APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0114p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20-2256

[Filed: May 25, 2022]

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; 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 VAIL, in her official capacity as the Health Officer of Ingham County; CAROL A. SIEMON, in

her official capacity as the Ingham County)
Prosecuting Attorney,)
Defendants-Appellees.)
)

On Petition for Rehearing En Banc.
United States District Court for the Western District of Michigan at Grand Rapids;
No. 1:20-cv-01016—Paul Lewis Maloney, District Judge.

Argued En Banc: March 9, 2022

Decided and Filed: May 25, 2022

Before: SUTTON, Chief Judge; SILER, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, and MURPHY, Circuit Judges.[*]

COUNSEL

ARGUED EN BANC: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Daniel J. Ping, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for State of Michigan Appellees. John J. Bursch, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Amicus Curiae. **ON**

[*] Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Siler, a senior judge of the court who sat on the original panel in this case, participated in this decision.

SUPPLEMENTAL BRIEF: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Daniel J. Ping, Ann M. Sherman, Jennifer Rosa, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for State of Michigan Appellees. Bonnie G. Toskey, Sarah K. Osburn, COHL, STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellees Linda Vail and Carol Siemon. **ON AMICUS BRIEF:** John J. Bursch, Cody S. Barnett, ALLIANCE DEFENDING FREEDOM, Washington, D.C., Matthew F. Kuhn, Brett R. Nolan, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Amici Curiae.

KETHLEDGE, J., delivered the opinion of the court in which SUTTON, C.J., and MOORE, COLE, CLAY, GIBBONS, WHITE, STRANCH, DONALD, THAPAR, LARSEN, NALBANDIAN, and MURPHY, JJ., joined, and READLER, J., joined in Parts I and II.A. MOORE, J. (pg. 8), delivered a separate concurring opinion in which WHITE, STRANCH, and DONALD, JJ., joined. READLER, J. (pp. 9–11), delivered a separate opinion concurring in part and dissenting in part. BUSH, J. (pp. 12–43), delivered a separate dissenting opinion in which SILER and GRIFFIN, JJ., joined.

OPINION

KETHLEDGE, Circuit Judge. In this case, a private religious school and two parents of students who attend private religious schools seek a preliminary injunction

as to a statewide mask mandate that the State itself repealed almost a year ago. We hold that both this interlocutory appeal and the claim itself are now moot.

I.

In April 2020, Michigan Governor Gretchen Whitmer imposed a statewide mask mandate in response to the COVID-19 pandemic. In September 2020, she extended the mandate to require children in elementary schools to wear masks in the classroom. R.1-4. On October 2, 2020, the Michigan Supreme Court held that both of the Governor's orders violated the Michigan Constitution, on the ground that they represented the "exercise of the legislative power by the executive branch." *In re Certified Questions*, 958 N.W.2d 1, 24, 31 n.25 (Mich. 2020).

Yet a week later the Michigan Department of Health and Human Services imposed a mandate of its own, which likewise required masks in public settings, including classrooms in public and private schools. R.1-1. The order included a dozen exceptions, namely for "individuals who:"

(a) Except as otherwise provided . . . are younger than 5 years old . . . ;
(b) Cannot medically tolerate a face covering;
(c) Are eating or drinking while seated at a food service establishment;
(d) Are exercising outdoors and able to consistently maintain six feet of distance from others;
(e) Are swimming;

(f) Are receiving a service for which temporary removal of the face covering is necessary;

(g) Are entering a business or are receiving a service and are asked to temporarily remove a face covering for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face covering would seriously interfere in the performance of their public safety responsibilities;

(j) Are at a polling place for purposes of voting in an election;

(k) Are engaging in a religious service;

(l) Are giving a speech for broadcast or to an audience, provided that the audience is at least six feet away from the speaker.

That same month, the plaintiffs brought this suit, claiming that the State's mask mandate violated their right to the free exercise of religion under the First (and Fourteenth) Amendment to the U.S. Constitution. R.1 at 22–23. The plaintiffs also filed a motion to enjoin the mask mandate preliminarily, which the district court denied in December 2020. The plaintiffs then brought this appeal, asking us to enjoin the mandate while their case is litigated in the district court.

Meanwhile, between November 2020 and May 2021, the Department issued no fewer than twelve different orders revising its mask mandate—sometimes eliminating an exception (such as the one for polling places), other times tightening an exception (such as by limiting the exception for "service[s] for which removal of the face mask is necessary" to only medical services), and sometimes revising an earlier revision (such as a change to allow people to remove masks for "personal care services" like tanning and piercing). By the spring of 2021, however, the relevant public-health conditions had changed. By then the U.S. Food and Drug Administration had authorized three COVID-19 vaccines; better therapeutics had become available; and case counts, hospitalizations, and deaths had fallen in Michigan. The Department cited these developments—along with the "warmer weather"—and rescinded the mask mandate (and various other pandemic-related orders) on June 17, 2021. Doc. 34-2. The defendants then moved to dismiss this appeal as moot.

II.

Any number of precepts about the federal judicial power (indeed, one could argue, nearly all of them) trace back to Chief Justice John Marshall's pronouncement that the "province of the court is, *solely*, to decide on the rights of individuals[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added). The precept that follows here is that, under Article III, the "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (internal quotation marks omitted). "Thus, when

a case at first presents a question concretely affecting the rights of the parties, but—as a result of events during the pendency of the litigation—the court's decision would lack any practical effect, the case is moot." *Ohio v. EPA* ("*Ohio*"), 969 F.3d 306, 308 (6th Cir. 2020).

A.

In deciding whether a decision in this appeal would have any "practical effect," we must be mindful of "the distinction between mootness as to a preliminary-injunction appeal and mootness as to the case as a whole." *Ohio*, 969 F.3d at 309. "The purpose of a preliminary injunction, unlike a permanent one, is to prevent any violation of the plaintiff's rights before the district court enters a final judgment." *Id*. Whether a preliminary-injunction appeal is moot, therefore, depends on whether our decision would have any "practical effect" during that window of time.

The plaintiffs face strong headwinds on that point, given that the State has already rescinded the mandate that they ask us "preliminarily" to enjoin. Yet the plaintiffs argue that two exceptions to the mootness doctrine apply here.

Voluntary Cessation. The first exception is that a defendant's "voluntary cessation" of challenged conduct moots a case only if there clearly is "no reasonable expectation that the alleged violation will recur." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (cleaned up). Here, forthe challenged conduct to recur, the State need not reimpose the "selfsame" mandate that it rescinded in June 2021. *Ne. Fla.*

Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 662 (1993) (emphasis omitted). But the State would need to impose a mandate "similar" enough to the old mandate to present substantially the same legal controversy as the one presented by the plaintiffs' complaint. *See id*. at 662 n.3.

For several reasons, however, we see no reasonable possibility of that happening here. First, the State rescinded the mask mandate not in response to this lawsuit, but eight months later, along with several other pandemic-related orders. In doing so the State cited high vaccination rates, low case counts, new treatment options, and warmer weather. This case is therefore unlike *Speech First*, where the "timing" of the University of Michigan's cessation of the challenged conduct "raise[d] suspicions that its cessation [was] not genuine." 939 F.3d at 769. And the defendants' own political accountability diminishes any chance that they would reimpose the same mandate after this litigation ends.

Second, the relevant circumstances have changed dramatically since the Department imposed its statewide mask mandate in October 2020. At that time, nobody was vaccinated and treatments were less effective than they are now. The relevant circumstances now, in contrast, are largely the same circumstances that prompted the State to rescind the mandate.

Third, any future masking order likely would not present substantially the same legal controversy as the one originally presented here. Michigan imposed the

first version of the mandate at issue here before the U.S. Supreme Court had blocked any COVID-19 orders on free-exercise grounds. The Supreme Court and other courts have since blocked any number of them, thereby providing concrete examples of mandates and restrictions that violate the Free Exercise Clause. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020). The Court has also recently told us that "government regulations" are subject to strict scrutiny under the Clause "whenever they treat *any* comparable secular activity more favorably than religious exercise"; and 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." *Tandon*, 141 S. Ct. at 1296. The plaintiffs' claim here is thus based primarily on the particular exceptions in the State's now-rescinded mandate—the idea being that, if those secular actors deserve relief, then the parents and children in this lawsuit do as well. *See, e.g.*, *id.* at 1297; *Roman Cath. Diocese*, 141 S. Ct. at 67–68. This dispute is therefore moot unless there is a decent chance that the defendant officials will not only impose a new mask mandate, but also roughly stick to the exceptions in the old one. And that prospect is exceedingly remote given all that has happened in the year or so since the State rescinded its mandate.

The plaintiffs emphasize that other government entities, like Ingham County, have imposed mask mandates more recently. But Ingham County has since rescinded its mandate too. And the question here is whether Michigan will reimpose the mask mandate on

the School, not whether some other entity will do so. *See Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309–10, 310 n.1 (6th Cir. 2004).

During oral argument for this appeal, an amicus supporting plaintiffs offered another argument as to why this claim remains live—namely, that Resurrection School's principal admitted to violating the mask mandate and thus potentially could be subject to prosecution in the future. But arguments in support of justiciability can be forfeited. *See California v. Texas*, 141 S. Ct. 2104, 2116 (2021); *Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, 21 F.4th 410, 414 (6th Cir. 2021). And this argument was forfeited because it was raised for the first time at oral argument. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009). The argument is also meritless: the school's principal is not a party here, and thus is not among the "individuals" whose rights we must adjudicate. *Marbury*, 5 U.S. at 170. Nor is there any credible threat of future prosecution. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014). If the principal or anyone else is ever prosecuted for violating the State's mandate, he can obtain a ruling on the mandate's constitutionality then.

Capable of Repetition Yet Evading Review. This exception is inapposite for largely the same reasons the previous exception is. Here, the challenged mandate was a product of the pandemic's early stages, and the plaintiffs' objections to it are grounded in the mandate's particulars. We are unlikely to see this mandate in a similar form again. *See Thompson v.*

DeWine, 7 F.4th 521, 525–26 (6th Cir. 2021). The plaintiffs' preliminary-injunction appeal is moot.

B.

Whether the claim as a whole is moot depends on whether there is "a fair prospect that the [challenged] conduct will recur in the foreseeable future." *Ohio*, 969 F.3d at 310. For all the reasons recited above—the changed circumstances since the State first imposed its mask mandate, the substantially developed caselaw, the lack of gamesmanship on the State's part—we see no reasonable possibility that the State will impose a new mask mandate with roughly the same exceptions as the one originally at issue here. This claim is moot—indeed palpably so.

* * *

We dismiss this appeal and remand with instructions for the district court to dismiss this claim. We also vacate the district court's order denying the plaintiffs' motion for a preliminary injunction, given that they lost their chance to appeal its merits through no fault of their own. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring. Three facts convince me that this claim is moot. First, in the months since the State lifted the mask mandate, the Centers for Disease Control has approved a vaccine for school-age children. *FDA*

Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 through 11 Years of Age, Food & Drug Admin. (Oct. 29, 2021), https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age. Second, the State declined to reimpose a mask mandate during the spikes in COVID-19 cases caused by the Delta and Omicron variants. *See Tracking Coronavirus in Michigan: Latest Map and Case Count*, N.Y. Times (last updated May 25, 2022), https://www.nytimes.com/interactive/2021/us/michigan-covid-cases.html. Third, and relatedly, the State has now gone close to a year without reimposing a similar mask mandate. Therefore, I concur in the majority opinion.

CONCURRING IN PART AND DISSENTING IN PART

CHAD A. READLER, Circuit Judge, concurring in part and dissenting in part. I concur in parts I and II.A of Judge Kethledge's majority opinion, which hold that plaintiffs' preliminary injunction appeal is moot. But, for many of the reasons stated in Judge Bush's thoughtful dissent, I believe plaintiffs' claims for declaratory relief and a permanent injunction remain alive. To my mind, mootness of this appeal is distinguishable from mootness of the underlying claims.

Plaintiffs asked the en banc court to reverse the district court's decision denying a preliminary injunction. A preliminary injunction's fundamental

purpose is to protect the status quo during litigation. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam). As a result, we lack jurisdiction over this appeal if there is no reasonable expectation that the state will reenact the mandate (or something similar) before the district court enters final judgment. *See Ohio v. U.S. Env't Prot. Agency*, 969 F.3d 306, 309 (6th Cir. 2020).

By all accounts, there is little chance that the state will do so. The school year is in its waning days, with summer break on the horizon. The calendar alone, in other words, dramatically reduces the need for a school mask mandate. That is true even for students and staff involved with summer instruction, as COVID-19 typically recedes during the summer, thereby lessening the need for mask requirements. *See Michigan Data*, Mich. Dep't of Health & Hum. Servs., https://www.michigan.gov/coronavirus/stats (last visited May 24, 2022) (displaying daily cases). In fact, the state rescinded its mandate last June partly because "the warmer weather ha[s] greatly reduced the spread of COVID-19." Doc. 34-2. Absent any realistic prospect of a masking-related burden on plaintiffs' religious liberties before the school bell rings this fall, a preliminary injunction "would lack any practical effect" during that period. *Ohio*, 969 F.3d at 308. Add in the fact that the district court likely can resolve expeditiously the "primarily if not entirely legal" issues that remain, and it becomes evident that plaintiffs' preliminary injunction appeal is moot. *Id.* at 309. On this latter point, I note that the district court has already performed much of the necessary analysis in holding that the county's school mask mandate likely

violated the Free Exercise Clause. *Resurrection Sch. v. Hertel*, No. 1:20-cv-1016, slip op. at 15–17 (W.D. Mich. Mar. 3, 2022); *see also supra*, at 5–6 (explaining that *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), set the legal framework for plaintiffs' Free Exercise challenge to the state's mask mandate).

"For the case as a whole, however, the mootness inquiry takes a longer view." *Ohio*, 969 F.3d at 310. That means the district court has jurisdiction over plaintiffs' claims for declaratory relief and a permanent injunction unless the state shows that there is no "fair prospect" that it will reenact the mandate "in the foreseeable future." *Id.*; *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019) (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

Yet the state failed to make that showing. To the contrary, as Judge Bush explains, a real possibility remains that the state will restore the mandate. Take last year as an example. Plaintiffs enjoyed a respite from mask mandates for much of the summer of 2021 until Ingham County—acting "in compliance with guidance" from the state—imposed its own school mask mandate that September. R.80, PageID#1645. The majority and dissenting opinions disagree about whether the county's school mask mandate informs the issues before the en banc court. But at the very least, those events offer some insight into how state officials might confront public health issues as the upcoming summer turns to fall. *See Ohio*, 969 F.3d at 309 (noting

that application of mootness principles "is driven above all by practicalities"); *see also Hawse v. Page*, 7 F.4th 685, 699 (8th Cir. 2021) (Stras, J., dissenting) ("Whatever else we might be able to say about the pandemic, absolute clarity is not one of its features."). Indeed, we have it on good authority that the state seemingly has not heeded the many lessons from the recent decisions in *Tandon* and *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020) (order). After all, when asked at oral argument whether the state would commit not to reenact its earlier mandate, the state's counsel bluntly responded: "Absolutely not." Oral Argument at 41:18–25; *cf. Hawse*, 7 F.4th at 699 (Stras, J., dissenting) ("[T]he court's novel theory that the County would not dare 'flout the Supreme Court's intervening pronouncements on equal treatment between religious exercise and comparable secular activity' . . . would be more comforting if it were based on anything the County had actually done or said." (citation omitted)).

All things considered, I believe the preliminary injunction proceedings are moot. But I would allow the district court to resolve plaintiffs' claims for declaratory relief and a permanent injunction, which seemingly involve a straightforward application of the rule that a regulation treating religious exercise worse than any comparable secular activity must survive strict scrutiny. *See Tandon*, 141 S. Ct. at 1296; *Monclova*, 984 F.3d at 480–82.

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting. "Article III judges should not be in the business of declaring an end to the COVID-19 pandemic[.]" *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 572 (6th Cir. 2021) (Moore, J., dissenting). Rather, we should be willing to acknowledge "the thing about a once-in-a-century crisis"—that "it is hard to know how it will develop over the coming months and years, particularly when COVID-19 has defied expectations to this point[,] with new variants and seasonal surges threatening to undo hard-won progress." *Id.* at 573 (cleaned up). In this case, however, it appears that these principles will not carry the day. A court majority instead deems moot not merely plaintiffs' preliminary- injunction request, but their entire *case*. Thus extinguished is plaintiffs' opportunity to litigate their claims on the merits under a proper interpretation of the First Amendment. That unfortunate result rests, in my view, on a score of mistaken factual and legal premises. Our collective experience with two years of on-again-off-again masking mandates demonstrates that there is at least a reasonable possibility this dispute could recur. For that matter, the recent masking reimpositions in Ingham County *itself* show that this dispute could reasonably recur. *See* Izzy Martin, "Waverly Community Schools masking up starting Monday," *WLNS6.com* (May 18, 2022), https://perma.cc/Z4MR-5JST; Izzy Martin, "East Lansing Public Schools reinstates mask mandate," *WLNS6.com* (May 13, 2022), https://perma.cc/7SAW-

WBY7; Sarah Lehr, "East Lansing schools reinstate mask mandate beginning Monday," *WKAR.org* (May 13, 2022), https://perma.cc/5SDN-V5WT. I therefore respectfully dissent.

I.

The majority's short opinion says little about the background of this case and, by virtue of having deemed it entirely moot, nothing about its merits. My approach will differ. A grasp of the underlying factual and procedural history is crucial to understanding the justiciability issues the majority places at center stage. So before turning to mootness, I will detail the origins of plaintiffs' First Amendment claims, how they should have been properly adjudicated by our circuit, and why that never came to pass.

Resurrection School is a "small, private, Catholic school in Lansing," a city itself in Ingham County, Michigan. Amended Complaint ¶16, R. 21. The School strives "to integrate the Catholic faith into all portions of the school day." *Id.* ¶1. And it remained committed to doing so even despite COVID-19. In response to the pandemic, the School implemented extensive "safety protocols" to protect its students. Supplemental Appellant's Br. at 6–7. Those included social distancing, "enforced handwashing," "strict sanitization and disinfection of its facilities several times a day," limitations on who could visit the school, and even a requirement that students "wear masks in common areas." *Id.* But when it came to masking *during* classroom instruction, the School drew the line: no students would be forced to wear masks "when seated in the classroom." Amended Complaint ¶3, R. 21. As it

explained, masks present "difficulties . . . for the spiritual, emotional, and physical development of younger students." *Id.* In particular, they impeded the School's religious instruction and violated a sincere religious obligation against covering faces "made in God's image and likeness." *Id.* ¶25.

Those scruples notwithstanding, the Michigan Department of Health and Human Services ("MDHHS") promulgated orders in October 2020 that directly conflicted with the School's religious views. Each required that children "participating in gatherings" such as classroom instruction be masked. And they contained no religious exemption. Rendered unlawful, then, was Resurrection School's continued practice of unmasked, face-to-face religious instruction.

The School responded soon after with a federal lawsuit challenging those orders. Its operative complaint named as defendants Robert Gordon,[1] then the Director of MDHHS; Dana Nessel, the Attorney General of Michigan; Linda S. Vail, the Health Officer of the Ingham County Health Department; and Carol A. Siemon, the Ingham County Prosecuting Attorney. The School sought declaratory and injunctive relief against both MDHHS's and Ingham County's enforcement of the restrictions, which the School alleged violated its and its co-plaintiffs' First Amendment rights. Yet despite its knowledge of this

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[1] Upon Gordon's departure from MDHHS, he was replaced by current MDHHS Director Elizabeth Hertel. She thus entered the suit via the automatic-substitution rule. *See* Fed. R. App. P. 43(c)(2).

religious objection, MDHHS continued to promulgate masking orders that contained no exemption for face-to-face religious instruction.

The basic structure of the order that became the crux of this case was as follows. First, section 7—titled "Face mask requirement at gatherings"—explained in subsection (a) that "All persons participating in gatherings are required to wear a face mask." But section 8—titled "Exceptions to face mask requirements"—then enumerated a host of activities exempted from masking. In the order's own words:

> Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:
>
> (a) Are younger than 5 years old, outside of a child care organization or camp setting (which are subject to requirements set out in section 7(e));
>
> (b) Cannot medically tolerate a face mask;
>
> (c) Are eating or drinking while seated at a food service establishment or at a private residence;
>
> (d) Are exercising outdoors and able to consistently maintain six feet of distance from others;
>
> (e) Are swimming;
>
> (f) Are receiving a medical or personal care service for which removal of the face mask is necessary;

(g) Are asked to temporarily remove a face mask for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

(j) Are engaging in a religious service;[2]

(k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or

(l) Are participating in a testing program specified in MDHHS's document entitled Guidance for Athletics . . . and are engaged in practice or competition where the wearing of a mask would be unsafe.

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[2] Of note, MDHHS did not consider Resurrection School's face-to-face religious instruction to qualify for the "religious service" exemption. To the contrary, it apparently construed "service" to include only more formalized worship settings, such as a sermon. Thus, as counsel for the State seemed to confirm at oral argument, the order would permit Resurrection School's students to attend Mass on campus unmasked, and yet would bar the very same students from attending face-to-face religious instruction in the classroom unmasked. *See* Recording of Oral Arg. at 1:03:40–1:07:13.

See "March 5, 2021 Gatherings and Face Mask Order," *Michigan.gov* (Mar. 5, 2021), https://perma.cc/MK89-DGZU.

This order then detailed several additional provisions exempting various other secular activities from the masking requirement. For instance, a separate portion concerning subsection (f)—the "personal care services" exemption—defined that term to include such "non-essential personal care services" as "hair, nail, tanning, massage, traditional spa, tattoo, body art, piercing services, and similar personal services." *See id.* Likewise, both collegiate and professional athletes were permitted to compete unmasked. *See* Becket Amicus Br. at 10 n.12; *see also* "Interim Guidance for Athletics," *Michigan.gov* (Apr. 1, 2021), https://perma.cc/U42B-3E3F (explaining that athletes with negative COVID tests were permitted to compete unmasked).

Read together, the orders and guidance thus established both a facially neutral and generally applicable masking requirement on the one hand, and, on the other, a host of secular exemptions to that requirement that undermined its purported general applicability. Indeed, everyone here agrees that the broad language of section 7 swept in Resurrection School's classroom instruction. But everyone also agrees that the companion provision, section 8, exempted from that language dining at a restaurant; dining with friends at a private gathering; receiving a haircut, tattoo, or massage; sessions in a tanning booth; or the installation of a nose-ring. Predictably, in response to that obvious disparity, Resurrection School

moved the district court to enter a preliminary injunction as the parties litigated the case.

The district court denied that request, however, in mid-December 2020. It reasoned that the relevant analytical framework arose from this circuit's published decision in *Commonwealth v. Beshear*, rendered just a few weeks earlier. *See Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897, 900 (W.D. Mich. 2020) (citing *Commonwealth v. Beshear*, 981 F.3d 505, 508–09 (6th Cir. 2020)). Citing *Beshear* and a handful of other cases, the district court explained that a restriction on religious exercise triggers strict scrutiny when it is (1) motivated by animus, (2) regulates religious activity as such, or (3) is neutral and generally applicable on its face but simultaneously so full of exemptions for comparable secular activities that it lacks neutrality and general applicability in practice. *Id.* at 901. *Beshear* itself had applied that tripartite test to a COVID-related closure the Kentucky government had imposed upon a religious school. *Beshear*, 981 F.3d at 507–09. Discerning neither animus nor targeting, *Beshear* focused its inquiry on general applicability. *Id.* at 509. But it reasoned that the contested order in that case *was* generally applicable, given that it "applie[d] to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise[.]" *Id.* Because the order treated the religious school's identical secular comparator equally, *Beshear* reasoned, its incidental effect on religious exercise "need not be justified by a compelling governmental interest." *Id.* And so *Beshear* determined that the contested orders likely presented no First Amendment violation. *Id.* at 509–10.

In the district court's view, *Beshear* similarly disposed of Resurrection School's challenge to MDHHS's analogous masking order. *See Resurrection Sch.*, 507 F. Supp. 3d at 901–02. True, it noted, the order permitted those engaging in copious other secular activities to do so unmasked. *Id.* at 902. But the order also treated Resurrection School and its identical secular comparator—public schools—the very same. *Id.* ("[T]he exceptions apply to public schools and private schools equally, and they apply to secular schools and religious schools equally."). Thus, the district court reasoned, plaintiffs' showing of merely an "incidental" burden undercut their "likelihood of success on the merits," and so it denied relief. *Id.* Plaintiffs appealed that decision soon after.

Yet as their case was pending before a panel of this circuit, three precedential developments unfolded that were favorable for the School's position. First was our circuit's decision in *Monclova*. 984 F.3d 477 (6th Cir. 2020). Like *Beshear*, and like this case, *Monclova* concerned a COVID restriction imposed upon religious schools, and against which they raised a First Amendment objection. *Id.* at 479. Specifically, the Toledo-Lucas County Health Department had ordered the shutdown of every school in its jurisdiction—public, private, and parochial—"to slow the spread of COVID-19." *Id.* So just as in *Beshear*, the restriction applied both to religious exercise and to its identical secular analogues. *Id.* But at the same time, *Monclova* noted, the County had *not* imposed its shutdown order upon a host of secular activities—"gyms, tanning salons, office buildings, and a large casino"—all of which posed at least *comparable* risks to public health.

Id. at 479, 482. In other words, *Monclova* rejected *Beshear*'s assumption that general applicability should be assessed solely by considering whether the restriction burdens *identical* secular conduct. *See id.* at 481 ("We find no support for that proposition in the relevant Supreme Court caselaw."). To the contrary, *Monclova* reasoned that other "similar" and "comparable secular facilities" were relevant to the general-applicability analysis. *Id.* at 480. And, discerning no compelling rationale for the County's preferential treatment of those comparable secular activities, *Monclova* held the religious schools likely to succeed in showing a First Amendment violation. *Id.* at 482.

So why was all that consistent with *Beshear*—an earlier, published decision? Future panels are bound only by prior panels' *holdings*—the reasoning found in the earlier decision that both "contribute[d] to the judgment" and on which it is "clear" the earlier court "consciously reached a conclusion." *Wright v. Spaulding*, 939 F.3d 695, 701–02 (6th Cir. 2019). Yet as *Monclova* itself explained, *Beshear* "said nothing about the question" at issue in *Monclova*: "namely, whether an order closing public and parochial schools violates the [Free Exercise] Clause if it leaves *other* comparable secular actors less restricted than the closed parochial schools." *Monclova*, 984 F.3d at 481. Unconstrained by *Beshear* on that issue, therefore, *Monclova* analyzed whether the relevant order was generally applicable when judged against not only the burdens placed upon the religious school's *identical* secular analogues, but also upon other, at least *similar* secular comparators. *Id.* at 481–82. *Monclova* then reasoned that because

Lucas County had shuttered a religious school while exempting "gyms, tanning salons, office buildings, and the Hollywood Casino," its order was subject to, and likely failed, strict scrutiny. *Id.* at 482.

A few months after *Monclova* came the second development: the Supreme Court, in *Tandon v. Newsom*, endorsed the same analytical framework as detailed in *Monclova*. 141 S. Ct. 1294 (2021); *see id.* at 1296. *Tandon* concerned yet another COVID restriction; this time, California's bar on multiple-family at-home religious gatherings. *Id.* at 1297. Despite that restriction, California simultaneously exempted "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* at 1297. If *Beshear* were the law, of course, none of those facts would have mattered to the Supreme Court. Instead, much like the Ninth Circuit below, it would have examined merely how California treated the proscribed conduct's *identical* secular analogues—multiple-family at-home gatherings (for instance, a book club) to discuss secular works. *See Tandon v. Newsom*, 992 F.3d 916, 920 (9th Cir. 2021). *Beshear* would have dictated that those secular activities were the only relevant comparators, as only those activities would have presented identical risks to at-home religious gatherings. Yet that is precisely *not* how the Supreme Court reasoned. It instead deemed the exempted secular activities like hair salons and restaurants "comparable" to the religious gatherings, given that each imposed risks at least "similar." *Tandon*, 141 S. Ct. at 1296–97. And thus it held that California's failure to regulate such secular activities

as harshly as it had in-home religious gatherings rendered its regime likely unconstitutional. *Id.* at 1297.

Following *Tandon* was the third development: the Supreme Court's decision in *Fulton v. City of Philadelphia*, which augmented the general-applicability principles detailed in *Tandon*. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In *Fulton*, the Court confronted the City of Philadelphia's refusal to contract with Catholic Social Services ("CSS"), a foster-care services provider, because of CSS's sincerely held religious belief that same-sex couples should not be certified as prospective foster families. *Id.* at 1875. The City ended its fifty-year relationship with CSS because of its strong interest, or so it asserted, in opposing anti-homosexual discrimination. *Id.* Yet the City's "standard foster care contract" that it had signed with CSS specified that the City Commissioner, in his "sole discretion," could grant certain organizations of his choosing an exemption from that general policy. *Id.* at 1878. CSS's sincere religious objection to same-sex foster couples was apparently deemed an unworthy rationale for the dispensing of such relief. *Id.* So CSS sued, and the Supreme Court took up its case.

In its unanimous ruling for CSS, the Court reaffirmed *Tandon*'s conclusion that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. It thus seemed that CSS had a powerful argument that the Commissioner's ability to exempt organizations from the anti-discrimination rule refuted the regime's general applicability. After all, the

contract apparently allowed the Commissioner to dispense exemptions for secular rationales that would have undermined the City's anti-discrimination interest in precisely the same way as would have an exemption for CSS. *Id.* at 1881–82. But the Court went even further in criticizing Philadelphia's regime. As it explained, the contract's provision conferring executive discretion to grant secular exemptions removed the law entirely from the framework established by *Employment Division v. Smith*, 494 U.S. 872 (1990), under which facially general laws are presumptively valid. *Fulton*, 141 S. Ct. at 1878. To the contrary, the executive-discretion provision made the contract more like an individualized exemption scheme, which the Court held long ago in *Sherbert v. Verner* was presumptively *in*valid and subject to strict scrutiny. *Id.*; *see also Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."). And because the City could "offer[] no compelling reason why it ha[d] a particular interest in denying an exception to CSS while making them available to others," the Court deemed the City's refusal to contract with CSS unable to satisfy that standard. *Fulton*, 141 S. Ct. at 1882.

II.

Heading into their argument for this case, therefore, Resurrection School's lawyers must surely have felt armed with a formidable new degree of precedential firepower. *Monclova* had deemed likely invalid a governmental restriction on religious schools that

failed to regulate comparable (but non-identical) secular conduct. 984 F.3d at 482. *Tandon* had then ratified that rule by explaining how California's regulations on at-home religious gatherings were likely invalid for their failure to equally burden "comparable" conduct in hair salons, personal-care-service venues, and restaurants. 141 S. Ct. at 1297. *Fulton* then buried the "only-identical-secular-conduct-counts" theory of general applicability, while simultaneously explaining that a regime conferring executive discretion to codify new secular exemptions from a purportedly general law (much as with MDHHS's continuous revisions of its orders to exempt new categories of secular conduct), merited strict scrutiny. *See, e.g.*, *Fulton*, 141 S. Ct. at 1879 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude[.]").

Surprisingly, however, the panel majority in this case attempted to weave around each of those precedents to affirm the district court's denial of preliminary relief.[3] The panel majority recognized, of

[3] I realize that as a technical jurisdictional matter under 28 U.S.C. § 1292(a)(1), we as the en banc court are reviewing the preliminary-injunction decision of the district court rather than the panel majority's subsequent affirmation of that decision. I include a discussion of the panel majority's analysis for two reasons. First, exposition of the panel majority's errors is required for an exposition of the proper First Amendment standard that should have governed Resurrection School's claims—a standard on which today's majority opinion has necessarily shed no light given

course, that under the rule of decision established in *Monclova*, it would have had to consider the order's exemptions for comparable (but non-identical) secular conduct when assessing whether the restriction upon Resurrection School was generally applicable. *See Resurrection Sch. v. Hertel*, 11 F.4th 437, 456–57 (6th Cir. 2021), *vacated* 16 F.4th 1215 (6th Cir. 2021). But the panel majority declined to apply *Monclova* on the ground that it conflicted with an earlier, published decision of the Sixth Circuit—*Commonwealth v. Beshear*. *Id.* at 457 (citing *Beshear*, 981 F.3d at 505). In response to *Monclova*'s pointthat *Beshear* never actually rejected the relevance of non-identical secular comparators, the panel majority claimed that, to the contrary, "[i]n *Beshear*, we *did* consider whether the appropriate comparator was other non-religious schools or other non-school entities and held that the former was the appropriate comparator." *Id.* (emphasis added).

How did the panel majority attempt to sustain such a claim? By pointing to some of the *briefs* from *Beshear* that had suggested a broader comparator analysis. *Id.* Thus, the panel majority reasoned, because the "issue was brought to the attention of the court," *Beshear* had apparently implicitly rejected *Monclova*'s comparator analysis. *Id.* (cleaned up). And under the law-of-the-circuit doctrine, in the panel majority's words, when

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its conclusion that the entire case is nonjusticiable. Second, the panel majority's reasoning here—particularly its view that MDHHS's order was lawful even under *Tandon*—guts the present majority's argument in favor of mootness that *Tandon* rendered a future MDHHS-style order so unthinkable that it could never recur.

"[f]orced to choose between conflicting precedents, we must follow the first one." *Id.* (quoting *United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021)). So the panel majority understood *Beshear*—not *Monclova*—to represent the law of the Sixth Circuit. *Id.*

What about *Fulton*? That precedent would seem to contain a powerful indictment of MDHHS's ever-shifting exemption scheme, as "it 'invite[d]' the government to decide which reasons for not complying with the policy [we]re worthy of solicitude." *Fulton*, 141 S. Ct. at 1879. For instance, after initially instituting its masking order in October 2020, MDHHS later decided that it should codify new secular exemptions for "'personal care services, like tanning and piercing[s]." Majority Op. at 4. Yet as MDHHS exercised its discretion to dispense favorable treatment for such secular activities, its various revisions to the policy steadfastly refused to codify an analogous religious exemption for entities like Resurrection School. And it withheld such equal treatment even after gaining actual knowledge of the School's sincere religious objections to the masking policy, first explained in the School's federal complaint against MDHHS filed in October

For the panel majority, however, *Fulton* appears to have been thought virtually irrelevant. Its opinion included no substantive analysis of *Fulton*'s holding, instead simply reciting *Fulton*'s basic facts while making no attempt to apply that case's executive-discretion principle to Michigan's masking regime. *See Resurrection Sch.*, 11 F.4th at 458–59. The Supreme Court's decision was ultimately dismissed as

containing merely a "narrow holding focused on a contract provision." *Id.* at 459.

And what about *Tandon*? As an on-point Supreme Court decision, it obviously would seem to supply the relevant analytical framework, no matter a putative conflict between *Monclova* and *Beshear*. Not so, however, at least according to the panel majority. As it expressly claimed, "*Tandon v. Newsom* does not compel a different comparator." *Id.* at 457 (citing *Tandon*, 141 S. Ct. at 1294). That was supposedly because the Supreme Court had deemed California's regime likely invalid for treating "*comparable* secular activities more favorably than at-home religious exercise[.]" *Id.* Yet the panel majority reasoned that no other exempted secular activities under the MDHHS order were even *comparable* to face-to-face religious instruction. *Id.* The risks posed by schools were instead "unique," since only schools brought children together "in an indoor setting and every day." *Id.* at 457–58. As a result, the only proper comparator to Resurrection School remained its identical secular analogues—"public and private non-religious schools." *Id.* at 458.

Of course, that analysis is patently inconsistent with the Supreme Court's reasoning in *Tandon*, which would have dictated that non-identical secular comparators be considered as well. *Tandon*, 141 S. Ct. at 1296–97. Rather, the panel majority's approach tracked almost perfectly with the district court and Ninth Circuit's reasoning in *Tandon* that the Supreme Court itself *rejected*. Indeed, in denying relief—and foreshadowing the exact language the panel majority here would later employ—the district court there

reasoned that the "unique" risks of at-home religious gatherings made secular at-home gatherings the only valid comparator. *See Tandon v. Newsom*, 517 F. Supp. 3d 922, 976 (N.D. Cal. 2021). And the restrictions were generally applicable, said the *Tandon* district court, since California treated each form of gathering equally. *Id.* A divided panel of the Ninth Circuit then doubled down on that conclusion. It too reasoned that the only valid comparator to religious at-home gatherings was secular at-home gatherings, given that only secular at-home gatherings posed identical risks. *Tandon*, 992 F.3d at 920. For instance, vis-à-vis California's less-regulated "train stations, malls, salons, and airports," at-home gatherings were more likely to involve "prolonged conversations" in "less ventilated" settings. *Id.* at 923, 925. And because California regulated equally both religious and secular at-home gatherings, the Ninth Circuit concluded as well that the religious restriction merited mere rational-basis review. *Id.* at 920. Yet the Supreme Court unequivocally *rejected* such reasoning in its own opinion on the dispute. *See Tandon*, 141 S. Ct. at 1296–97. *Tandon*, therefore, should have indicated to the panel majority that its refusal to consider a broader class of comparators was misguided.

And perhaps it did. Lacking conviction in its parsimonious reading of *Tandon*, apparently, the panel majority claimed that even if it *were* required to embrace a "broader conception of comparable secular activity, the MDHHS orders [we]re not so riddled with secular exceptions as to fail to be neutral and generally applicable." *Resurrection Sch.*, 11 F.4th at 458. So the underlying premise from which the panel majority

reasoned is that there can exist some arbitrarily large number of exemptions disparately favoring secular conduct but that pose no First Amendment concern, at least until the exemptions can be deemed to "riddle" the challenged law. *Id.* This supposition stands in obvious tension with *Tandon*, which explained 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." *Tandon*, 141 S. Ct. at 1296. Thus, it is difficult to understand how the panel majority thought itself correctly applying *Tandon* here. Its purported "application" of *Tandon* simply concluded that none of the exempted secular activities was comparable to face-to-face religious instruction—a rehashing of its earlier point that such instruction posed "unique" risks and thus could be compared only to its perfect secular analogue. *Resurrection Sch.*, 11 F.4th at 458.

In any event, none of the panel majority's second-order attempts to distinguish Resurrection School's face-to-face instruction from the various secular activities MDHHS exempted can withstand analytical scrutiny. Take first, for instance, the panel majority's rationalization of the exemptions for eating, drinking, swimming, and medical treatments—said to be "inherently incompatible with wearing a mask." *Id.* at 458 (cleaned up). The apparent implication of this comment is that those activities are physically impossible while wearing a mask and thus are "inherently incompatible," while simultaneous masking

and religious instruction is *physically* possible, and thus "compatible." *Id.*

Yet the problems with this argument are legion. Resurrection School has consistently asserted that simultaneous masking and proper religious instruction *is* physically impossible, given that seeing students' faces is critical to the school's religious instruction. *See, e.g.*, Amended Complaint ¶¶26–35, 130–32, R. 21; Appellant's Br. at 13–14. Likewise, it has also asserted that simultaneous masking and religious instruction is *spiritually* impossible, since it violates its school-members' sincere religious beliefs. *Id.* The panel majority's conclusion that masking and religious instruction are "compatible" after all seems predicated on nothing more than a judicial reappraisal of what Resurrection School's religious scruples do and do not permit. *See Resurrection Sch.*, 11 F.4th at 458 (describing plaintiffs' sincere religious objection to masked instruction as rendering masking merely "undesirable"for them).[4] For good reason, however, the Supreme Court has long instructed that this inquisitorial behavior is inappropriate for a federal tribunal. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." (quoting *Thomas v. Rev. Bd.*

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[4] Note the logical implication of this argument for religious liberty more broadly. It was physically *possible* for the schoolchildren in *Barnette*, for instance, to salute the flag, even though doing so would have violated their sincere religious beliefs. *See W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

of Ind. Emp. Sec. Div., 540 U.S. 707, 714 (1981)); *see also United States v. Ballard*, 322 U.S. 78, 85–88 (1944) (holding that courts may not inquire into the truth or falsity of sincerely held religious beliefs).

Other alleged distinctions the panel majority marshaled to justify the favorable treatment of the exempted secular activities included that they either (a) involved interactions "short[er] in duration" than classroom instruction or (b) had "a stringent social distancing requirement." *Resurrection Sch.*, 11 F.4th at 458. Supposed distinction (b) is difficult to even understand. Resurrection School *itself* had a "stringent social distancing requirement"—including during classroom instruction—as the School repeatedly explained in its briefs. *See* Appellant's Br. at 15–16, 29, 33–34; Corrected Reply Br. at 1, 4. If anything, then, that both the School and certain of the exempted secular activities had a social-distancing requirement would make them *more* alike for comparator analysis, not less. Supposed distinction (a) is probably true for at least certain of the secular exemptions, like briefly lowering a mask when voting for identification purposes. But it hardly could be said to characterize *all* the secular activities the orders exempted. For instance, the orders would permit someone engaging in secular activities to spend *all day* unmasked while indoors: breakfast at a diner; then a haircut; then lunch; then a massage, piercing, or tattoo; then dinner. By contrast, a student attending Resurrection School necessarily could *not* have spent the full day unmasked. Masks were required while walking into the school and while walking in common areas, such as in hallways between classes. Supplemental Br. at 6. It

was only during classroom instruction *itself* that masks were asserted to conflict with religious instruction. *See id.* at 6–7; Amended Complaint ¶¶26–35; 130–32. So the panel majority's claim that Resurrection School would pose "unique" dangers if granted an analogous exemption cannot be sustained on these alternative grounds either. *Resurrection Sch.*, 11 F.4th at 457.

The panel majority last asserted that certain other secular exemptions—for police, fire, and emergency medical services—were distinguishable (a) because they were necessary to fulfill "important obligations" to "citizens' health and safety" and (b) because "wearing a face mask would seriously interfere in the performance of their public safety responsibilities." *Id.* at 458. (emphasis deleted). Yet each of these purported distinctions rests, once again, not on any known precept of legal reasoning, but instead a value judgment that Resurrection School's religious views are neither an "important obligation[ ]" nor sincerely held. *Id.* Only by entertaining the first supposition could the panel majority have concluded that unmasked, face-to-face religious instruction does not servean "important obligation[ ]." *Id.* And only by entertaining the second—that the School's religious beliefs are insincere—could the panel majority have concluded that masking does not "seriously interfere" with the School's religious mission. *Id.* at 458. These implicit premises went unstated of course, for reasons about which I will not speculate, other than to note that they clearly conflict with established Supreme Court precedent concerning inquisition into the sincerity of religious views. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531; *Thomas*, 450 U.S. at 714; *Ballard*, 322 U.S. at 88.

Thus was the world as we knew it in August 2021, after the panel decision emerged. The panel majority considered *Beshear* controlling, *Monclova* but a nullity under the law-of-the-circuit doctrine, *Tandon* to compel no "different comparator," and *Fulton*'s "narrow holding" seemingly irrelevant *per se*. *See Resurrection Sch.*, 11 F.4th at 457–59. With nowhere left to go but a petition for certiorari or rehearing en banc, Resurrection School availed itself of the latter path in the hope that it might vindicate its rights at last against MDHHS's illegal order.

III.

And, for good reason, we granted that request. *See Resurrection Sch. v. Hertel*, 16 F.4th 1215, 1216 (6th Cir. 2021). Given the clear conflict among *Beshear*, *Monclova*, and the panel decision in this case, rehearing en banc became "necessary to secure and maintain [the] uniformity of the court's decisions." *See* Fed. R. App. P. 35(b)(1)(A). And given the additional tension between the panel decision and *Tandon*, rehearing en banc was likewise necessary to restore our precedent's conformity "with a decision of the United States Supreme Court." *Id.* Unfortunately, however, today's majority has achieved neither task. By declaring plaintiffs' entire *case* nonjusticiable, the majority has necessarily said *nothing* about the proper rule of decision for First Amendment claims and *nothing* about whether *Beshear* or *Monclova* represents the law of our circuit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). That decision is wrong as a matter of both substance and procedure, and I shall now explain why.

A. MDHHS's and Ingham County's Voluntary Cessation of the Restrictions Did Not Moot the Case, and their Orders are Capable of Repetition, Yet Evading Review

The leading edge of the majority's argument that Resurrection School's challenge is now moot arises from the fact that MDHHS rescinded its masking order "almost a year ago" in June 2021. Majority Op. at 2.[5] True, Resurrection School is not subject to MDHHS's order *at present*. But as the Supreme Court has repeatedly explained—in the very context of COVID restrictions, no less—a defendant's voluntary cessation of challenged conduct cannot alone moot a case. *See Tandon*, 141 S. Ct. at 1294 ("[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."); *see also Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (holding that because the defendant had "not carried the 'heavy

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[5] Note how MDHHS's order was already withdrawn by the time the panel majority adjudicated its legality in August 2021. Ironically, the panel majority first had to conclude that the mandate was capable of repetition, yet evading review and that defendants' voluntary cessation did *not* moot the case in order to deny the religious-liberty claim. *See Resurrection Sch.*, 11 F.4th at 452 (holding that defendants' voluntary cessation did not moot the case because it is not "'absolutely clear' that [defendants] will not reimpose a mask requirement" and because "[p]laintiffs' claims further come within the exception to the mootness doctrine for actions that are 'capable of repetition, yet evading review.'").

burden' of making 'absolutely clear' that it could not revert to its [prior] policy," the controversy was not moot); *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (cleaned up)). Rather, such voluntary cessation moots the case only if the party claiming mootness—here, defendants—meets its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 190).

Likewise, the cessation of challenged conduct also cannot moot a case when that conduct is "capable of repetition, yet evading review." *Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 170 (2016) (quoting *Spencer v. Kenma*, 523 U.S. 1, 17 (1998)). This additional doctrine[6] becomes relevant when two

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[6] The voluntary cessation and capable of repetition, yet evading review doctrines are sometimes called "exceptions" to Article III mootness. *See, e.g.*, *Resurrection Sch.*, 11 F.4th at 449. I find this term misleading, as it implies that the doctrines would permit a federal court to spuriously enjoin some contested behavior that was certain never to recur. Federal courts, of course, do not have the power to render advisory opinions. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). But the two aforementioned doctrines, in my view, are consistent with that principle, because they "merely recognize a shift from a present harm to a potential future harm." Tyler B. Lindley, *The Constitutional Model of Mootness*, 48 BYU L. Rev. __ (draft at 1) (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050643. In this sense, the "exceptions are not really exceptions at all," given that it is

conditions apply: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Tech., Inc.*, 579 U.S. at 170 (cleaned up) (quoting *Spencer*, 523 U.S. at 17); *see also Weinstein v. Bradford*, 423 U.S. 147, 148 (1975). No one here much contests that MDHHS's order satisfies element 1—and for good reason. The Supreme Court has held that a period of even "two years is too short to complete judicial review of the lawfulness" of challenged conduct. *Kingdomware Tech., Inc.*, 579 U.S. at 170 (citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514–16 (1911)). So our only dispute concerns element 2—whether there exists a reasonable possibility that MDHHS could subject Resurrection School to a masking restriction once again. *Id.*

Indeed, as the majority itself notes, a reasonable possibility of recurrence is the critical inquiry around which *both* the relevant doctrines—voluntary cessation and capable of repetition, yet evading review—coalesce in this case. Majority Op. at 5–7. In the majority's view, however, neither doctrine absolves the preliminary-injunction request (or even the case itself) of mootness, as there is "no reasonable possibility" that MDHHS could again subject Resurrection School to the

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uncontroversial Article III courts may dispense remedies to mitigate potential future harms. *Id.*; *see, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908). So I do not consider myself to be advocating for the application of true "exceptions" to Article III in these pages; rather, I believe that whether "the harm recurs in the future" from a mask mandate "is likely enough" here "to satisfy the requirements of Article III." Lindley, *supra*, draft at 8.

challenged restriction. *Id.* at 7. The majority's conclusion appears to rest upon four principal arguments: (1) defendants' good-faith rescission of the order and "political accountability" show that MDHHS would not reimpose a mandate; (2) Ingham County's orders—rescinded only in February—are irrelevant to the litigation against MDHHS; (3) the changed legal landscape after *Tandon* shows that no reasonable officer would reimpose an MDHHS-style order; and (4) the threat from COVID-19 has abated such that there is "no reasonable possibility" MDHHS (or Ingham County) could reimpose a mandate. *Id.* at 5–7. As explained below, however, none of these proffered rationales can withstand serious scrutiny.

1. Claim One: Good-Faith Rescission and "Political Accountability"

The first reason given for why the case is extinguished is that MDHHS rescinded its order months rather than weeks after being sued, supporting an inference of good-faith rescission under *Speech First*, and that, as well, "defendants' own political accountability" would prevent them from reimposing a similar restriction. *Id.* at 5 (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769 (6th Cir. 2019)). I will address those points in turn.

As to good faith, the *Speech First* decision actually *undermines* the majority's reasoning rather than supporting it. That case concerned a First Amendment challenge levied against the University of Michigan Office of Student Conflict Resolution's ("OSCR") overbroad definitions of the terms "harassing" and "bullying." *Speech First, Inc.*, 939 F.3d at 762. About a

month after the challengers filed suit, OSCR removed the objectionable definitions from its website, so the district court deemed the case moot. *Id.*; *see also Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700, 714 (E.D. Mich. 2018) (explaining the timeline of the definitions' removal). In reversing that determination, however, we evaluated not merely one factor (good faith), but four: good faith; the University's refusal to disavow reenactment of the challenged definitions; the rescission's status as a "discretionary[ ] and easily reversible action[ ]"; and the definitions' continued defense by the University. *Speech First, Inc.*, 939 F.3d at 768–70. So how does MDHHS's behavior fare under the framework that *Speech First* established? Not so well. The "good faith" contention as a rationale for a mootness finding makes little sense in this context, and the latter three factors from *Speech First* clearly cut *against* the majority's position.

Good Faith. A defendant's *bad*-faith rescission—rescission done as in *Speech First* itself to purposefully evade judicial review—is no doubt insufficient by itself to moot a case. The majority's *non sequitur* here is to argue the reverse—that because MDHHS's rescission was done in apparent *good* faith, MDHHS thus will never reimplement the restriction. In the context of this case, however, there is no necessary relationship between those two propositions. Indeed, MDHHS could have rescinded its orders in perfectly good faith and yet could still reinstitute them in perfectly good faith as well. Why? Because MDHHS did not rescind its orders on the ground that they might conflict with the First Amendment—a matter of legal principle not contingent on shifting real-world conditions. The agency instead

cited improving *factual* circumstances surrounding COVID-19. Because those circumstances could change—and, in fact, are changing—the agency could reinstitute its orders in light of updated circumstances, even if its earlier rescission had been in good faith under *previous* circumstances. Merely that MDHHS's rescission occurred in alleged good faith in response to one set of facts, in other words, tells us nothing about whether MDHHS could reinstitute its orders in light of some different set of facts. So what about the other three considerations mentioned above?

A Refusal to Disavow Reenactment. As we recognized in *Speech First*, a defendant's failure to "affirmatively state[ ] that it does not intend to reenact the challenged" provision counsels against a finding of mootness. *Id.* at 769. Thus, we held that the mere *absence* in the record of the University's disavowal of its prior, constitutionally suspect definitions created an inference that they could be reenacted. *Id.* Here, by contrast, we confront no uncertainty about whether MDHHS has disavowed reimposition of its masking order. To the contrary, MDHHS's counsel at oral argument explicitly *refused* to disavow its reimposition. The Court pressed counsel on this point directly, asking, "Are you willing to commit today that the state won't reenact its prior rule?" Recording of Oral Arg. at 41:18–41:25. Counsel's response was emphatic: "*Absolutely not*." *Id.* So Resurrection School's argument on this factor is even stronger than was Speech First's. There is no uncertainty about whether MDHHS has or might disavow reinstitution of its mask mandate; *cf. Speech First*, 939 F.3d at 769, it already categorically

told us that it is keeping the option of another mandate on the table.

A Discretionary and Easily Reversible Action. Additionally, *Speech First* recognized a key distinction between rescission effected by the *legislature*'s passing of a new law versus merely an *executive* body's "discretionary[ ] and easily reversible" withdrawal of some contested restriction. *Id.* at 768. As we there explained, when "the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case"—a concept that we referred to as the judicial "solicitude" afforded the legislature's decision. *Id.* By contrast, however, the "easily reversible" cessation of an executive-branch action does *not* presumptively moot a case. *Id.* Rather, "*significantly more* than [such] bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.* (emphasis added).

The import of this distinction for today's dispute? Counsel for MDHHS conceded at oral argument that MDHHS could reinstitute its masking order "on a moment's notice," "without the legislature," "on their own," and "without any other approval." Recording of Oral Arg. at 43:42–44:03. Thus we owe no deference to MDHHS's bare rescission of its order. *See Speech First*, 939 F.3d at 768. Its rescission was, instead, a quintessential "easily reversible" executive-branch action, for which a "significantly" higher showing is required before diagnosing the case as moot. *Id.*

A Continued Defense. Last, both *Speech First* and the Supreme Court's own precedents instruct that a

challenge to a rescinded policy is unlikely moot when the defendant mounts a vigorous defense of the policy's lawfulness. *See id.* at 770 ("Significantly, the University continues to defend its use of the challenged definitions."); *see also Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) ("[T]he district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, a heavy burden that [defendant] has clearly not met." (cleaned up)). The reason for such holdings is obvious: if the defendant admits the error of his ways, it supports an inference that he has acquiesced in refusing to commit future violations. Yet a vigorous defense creates exactly the opposite inference: the defendant's desired freedom to resume the challenged conduct shows that it is *not* "absolutely clear" the defendant will abstain from those future violations.

As applied to this case, if ever there were a "vigorous defense" of a contested policy, MDHHS and Ingham County have mounted it. Both have steadfastly refused to admit that their policies of declining a religious exemption to Resurrection School violated the First Amendment. To the contrary, they have insisted upon the constitutionality of their policies before the district court, before the original panel, and now before the en banc court. Echoing the panel majority, MDHHS contends that its orders were neutral and generally

applicable, that *Tandon* and *Fulton* cannot compel a different result, and that *even if* its orders were subject to strict scrutiny, they would satisfy that standard. *See* MDHHS Supplemental Br. at 17 ("*Tandon*'s framework underscores that there is no Free Exercise Clause violation here, and *Fulton* offers little guidance on comparability.").

Ingham County likewise believes the orders are neutral and generally applicable, even despite *Tandon* and *Fulton*, and could survive strict scrutiny as well. *See* Ingham County Supplemental Br. at 21. Ingham County's brief also asserts—as did counsel for MDHHS at oral argument, *see* Recording of Oral Arg. at 35:58–39:16—that *Monclova* is wrongly decided and null because it purportedly conflicts with our earlier decision in *Commonwealth v. Beshear*. *See* Ingham County Supplemental Br. at 16 ("The Panel's decision correctly provides that if forced to choose between conflicting precedent, [courts] are required to follow the first one, which in this case is *Beshear*."). Given these persistent defenses, neither entity has given us any reason to believe that they have acquiesced and seen the error of their ways. In their ideal world, we would hold that their orders were perfectly constitutional, and thus that they are free once again to criminalize Resurrection School's face-to-face instruction.

That all brings me to the majority's speculation about how defendants' "political accountability" would surely prevent reimposition of a mask mandate. *See* Majority Op. at 5. That is a curious argument. I had always thought that defendants' imposition and rescission of the mask mandate was based upon

biological science rather than political science. I also would have thought that insulation from political accountability was the very *reason* the Michigan legislature, through an extensive delegation, established an independent public-health bureaucracy full of advisors removable "for good cause"—so that it could institute measures unpopular but deemed necessary to safeguard the public health without fear of democratic reprisal. *See* M.C.L. 333.2208(3); *see generally Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). Perhaps MDHHS is immune from the ordinary principles of administrative law, but why that might be so the majority never says.

The majority moreover offers no empirical support for its "political accountability" claim. If anything, polling suggests that the Michigan public might actually *favor* reimposition of a mask mandate. *See, e.g.*, Ken Haddad, "Poll: WhereMichigan voters stand on mask mandates, COVID vaccines requirements," *Click on Detroit* (Jan. 12, 2022), https://perma.cc/BU84-6UP8 (explaining that "63% of [Michigan] voters support a requirement for people to wear masks in indoor places[.]"). In any event, how disquieting for Resurrection School that its religious free exercise should hinge upon the caprice of the electorate. *See Barnette*, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials[.]").

2. Claim Two: The Supposed Irrelevance of the Ingham County Orders to this Proceeding

As noted above, one of the foundational assumptions underlying the majority's mootness analysis is that MDHHS's order was "repealed almost a year ago." Majority Op. at 2. One would have to be forgiven, based on that comment, for believing that Resurrection School thus has not been subjected to a mask mandate since June 2021. But that would be false. Resurrection School was actually subject to the mandate until February 2022, shortly before this case was argued. This latter mandate was the creation of Ingham County, rather than a direct imposition from MDHHS itself. But just like its predecessor from MDHHS, this new mandate illegalized Resurrection School's face-to-face instruction as it simultaneously exempted "restaurants, hair and nail salons, performance venues, gyms, office buildings, indoor sports venues, [and] casinos." Opinion & Order at 16, R. 77. And, it turns out, Ingham County's decision to impose such a measure was deeply intertwined with MDHHS's own views on the necessity of masking.

The majority's contention to the contrary rests on its mere *ipse dixit* that the two mandates have nothing to do with each other, and thus that Ingham County's behavior is categorically irrelevant to its mootness analysis. Majority Op. at 6.[7] I disagree with the

[7] Inversely, because the majority insists that MDHHS and Ingham County have nothing to do with each other, today's opinion has said nothing about whether that portion of Resurrection School's suit against the latter is moot. Resurrection School is thus free to continue pursuing relief against Ingham County.

majority, of course, but so does Ingham County. When it initially imposed its mask mandate in September 2021, it explicitly cited MDHHS's August 13, 2021, guidance "stating that all schools should require universal indoor masking"—i.e., *sans* religious exemption—as a rationale for its own imposition of indoor masking. *See* "Emergency Order (Ingham 2021-2) for Control of Epidemic," *Ingham Cnty. Health Dep't* (Sept. 2, 2021), https://perma.cc/K25B-URTF. And what about when Ingham County rescinded its order this February? As it explained to the district court, "because MDHHS guidance regarding masks has changed, Ingham County has *shifted its policies accordingly*." Opinion & Order at 6, R. 77 (emphasis added); *see also* 2/17/2022 Transcript at 14:4-12, 21:16-25, R. 80 (explaining that Ingham County both imposed and rescinded its "universal masking" mandates in schools "[b]ased on" and "in compliance with guidance" from MDHHS).

As Resurrection School points out in its briefs before us, it is a basic principle of equity jurisprudence that a defendant bound by an injunction cannot escape the decree by enlisting a third party to do his bidding. Indeed, Federal Rule of Civil Procedure 65(d) provides that even a *nonparty* with notice of a decree can be held in contempt for working in "active concert or participation" with a party to violate the terms of the injunction. Fed. R. Civ. P. 65(d)(2)(C). As the Supreme Court has explained, this principle prevents "nullif[ication of] a decree by carrying out prohibited acts through aiders and abettors." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *see also McGraw-Edison Co. v. Preformed Line Prods. Co.*, 362 F.2d 339,

344 (9th Cir. 1966) ("Nonparties may be found in contempt of an injunction provided that they have actual notice of the injunction and aid or abet its violation.").

The majority's unexplained refusal to consider Ingham County's conceded cooperation with MDHHS to impose a mask mandate thus creates an illogical disparity. Rule 65 provides that even a *nonparty* acting in concert or participation with a defendant-party may be jailed for contempt of a decree. *McGraw-Edison Co.*, 362 F.2d at 344. Yet in the majority's view, when a *party to the suit* (Ingham County) acts in concert with another party to the suit (MDHHS) to carry out an illegal act, that fact is categorically insufficient to show that a suit against the latter is even justiciable. *See* Majority Op. at 6.

Contrary to what the majority implies, its creation of that mismatch finds no support in the cited pages or footnote from our decision in *Chirco v. Gateway Oaks*. *But see id.* (citing *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309–10, 310 n.1 (6th Cir. 2004)). If anything, *Chirco* actually *supports* justiciability in this case. *Chirco* involved a businessman, Chirco, who sued a condominium developer, Gateway Oaks, for copyright infringement, claiming that condos Gateway Oaks had constructed were substantially similar to condos that Chirco himself had designed. *Chirco*, 384 F.3d at 308. He also filed a notice of *lis pendens* on the condos, the point of which was to inform potential buyers that an action was pending against the property. *Id.* The district court canceled the *lis pendens*, however, reasoning that the copyright suit "did not affect the

title to the Gateway Oaks condominiums." *Id.* Chirco appealed the cancellation. *Id.* Yet as the suit proceeded, Gateway Oaks sold off all the condos to third parties. *Id.* at 309. Chirco conceded, therefore, "that any decision by [the Sixth Circuit] would have [had] no impact on the instant case against Gateway Oaks." *Id.* But he asked us to adjudicate the validity of the cancellation anyway, as a *lis pendens* dispute could potentially recur between Chirco and some other party not before the court. *Id.* We refused to do so, however, applying the basic principle that the capable-of-repetition doctrine requires that the dispute be capable of repetition between the same parties. *Id.* at 309–10 (citing *Norman v. Reed*, 502 U.S. 279, 288 (1992)).

That the majority views *Chirco* (or the same-party requirement more generally) as defeating the relevance of Ingham County's behavior to the mootness analysis here betrays a basic misunderstanding of Resurrection School's argument. Resurrection School is not seeking an abstract declaration that MDHHS's mandate was illegal solely because it might later deploy that holding against some unknown party in some future, collateral proceeding—as Chirco might have done against some unknown third party not before the court. Instead, it wants a ruling that MDHHS *itself* must stop instructing Ingham County to impose "universal indoor masking" *sans* religious exemption upon the School. *See* "Emergency Order (Ingham 2021-2) for Control of Epidemic," *supra.* And given that Ingham County "shift[s] its policies accordingly" based on what MDHHS tells it to do, Opinion & Order at 6, R. 77, Resurrection School plainly has a justiciable interest in securing a decree against MDHHS itself. What it fears,

in other words, is not merely a repetition of Ingham County's behavior, but of MDHHS's as well, given MDHHS's evident control over Ingham County's decisions.[8]

3. Claim Three: No Reasonable Officer Would Reinstitute an MDHHS-Style Order after *Tandon v. Newsom*

The majority next asserts that no reasonable officer would reimpose an MDHHS-style mandate given the now-"substantially developed caselaw" on general applicability; namely, the Supreme Court's decision in *Tandon*. Majority Op. at 7, *id.* at 5–6 (citing *Tandon*, 141 S. Ct. at 1294). Yet the majority's bare assertion gives me no confidence that MDHHS and Ingham County share that understanding of the relevant precedent. MDHHS *itself* kept its contested orders in place for *months* after *Tandon* came down. Ingham County likewise promulgated its own orders disparately burdening Resurrection School's religious free exercise well after *Tandon*. For that matter, the only reason we are even in an en banc proceeding right now is because the panel majority held that MDHHS's

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[8] That Ingham County may once again "shift[ ] its policies accordingly" based on new masking guidance from MDHHS, Opinion & Order at 6, R. 77, is bolstered by MDHHS's explicit acknowledgment on its own website that it may institute new masking measures in response to "future phases" of the pandemic. *See, e.g.*, "Updated Masking Guidance for Michiganders," *Mich. Dep't of Health & Hum. Servs.* (Feb. 16, 2022), https://perma.cc/4ALG-U53H ("Recommendations regarding masking may change as conditions evolve—such changes could include the presence of a new variant that increases the risk to the public, or an increased number of cases that strains the healthcare system.").

orders were lawful even under *Tandon*. *See Resurrection Sch.*, 11 F.4th at 457 ("*Tandon v. Newsom* does not compel a different comparator." (citation omitted)). And both MDHHS and Ingham County continue to insist that their orders pose no First Amendment concern, even under *Tandon*. *See supra* pages 30–31; *see also* 2/17/22 Transcript at 22:9-20, R. 80 (contending that Ingham County's orders are generally applicable even under *Tandon* and *Monclova* and that, in any event, they could satisfy strict scrutiny). It is simply not credible to claim that *Tandon* itself obviated the possibility that an MDHHS-style order could return.

4. Claim Four: COVID has Abated Such That There is "No Reasonable Possibility" Defendants Could Reimpose a Mask Mandate

The majority last asserts that conditions have so improved regarding COVID-19 that there is "no reasonable possibility" defendants could reinstitute a mask mandate. Majority Op. at 7. Much like the majority's speculation about defendants' "political accountability," however, this intuition about a rapidly evolving public-health situation—derived from a year-old record assembled in a preliminary-injunction proceeding—has scant empirical support. Indeed, in the weeks after our oral argument for this case, the following institutions have either reinstated or extended their mask mandates in light of new surges of COVID-19:

- **Columbia University**
  - *See* "As of April 11, Non-Cloth Masks are Mandatory in Classrooms," *COVID-19 Resource Guide for the Columbia Community* (Apr. 10, 2020), https://perma.cc/P9TK-ACJT.
- **Georgetown University**
  - *See* Lauren Lumpkin, "Georgetown, Johns Hopkins temporarily restore some covid measures," *Wash. Post* (Apr. 7, 2022), https://perma.cc/Z39F-27V6.
- **Johns Hopkins University**
  - *See id.*
- **The City of Philadelphia**
  - *See* Elizabeth Wolfe, "Philadelphia will reinstate its indoor mask mandate as cases rise," *CNN* (Apr. 11, 2022), https://perma.cc/76XM-QHKK?type=image.
- **American University**
  - "Mask Guidelines: New Spring 2022 Protocols," *American University* (last visited Apr. 12, 2022), https://perma.cc/WR33-RSL6?type=image ("As of April 12, 2022, masks will be required in all campus buildings, except when individuals are alone in private offices, inside residence hall rooms with only roommates, or when actively eating or drinking.").
- **George Washington University**
  - *See* "GW to Reinstate Indoor Mask Requirement," *The George Washington*

University (Apr. 11, 2022), https://perma.cc/4SPU-HVEQ.

- **The University of Connecticut**
  - *See* "UConn Reinstituting mask requirement as COVID positivity rates rise," *News 8 wtnh.com* (Apr. 15, 2022), https://perma.cc/75S6-W5V9?type=image.
- **Rice University**
  - *See* Giulia Heyward, "Virus outbreaks are pushing some U.S. universities to reinstate mask mandates," *N. Y. Times* (Apr. 16, 2022), https://perma.cc/KF9N-9JRS.
- **Elementary schools in (1) Ottawa, (2) Chicago, (3) North Carolina, (4) New Jersey, (5) Milwaukee, (6) California, (7) Massachusetts, and (8) Pennsylvania**
  - *See* Caroline Alphonso, "Ottawa public school board reinstates mask mandate as other boards make new plea for masking," *The Globe & Mail* (Apr. 13, 2022), https://perma.cc/Y2QB-6EGT.
  - *See* Kelly Davis, "Some classes at North Side school return to mask mandate after increase in Covid cases," *WGN9* (Mar. 21, 2022), https://perma.cc/2R37-NSJE.
  - *See* Samantha Kummerer, "Masks are back at Carrboro High School after uptick in COVID cases connected to prom," *ABC11* (Apr. 14, 2022), https://perma.cc/QGL3-MU6K.

- *See* Lauren McCarthy, "Two high schools in New Jersey reinstate mask mandates following outbreaks," *N. Y. Times* (Apr. 1, 2022), https://perma.cc/2T5A-L8NC.
- *See* Elizabeth Wolfe & Andy Rose, "Milwaukee schools reinstate mask mandate just one day after it was dropped," *CNN* (Apr. 20, 2022), https://perma.cc/4JEP-7WDD.
- *See* "Pacific Charter High School reinstates mask mandate amid spike in COVID cases after spring break," *ABC7* (Apr. 20, 2022), https://perma.cc/V3HP-NPB5?type=image.
- *See* Adria Watson, "Northampton reinstates school mask mandate following increase in COVID-19 cases," *Boston Globe* (May 11, 2022), https://perma.cc/Q75C-H2M6.
- *See* "Masks go back on at Woodland Hills High School," *Pittsburgh Post-Gazette* (May 5, 2022), https://perma.cc/NTF2-DABF.
- *See* "Pittsburgh Public Schools to require masks again, starting Friday," *11 News* (May 12, 2022), https://perma.cc/84NX-ABCB.
- *See* "Masks Now Required at Evanston Township High School as COVID Cases Rise," *NBC5 Chicago* (May 16, 2022), https://perma.cc/SMC2-E2NP.

- **The University of Rochester**
  - *See* "Face mask mandate reinstated on University of Rochester campuses," *WXXI News* (Apr. 15, 2022), https://perma.cc/R9N9-E5MS.
- **The State University of New York–Orange**
  - *See* "SUNY Orange Returns to Indoor Masking (effective April 18, 2022)," *SUNY Orange* (last visited Apr. 18, 2022), https://perma.cc/VNJ9-E3JK.
- **Syracuse University**
  - *See* Jeanne Lockman, "Syracuse University to require masks during classes, some events as COVID cases rise," *CNYCentral* (Apr. 18, 2022), https://perma.cc/S6X7-3C8C.
- **Bowdoin College**
  - *See* "Reinstating Masks (April 12, 2022)," *Bowdoin College Office of the President* (Apr. 12, 2022), https://perma.cc/3CN2-5ZW6?type=image.
- **Rockefeller University**
  - *See* "Updates on COVID-19," *The Rockefeller University* (Apr. 15, 2022), https://perma.cc/YD3M-K4T2.
- **Los Angeles County Public Transit**
  - *See* "Los Angeles County to Issue New COVID-19 Health Order Requiring Masks on All Public Transit," *NBC Los Angeles* (Apr. 21, 2022), https://perma.cc/VN7Y-Q477.

- **The Centers for Disease Control's ("CDC") Airline Mask Mandate**
  - *See* Heather Murphy, "Masks Stay On: C.D.C. Keeps the Mandate on Planes," *N. Y. Times* (Apr. 13, 2022), https://perma.cc/D5K7-BP36.
    - Of note, after a Florida district court enjoined enforcement of this particular mandate, the CDC authorized the Department of Justice to appeal the decision after certifying that a transportation masking mandate remains "necessary for the public health." *See* "CDC Statement on Masks in Public Transportation Settings," *CDC Newsroom* (Apr. 20, 2022), https://perma.cc/73LU-4P5K.
- **San Francisco Public Transit**
  - *See* Lauren McCarthy, "The largest transit system in the Bay Area reinstates a mask mandate for riders," *N. Y. Times* (Apr. 28, 2022), https://perma.cc/2HW2-ZD9F.
- **Various Schools in Ingham County itself**
  - *See* Izzy Martin, "East Lansing Public Schools reinstates mask mandate," *WLNS6.com* (May 13, 2022), https://perma.cc/7SAW-WBY7.
  - *See* Sarah Lehr, "East Lansing schools reinstate mask mandate beginning Monday," *WKAR.org* (May 13, 2022), https://perma.cc/5SDN-V5WT.

- Izzy Martin, "Waverly Community Schools masking up starting Monday," *WLNS6.com* (May 18, 2022), https://perma.cc/Z4MR-5JST.

Given these developments—which include even reimposed mandates in Ingham County itself—I would hesitate to categorically declare that there is "no reasonable possibility" defendants could reinstate their prior orders.[9] I recognize, of course, that the materials just cited are not in the present record of this case, and so I do not fault the majority for failing to address those specific sources. What I *do* fault the majority for, however, is its decision to declare moot not merely Resurrection School's preliminary-injunction request—the order actually before us—but its entire *case* against MDHHS, thus forever precluding the School from introducing those materials (or whatever else it sees fit) into the record at the district court in a trial on the merits. The majority's reasoning stands in substantial tension with circuit and Supreme Court precedent, *see infra* at 40–43, and works an intolerable unfairness on Resurrection School.

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[9] In addition to the masking reimpositions that we are *already* seeing across the United States, there is also the reasonable possibility of reimpositions later on, such as this fall and winter. *See, e.g.*, Yasmeen Abutaleb & Joel Achenbach, "Coronavirus wave this fall could infect 100 million, administration warns," *Wash. Post* (May 6, 2022), https://perma.cc/H4SL-F8SB. For that reason as well, Resurrection School plainly has a justiciable interest in securing long-term relief through a permanent injunction or declaratory judgment.

What we should have done instead was vacate the district court's denial of the preliminary injunction, which was based on an erroneous understanding of the First Amendment. We then should have remanded both that order and the case itself to the district court for a fresh analysis of the preliminary-injunction factors—an analysis the district court has never properly conducted. *See* Order at 7, R. 24. Because there is a "reasonable possibility" that MDHHS or Ingham County (at the former's behest) could reinstitute the challenged orders either during the pendency of the litigation—which itself could take yet additional months—or after it, plaintiffs retain a live interest in seeking both preliminary and permanent relief.

But let's pretend that I'm wrong about all that. Pretend the present record on interlocutory appeal really *does* give rise to justiciability concerns. Would it thereby follow that the appropriate course was the majority's here—to deem the entire *case* moot and make no meaningful attempt to clarify the merits of the relevant free-exercise jurisprudence? Certainly not. As it turns out, there was an alternative path available to us, a path not taken, through which we could have decided this appeal that would have simultaneously respected the majority's apparent justiciability qualms while also doing much good to clarify the free-exercise law of our circuit. In the section that follows, therefore, I will briefly describe that approach—and why its apparent repudiation further underscores the indefensible nature of today's result.

B. *Unwinding the Majority's Conflation of the Preliminary-Injunction Proceeding and the Permanent-Injunction Proceeding*

Today's decision will have the practical effect of a final judgment, given that it brings an end to Resurrection School's suit against MDHHS. Strictly speaking, however, we are not evaluating a final decision of the district court. This case comes to us instead on the denial of a preliminary injunction, and so is an interlocutory appeal under 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(a)(1). Thus, what we are doing (or, rather, should have been doing) is *predicting* whether Resurrection School would likely succeed on the merits of its claims at trial, where it then would have sought a permanent injunction and declaratory judgment. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394–96 (1981). The distinction between review of a preliminary injunction and a permanent injunction is critical here, in my view, for two reasons.

First, the litigation of a preliminary-injunction request in the district court involves a rapid, abbreviated proceeding in which the district court itself attempts to predict whether the plaintiff is likely to succeed at trial. *See Camenisch*, 451 U.S. at 395 (noting that a preliminary-injunction proceeding involves procedures "less formal" and evidence "less complete" than a trial on the merits).[10] The decision is fast paced because its purpose is simply to protect plaintiffs'

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[10] For instance, the district court denied the preliminary-injunction request here without even holding a hearing.

rights during the litigation, up to and until the district court can rule on the merits of the permanent injunction and declaratory judgment. *Id.* (noting the relative "haste" of such preliminary proceedings). For this reason as well, the district court's determinations at the preliminary-injunction stage have no preclusive effect upon its determinations at the merits stage regarding the permanent injunction and declaratory judgment. *Id.*; *see also Gjertsen v. Bd. of Election Comm'rs of City of Chicago*, 751 F.2d 199, 202 (7th Cir. 1984) ("A preliminary injunction has no preclusive effect—no formal effect at all—on the judge's decision whether to issue a permanent injunction."). So the irony here is that we are declaring plaintiffs' *merits* challenge moot, and thus their entire case against MDHHS extinguished, based on an abbreviated and outdated record assembled at a preliminary and non-preclusive proceeding held over a year ago.

Second, and more important, is that the majority's decision to declare the entire *case* against MDHHS moot—rather than simply deciding the preliminary-injunction appeal—has stripped us of a valuable opportunity to clarify the law of our circuit. What the majority should have done, instead, is rule solely on the interlocutory order before us. That would have put us in the predictive posture characteristic of preliminary injunctions that I mentioned above. In the course of deciding whether to affirm the denial of preliminary relief, therefore, we could have ruled on whether Resurrection School was *likely* to illustrate justiciability at the merits proceeding and, even if we thought *that* showing deficient, whether it was likely to succeed on the merits of its First Amendment claim as

well. That is because, as we recently explained, Article III courts sitting in such a "predictive" posture may permissibly opine on both justiciability *and* the merits (technically, *likely* justiciability and *likely* merits), even if they believe the former likely lacking. *See Arizona v. Biden*, 31 F.4th 469, 479 (6th Cir. 2022) ("We address these [merits] questions despite our initial doubts about standing and reviewability given the predictive nature of the likelihood-of-success inquiry at this early stage.").[11]

Thus, we could haveexplained that Resurrection School was likely to succeed on the merits of its free-exercise claim, given that *Tandon* overruled *Beshear*. But then our court—presumably a different subset of it, as I would not have agreed on this point—also could have explained that Resurrection School was unlikely to establish justiciability. So we could have affirmed denial of *preliminary* relief on that basis, and yet "withh[e]ld judgment" on whether the entire *case* was moot, *see Ramsek v. Beshear*, 989 F.3d 494, 500

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[11] *Arizona* involved a request for a stay of a preliminary injunction rather than a request for a preliminary injunction itself, 31 F.4th at 472, but this difference is immaterial for present purposes, as the predictive posture of each, and the factors used to evaluate each, are the same. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting the substantial overlap of the stay and preliminary-injunction tests because "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined."); *see also Bristol Regional Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 n.1 (6th Cir. 2021) (Thapar, J., dissenting) ("[T]here is no material difference between a preliminary injunction case and a stay case: Courts apply the same test in both."), *vacated on other grounds* 994 F.3d 774 (6th Cir. 2021).

(6th Cir. 2021), given that the *case's* justiciability hinges on rapidly evolving factual circumstances that plaintiffs should have had a fair shot at introducing into the record. We then could have remanded the case so the district court could have taken updated information about COVID-19 and made a ruling on the justiciability of the permanent injunction and declaratory judgment in a trial on the merits.[12]

Such an opinion, even though delivered in a preliminary posture, would have provided valuable guidance to litigants in our circuit about the proper scope of the First Amendment—just as the Supreme Court's orders-docket opinions have done on the same topic. *See, e.g.*, *Tandon*, 141 S. Ct. at 1294. And that approach would have been much fairer to plaintiffs as well, giving them a procedural window to introduce new evidence about what continues to be a rapidly evolving situation. *See, e.g.*, *Ramsek*, 989 F.3d at 500 (dismissing an *appeal* as moot but "withhold[ing] judgment on whether the case as a whole is moot" and remanding for the district court to evaluate additional theories of injury); *see also Reclaim Idaho v. Little*, 826 F. App'x 592, 595 (9th Cir. 2020) (remanding a case in which the mootness issue arose in the first instance on appeal "to allow the parties to develop the record and brief the district court on whether th[e] controversy [was] 'capable of repetition, yet evading review.'").

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[12] And, because this case is not moot, the district court presumably would have ruled on the merits of Resurrection School's requests for declaratory and permanent-injunctive relief as well.

Instead, today's majority has done the very opposite. It makes not a prediction about justiciability in the context of an interlocutory order, but instead an affirmative declaration that there is no case or controversy *at all* between Resurrection School and MDHHS. *See* Majority Op. at 7. As a result, it has necessarily said nothing about the merits of the First Amendment challenge underlying today's dispute. *Steel Co.*, 523 U.S. at 101–02. So Resurrection School is now stripped of its right to make its case for permanent relief in the district court, while similar litigants throughout our circuit will be left uncertain about what standard governs the Free Exercise Clause. Prudence, in my view, would have dictated a different course.

* * *

I hope that I am eventually proven wrong. I would be quite pleased if COVID-19 were to permanently enter humanity's rear-view mirror. But the point is that I—just like the majority—have no basis upon which to proclaim that my hopes today will surely become realities tomorrow. Because I would hold that the present controversy is not moot, I respectfully dissent.

APPENDIX B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0191p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20-2256

[Filed: August 23, 2021]

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; 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 VAIL, in her official capacity as the Health Officer of

Ingham County; CAROL A. SIEMON, in)
her official capacity as the Ingham)
County Prosecuting Attorney,)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:20-cv-01016—Paul Lewis Maloney, District
Judge.

Argued: July 21, 2021

Decided and Filed: August 23, 2021

Before: SILER, MOORE, and DONALD, Circuit
Judges.

COUNSEL

ARGUED: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, for Appellants. Daniel J. Ping, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Elizabeth Hertel. Ann M. Sherman, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Dana Nessel. **ON BRIEF:** Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Daniel J. Ping, Joseph T. Froehlich, Ann M. Sherman, Rebecca A. Berels, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for State of Michigan Appellees. Bonnie G. Toskey, Sarah K. Osburn, COHL,

STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellees Linda Vail and Carol Siemon. Alex J. Luchenitser, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amici Curiae.

MOORE, J., delivered the opinion of the court in which DONALD, J., joined, and SILER, J., joined in part. SILER, J. (pg. 31), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. To control the spread of COVID-19, the Michigan Department of Health and Human Services ("MDHHS") required that all persons five years of age and older wear a mask in indoor public settings, including while attending public and private K–12 schools. Plaintiffs Resurrection School, a Catholic elementary school in Lansing, Michigan, and two parents with children enrolled at the school, on behalf of themselves and their minor children, challenge the mask requirement as a violation of their free exercise of religion, equal protection, and substantive due process rights. Since Plaintiffs filed suit, MDHHS has rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement. We hold that Plaintiffs' challenge to the mask requirement is not moot, and we **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction on the merits.

I. BACKGROUND

A. COVID-19 in Michigan

COVID-19 is a novel respiratory infection first discovered in December 2019. Since then, 925,377 Michigan residents have been diagnosed with COVID-19 and 20,076 Michigan residents have died from the disease. Mich. COVID-19 Dashboard, Cumulative Confirmed Cases and Deaths Among Confirmed Cases, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (accessed Aug. 19, 2021). Although young children have been largely spared the worst of the disease's impact, six children ages 5–14 have died of COVID-19 in Michigan, *Number of COVID-19, Pneumonia and Influenza Deaths by Age of Death, Michigan Occur[r]ences*, MDHHS, https://www.mdch.state.mi.us/osr/Provisional/CvdTable2.asp (accessed Aug. 19, 2021), and 1,280 children ages 0-17 have been hospitalized with COVID-19, COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (accessed Aug. 19, 2021). One-hundred-and-sixty-one children in Michigan who recovered from COVID-19 went on to develop Multisystem Inflammatory Syndrome in Children ("MIS-C"), a condition causing inflammation and damage to organs. MIS-C Data and Reporting, MDHHS, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_104661---,00.html (accessed Aug. 19, 2021); *see also* R. 16-2 (Vail Aff. ¶ 7) (Page ID #538) (describing MIS-C and other long-term complications of COVID-19 infection). Children infected with COVID-19 can spread the disease to their parents and grandparents, teachers

and school staff, and other medically vulnerable Michiganders.

COVID-19 primarily spreads through airborne particles that accumulate in enclosed spaces with inadequate ventilation, respiratory droplets produced when a person coughs, sneezes, or talks, and occasionally through contact with objects contaminated with the virus. *How COVID-19 Spreads*, CDC (July 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. Individuals infected with COVID-19 can spread the disease while asymptomatic and pre-symptomatic, and many individuals infected with COVID-19 experience mild symptoms. *See* R. 14-6 Ex. 5 (Nathan Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 Emerg. Infect. Dis. (July 2020)) (Page ID #297–303). These features make COVID-19 difficult to control. As a result, universal community use of masks is a widely accepted method to prevent the spread of COVID-19, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html, despite Plaintiffs' contentions to the contrary, R. 21 (First Amended Compl. ¶¶ 75–77) (Page ID #648–49).

Since Plaintiffs filed their lawsuit in October 2020, the Food and Drug Administration ("FDA") has authorized three COVID-19 vaccines for emergency use, including one for use in persons twelve years of age and older. *Different COVID-19 Vaccines*, CDC (May

27, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html. Two of the vaccine manufacturers, Pfizer-BioNTech and Moderna, are testing their vaccines in children ages six months to eleven years old. Apoorva Mandavilli, *In the U.S., Vaccines for the Youngest Are Expected This Fall*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/health/us-vaccines-children-fall.html. Although initially Pfizer-BioNTech hoped to apply for emergency authorization of the vaccine for children ages five to eleven years old in September, and Moderna sometime in the fall, *id.*, the FDA has requested that the two vaccine manufacturers increase the size of their studies, which may delay the FDA's authorization of the vaccine for children younger than twelve, *see* Sheryl Gay Stolberg et al., *At the F.D.A.'s Urging, Pfizer-BioNTech and Moderna Are Expanding Their Trials for Children 5 to 11*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/us/politics/fda-covid-vaccine-trials-children.html.

B. Michigan's Mask Requirement

Masks have been a significant part of Michigan's COVID-19 response, especially prior to the widespread availability of safe and effective vaccines. Beginning on April 27, 2020, Michigan required all persons "able to medically tolerate a face covering" to wear a face covering "when in any enclosed public space." E.O. 2020-59 § 15(a) (Apr. 24, 2020); *see also* E.O. 2020-147 § 1 (July 10, 2020) (reiterating that all persons ages five and older must wear a face covering in public except in limited circumstances or if medically unable to wear a face covering).

In preparation for the 2020–2021 school year, Governor Gretchen Whitmer issued the MI Safe Schools Roadmap ("Roadmap"), which outlined safety recommendations and requirements for K–12 schools. *MI Safe Schools: Michigan's 2020-21 Return to School Roadmap* (June 30, 2020), https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf. The Roadmap varied its prescriptions based on the prevalence of COVID-19 in the community and the grade of the students. *Id.* at 9.[1] The Roadmap strongly recommended, but did not require, students in grades K–5 to wear a face covering in the classroom so long as they did not come into contact with students in another class. *MI Safe Schools*, at 22; *see also* E.O. 2020-142 § (2)(b)(1)(E)

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[1] The Roadmap corresponds to the MI Safe Start Plan, which adopted a six-phase approach to reopening the state based on the prevalence of disease. In Phase 1, a region is experiencing "[i]ncreasing number of new cases every day, likely to overwhelm the health system" and only critical infrastructure is permitted to remain open, whereas in Phase 6, the region has community immunity sufficient to minimize community spread and restrictions are lifted. *MI Safe Start: A Plan to Re-engage Michigan's Economy*, at 2 (May 7, 2020), https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf. When a region is in at least Phase 4, the Roadmap permitted schools to reopen for in-person learning with certain safety protocols. *MI Safe Schools*, at 21. In practice, Michigan treated in-person K–12 instruction more permissively than the terms of the MI Safe Start Plan and the Roadmap. The MI Safe Start plan permitted schools to reopen for in-person instruction only in Phases 5 and 6, *MI Safe Start*, at 2, and MDHHS permitted K–8 schools to remain open for in-person instruction even when all regions were at the highest risk level, 11/15/20 MDHHS Order.

(June 30, 2020) (incorporating requirement into an executive order).

On September 25, 2020, citing "the higher incidence of [COVID-19] cases among children in recent months," "the clear effectiveness of masking as mitigation strategy," and the "absence of a widespread vaccine," Whitmer issued an executive order mandating that children in grades K-5 also wear a face covering in classrooms. E.O. 2020-185 § 1 (Sept. 25, 2020). A few days later, the Michigan Supreme Court concluded that the 1945 law under which Whitmer had been issuing executive orders regarding the COVID-19 pandemic was an improper delegation of legislative power in violation of the Michigan Constitution. *See In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1 (Mich. 2020). MDHHS then issued an order reinstating the requirement that children in grades K–5 wear a face covering in the classroom. 10/05/20 MDHHS Order §§ 2–3. MDHHS issued another near-identical order on October 9, 2020. 10/09/20 MDHHS Order. The Ingham County Health Department, which includes Lansing, also issued its own emergency order requiring all persons who leave their home or place of residence to wear a face covering, including children in grades K-5. Ingham Cnty. E.O. 2020-21 (Oct. 4, 2020); *see also* R. 16-2 Ex B. (Vail Aff. ¶¶ 13–22) (Page ID #539–41) (describing the Ingham County order). On October 23, 2020, the Ingham County Health Department rescinded its order after it confirmed that the MDHHS Orders included all requirements of the county order. *Id.* ¶ 23 (Page ID #541).

Since then, MDHHS has issued several orders slightly changing the circumstances for when a mask is required. The March 2, 2021 Order, which is the focus of the parties' briefing,[2] provides in relevant part:

7. **Face mask requirement at gatherings.**
   - (a) All persons participating in gatherings are required to wear a face mask.
   - (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
   - (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and

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[2] Defendants acknowledge that MDHHS has made "minor alterations" to the exceptions between the 10/09/20 MDHHS Order and the 03/02/21 MDHHS Order, and thus, refer to "the orders" collectively. Hertel & Nessel Br. at 8 n.6. For instance, during the winter surge in COVID-19 cases, MDHHS prohibited any non-essential personal care services that required removal of face masks, most organized sports, and indoor dining. 11/15/20 MDHHS Order. Accordingly, we use "MDHHS Orders" to refer to the orders leading up to the rescission of the mask requirement.

denies entry or service to all persons refusing to wear face masks while gathered.

(d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.

. . .

8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:

(a) Are younger than 5 years old, outside of a child care organization or camp setting (which are subject to requirements set out in section 7(e));

(b) Cannot medically tolerate a face mask;

(c) Are eating or drinking while seated at a food service establishment or at a private residence;

(d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;

(e) Are swimming;

(f) Are receiving a medical or personal care service for which removal of the face mask is necessary;

(g) Are asked to temporarily remove a face mask for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

(j) Are engaging in a religious service;

(k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or

(l) Are participating in a testing program specified in MDHHS's document entitled Guidance for Athletics issued February 7, 2021, and are engaged in practice or competition where the wearing of a mask would be unsafe.

03/02/21 MDHHS Order. In accordance with Mich. Comp. Laws § 333.2261, "violation of this order is a

misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both." *Id.* § 10(e). Further, MDHHS promulgated emergency rules stating that a violation of the MDHHS Orders carries "a penalty of up to $1,000 for each violation or day that a violation continues." MDHHS Emergency Rules (Oct. 20, 2020).

On May 14, 2021, in response to CDC guidance that fully vaccinated persons no longer need to wear a mask in most settings, MDHHS added fully vaccinated persons to the list of exceptions to the mask requirement. 05/14/2021 MDHHS Order. One month later, MDHHS rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement, because of the reduction in COVID-19 test positivity rates, case rates, hospitalizations, and deaths, the availability of COVID-19 vaccines, the availability of therapeutics, such as monoclonal antibodies, and warmer weather. 06/17/21 MDHHS Order. The 06/17/21 MDHHS Order became effective June 22, 2021. *Id.*

MDHHS's rescission coincided with summer break, which leaves open the question of what restrictions MDHHS may impose for the 2021–2022 school year. MDHHS's interim guidance for schools recommends that schools use multiple prevention strategies, including face masks, to limit transmission in school. MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Guidance_for_Operating_ Schools_Safely_728838_7.pdf.

Other public-health authorities have weighed in on mitigation measures for in-person education for the 2021–22 school year. In consideration of new evidence regarding the B.1.617.2 (Delta) coronavirus variant, the CDC's guidance for K–12 schools now recommends that all persons wear a mask indoors at school regardless of vaccination status. *Guidance for COVID-19 Prevention in K-12 Schools*, CDC (updated Aug. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html. The American Academy of Pediatrics ("AAP") also recommends that all students and staff—regardless of whether they are fully vaccinated against COVID-19—wear a mask indoors at school as a "necessary measure[] to limit the community spread of SARS-CoV-2 to ensure schools can remain open and safe for all students." *COVID-19 Guidance for Safe Schools*, Am. Acad. Pediatrics (last updated July 18, 2021), available at https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/. Masks, according to the AAP, are part of a "multi-pronged, layered approach" that together "will make in-person learning safe and possible." *Id.*

Some states and localities have adopted universal mask requirements in line with public health authorities' recommendations. *See, e.g.*, Kalamazoo Cnty. Health Dep't 08/18/2021 Order (requiring that children in grades K–6 and those providing services to children in grades K–16 wear a mask in school settings); Ky. E.O. 2021-585 (Aug. 10, 2021); Cal. Dep't Pub. Health, *COVID-19 Public Health Guidance for*

K-12 Schools in California, 2021-22 School Year (July 12, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx (requiring that all persons, including children in grades K–5, wear masks at school); *K-12 School Updates*, Del. Div. Pub. Health (May 12, 2021), https://coronavirus.delaware.gov/schools-and-students/school-updates/ (same). Other states have recommended, but not required, students in grades K–12 to wear masks in school. *See, e.g.*, Ohio Dep't Pub. Health (July 26, 2021), https://coronavirus.ohio.gov/static/responsible/schools/K-12-Schools-Guidance.pdf.

Despite the CDC's and the AAP's guidance and the decisions of other states to impose mask requirements in school, Whitmer has stated that she does not expect MDHHS to issue a mask requirement or other pandemic orders "in the near future and maybe not ever." Dave Boucher & Kristen Jordan Shamus, *Whitmer: No New State Mask Rule Expected Despite Updated CDC Guidance*, DET. FREE PRESS (July 27, 2021), https://www.freep.com/story/news/health/2021/07/27/whitmer-no-new-state-mask-rule-despite-updated-cdc-guidance/5385179001/. Hertel has indicated that she "expect[s] and encourage[s] schools when they go back to have mask requirements for kids younger than 12 and those who haven't been vaccinated." *MDHHS Director: State Urging Schools to Have Mask Mandates for Kids Under 12, Those Not Vaccinated*, WXYZ-Det. (July 22, 2021), https://www.wxyz.com/news/coronavirus/mdhhs-director-state-urging-schools-to-have-mask-mandates-for-kids-under-12-those-not-vaccinated.

C. Plaintiffs' Lawsuit

On October 22, 2020, Plaintiffs filed a complaint in the U.S. District Court for the Western District of Michigan. Plaintiffs allege that the MDHHS Orders violate their rights to free exercise, equal protection, substantive due process, freedom of speech, and freedom of association. R. 1 (Compl. ¶¶ 135–41, 163–85) (Page ID #22–23, 27–30). In addition to these constitutional claims, Plaintiffs argued that the 10/05/20 MDHHS Order is an unlawful exercise of authority under Michigan law and violates the Michigan constitution's separation of powers and non-delegation clauses. *Id.* ¶¶ 142–62 (Page ID #24–26).

The declaration submitted by the principal of Plaintiff Resurrection School, Jacob Allstott, attests that MDHHS's mask requirement for students in grades K–5 violates Resurrection School's sincerely held religious beliefs because it interferes with the school's religiously oriented disciplinary policies and prevents younger students from partaking fully in a Catholic education.[3] R. 8-1 (Allstott Decl. ¶¶ 41–58) (Page ID #178–80). The declarations submitted by the Plaintiff parents assert that their children find masks uncomfortable and distracting from their religious education, and that the mask requirement conflicts

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[3] In the initial complaint, Plaintiffs also argued that "[i]n accordance with the teachings of the Catholic faith, Resurrection School believes that every human has dignity and is made in God's image and likeness. Unfortunately, a mask shields our humanity. And because God created us in His image, we are masking that image." R. 1 (Compl. ¶ 22) (Page ID #5).

with "the right [as a parent] to choose a school for them which corresponds to their own convictions." R. 8-2 (Mianecki Decl. ¶ 59) (Page ID #190) (quoting Catechism of the Catholic Church ("CCC") § 2229); R. 8-3 (Smith Decl. ¶ 40) (Page ID #197–98).

Plaintiff Christopher Mianecki attests that wearing a mask in the classroom "interferes with [his children's] ability to engage in their elementary school classroom and its Catholic, religious teachings." R. 8-2 (Mianecki Decl. ¶ 52) (Page ID #189). He provides specific examples of how the requirement that children wear masks in the classroom affects his three children who are enrolled at Resurrection School. He states that wearing a mask negatively impacts his children's focus, *id.* ¶ 33 (Page ID #187), "diverts [their] attention away from the lesson taught in class," *id.* ¶ 36 (Page ID #187), and "negatively affect[s] [their] ability to breathe effectively," *id.* ¶ 38 (Page ID #187).

Plaintiff Stephanie Smith states that her child, F.S., is unable to wear a mask because he "suffer[s] from breathing issues," R. 8-3 (Smith Decl. ¶ 8) (Page ID #194), and "is highly susceptible to respiratory infections that quickly turn into additional infections such as bronchitis," *Id.* ¶ 9 (Page ID #194). Despite Smith's observation that F.S. is unable to wear a mask because of his health conditions, F.S.'s pediatrician determined that F.S. did not qualify for a medical exemption.[4] *Id.* ¶ 11 (Page ID #194). As a result, Smith

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[4] The MDHHS Orders exempted children who "[c]annot medically tolerate a face mask" from complying with the face mask requirements. 03/02/21 MDHHS Order § 8(b). The MDHHS Orders

is "educating F.S. at home where he is not mandated to wear a mask, and F.S. is on a long-term absence from his Catholic school." *Id.* ¶ 16 (Page ID #195). Smith and her husband "cannot give F.S. the same Catholic education that he receives at Catholic school with his classmates." *Id.* ¶ 20 (Page ID #195).[5]

Plaintiffs moved for a temporary restraining order ("TRO") and a preliminary injunction seeking to enjoin Defendants from enforcing the 10/05/20 MDHHS Order against Resurrection School and the other plaintiffs. R. 7 (Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #65–70). The district court denied Plaintiffs' expedited ex parte motion for a TRO, concluding that Plaintiffs could not establish that they would experience irreparable harm without the order because they had unreasonably delayed in filing for emergency ex parte injunctive

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clarify that "[a]n individual's verbal representation that they are not wearing a face mask because they fall within a specified exception . . . may be accepted." *Id.* § 7(d). Organizations may choose to require documentation that an individual cannot medically tolerate a face mask. *See, e.g.*, Diocese of Lansing, *Return to Learn: Phase 4 Plan*, https://www.dioceseoflansing.org/education/phase-4-plan (requiring that students and staff obtain a "written and signed verification by a physician" in order not to wear a mask while at school).

[5] We are troubled by public statements suggesting that Resurrection School did not require students in grades K–5 to wear masks during the entire school year, Cody Butler, *Federal Appeals Court to Hear Arguments over Michigan Mask Mandate*, WILX-Lansing (July 20, 2021), https://www.wilx.com/2021/07/20/federal-appeals-court-hear-arguments-over-michigan-mask-mandate/, when they have made contrary representations to this court and the district court.

relief.[6] R. 11 (Order Denying Mot. for TRO at 3–4) (Page ID #207–08). Defendants then filed motions to dismiss, R. 13 (Gordon & Nessel Joint Mot. to Dismiss) (Page ID #215–18); R. 15 (Vail & Siemon, Mot. to Dismiss) (Page ID #475–76), and responses in opposition to Plaintiffs' request for a preliminary injunction, R. 18 (Gordon & Nessel, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #565–60); R. 19 (Vail & Siemon, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #602–04).

After Defendants responded to Plaintiffs' initial complaint and motion for a TRO and preliminary injunction, Plaintiffs filed an amended complaint. R. 21 (First Am. Compl.) (Page ID #636–68). The First Amended Complaint narrowed Plaintiffs' claims to violations of free exercise, equal protection, and substantive due process, and the Michigan constitutional and state-law claims. *Id.* The district court determined that the amended complaint did not render Defendants' motions to dismiss moot and required Plaintiffs to respond to the motions to dismiss. R. 23 (12/10/20 Order) (Page ID #692).

The district court denied Plaintiffs' motion for a preliminary injunction. *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897 (W.D. Mich. 2020). Applying *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir.

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[6] The district court noted that Whitmer and MDHHS issued executive orders requiring individuals over the age of five to wear a face covering indoors on July 17, 2020 and July 29, 2020 respectively, and thus, the "Plaintiffs cannot rely on the October 2, 2020 Opinion from the Michigan Supreme Court as the critical event." R. 11 (Order at 4) (Page ID #208).

2020) (order), the district court determined that Plaintiffs were unlikely to succeed on the merits of their free-exercise challenge to the 10/05/2020 MDHHS Order. *Id.* at 900–01. First, the district court found that the 10/05/2020 MDHHS Order was neither motivated by animus against people of faith or a specific faith nor limited to regulating only religious activity. *Id.* at 901. The district court then determined that the order was neutral and generally applicable because it "require[d] all individuals over the age of five to wear a face mask in public. This requirement is in place whether they are attending a religious school, a secular school, running errands, or participating in some other facet of daily life." *Id.* at 901–02. The exceptions to the order are "narrow and discrete," and "apply to public schools and private schools equally, and they apply to secular schools and religious schools equally." *Id.* at 902. Thus, the district court concluded that Plaintiffs were unlikely to succeed on the merits of their free exercise claim. *Id.*

The district court dismissed Plaintiffs' claim that the Order violated their equal-protection rights by permitting individuals to remove their face covering in certain circumstances, because "[t]here is nothing in the face-mask requirement that treats similarly situated groups of individuals different." *Id*. As for Plaintiffs' state-law claims, the district court declined to address this "novel question of state law for the first time" at this stage of litigation. *Id*. Although the district court did not address Plaintiffs' substantive-due-process claim by name, it concluded at the end that "Plaintiffs have failed to establish a lik[e]lihood of

success on the merits on *any* of their claims." *Id.* (emphasis added).

Plaintiffs timely appealed. R. 25 (Not. of Appeal) (Page ID #700–01). Defendants move to dismiss the appeal as moot because MDHHS has rescinded the mask requirements. No. 20-2256, R. 34 (Hertel & Nessel Mot. to Dismiss Appeal as Moot); No. 20-2256, R. 37 (Siemon & Vail Mot. to Dismiss Appeal as Moot). Plaintiffs oppose the motion. No. 20-2256, R. 38 (Pls.' Resp. Mot. to Dismiss Appeal as Moot).

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II. ANALYSIS

A. Mootness

Defendants argue that we lack jurisdiction because Plaintiffs' claims are moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "We do not have the power to adjudicate disputes that are moot, and '[t]he mootness inquiry must be made at every stage of a case.'" *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). There are two relevant exceptions to the mootness doctrine. First, voluntary cessation of the challenged conduct does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203

(1968). Second, a case will not become moot if the injury is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs argue that their case should proceed under both exceptions, and we address both in turn.

1. Voluntary Cessation

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Where the defendant voluntarily ceases the challenged conduct, the defendant must establish that: "there is no reasonable expectation that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[7] *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021) (quoting *Speech First v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019)). We caution that "[t]he burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

We generally treat "cessation of the allegedly illegal conduct by government officials . . . with more solicitude . . . than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). "This [voluntary cessation] exception

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[7] The second requirement is not at issue here.

properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation." *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *see also Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) ("[S]elf-correction [by government officials] provides a secure foundation for a dismissal based on mootness so long as it appears genuine." (quoting *Mosley*, 920 F.2d at 415)).

Plaintiffs argue, and Defendants acknowledge, that because Defendants' "discretion to effect the change lies with one agency or individual, . . . significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim," *Speech First*, 939 F.3d at 768. Hertel & Nessel Reply at 4; Pls.' Resp. at 7. Although MDHHS, like the Defendants in *Speech First*, retains the sole authority to change the mask requirements, this case is distinguishable from *Speech First* because MDHHS rescinded the challenged orders in response to "changing circumstances." Defendants Hertel & Nessel offer evidence that the policy change was genuine, including that the policy change reflects increased access and eligibility for vaccines, that Michigan joins other states in rescinding their mask requirements,[8]

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[8] Defendants note that as of July 2021 thirty-one states have rescinded their mask requirements. Hertel & Nessel Reply at 5 n.4 (citing Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (July 12, 2021), available at https://www.aarp .org/health/healthy-living/info2020/states-mask-mandates-coron avirus html.). This argument cuts both ways because many states have imposed mask requirements for K–12 instruction, *see* Part I.B, and some states and localities have recently reimposed broad indoor mask requirements following a new surge in COVID-19

and that MDHHS rescinded almost all COVID-19 orders, not merely the orders at issue here.

Although the Supreme Court has addressed mootness in the context of COVID-19 restrictions, the factual circumstances are distinguishable from those present here. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020), the Supreme Court held that the plaintiffs' challenge to a state COVID-19 pandemic order limiting attendance at religious services was not moot even though the state had relaxed the attendance limitations in response to declining COVID-19 cases. The Court reasoned that the plaintiffs "remain under a constant threat" that the state will reimpose attendance limits without notice and "bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* at 68. The state health department assigned areas to different risk categories based on the severity of the COVID-19 outbreak, and imposed defined restrictions on activity. *Id.* at 66. The state continued to use this framework, meaning that the plaintiffs remained at risk of restrictions on attendance at religious services if the number of COVID-19 cases, deaths, and hospitalizations increased. *Id.* at 68. Here, Defendants do not presently use a similar framework for imposing mask requirements and other pandemic restrictions. To the contrary, Defendants at present have rescinded all pandemic restrictions.

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cases, *see* Nev. Exec. Directive. 047 (July 27, 2021) (requiring mask usage by all persons in areas with substantial or high transmission of COVID-19); La. Procl. No. 2021-137 (Aug. 2, 2021) (implementing a statewide mask mandate).

Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), the Supreme Court held that the plaintiffs' challenge to the state COVID-19 pandemic order limiting gatherings, including gatherings for at-home religious activities, was not moot even though the defendants altered the guidance during litigation. The Court explained that

> even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Id. at 1297 (quoting *Catholic Diocese of Brooklyn*, 141 S. Ct. at 68). In concluding that plaintiffs' challenge was not moot, the Court noted that "the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Id.* (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.)).

The *Tandon* Court's conclusion rested on its perception that state officials had a "track record" of altering COVID-19 guidance, and that it had previously "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" four times. 141 S. Ct. at 1297. In contrast here, Defendants have been consistent in their

approach to mask requirements. For the 2020–21 school year, excluding a few weeks at the beginning of the school year, Defendants required students in grades K–5 to wear masks in the classroom. MDHHS altered its mask requirements only in May 2021 in response to the CDC's guidance that individuals who were vaccinated are unlikely to transmit COVID-19, and MDHHS eliminated the mask requirements in June 2021 in response to sustained decreases in the number of COVID-19 cases, hospitalizations, and deaths and the wide availability of safe and effective vaccines.

As for our own circuit, in an unpublished case reviewing a COVID-19 public-health order, we declined to apply the voluntary-cessation exception to mootness where the Governor replaced an executive order with a recommendation. *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 938 (6th Cir. 2020) (order); *cf. Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 566 (6th Cir. 2020) (per curiam) (remanding to the district court to permit it to consider "whether these cases have become moot in light of the Governor's new orders"). In distinguishing the case from *Catholic Diocese of Brooklyn*, we emphasized that "there, unlike here, the challenged order remained in force subject to the apparent whims of the Governor, to whom a presumption of regularity did not apply." *Pleasant View Baptist Church*, 838 F. App'x at 939.[9]

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[9] Plaintiffs suggest without explanation that "*Tandon* adopted a different analysis from *Pleasant View Baptist Church* and a different standard." Pls.' Resp. at 12. Plaintiffs' argument is unavailing. The *Tandon* Court arrived at a different conclusion

In some ways, Defendants' argument that their rescission of the challenged MDHHS orders moots Plaintiffs' claims is stronger than the one accepted in *Pleasant View Baptist Church*. In *Pleasant View Baptist Church*, we relied on the Governor's public statements that he would rely on recommendations instead of mandates, which he made prior to the widespread availability of effective vaccines. MDHHS's rescission of the challenged orders, by contrast, reflects widespread availability of and increased eligibility for effective COVID-19 vaccines. On the other hand, *Pleasant View Baptist Church* involved school closures, which are a more onerous public health measure than requiring that students wear masks at school. In fact, MDHHS and other public-health authorities recommend that all persons wear masks in school to ensure that schools can maintain in-person learning. *See, e.g.*, MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Guidance_for_Operating_Schools_Safely_728838_7.pdf. ("Schools can layer multiple prevention strategies developed by the Centers for Disease Control and Prevention (CDC) to prevent transmission within school buildings, reduce disruptions to in-person learning, and help protect the people who are not fully vaccinated, which currently includes all children under the age of 12 years.").

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regarding mootness than we did in *Pleasant View Baptist Church* because the Court was responding to the distinct facts of that case, not because it applied a different standard.

We conclude that Defendants cannot meet the heavy burden of establishing that it is "absolutely clear" that they will not reimpose a mask requirement, especially for children younger than twelve who cannot be vaccinated. We do not doubt the sincerity of MDHHS's statements that they have no intention to reimpose a mask requirement like the one challenged by Defendants. We also recognize that the rescission of all pandemic orders, including the mask requirement, is unique because it reflects the wide availability of safe and effective vaccines. At the same time, the FDA has not yet authorized their use in persons younger than twelve, the group comprising students in grades K–5. MDHHS has previously reimposed certain pandemic emergency orders and tightened mask requirements in response to increasing COVID-19 cases, hospitalizations, and deaths. Considering the very real possibility that MDHHS may be faced again with escalating COVID-19 cases, hospitalizations, and deaths, we hold that Defendants have not met their "heavy burden" of showing that it is "absolutely clear" that they will not reimpose impose a mask requirement, including for children in grades K–5 receiving in-person instruction. Defendants' rescission of the challenged MDHHS Orders does not moot Plaintiffs' claims.

2. Capable of Repetition, Yet Evading Review

Plaintiffs' claims further come within the exception to the mootness doctrine for actions that are "capable of repetition, yet evading review." Pls.' Resp. at 10–14. This exception is limited "to situations where: '(1) the challenged action was in its duration too short to be

fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). As the party asserting this exception, Plaintiffs bear the burden of proof. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). Plaintiffs satisfy both requirements for this exception.

Plaintiffs have satisfied the first prong. Although Plaintiffs filed their complaint and motion for a preliminary injunction in October 2020, the school year ended prior to when this case could reach the court of appeals. It is true that Plaintiffs did not take advantage of opportunities to expedite our review of the case.[10] Nonetheless, the Supreme Court has found

[10] Plaintiffs note that "[t]he District Court's decision resulted in nine months of orders that stripped Appellants from their sincerely held right to religious exercise, equal protection of the law, and substantive due process." Pls.' Resp. at 13. But Plaintiffs are at least partly responsible for delays in this litigation. Plaintiffs delayed in filing their complaint in federal court until October 22, 2020 and their emergency motion for a TRO or preliminary injunction until October 27, 2020, even though Governor Whitmer issued her initial executive order requiring that students in grades K–5 wear masks on September 25, 2020, E.O. 2020-185 § 1 (Sept. 25, 2020), and MDHHS issued its first order on October 5, 2020, 10/05/20 MDHHS Order §§ 2–3. Plaintiffs also failed to take advantage of opportunities to expedite the litigation. For instance, Plaintiffs could have filed a motion for an injunction pending appeal, as other parties challenging COVID-19 pandemic orders have done, *see, e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020) (granting the

periods of up to two years to be too short to be fully litigated. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 390–91 (6th Cir. 2001) (holding that two years to challenge to a local ordinance prohibiting individuals with a sex-crime history to work for a sexually oriented business was too short in duration). Specific to the educational context, we have held, albeit in an unpublished decision, that an individualized education program lasting a school year is too short in duration to litigate to conclusion. *Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 980 (6th Cir. 2012).

Plaintiffs also satisfy the second requirement of the "capable of repetition, yet evading review" exception. This is in part because the standard is a forgiving one. "Recurrence of the issue need not be more probable than not; instead, the controversy must be capable of repetition." *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016). This standard provides that "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* at 716.

Although Defendants provide ample reasons—namely the availability of and expanded eligibility for

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plaintiffs' motion for an injunction pending appeal fifteen days after the district court denied their request for a preliminary injunction and twenty-four days after the plaintiffs filed their complaint), or requested expedited briefing or expedited consideration of their appeal.

COVID-19 vaccines—that a mandatory requirement that students in grades K–5 wear masks in the classroom is unlikely, that is not the standard. Rather, we look to whether the controversy is capable of repetition. MDHHS acknowledged in its order rescinding the mask requirements that "the COVID-19 pandemic continues to constitute an epidemic in Michigan." 06/17/21 MDHHS Order. Both the CDC's and MDHHS's guidance recommend that students in grades K–12 wear masks in the classroom. This is sufficient to establish that Plaintiffs' claims are capable of repetition, yet evading review.

True, in the election context, we have determined that lawsuits challenging election procedures in light of the COVID-19 pandemic and attendant restrictions are not capable of repetition, yet evading review. Most recently in *Thompson v. DeWine*, -- F.4th --, 2021 WL 3183692 (6th Cir. July 28, 2021), we held that the plaintiffs' challenge to the signature requirements for ballot initiatives was moot as to the 2021 election. In *Thompson*, the plaintiffs argued that "COVID-19 remains a 'full blown crisis' hampering their efforts to gather signatures for 2021 initiatives," and thus their challenge fell under the capable of repetition, yet evading review exception to the mootness doctrine. *Id.* at *4. We concluded, however, that "advancements in the COVID-19 vaccine and treatment" made COVID-19 unlikely to threaten seriously the plaintiffs' ability to collect signatures for the 2021 ballot initiatives. *Id.*; *see also Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) ("Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19

pandemic is unlikely to pose a serious threat during the next election cycle." (citing *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (June 15, 2021)).[11]

These election cases, however, are distinguishable from the present case. First, our decisions in those cases were contingent on the availability of COVID-19 safe and effective vaccinations and treatment, which are presently authorized for use by persons old enough to vote and sign petitions for ballot initiatives, but not for children in grades K–5. Second, in-person instruction meaningfully differs from participation in the electoral process in a way that increases the risk of contracting and transmitting COVID-19. Whereas participating in the electoral process is a "discrete, individualized, often brief activit[y]," in-person classroom instruction involves "indoor gatherings occurring for hours a day on a daily basis." Hertel & Nessel Br. at 36. Finally, although COVID-19 may not pose a serious enough disruption to the electoral process, it may still pose a significant enough problem to compel MDHHS to mandate that persons, especially individuals not yet able to be vaccinated, wear masks.

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[11] Unfortunately, the daily number of COVID-19 cases, hospitalizations, and deaths has since trended significantly upwards. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (accessed on Aug. 2, 2021).

Accordingly, we conclude that Plaintiffs' claim is not moot and turn to the merits of their challenge.

B. Standard of Review

We review for abuse of discretion a district court's denial of a preliminary injunction. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). "While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, we review the district court's legal conclusions *de novo* and its factual findings for clear error." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). We have cautioned that "[t]his standard of review is 'highly deferential' to the district court's decision." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007) (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). To summarize, "[w]e 'review the District Court's legal rulings *de novo*' (including its First Amendment conclusion), 'and its ultimate conclusion [as to whether to grant the preliminary injunction] for abuse of discretion.'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 454 (6th Cir. 2014) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005)).

In determining whether to grant a preliminary injunction, we consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an

injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). Where, as in this case, Plaintiffs "seek[] a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am.*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Accordingly, we focus our attention on whether Plaintiffs can establish a likelihood of success on the merits.

C. Free-Exercise Challenge

Plaintiffs argue that MDHHS's Orders violate their sincerely held religious beliefs because they require students in grades K–5 at religious schools to wear a face covering. We do not question the sincerity of Plaintiffs' beliefs that wearing a mask in the classroom violates their Catholic faith. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Defendants largely do not question the sincerity of the Plaintiffs' religious objection to wearing a mask in the classroom.[12]

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[12] Defendants Vail and Siemon contend in their brief that "Appellants do not cite to any sources to support their position that the Catholic faith or Catholic theology is in any way opposed to the use of prophylactic masks during a global pandemic," Vail & Siemon Br. at 6, or "provide any examples of ways in which masks interfere with or burden their religious beliefs," *id.* at 19. Plaintiffs' objections to masks admittedly are confusing and at times, digress into secular, rather than religious concerns. Nevertheless, a

We begin with the familiar framework for free-exercise claims. Where a challenged law is neutral and of general applicability and has merely an "incidental effect" on Plaintiffs' religious beliefs, Defendants need not show a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) (holding that if burdening the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Where the challenged law does not meet these requirements, Defendants must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32. This rule, in part, reflected practical concerns with requiring governments to satisfy the stringent standard of establishing a compelling interest for "all actions thought to be religiously commanded." *Smith*, 494 U.S. at 888. Requiring governments to show more than a rational basis for a law of neutral and general applicability would:

> open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as

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plaintiff's "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

> manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888–89 (citations omitted).

A law, of course, is not neutral and of general applicability if it discriminates on its face. *Hartmann v. Stone*, 68 F.3d 973, 976, 978 (6th Cir. 1995). Relatedly, "[a] law might be motivated by animus toward people of faith in general or one faith in particular." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam). Even if a law appears neutral and is devoid of animus, it is not neutral and of general applicability if it is "riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

We considered the intersection between religious schools and COVID-19 orders in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). In *Beshear*, the plaintiffs argued that a Kentucky order that temporarily prohibited in-person instruction at public and private K–12 schools violated their free-exercise rights. We concluded, in a published opinion, that the plaintiffs were unlikely to succeed on their claims that the order violated the Free Exercise Clause of the First Amendment, and thus stayed the district court's preliminary injunction. *Id.* at 511. First, we determined that the order was "neutral and of general applicability" because it "applies to all public and private elementary and secondary schools in the

Commonwealth, religious or otherwise." *Id.* at 509. Accordingly, the order "need not be justified by a compelling governmental interest." *Id.* Thus, deferring to "the Governor's determination regarding the health and safety of the Commonwealth at this point in time," we concluded that the plaintiffs were unlikely to succeed on the merits of their free-exercise challenge. *Id.* at 510. The Supreme Court denied the plaintiffs' petition for a writ of certiorari without reaching the merits of the case because of the "timing and the impending expiration of the Order." *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020).

In the present case, the district court applied *Beshear* and correctly concluded that because the requirement to wear a facial covering applied to students in grades K–5 at both religious and non-religious schools, it was neutral and of general applicability. We agree with the district court's application of *Beshear*.

Plaintiffs argue that a subsequent case, *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020) (order), conflicts with the district court's order here. In *Monclova Christian Academy*, the panel concluded that a county health-department order requiring all schools in the county to close for in-person learning was subject to strict scrutiny. Although the order temporarily prohibiting in-person education applied to public and religious K–12 schools alike, the panel construed the relevant comparator as secular businesses such as "gyms, tanning salons, office buildings, and the Hollywood Casino" that the health order had permitted

to remain open, not non-religious K–12 schools. *Id.* at 482. Accordingly, the panel held that health order was not neutral and of general applicability and applied strict scrutiny to the challenged order. Applying this standard, the panel concluded that the health-department order was not narrowly tailored to serve a compelling state interest and granted plaintiffs' motion for a preliminary injunction. Following the framework of *Monclova Christian Academy*, Plaintiffs argue that the district court erred by failing to compare MDHHS's interest in requiring that students in grades K–5 wear masks in the classroom with MDHHS's interest in allowing persons not to wear masks in certain, secular circumstances. Pls.' Br. at 30.

Beshear and *Monclova Christian Academy*, however, seemingly conflict with one another. Indeed, the panel in *Monclova Christian Academy* recognized that *Beshear* could pose an issue but contended that the decision in *Beshear* did not consider the "broader question" of "whether an order closing public and parochial schools violates the Clause if it leaves *other* comparable secular actors less restricted than the closed parochial schools." *Id.* at 481. Thus, according to the panel in *Monclova Christian Academy*, it was free to consider in the first instance whether the relevant comparators were secular actors regulated by the specific order or a broader set of secular businesses. *Id.* As Plaintiffs and amici here suggest, *Monclova Christian Academy*'s interpretation of *Beshear* is incorrect. Amici Br. at 9. In *Beshear*, we did consider whether the appropriate comparator was other non-religious schools or other non-school entities and held that the former was the appropriate comparator.

The plaintiffs and amici in *Beshear* argued at the district court and in their appellate briefs that the law was not neutral and of general applicability because it prohibited in-person education at K–12 religious schools while permitting secular activities to continue. *See, e.g.*, Pls.-Appellees' Resp. Mot. for Stay Pending Appeal, at 3–5, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Pleasant View Baptist Church et al. as Amici Curiae Supporting Respondents, at 5–10, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Multiple Private Kentucky Religious Schools as Amici Curiae Supporting Respondents, at 9–12, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Accordingly, as this issue was "brought to the attention of the court" and "ruled upon" in the earlier case, we must follow *Beshear* rather than *Monclova Christian Academy*. *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)); *see also United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021) ("Forced to choose between conflicting precedents, we must follow the first one.").

Tandon v. Newsom, 141 S. Ct. 1294 (2021), does not compel a different comparator. In *Tandon*, the Supreme Court concluded that the plaintiffs were likely to succeed on the merits of their free-exercise challenge to a California order limiting all gatherings in homes, religious and non-religious, to three households. *Id.* at 1297. "[G]overnment 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. In

concluding that the restriction was not neutral and of general applicability, the Court noted that "California treats 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." *Id.* (emphasis added). Identifying a comparable secular activity for religious schools other than a public or private nonreligious school is difficult. Schools educating students in grades K–5 are unique in bringing together students not yet old enough to be vaccinated against COVID-19 in an indoor setting and every day.[13] Accordingly, the proper comparable secular activity in this case remains public and private nonreligious schools.

Even under this broader conception of comparable secular activity, the MDHHS orders are not so riddled with secular exceptions as to fail to be neutral and generally applicable. The exceptions to the MDHHS Orders were narrow and discrete. First, many of the exceptions, such as medical intolerance to mask use, eating and drinking, swimming, or receiving a medical treatment during which a mask cannot be worn, are "inherently incompatible with" wearing a mask. Hertel & Nessel Br. at 30. Contact sports where participants cannot safely remain masked must adhere to a testing protocol. 03/02/2021 MDHHS Order § 6(a)(2). Here,

[13] Perhaps the only other comparable secular activity, childcare organizations, were subject to the same requirement that children ages five years and older wear a mask. 03/02/21 MDHHS Order § 7(e).

Plaintiffs seek to exempt children in grades K–5 at religious schools from having to wear a mask during an activity in which wearing a mask is possible, albeit undesirable for Plaintiffs. Second, almost all exceptions to the MDHHS Orders—aside from children younger than five years old and those medically unable to wear a mask—are short in duration and lower risk (medical and personal care services requiring removal of a mask; voting). Hertel & Nessel Br. at 30–31. Some of the exceptions have a stringent social distancing requirement (public speaking with twelve feet of distance) or are outdoors where the risk of COVID-19 transmission is reduced (outdoor, physically distanced exercise). *Id.* at 33. Third, The MDHHS Orders also exempt activities that are necessary to fulfill "equally important obligations to its citizens' health and safety" (firefighters, police officers, and emergency medical personnel "actively engaged in a public safety role . . . where wearing a face mask would *seriously interfere* in the performance of their public safety responsibilities," 03/02/21 MDHHS Order § 8(i) (emphasis added)). Hertel & Nessel Br. at 33–34. By contrast, as Defendants aptly describe it, "plaintiffs' activity comprises all-day, indoor mixing of the same groups of people, five days a week for months on end." *Id.* at 33. Thus, unlike in *Monclova Christian School*, where the challenged order exempted an array of secular activities that the panel viewed as posing a greater risk than in-person instruction, the exceptions to the MDHHS Orders are narrow and largely limited to activities of lesser risk than in-person instruction.

Finally, all exceptions to the MDHHS Orders were available to Plaintiffs if they had chosen to engage in

that activity. Hertel & Nessel Br. at 27. Plaintiffs were able to remove their face coverings to eat lunch at school, swim during physical education class, participate in Mass at school, engage in distanced public speaking on a religious topic, or exercise outdoors while physically distanced during recess. *Id.* Under the MDHHS orders, persons medically unable to wear a face covering, such as Smith's son, could go without a face covering at school. Because the MDHHS Orders are not so riddled with exceptions for comparable secular activities as to render the mask requirement not neutral and of general applicability, we review the MDHHS Orders for whether the state has a rational basis.

Other cases cited by Plaintiffs do not change this standard. At oral argument, Plaintiffs argued that the Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), pronounced a different standard. In *Fulton*, the Supreme Court concluded that the city's refusal to contract with Catholic Social Services for the provision of foster care because the agency's religious beliefs prevented it from certifying same-sex couples violated the organization's free-exercise rights. *Id.* at 1882. The *Fulton* majority's narrow holding focused on a contract provision that permitted the commissioner of the city's Department of Human Services to grant exemptions to the non-discrimination clause in her "sole discretion." *Id.* at 1878. The contract's grant of unfettered discretion meant that the non-discrimination clause was not neutral and of general applicability, and thus, was subject to strict scrutiny. *Id.* at 1881. Although the plaintiffs and some of the concurring justices asked

that the Court reconsider *Smith*, the majority declined to do so because the city's policy was not neutral and of general applicability, and thus, fell outside the scope of *Smith*. *Id.* at 1876–77.

Plaintiffs cite the Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), for the principle that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,'" (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Pls.' Br. at 26. Plaintiffs' reliance on *Our Lady of Guadalupe School* is misplaced. In *Our Lady of Guadalupe School*, the Supreme Court concluded that a form of immunity from employment-discrimination claims brought by certain employees, the ministerial exception, extended to two teachers who taught religion and participated in religious activities. *Id.* at 2066. The Supreme Court, however, emphasized that religious institutions' ability to decide "matters of church government" and "faith and doctrine," "does not mean that religious institutions enjoy a general immunity from secular laws." *Id.* at 2060. MDHHS Orders requiring all persons ages five and older to wear a mask in public—including in the classroom—is not comparable to infringing on the school's authority to select their ministers and religious educators. Thus, *Our Lady of Guadalupe School* provides no help to Plaintiffs.

Plaintiffs' citation to *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707

(1981), is also misplaced. According to Plaintiffs, *Thomas* compels us to "defer[] [to] Plaintiffs' understanding of their own religious beliefs" and not conclude that "any burden to Plaintiffs' religious beliefs was 'incidental.'" Pls.' Br. at 22 (quoting *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897, 902 (W.D. Mich. 2020)). *Thomas*, however, stands for the proposition that we should defer to a plaintiff's characterization of her opposition to a law as religious. *Thomas*, 450 U.S. at 714.

Plaintiffs also argue that we should apply strict scrutiny to MDHHS's Orders because the orders violate both their free-exercise rights and their rights as parents to direct the education of their children. Pls.' Br. at 32.[14] This hybrid-rights theory stems from dicta in *Smith* explaining that a plaintiff may establish a violation of the Free Exercise Clause by showing that a neutral and generally applicable law violates "the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881.

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[14] In support of this hybrid-rights argument, Plaintiffs cite language from the Supreme Court's order in *Danville Christian Academy* declining to grant Plaintiffs' application for a writ of certiorari. Pls.' Br. at 32 ("Even if this Court were to deem Defendants' orders generally applicable, which they are not, Plaintiffs' free exercise claim also requires heightened scrutiny because the 'application of a neutral, generally applicable law to religiously motivated action implicates the right of parents to direct the education of their children.'" (quoting *Danville Christian Acad.*, 141 S. Ct. at 528)). Plaintiffs' reference is misleading, because the Supreme Court was merely repeating an argument raised by amici, not assessing the merits of this argument.

Although some circuits have recognized hybrid-rights claims, we have consistently declined to recognize hybrid-rights claims. For instance, in *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine*, 5 F.3d 177 (6th Cir. 1993), we considered the merits of a veterinary student's claim that her college's policy of requiring students to dissect animals violated the Free Exercise Clause and other constitutional provisions. We declined to apply strict scrutiny to her hybrid claim, reasoning that "[w]e do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights." *Id.* at 180. Simply put, this outcome would be "completely illogical." *Id.* "[T]herefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated," we explained that we would "not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Id.* Since then, we have consistently declined to recognize a hybrid-rights theory. *See Pleasant View Baptist Church*, 838 F. App'x at 940–41 (Donald, J., concurring) (collecting cases). We decline to recognize a hybrid-rights claim here.

Applying rational-basis review, we hold that the MDHHS Orders are rationally related to a legitimate government interest. To satisfy rational-basis review, Defendants must show "only that the regulation bear[s] some rational relation to a legitimate state interest."

Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002). Here, Defendants had a legitimate state interest in controlling the spread of COVID-19 in Michigan. Plaintiffs apparently concede this point, acknowledging that "COVID-19 poses real challenges and concerns to everyone and requires a robust response." Pls.' Br. at 4. Further, Defendants cite more than ample evidence that requiring masks in the school setting minimizes the spread of COVID-19. *See* Hertel & Nessel Br. at 4–5; Vail & Siemon Br. at 8; R. 16-2 (Aff. of Vail) (Page ID #535–62). Although Plaintiffs question the effectiveness of masks, even they admit that "masks serve a purpose when students cannot socially distance and do not object to (and, indeed, enforce) mask wearing in the hallways and common areas of the school." Pls.' Br. at 5–6.

We conclude that the MDHHS Orders do not violate the Free Exercise Clause because the MDHHS Orders are neutral and of general applicability and satisfy rational-basis review.

D. Equal-Protection Claim

Plaintiffs argue that the MDHHS Orders violate the Equal Protection Clause because the Orders exempt certain secular activities but not religious education, and, alternatively, because the Orders lack a rational basis. Plaintiffs also fault the district court for failing to cite caselaw explaining why the MDHHS Orders satisfy the Equal Protection Clause.

To establish an equal-protection violation, "a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to

similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)). We have explained that "[t]he threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

Plaintiffs' equal-protection challenge is confusing, is largely a repackaging of its free-exercise argument, and is ultimately meritless. First, Plaintiffs fail to satisfy this threshold requirement of showing that the state has treated similarly situated persons differently than Plaintiffs. Plaintiffs argue that the MDHHS Orders result in "disparate treatment" because they permit persons to remove their masks while engaging in certain secular activities and in religious worship in a house of worship, while requiring students in grades K–5 at religious schools to wear masks. This is a free-exercise challenge, not an equal-protection challenge. Seemingly recognizing that this is a free-exercise challenge, Plaintiffs open their argument by stating that "the challenged measures burden Plaintiffs' fundamental rights to the free exercise of religion under the First Amendment in violation of the equal protection guarantee of the Fourteenth Amendment." Pls.' Br. at 34. Further, there is no "disparate treatment" because the MDHHS Orders did

not distinguish between certain groups of children. The MDHHS Orders required all children ages five and older to wear masks in public, subject to a few universal exceptions that were available to Plaintiffs.

Plaintiffs' argument that the requirement that children ages five years and older wear masks in the classroom lacks any rational basis is equally unavailing. Although unclear from the brief, Plaintiffs appear to argue that the MDHHS Orders lack any rational basis because the Orders exempted activities that Plaintiffs perceive as riskier than the in-person education of students in grades K–5. Pls.' Br. at 34. One could also include Plaintiffs' general belief that masks do not work to limit the transmission of COVID-19 within this argument. *Id.* at 5. As discussed in Part II.C, however, the MDHHS Orders satisfy rational-basis review. Accordingly, we conclude that Plaintiffs' equal-protection claim fails.

E. Substantive-Due-Process Claim

Finally, Plaintiffs argue that the MDHHS Orders violate their substantive-due-process rights. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see also Kiser v. Kamdar*, 831 F.3d 784, 791 (6th Cir. 2016) (declining to consider the plaintiff's substantive-due-process challenge because it was really a commercial-speech case).

Plaintiffs' challenge to the MDHHS Orders lies in the First Amendment's Free Exercise Clause, and thus, their substantive-due-process claim is duplicative. The district court admittedly did not explicitly address the merits of Plaintiffs substantive-due-process claim. We nonetheless conclude that Plaintiffs' substantive-due-process claim is without merit.

III. CONCLUSION

For the foregoing reasons, we hold that Plaintiffs' challenge to the mask requirement for children in grades K–5 in all schools in Michigan is not moot. We **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction.

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's conclusions on mootness, in part A of the opinion. However, I dissent on the merits on the primary issue, that is, whether the district court correctly denied the petition for the granting of a preliminary injunction.

I do not quarrel with the fact that the district court had the authority to deny the motion for preliminary injunction under the facts of this case, but it did not have the benefit of the more recent case *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). It also did not have the benefit of the decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), which was handed down

later in the same month that the district court made its ruling. *Monclova* held that in cases such as this, the court should look at all comparators, not just the public schools. *Id.* at 480. The district court here compared the restrictions in this matter with those followed in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Yet *Monclova* is more consistent with *Tandon* than *Beshear*. The court did not consider other comparable secular activities beyond the public schools. I feel it is a mistake for this court to uphold the denial of the preliminary injunction on the interpretation from *Tandon* without giving the district court an opportunity to consider it in light of all the evidence before it. Therefore, I would remand to the district court to review the case in light of the decision in *Tandon*.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:20-cv-1016

[Filed: December 16, 2020]

RESURRECTION SCHOOL, *et al.*,)
Plaintiffs,)
)
-v-)
)
ROBERT GORDON, *et al.*,)
Defendants.)
)

Honorable Paul L. Maloney

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' motion for a preliminary injunction (ECF No. 7). Plaintiffs seek to enjoin Defendant Director of Michigan Department of Health and Human Services Robert Gordon from enforcing his December 7, 2020 Emergency Order as applied to them, effectively eliminating the face covering requirement for children attending kindergarten through fifth grade at religious schools.

I.

On November 15, 2020, Director Gordon issued an emergency order requiring all individuals over the age of five to wear a face covering or face mask in most settings (*see* ECF No. 14-23). On December 7, 2020, shortly before the original order expired, Director Gordon issued a second emergency order extending the mandate through December 20, 2020.[1]

Plaintiffs are a Catholic school and parents of children who attend Catholic schools. They argue that face masks present challenges for young students, and that they interfere with the free exercise of the students' religion. Accordingly, Plaintiffs seek a preliminary injunction enjoining enforcement of Director Gordon's emergency orders against them (ECF No. 7). Plaintiffs' amended complaint brings five claims (ECF No. 21). Plaintiffs allege that (1) the orders violate the First Amendment's Free Exercise Clause; (2) that they are unlawful exercises of authority under Michigan law; (3) that M.C.L. § 333.2253 (the source of Director Gordon's authority to issue the orders) violates the Non-Delegation Clause of the Michigan Constitution; (4) that the orders violate the Substantive Due Process Clause of the Fourteenth

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[1] The December 7 emergency order is not attached to any filings as an exhibit, but it is explicitly referred to in Plaintiffs' First Amended Complaint (*see* ECF No. 21 at ¶ 19). The face mask requirements in the December 7 order are identical to the face mask requirements in the November 15 order (*compare* ECF No. 14-23 with December 7 order, available at https://www.michigan.gov/documents/coronavirus/Masks_and_Gatherings_order_-_12-7-20_709796_7.pdf (last accessed December 16, 2020)).

Amendment and the Michigan Constitution; and (5) that the orders violate the Equal Protection Clause. Defendants oppose the motion (ECF Nos. 18, 19). The Court has determined that oral argument on the motion is unnecessary.

II.

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Michigan*, 782 F.3d 318, 323 (6th Cir. 2015). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *see Patio Enclosures, Inc. v. Herbst*, 39 F. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)). The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)).

To determine whether a plaintiff has met this high bar, a court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008)

(quoting *Northeast Ohio Coalition for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coalition*, 467 F.3d at 1009; *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, however, the liklihood of success on the merits often will be the determinative factor." *Commonwealth of Kentucky v. Beshear*, ___ F.3d ___, 2020 WL 7017858, at *2 (6th Cir. Nov. 29, 2020) (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014)) (cleaned up).

III.

The Court must first determine whether Plaintiffs have established a liklihood of success on the merits of their claims.[2]

Plaintiffs first argue that Director Gordon's orders violate their right to freely exercise their religion under the First Amendment. The Sixth Circuit recently summarized the basic legal landscape in *Commonwealth v. Beshear*, 2020 WL 7017858, at *2:

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[2] Plaintiffs raise several arguments in their motion for preliminary injunction that have since been abandoned (*see* First Amended Complaint, ECF No. 21). Therefore, the Court only considers the claims that remain in the Amended Complaint.

> "The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . .' " *Church of Lukumi Babalu Aye, Inc v. Hialeah*, 508 U.S. 520, 531 (1993) (alteration in original) (internal citation omitted). "On one side of the line, a generally applicable law that incidentally burdens religious practices usually will be upheld." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (order) (per curiam) (citing *Emp. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990)). "On the other side of the line, a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.' " *Id.* (quoting *Church of Lukumi*, 508 U.S. at 533).

An order usually falls on the prohibited "side of the line" for one of three reasons. First, if it is motivated by animus towards people of faith in general or towards one faith in particular. *Church of Lukumi*, 508 U.S. at 553. Second, if it regulates only religious activity. *Hartmann v. Stone*, 68 F.3d 973, 976 (6th Cir. 1995). Or third, it might appear to be generally applicable, but be so full of exceptions for comparable secular activities that in practice, it is not neutral or generally applicable. *See, e.g., Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). There is no argument from Plaintiffs in this case that Director Gordon is motivated by animus

towards people of faith or that he has required only religious children to wear masks. Thus, the Court considers only the third question: are the challenged orders truly neutral and generally applicable?

This Court finds it useful to begin its analysis with *Commonwealth v. Beshear*, 2020 WL 7017858. On November 18, Kentucky Governor Andrew Beshear issued an executive order prohibiting in-person instruction at all public and private elementary and secondary schools in the Commonwealth. *Id.* at *1. That order excepted only a very small group in-person targeted services and private homeschools. *Id.* Plaintiff Danville Christian Academy sued, arguing that Governor Beshear's order violated their Free Exercise rights. *Id.* The district court granted plaintiff's request for preliminary injunctive relief and enjoined enforcement of the order as applied to private, religious schools. *Id.* On appeal, the Sixth Circuit found that the challenged order "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." *Id.* at *2. The Court found that the "contours of the order at issue here also in no way correlate to religion, and cannot be plausibly read to contain even a hint of hostility towards religion." *Id.* at *3. Because the challenged order was neutral and generally applicable, the Circuit found that Danville Christian Schools had failed to demonstrate a substantial liklihood of success on its claim, and stayed the injunction pending appeal. Plaintiff has applied to the Supreme Court to vacate the Sixth Circuit's stay, but the Supreme Court has not

yet ruled on that application. *Danville Christian Academy, Inc. v. Beshear*, No. 20A96 (filed Dec. 1, 2020).

The Court finds this analysis directly applicable to the case at bar. Director Gordon's orders require all individuals over the age of five to wear a face mask in public. This requirement is in place whether they are attending a religious school, a secular school, running errands, or participating in some other facet of daily life. The exceptions listed in the order are very narrow and discrete: individuals may remove their mask while voting, attending a public religious worship ceremony, eating, drinking, speaking to an audience more than six feet away, or receiving a service that requires removal of a mask. But these exceptions apply to public schools and private schools equally, and they apply to secular schools and religious schools equally. The exceptions—some of which, like eating and drinking, cannot be accomplished while wearing a mask—do not reveal any lack of neutrality. The order is clear: individuals over the age of five *must* wear a mask when they are out in public. Therefore, given the near-universal mask requirement, the Court finds nothing in the contours of the order at issue that correlate to religion, and finds that the order "cannot be plausibly read to contain even a hint of hostility towards religion." *Id*. at *2. The Court finds that the challenged face-mask requirement is neutral and generally applicable. Any burden on Plaintiffs' religious practices is incidental, and therefore, the orders are not subject to strict scrutiny. *Id.* at *3. Plaintiffs have failed to establish a liklihood of success on the merits of their First Amendment claim.

Plaintiffs also argue that Director Gordon has exceeded the authority given to him by M.C.L. § 333.2253(1), and that M.C.L. § 333.2253 is an impermissible delegation of legislative authority that violates the Michigan Constitution. These questions of state law have not yet been considered by the Michigan courts. Thus, rather than interpret a novel question of state law for the first time—particularly a question of state law that might affect every citizen over the age of five in the state of Michigan—this Court declines to address the state law questions for the purposes of this motion.

Finally, Plaintiffs argue that Director Gordon's orders violate the Equal Protection clause because individuals may remove their face covering in some circumstances. Plaintiffs' argument here is conclusory and unpersuasive: There is nothing in the face-mask requirement that treats similarly situated groups of individuals differently. Every person over the age of five must wear a mask when outside the home, and the exceptions apply universally. Plaintiffs have not demonstrated a liklihood of success on their Equal Protection claim.

IV.

Plaintiffs have failed to establish a liklihood of success on the merits on any of their claims. This is determinative: The Court need not balance the remaining factors, and the request for preliminary injunctive relief must be denied. *Commonwealth v. Beshear*, 2020 WL 7017858at *4.

ORDER

For the reasons stated in this opinion,

IT IS HEREBY ORDERED that Plaintiffs' motion for a preliminary injunction (ECF No. 7) is **DENIED**.

IT IS SO ORDERED.

Date: December 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge