No. _____

In the Supreme Court of the United States

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.,

Petitioners,

v.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Courts have struggled with mootness; a problem intensified recently with governments' hefty issuances of recurrent orders. Improper dismissal of a case as moot enables a defendant to jockey the court system "in a way that should not be countenanced." *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting). What is more, it closes the door to important constitutional claims that deserve their day in court while simultaneously allowing governments to remain unaccountable for the policies they set, carry out, and here, admittedly desire to carry out again. App. at 15, 43. In a divided decision that conflicts with many rulings of this Court and other circuits, the en banc Sixth Circuit dismissed Petitioners' claim as moot, leaving Petitioners without any relief and as noted in two dissenting opinions, prior to the government truly ceding its offending behavior. App. at 15, 43. *Roman Catholic Diocese v. Cuomo* rejected mootness when parties "remain under a constant threat" that the government may re-issue the challenged regulations. 141 S. Ct. 63, 68 (2020). Yet, the Sixth Circuit and others, find mootness even when governments maintain the power to re-enact the regulations and would again, creating inter-circuit conflict. *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting) ("I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance"). The questions presented are:

1. Whether under the voluntary cessation exception to mootness a government must satisfy the

"absolutely clear" standard and, if not, to what extent should the government be treated differently from private defendants?

2. Whether the government is owed a presumption of good faith under the voluntary cessation exception to mootness when it retains the authority and interest to reimpose its challenged policy?

3. Whether a claim is capable of repetition yet evading review when the government retains the authority to re-issue a restriction that imposes the same harm in the same way?

PARTIES TO THE PROCEEDING

Petitioners are Resurrection School, Christopher Mianecki, his minor children C.M., N.M., and Z.M., and Stephanie Smith and her son F.S. Respondents are 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 the Attorney General of the State of Michigan, Linda S. Vail, in her official capacity as the Health Officer of the Ingham County Health Department, and Carol A. Siemon, in her official capacity as the Ingham County Prosecuting Attorney.

CORPORATE DISCLOSURE STATEMENT

Petitioners certify that they have no parent company, that no publicly held company owns 10% or more of its stock, and that no publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT OF RELATED PROCEEDINGS

This case is related to the following proceedings in the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Michigan:

- *Resurrection Sch. v. Hertel*, No. 21-1699, 2022 U.S. App. LEXIS 829 (6th Cir. Jan. 11, 2022);

- *Resurrection Sch. v. Hertel*, 569 F. Supp. 3d 658 (W.D. Mich. 2021);

- *Resurrection Sch. v. Hertel*, Case No. 1:20-cv-01016, R-77 (Mar. 3, 2022) (Op. and Order denying Pl.'s Mot. for Prelim. Inj.)

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The Sixth Circuit's decision below "stands in substantial tension with circuit and Supreme Court precedent . . . and works an intolerable unfairness on Resurrection School." App. at 59 (Bush, J., dissenting).

This case presents a recurring problem that arises when government defendants assert that their actions moot the very case against it and thereby void the courts of their Article III jurisdiction to hear the case and controversy. Petitioners brought a First Amendment challenge to the Respondents' COVID-19 response measures that required them to change how they carried out religious education or face criminal prosecution and civil fines. In October of 2020, Petitioners motioned for preliminary injunctive relief. In December of 2020, the district court denied their motion without holding a hearing. Petitioners appealed to the Sixth Circuit.

After the appellate briefing had been filed, but before oral argument, Respondents rescinded the challenged orders and motioned for the appeal to be found moot. After the release of the panel opinion, Respondents publicly proclaimed victory and that their orders properly balanced Petitioners' constitutional rights. In September 2021, Respondent Vail issued orders mirroring the orders challenged in this appeal and harmed Petitioners' First Amendment rights in the same way. Those orders remained in place until just a couple weeks prior to the en banc oral argument on March 9, 2022. To be sure, none of the

subsequent motions, amended complaints, appeal, or additional year of protracted litigation would not have been necessary if Respondents Hertel and Vail would have been enjoined from carrying out the conduct addressed in this case. And moving forward, prospective injunctive relief would avoid additional judicial proceedings.

As it stands now, however, the Sixth Circuit has not only dismissed as moot Petitioners' motion for a preliminary injunction, but also their free exercise claim. Without this Court's intervention, Petitioners face re-litigating the same or similar restrictions yet again. Respondents continue to argue that their restrictions were constitutional and that they could reinstitute the challenged restrictions again. App. at 15 ("[W]hen asked at oral argument whether the state would commit not to reenact its earlier mandate, the state's counsel bluntly responded: 'Absolutely not.'"); *see also* App. at 43. Respondents have made a sport of the mootness doctrine and insured one thing: Petitioners will never see their day in court or be able to question why these regulations were necessary or if they even met their legal burden in the first place.

This case reflects a growing trend in some circuits of allowing government defendants to moot a pending case through rescinding the challenged regulation prior to the courts deciding the constitutionality of the claims against them, thus allowing the government to remain unaccountable for the legal ramifications of their enacted policies. Indeed, the Sixth Circuit below and the Ninth Circuit, both sitting en banc, have entrenched themselves in the extreme position that

Article III requires dismissal of a case as moot when the government retains its power to, and continues to profess it could, reissue the same challenged restrictions in the future. App. at 15, 43. Other circuits, meanwhile, caution against such decisions as abuse of the mootness doctrine: "To be clear, it's not supposed to be this way. It shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens, fundamental constitutional freedoms frequently suffer as a result." *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). And that is what happened to Petitioners here.

Petitioners' First Amendment claims were denied preliminary injunctive relief on the briefs of the motion, having never even seen a hearing in the district court. Now, Petitioners' entire case is dismissed. The Sixth Circuit not only "sheltered in place," choosing not to involve itself in this live case and controversy, it kicked Petitioners out of court entirely, disallowing Petitioners from ever having their live claims for prospective and declaratory relief adjudicated before the district court. In *Roman Catholic Diocese*, Justice Gorsuch warned in his concurrence that "we may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring). And yet, the court below and other circuits have interpreted the

mootness doctrine as not just a shelter, but as repellant to avert its ordinary Article III duties when plaintiffs bring challenges that question the constitutionality of government regulations upon the mere showing that the government "*at present*" is not enforcing the regulations. App. at 38 (Bush, J., dissenting) (emphasis in original).

What remains is a stark difference between the circuits in how to apply and analyze exceptions to the mootness doctrine. To resolve the conflict between the lower courts and "[w]ith the circuits apparently divided" on the scope of the mootness doctrine, this petition "require[s] action from the Supreme Court to get things back on track." *Id*. at 297; *Brach*, 38 F.4th at 18 (Paez, J., dissenting); App. at 59.

This Court has granted certiorari on matters partially addressing the issue in *Roman Catholic Diocese* and *Tandon* but has not yet been able to definitively answer the questions posed in this Petition for lower courts regarding the scope and application of the voluntary cessation and capable of repetition yet evading review exceptions to the mootness doctrine. *Compare* App. at 1-11 and *Brach Brach*, 38 F.4th 15-18 to *Tucker*, 40 F.4th 289-93. The Court should grant certiorari and provide clarity on whether this Court meant what it said in *Roman Catholic Diocese* and *Tandon* or spoke through its silence in *N.Y. State Rifle & Pistol Ass'n*. The circuit courts need this Court to explain when the mootness doctrine allows government defendants to evade determinations on the constitutionality of their

regulations by rescinding them or allowing them to expire on appeal.

OPINIONS BELOW

The Sixth Circuit's en banc decision appears at 35 F.4th 524 and is reproduced at App. 1. The Sixth Circuit's vacated panel decision appears at 11 F.4th 437 and is reproduced at App. 66. The District Court's decision appears at 507 F.Supp.3d 897 and is reproduced at App. 115.

JURISDICTION

The Sixth Circuit's order denying preliminary injunctive relief and dismissing the case in its entirety was entered on May 25, 2022. App. 1. The lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State,

between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., Art. III § 2, cl. 1.

STATEMENT OF THE CASE

A. Factual Background[1]

Resurrection School is a small, private, Catholic School in Lansing, Michigan, serving students from kindergarten through eighth grade. App. at 17. Christopher Mianecki is a parent with children, C.M., N.M., and Z.M., who attend Resurrection School. App. at 81. Stephanie Smith is a parent of F.S. who could no longer attend school due to Respondents' orders. App. at 81-82.

Resurrection School exists to educate children in the Catholic faith and strives to integrate "faith into all portions of the school day." App. at 17. Resurrection School continues to educate children during the pandemic. App. at 17. The school implemented robust safety protocols that included screening of students and staff, limitations on visitors to the school, strict sanitization and disinfection measures that includes the use of ultraviolet germicidal irradiation, frequent handwashing, and

[1] Since "[t]he 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[,]" much of the factual background is supported by citations from the dissenting opinions and panel opinion. App. at 17.

the use of masks in common areas of the school. App. at 17. The school did not require that students wear masks when seated and distanced from each other in the classroom to preserve its religious curriculum. App. at 17.

A month into the 2020-21 schoolyear, on September 25, 2020, Michigan's governor issued an executive order requiring that children in grades kindergarten through fifth grade wear facial coverings in the classroom. App. at 75. The order was stricken after the Michigan Supreme Court ruled that the governor no longer had the power to issue such orders under the Michigan Constitution. App. at 75; *In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1 (Mich. 2020). Undeterred by the ruling, the governor vowed to use every tool at her disposal to reimplement the order, including the state and local health departments, and on the next business day the Michigan Department of Health and Human Services ("MDHHS") issued a near identical order as did the Ingham County Health Department.
https://www.michigan.gov/coronavirus/news/2020/10/05/mdhhs-issues-emergency-order-designed-to-protect-the-health-and-safety-of-all-michiganders-directiv, last visited Aug. 23, 2022; App. at 73.

Respondents "required masks in public settings, including classrooms in public and private schools." App. at 4. And while the "order included a dozen exceptions," it did not accommodate religious education at Resurrection School. App. at 4-5, 18. It "[r]endered unlawful . . . Resurrection School's

continued practice of unmasked, face-to-face religious instruction." App. at 18, 81. The order caused concern amongst the school's parents. Petitioner Mianecki explained that the order "interferes with [his children's] ability to engage in their elementary school classroom and its Catholic, religious teachings." App. at 82. Petitioner Stephanie Smith pulled her son, F.S. from school to avoid implementation of the order but "cannot give F.S. the same Catholic education that he receives at Catholic school with his classmates." App. at 82. The order's numerous exceptions, however, exempted such activities as "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." App. at 21.

On October 22, 2020, Petitioners filed their Complaint and moved for a preliminary injunction alleging, *inter alia*, a violation of the free exercise clause. App. at 21-22, 80. Petitioners "sought declaratory and injunctive relief against both MDHHS's and Ingham County's enforcement of the restrictions." App. at 18. The next day, on October 23, 2020, Respondent Vail rescinded the Ingham County Health Department citing its indistinction from MDHHS's order. App. at 73.

Petitioners remained under various MDHHS orders burdening their religious exercise in the same way throughout the 2020-21 schoolyear. App. at 18, 48. For the majority of the 2021-22 schoolyear, Petitioners remained under various orders, again burdening their religious exercise in the same way,

put in place by Respondent Vail at MDHHS's urging and recommendation. App. at 48-52.

MDHHS continues to assert to this day that "the pandemic is not over," and its response "will cycle through periods of readiness, response, and recovery." https://www.michigan.gov/-/media/Project/Websites/coronavirus/Folder2/Readiness_Response_Recovery_Cycle_030222.pdf?rev=571bdd3b71b74a4388813f6e784d714d, last visited Aug. 23, 2022. MDHHS "acknowledge[es] 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.')." App. at 52, fn. 1.

To this day, MDHHS continues to advocate for "universal masking" in schools with no religious exemption. https://www.michigan.gov/coronavirus/-/media/Project/Websites/coronavirus/Folder18/COVID-19_Guidance_for_Operating_Schools_Safely.pdf?rev=07354788516749b1a167513ae4a58e5d&hash=3FD85DA225DA1F5333FFE183E2574C99, last visited Aug. 23, 2022 (emphasis in original). The Centers for Disease Control and Prevention ("CDC") presently recommends "universal indoor masking in schools" located within a county at a high COVID-19 community level. https://www.cdc.gov/coronavirus/

/2019-ncov/community/schools-childcare/k-12-childcare-guidance.html, last visited Aug. 23, 2022. Per the CDC, Ingham County's community level is currently classified as "medium," just one level below the categorization of "high." https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Michigan&data-type=CommunityLevels&null=CommunityLevels&list_select_map_data_metro=metro&list_select_county=26065, last visited Aug. 22, 2022.

During the en banc Sixth Circuit oral argument, when Respondents were asked "whether the state would commit not to reenact its earlier mandate, the state's counsel bluntly responded: 'Absolutely not.'" App. at 15, 43.

B. Procedural Background

Petitioners filed their Complaint on October 22, 2020. App. at 93. On October 27, 2020, Petitioners moved for a preliminary injunction to enjoin Respondents' enforcement of the challenged orders on First Amendment grounds. App. at 93. On December 16, 2020, without holding a preliminary injunction hearing, the District Court denied Petitioners' motion. App. at 115. Petitioners appealed. App. at 85. After the parties filed their appellate briefs and the Sixth Circuit set oral argument for July 21, 2021, Respondents rescinded their school masking orders for the summer. App. at 13, 67. On July 1, 2021, Respondents moved to dismiss the appeal as moot. App. at 85.

On August 23, 2022, in a 2-1 decision, the panel of the Sixth Circuit affirmed the lower court's denial of Petitioners' motion for a preliminary injunction on the grounds that Respondents' restrictions did not violate Petitioners' free exercise of religion under *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). App. at 98-110. The panel also unanimously held that Petitioners' claims were not moot under both the "voluntary cessation" and the "capable of repetition, yet evading review" exceptions to the mootness doctrine. App. at 85-97. The next day, the news reported that Petitioners would seek en banc review. https://www.detroitnews.com/story/news/local/michigan/2021/08/24/lansing-catholic-school-set-appeal-ruling-school-mask-requirements/5570800001/, last visited Aug. 23, 2022. Respondent Nessel stated that "[a]s science has proven and now the Sixth Circuit agrees, enacting a mask mandate in the manner in which MDHHS did so does not violate one's rights." *Id*.

On September 2, 2021, Respondent Vail re-imposed the challenged orders, again with not exception for Petitioners' free exercise of religion, pursuant to MDHHS's guidelines. App. at 49. On September 8, 2021, Petitioners motioned the Sixth Circuit for a rehearing en banc. On November 10, 2021, the Sixth Circuit granted the petition and set oral argument for March 9, 2022. App. at 2.

In the lower court, Petitioners challenged Respondent Vail's orders and the district court again

denied Petitioners' motion for a preliminary injunction. *See Resurrection Sch. v. Hertel*, 569 F. Supp. 3d 658 (W.D. Mich. 2021). Petitioners appeal and the Sixth Circuit vacated the district court's denial of a preliminary injunction. *Resurrection Sch. v. Hertel*, No. 21-1699, 2022 U.S. App. LEXIS 829, at *1 (6th Cir. Jan. 11, 2022). But on remand, the district court again denied preliminary injunctive relief. *Resurrection Sch. v. Hertel*, Case No. 1:20-cv-01016, R-77 (Mar. 3, 2022) (Op. and Order denying Pl.'s Mot. for Prelim. Inj.). Only seven days before the scheduled oral argument set for February 17, 2022, Respondent Vail issued a statement that she would be rescinding her order at midnight on February 19, 2022. *Id.* at *4. The district court found no need for injunctive relief given the rescission of the order. *Id.* at *17-20. Petitioners were "actually subject to the mandate until February, shortly before this case was argued" on March 9, 2022. App. at 48.

On May 25, 2022, the en banc Sixth Circuit held that Petitioners' motion for preliminary injunctive relief against Respondents was moot, "indeed palpably so." App. at 4-11. The decision below then proceeded to dismiss Petitioners' entire free exercise claim as moot. App. at 11.

Judge Readler concurred in the dismissal of Petitioners' preliminary injunction appeal as moot but dissented to the finding that Petitioners' entire claim was moot. App. at 12-15. Judge Readler disagreed with the majority, writing that Petitioners' claims for declaratory judgment and permanent injunctive relief still lived. App. at 14. He noted Respondents'

persistent position that its restrictions were constitutional under *Tandon v. Newsom* and *Roman Catholic Diocese of Brooklyn*. App. at 14. He also noted Respondents' insistence to maintain the authority to reimpose the same orders on Petitioners in the future. App. at 15.

Judge Bush issued a piercing dissent, joined by Judge Siler and Judge Griffin. App. at 16-65. The dissent questions the deference that the majority attached to Respondents, projecting good faith on the government even in the face of Respondents admitting they would reimpose the same orders. App. at 38-65. Judge Bush questioned the wisdom of excusing government action under the court's voluntary cessation argument because the government is "politically accountable." App. at 41-47. He clarified the interrelation of MDHHS and Ingham County's pandemic response. App. at 48-52. The dissent questions the thin reed upon which the majority assumes Respondents will follow *Tandon v. Newsom* in the future considering their vigorous defense of the challenged orders thus far and its arguments and admissions before the court. App. at 52-53. Judge Bush also examines how MDHHS current policy does not foreclose reinstating the challenged orders when the pandemic worsens and that "Article III judges should not be in the business of declaring an end to the COVID-19 pandemic[.]" App. at 1 (quoting *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 572 (6th Cir. 2021) (Moore, J., dissenting); App. at 53-65. He highlights concerns with the Sixth Circuit's decision to dismiss Petitioners' entire claim, not just their appeal for preliminary injunctive relief. App.

61-65. Judge Bush concludes, "[w]hat I do fault the majority for . . . 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." App. at 59.

REASONS FOR GRANTING THE PETITION

The decision below allows government defendants to avoid redress for unconstitutional policies they vigorously defend and plan to re-enact. The consequences of that error are dramatic, both for Petitioners and for First Amendment values. Unless this Court grants review, the decision below will prevent important constitutional claims from ever seeing the light of day. It has already been cited by the en banc Ninth Circuit and used to moot a challenge where California's governor retains the power to re-instate the same regulations in the future. *See Brach*, 38 F. 4th, *supra*. Surely, the power Congress granted to Article III judges to hear cases and controversies was never meant to eliminate cases where the Petitioners have not yet obtained all the prospective relief they sought or declaratory relief. And surely, Article III was never meant to moot prospective relief when Petitioners remain under an "emphatic" threat that the government may re-issue the challenged regulations again. App. at 15; App. at 43. The circuit courts have made a mess of this Court's mootness doctrine and its exceptions. As stated by dissenting and concurring judges in the Fifth, Sixth,

and Ninth Circuits, intervention is necessary to resolve the conflict that the decision below imposes on the holdings of other circuits and this Court. App. at 59 (Bush, J., dissenting, joined by Siler and Griffin, JJ.); *Brach*, 38 F.4th at 18 (Paez, J., dissenting, joined by Berzon, Ikuta, Nelson, and Bress, JJ.); *Tucker*, 40 F.4th at 297 (Ho, J., concurring).

I. The Court Should Grant Certiorari to Clarify whether Voluntary Cessation Requires Government Defendants to Meet the "Absolutely Clear" Standard or, if Not, What Standard the Lower Courts Should Apply.

In holding that the government's voluntary cessation of the challenged orders mooted Petitioners' entire case, the Sixth Circuit deepened an existing conflict between the circuits and disregarded this Court's longstanding precedent that under this exception, Respondents must prove to an "absolutely clear" standard that the case is moot. The majority's decision below fails to even mention this controlling standard, thus rejecting decades of this Court's paradigmatic voluntary cessation holdings. App. at 1-11. The "absolutely clear" standard is not mentioned until Judge Bush's dissent, where he points to the decision below conflicting with law applied in this Court's cases, such as *Already, LLC v. Nike*, 568 U.S. 85, 91(2013); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Instead of following this Court, the Sixth Circuit crafted its own standard, asking "if there clearly is 'no reasonable expectation that the alleged violation will recur.'" App. at 7 (quoting *Speech First, Inc.*, 939 F.3d at 767). And while the Sixth Circuit did not explicitly assign the burden of proof for its standard to either party, it seemingly placed the burden on Petitioners. App. at 7 (stating "[t]he plaintiffs face strong headwinds").

But the stringent standard adopted by this Court serves an important purpose. This Court's standard curbs the harm that results when disputes are dismissed for mootness only to arise again when the defendant resumes its prior conduct. It curtails irreparable harm to Petitioners' constitutional rights, as well as harm to the public interest, the integrity of the legal process, and to judicial economy.

The Sixth Circuit, however, is not alone in its approach. Other circuit courts have applied a "lighter burden" specifically to governmental defendants. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009); *but see Tucker*, 40 F.4th 292 (refusing to apply a lower standard to a government actor who does not disallow the challenged behavior). In these circuits, "government actors" are entitled to "a presumption of good faith" because "they are public servants, not self-interested private parties." *Sossamon,* 560 F.3d at 325. These circuits "assume that formally announced changes to official governmental policy are not mere litigation posturing." *Id.*; *see also, e.g.*, *Marcavage v. National Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012)

("[G]overnment officials are presumed to act in good faith."); *Troiano v. Supervisors of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur."). It seems these circuit courts, which includes the Sixth Circuit, seemingly over the fact that 42 U.S.C. § 983 was enacted because the government "might, in fact, be antipathetic to the vindication of constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Still other circuits have gone even further, flipping the burden of proof to require that the plaintiff demonstrate it is "virtually certain" that the government will reenact the challenged law. *Chemical Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). And while some circuits have at least tried to reconcile their decisions with this Court's precedents, others have simply declared that relevant portions of this Court's holdings are "dicta and therefore not controlling." *Federation of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003).

In *Trinity Lutheran*, this Court seemingly accepted as obvious that a government defendant must be held to the "absolutely clear standard." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). This Court noted:

> That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does

> not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations."

Id. But then three years later in *N.Y. State Rifle & Pistol Ass'n*, this Court accepted certiorari to review the Second Circuit's decision that upheld the constitutionality of New York City's restrictions limiting the transportation of firearms. 140 S. Ct. at 1526. While the case was pending before this Court, New York City enacted a new rule to govern the transportation of firearms. *Id*. Importantly, this Court's per curiam opinion did not moot the entire case but only the pending appeal. This Court vacated the opinion of the Second Circuit and remanded the case for further proceedings, which could include "developing the record more fully." *Id*. at 1526-27 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482-483 (1990)). While New York City's rule change implicated the voluntary cessation doctrine and the city argued for this Court to adopt a standard lower than "absolutely clear" for government defendants, the short per curiam opinion does not

explicitly adopt a lower standard, nor did it overrule this Court's earlier precedent.

Judge Alito's dissent, joined by Justice Gorsuch and in part by Justice Thomas, questioned the wisdom of dismissing a case as moot based upon a government's decision to change course during the pendency of the appeal. *N.Y. State Rifle & Pistol Ass'n,* 140 S. Ct. at 1528. The dissent emphasized the "heavy burden" placed on the party asserting mootness, *id.* (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)), and that a case "becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *N.Y. State Rifle & Pistol Ass'n,* 140 S. Ct. at 1528 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) and adding emphasis). The dissent applied the "absolutely clear" standard and recognized that petitioners had not obtained all the prospective relief they sought.

The Sixth Circuit below failed to apply the "absolutely clear" standard articulated in this Court's quintessential voluntary cessation cases, such as *Laidlaw* and *City of Mesquite*, and its more recent holdings in *Trinity Lutheran*. But the Sixth Circuit even failed to follow the more generalized holding in *N.Y. State Rifle & Pistol Ass'n*. In all this confusion, this much is clear: the decision below squarely conflicts with other circuits and the holdings of this Court, and clarity is desperately needed. This Court should grant certiorari to resolve the proper analysis of the voluntary cessation exception.

II. Circuit Courts Disagree Whether the Government is Owed a Presumption of Good Faith under the Voluntary Cessation Exception When the Government Retains the Authority and Interest to Reimpose the Challenged Policy.

The decision below seems to be premised on the Respondents being owed a presumption of good faith because they "rescinded its order months rather than weeks after being sued," App. at 41, and because the government could be held "politically accountable" if it were to reenact the challenged regulations. Appt. at 46-47. Judge Bush in his dissent analyzes how the majority's holding creates intra-circuit conflict and conflicts with this Court's precedent.

Judge Bush explains how the majority departed from *Speech First, Inc. v. Schlissel*, which relied on a four-part test to determine whether a good faith presumption applied to a government's voluntary cessation. 939 F.3d 756, 769 (6th Cir. 2019). *Speech First*'s four-part test analyzed whether the government refused to disavow reenactment of the challenged policy, whether the policy was discretionary and easily reversible, whether the government acted in good faith and not in a way that would manipulate the court docket, and whether the government continued to defend the legality of its regulation. App. at 42 (quoting *Speech First, Inc.*, 939 F.3d at 768–70). Judge Bush notes that the majority's decision below did not apply *Speech First* but primarily focused on two factors: not acting in bad faith and political accountability.

Judge Bush's dissent skillfully dissects why relying on these two factors to presume that the government acted in good faith and therefore somehow has voluntarily ceded its behavior is woefully deficient when determining mootness under Article III. App. at 42-65.

First, Judge Bush acknowledges that "[a] defendant's bad faith recission . . . is no doubt insufficient by itself to moot a case" but then corrects the majority, pointing out the "non sequitur" in its reasoning. App. at 42. Simply because the government's "rescission was done in apparent good faith," does not establish that the government "will never reimplement the restriction." App. at 42. Since the government "did not rescind its orders on the ground that they might conflict with the First Amendment" but due to "shifting real-world conditions," there is no guarantee the government will not reinstate the orders when conditions shift again. App. at 42. Second, Judge Bush explains the importance of this distinction where, as here, the government can easily reinstate the challenged orders "on a moment's notice, without the legislature, on their own, and without any other approval." App. at 44 (internal quotations and citations omitted). Third, Judge Bush opines that the Respondents' "vigorous defense of the policy's lawfulness" weighs against a finding of mootness, adding that the majority's decision to glossed over this factor, thus conflicting with this Court's holding in *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). App. at 45 (noting how this Court held that vigorously defending the constitutionality of the

challenged governmental policy precluded the finding of a presumption of governmental good faith under the voluntary cessation exception). Judge Bush further commented that "if ever there were a 'vigorous defense' of a contested policy, MDHHS and Ingham County have mounted it," noting how even while arguing the case was moot to the en banc Sixth Circuit, the Respondents continued to defend that their actions were at all times constitutional. App. at 45-46; App. at 52-53.

Judge Bush explains how that replacing this Court's holding in *Parents Involved* the en banc majority's "political accountability" test proves problematic, especially in the instant case where the state legislature appointed and insulated health officers from the political process by statute to only face removal for "good cause" and not contingent on their decisions achieving political popularity. App. at 47. But more critical is the nature of the Sixth Circuit's "political accountability" test itself. "[H]ow disquieting for" Petitioners that their "religious free exercise should hinge upon the caprice of the electorate," rather than the sound interpretation of the First Amendment. App. at 47 (quoting *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("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[.]")). In a word, relying on "political accountability" to remedy violations of the First Amendment is "indefensible." App. at 60.

But the decision below is not alone in its abandonment of *Parents Involved* and this Court's analysis in its other voluntary cessation cases. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In *Brach*, for example, the en banc Ninth Circuit held the government deserved the presumption of good faith under the voluntary cessation exception when it retained the authority to reenact the same regulations and continued to defend the constitutionality of its regulations. *Brach*, 38 F.4th at 12-15. Yet, the Ninth Circuit majority at least analyzed whether the government disavowed reenactment of the school closure orders at issue in that case, holding that "most importantly" the government had "unequivocally renounced" reenactment of the challenged orders in the future. *Id.* at 13 (internal quotations omitted) (citing *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019). Here, as noted in the dissents, the converse is true, Respondents unequivocally refuse to disavow reenactment of the challenged restrictions. App. at 15 (Readler, J., concurring in part and dissenting in part); App. at 43 (Bush, J., dissenting, joined by Siler and Griffin, JJ.). And the en banc Sixth Circuit declined to analyze or even mention whether this factor affected the government's good faith presumption; instead, it assumed the government was owed it. It did not require that the government meet the heightened burden usually required for private actors and in the absence of a finding of governmental good faith. And

by ignoring the factor, the Sixth Circuit, *ipso facto*, settled its nonimportance.

In stark contrast from the decision below is the Fifth Circuit's holding in *Tucker v. Gaddis*. Here, the circuit refused to grant the government defendant a presumption of good faith when "the government has not even bothered to give" the plaintiff "any assurance that it will permanently cease engaging in the very conduct that he challenges." 40 F.4th at 293. During oral argument in *Tucker*, the government "would *not* guarantee" that it would refrain from reenacting a similar policy "in the future, but instead would reserve the question in light of potential 'time, space, and security concerns.'" *Id*. The Fifth Circuit held "[i]f anything, it is far from clear that the government has ceased the challenged conduct *at all*, let alone with the permanence required under the 'stringent' standards that govern the mootness determination when a defendant claims voluntary compliance." *Id*.

In his concurrence in *Tucker*, Judge Ho recognizes the inter-circuit split that now plagues the voluntary cessation doctrine: "our sister circuits enabled public officials to avoid judicial review by dismissing the claims against them as moot—despite the fact that the officials refused to promise never to return to their challenged conduct." (citing App. 1-65 and *Hawse v. Page*, 7 F.4th 685, 699 (8th Cir. 2021) (Stras, J., dissenting)). In short, "[w]ith the circuits apparently divided on these questions," the lower courts now "require action from the Supreme Court to get things

back on track." *Tucker*, 40 F.4th at 489 (Ho, J., concurring).

III. The Decision Below, Finding that the Challenged Policy was Not Capable of Repetition Yet Evading Review, is at Odds with this Court's Holdings in *Roman Catholic Diocese* and *Tandon*.

Instead of applying *Roman Catholic Diocese* and *Tandon* to determine whether Petitioners remained under a constant threat of Respondents reimposing the challenged restrictions, the en banc Sixth Circuit found that the holdings in these cases foreclosed the capability of the government to repeat its conduct. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The majority determined that since the comparator analysis from *Roman Catholic Diocese* and *Tandon* could instruct the Respondents' actions, it would be unreasonable to assume that Respondents would reissue its orders that offend Petitioners' free exercise of religion. App. at 9. Two glaring issues with this finding. First, *Roman Catholic Diocese* was decided on November 25, 2020 and *Tandon* on April 9, 2021. Respondents repeatedly reissued their orders, treating that Petitioners' religious exercise worse than comparably risky secular activity after these dates.

Second, Respondents continue to defend the constitutionality of all their orders, arguing both that *Roman Catholic Diocese* and *Tandon*'s comparator analysis does not apply to their orders because they are generally applicable (they aren't), and that even if

strict scrutiny did apply, their orders satisfy it (they don't). App. at 46. "Given these persistent defenses, neither entity has given us any reason to believe that they have acquiesced and seen the error of their ways." App. at 45 (Bush, J., dissenting).

In *Roman Catholic Diocese*, this Court determined that a challenge to a rescinded government order was not moot because the "Governor regularly change[d]" the scope of his orders and retained the authority to re-issue an order that harmed the plaintiff in a similar way. 141 S. Ct. at 68. Then, in Tandon, this Court applying its reasoning from *Roman Catholic Diocese*, held that a rescinded order restricting in home religious gatherings was not moot because "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. *Tandon*, 141 S. Ct. at 1297.

And while this case differs from the facts of *Roman Catholic Diocese* and *Tandon*, the Sixth Circuit's finding of mootness in this case no less offends this Court's capable of repetition yet evading review precedent. As this Court explained in *Honig v. Doe*, the concern revolves around "whether the controversy [is] *capable* of repetition and not . . . whether the claimant had demonstrated that a reoccurrence of the dispute [is] more probable than not." 484 U.S. 305,

318 n.6 (1988) (emphasis in original) (internal citations omitted). The preeminent question under this exception is capability, and a strong indicator that a restriction is *capable* of repetition is when the government admits it would reissue it. App. at 43.

In his Ninth Circuit dissent, Judge Paez highlights a circuit split, where a majority of circuits focus on whether the government has retained the power to reenact the challenged restriction. *Brach*, 38 F.4th at 17 (Paez, J., dissenting). A minority of cases, including the decision below, do not inquire whether the action is capable of repetition based on the government's authority to reinstitute the restriction. *Id*. Judge Paez then concludes: "I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance—and find that the Governor's continuing authority under his pandemic emergency order is a crucial factor in this analysis." *Id*. at 18. The lower court conflict asking if and to what extent the government's continue power and willingness to repeat reissue its policies should be resolved by this Court.

IV. This Case Presents Exceptionally Important Questions That Warrant This Court's Review.

The decision below is plainly wrong and will have untenable consequences, both for Petitioners and future litigants from across the political spectrum and faced with a wide-ranging and unknowable array of issues. Under the decision below, a government may violate a person's constitutional rights without any

redress if it claims that an outside force caused it to change its policies. The government need not show it will not resume the challenged action. Indeed here, the government may expressly reject disavowing reimposition of the same challenged actions that give rise to the lawsuit. The decision below erroneously diverts the focus of the courts' Article III mootness determination away from the actions and intentions of the government and away from the harm it inflicts on Petitioners with no qualms or pause that the government would willingly impose the same harm on Petitioners again. Furthermore, the decision below allows the Court to dismiss constitutional cases against the government with no assertion that the government has or will change its ways. Instead, the Sixth Circuit leaves the irreparable harm caused by the loss and the threatened loss of plaintiff's constitutional rights not only undressed but places the future of that harm in the hands of the legislative branch or a loud political majority. App. at 41-44.

Surely such a flawed en banc circuit holding cannot stand. One of the great provinces of the exceptions to the mootness doctrine is to prevent the government from evading judicial review. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). These exceptions vindicate the public interest by encouraging review of "the legality of the [government's] practices." *W.T. Grant Co.*, 345 U.S. at 632. And this interest is at its pinnacle when the government is accused of violating an individual's constitutional rights, cases which frequently carry

broad ramifications for the general public. The decision below forecloses this important function. It weakens Article III and aggrandizes the mootness doctrine: it makes it harder for court to settle the legality of the government's practices and it leaves those wishing to find answers and redress for bold and overreaching government action, like Petitioners, with nothing. The decision below assuredly will result in intolerable and inequitable findings of mootness that specifically disadvantage controversial cases and claims seeking to vindicate the loss of constitutional rights.

Litigants during the pandemic have called upon this Court's emergency docket to resolve important violations of constitutional rights. *See generally, Tandon, supra., Roman Catholic Dioceses, supra.* The decision below would incentivize, and frequently require, litigants to challenge the government's infringement of their constitutional rights on an emergency basis to obtain a ruling from the court before the government unilaterally rescinds its challenged actions and claims mootness. The decision below will necessitate more emergency appeals in the circuit courts and more emergency applications before this Court. Litigants who face the deprivation of their constitutional rights will not be able to trust that the matter will be resolved in the circuit courts in the ordinary course of litigation. Instead, more cases will be determined via emergency motions for injunctive relief and emergency applications to this Court's emergency docket. The Sixth Circuit decision below sends one "palpable" message: if one does not seek to rectify the loss of his/her constitutional freedoms

through the filing of emergency means, the case will never reach resolution before first becoming moot.

In final thought, nothing would be gained from allowing the questions presented to percolate further. The en banc Ninth Circuit has already relied on the decision, and assuredly more circuits will hinge the future of litigants' important constitutional claims on its mootness analysis. This Court should grant certiorari now to resolve the great disparity by which the lower courts apply the mootness doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the Sixth Circuit.

Respectfully submitted,

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