No. 20-2256

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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
Western District of Michigan
Honorable Paul Lewis Maloney

DEFENDANTS-APPELLEES' JOINT SUPPLEMENTAL BRIEF

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INTRODUCTION

In the wake of several Supreme Court decisions addressing state governments' restrictions on gatherings during the COVID-19 pandemic, a simple rule has emerged: A government regulation—including one with a framework of exceptions—is subject to rational basis review so long as it does not "treat any comparable secular activity more favorably than religious exercise." *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (citation and emphasis omitted). If, on the other hand, a regulation affords more favorable treatment to a comparable secular activity, it is subject to strict scrutiny. *Id.* The touchstone concept is "comparability," which refers to the type and degree of harm the regulations seek to avoid—in this case, the risk of exacerbating the COVID-19 pandemic. *Id.*

Michigan's long-rescinded statewide masking order complied with this simple rule. It mandated mask wearing based on a gathering's risk factors, such as proximity, frequency, duration, and the number of households involved. All-day classroom settings such as Plaintiffs' implicated all of these factors at once. Some activities were excepted from the mandate, but only because they posed a far lower risk of contracting or transmitting the virus, especially compared to in-classroom instruction. In other words, they were not "comparable." To be entitled to relief under *Tandon*, Plaintiffs must point to a group (to which they do not already

belong) that received "more favorable treatment" from the State notwithstanding that group's "comparable" risk. They cannot do so.

All that said, this Court must avoid reaching the merits, because this case is moot, and mootness is jurisdictional. The statewide masking order was rescinded in good faith a number of months ago, and it has not been reimposed upon Plaintiffs or anyone else. This remained true notwithstanding the ebb and flow of the pandemic, which broke numerous records over the past few months with respect to case counts and hospitalizations. If ever there was a time one could have reasonably expected a similar order to be imposed, that time has come and gone. And all the while, vaccine eligibility has continued to expand, vaccinations continue to occur, effective treatments are developed and approved, and understanding of the virus grows. And besides, the School has admitted that masks were not worn in the classrooms during the 2020-2021 schoolyear. This Court should dismiss this appeal as moot.

ARGUMENT

I. This dispute is moot, as demonstrated by DHHS's good faith and its decision not to reimpose the order even during subsequent surges of COVID-19.

A. This case is moot notwithstanding that rescission of the order was voluntary.

Although courts have been cautious about recognizing a case's mootness when there is a risk that the defendant ceased their behavior simply to avoid a bad outcome in the litigation, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), courts give credence to voluntary cessation when the defendant can establish it ceased its conduct in good faith—particularly when the defendant is a government actor, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)); *see also Youngstown Publ'g Co. v. McKelvey*, 189 F. App'x 402, 406 (6th Cir. 2006) (holding that a case was moot because, based on the totality of the circumstances, voluntary cessation "appears genuine"); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) (holding that "voluntary cessation" exception "properly applies *only* when a recalcitrant [governmental entity] clearly intends to reenact the challenged regulation" (emphasis added)).

Generally, a defendant can overcome the presumption, and its "voluntary cessation" will compel dismissal, if it can show: (1) "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." *Thomas v. City of Memphis, Tenn.*, 996 F.3d 318, 324 (6th Cir. 2021) (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019)). Only the first prong is at issue here.[1] But this doctrine's general contours apply to *any* civil case, regardless of the defendant. When, as here, the defendant is the government, this Court's inquiry—essentially whether the cessation occurred in good faith—becomes significantly less searching. *Speech First*, 939 F.3d at 767. In fact, it can flip the presumption of strategic cessation on its head. *Id.* (stating that, unlike the presumption applied to private litigants, "we presume that the same allegedly wrongful conduct by the government is unlikely to recur").

Granted, the easier it is for the government to reimpose its policy, the more of its initial burden remains. *See id.* at 768. But contrary to Plaintiffs' suggestion—which implies that nothing short of revocation of the Director's authority will suffice to establish mootness—neither the Director's retained authority nor her discretion are strikes against mootness. Rather, those details go

[1] The second prong has nothing to do with any harm that might arise from a *reissuance* of the masking regulation, but instead concerns any lingering effects of the rescinded regulation. *See Thomas*, 996 F.3d at 329–30. That makes this issue a simple one: Plaintiffs are before this Court seeking injunctive relief, but Defendants are no longer engaging in activity that could be enjoined. The effects of the alleged violation have been eradicated. Furthermore, Plaintiffs admitted on the record that they never complied with the prior mask mandate in classrooms in the first place. (9/23/21 Hr'g Tr. at 29–31, ECF No. 51, PageID.1091–93.)

to the *weight* of the fact that Defendants are government actors presumed to act in good faith, which fact supports mootness.

Applying these principles shows that this matter is moot. "[A]dvancements in COVID-19 vaccinations and treatment," in particular, explain DHHS's decision to rescind its restrictions, and they render it unreasonable to expect "the same burdens" in the future. *Thompson v. DeWine*, 7 F.4th 521, 526 (6th Cir. 2021). Vaccine eligibility has been expanded to children as young as five, and history shows that DHHS considers vaccination to be a crucial factor regarding the reach of a mask mandate. (*See, e.g.*, 5/24/21 DHHS Order § 5(a) (exempting all vaccinated persons).) *See also Resurrection School v. Hertel*, 11 F.4th 437, 454 (6th Cir. 2021) (stating that its decision rejecting mootness hinged on "individuals not yet able to be vaccinated"). And treatments have come a long way, too. For example, in December 2021, the Food and Drug Administration authorized a pill that "reduced the proportion of people with COVID-19 related hospitalization or death from any cause by *88%* compared to placebo." [2] (Emphasis added.)

A number of other facts confirm that DHHS rescinded its orders in good faith, precluding application of the voluntary-cessation exception to mootness. First, Plaintiffs argued that DHHS casually rescinded its mandate due to summer

[2] FDA, Coronavirus (COVID-19) Update: FDA Authorizes First Oral Antiviral for Treatment of COVID-19 (Dec. 22, 2021), available at https://bit.ly/33NMlqp.

break (and summer temperatures). But the passage of time has disproved that theory. Second, DHHS rescinded the *entire order* that housed the rules challenged here, including myriad restrictions unrelated to masking; if DHHS had intended only to avoid an unfavorable ruling, it did not need to rescind unrelated provisions. Third, many other states similarly rolled back their orders in response to these same circumstances, further supporting that rescission was not some targeted, pretextual effort to avoid an injunction in this case.[3] There is no credible argument that the mask mandate was rescinded in bad faith, and, to the extent the possibility of a future masking order is nevertheless relevant, these points of circumstantial evidence leave a vanishingly small doubt regarding any such possibility.

Finally, when the original panel answered this question, a mere two months had passed since the order's rescission in June 2021, and across the country many were still contemplating both how to respond to surges and how to best protect children. But despite several surges in COVID-19 case counts in the ensuing months—exactly the type of occurrences one would expect to cause DHHS to reimpose its mask mandates—DHHS has not issued any statewide masking order

[3] *See, e.g.*, Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Jan. 26, 2022) (noting that of the 39 state that had orders broadly requiring residents to wear masks in public, 29 have lifted them), available at https://bit.ly/32l7tnE.

since May 2021.[4] If it was not clear in August 2021 that this matter was moot, it is absolutely clear now.

Notably, Plaintiffs do not say a word about developments in treatment or expanding vaccination eligibility, the ever-lengthening time period in which DHHS could have—but did not—impose a new version of its order, or the myriad other evidence that DHHS did not act in response to this lawsuit. Accordingly, there being no non-speculative argument to the contrary, weight of the evidence compels a finding of mootness here.

Finally, this case differs from those where the Court did not dismiss challenges to COVID-19 regulations as moot. Plaintiffs point primarily to *Tandon*, (Pls.' Supp. Br. at 24–25 & n. 6), but *Tandon* is distinguishable for reasons set forth fully in State Defendants' reply to their motion to dismiss in this Court. (State Defs.' 7/14/21 Reply at 6–8.) In sum, the State in *Tandon* still had its restriction in force when the Court granted relief; it had been admonished *four times* for its discriminatory policies, to no effect; and, in any event, the State had a whiplash-inducing track record of rescinding and reimposing restrictions on a whim. California thus had created a "constant threat" that its officials would use their power to reinstate the challenged restrictions. *Tandon*, 141 S. Ct. at 1297

[4] *E.g.*, Kristen J. Shamus, *The omicron effect? New daily COVID-19 cases smash record in Michigan*, DETROIT FREE PRESS (Dec. 29, 2021), available at https://bit.ly/3tIf4aY.

(quotation omitted). None of these facts is present here, and, unlike California, the State Defendants can support their mootness claim using far more than the bare fact that the orders were rescinded.

B. The rescinded DHHS order did not render this controversy "capable of repetition, yet evading review."

Plaintiffs have the burden to show that this is a controversy "capable of repetition, yet evading review." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 559 (6th Cir. 2021) (citation omitted). They have not done so.

Under this exception, a dispute is not moot if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011).

The first prong is not satisfied. This controversy is not the kind of inherently transitory situation—such as a pregnancy or an election campaign—that necessarily will run its course before the courts can rule on the merits. *E.g.*, *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (elections); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (pregnancy). Neither Plaintiffs nor the panel majority supplied a case applying this exception to activity that *could have* lasted indefinitely, but happened to cease during litigation. Regardless, this matter could have been fully litigated more quickly, but Plaintiffs delayed filing their lawsuit and "failed to take

advantage of opportunities to expedite the litigation." *Resurrection Sch.*, 11 F.4th at 452 n. 10. A case does not "evade" review when Plaintiffs themselves give up the chase.

More importantly, for the reasons set forth above, there is no "reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life, Inc.*, 551 U.S. at 462. Consistent with DHHS's track record, any future masking order would incorporate months of developments in understanding, treating, and vaccinating citizens against COVID-19 and likely would not resemble the orders in issue here. *Thompson*, 7 F.4th at 526.

Finally, one fact (added to the record since the last oral argument) shows that the complained-of "injury" cannot reasonably be expected to reoccur: Begrudgingly, Plaintiffs admitted that they never followed the masking order in the first place. (9/23/21 Hr'g Tr. at 29–31, ECF No. 51, PageID.1091–93 (conceding masks "were not worn in the classrooms" during the 2020–2021 school year).) Plaintiffs therefore never suffered the injury required to establish standing. And unlike a case where a plaintiff intends to engage in prohibited conduct and must establish a credible fear of prosecution, *e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014), Plaintiffs *did* violate the DHHS order for an entire school year—yet no enforcement is alleged. In terms of mootness, this means any

future "injury" would not comprise a reoccurrence because there was never an injury in the first place.

II. The order did not violate Plaintiffs' Free Exercise rights.

Even if this case is not moot, this Court should affirm the denial of Plaintiffs' motion for injunctive relief because the DHHS orders did not affect Plaintiffs differently from any comparable secular activity.

Rational basis review applies here. Strict scrutiny does not apply unless and until Plaintiffs can identify a "comparable secular activity" that receives more favorable treatment than the religious education at issue. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (noting that strict scrutiny applies "once a law fails to meet the *Smith*[5] requirements" of neutrality and general applicability); *Tandon*, 141 S. Ct. at 1298 ("California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). This makes sense. The "comparable secular activity" inquiry is intended to discern whether a restriction is, in fact, "neutral and generally applicable." *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese*, 141 S. Ct. at 66–67. A restriction must satisfy strict scrutiny only when it

[5] *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990).

is not neutral and of general applicability. *Roman Catholic Diocese*, 141 S. Ct. at 67. As set forth below, the excepted activities are not "comparable" in terms of risks related to the COVID-19 pandemic, so rational basis applies.

Even if the court determines that strict scrutiny applies because the different activities are "comparable," the orders survive strict scrutiny because they cannot be tailored further.

A. Because the DHHS order treated all comparable activities similarly, it is neutral and generally applicable and rational basis review applies.

Plaintiffs' challenge does not make it past the concept of "comparability." Neutral, generally applicable laws are subject to rational basis review. Strict scrutiny applies only when the government treats "any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (emphasis omitted). "Comparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.* (citation omitted). Comparability is a matter of degree; the mere fact that two activities each implicate the same *category* of risk (*e.g.*, disease transmission) is insufficient. *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) ("[C]omparability depends on whether the secular conduct 'endangers these interests in a *similar or greater degree* than' the religious conduct does.") (quoting *City of Hialeah*, 508

U.S. at 543 (emphasis added)). Religious activities must be treated no worse than secular activities that equally implicate the harm the government seeks to address.

Before identifying a "*comparable* secular activity," one must identify the allegedly protected activity. *See Tandon*, 141 S. Ct. at 1297 (framing the proper question as whether "those [less-regulated] activities pose a lesser risk of transmission than *applicants'* proposed religious exercise"). Helpfully, Plaintiffs have identified the basis for comparison: In their proposed TRO, they object to the order's requirement that they wear masks while seated indoors at their desks during normal classroom instruction. (*See* Proposed TRO at 1–2, ECF No. 9, PageID.199–200 (proposing injunction against enforcement of DHHS order "when the children are seated at their desks in their elementary school classrooms, socially distanced"[6]).) As framed by Plaintiffs, then, the activity in question comprises indoor mixing of relatively large groups of people from different households, every school day—seven hours a day, five days a week.

Having established the basis of comparison, the pertinent DHHS orders did not except even one secular activity that was "comparable" in terms of risk. To be comparable, the activity would have to resemble in-classroom instruction to the

[6] Plaintiffs define "socially distanced" not as a measure of physical distance, as the term has come to be understood, but rather as a form of social limitation. (Am. Compl. ¶ 9, ECF No. 21, PageID.639 (alleging that Plaintiffs "kept students socially distant from one another by grouping into cohorts of students and, within each cohort, to pods of students").)

extent that the activity "involve[s] (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (statement of GORSUCH, J.). These indisputably represent "factors [that] may increase the risk of transmitting COVID-19." *Id*. In *every instance* meeting those criteria—including but not limited to secular and non-secular classrooms—DHHS's orders required masks. (3/2/21 Order § 7(a).) Any secular activity that was comparable to a classroom setting—one that entailed indoor mixing of large groups from different households in close quarters five days a week for months on end—was equally subject to a mask requirement, in recognition of the fact that it presented a similar risk.

Of course, it is in the exceptions to the orders' general rule that Plaintiffs try to make their case. *See also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (citations omitted) (observing that "general bans that cover religious activity [are in fact discriminatory] when there are exceptions for comparable secular activities"). But none of the exceptions was "comparable" to a classroom in terms of risk, either. The exceptions applied to individuals who:

> (a) Are younger than 5 years old, outside of a child care organization or camp setting . . . ;
>
> (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. [3/2/21 DHHS Order § 8.]

Not one of these activities is comparable, because not one presents the same risk profile as a classroom setting (or, for that matter, any other activity that entails all-day, every day mixing of people from different households in close proximity—every one of which was subject to the mask mandate). Some applied to necessarily smaller groups, or contemplated mask removal by only a small

subset of those involved in the activity.[7] Some described interactions inherently shorter in time than classroom instruction.[8] And many activities were outside of the "comparability" inquiry altogether, because Plaintiffs already belonged to the group that benefitted from the exception.[9] In those instances, the exceptions were available to Plaintiffs in providing their religious education to the same extent they were available for a secular purpose.

The exception for receiving "personal care services" illustrates that the DHHS orders never ran afoul of *Tandon*. (*See* ADF Br. at 6 ("[T]attoo parlors and spas alone prove that the mandate lack[ed] general applicability.").) That exception applied only to the recipient of services—and only to services "for which removal of the face mask [was] necessary."[10] (3/2/21 DHHS Order § 8(f).)

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[7] *E.g.*, 3/2/21 DHHS Order §§ 8(b) (medical intolerance), 8(f) (medical or personal care services), 8(g) (identification), 8(h) (communication with those who need to see the mouth), 8(i) (public safety officers), 8(k) (public speakers).

[8] *E.g.*, 3/2/21 DHHS Order §§ 8(c) (eating), 8(d) (outdoor exercise), 8(e) (swimming), 8(f) (medical and personal care services), 8(g) (identification), 8(i) (public safety officers), 8(j) (religious services).

[9] *E.g.*, 3/2/21 DHHS Order §§ 8(a) (persons under five years of age), 8(b) (medical intolerance), 8(c) (eating), 8(d) (outdoor exercise), 8(e) (swimming), 8(k) (public speaking).

[10] Plaintiffs portray this exception, and others, as applying to "anyone" engaged in activities potentially eligible for an exception—"anyone . . . receiving performing a public safety role" was not required to wear a mask, nor was "anyone . . . receiving a personal care service," and so on. (Pls.' Supp. Br. at 12.) Such misstatements are intended to paint the orders as extremely overbroad and ill-considered, but they

The exception necessarily applied only to situations where only one person removed their mask, and only to the brief extent necessary to receive the service. No one possibly would have received this type of service for thirty-five hours per week, each week, and with twenty other people in the room. Regardless, the activity *still* presented a lower risk of contracting or spreading COVID-19, because everyone other than the recipient of the service remained subject to the general mask mandate.[11]

In sum, each of the exceptions had at least one inherent characteristic rendering it less "risky" than in-person classroom instruction. In-classroom instruction *always* presents all of the compounding risk factors listed above, and none of the exceptions even *possibly* presents the same degree of risk. *See also S. Bay*, 141 S. Ct. at 718 ("But California errs to the extent it suggests its four factors are always present in worship, or always absent from the other secular activities its regulations allow."). DHHS did not make value judgments. It did not decide that certain activities were sufficiently important, relative to religious exercise, to

do so simply by disregarding the plainly stated and circumscribed scope of the exceptions.

[11] The brief removal of a patient's mask did not eliminate the benefit the provider's mask conferred on both parties. *E.g.*, CDC, *Guidance for Wearing Masks* (Apr. 19, 2021) ("When you wear a mask, you protect others as well as yourself."), available at https://bit.ly/3qGxN4Y.

overcome its asserted interest in mitigating the pandemic. Instead, it evenhandedly looked at each activity in terms of its risk.

Again, "comparability depends on whether the secular conduct 'endangers these interests in a *similar or greater degree* than' the religious conduct does." *Monclova*, 984 F.3d at 480 (quoting *City of Hialeah*, 508 U.S. at 543) (emphasis added). The excepted activities inherently pose an appreciably lower risk than in-classroom instruction, and this difference in degree justifies a difference in treatment. In overlooking that key premise to the rescinded orders, Plaintiffs would flatten this Court's inquiry to the point that it becomes meaningless, stating that any broad order that "allows secular exemptions which pose *a risk* of Covid transmission" must be struck down. (Pls.' Supp. Br. at 13 (emphasis added).) Respectfully, Plaintiffs understanding of the governing law is therefore both incorrect and unworkable.

B. Neither *Tandon* nor *Fulton* compels a different result.

Plaintiffs insist that, to the extent there was any ambiguity in the law during this case's lifetime, that ambiguity has been resolved in their favor by *Tandon*, 141 S. Ct. 1294, and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). (Pls.' Supp. Br. at 13–16.) Not so. *Tandon*'s framework underscores that there is no Free Exercise Clause violation here, and *Fulton* offers little guidance on comparability.

Tandon resolved a free-exercise challenge to a California order limiting all gatherings in homes—religious and non-religious—to members of no more than three households. 141 S. Ct. at 1297. Because no "three household" limit applied to comparable secular activities in public places (retail stores, restaurants, etc.), the limit was unsupportable. *Id.* Worse yet, the Ninth Circuit's attempt to explain the difference in treatment was inscrutable. It declined to conclude that there was any inherent difference in risk justifying the difference in treatment; it gave significance to whether a gathering occurred on public or private property; and it held that the precautionary restrictions deemed sufficient for businesses (such as masks) would not "translate readily" to home gatherings. *Id.* (citing *Tandon v. Newsom*, 992 F.3d 916, 926 (9th Cir. 2021)).

Tandon differs from this case, primarily because the premise for *Tandon*'s four-step analysis—the activities being "comparable" for purposes of spreading COVID-19—is not present here. California took two plainly comparable activities and treated them differently. That State (as well as dissenting Justices) attempted to distinguish worship-based overly sweeping and speculative assumptions—such as that all shopping trips would be shorter than all worship services, or all stores would have better ventilation than all homes. *Id.* at 1298 (Kagan, J., dissenting). Such an approach did not account for the rule that a State cannot "treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296.

Whereas the Ninth Circuit "did not conclude that [exempted] activities pose a lesser risk of transmission," *id.*, here DHHS and the panel majority did exactly that.[12] And the State Defendants have explained why the relief Plaintiffs seek—near-total exemption from the orders on an ongoing basis—did "not address its interest in reducing the spread of COVID," *id.* (*See also* Part II.C, *infra*.)

As applied to the issue before this Court—comparability—*Fulton* confirms that the DHHS order did not create an impermissible double standard. There, a religious foster care agency refused to place children with same-sex couples. The City's contract with such agencies purported to bar such refusal using a non-discrimination provision—but the City reserved a right to unilaterally issue "individual exemptions" from the non-discrimination provision. *Fulton*, 141 S. Ct. at 1878. The City's asserted interest supposedly comprised ending discrimination in adoption placements. Inexplicably, however, the City reserved to itself a right to *permit discrimination* by an entity of its choosing. Thus, the City "undermine[d] [its] asserted interests." *Id.* at 1877.

[12] Amicus ADF asserts that the panel concluded only that "almost all" of the exceptions posed a lesser risk. (ADF Br. at 6 (quoting *Resurrection School*, 11 F.4th at 458).) In fact, the panel majority concluded that the only exceptions that did not apply to lower-risk activities were the medical-necessity exception and the exception for children under age five. Both these exceptions applied to Plaintiffs' religious exercise, however, meaning that no secular actor was "favored" in this regard. Moreover, the medical-necessity exception *was* a lower-risk activity because it applied to individuals, not groups.

Even setting aside the relevant fact that the DHHS order does not permit ad hoc, individualized exceptions, *Fulton* would be applicable here only if the DHHS order afforded different treatment to two activities that facially implicated the State's interest in mitigating the pandemic in the same way and measure. As stated above, because the exceptions to the mask requirement were premised on lower risk, they are neither comparable nor "entirely discretionary," *id.* at 1878, and they did not undermine the asserted interest.

Fulton, *Tandon*, and the DHHS orders all hew to the principle that a State must regulate religious and secular activities the same when each implicates the State's asserted interest to the same degree. In *Tandon*, that involved gathering in a private space versus gathering in a public space. In *Fulton*, it involved enforcing a non-discrimination provision against one party versus permitting another party to violate the same non-discrimination provision. Here—representing the other side of the coin—the DHHS order involved indoor mixing of large groups from different households for months on end versus activities that necessarily were brief, conducted outdoors, involved a smaller group, or some combination thereof. Because DHHS acted in accordance with the principles set forth in these and other cases, this Court should therefore affirm.

C. Even if strict scrutiny applies, the DHHS order satisfied that standard.

If this Court disagrees and applies strict scrutiny, it still should affirm. The State's interest in mitigating the COVID-19 pandemic is compelling. *See also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest."). Plaintiffs disagree only that the mask requirement is narrowly tailored.

The order established a default rule: One must wear a mask to participate in a gathering. Acknowledging that such a rule, on its own, might benefit from further tailoring, the order set about fine-tuning that rule. It offered exceptions for religious worship, medical intolerance, and activities posing a reduced risk, to name a few. For several of these, the exceptions were available to anyone, including Plaintiffs, and thus did not render one group of people less regulated than another. This kind of structure is the definition of narrow tailoring.

Furthermore, a regulation like this one, whose efficacy is rooted in its widespread application, survives strict scrutiny when the nature of the requested exemption "would undermine the soundness of the . . . program." *United States v. Lee*, 455 U.S. 252, 258 (1982) (quotation omitted). "[A] comprehensive [regulatory] system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer." *Id.* Limited exceptions from such a system do not undermine its soundness, *see S. Ridge*

Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1209 (6th Cir. 1990) (holding that narrow, identifiable exemptions do not defeat the general rule set forth in *Lee*), but Plaintiffs' proposed exception would do just that.

Crucially, the activity Plaintiffs ask this Court to add to that list shares nothing in common with the items already on it, and granting their request would vault Plaintiffs past equality and into a special favored class. Plaintiffs' idea of a narrowly tailored mask order is one that "exempt[s] a non-public religious school or K through fifth grade students . . . who attend religious schools." (Pls.' Br. in Support of Mot. for Prelim. Inj. at 22, ECF No. 8, PageID.158.) But that is incompatible with any of the risk-mitigating characteristics weighed by the public health experts at DHHS when formulating the exceptions. This kind of clumsy, overbroad "tailoring" would throw the baby out with the bathwater, proving that the order is already as narrow as can be while still retaining effectiveness.

It is also relevant to narrow tailoring that this case relates to masking—an already "tailored" restriction, calculated in part to permit activities like in-person school to occur—whereas all of the other COVID-19 cases entailed telling certain people they could not go somewhere. The Supreme Court has determined that a regulation fails to satisfy strict scrutiny when a State inexplicably declined to apply precautions deemed "good enough" for secular activities. *S. Bay*, 141 S. Ct. at 719 (statement of Gorsuch, J.) ("[T]he State fails to explain why narrower options it

finds sufficient in secular contexts do not satisfy its legitimate interests."); *Tandon*, 141 S. Ct. at 1297. For example, a State may not permit secular businesses to operate at any capacity so long as patrons wear a mask, while simultaneously restricting capacity at houses of worship regardless of congregants' willingness to mask up. But, again, this case is about masks; it is incoherent to ask the State to "explain why it could not safely permit" Plaintiffs' desired activity "while using precautions used in secular activities," *Tandon*, 141 S. Ct. at 1297, because what Plaintiffs want is to be excused from the very "precautions" the State has deemed necessary to "safely permit" both Plaintiffs' activities and comparable secular activities.[13] That Plaintiffs may prefer to choose their own precautions (or none at all) does not render the ones required of them (and all other schools) constitutionally infirm. *See Lee*, 455 U.S. at 258.

For these reasons, the DHHS orders were narrowly tailored to serve a compelling state interest.

[13] Appropriately, *Tandon* put the focus on precautions deemed acceptable *by a State's public health experts*. 141 S. Ct. at 1297. Giving weight to Plaintiffs' subjective beliefs about their unapproved precautionary measures, (Pls.' Supp. Br. at 6–7), would run counter to the principle that judges "are not public health experts, and [courts] should respect the judgment of those with special expertise and responsibility in this area." *Roman Catholic Diocese*, 141 S. Ct. at 68.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully ask this Court to hold that this lawsuit challenging DHHS's long-rescinded public health order is moot. In the alternative, it should affirm the District Court on the grounds either that the order was neutral and generally applicable and survives rational-basis review or survives strict scrutiny.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. The length of this brief having been specified by this Court, the type-volume limitations of the Federal Rules of Appellate Procedure do not apply. This brief complies with the 25-page limit set forth in this Court's November 10, 2021, letter.

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CERTIFICATE OF SERVICE

I certify that on January 28, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

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