NO. 20-2256

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, INDIVIDUALLY AND AS NEXT FRIEND ON BEHALF OF MINOR CHILDREN C.M., Z.M., AND N.M; AND 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 S. VAIL, IN HER OFFICIAL CAPACITY AS THE HEALTH OFFICER OF INGHAM COUNTY; AND CAROL A. SIEMON, IN HER OFFICIAL CAPACITY AS THE INGHAM COUNTY PROSECUTING ATTORNEY,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL L. MALONEY
Civil Case No. 1:20-cv-1016

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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REPLY

A five-year-old enters her kindergarten classroom at her Catholic school. The government requires her to wear a face mask. She is directed to sit at a table with two other students; both are unmasked because they have doctors' notes. The bell rings. The teacher asks the students tell the class about their summer vacations. The students can give presentations alone or with friends, and while engaged in this public speaking exercise remove their masks. A police officer checks in on the class to make sure everyone is safe. He does not wear a mask and is exempted from the requirement regardless of how long he stays; he could give a presentation on community policing and would not be required to mask. Meanwhile, the religious education teacher must cover her face with a mask.

The governments' order creates this perplexing landscape. It forwards the idea that a student in a classroom poses a public health risk, but then exempts that student from the mask requirement for reasons not related to the students' risk of transmitting COVID. In its reply, the government argues it "evenhandedly looked at each activity in terms of its risk" before restricting some activities, but not others, under its epidemic powers. (Defs. Hertel & Nessel Supp. Br. at 17). Aside from the fact that there is no evidence in the record to support this, the above examples demonstrate the lack of exactness in that assertion. The order fails to follow the framework required in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

A religion class poses no greater danger than a public speaking class. Being in a classroom with a COVID negative student of faith poses no greater danger than being in a classroom with a COVID negative student who has a note from a D.O. Engaging in religious education in the classroom poses no greater danger to public health than performing law enforcement functions in that same classroom. Sitting at a desk learning for three hours poses no greater danger than sitting at a table in a public restaurant for three hours. These activities pose comparable risk, but the government has withheld an exemption for the religious activity while granting exemptions for secular purposes. This is a fatal flaw under *Tandon*, 141 S. Ct. 1294 and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The government's order is not neutral or generally applicable. It fails strict scrutiny review. It should be immediately enjoined. Thus, it is imperative that the Court reach the merits of this case.

The government asserts an extreme reading of the mootness doctrine that would allow it to impose any epidemic order it pleases, while evading the review of the appellate courts. The nature of the government's ever-changing COVID orders allow only a small window of time for adjudication in the courts. Recognizing this, the Supreme Court found it proper to allow a plaintiff to obtain injunctive relief from such an order that has been rescinded. *Tandon*, 141 S. Ct. at 1297. Plaintiffs have faced the constant threat of Defendants' orders. Indeed, Defendant Hertel continues

to advise public health agencies under MDHHS' control to require universal masking without religious accommodations. Defendants continue to exercise their authority to issue emergency epidemic orders. Nothing would prevent Defendant Hertel from re-issuing another face mask order today without any legal repercussion.[1] Defendants argue that the case is moot, asserting that Plaintiffs are not facing a constant threat of enforcement. Yet Defendant Vail is *presently* imposing a face mask order against Plaintiffs. *See Resurrection Sch. v. Hertel*, No. 21-1699, 2022 WL 332400 (6th Cir. Jan. 11, 2022); *Resurrection Sch. v. Hertel*, No. 1:20-CV-1016, 2021 WL 5121154, at *6 (W.D. Mich. Nov. 3, 2021), vacated and remanded, No. 21-1699, 2022 WL 332400 (6th Cir. Jan. 11, 2022) (concluding that Defendant Vail's order was reasonable based in part on its reliance on MDHHS's recommendation that students should wear face coverings in schools).

The government has fallen fatally short of its burden of proving mootness. Beyond its naked assertions, the record fails to support the government's claim that it is "absolutely clear" the same order could not be issued today. In fact, Defendants are presently imposing the same restriction on Plaintiffs and imposing a substantial

[1] Hertel continues to issue epidemic orders, stating "I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws." (https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-575843--,00.html, *last visited* Feb. 8, 2022).

burden on their religious exercise. This case squarely falls within the voluntary cessation doctrine and capable of repetition, yet evading review exception to mootness. This Court should exercise its jurisdiction (and its duty) and reverse the district court's denial of injunctive relief. We turn first to the mootness issue.

I. VOLUNTARY CESSATION OF A COVID ORDER DOES NOT MOOT A CLAIM FOR INJUNCTIVE RELIEF FROM THE ORDER.

A case may become moot if the issues that gave rise to it have been resolved or have otherwise disappeared. "[M]ootness asks whether the injury that has happened is too far beyond a useful remedy." 13 C.A. Wright, A.R. Miller & E.H. Cooper, *Federal Practice & Procedure* § 3531.12, at 50. Mootness should not bar a plaintiff from obtaining relief. Instead, a case "becomes moot only when it is *impossible* for a court to grant *any effectual relief* whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added). "As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Id*. (emphasis added).

Defendants argue that this case is moot based solely on the government's voluntary cessation of the order at the end of June. Defendants' arguments are unconvincing. In *Tandon*, the Supreme Court held 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. *Roman Catholic Diocese*, 592 U. S., at ——, 141 S.Ct., at 68; *see also High Plains Harvest Church v. Polis*, 592 U. S. ——, 141 S. Ct. 527, 208 L.Ed.2d 503 (2020).

Tandon, 141 S. Ct. at 1297. Defendants ask this Court to depart from *Tandon*, arguing that Plaintiffs do not remain under a constant threat. Such a claim ignores the reality that Defendants continue to impose (on Plaintiffs) universal masking without any accommodation for private religious schools. Plaintiffs are not just under a constant "threat," but are actually under extant COVID orders—the exact harm the Supreme Court sought to address in *Tandon* with its holding that continual COVID orders imposing injury on plaintiffs did not moot their ongoing claim for relief. Defendants' argument that they have changed their errant ways and will not return to a similar order is as hollow and as it is disingenuous. Currently, Defendants mandate and encourage a similar order. *See Resurrection Sch.*, 2022 WL 332400, at *1–2; (https://www.michigan.gov/documents/coronavirus/MI_Safer_Schools_Guidance_for_Managing_Students_Exposed_to_COVID-19_734750_7.pdf, *last visited* Feb. 8, 2022) ("MDHHS continues to recommend universal masking in K-12 schools.") (emphasis in original); (https://hd.ingham.org/Portals/HD/Home/Documents/cd/Coronavirus/EOSept2-2021-2.pdf, last *visited* Feb. 8, 2022 (after rescinding its order in June, "MDHHS issued updated guidance" continuing the policy challenged here "that all schools should require universal indoor masking").

Defendants allege to have abandoned universal masking in schools. Their

actions show otherwise. Defendants claim entitlement to a good faith presumption because they are the government, but Defendants fall short of the criteria required to obtain this presumption. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-70 (6th Cir. 2019). Defendants' orders are "ad hoc, discretionary, and easily reversible." *Id.* at 767. Defendant Hertel, at her discretion, unilaterally issues, promulgates, and oversees the epidemic orders that Plaintiffs have challenged. The discretion to change the department's orders lies with her and her alone. "[T]here are no formal processes required to effect the change." *Id.* at 767. Without an order from this Court, nothing would stop Defendant Hertel from issuing the universal masking order again. And it would not be surprising if Defendant Hertel did.

The government only makes its mootness argument worse with its requirement for masking in schools without regard to religious accommodations and by "vigorously defending the constitutionality" of its orders in Court. *Id.* at 770. Nearly all of the factors discussed in *Speech First, Inc.* weigh heavily *against* a presumption of good faith in this case. Finally, the government argues that mootness hinges on the availability of the COVID vaccine. (Defs. Hertel & Nessel Suppl. Br. at 5). It asserts that since vaccinations are now available, we cannot expect "the same burdens" in the future. (Defs. Hertel & Nessel Suppl. Br. at 5) (quoting *Thompson v. DeWine*, 7 F.4th 521, 526 (6th Cir. 2021)). This statement is problematic for three reasons. First, the government ignores that *presently* they are

enforcing and encouraging the exact same burden of universal masking in the religious classroom, even in light of widespread vaccination.[2] Second, it contradicts itself by asserting that the vaccine has eliminated the need for masking orders to be reviewed by the Court because conditions have substantially improved; but then inconsistently states that—post-vaccine—the state has "suffered through two devasting surges," cases have "skyrocketed," and "hospitals again were pushed to the brink." (Defs. Vail & Siemon Suppl. Br. at 7). Both statements cannot be true: COVID cannot be neutered to the point of making regulation cases moot and, at the same time, be raging to "skyrocketed" proportions. Defendants do not establish the high burden of establishing it is "absolutely clear" the case is moot.

And third, Defendants rely on *Thompson v. DeWine* to assert the generalization that adjudication of COVID restrictions is now moot. 7 F.4th 521.

[2] Defendants deny "that should a preliminary injunction be issued, it would enjoin Hertel from continuing to authorize and support local departments and agents from violating Appellants' religious liberty." (Defs. Vail & Siemon Suppl. Br. at 8). Rule 65, however, provides that a preliminary injunction "binds (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Fed. R. Civ. P. 65 (d)(2)(A)-(C). Furthermore, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Defendants enact and carry out their enforcement orders in concert with each other. *See, e.g.*, Mich. Comp. Laws §§ 333.2211; 333.2224; 333.2235; 333.2237; 333.2251; 333.2431; 333.2437; 333.2482; 333.2483;333.2488; 333.2492; 333.2495; 333.2497.

Again, Defendants' argument is wrong. *Thompson* asked whether a claim for declaratory relief, to effectuate a change in the results of the 2020 election cycle, was moot a year and a half after the election had concluded. Since the relief plaintiffs requested in that case sought specific relief solely pertaining to the November 3, 2020 election, the case was moot because the election was over. *Id*. at 523-25. This differs from the case at hand, which seeks to enjoin Defendants' COVID orders in so far as they continually threaten and substantially burden their religious exercise.

Since October 2020, Plaintiffs have challenged Defendants' COVID orders requiring face masks in the private, religious classroom. As in *Tandon*, despite the rescinding of old orders, the same restrictions regarding face masks remain in place. The governmental officials here, as in *Tandon*, have a "track record of 'moving the goalposts' [to] retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297 (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.)). The Panel correctly found that "Defendants have been consistent in their approach to mask requirements." *Resurrection Sch. v. Hertel*, 11 F.4th 437, 451 (6th Cir.), *reh'g en banc granted, opinion vacated*, 16 F.4th 1215 (6th Cir. 2021). Defendants' persistence has not changed—the face mask requirement is in place at the behest of the Defendants, and similar, future orders can be signed on a whim by Defendant Hertel at any time.

Defendants bear the burden to establish that voluntary cessation of the order

makes "it ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur." *Speech First*, 939 F.3d at 770. They have not met that burden.

II. THE GOVERNMENT'S ORDER IS CAPABLE OF REPETITION YET EVADING REVIEW.

Defendants argue that its rescinded order is not capable of repetition. It is. Defendants' short-lived COVID regulations are precisely the sort of action for which this exception was created, and it is reasonable for Plaintiffs to expect the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Plaintiffs have been subject to Defendants' rotating face mask orders since fall of 2021 and are still subject to the mandate. Defendants continue to declare their authority to issue epidemic orders, and have done so as recently as January 2022 (https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-575843--,00.html, *last visited* Feb. 8, 2022); (https://hd.ingham.org/Portals/HD/Home/Documents/cd/coronavirus/EOSept22021-2.pdf, *last visited* Feb. 8, 2022). Although the capable of repetition, yet evading review exception requires only *capability* of reoccurrence. "[T]he chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness. Instead, it is sufficient that [the plaintiffs] *possibly* could have found [themselves] once again in the same situation [they] faced when [the] suit was filed." *Barry v. Lyon*, 834 F.3d 706, 716 (6th Cir. 2016). This case is not moot.

III. THE GOVERNMENT'S ORDER VIOLATES THE FIRST AMENDMENT

Defendants' arguments cannot be squared with the Supreme Court's decisions in *Tandon* and *Fulton* and this Court's holding in *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 481 (6th Cir. 2020), *reh'g denied* (Jan. 6, 2021). Defendants supplemental briefs echo one sentiment—Defendants wish the controlling precedent were different. But it is not; Plaintiffs have established a likelihood of success on their Free Exercise claim.

Defendants "treat[] some comparable secular activities more favorably than" religious education." *Tandon*, 141 S. Ct. at 1297. Their order permits the removal of masks for commercial purposes, at restaurants, in speech class, and for students with doctors' notes claiming medical exemptions. *Tandon* requires the Court to conclude whether exempted "activities pose a lesser risk of transmission than" Plaintiffs' religious exercise at their private school (with consistent and robust COVID safety practices). *Id.* The district court "erroneously rejected these comparators," limiting its inquiry to school buildings (albeit providing the same analysis for Plaintiffs' private and highly regulated school to school buildings open to the public at large). This inquiry is too narrow. *Monclova*, 984 F.3d at 481 (finding "no support . . . in the relevant Supreme Court caselaw" that this Court "may consider only the secular actors (namely, other schools) . . . in determining whether the plaintiffs' schools are treated less favorably than comparable secular

actors are."); *Resurrection Sch.*, 2022 WL 332400, at *1 (remanding to district court to apply a comparative risk analysis and clarifying that "[i]n *Tandon* and *Monclova*, the courts identified comparable less restricted activities to include such things as retail stores, movie theatres, gyms, and office buildings.").

Instead of addressing the risks posed by these comparable activities, the government offers its own opinions, and even self-proclaimed necessity, for exempting secular activities, but not Plaintiffs' religious exercise. But under *Tandon* and *Monclova*, the government is required "to explain why it could not safely permit" the religious activity before interfering with it. *Tandon*, 141 S. Ct. at 1297 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)). This requirement is not "incoherent," as Defendants characterize it; it is the central holding of *Tandon*.

Fulton v. City of Philadelphia also requires the application of strict scrutiny. Defendants allege *Fulton* is a case about a "contract." (Defs. Vail & Siemon Suppl. Br. at 22). Defendants argue that since Director Hertel did not individually review each request for an exemption herself and instead created a scheme of exemptions, the order must be generally applicable. *Id.*[3] Justice Gorsuch's dissent in *Does 1-3 v. Mills* provides a different view. 142 S. Ct. 17, 19 (2021) (J., Gorsuch, dissenting).

[3] Defendants argue their exemptions were "specifically available to Appellants." (Defs. Vail & Siemon Suppl. Br. at 22). Defendants' exemption for swimming at a school without a pool or medical exemption for Plaintiffs without any qualifying medical conditions are not "specifically available." The exemptions did nothing to ameliorate the government's interference with their religious exercise.

Justice Gorsuch asks whether Maine, by permitting a medical exemption from its state-wide COVID regulation, has established a scheme of individualized exemptions. *Id*. As here, Maine's law did not limit who could obtain a medical exemption or what might qualify as a medical basis worthy of exemption. *Id*. The law only required that the exemption be "phrased in medical and not religious terms." *Id*. The dissent concluded that the mere existence of an exemption for medical purposes, but not for the protection of religious exercise, presented the "kind of double standard . . . enough to trigger . . . strict scrutiny." *Id*. The controlling inquiry is whether the government has provided a "mechanism for individualized exemptions." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). If so, "it must grant exemptions for cases of 'religious hardship.'" *Id*. (quoting *Fulton*, 141 S. Ct. at 1877). Thus, Defendants must do so here.

CONCLUSION

Based on the foregoing, this Court should reverse the district court's denial of preliminary injunctive relief and enter the injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached petition is proportionally spaced, has a typeface of 14 points Times New Roman, is no more than 12 pages in length.

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022 I electronically filed the foregoing Supplemental Brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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