No. 20-2256

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESURRECTION SCHOOL, *et al.*,

Plaintiffs-Appellants,

v.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Western District of Michigan
Case No. 1:20-cv-1016, Hon. Paul L. Maloney

BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF PRESBYTERIANS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-2256 Case Name: Resurrection School v. Hertel

Name of counsel: Alexander J. Luchenitser

Pursuant to 6th Cir. R. 26.1, see attachment
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 24, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alexander J. Luchenitser

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

ATTACHMENT TO DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FORM

The disclosures on the previous page apply to all the *amici* filing this brief. The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious and should never be misused to cause harm. *Amici* therefore write to explain that the Free Exercise Clause does not entitle religious schools to exemptions from public-health rules that apply to all institutions.

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. More than 543,000 Americans, including more than 16,900 Michigan residents, have died from COVID-19. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Mar. 23, 2021), https://bit.ly/31VrTAa. And though children are less likely than adults to suffer serious illness from the virus, some children do become very sick or die, and there is growing evidence that a significant proportion of children who are infected suffer distressing, long-lasting symptoms thereafter. *See infra* at 21.

To reduce the suffering and death that the pandemic is causing, Michigan has issued an order that requires all people in the state who are at least five years old to wear face masks whenever they are in a shared space with someone outside their household. *See March 19 Gatherings and Face Mask Order* §§ 1(k), 7(a), STATE ORDERS AND DIRECTIVES (Mar. 19, 2021), https://bit.ly/3tPOCZO. The mask order applies equally to all schools—public, secular private, and religious. *See FAQs for the March 19, 2021 Gatherings and Face Mask Order*, STATE ORDERS AND DIRECTIVES, https://bit.ly/2Pnxuvs (last visited Mar. 23, 2021). Moreover, virtually all of the exemptions from the face-mask requirement—including an exemption for individuals who "[a]re engaging in a religious service"—

apply equally in schools and non-school environments. *See* Mask Order § 8.

Plaintiffs nevertheless seek a complete exemption from the mask order for their religious school, contending that the order violates the First Amendment's Free Exercise Clause. But the Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Clause. Michigan's mask mandate complies with this legal standard because it applies equally to all schools, religious or secular, and to all other spaces shared by people from more than one household. Even if heightened scrutiny were warranted, Michigan's mask requirement is constitutional because it is narrowly tailored to advance the state's compelling interest in protecting its residents from a deadly disease. And history supports this result, confirming that the Free Exercise Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety.

ARGUMENT

Michigan's mask requirement does not violate the Free Exercise Clause.

A. Rational-basis review applies to Michigan's mask requirement.

Religious freedom is a value of the highest order, and the provision of religious education for children is particularly important to many people of faith. But as the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). As Justice Scalia previously wrote for the Court, to "h[o]ld that an individual's religious beliefs excuse him from compliance with an otherwise valid law" would make "'professed doctrines of religious belief superior to the law of the land'" and "'in effect . . . permit every citizen to become a law unto himself.'" *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Supreme Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are neutral toward religion and apply generally. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531, 543 (1993); *Smith*, 494 U.S. at 879.

The neutrality requirement means that a law must not "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The Free Exercise Clause thus bars discriminating against religion facially or through "religious gerrymanders" that target specific religious conduct. *Id.* at 534 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). General applicability is the closely related concept that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 531, 543. The touchstone in both inquiries is whether government has discriminated against religious conduct. *See id.* at 533–34, 542–43.

Michigan's face-mask mandate does not discriminate against religion. It applies equally to all schools—public, secular private, and religious. That should be enough to end the analysis. But even if it were appropriate to inquire further and consider whether the exemptions in the mask order discriminate against religion, the answer would remain the same. For the mask order contains an express exemption for individuals who "[a]re engaging in a religious service"; virtually all of the order's exemptions also apply in the school context; and nearly all concern brief activities that pose much less risk than does being without a mask in a classroom all day.

1. The mask requirement treats religious schools the same as nonreligious ones.

That the mask order applies to both religious and nonreligious schools is sufficient, under this Court's precedent, to foreclose Plaintiffs' free-exercise claim. In *Danville Christian Academy v. Beshear*, __ F.Supp.3d __, No. 3:20-cv-75, 2020 WL 6954650, at *4 (E.D. Ky. Nov. 25, 2020), a district court enjoined under the Free Exercise Clause a Kentucky order that temporarily prohibited in-person instruction at all K–12 schools in the state, concluding that Kentucky discriminated against religious schools by allowing certain nonreligious institutions other than K–12 schools to remain open. In a published opinion, this Court refused to compare the rules governing religious K–12 schools to rules governing entities other than schools, concluded that the plaintiff religious school was unlikely to succeed on the merits of its claims, and therefore stayed the injunction. 981 F.3d 505, 507–09 (6th Cir. 2020). The Court explained that the Kentucky order "applie[d] to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it [was] therefore neutral and of general applicability." *Id.* at 509.

Two days after this Court issued that decision, the religious school filed an emergency application for injunctive relief with the Supreme Court. *See* Docket, *Danville Christian Acad. v. Beshear*, No. 20A96 (U.S., docketed

Dec. 1, 2020), https://bit.ly/3ks7FpF. Kentucky's governor filed his opposition three days later, on December 4, 2020. *See id.* Nearly two weeks later, on December 17, the Supreme Court issued a decision. 141 S.Ct. 527 (2020). In it, the Court noted that the Kentucky order would expire by January 4, 2021, and that "many Kentucky schools" would be on a holiday break starting December 18. *Id.* at 527. The Court ruled: "Under all of the circumstances, especially the timing and the impending expiration of the Order, we deny the application without prejudice to the applicants or other parties seeking a new preliminary injunction if the Governor issues a school-closing order that applies in the new year." *Id.* at 528. Only two Justices (Alito and Gorsuch) dissented. *See id.* at 528–30. Though the Court did not adjudicate the merits of the matter, the absence of other dissenters and the Court's lack of immediate action on the application when plenty of time remained before the challenged order's expiration suggest that a majority of the Court agreed with this Court's decision to compare religious schools to nonreligious schools and not to other, nonschool settings.

Yet subsequently, in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477, 479, 482 (6th Cir. 2020)—a decision on which Plaintiffs substantially rely (Appellants' Br. 29–31)—

another panel of this Court enjoined an Ohio county's temporary restrictions on all public and private in-person education for seventh through twelfth graders, on the grounds that "gyms, tanning salons, office buildings, and the Hollywood Casino" were permitted to remain open. With deep respect to the *Monclova* panel, *amici* submit that *Monclova* is irreconcilable with *Danville*, and that because *Danville* was decided first, *Danville* and not *Monclova* is circuit precedent. *See, e.g.*, *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000). The *Monclova* panel was of the view that *Danville* did not expressly decide whether it was proper to compare restrictions on religious schools to limitations on non-school entities (*see Monclova*, 984 F.3d at 481), but because the main argument made by the district court and the plaintiffs in *Danville* was that religious schools were being closed while non-school entities were allowed to stay open (*see* __ F.Supp.3d __, 2020 WL 6954650, at *4; 6th Cir. No. 20-6341, Doc. 22, Pls.-Appellees' Resp. Mot. Stay Pending Appeal, at 2–5, 14–23), it is clear that the *Danville* panel concluded that considering restrictions on institutions other than schools would be incorrect. As the key contention upon which the *Monclova* panel relied was "brought to the attention of the court," "ruled upon," and rejected by the *Danville* panel, *Danville* is

controlling. *See United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)).

Amici further respectfully submit that the *Monclova* panel's view of the substantive law was in error because if it were correct, multiple decisions of the Supreme Court in free-exercise cases would have had to come out opposite to how the Court actually decided them. In *Smith*, 494 U.S. at 874, 890, for example, the Supreme Court held that Oregon's general criminal prohibition against use of the mind-altering drug peyote could be constitutionally applied to people who use peyote as a religious sacrament. The Court concluded that the Oregon law was neutral and generally applicable, as it prohibited both religious and nonreligious uses of peyote. *See id.* at 874, 879–80. Yet on the *Monclova* panel's view, because Oregon has long allowed people to use another mind-altering substance—alcohol—for secular and religious purposes, Oregon's statutes would amount to unconstitutional religious discrimination between secular uses of alcohol and religious uses of peyote.

Likewise, in *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989), the Supreme Court ruled that the Free Exercise Clause did not entitle a religious group's members to an exemption from taxation of income paid for spiritual-training sessions. The Court explained that the tax code

contains a general prohibition against deducting from income money paid to nonprofits in exchange for services. *See id.* at 687–88, 699–700. Of course, the tax code allows taxpayers to deduct contributions to both religious and nonreligious charities when the taxpayer receives nothing in return. *See id.* at 687–88. Yet the *Monclova* panel's view of the law would have made *Hernandez* come out the other way, because the tax code affords different treatment to payments for spiritual-training sessions than it does to pure gifts to nonreligious charities.

Similarly, in *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 U.S. 617, 618–19, 621, 630–31 (1961) (plurality opinion), the operators of a Kosher supermarket unsuccessfully challenged under the Free Exercise Clause a Massachusetts law that prohibited all supermarkets from opening on Sundays while allowing people to attend religious services and engage in various recreational activities on Sundays. *Id.* at 621. If the *Monclova* panel's view of the law were right, the Massachusetts law would have been struck down on the ground that it discriminated between operation of a religious supermarket and secular recreational activities.

In addition, the Supreme Court ruled just last year in *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2251, 2255 (2020), that

the Free Exercise Clause barred Montana from using a tax-credit program to fund tuition at private secular schools while excluding religious schools—solely because of the schools' religious character—from the program's benefits. But the Court made clear that "[a] State need not subsidize private education" at all. *Id.* at 2261. In other words, funding public schools but not private religious and secular schools is not discrimination against religion under the Free Exercise Clause. For purposes of determining whether government is discriminating against religion, the treatment of religious private schools should therefore be compared to the treatment of secular private schools, not to rules applicable to other kinds of institutions or activities.

2. The mask requirement's exemptions do not discriminate against religion.

Even if it were proper to extend the analysis beyond the question whether the mask order treats religious schools the same as nonreligious schools, the result would not change. For the mask requirement is not limited to schools but instead applies to all places where people from more than one household share a space. *See* Mask Order §§ 1(k), 7(a). And far from disfavoring religion, the mask order contains an express exemption for individuals who "[a]re engaging in a religious service." *Id.* § 8(j).

What is more, virtually all the other exemptions to the order are applicable to—and can be invoked within—the religious-school context. *See id.* § 8; State Appellees' Br. 25–29; Cty. Appellees' Br. 27–28. The only exemption that is not applicable within schools, which is for residential gatherings where everyone is vaccinated, is equally applicable to religious residential gatherings. *See* Mask Order § 8(n). In addition, *all* the exemptions for types of conduct are for activities that are normally brief (*see id.* § 8), whereas Plaintiffs seek an exemption that would allow students to be without masks in class throughout the day. And though the exemption for individuals who "[c]annot medically tolerate a face mask" (*id.* § 8(b)) is not temporally limited, it cannot trigger heightened scrutiny under the Free Exercise Clause because it serves the same governmental interest that the mask requirement itself serves—protecting people's health. *See Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 265–66 (3d Cir. 2007).

Plaintiffs rely on *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), and *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), which enjoined restrictions on in-person worship services, as did *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021), and *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020). But in *Diocese of*

Brooklyn and *South Bay*, states subjected houses of worship to special rules that applied only to them, while imposing lesser restrictions on activities that the Supreme Court deemed comparable. *See Diocese of Brooklyn*, 141 S.Ct. at 66–67; *S. Bay*, 141 S.Ct. at 717, 719 (statement of Gorsuch, J.). Similarly, in *Roberts* and *Maryville Baptist*, Kentucky classified houses of worship within a broad category of "mass gatherings" but created numerous exemptions from that category for activities that this Court deemed comparable. *See Roberts*, 958 F.3d 411–12, 414–15; *Maryville Baptist*, 957 F.3d at 611, 614–15. By contrast, Michigan's mask requirement is applicable to all institutions, exempts religious worship, and provides no exemptions remotely like the broad one that Plaintiffs demand.

As the mask requirement works no discrimination against religion, it should not be subjected to any heightened review under the Free Exercise Clause; rational-basis review applies. *See, e.g.*, *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.*, 567 F.3d 278, 302 (6th Cir. 2009).

3. This Court has repeatedly rejected Plaintiffs' "hybrid rights" theory.

Plaintiffs also contend that heightened scrutiny should apply because they couple their free-exercise claim with an argument that the mask order infringes on the rights of parents to control the education of their

children. Appellants' Br. 32. But this Court has repeatedly rejected the "hybrid rights" theory that combining a free-exercise claim with an allegation of violation of another constitutional right should trigger heightened scrutiny that does not otherwise apply. *See Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993); *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 240 F.3d 553, 562 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002).

In all events, Plaintiffs have no colorable claim here that Michigan is violating parental rights to control the education of their children. "The [Supreme] Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." *Runyon v. McCrary*, 427 U.S. 160, 178 (1976). Indeed, the Supreme Court has "expressly acknowledged 'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.'" *Id.* at 178–79 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)); *see also Seger v. Ky. High Sch. Athletic Ass'n*,

453 F.App'x 630, 634 (6th Cir. 2011) ("fundamental right of parents to control the education of their children d[id] not extend to a right to demand" that students attending religious schools be exempted from general rules governing eligibility to take part in interscholastic athletics).

* * * * *

Michigan's mask requirement is thus subject to rational-basis review only. And because it is rationally related to Michigan's interest in combatting the pandemic, it does not violate the Free Exercise Clause.[2]

B. Michigan's mask requirement would satisfy even a compelling-interest test.

Even if a compelling-interest test did apply, more than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand that scrutiny. Before its decision in *Smith*, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest test whenever religious exercise was substantially burdened by governmental

[2] Plaintiffs' Equal Protection Clause claim likewise does not trigger heightened scrutiny, for equal-protection arguments that are based (as here, *see* Appellants' Br. 34) on an alleged burden on the free exercise of religion are subject to rational-basis scrutiny when there is no violation of the Free Exercise Clause. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). The same is true for Plaintiffs' substantive-due-process claim. *See* State Appellees' Br. 44–45; Cty. Appellees' Br. 29–34.

action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Yet those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness.

More than one hundred years ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *See id.* at 26. The Court thus straightforwardly rejected the view that the Constitution bars compulsory measures to protect the public health, recognizing instead the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state.'" *Id.* (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). For "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Although *Jacobson* did not specifically consider a Free Exercise Clause argument, perhaps because the Clause had not yet been held applicable to the States, several of the Court's subsequent decisions have recognized

that the principles of the case apply in the free-exercise context as in all others. In *Prince v. Massachusetts,* 321 U.S. 158, 166–67 (1944), for example, the Court explained that one "cannot claim freedom from compulsory vaccination . . . on religious grounds," as the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease." In *Sherbert*, 374 U.S. at 402–03, the Court, citing *Jacobson* and *Prince*, noted that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." And in *Yoder*, 406 U.S. at 230 & n.20, the Court underscored that free-exercise claims are denied when "harm to the physical or mental health . . . or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred"; in explaining that foundational principle, the Court specifically pointed (*id.* at 230 & n.20) to *Jacobson*, as well as a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), and a case rejecting an attempt to use the Free Exercise Clause to block a lifesaving blood transfusion (*In re*

President & Dirs. of Georgetown Coll., 331 F.2d 1000, 1007–10 (D.C. Cir. 1964) (Wright, J., in chambers)).

The Supreme Court has also repeatedly denied in other contexts free-exercise claims for religious exemptions that would have imposed harms on third parties. For example, in *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court rejected an Amish employer's request for an exemption from paying Social Security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." In *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (plurality opinion), the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." And in *Prince*, 321 U.S. at 170, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children."

Consistent with this line of cases, the Supreme Court held in *Diocese of Brooklyn*, 141 S.Ct. at 67, that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." Michigan's mask requirement is

critical to the advancement of that interest. There have been numerous outbreaks of the virus in schools. *See, e.g.*, THE COVID MONITOR, https://bit.ly/3s2BrV6 (last visited Mar. 23, 2021). And mask-wearing is essential to reduction of transmission in the school environment. *See, e.g.*, *Operational Strategy for K–12 Schools through Phased Prevention*, CDC (updated Mar. 19, 2021), https://bit.ly/3cSmNt0.

Children who contract the virus at school can then infect family members at home, increasing community spread. Moreover, it is expected that no vaccine will be available for children until late 2021 or early 2022. *See* Tucker Higgins, *Covid vaccine for elementary school children likely coming in early 2022, Fauci says*, CNBC (Mar. 2, 2021), https://cnb.cx/3lF43kU. Meanwhile, variants of the virus that are more transmissible among children and more likely to sicken them are becoming dominant across the country. *See* William A. Haseltine, *Schools Must Reconsider Accelerating Plans To Reopen In Light Of Dangerous New Covid-19 Variants*, FORBES (Feb. 28, 2021), http://bit.ly/38Wj4JP; Melissa Healy, *Coronavirus strains from California and the U.K. in battle for U.S. dominance*, L.A. TIMES (Mar. 17, 2021), http://lat.ms/3lw2DJu. Indeed, Michigan now has the second-highest number of cases in the country of one fast-spreading variant, and children between ten and nineteen have

the highest COVID-19 infection rate of any age group in the state. *See* Arielle Mitropoulos, *COVID-19 is increasing in Michigan; Why it may be a warning*, ABC NEWS (Mar. 21, 2021), abcn.ws/394C6xT.

Though children are less likely to suffer serious illness from the virus than are adults, some children do become very sick or die. *See* Pam Belluck, *The virus can sicken children in very different ways, a new study finds*, N.Y. TIMES (Feb. 24, 2021), https://nyti.ms/3q0PCrO; Pam Belluck, *Covid-Linked Syndrome in Children Is Growing, and Cases Are More Severe*, N.Y. TIMES (Feb. 17, 2021), http://nyti.ms/3pJ5Aqq. Moreover, there is growing evidence that a significant proportion of children who are infected experience distressing, long-lasting symptoms thereafter. *See* Ariana Eunjung Cha, *These children had covid-19; Now, they have long-haul symptoms*, WASH. POST (Mar. 18, 2021), https://wapo.st/2OLlHr2. And one study concluded that a high proportion of infected children—including some with mild or no symptoms—suffer blood-vessel damage that might have dangerous long-term consequences. *See* Emily Shaffer, *SARS-CoV-2 Infections Regardless of Severity Linked to Blood Vessel Damage in Children*, CHILDREN'S HOSPITAL OF PHILADELPHIA RESEARCH INSTITUTE: CORNERSTONE BLOG (Dec. 16, 2020), http://bit.ly/3tyvFLg.

A compelling-interest test, if it applied, would also ask whether Michigan's mask order is narrowly tailored to the governmental interest at stake. *E.g.*, *Diocese of Brooklyn*, 141 S.Ct. at 67. The Supreme Court and this Court concluded in *Diocese of Brooklyn*, *South Bay*, *Roberts*, and *Maryville Baptist* that the restrictions there were not narrowly tailored because they effectively barred worship services altogether, or because, without sufficient justification, they restricted worship more than activities that the decisions treated as comparable. *See Diocese of Brooklyn*, 141 S.Ct. at 67–68; *S. Bay*, 141 S.Ct. at 717 (Roberts, C.J., concurring in partial grant of application for injunctive relief); *Roberts*, 958 F.3d at 415; *Maryville Baptist*, 957 F.3d at 614. By contrast, Michigan permits religious schools to provide full-time in-person instruction, and faculty and students are allowed to remove their masks when they "[a]re engaging in a religious service." Mask Order § 8(j). And as noted above, Michigan's mask requirement applies to all institutions, and none of the activities that it exempts are comparable to full-day schooling, given their far shorter duration.

Plaintiffs argue, however, that there are "less restrictive alternatives" to requiring masks, "such as social distancing, plexiglass barriers, air filtration systems, and improved ventilation systems." Appellants' Br.

32. But under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). That is the case here: though Plaintiffs' alternatives can lessen transmission of the virus, the measures are more effective when masks are worn. *See Social Distancing,* CDC (updated Nov. 17, 2020), http://bit.ly/2NaWFks; JV Chamary, *Why Face Shields and Plexiglass Barriers Don't Block Coronavirus*, FORBES (Oct. 23, 2020), http://bit.ly/3epe9ET; Brian Resnick, *Coronavirus is in the air; Here's how to get it out*, VOX (Sept. 28, 2020), http://bit.ly/3l54y7e. Indeed, one analysis of Florida school districts showed that "school districts without mask mandates have an average case rate . . . nearly twice as high as those with mask mandates." Rebekah Jones, et al., *Should Schools Stay Open? Not So Fast*, U.S. NEWS & WORLD REPORT (Dec. 2, 2020), https://bit.ly/38YxVU0.

Thus, even if the compelling-interest test were applicable, Michigan's mask requirement satisfies it.

C. The Free Exercise Clause was neither intended nor originally understood to require exemptions from laws that protect the health and safety of the public.

The conclusion that Michigan's mask requirement does not violate the Free Exercise Clause is bolstered by the Clause's historical context. In its

recent jurisprudence, the Supreme Court has looked to "history for guidance" when determining the meaning of provisions of the Bill of Rights. *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019) (plurality opinion); *see also, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014); *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). In *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008), for example, the Court considered "the history that the founding generation knew" in concluding that the Second Amendment's preface is consistent with an individual right to bear arms. The Court explained that "the way tyrants had eliminated a militia" in England informed "the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 598–99.

The Free Exercise Clause's history demonstrates that the Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. Rather, the Clause was enacted to address a long history of governmental efforts to suppress particular religious groups based on disapproval of the groups or their beliefs. And the writings of leading Founders, as well as early state constitutions and judicial decisions, demonstrate that the right to free exercise was not viewed during the Founding Era as overriding laws meant to protect the public from serious harm.

1. The intent and writings of the Founders.

Both Religion Clauses of the First Amendment were informed by the history of European and colonial religious persecution. For the Founders of our Nation well knew that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947); *see also Engel v. Vitale*, 370 U.S. 421, 432–33 (1962); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982). During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted to "destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Emigration to colonial America was spurred by these religious conflicts and persecutions. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 57 (2009). Yet some colonists then came to engage in similar practices themselves, using political authority to impose their own

preferred beliefs and religious institutions at the expense of other denominations. *See Everson*, 330 U.S. at 9–10.

These "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause" (*Bowen v. Roy*, 476 U.S. 693, 703 (1986)), including, notably, James Madison, the primary architect of the First Amendment (*Everson*, 330 U.S. at 13). As Madison explained, "[t]orrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.). In contrast, noted Madison, "the forbearance of our laws to intermeddle with Religion" "has produced" "moderation and harmony" in America. *Id.*

Accordingly, those who drafted the First Amendment sought to ensure (*see Everson*, 330 U.S. at 13) that government would, as Madison put it, be prevented from "proscribing all difference in Religious opinion" (*Memorial and Remonstrance*, *reprinted in Everson*, 330 U.S. at 69). Thus, the Supreme Court has recognized the Free Exercise Clause to forbid governmental actions that have "as their object the suppression of religion" (*Lukumi*, 508 U.S. at 542), that evince "hostility toward . . .

sincere religious beliefs" (*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018)), or that "impose special disabilities on the basis of religious status" (*Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. 2012, 2021 (2017) (quoting *Lukumi*, 508 U.S. at 533) (alterations omitted)).

But while the Free Exercise Clause was intended to prohibit governmental disfavor toward or targeting of particular faiths, it was not originally understood to mandate exemptions from laws that protect public safety or health. For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/34wu2n5.

So too, it is "quite clear that Jefferson did not" endorse a "broad principle of affirmative accommodation" for religious objections against laws that secure public safety. *See City of Boerne v. Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part). While Jefferson warned against the dangers of allowing government to "restrain the profession or propagation of [religious] principles," he believed that government might validly "interfere when [those] principles break out into overt acts against

peace and good order." *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), https://bit.ly/2JShvmT.

Likewise, George Washington expressed the "wish and desire that the Laws may always be as extensively accommodated to [freedom of conscience], as a due regard for the Protection and essential Interests of the Nation may Justify, and permit." Letter from George Washington to the Society of Quakers (Oct. 13, 1789), https://bit.ly/3lQjkxG. In other words, Washington believed that religion should be accommodated willingly and enthusiastically, but not at the expense of public safety.

Prominent religious thinkers of the day also shared as a theological commitment this same understanding that religious objectors were not entitled to exemptions from public-safety laws, as the writings of Isaac Backus and John Leland demonstrate. *See* Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 630–32 (1990). They adopted and defended the views of Roger Williams, the Baptist theologian and founder of Rhode Island, who had likewise opposed the idea of an entitlement to religious exemptions from general laws protecting public safety. *See id.*

And it was broadly accepted in colonial and Founding Era America that public-health laws such as quarantine measures were essential to public

safety. To fight diseases such as smallpox, yellow fever, plague, and cholera, colonies and states imposed quarantine measures—often very strict ones—during those times. Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 82, 93–126 (2014). Thus "[q]uarantine was widely regarded as a central tenet of state police powers" then. *Id.* at 90; *see also Gibbons v. Ogden*, 22 U.S. 1, 203, 205 (1824). So our Constitution's Framers could not have thought that measures to safeguard the public health must be subordinated to religious practices.

2. Early state constitutions and court decisions.

Most Founding Era state constitutional analogues to the Free Exercise Clause contained caveats reflecting this basic understanding that the right to free exercise did not override public-safety concerns. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461–62 (1990). For example, the free-exercise guarantee of Delaware's Declaration of Rights of 1776 included the qualifier "unless, under Colour of Religion, any Man disturb the . . . Safety of Society." Del. Decl. of Rights of 1776, § 3. The free-exercise guarantee of the Maryland Constitution of 1776 contained the limitation "unless, under colour of religion, any man shall disturb the good

order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights." Md. Const., art. XXXIII (1776). The free-exercise clause of New York's 1777 Constitution provided that "the liberty of conscience, hereby granted, shall not be so construed as to . . . justify practices inconsistent with the peace or safety of this State." N.Y. Const., art. XXXVIII (1777). The Georgia Constitution of 1777 recognized that all "persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." Ga. Const., art. LVI (1777). And the New Hampshire Constitution of 1784 stated that although everyone has "a natural and unalienable right to worship God according to the dictates of his own conscience," none have the right to "disturb the public peace or disturb others in their religious worship." N.H. Const., part I, art. 5 (1784); *accord* Mass. Const., art. II (1780); R.I. Charter (1663); S.C. Const., art. VIII, § 1 (1790).

As Professor McConnell has explained, "[t]he wording of the state provisions . . . casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, 103 HARV. L. REV. at 1456. And that original meaning, according to Professor McConnell, was that "the free

exercise right should prevail" "[w]here the rights of others are not involved" but does not override "peace and safety limitations" "necessary for the protection of others." *Id.* at 1462, 1464–66.

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions" from public-safety laws. Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1099 (2008) (citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 276–95 (1991)).

Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. For instance, the Pennsylvania Supreme Court held in 1831 that while "religious scruples of persons concerned with the administration of justice[ ] will receive all the indulgence that is compatible with the business of government," respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips v. Gratz*, 2 Pen. & W. 412, 416–17 (Pa. 1831). Similarly, in 1854, the Supreme Judicial Court of Maine noted that

it "is not disputed" that "society['s] . . . right to interfere on the principle of self-preservation" prevails over the right to freely exercise religion. *Donahoe v. Richards*, 38 Me. 379, 412 (Me. 1854).

* * * * *

A ruling that the Free Exercise Clause gives Plaintiffs a right to a religious exemption from Michigan's mask requirement would be squarely at odds with the Framers' intent that the Clause not override laws that protect public safety.

CONCLUSION

The precious right of religious freedom should not be misused in a manner that jeopardizes the health of children and their family members. This Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) This brief complies with the type-volume limits of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,472 words;

(ii) This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Alex J. Luchenitser*

CERTIFICATE OF SERVICE

I certify that on March 24, 2021, the foregoing brief was filed using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

/s/ *Alex J. Luchenitser*