Case No. 20-2256

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 United States District Court
for the Western District of Michigan
Case No. 1:20-cv-01016

BRIEF FOR THE STATES OF KENTUCKY, OHIO, AND TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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INTERESTS OF *AMICI* AND INTRODUCTION[1]

The question in this case is what makes a law "generally applicable" under the Free Exercise test announced in *Employment Division v. Smith*, 494 U.S. 872 (1990). That question is exceedingly important. Since the start of the pandemic, state and local governments have struggled to implement public-safety measures without "treating religious exercises worse than comparable secular activities." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). And courts have likewise struggled to apply the "First Amendment's terms and long-settled rules." *Id.* at 70 (Gorsuch, J., concurring). The result? Many Americans have endured "irreparable harm[] by the loss of free exercise rights" as government officials "move[] the goalposts" and courts fail to step in. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021).

But not in this circuit. This Court recognized early on that good intentions (even in times of crisis) cannot justify discriminatory burdens on religious freedom. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). Because of that, the residents of the *amici* States have spent much of the pandemic

[1] The *amici* States of Kentucky, Ohio, and Tennessee may file this brief without consent of the parties or leave of the court under Fed. R. Civ. P. 29(a)(2).

knowing that the First Amendment stood as a bulwark against government overreach. And the *amici* States have had relatively clear rules on how to navigate the pandemic while protecting the Free Exercise rights of their citizens.

No longer. The panel majority's decision in this case undoes much of what this Court's prior decisions built. And it did so by "ignor[ing] Supreme Court and Sixth Circuit precedent." *See Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 (6th Cir. 2021) (Thapar, J., dissenting), *reh'g en banc granted Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 993 F.3d 489, 489 (6th Cir. 2021) (Mem.).

That makes this case particularly troubling for the *amici* States. Not only does the panel majority's decision diverge sharply from the relevant precedent, it does so by creating intra-circuit conflict and confusion about what the applicable rules are. The *amici* States must have clarity on how the Free Exercise Clause applies to COVID-19 restrictions like the ones at issue here.

ARGUMENT

The panel majority held that government officials can impose COVID-19 restrictions on religious schools that are harsher than those for tanning salons and restaurants without triggering strict scrutiny under the First Amendment. Nine months ago, this Court held the opposite. *See Monclova Christian Academy v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020). That kind of intra-

circuit conflict alone merits rehearing en banc. *See Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc) (finding "the traditional grounds for full court review" lacking where "[t]here is no intra-circuit conflict").

Yet the conflict between this case and *Monclova Christian* is just the start. The panel majority's decision also conflicts with recent Supreme Court precedent applying *Smith*. It is irreconcilable with case law prohibiting courts from second-guessing the importance of particular religious beliefs. And it invented a new rule for stare decisis in which future panels are bound not just by the holding of a decision, but also by arguments in the briefs that the Court never discussed.

The *amici* States need clarity on these issues of exceptional importance and urge the Court to grant rehearing en banc.

I. This Court's Free Exercise precedent is now hopelessly incoherent.

The First Amendment prohibits the government from burdening the "free exercise" of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protect[s] religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citation omitted). That means when the government burdens religious exercise, it must do so with generally applicable rules that are neutral toward religion, *see Smith*, 494 U.S. at

878–79, or else "run the gauntlet of strict scrutiny." *Maryville Baptist*, 957 F.3d at 614.

1. Applying these rules to COVID-19 restrictions has been difficult for state and local governments. *See Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring). But this Court has helped mark the boundaries.

The Court intervened early on and held that governments cannot close houses of worship while allowing comparable secular businesses like grocery stores and shopping malls to remain open. *See Maryville Baptist*, 957 F.3d at 611, 614–15. That standard has governed the Sixth Circuit for most of the pandemic, and it is similar to the standard the Supreme Court eventually adopted in *Roman Catholic Diocese*. *See* 141 S. Ct. at 66–67. Even when the Court reached a different outcome (like allowing the government to close religious schools in Kentucky), it did so only after finding that the relevant order did not include exceptions for secular businesses like "airlines, funeral homes, liquor stores, and gun shops." *Commonwealth v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020). While there are good reasons to doubt that *Beshear* can be reconciled with *Roman Catholic Diocese*, this Court clarified just one month later that strict scrutiny still applies if the govern-

ment closes "public and parochial schools" while "leav[ing] *other* comparable secular actors less restricted than the closed parochial schools." *Monclova Christian*, 984 F.3d at 481. Perfect or not, these rules were clear.

This case should have been easy under those rules: Michigan imposed COVID-19 restrictions that apply to individuals attending religious schools but do not apply to individuals eating at restaurants or patronizing tanning salons, tattoo parlors, or other similar "personal care service[s]." *See* March 2, 2021 Emergency Order at 9, *available at* https://perma.cc/PXR9-8ST8 (last visited Sept. 14, 2021).[2] In *Monclova Christian*, the Court held that "tanning salons" (among other things) "are comparable [to religious schools] for purposes of spreading COVID-19." 984 F.3d at 482 (internal quotations omitted). Because of that, a law burdening religious schools but not similarly burdening "tanning salons" is not generally applicable under *Smith*. *Id.* And so Michigan's COVID-19 restrictions—restrictions that apply to religious schools but not tanning salons—must overcome strict scrutiny. Yet the panel majority held otherwise.

[2] Michigan's emergency order cryptically exempts individuals "receiving a . . . personal care service for which removal of the face mask is necessary." *Id.* Elsewhere in the order, Michigan explains that "personal care services" include "hair, nail, tanning, massage, traditional spa, tattoo, body art, [and] piercing services," as well as other "similar personal care services." *Id.* at 7.

There's no getting around the intra-circuit conflict between *Monclova Christian* and the panel majority's decision. Nor does the panel majority disagree. Rather than distinguish or clarify *Monclova Christian*, it decided that *Monclova Christian* is not binding. *Resurrection School v. Hertel*, No. 20-2256, 2021 WL 3721475, at *13 (6th Cir. Aug. 23, 2021).

The panel majority's reason for disregarding *Monclova Christian* was untenable (more on that below). But the *amici* States now face a problem that only the en banc Court can resolve. Which rule governs the States and their local governments going forward? As both the majority and the dissent recognized, these issues are not going away any time soon. *See id.* at *9 (holding that the case is not moot despite the executive orders at issue being withdrawn); *id.* at *17 (Siler, J., concurring in part and dissenting in part) (agreeing "with the majority's conclusions on mootness"). And now the *amici* States and their political subdivisions must gamble on whether the *next* panel will agree with *Monclova Christian* or the panel majority's decision here. That kind of intra-circuit disagreement on an exceptionally important issue is a "traditional ground[] for full court review." *Mitts*, 626 F.3d at 370 (Sutton, J., concurring in the denial of rehearing en banc). Put simply, only the en banc Court can tell the *amici* States with any certainty what the

applicable rule of law is. *See, e.g., Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 483 n.1 (6th Cir. 2021) (en banc).

2. Equally troubling as the intra-circuit conflict is how the panel majority got there. It is well established that "the holding of a published panel opinion binds all later panels." *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). And while it's sometimes tricky to "separate holdings from dicta," *id.*, the holding of *Monclova Christian* was clear. So the panel majority had to disregard it. *See Resurrection School*, 2021 WL 3721475, at *13. And it did so by applying a novel rule for deciphering the holding of a case—one that requires courts (and litigants) to read every brief in a case to discern whether there are any unwritten "holdings" that might bind a future panel.

Some background helps explain this problem. This Court's first decision addressing a school-closure order was *Beshear*. In that case, the Court held that an executive order shutting down grade schools (both religious and non-religious) was generally applicable under *Smith* because it did not include any exceptions for secular businesses like "airlines, funeral homes, liquor stores, and gun shops." *Beshear*, 981 F.3d at 509. After *Beshear*, this Court then decided *Monclova Christian*, a case involving a similar school-closure order in Ohio. But the Court distinguished the facts of *Monclova Christian* from *Beshear* because the Ohio county that

issued the school-closure order continued to allow "gyms, tanning salons, office buildings, and the Hollywood Casino [to] remain open." *Monclova Christian*, 984 F.3d at 482. That meant the orders were not generally applicable, and so the county had to overcome strict scrutiny.

The panel majority disagreed with *Monclova Christian*'s analysis of *Beshear*. According to the panel majority, *Beshear* had already held that secular businesses like tanning salons and office spaces were not comparable to religious schools. *Resurrection School*, 2021 WL 3721475, at *13. And so, the panel majority concluded, *Monclova Christian* is not binding because it conflicts with the holding of an earlier decision. *Id.* But there's one problem with this conclusion: *Beshear* never said what the panel majority suggests. And that is why the panel majority did not cite *Beshear* for its claim. *See id.* Instead, the panel majority relied exclusively on the briefs in the case to declare what the holding of *Beshear* actually was. *Id.*

It's hard to overstate the impact of this decision. If the panel majority is right, future panels are bound not just by what a decision *says*, but also by what the parties argued in their briefs—even if those arguments are ignored or directly contradicted by the court's written decision. That means litigants and courts alike

must mine the briefs in every case before being certain about what the legal precedent actually is. And even then, certainty might be illusory if (like *Beshear*) the unwritten "holding" appears contrary to the court's actual words.

Put simply, there is no way to square the panel majority's decision with the ordinary rule that a panel is only bound when it is "clear that the court considered the issue and consciously reached a conclusion about it." *Wright*, 939 F.3d at 702. And to avoid *Monclova Christian*, the panel majority might have opened up a Pandora's box.

II. The panel majority's decision diverges from recent Supreme Court precedent applying *Smith*.

1. The panel majority's decision also departs from how the Supreme Court recently instructed lower courts to apply *Smith* to COVID-19 restrictions in *Tandon*. *See* 141 S. Ct. at 1296. *Tandon* provided simple instructions: When a COVID-19 restriction burdens religious exercise, courts must look to see whether the government "treat[s] *any* comparable secular activity more favorably than religious exercise." *Id.* A court cannot limit its analysis to comparing religious activity to only its closest secular counterpart—it must look to *all* secular exemptions and apply strict scrutiny if even one raises similar risks but receives better treatment. *Id.*

The panel majority acknowledged this standard but failed to apply it. *Compare Resurrection School*, 2021 WL 3721475, at *13 (explaining that the exemptions were "largely" but not exclusively "limited to activities of lesser risk than in-person instruction"), *with Tandon*, 141 S. Ct. at 1296 ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."). Instead of considering whether Michigan exempted "*any*" secular activity that posed similar risks as attending religious school, the panel majority asked whether the exemptions "were narrow and discrete." *Resurrection School*, 2021 WL 3721475, at *13. It outlined four reasons that the exemptions in the Michigan order did not move it outside the bounds of a generally applicable law. *Id.* at *13–14. But the panel majority failed to answer the one question *Tandon* requires: Do any secular activities raising similar risks of spreading COVID-19 receive better treatment than attending religious schools?

Take as an example the panel majority's discussion of eating at restaurants. The panel majority dismissed concerns with this exemption because "eating and drinking" are "inherently incompatible" with wearing a mask. *Resurrection School*, 2021 WL 3721475, at *13. But what does that have to do with whether the risk of spreading COVID-19 is the same? If anything, the panel majority's conclusion

is just an argument for prohibiting people from eating at restaurants because doing so is "inherently incompatible" with taking the precautions that Michigan deems necessary to stay safe. Yet this has nothing to do with the question under *Tandon*: whether eating at a restaurant is significantly safer than attending a religious school—so much safer that Michigan can exempt the restaurant industry from its restrictions without extending similarly favorable treatment to a religious school.

Tandon resolved many of the hard questions that courts wrestled with when applying *Smith* to COVID-19 restrictions. The panel majority's conclusion that Michigan faces no heightened scrutiny when it provides exemptions for restaurants but not religious schools diverges sharply from what *Tandon* requires, and it moves the law of this circuit several steps back.

2. The problem goes deeper still. The panel majority's application of *Smith* impermissibly privileges secular concerns over religious belief. *See Maryville Baptist*, 957 F.3d at 614. It does so by downplaying the importance of the plaintiffs' religious objection while elevating the value of "life-sustaining business" over "soul-sustaining" activities. *See id.* (cleaned up).

Consider again how the panel justified the exemption for restaurants. The panel majority explained that exempting restaurants makes sense because "eating

and drinking" are "inherently incompatible" with wearing a mask, but it is merely "undesirable" for the plaintiffs who have sincerely held religious objections to do so. *Resurrection School*, 2021 WL3721475, at *13. Is that not just another way of saying the Court does not believe the religious objectors are sincere? Or perhaps the panel majority is relegating religious concerns to mere preferences, in which it might be desirable to practice your faith, but not necessary. Either way, it's hard to reconcile that analysis with this Court's Free Exercise precedent. After all, just over a year ago the Court made clear that "federal courts are not to judge[] how individuals comply with their own faith as they see it." *Maryville Baptist*, 957 F.3d at 615. Yet that is precisely what the panel majority did in dismissing the plaintiffs' religious objections as nothing more than a preference about what is "desirable." For those believers, complying with Michigan's COVID-19 restrictions is "inherently incompatible" with practicing their faith. And this Court should have nothing to say about that. *See W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(b)(4) because it contains 2,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 15-point Garamond font using Microsoft Word.

s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on September 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Brett R. Nolan