Mississippi College Law Review

Volume 41 | Issue 1 Article 10

Summer 2023

MASKING GOD IN RESURRECTION SCHOOL V. HERTEL: ONE SCHOOL'S EFFORTS TO EXERCISE RELIGION DURING AN ONGOING PANDEMIC

Sean Turnipseed
Mississippi College School of Law

MASKING GOD IN *RESURRECTION SCHOOL V. HERTEL*: ONE SCHOOL'S EFFORTS TO EXERCISE RELIGION DURING AN ONGOING PANDEMIC

*By Sean Turnipseed**

Table of Contents

* J.D. Candidate, May 2023, Mississippi College School of Law. A special thank you to Professor Mark Modak-Truran, without whose assistance this article would not have been possible. His insights and guidance proved invaluable, and I am grateful for multiple discussions, revisions, and comments. And I'd like to offer special thanks and dedication of this article to my wife, Morgan, and my daughter, Jane, who provided much needed and well appreciated breaks in writing to laugh, play, and read all about dinosaurs, the Cookie Monster, and baby Moses.

I. INTRODUCTION

SARS-CoV-2, colloquially termed "COVID-19," dramatically altered the world in which we live. But no one would have guessed the virus would spark a flurry of litigation under the U.S. Constitution's Free Exercise Clause. Shortly after the virus began to spread, former President Donald Trump advised a two-week plan with hopes to "flatten the curve" of COVID-19's impact.[1] The plan encouraged individuals to avoid gatherings with ten or more people, work and attend school from home, eat at home rather than in restaurants, and avoid discretionary travel and shopping, to name a few.[2] But the two-week plan did not effectively thwart the spread of the virus, and more action was needed. Several states shut down their economies, schools, and churches to deter the spread. One of the most universally adopted approaches by the states included the implementation of universal mask mandates upon its citizens.

Indeed, the mitigation efforts, including mask mandates, that began under a two-week plan to prevent further spread of the virus lasted for over two years in some areas. Unsurprisingly, many citizens grew concerned over limitations of constitutional liberties, particularly the right to exercise one's religion without government prohibition. As a result, a plethora of lawsuits regarding the Free Exercise Clause have been filed since the onset of the pandemic, and several have reached the Supreme Court. The Court has ruled in religion's favor often. One author noted that the current Court, under Chief Justice John G. Roberts, rules in favor of religion 81% of the time.[3] For comparison, former Chief Justice William Rehnquist's Court ruled in favor of religion 58% of the time, several percentage points behind the current Court led by Chief Justice Roberts.[4] Due to the expediency caused by a global pandemic, the Court is addressing hotly contested litigation under the Free Exercise Clause without delay. The current Court has issued most of its recent pro-religion decisions from the shadow docket in per curiam opinions.[5] Further, the Court dramatically shifted its approach since the pandemic began. The Court has repeatedly granted great deference to religious exercise claims and strictly scrutinized government regulations. Indeed, the Supreme Court reminded us lately that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[6]

---

1. Dan Mangan, Trump Issues 'Coronavirus Guidelines' for next 15 days to slow pandemic, CNBC (March 16, 2020, 6:28 P.M.), https://www.cnbc.com/2020/03/16/trumps-coronavirus-guidelines-for-next-15-days-to-slow-pandemic.html.

2. *Id*.

3. Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html.

4. *Id*.

5. The term "shadow docket" was first introduced by Professor William Laude as a substitute for the proper term, "emergency docket." The shadow docket in conjunction with per curiam opinions expedites the decision-making process of the Court at the mercy of disposing of the filing of briefs by each party. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015).

6. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

One may assume that because the United States Supreme Court has ruled in favor of religion as of late, so would the Federal Circuit Courts of Appeals. But the Sixth Circuit recently went rogue. In Resurrection School v. Hertel, the Sixth Circuit ignored recent precedent handed down by the Court during the pandemic.[7] A regulation that enforced a universal mask mandate in Michigan was at issue in Hertel.[8] Though the regulation was riddled with exceptions, the Sixth Circuit expressly denied the Resurrection School's request for an exception under the Free Exercise Clause. The court refused to apply strict scrutiny in its analysis and ruled in favor of the government as it found the mask mandate on appeal neutral and of general applicability. As a result, the Resurrection School was denied a preliminary injunction over the mask mandate.[9] But the battle was not over. The Resurrection School continued to fight for the right to exercise their religion and was awarded a rehearing en banc. Accordingly, the Sixth Circuit granted the rehearing and, as a result, vacated the judgment of the previous decision wherein the court found the order did not violate the Free Exercise Clause.[10] However, the en banc panel held that not only was the Resurrection School's interlocutory appeal moot but so too was the entire case.[11] Thus, the court remanded the case to the district court to be dismissed entirely.

This case should not be viewed in a vacuum because future governmental regulations may place restrictions and burdens on religious practices, and the unfortunate dismissal of this case further demonstrates why this Note matters. In light of recent Supreme Court Free Exercise Clause cases, this Note will argue that the Sixth Circuit erred when it continually refused to apply strict scrutiny to a government regulation riddled with secular exceptions. Part II provides an overview of the case's factual summary and procedural history. Part III produces insight into the background and history of the law with particular emphasis on identifying comparable secular conduct in free exercise challenges. Part IV details the court's reasoning in the instant case. Part V will argue how the Sixth Circuit erred when it failed to apply strict scrutiny because the order was not of general applicability as it contained myriad exceptions, which triggered a strict scrutiny analysis.

II. FACTS AND PROCEDURAL HISTORY

To protect its citizens during COVID-19, Michigan enacted regulations requiring limited gatherings, mask mandates, and closures of certain venues. On April 27, 2020, Governor Gretchen Whitmer passed an executive order that required all persons "able to medically tolerate a face covering" to wear such covering "when in any enclosed space."[12] Several months later, in E.O. 2020-185 § 1 (Sept. 25, 2020), Whitmer mandated masks in the classroom for all

7. Resurrection Sch. v. Hertel, 11 F.4th 437, 441 (6th Cir. 2021).
8. *Id.* at 443.
9. *Id.* at 462.
10. Resurrection Sch. v. Hertel, 16 F.4th 1215, 1216 (6th Cir. 2021).
11. Resurrection Sch. v. Hertel, 35 F.4th 524, 530 (6th Cir. 2022).
12. *Hertel*, 11 F.4th at 443 (citing E.O. 2020-59 § 15(a) (Apr. 24, 2020)).

children in grades K-5.[13] However, this order was rejected by the Supreme Court of Michigan because Governor Whitmer issued the executive orders under a law that was deemed "an improper delegation of legislative power in violation of the Michigan Constitution."[14]

Shortly thereafter, the Michigan Department of Health and Human Services ("MDHHS") issued an order reinstating the very requirement Whitmer's executive order could not grant and required all children in grades K-5 to wear a face covering in the classroom.[15] On October 22, 2020, the Resurrection School filed a complaint and alleged that the MDHHS order "violated their right to free exercise, equal protection, substantive due process, freedom of speech, and freedom of association."[16] Resurrection School's principal stated that the mask requirement interfered with the school's religiously oriented disciplinary policies and prevented the students from fully partaking in their Catholic education.[17] In an effort to precisely explain how the students would be unable to exercise their religion as a result of the mask mandate, the initial complaint explained that "every human has dignity and is made in God's image and likeness. Unfortunately, a mask shields our humanity. And because God created us in His image, we are masking that image."[18]

The Resurrection School moved for a temporary restraining order ("TRO") and a preliminary injunction to enjoin the government from enforcing the 10/05/2020 MDHHS order.[19] Without establishing that students of the Resurrection School would experience irreparable harm without the TRO, the district court denied the school's motion and concluded the school unreasonably delayed its filing for emergency injunctive relief.[20] Thereafter, the government filed motions to dismiss and a response in opposition to Resurrection School's request for a preliminary injunction.[21] The Resurrection School filed an amended complaint in reply that narrowed their claims to violations of free exercise, equal protection, and substantive due process, as well as the Michigan constitutional and state-law claims.[22]

Generally, free exercise challenges succeed on three occasions.[23] First, the party may show that the order "is motivated by animus towards people of faith in general or towards one faith in particular."[24] Second, a free exercise challenge may succeed if the order regulates *only* religious activity.[25] Third, a party may succeed if the order appears to be generally applicable but has so many

13. *Id.*

14. In re Certified Questions from United States Dist. Ct., W. Dist. of Mich., 506 Mich. 332, 356-57, 958 N.W.2d 1, 16 (2020).

15. *Hertel*, 11. F.4th at 443-44.

16. *Id.* at 446.

17. *Id.* at 447.

18. *Id.* at 447 n.3.

19. *Id.* at 448.

20. *See Id*. at 448 n.6.

21. *Id.* at 448.

22. *Id.*

23. Resurrection Sch. v. Gordon, 507 F. Supp. 3d 897, 901 (W.D. Mich. 2020).

24. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 553 (1993)).

25. *Id.* (citing Hartmann v. Stone, 68 F.3d 973, 976 (6th Cir. 1995)).

exceptions for comparable secular activities that it is not, in practice, neutral or generally applicable.[26] Because the Resurrection School did not pursue the first or second prohibitive scenarios, the district court focused on the third, whether the order was neutral and generally applicable.[27]

The district court found the 10/05/2020 MDHHS order was of neutral and general applicability because it required all individuals above the age of five to wear a face mask in public.[28] Specifically, the district court recognized the order requiring a face mask in public applied to *all* individuals over the age of five.[29] Further, because the exceptions were "narrow and discrete" and applied to public and private schools equally, regardless of religious affiliation, the order was neutral and generally applicable.[30] Perhaps most importantly, because the order did not correlate to religion, the court noted that it "cannot be plausibly read to contain even a hint of hostility towards religion."[31] Thus, the district court denied the motion for a preliminary injunction and determined the Resurrection School was unlikely to succeed on the merits of its free-exercise challenge.[32]

Since the passage of the MDHHS's mask requirement, many orders were issued by the MDHSS that changed the circumstances for when a mask is required. For instance, the March 2, 2021 order required, in relevant part, that *all* persons participating in gatherings are required to wear a face mask.[33] Though several exceptions were raised to include anyone under the age of five, those with medical reasons, and individuals engaged in religious service, among other things, no exception seemingly applied to the children attending Resurrection School.[34] Notably, almost all COVID-19 emergency orders were rescinded in June 2021, including the mask requirement challenged in the instant case.[35] Unsurprisingly, the Resurrection School's entire case was deemed moot upon the most recent review by the Sixth Circuit.[36] Even so, the instant case provides a noteworthy example of how lower courts struggle to interpret the Free Exercise Clause under Chief Justice Roberts' Court during the pandemic. Thus, the following section will describe a brief history of interpretations of the Free Exercise Clause compared with how the United States Supreme Court and the Sixth Circuit have recently interpreted the clause.

---

26. *Id.* (citing Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012)).

27. *Id.*

28. *Id.* at 902.

29. *Id.*

30. *See Id.* The exceptions included children under the age of five, those who cannot medically tolerate a facemask, individuals engaged in public speech, those communicating with the deaf and blind, athletes engaged in competition, individuals in religious services, and first responders actively engaged in the performance of their profession.

31. *Id.* (quoting Kentucky v. Beshear, 981 F.3d 505, 509 (6th Cir. 2020)).

32. *Id.*

33. Resurrection Sch. v. Hertel, 11 F.4th 437, 444 (6th Cir. 2021).

34. *Id.* at 444-45.

35. *Id.* at 445.

36. Resurrection Sch. v. Hertel, 35 F.4th 524, 530 (6th Cir. 2022).

III. BACKGROUND AND HISTORY OF THE LAW

To frame the discussion concerning the Sixth Circuit's error in refusing a strict scrutiny analysis under a free exercise challenge, it is necessary to consider the origins of the Free Exercise Clause. After discussing the origins of the Free Exercise Clause, this section will identify the tests formulated by the Supreme Court governing free exercise challenges, which eventually introduced the comparable secular conduct component. The *Hertel* decision revealed the Sixth Circuit's error when it refused to apply strict scrutiny and erroneously chose the incorrect comparable secular conduct based on recent Supreme Court precedent.

A. The Origins of the Free Exercise Clause

The Free Exercise Clause originates from the text of the First Amendment and demands that "Congress shall make no law respecting an establishment of religion, *or* prohibiting the free exercise thereof. . . ." [37] But just how far does this protection reach? One scholar argued that the protection offered by the Free Exercise Clause extends to those situations where the government prohibits behavior that a person's religion requires.[38] The Free Exercise Clause is also protective when the government requires conduct that a person's religion prohibits.[39] To best understand the clause, it is essential to return to its first interpretation by the Supreme Court in the seminal case *Reynolds v. United States*.[40]

1. Early Interpretations of the Free Exercise Clause

In *Reynolds*, the Court held a member of the Mormon Church guilty of bigamy in violation of statutes that prohibited concurrent marriages to more than one spouse.[41] Reynolds argued his decision to practice polygamy was protected by his freedom to exercise religion since the practice stemmed from the Mormon belief that "it was the duty of the male members of [the Mormon] church . . . to practice polygamy."[42] The Court analyzed the historical roots of the First Amendment and noted that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[43] In sum, the Court determined "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."[44] Because marriage was viewed as a civil contract regulated by law, the Court recognized the legislative duty to ensure polygamy remained outlawed in the United States and refused to grant a free-exercise exception to Reynold's practice of polygamy.[45]

---

37. U.S. CONST. amend. I (emphasis added).
38. ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1315 (5th ed. 2015).
39. *Id.* at 1316.
40. *See* Reynolds v. United States, 98 U.S. 145 (1878).
41. *Id.* at 146.
42. *Id.* at 161.
43. *Id.* at 164.
44. *Id.* at 166.
45. *Id.* at 165.

In the cases that followed *Reynolds*, the Court continued to recognize that "[t]he freedom to hold religious beliefs and opinions is absolute."[46] Still, the Court consistently held that the freedom to act is not absolute and "[c]onduct remains subject to regulation for the protection of society."[47] But for decades, the Court failed to adopt a test to discern whether government regulations regulating religious conduct violated the First Amendment. It was not until 1963 when the Court finally developed such a test in *Sherbert v. Verner*.[48]

2. Testing the Free Exercise Clause

In *Sherbert v. Verner*, an employer fired a Seventh-Day Adventist Church member who refused to work on Saturday, the Sabbath day of her faith.[49] After her termination, she was denied unemployment benefits for failure to provide "good cause" as to why she refused the Saturday work offered to her in accordance with South Carolina unemployment statutes.[50] Naturally, the former employee appealed the denial of her unemployment benefits and argued that working on Saturday violated her right to the free exercise of her religion.[51] The South Carolina Supreme Court rejected the free exercise argument because it determined there was no restriction or prevention upon her beliefs on the record.[52]

Upon review, the United States Supreme Court overturned that holding. The Court recognized that the law substantially burdened the plaintiff because she was forced to choose between adhering to her religious beliefs and forgoing any governmental benefits or violating her religious beliefs to receive government aid.[53] Thereafter, the Court officially adopted a strict scrutiny analysis and held that governmental actions substantially burdening the free exercise of religion must be justified by a compelling state interest.[54] Because the State failed to provide a compelling interest, the statute failed the strict scrutiny analysis and was deemed unconstitutional.[55]

Over the next twenty-seven years, the court applied strict scrutiny to religious claims but generally sided with the government when individuals claimed the law infringed on their free exercise of religion.[56] However, the Court upheld a free exercise challenge in *Wisconsin v. Yoder*.[57] In *Yoder*, the Court upheld a free exercise challenge by members of the Amish community who argued compulsory school attendance would force the Amish to abandon

46. Braunfeld v. Brown, 366 U.S. 599, 603 (1961).
47. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
48. *See* Sherbert v. Verner, 374 U.S. 398 (1963).
49. *Id.* at 399.
50. *Id.* at 399-401.
51. *Id.* at 401.
52. *Id.*
53. *Id.* at 404.
54. *Id.* at 406.
55. *Id.* at 407.
56. CHEMERINKSY, *supra* note 38, at 1316.
57. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

their beliefs.[58] The Court recognized that the law's impact forced the Amish to "perform acts undeniably at odds with fundamental tenets of their religious beliefs."[59] Strict scrutiny proved too difficult a barrier for the State to overcome as it failed to demonstrate any compelling governmental interest to override the religious beliefs of the Amish.[60] But *Yoder* was an outlier, and the Court would otherwise customarily side with the government in free exercise claims when applying strict scrutiny.

In 1990, the Court continued to express government deference when it disavowed *Verner's* strict scrutiny test regarding the free exercise of religion for laws that are generally applicable. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[61] two employees were fired for "misconduct" after ingesting peyote for sacramental purposes at their Native American Church.[62] After their termination, both individuals sought unemployment benefits but were deemed ineligible.[63] At the time, peyote was listed as a Schedule I drug under Oregon statutes, and those who possessed peyote were guilty of a class B felony.[64] Because there was no exception for the sacramental use of peyote, the former employees were guilty of criminal acts and sought relief from the Supreme Court under the Free Exercise Clause.[65] Rather than adopt *Verner's* strict scrutiny test, the Court refused to extend the test for generally applicable criminal laws.[66] As a result, the general prohibition of peyote ingestion was held constitutional, and the denial of unemployment benefits was deemed proper.[67] After *Smith*, such laws did not need a compelling government interest. Instead, only a rational basis review was required for neutral and generally applicable laws.

A few years later, the Court revisited the issue of generally applicable regulations in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[68] In *Lukumi*, the city of Hialeah passed ordinances that prohibited the practice of animal sacrifice that significantly burdened the religious beliefs and practices of the members of the Santeria religion.[69] When the church members sought relief under the Free Exercise Clause, the district court agreed that the ordinances were not religiously neutral but held that compelling government interests existed to prevent public health risks and animal cruelty.[70] The Supreme Court granted *certiorari* and noted that "where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it *must* be justified by a compelling governmental interest and *must* be narrowly tailored to advance

58. *Id.* at 218.
59. *Id.*
60. *Id.* at 228-29.
61. *See* Emp. Div. Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).
62. *Id.* at 874.
63. *Id.*
64. *Id.*
65. *Id.* at 878-79.
66. *Id.* at 884.
67. *Id.* at 890.
68. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
69. *Id.* at 526-28.
70. *Id.* at 529.

that interest."[71] After review, the Court unanimously agreed the law was not neutral nor generally applicable because they were not pursued with "respect to analogous non-religious conduct."[72] The law was examined through the lens of strict scrutiny and failed the test.[73] As such, the law was unconstitutional.[74]

The *Lukumi* Court also elaborated upon the distinction between neutrality and general applicability.[75] Neutrality may be discerned by analyzing direct and circumstantial evidence from the formation of the government regulation at issue.[76] Because much evidence pointed towards "targeting" the Santeria religion through "gerrymandering," the Court held that the regulation was not neutral in its purpose.[77] The inference drawn from the general applicability of a law is that it must apply equally to everyone in all similar situations.[78] In other words, the government "cannot in a selective manner impose burdens *only* on conduct motivated by religious belief . . . ."[79] In *Lukumi*, the city failed to prohibit nonreligious conduct that "endanger[ed] [government] interests in a similar or greater degree than Santeria sacrifice [did]."[80] Because the ordinances banned certain Santeria religious practices but not similar nonreligious conduct, the law was not generally applicable.[81] Problematically, the Court stated that it "need not define with precision the standard used to evaluate whether a prohibition is of general application . . . ."[82] But the Court did expand the evaluation to include another factor not yet discussed in previous free exercise challenges.

For the first time, the *Lukumi* Court distinguished the notion of comparable secular conduct when considering the general applicability of a law. The *Lukumi* Court applied a broad approach when identifying comparable secular conduct to the Santeria church. Such conduct included killing animals in restaurants, failure to require inspection of meat for hunting and fishing expeditions, and small commercial operations of slaughterhouses.[83] Indeed, the *Lukumi* Court approached the comparability standard to consider whether the regulations "prohibit nonreligious conduct that endangers [the state's] interests in a similar or greater degree" than religious conduct.[84] In other words, if *any* secular conduct seemed similar, the Court considered such conduct a comparator. Most unfortunately, however, the Court did not elaborate on any limitations as to how the comparator is to be identified for the lower courts moving forward. Recent

71. *Id.* at 521 (emphasis added).

72. *Id.* at 546.

73. *Id.* at 521-22.

74. *Id.* at 547.

75. Douglas Laycock & Steven T. Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 6 (2016) (emphasis added).

76. *Lukumi*, 508 U.S. at 540.

77. *Id.* at 542.

78. Laycock & Collins, *supra* note 75, at 9.

79. *Lukumi*, 508 U.S. at 543 (emphasis added).

80. *Id.*

81. *Id.* at 545.

82. *Id.* at 543.

83. *Id.* at 543-46.

84. *Id.* at 543.

litigation arising from the pandemic has demonstrated how inconsistent such identification can be.

B. Recent Free Exercise Challenges and Strict Scrutiny

1. The Supreme Court's Approach

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court granted a free exercise claim for an injunction to former New York Governor Andrew Cuomo's executive order that limited the size of gatherings in certain areas of the city during the pandemic.[85] For example, religious services held within "red zones" were capped at ten individuals, while those within "orange zones" were capped at twenty-five individuals.[86] Within the orange zones, the order held that "[e]ssential businesses and many non-essential businesses [were] subject to no attendance caps at all."[87] "Essential" businesses not affected by the regulation included hardware stores, liquor stores, bicycle repair shops, signage companies, and insurance agents.[88] Each "essential" business was permitted to admit as many people as they wished.[89] Churches and other religious institutions were not so fortunate. Justice Gorsuch keenly quipped in his concurring opinion that while it "may be unsafe to go to church," it was always safe to "pick up another bottle of wine."[90] Because the executive order targeted all houses of worship within the newly created emergency zones but no "essential" businesses, the order targeted religious communities, which voided its neutrality and general applicability.[91]

Because of the order's facial discrimination, the Court applied strict scrutiny to the regulation and required it be "narrowly tailored" to stem the spread of COVID-19.[92] The Court noted that the regulation could have been less restrictive in considering a proportionate approach to the size of the house of worship rather than a strict ten or twenty-five-person limit.[93] The Court further recognized that individuals barred from attending worship in person would suffer irreparable harm.[94] Such restrictions struck "at the very heart of the First Amendment's guarantee of religious liberty."[95] Even during a pandemic, "the Constitution cannot be put away and forgotten."[96]

Unfortunately, but unsurprisingly, the Court again failed to elaborate as to how lower courts should identify which secular conduct is comparable. Justice

---

85. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65-66 (2020) (per curiam).

86. *Id.* at 66.

87. *Id.* at 73 (Kavanaugh, J., concurring).

88. *Id.* at 69 (Gorsuch, J., concurring).

89. *Id.* at 66 (per curiam).

90. *Id.* at 69 (Gorsuch, J., concurring).

91. *Id.* at 66 (per curiam).

92. *Id.* at 67 (per curiam).

93. *Id.* ("It is hard to believe that It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.").

94. *Id.* at 68.

95. *Id.*

96. *Id.*

Gorsuch's concurrence focused on the fact that *no* restrictions were placed upon "essential" businesses under Governor Cuomo's executive order, which opened the door to identify *any* "essential" business as comparable.[97] Justice Kavanaugh's concurring opinion observed that it was not enough that *some* secular businesses suffered similarly to the severe restrictions that *all* houses of worship faced.[98] If *any* secular business did not suffer similarly without sufficient justification, it would fail a strict scrutiny analysis.[99] The Court's reasoning reveals that most of the Court followed *Lukumi's* overarching approach, which considered *any* secular conduct exempt from severe restrictions without sufficient justification as comparable. Several months later, however, the Court appeared to offer further guidance as to how lower courts should identify comparable secular conduct when applying strict scrutiny.

In *Tandon v. Newsom*, the Court granted an injunction against California Governor Gavin Newsom's executive order that prohibited gatherings for at-home religious services but offered myriad exceptions for other comparable non-religious activities.[100] The Court reiterated that government regulations will trigger a strict scrutiny analysis and be treated as non-neutral and non-generally-applicable under the Free Exercise Clause "whenever they treat *any* comparable secular activity more favorably than religious exercise."[101] Under Governor Newsom's regulation, hair salons, retail stores, personal care services, movie theaters, private sporting events and concert suites, and indoor restaurants were permitted to bring together more than three households at a time, while religious gatherings at homes were forbidden from doing so.[102] The myriad exceptions and accommodations for comparable activities voided the regulation's general applicability and required the application of strict scrutiny.[103]

In applying strict scrutiny to the exceptions, the Court echoed the government's requirement to narrowly tailor its measures and "show that measures less restrictive of the First Amendment activity could *not* address its interest in reducing the spread of COVID."[104] In other words, precautions offered to secular activities that allow them to remain open must also be offered for religious exercises.[105] But the Ninth Circuit failed to show how the same precautions used in public could not translate readily to the home.[106] The Court reiterated that the State cannot "assume the worst when people go to worship but assume the best when people go to work."[107] Because the regulation failed to

97. *Id.* at 69 (Gorsuch, J., concurring).
98. *Id.* at 73 (Kavanaugh, J., concurring).
99. *Id.*
100. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).
101. *Id.*
102. *Id.* at 1297.
103. *Id.* at 1298.
104. *Id.* at 1296-97 (emphasis added).
105. *Id.*
106. *Id.*
107. *Id.* (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

further the government's interest by narrowly tailored means in pursuit of those interests, the regulation violated the Free Exercise Clause.[108]

The *Tandon* Court appeared to again follow *Lukumi's* broad approach to identifying comparable secular conduct without providing much guidance beyond identifying *any* secular conduct as comparable if treated more favorably than a religious activity.[109] However, the Court suggested that identifying comparable secular conduct requires that one must first consider the "asserted government interest that justifies the regulation at issue."[110] The most direct guidance by the Court proposed that "[c]omparability is concerned with the *risks* various activities pose, not the *reasons* why people gather."[111] But in her dissent, Justice Kagan honed in on the similarity of the activity's location as opposed to the nature of the activity. Justice Kagan posited that the best approach in *Tandon* was to compare at-home religious gatherings with at-home secular gatherings, not secular businesses.[112] Without further guidance, however, lower courts remained confused about how they should identify comparable secular conduct when applying strict scrutiny in free-exercise challenges.

2. The Sixth Circuit's Approach

In *Kentucky v. Beshear*, the Sixth Circuit stayed a preliminary injunction on appeal for Kentucky Governor Andy Beshear's executive order that prohibited in-person instruction for all public and private primary and secondary schools in the state.[113] The plaintiffs in that case argued the order violated the Free Exercise Clause.[114] Because the order applied to all public and private schools, religious or otherwise, the Sixth Circuit concluded the order was neutral and generally applicable and did not require any strict scrutiny analysis.[115] The Sixth Circuit recognized no comparable exemptions to the order because it included *all* schools, religious or otherwise.[116] Though the plaintiff school was religious in nature, the order did not target religion but all in-person instruction for any educational purposes.[117] Therefore, any burden to their religion was incidental and not subject to strict scrutiny.[118] Because the order only targeted educational institutions without exception, the Sixth Circuit explained that the comparable secular activity for private, religious schools was public, non-

108. *Id.* at 1298.
109. *Id.* at 1296.
110. *Id.*
111. *Id.* (emphasis added).
112. *Id.* at 1298 (Kagan, J., dissenting).
113. Kentucky v. Beshear, 981 F.3d 505, 511 (6th Cir. 2020).
114. *Id.* at 508.
115. *Id.* at 509.
116. *Id.*
117. *Id.*
118. *Id.* at 510.

religious schools.[119] The Sixth Circuit then granted the stay for the preliminary injunction and held the order constitutional.[120]

One month later, however, the Sixth Circuit granted a preliminary injunction in a free exercise challenge for an executive order that shut down all public, private, and parochial schools in *Monclova Christian Academy v. Toledo-Lucas County Health Department*.[121] Unlike the regulation that contained no exemptions in *Beshear,* the order in *Monclova* permitted gyms, tanning salons, office buildings, and a large casino to remain open but closed all schools.[122] Such numerous exceptions voided the regulation's general applicability and triggered strict scrutiny.[123] In its analysis, the Sixth Circuit did not follow *Beshear's* identification of comparable secular conduct by looking only at other schools.[124] In fact, the Sixth Circuit specifically held that no Supreme Court precedent bound them *only* to consider other secular schools when determining whether the religious schools were treated less favorably than comparable secular actors.[125] Instead, comparable activities can be very different.[126] The court held that "comparability is measured against the interests the State offers in support of its restrictions on conduct" rather than whether the religious and secular conduct involve similar forms of activity.[127] "Specifically, comparability depends on whether the secular conduct "endangers these interests in a similar or greater degree than" the religious conduct does."[128]

The *Monclova* decision opened the door and broadened which secular conduct may be considered as comparable under the Free Exercise Clause when a government regulation contains myriad exceptions. Rather than consider the activities' facial similarities, courts in the Sixth Circuit are free to consider how the activities similarly endanger the interests of the State instead. But, as detailed below, the court in *Resurrection School v. Hertel* failed to follow both the Sixth Circuit and the United States Supreme Court's recent pandemic-related holdings.[129] Indeed, the court erroneously drifted from its standard to apply strict scrutiny when a government regulation is riddled with exceptions.

IV. RESURRECTION SCHOOL V. HERTEL

In its opinion, the court dedicated a lengthy discussion on arguments that the plaintiff's appeal was moot in light of the mask requirement's recission.[130]

---

119. *Id.*

120. *Id.* at 511.

121. Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477, 479 (6th Cir. 2020).

122. *Id.*

123. *Id.* at 482.

124. *Id.* at 480-81.

125. *Id.* at 481.

126. *Id.* (comparing "attendance at church services and patronizing "acupuncture facilities[,]" for example." (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66-67 (2020) (per curiam))).

127. *Id.* at 480.

128. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

129. *See* Resurrection Sch. v. Hertel, 11. F.4th 437 (6th Cir. 2021).

130. *See Id*. at 449-54. The Court addressed the defendant's argument that plaintiff's appeal was moot due to the recission of the mask requirement at issue. Even if the argument was moot, the Court noted two exceptions apply to the mootness doctrine. First, a defendant's voluntary cessation will not moot an argument

After wading through the mootness issue, the court spent much of its time analyzing the free exercise challenge. In succinctly addressing the Equal Protection and Substantive Due Process claims, the court deemed both duplicative of the free exercise challenge.[131]

A. Majority Opinion by Circuit Judge Moore

Authored by Circuit Judge Moore, the majority opinion held that the plaintiff's challenge to the mask requirement was not moot and instead affirmed the district court's denial of the plaintiff's motion for a preliminary injunction.[132] The standard of review for a district court's denial of a preliminary injunction is an abuse of discretion.[133] The court noted the four factors[134] in determining whether granting a preliminary injunction is proper but narrowed its focus only to one factor, namely, whether the plaintiffs can establish a likelihood of success on the merits.[135]

At the root of the plaintiff's free exercise challenge was the argument that MDHHS's order violated their sincerely held religious beliefs.[136] Properly, the court did not question the sincerity of the Resurrection School's religious beliefs and accepted the allegedly burdened conduct as religiously motivated.[137] The court followed "the familiar framework for free exercise claims" that exempts defendants from showing a compelling governmental interest if the challenged law is of neutral and general applicability with a mere "incidental effect" on the plaintiff's religious beliefs.[138] But if the law does not meet those requirements, the defendant must show the policy was narrowly tailored to serve a compelling state interest.[139] Ironically, the court realized that "[e]ven if a law appears neutral and is devoid of animus, it is not neutral of general applicability if it is "riddled with exemptions."[140]

---

unless it is clear the allegedly wrongful behavior could "not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Second, a case will not become moot if the injury is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). The Court concluded that the defendant could not establish it was "absolutely clear" that they will not reimpose a mask requirement or vaccine mandate for children under twelve, even though the Court did not doubt the defendant's sincerity. Further, the Court agreed that such mask mandates are subject to the capability of repetition. In sum, plaintiff's claim was not moot.

131. *Hertel*, 11. F.4th at 455-62.

132. *Id.* at 462.

133. *Id.* at 454.

134. *Id.* at 454-55 (The four factors include: "1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent the injunction; 3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." (quoting Bays. v. City of Fairborn, 668 F.3d 814, 818-19 (6th Cir. 2012))).

135. *Hertel*, 11. F.4th at 455.

136. *Id.*

137. *Id.* It is assumed the Sixth Circuit accepted the plaintiff's religious claims though the pleadings did not indicate precisely what religious conduct was burdened. Several attempts on my behalf were made to reach the Resurrection School for clarification to no avail.

138. *Id.* (citing Emp. Div. Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878 (1990)).

139. *Id*. at 455 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993)).

140. *Id.* (quoting Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012)).

The court considered two similar Sixth Circuit cases with alternate outcomes and ultimately agreed with the district court's application of *Beshear*.[141] In *Beshear*, the court determined the order to be of neutral and general applicability as it applied to all public and private elementary schools, religious or not, and did not need to be justified by a compelling governmental interest.[142] The court deduced from *Beshear* that the MDHHS order likewise applied to students in grades K-5 at religious *and* nonreligious schools and was, therefore, of neutral and general applicability.[143]

The court expressly rejected the plaintiff's request that the subsequent decision in *Monclova*[144] conflicted with the district court's order.[145] *Monclova* held that an order that contained exceptions for certain businesses yet closed all in-person learning for schools was subject to strict scrutiny.[146] Because the panel construed the relevant comparator of secular businesses such as gyms and office buildings to public and religious schools, the panel applied strict scrutiny.[147] The *Monclova* panel concluded the order was not narrowly tailored to serve a compelling state interest, and the plaintiff's motion for a preliminary injunction was granted.[148] The plaintiffs argued that this same standard should have applied to MDHHS's order in the district court's analysis below.[149] The court recognized that, although *Beshear* and *Monclova* had conflicting comparators, *Beshear* appropriately compared religious and nonreligious schools as the proper standard.[150] Even though Sixth Circuit precedent varied, the court held it must follow *Beshear* without further elaboration.[151]

The court briefly discussed the issue of using a different comparator and considered the recent Supreme Court decision in *Tandon*.[152] In *Tandon*, the Court concluded that California treated some comparable secular activities more favorably than at-home religious exercises and, therefore, was not neutral and of general applicability.[153] But the Sixth Circuit argued that identifying a comparable secular activity for religious schools other than public or private nonreligious schools was far more difficult than identifying comparable conduct for at-home activities.[154] Thus, the majority concluded that public and private nonreligious schools were appropriate comparable secular activity for the Resurrection School.[155]

---

141. Kentucky v. Beshear, 981 F.3d 505, 511 (6th Cir. 2020).
142. *Id.* at 509.
143. *Hertel*, 11. F.4th at 456.
144. Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477 (6th Cir. 2020).
145. *Hertel*, 11. F.4th at 456.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 457.
151. *Id.*
152. *Id.*
153. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam).
154. *Hertel*, 11. F.4th at 457.
155. *Id.* at 457-58.

The Sixth Circuit panel then recognized the exceptions to the MDHHS order were narrow and discrete because many focused on scenarios where mask-wearing was "inherently incompatible" with the activity.[156] The mask exceptions under the MDHHS order were also short in duration and of lower risk than the plaintiff's desire to unmask students for hours multiple days a week.[157] Finally, the panel argued that the exceptions to the order were available to the plaintiffs as they were not excluded from such exceptions.[158] The plaintiffs unsuccessfully argued for the application of recent Supreme Court cases in support of applying strict scrutiny.[159] Instead, the court shifted and analyzed whether the state's MDHHS order had a rational basis.[160] To survive a rational-basis review, a party must show that the regulation bears "some rational relation to a legitimate state interest."[161] The court held that the MDHHS order was rationally related to a legitimate government interest in controlling the spread of COVID-19 in Michigan.[162] As a result, the court concluded the order did not violate the Free Exercise Clause as it was of neutral and general applicability.[163]

B. Judge Siler's Concurrence in Part and Dissent in Part

Judge Siler concurred with the majority's conclusion as to the mootness of the plaintiff's appeal.[164] However, Judge Siler's dissent focused on the district court's authority to deny the motion for a preliminary injunction in the aftermath of Tandon and Monclova.[165] In his opinion, the Court should have remained consistent with Monclova and considered all secular comparators, not just public schools.[166] In this light, Judge Siler preferred to remand the case for further review under the guidance of *Tandon*.[167]

V. ANALYSIS

The Sixth Circuit failed to follow recent precedent handed down by the United States Supreme Court in *Tandon* and *Roman Catholic Diocese of Brooklyn* regarding claims under the Free Exercise Clause. Specifically, the Sixth Circuit erred when it refused to apply strict scrutiny to the MDHSS order and failed to properly identify the true secular comparator for the Resurrection

156. *Id.* at 458.

157. *Id.*

158. *Id.*

159. *Id.* at 459. The plaintiffs argued for the court to apply the Supreme Court's decision in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (holding the First Amendment protects the rights of religious institutions to decide for themselves matters of church government, as well as those of faith and doctrine). However, the Supreme Court also emphasized that such ability "does not mean religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. Thus, the holding provided no assistance to the plaintiffs.

160. *Id.*

161. *Id.* at 460 (quoting Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002)).

162. *Id.*

163. *Hertel*, 11. F.4th at 458.

164. *Id.* at 462 (Siler, J., dissenting).

165. *Id.*

166. *Id.*

167. *Id.*

School. Due to the dramatic shift of recent precedent by the Supreme Court regarding the extension of *Lukumi*, this Note will apply strict scrutiny accordingly.

A. The Problem with Exceptions in Resurrection School v. Hertel

It is nearly impossible to create any regulation without providing exceptions. But that does not permit the government to legislate myriad secular exceptions without providing the same opportunity for the nonsecular. Sixth Circuit precedent has established that this exact scenario may implicate faith-based discrimination.[168] The Sixth Circuit directly stated that, "[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law."[169] A policy riddled with exceptions takes on "the appearance . . . of a system of individualized exemptions" and falls out of the scope of general applicability and "*must* run the gauntlet of strict scrutiny."[170] When those exceptions implicitly or indirectly burden any religion, as in the case of *Resurrection School v. Hertel*, the demand for strict scrutiny proliferates.

Nevertheless, the Sixth Circuit ignored its own precedent to enforce strict scrutiny and accepted that the exceptions were largely for activities "inherently incompatible" with wearing a mask.[171] But a closer examination of the exceptions may not warrant such bold assurance. The exceptions included children under the age of five, those who cannot medically tolerate a facemask, individuals engaged in public speech, those communicating with the deaf and blind, and first responders actively engaged in the performance of their profession.[172] The order also exempted athletes engaged in practice or competition.[173] And most remarkably, the order exempted those engaged in religious service.[174] Though it is clear that there were exceptions to mask-wearing for secular and nonsecular conduct, the plaintiffs were denied an exception based on their sincerely held religious beliefs.

Problematically, these exceptions are created by value-based judgments from the government. Value-based judgments may lead to results where the government routinely grants exceptions to persons for non-religious reasons while denying those requesting the same exception based on sincerely held religious beliefs, which is strictly forbidden.[175] For instance, how does one choose to exempt masks for close-contact sporting events and communal worship but not for students seeking to exercise their religion? Surely, legislators and judges engage in value-based decisions that derive from their presuppositions of economics, politics, and religion, to name a few. As a result,

168. Roberts v. Neace, 958 F.3d 409, 413 (6th Cir. 2020).
169. *Id.*
170. Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012) (emphasis added).
171. *Hertel*, 11 F.4th at 458.
172. *Id.* at 445.
173. *Id.*
174. *Id.*
175. Rader v. Johnston, 924 F. Supp. 1540, 1555 (D. Neb. 1996).

some exceptions will inevitably be perceived as favoring secular activities over nonsecular activities. Under those circumstances, the general applicability of a law is challenged, and strict scrutiny should be applied. One author argued that "[w]hen unequal treatment of religious and secular activity imposes a burden on religion, the reasons for the unequal treatment are evaluated under the compelling interest test."[176] As such, strict scrutiny must be applied whenever there is a hint of imposition upon religious conduct that is not otherwise burdening non-religious conduct due to myriad exceptions.

B. Applying Strict Scrutiny

Although riddled with exceptions, the Sixth Circuit only focused on the facial neutrality of the order. True, the order did not target religious exercises that would easily void the order of neutrality. But the inquiry should not have ended with merely perceiving the order's facial neutrality. "To pass constitutional muster a governmental law or policy must also be neutral in *purpose and effect*."[177] When reviewing the effect of the order's exceptions, the outcome did not treat all religious and secular conduct equally. One constitutional scholar provided that "[u]nequal treatment of religious and secular conduct *requires* strict scrutiny, whether or not that inequality is reflected in the text of the challenged law."[178] Thus, this Note will apply strict scrutiny and demonstrate that the MDHSS order would have failed such review.

Without question, the order was justified by a compelling governmental interest.[179] The motivation for the order was to mitigate the spread of the COVID-19 virus.[180] When the order was executed, the leading scientific communities advocated for the implementation of mask mandates as the best effort the government could make to slow the spread of COVID-19.[181] Michigan followed these suggestions and implemented several mask mandates, including the one in the instant case for school-aged children.[182] One would be hard-pressed to find a more compelling governmental interest than the mitigation of what has become one of the most contagious viruses in recent memory.

Even so, the order was not narrowly tailored to advance the state's interests and would fail the second prong of a strict scrutiny analysis. Because the issue at hand involves the First Amendment, the court should have considered "whether the "government, in pursuit of legitimate interests," has imposed greater burdens on religious conduct than on analogous secular conduct."[183]

---

176. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210 (2004).

177. *Rader*, 924 F. Supp. at 1553 (emphasis added).

178. Laycock & Collins, *supra* note 75, at 17 (emphasis added).

179. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

180. Resurrection Sch. v. Hertel, 11. F.4th 437, 443 (6th Cir. 2021). In the United States alone, there have been more than forty-six million cases of COVID-19 and more than seven-hundred and sixty thousand deaths at the time of this authorship. *See* Centers for Disease Control and Prevention, COVID Data Tracker (Dec. 30, 2022, 5:20 PM), https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

181. *Hertel*, 11 F.4th at 442.

182. *Id.* at 443-44.

183. Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477, 482 (6th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543).

One author correctly noted that "[i]f the exempted secular conduct undermines the state's interest to the same degree as the burdened religious conduct, such a law is not generally applicable."[184] Thus, the government would have faced the daunting task of proving that the order's numerous exceptions did not place a greater burden on religious conduct than secular conduct.[185] Herein lies the greatest issue for courts today when presented with free exercise challenges. How can courts properly identify comparable secular conduct? Must the court focus on the similarity of the activity only, or instead, as the *Tandon* Court recently pronounced, focus on the similarity of risk? [186] *Tandon* opened the gates to focus on the government's interest rather than discerning the similarities of the activities. Here, the comparability should have rested upon how Michigan restricted the spread of COVID-19 among secular and non-secular conduct, regardless of the similarities of the activities. The exceptions included in the MDHSS order are telling.

Under the order, students engaged in practice and athletic competitions are exempt, but not if they engage in worship in the classroom. Patrons at local restaurants and movie theaters enjoyed an exemption from the mask mandate, but socially distanced children at the Resurrection School were not allowed such an exemption. In accordance with *Tandon*, these exempted secular activities, among others, should have been the comparator, not merely other schools. If the exempted secular conduct was not so against the state's interest of preventing COVID-19, why not include another exemption for non-secular conduct that comparably poses the risk of spreading the disease? Exercising one's religion in school while practicing social distancing cannot be more dangerous than ignoring social distancing in close contact sports and leisure activities. In pursuit of mitigating the spread of COVID-19, the order placed a greater burden upon non-secular conduct than comparable secular conduct, voiding the order of general applicability.

One final exception is worth examination. The order carved an exception to the mask mandate for those *engaged* in religious services.[187] This exception advances the religious exemptions strictly confined within the boundaries of the localities that serve as houses of worship. But the First Amendment knows no such boundaries. The freedom to exercise one's religion extends beyond his or her church, mosque, synagogue, or temple.[188] And the Resurrection School functions as an extension of the Catholic Church in its community. It should therefore be expected that religious worship will occur at a Catholic school that offers three Masses each week, retreats for students, and time allowed for students to spend in Eucharistic Adoration.[189] Surely such actions can be

184. Laycock & Collins, *supra* note 75, at 19.

185. *Hertel*, 11. F.4th at 444-45.

186. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (per curiam) ("Comparability is concerned with the risks various activities pose, not the reasons why people gather.").

187. *Hertel*, 11. F.4th at 444-45.

188. *See* Chandler v. Siegelman, 230 F.3d 1313, 1317 (11th Cir. 2000) (holding that students could not be restricted from praying at any time nor in isolation because "[p]rivate speech endorsing religion is constitutionally protected—even in school[s].").

189. Letter from Jacob Allstott, Principal of Resurrection Sch., to Prospective Families,

considered as engaging in one's religion sufficient enough to fit an already existing exception—but, the government disagreed and refused to grant the same to the Resurrection School. If the order exempted religious conduct for congregants who are more prone to sing, engage in physical touching, and not socially distance, why should socially-distanced students be limited in their freedom to exercise religion at their school?

The Sixth Circuit observed that the plaintiffs could have enjoyed each exception detailed by the order had they simply engaged in *that* activity.[190] But the plaintiffs did not argue they were not able to enjoy *any* exception to the order. The plaintiffs sought to acquire *their own* exception to remove masks during school hours to exercise their religion. The order expressly allowed an exception for those engaged in worship. Why not extend the same freedom to the Resurrection School? Erroneously, the Sixth Circuit only focused on whether other non-religious schools enjoyed any analogous exception to answer that question. In fact, the Sixth Circuit completely ignored the prospect of considering any other secular comparator during its analysis. But if the court had correctly followed *Tandon* and *Roman Catholic Diocese of Brooklyn*, it would have looked to *all* comparators, not solely non-religious schools. Under this approach, the outcome would have changed drastically by considering *all* secular conduct listed in the exception, not simply whether other schools were comparably affected. Indeed, the Sixth Circuit could have easily concluded that the order was not generally applicable in light of the exceptions granted to various secular activities and therefore could not survive strict scrutiny.

VI. CONCLUSION

The COVID-19 pandemic persists at the time of this authorship, and government regulation remains a hot topic within the United States. On the one hand, people fear the government has failed to regulate orders that will sufficiently protect its citizens. On the other, people fear the government has gone too far with regulations that encroach upon freedoms protected by the First Amendment. The recent litigation discussed in this Article, including *Tandon* and *Roman Catholic Diocese of Brooklyn*, has revealed the pandemic's impact on the First Amendment. But "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[191] Thankfully, the Supreme Court has stood resolute in defending the free exercise of religion by reigning in governmental regulations that encroach upon constitutionally protected freedoms.

Specifically, the Court has appeared to distance itself from *Smith* and its hesitancy in applying strict scrutiny to facially neutral government regulations. Indeed, the current bench is arguably the most pro-religious freedom bench that we have ever had. Perhaps the religious and ideological backgrounds of recently appointed justices sitting on the bench will continue to pave the way for groundbreaking precedent under the Free Exercise Clause. Relevant to this

https://www.corlansing.org/school (last visited Jan. 3, 2022).

190. *Hertel*, 11 F.4th at 458.

191. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

Note, the Court offered its best guidance since *Lukumi* in *Tandon* and *Roman Catholic Diocese* for conducting proper analyses identifying comparable secular conduct for regulations that are riddled with exceptions but provide little relief for religious exercise. When this is true, as it was in *Hertel*, courts should look to *all* secular comparators, not just those facially similar by way of activity. Had the Sixth Circuit properly followed *Tandon* and *Roman Catholic Diocese*, or its proper holding in *Monclova*, it would have considered all secular comparators and noticed the order was not generally applicable. The Sixth Circuit should have applied strict scrutiny rather than rational basis review and, in so doing, would have likely determined that the regulation could not survive such heightened scrutiny. Accordingly, the Resurrection School should have prevailed on its free exercise challenge in the Sixth Circuit.[192]

192. The Sixth Circuit released a new ruling dismissing the entire case as the plaintiff's claims were deemed moot after this Note was submitted for publication. *See* Resurrection Sch. v. Hertel, 35 F.4th 524, 530 (6th Cir. 2021). However, the Sixth Circuit's most recent opinion does not impact the analysis of this Note. Indeed, the dissenting opinion by Judge Bush advocates for a similar argument proffered by this author.