22-7099

No. _____

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Dana Simmons,

Petitioner

vs.

Andrew Beshear, Ray Perry, and Gerina Weathers,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Article III of the Constitution of the United States of America limits federal courts to hearing the actual case or controversy before them. May lower federal courts and federal courts of appeal transpose a prima facie claim under 42 U.S.C. §1983 into a Constitutional challenge which was not presented by the Petitioner's well-pleaded complaint and forego any analysis required under §1983 thus altering the case before it and yielding an outcome that is not responsive to the actual claims presented in Plaintiff's complaint and is tantamount to an advisory opinion?

II. A prima facie claim under §1983 consists of two elements: (1) Plaintiff must prove by a preponderance of the evidence that Defendants(s) acted under color of state law; and (2) While acting under color of state law, Defendant(s) deprived Plaintiff of a federal constitutional or statutory right.[1] May lower federal courts and federal courts of appeal dispose of a prima facie claim under 42 U.S.C. §1983 by refusing to consider whether the defendants acted under color of state law where state law is established and where no valid abstention doctrine applies?

III. Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2] May lower federal courts and federal courts of appeal deny a motion for summary judgment under a §1983 claim where the material facts of the case are not in dispute; where the defendants, by their own admission, have acted under color of state law; where the defendants have admitted in their filings to the court that they "do not

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[1] Gomez v. Toledo, 446 U.S. 635, 640 (1980)

[2] Fed. R. Civ. P. 56(a); *See also Johnson v. Karnes*, 398, 873 (6th Cir. 2005).

dispute that...Plaintiff has a protected property interest in her classified employment;"[3] and where there is no theory by which the defendants may prevail under established state law?

IV. "When deciding whether to issue a preliminary injunction, a district court should address four factors: (1) the likelihood of success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest; and (4) the possibility of substantial harm to others." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992) (internal citation omitted). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573. May lower federal courts deny a motion for injunctive relief based on its assessment of one of the four factors required without considering the other three factors and without balancing the four factors against each other?

V. The issuance of an injunction is appropriate where there is relief that a court may offer. May circuit courts render an interlocutory appeal of the denial of injunctive relief moot in a case where a state employee seeks an injunction against her employer and the employer terminates her, yet the appellate court may order her reinstated upon a finding that injunctive relief should have been granted below? Would the fact that this sort of behavior is capable of reputation yet evading review impact this determination?

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[3] See page 13 of Defendants Response to Plaintiff's motion for injunctive relief.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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TABLE OF AUTHORITIES CITED

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CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is
[ ] reported at ____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is
[ ] reported at ____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at toAppendix to the petition and is
[ ] reported at ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the
appears at Appendix to the petition and is
court
[ ] reported at

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 9, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. ____A_____ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States of America
Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property without due process of law**; nor deny to any person within its jurisdiction the equal protections of the laws."

Amendment VIII of the Constitution of the United States of America

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Article III of the Constitution of the United States of America
Section 2

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;- to all Cases of admiralty and maritime Jurisdiction;- to Controversies to which the United States shall be a arty;- to Controversies between two or more States;- between a State and Citizens of another State;- between Citizens of different States;- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have Appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed."

42 U.S.C. §1983 - Civil Action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Material Facts

Petitioner, Dana Simmons, was hired as a Staff Attorney II for the Kentucky Public Protection Cabinet in September of 2020. On September 21, 2021, Petitioner was instructed by the Deputy Commissioner of her department to cover her face while in common areas of the building pursuant to the COVID-19 Face Covering Policy- effective July 29, 2021 (Policy). The next day, Petitioner emailed her direct supervisor and informed him of the conversation with the Deputy Commissioner. She further stated that she believed it was her prerogative to choose whether to cover her face or not and that she chooses not to. She also informed her supervisor that she would be happy to seek employment elsewhere if her choice not to cover her face was a problem. Finally, Petitioner inquired by what authority her government employer purported to require her to cover her face in light of the recent legislation passed by the General Assembly which prohibited the mask mandate and which ended the Policy.

Petitioner received a response from her supervisor that day stating that her good work was valued, and it would be a loss to the Cabinet if she left. He also attached a copy of the Policy and indicated that the Policy did not violate the General Assembly's prohibition against unilateral Executive Branch mask mandate. Petitioner thanked him for his response and requested that he notify her if her choice not to cover her face was seen as problematic. Two days later, on Friday, September 24, 2021, Petitioner was called into a meeting with the General Counsel and the H.R. Director of the Cabinet. During the meeting, Petitioner was assured that she was reputed as being a good employee who does good work, but that she was required to cover her face

pursuant to the Policy. Petitioner was also informed at this meeting that another employee had complained that Petitioner does not cover her face and that employee was concerned as she had immune-compromised loved ones for whom she cared. Petitioner informed the General Counsel and H.R. Director that she did not believe that the Policy was enforceable in light of legislation passed by the General Assembly in 2021. Petitioner further suggested that the anonymous employee who was afraid for her immune-compromised loved one perhaps be given an accommodation and allowed to work from home. Alternatively, Petitioner would be willing to work from home as she had for the first nine months of her employment. Both suggestions were immediately rejected.

Petitioner was provided with an appeal form and a copy of the Policy and told that she must leave the building and not return unless she covered her face. Petitioner was given a letter at the meeting which stated that she would be able to work on the three days per week that she was scheduled to work from home per her telecommuting schedule, but that she would not be permitted to work on the two days per week that she was scheduled to work in the office but could not due to her choice not to cover her face. The letter also stated that Petitioner would be permitted to use her accrued leave on days she was not permitted to enter the building and work. Plaintiff left the building as directed. Later that day, Petitioner received a follow-up email from the General Counsel informing her that she would not be permitted to use her accrued leave on days that she was not permitted to enter the building and work due to her choice not to cover her face. Petitioner was directed to use unauthorized leave without pay instead of accrued leave.

On September 28, 2021, Petitioner emailed the General Counsel and informed him that he had presented her with two conflicting directives during their meeting. The first was that she was prohibited from entering the building or working if she chose not to cover her face. The second was that she was expected to work in the building on the two days per week that she was scheduled to pursuant to her telecommuting agreement. The obvious choice in the face of these conflicting directives was singular - comply with the illegal Policy or be punished. She stated in her email that she would arrive to the office on the following day that she was scheduled to work as she was directed and as she always had, and that she hoped to be permitted to work peacefully and productively as she always had.

Petitioner worked from home the following Monday and Tuesday and arrived to the office as scheduled on the morning of Wednesday, September 29, 2021, and logged into her computer per usual. She saw that she had an email from the General Counsel which had been sent after 10:00PM the night before. The email stated that Petitioner should not enter the building without covering her face. Petitioner responded to the email and informed the General Counsel that she was in the building and had just received his email after logging into her computer. She informed him that if he wanted her to leave the building, she would. He responded informing her that she could stay if she wore a face covering while in common areas of the building, but she must leave if she chose not to. Petitioner left the building and did not work that day as directed.

Petitioner worked from home as scheduled the following Thursday, September 30, 2021. Petitioner also received a written reprimand on September 30th for "refusal to

adhere to the directive given to you on September 24, 2021, that restricts your access to any Executive Branch building/office for choosing not to wear a face covering in accordance with the Personnel Cabinet's policy." .

On Friday, October 1, 2021, Petitioner arrived to the lobby of her work station but did not proceed past the lobby. Rather, Petitioner emailed the General Counsel, the Appointing Authority, and her direct supervisor from the lobby and requested permission to proceed to her work station and to work peacefully and productively as she always had. After not receiving a response to her email within 15 minutes, Petitioner left the building and did not work pursuant to the previous directive she had received. Shortly after leaving the building, Petitioner received a response from the Appointing Authority, Mr. Brian Raley. Mr. Raley informed Petitioner that she could proceed to her work station if she complied with the Policy. Petitioner did not return to the office. Petitioner emailed Mr. Raley, the General Counsel, and her supervisor and informed them that she felt that they had reached an impasse due to their continued enforcement of an illegal Policy against her and her unwillingness to comply with it. Petitioner further informed them that she would no longer arrive to the building to request permission to work but would rather seek redress from the courts. From that date, Petitioner began researching and drafting her Complaint. Petitioner worked on the dates that she was scheduled to work from home and did not work on the two days per week that she was scheduled to work in the office as she was essentially banned from all Executive Branch buildings.

On October 5, 2021, Petitioner received an email from Mr. Raley informing her that she was being suspended for three days beginning October 6, 2021 through

October 8, 2021 for having arrived to the lobby of the building on October 1, 2021 without covering her face. Plaintiff did not work during the three-day suspension. Petitioner continued working from home on Mondays, Tuesdays, and Thursdays, and taking unauthorized leave without pay on Wednesdays and Fridays as directed. On October 22, 2021, Petitioner filed her Complaint under 42 U.S.C. §1983 and her Emergency Motion for Injunctive Relief with the United States District Court in Frankfort, KY. The Respondents filed a Response to Petitioner's motion for injunctive relief wherein they, fir the first time, asserted the authority for the Policy as being KRS 18A.025 and 18A.030. Prior to this filing, Petitioner always received a copy of the Policy in response to her question of what the authority was for the Policy.

Petitioner also received an email from Mr. Raley on October 22, 2021 informing her that she was being suspended for five days for alleged noncompliance with the Policy, despite not having entered the building since October 1, 2021, and for not working on the days she was scheduled to work in the office, despite having been banned from the building.

The district court scheduled an emergency hearing on Petitioner's motion for injunctive relief on October 29, 2021 in Northern Kentucky. Injunctive relief was denied and Petitioner was terminated from her position effective December 16, 2021 for alleged noncompliance with the illegal Policy.

Applicable State and Federal Law

Beshear v. Acree - "The Proverbial T.K.O."

The Supreme Court of Kentucky upheld Governor Beshear's use of emergency powers under KRS Chapter 39A in the 2020 case of *Beshear v. Acree*, 615 S.W.3d 780

(Ky. 2020). Specifically, the Court stated, "...we note that if Plaintiffs and the Attorney General were successful on **any one** of the first three issues of law- proper invocation of emergency powers, separation of powers among the three branches of government, or applicability of KRS Chapter 13A- it would be the proverbial 'knock-out punch' because it would undermine all of the Governor's COVID-19 response." *See Acree,* at 788. (emphasis added). The issuance of the COVID-19 Face Covering Policy and its enforcement against Plaintiff is violative of (1) KRS Chapter 39A and House Joint Resolution 1 of the 2021 special session of rate Kentucky General Assembly; and (3) KRS Chapter 13A. Thus, the applicability of each of these three issues of law in this case constitute the proverbial T.K.O. and calls for summary judgment in this case.

***Cameron v. Beshear* - Established State Law Limiting the Executive Branch**

In response to *Acree*, the Kentucky General Assembly passed legislation, during the regular session of 2021 limiting the emergency powers of the Governor and ending all COVID-19 agency action which the General Assembly did not specifically adopt in House Joint Resolution 77. The Governor filed suit challenging the newly passed legislation, including HJR 77, and lost. The Supreme Court of Kentucky upheld the challenged legislation in the August 2021 decision of *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021).

The new legislation amended KRS 39A.090 by setting an expiration date on Executive Orders and prohibiting the issuance of the same or similar Orders without the consent of the General Assembly. Additionally, HJR 77 rendered all agency action not specifically adopted by the Resolution "of no further force or effect as of the effective date of this Resolution." Consequently, once the Supreme Court of Kentucky

upheld *Cameron v. Beshear* in August of 2021, the Face Covering Policy- effective July 29, 2021, was ended effective August 2021.

The Governor acknowledged, through his spokesperson in newspaper articles, that the managing of the pandemic and the well-being of Kentuckians was now in the hands of the General Assembly. He issued a gubernatorial proclamation calling the General Assembly into a special session beginning September 7, 2021. The Governor's proclamation specifically requested that the General Assembly " Set forth the criteria pursuant to which the Governor may exercise authority to require facial coverings in indoor settings during the State of Emergency." The General Assembly declined to set forth any criteria authorizing the Governor to require facial coverings in indoor settings during the State of Emergency; therefore, the Executive Branch was prohibited from issuing its unilateral mask mandate without the consent of the General Assembly under the guise of policy.

On the first day of the special session, the General Assembly passed, and the Governor signed into law, House Joint Resolution 1. Section 1 of HJR 1 was practically identical to HJR 77 which became law during the regular session of 2021 and was upheld by the Supreme Court of Kentucky. Section 1 states, "**All SARS-COV-2-related** executive orders issued by the Governor and **all** administrative orders, administrative regulations, or other administrative actions not specifically extended by this Resolution are of no further force or effect as of the effective date of this Resolution." (Emphasis added). HJR 1 took effect on September 7, 2021, three weeks before Respondents disciplined and terminated Petitioner for alleged noncompliance

with the Policy. The Executive Branch's continued enforcement of the Policy against Petitioner in late September of 2021 was a clear violation of State law.

***Oswald v. Beshear*- The Executive Branch cannot Ignore Laws passed by the Legislature**

During the pendency of *Cameron v. Beshear*, the Governor issued Executive Order 2021-585, a mask mandate for all Kentucky schools, in direct contravention of the newly passed legislation. The executive order was challenged before the Eastern District Court of Kentucky in the case of *Oswald v. Beshear*, Civil Action No. 2:21CV96 (E.D.K. 2021). The district court in *Oswald* issued an injunction against the Governor during an *ex parte* proceeding held August 19, 2021, stating, "**The Executive Branch cannot simply ignore laws passed by the duly-elected representatives of the citizens of the Commonwealth of Kentucky. Therein lies tyranny.**" (Emphasis added). The district court in *Oswald* ultimately dismissed the case on November 5, 2021, on grounds of mootness and qualified immunity. Specifically, the *Oswald* court held that, "[U]ntil the Kentucky Supreme Court issued its ruling in *Cameron v. Beshear* as to the constitutionality of the state laws, the law was unsettled." The *Oswald* decision also referenced the court's holding in the matter of *Roberts v. Beshear*, 2021 WL 3827128, at *4 (E.D. Ky. Aug. 26, 2021), quoting "Even if Governor Beshear wanted to invoke another mass gathering ban that effectively shut down in-person worship, or issue another travel ban, the measures taken by the General Assembly prevent him from lawfully doing so."

Petitioner's case strongly resembles *Oswald* with the limited exception being that the Executive Order in Oswald was plainly executed as such, while the Executive Order in the case at bar was issued under the guise of policy. Both were in violation of

state law. Thus, after *Cameron v. Beshear*, the newly passed legislation became established state law. Unlike the Respondents in *Oswald*, Respondents in the case at bar violated established state law and are not entitled to immunity.

KRS Chapter 13A- Required State Procedures for Administrative Regulations

The Respondents in this case claim that the Policy was issued pursuant to KRS 18A.025 and 18A.030. Their argument fails because KRS Chapter 18A neither permits the Executive Branch to promulgate administrative regulations apart from the process required by KRS Chapter 13A, nor permits an end-run around the prohibition preventing a unilateral mask mandate of the Executive Branch in KRS 39A.090. The COVID-19 Face Covering Policy was a compulsory veiling law applicable to anyone and everyone in the Commonwealth who wished to enter an Executive Branch building or office for any reason. The plain language of the Policy states, "As part of the continuing COVID-19 'Healthy at Work' initiative, the Commonwealth of Kentucky remains committed to limiting the spread of COVID-19..." The Policy further states "Visitors will be required to wear a face covering when entering Executive Branch buildings/offices. If a visitor chooses not to wear a face covering, they will not be permitted to enter the building/office." (Emphasis added). Further still, the Policy states, "Employees who do not comply with this policy may be removed from Executive Branch buildings/offices and may be subject to corrective or disciplinary action." The Policy was issued by a memorandum which was emailed to Executive Branch employees by the Secretary of the Personnel Cabinet and did not undergo the requirements for administrative regulations required by KRS Chapter 13A. The only authority identified in the Policy for its authority is the "Healthy at Work initiative"

which, by that time, had been rescinded by both the Governor and the General Assembly.

KRS 18A.030(2)(b) states, "Subject to the provisions of this chapter and KRS Chapter 13A, the secretary shall, with the aid of his staff: As provided by this chapter, promulgate comprehensive administrative regulations **consistent with the provisions of KRS Chapters 13A** and 18A, and with federal standards for the administration of a personnel system in the agencies of the state government receiving federal grants." (Emphasis added). Defendants have failed to to comply with the requirements of KRS Chapter 13A, and KRS 18A does not, on its own, provide the Executive Branch authority to issue a compulsory veiling law.

KRS 13A.010(2) provides that "Administrative regulation means each statement of general applicability promulgated by an administrative body that implements, interprets, **or prescribes law or policy**, or describes the organization, procedure, or practice requirements of any administrative body...". (Internal quotations omitted). None of the exceptions listed in the definition apply here as the Policy is a directive governing all Executive Branch employees **and visitors** throughout the Commonwealth. Further, KRS 13A.100 (1) provides that "Subject to limitations in applicable statutes, any administrative body that is empowered to promulgate administrative regulations shall, by administrative regulation, prescribe, consistent with applicable statutes: (1) Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedures available to the public." The Policy was simply decreed by a memorandum emailed to Executive Branch employees. The policy

did not go through the process prescribed by the Legislature for administrative regulations nor did it provide the proper notice or comment period which is the requisite opportunity to be heard. Thus neither KRS 18A.025 nor 18A.030 validate the Policy.

14th Amendment U.S. Constitution - Due Process Clause

Petitioner's well-pleaded Complaint avers, among other things, that Respondents violated her Constitutional rights under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment when they acted arbitrarily in enforcing the illegal Policy against her which had been unequivocally by the state legislature. More specifically, the Sixth Circuit has held, "Substantive due process... serves the goal of preventing 'governmental power from being used for purposes of oppression,' regardless of the fairness of the procedures used. Substantive due process serves as a vehicle to limit various aspects of potentially oppressive government action. For Example, it can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights; or as a check on official misconduct which infringes on a 'fundamental right;' or as a limitation on official misconduct, which although not infringing on a fundamental right, is so literally 'conscience shocking,' hence oppressive, as to rise to the level of a substantive due process violation.' "*Id.*

The Supreme Court has stated, "Thus, in *Collins v. Harker Heights*, for example, we said that **the Due Process Clause was intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression."** *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 523 U.S. 833, 140 L.Ed.2d 1043 (1998)

(emphasis added). KRS 18A.095(1) prohibits the discipline or termination of a state classified employee without cause. When Respondents disciplined and terminated Petitioner for alleged noncompliance with the Policy weeks after it had unequivocally been rendered of no further force or effect, they exceeded their authority and acted arbitrarily in depriving Respondent of her livelihood among other things.

Procedural History and Outcomes

Petitioner filed her Complaint and an emergency motion for injunctive relief with the United States District Court Eastern District of Kentucky in Frankfort, KY on October 22, 2021. A hearing was held on the Petitioner's Motion on October 27, 2021 in Northern Kentucky. Petitioner's motion was denied. Petitioner filed an interlocutory appeal which was denied by the Sixth Circuit on June 30, 2022.

Pending the decision in her interlocutory appeal, Petitioner filed a Motion for Summary Judgment. Petitioner's Motion for Summary Judgment was denied without prejudice on December 28, 2021.

Petitioner's Complaint was dismissed on May 5, 2022. Petitioner timely appealed, but her appeal was dismissed by the Sixth Circuit on December 9, 2022. While there was a plethora of other filings in Petitioner's cases, the ultimate outcome was that her case was dismissed for lack of jurisdiction and failure to state a claim upon which relief may be granted. Both courts analyzed Petitioner's case as though it were a constitutional challenge to the COVID-19 Face Covering Policy rather than as a civil rights claim under §1983 on the grounds that her rights under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment of the Constitution were deprived by Respondents under color of state law.

In so doing, the courts reached the merits of the case and automatically gave credence to the Policy as having undergone the proper procedures required by law and as somehow obviating the directives of the General Assembly rendering the Policy of no further force or effect weeks prior to Respondents' enforcement of the Policy against Petitioner. The lower courts complete disdain of the statutory standing and the statutory requirement Congress placed on them to consider whether Respondents acted under color of state law is in direct contravention of their obligation and duty under Article III of the Constitution to decide the case and controversy properly before them.

REASONS FOR GRANTING THE PETITION

It is a matter of national importance that the courts of the United States, in accordance with Article III of the Constitution, take care to (1) resolve all cases properly before them; (2) refrain from altering the outcome of cases by transposing the claims presented by the parties into claims not actually before the courts; and (3) render decisions in accordance with sound legal reasoning rather than in novel and unpredictable ways that do not comport with well established law or with the doctrine of *stare decisis*.

In the case at bar, Petitioner's Complaint presents claims under 42 U.S.C. §1983. A prima facie claim under §1983 consists of two elements: (1) Plaintiff must prove by a preponderance of the evidence that Defendant(s) acted under color of state law; and (2) while acting under color of state law, Defendant(s) deprived Plaintiff of a federal constitutional or statutory right. *See Gomez v. Toledo,* 446 U.S. 635, 640 (1980). The Respondents in this case admit that they sanctioned Petitioner for alleged noncompliance with the Policy and stated on page 13 of their Response to Petitioner's motion for injunctive relief stating, "Defendants do not dispute that, for procedural due process purposes, Plaintiff has a protected property interest in her classified employment with the Public Protection Cabinet." Hence, by their own admission, Defendants have deprived Plaintiff of her rights protected under the Fourteenth Amendment of the Constitution under color of state law.

Further, Respondents claim in their defense (though no Answer was filed by Respondents) that the Policy was issued under KRS 18A.025 and 18A.030 rather than under the emergency powers provided under KRS Chapter 39A; therefore, it is not

prohibited by the General Assembly's amendments to KRS 39A.090. Petitioner showed that Respondents' argument fails under established state law for many reasons including, *inter alia,* the fact that Section 1 of HJR 1 of the special session of 2021 rendered "All SARS-COV-2-related" agency action of no further force or effect which the General Assembly did not specifically adopt in the Resolution, irrespective of the origin of its statutory authority. The Policy was not adopted in the Resolution; therefore, it was unequivocally ended by the Legislature effective September 7, 2021 - three weeks before Respondents enforced the Policy against Petitioner. Under state law, "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." *See* KRS 18A.095(1); *See also* KRS 13A.130.

Petitioner's §1983 claim could not be any more "prima facie" under the facts of this case. The material facts of the case are largely undisputed - Petitioner was disciplined and ultimately terminated due to her alleged noncompliance with the illegal Policy. The Policy was obviously invalid under established state law at the time it was enforced against Petitioner by Respondents. Respondents acted arbitrarily in enforcing a policy against Petitioner which the Legislature rendered of no further force or effect thus depriving Petitioner of her property interest in her livelihood and of her liberty interest in her good name and reputation, and of her right, under the Substantive Due Process Clause of the Fourteenth Amendment to be free from arbitrary actions of Executive Branch state actors. Based on the facts of this case, - no theory exists in law by which Respondents could prevail, and Petitioner is entitled to judgment as a matter of law.

Despite the straightforward simplicity of this case and the plethora of law supporting summary judgment in favor of Petitioner, the Sixth Circuit and the district court have flat out refused to acknowledge that Petitioner's case presents a §1983 claim and to analyze it accordingly. Rather, the lower courts have engaged in convoluted analyses which require great mental contortions and have yielded outcomes that do not comport with well established law nor with the doctrine of stare decisis. More specifically, both courts have transposed Petitioner's Complaint into a constitutional challenge to the COVID-19 Face Covering Policy rather than a challenge to, inter alia, the arbitrary action of government actors who have exceeded the bounds of their authority, violated state law, and injured Petitioner in so doing. The courts course of action is not supported by Petitioner's Complaint. A constitutional challenge to the COVID-19 Face covering Policy is not before the Court.

Thus, the lower courts have, in part, divested Petitioner of her statutory standing which §1983 provides and have carved out a portion of Petitioner's claim which they state Petitioner may legitimately challenge. Additionally, the lower courts have necessarily reached the merits of the case in assuming and acting as though the policy is valid under state law despite Petitioner's showing that established state law provides that the Policy was invalidated and rendered of no force or effect by the state Legislature. The outcomes reached by the lower courts do not address the case actually presented by Petitioner's Complaint and have, in essence, deprived Petitioner of her day in court and of her right to receive redress from the courts. Not only was this course of action palpable error, it was, according to a recent decision of the Sixth

Circuit, "treason to the constitution." *See Doster v. Kendall,* 54 F.4th 398, 411 (6th Cir. 2022).

Both the Sixth Circuit and the district court concluded that they would not consider the issues of state law. The Sixth Circuit stated that it would not reach the issue of arbitrariness because it would not consider the issues of state law. A claim under §1983 necessarily requires the court to consider state law. Both elements of a §1983 claim require the court to consider whether the Respondents acted under color of state law. The lower courts' failure to do so is inexcusable and also amounts to treason to the constitution. A court cannot simply transpose one claim to another at will nor refuse to consider elements of a claim before it apart from some identifiable cause for doing so. The court did not articulate or even hint at any valid doctrine for abstaining. It merely announced that it would not consider state law and did not.

In the 2022 case of *Doster v. Kendall,* the Sixth Circuit engaged in a fairly thorough analysis of the circumstances in which a court may decline to hear a properly filed case. The court states, "Courts start with the presumption of a 'virtually unflagging' duty to resolve all cases that fall within their jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 491 U.S. 350, 359, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (citation omitted). As Chief Justice Marshall said long ago, a court would commit 'treason to the constitution' if it refused to resolve an Article III 'case" because the case's legal issues touched sensitive matters. *Cohens v. Virginia,* 19 U.S. 264, 404, 6 Wheat. 264, 5 L.Ed. 257 (1821). More recently, the Court has reaffirmed that the judiciary lacks a common-law power to create policy-rooted "exceptions" to its jurisdiction. *See Doster,* at 411. The *Doster* Court goes on to state, "Just because

'congressionally uninvited intrusion into military affairs by the judiciary is inappropriate,' does not mean that courts may 'decline' an invitation that Congress has sent. They should review a claim against the military if Congress has 'provided' for that review." *Id.* at 412. (Internal citations omitted). Finally, the *Doster* Court states, "Because the Plaintiffs' claims arise from this statutory source, we may not adopt common-law abstention rules as if we were regulating a court-created claim." *Id.* at 413.

Much like the claims presented in *Doster*, Petitioner's claims are specifically provided for by Congress and the courts may not decline Congress' invitation to review claims statutorily provided for. §1983 requires the courts to consider whether defendants have acted under color of state law and, if so, whether while acting under state law defendants have deprived Petitioner of her rights under the Constitution or under federal laws. *Doster* concluded, "In sum, we may adopt only those abstention rules that comport with the law under which a plaintiff sues" and where no abstention rule is provided, "[W]e are left with our 'virtually unflagging' duty to resolve the Plaintiffs'...claims." *Id*. at 415. (Internal citations omitted).

If courts are permitted to render decisions like *Doster* which adhere to a very faithful interpretation and application of this Court's and of their own jurisprudence and just a few months later render a decision like that in the case at bar which is both unfaithful and repugnant to the doctrine of stare decisis, then the appearance and the very notion of justice in the U.S. courts will soon lose its value and will tragically be found wanting.

Additional decay to the U.S. judicial systems may occur if the actions taken by the lower courts in this case are not quelled expressly and promptly. Specifically, the

actions of the lower courts of in transposing Petitioner's claims from §1983 claims into constitutional challenges to the Policy present a sort of mutation to the Court's prohibition against advisory opinions. This Court has defined an "advisory opinion" as an "advance expression of legal judgment upon issues" that are not before a court in the form of litigation involving concrete claims by adverse litigants. *See United States v. Fruehauf,* 365 U.S. 146, 157 (1961). The Court has long held that the language in Article III authorizing federal court jurisdiction over certain "Cases" and "Controversies" prohibits federal courts from issuing advisory opinions. *See Chi. & S. Air Lines v. Waterman S. S. Corp.,* 333 U.S. 103, 113-114 (1948). The Court has explained that cases seeking advisory opinions are not justiciable, thus, the federal courts lack jurisdiction to decide such cases. *See, e.g.,*

v. United States, 219 U.S. 346, 361-63 (1911). *See also, Flast v. Cohen,* 392 U.S. 83, 96-97 (1968). The ban on advisory opinions has been recognized as being at the "core of Article III," and one commentator has noted that "other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions." Erwin Chermerinsky, Federal Jurisdiction §2.2 (6th ed. 2012).

While the decisions of the lower courts in this case may not present advisory opinions in the traditional sense, that is, in the form of the parties requesting the courts to render decisions in cases in which they lack jurisdiction pursuant to Article III's limitation to cases and controversies; they do present, perhaps, a mutated variety of an advisory opinion- one in which the courts, *sua sponte,* transpose a perfectly justiciable claim which is properly before it into a claim that is not presented by the Complaint and, therefore, is not the actual case or controversy before the court. Such a course of

action, left unchecked, would produce a breeding ground for nefarious dealings and outcomes which exude the appearance of, and indeed, the very presence of impropriety in the courts.

The integrity of the courts and the preservation of individual rights and of justice must be maintained by dealing swiftly and evenhandedly with error presented by the decisions of the Sixth Circuit and the district court in this case. Both decisions stand for the proposition that courts may, at will, depart from sound legal doctrine and alter the rights of a party and the outcome of a case at any given time.

Injunctive Relief and Mootness

Finally, the district court dismissed Petitioner's motion for injunctive relief on grounds that Petitioner did not demonstrate irreparable harm. Petitioner appropriately demonstrated irreparable harm of a Constitutional stature, but the district court did not consider this. The court looked rather to whether abiding by the Policy would produce any physical or psychological harm to Petitioner. This error was based on the court's erroneous analysis of the case as a constitutional challenge to the Policy, which it was not. The court erred in solely basing its decision on this one factor. The Sixth Circuit held in the case of *Doe v. Sundquist*, 106 F.3d 702, that, "The likelihood of irreparable harm does not, however, control completely; other factors must still be weighed." *Sundquist,* at 707. The court should have weighed each of the four factors against one another rather than basing its decision on a single factor which, too, was wrongly applied.

Petitioner was terminated shortly after her motion for injunctive relief was denied. As a result, the Sixth Circuit rendered Petitioner's interlocutory appeal as moot

because she was no longer employed by Respondents. This was palpable error because Petitioner's motion requested whatever relief the court may have deemed appropriate in the case. The fact that Petitioner was terminated did not render her interlocutory appeal moot because the court could very obviously have ordered her reinstated if her request for injunctive relief were denied in error. The court's decision to dismiss Petitioner's interlocutory appeal as moot despite its ability to order her reinstated to her position upon a finding that the district court's denial of her request for injunctive relief was improper, was in error. This is especially so because Respondents' behavior was very obviously capable of repetition yet evading review.

If a state employee files suit against her government employer seeking injunctive relief, and her state employer is able to moot the employee's case simply by terminating her, then the actions of government employers will be virtually unreviewable regardless of any remedy or cause of action provided in law. This sort of outcome is insupportable in the American justice system as it would yield egregious results that are positively blasphemous to American values and to the system of checks and balances upon which our great nation depends.

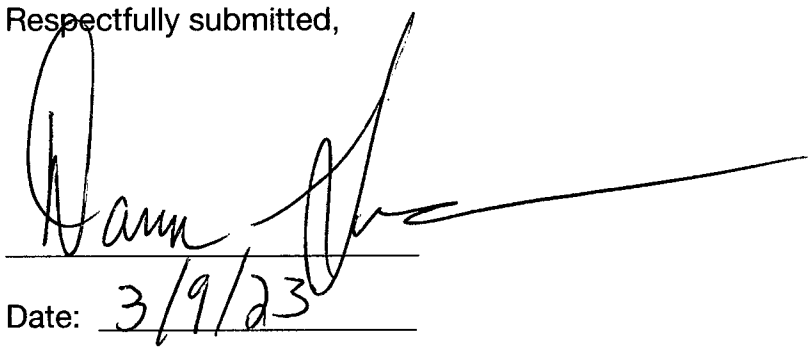
CONCLUSION

The integrity of the courts or the deterioration thereof is of unspeakable importance to the nation. Our system of separation of powers and of checks and balances depends vitally upon each of our three branches of government vigilantly fulfilling the mandates which the Constitution dictates to them. The courts, and indeed- this Court, must be diligent in enforcing and keeping guard over that sacred document and in protecting the rights of the people at all costs. Willful neglect of its

duties would render the court system ineffective and culpable. For, as the French Judge and Philosopher, Montesquieu observed, "There is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice."

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 3/9/23