No. _____

In the Supreme Court of the United States

GWYNETH K. MURRAY-NOLAN,
Petitioner,

v.

SCOTT RUBIN, KURT PETSCHOW, LISA CARBONE, TERRY DARLING, BRETT DRYER, WILLIAM HULSE, NICOLE SHERRIN KESSLER, MARIA LOIKITH, PATRICK LYNCH, KRISTEN MALLON, CRANFORD BOARD OF EDUCATION, JENNIFER OSBOURNE, SCIARRILLO CORNELL MERLINO MCKEEVER AND OSBOURNE LLC, JOHN DOES 1–25, ABC DEFENDANTS 1–25, ANTHONY SCIARRILLO, CRANFORD POLICE DEPARTMENT, NADIA JONES, ROBERT CHAMRA, DENNIS MCCAFFERY, LESLI RICE, AND ANTHONY GIANNICO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether conduct must convey a particularized message to be protected as expressive under the First Amendment.

2. Whether the full context of conduct must be considered to determine its expressive nature.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Third Circuit, No. 22-2702, *Murray-Nolan v. Rubin et al.*, judgment entered February 5, 2024.

United States District Court for the District of New Jersey, No. 22-801 (EP), *Murray-Nolan v. Rubin et al.*, judgment entered September 8, 2022.

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The Third Circuit's opinion affirming is reported at 92 F.4th 193 (CA3 2024), and reprinted at App. 1–39.

STATEMENT OF JURISDICTION

Petitioner timely files this petition from the Third Circuit's February 5, 2024, decision. This Court has jurisdiction under 28 U.S.C. § 1254(a).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

INTRODUCTION

Like many parents, Gwyneth Murray-Nolan was a parent of children who had been intensely harmed by the sustained, isolating requirement of mandatory masking in public schools during COVID. And like many parents, she took action. Advocating against her local school district's failure to challenge an executive order interpreted as requiring universal masking of schoolchildren, including those with special needs, she had spoken at the local Board of Education meeting over at least six months—along with advocacy before legislators and many others. Each time, she was unmasked, no matter the threats issued in the meetings for that choice. Reasonable observers well understood why she was unmasked: to convey her message that mandatory masking was harming children and to express solidarity with those children.

By the start of 2022, mandatory masking was on its way out, even in places like New Jersey. But though the New Jersey governor had announced that the executive order would expire in March, Ms. Murray-Nolan's school district stuck to its policies. She attended the January 2022 meeting, when the Board threatened to call the police on her—then cancelled the public comment portion of the meeting after other attendees took off their masks in solidarity with Ms. Murray-Nolan. So Ms. Murray-Nolan filed a lawsuit to protect her advocacy before the February meeting. By that point, Board and meeting observers knew well why she came unmasked: to express her message. Yet shortly after she arrived unmasked at the February meeting, she was arrested and taken to jail. She sued for First Amendment retaliation.

The courts below held that her claim should be dismissed. According to their decisions, conduct is expressive only if it conveys a "particularized message"—and wearing or not wearing a mask is *per se* unexpressive because any message is not obvious. These holdings deepen a conflict in the courts of appeals and depart from this Court's precedents.

For decades now, the lower courts have been split as to how to interpret this Court's contradictory suggestions that (1) conduct must "convey a particularized message" to be protected, *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *State of Wash.*, 418 U.S. 405, 409 (1974)), and (2) "a narrow, succinctly articulable message is not a condition of constitutional protection," so conduct need not "convey[] a 'particularized message.'" *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (quoting *Spence*).

Unsurprisingly, as the Tenth Circuit explained, the "circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test." *Cressman* v. *Thompson*, 798 F.3d 938, 955 (CA10 2015). That sustained disagreement is detailed here, and includes contradictory decisions from within particular circuits. In a prior opinion with the same author as the decision below, the Third Circuit had rejected the exact "particularized message" requirement that it applied below. This Court's review is urgently needed to address this unsettled area of law, which threatens core First Amendment rights.

The Court should also address the deviation of the decision below from its precedents about the

importance of considering context when assessing the expressive content of conduct. Many precedents recognize that context is key here. Sometimes flag burning might convey a message, and sometimes not. Yet the decision below sweeps all relevant context away—disregarding Ms. Murray-Nolan's long history of unmasked advocacy—to hold that not wearing a medical mask can never be symbolic. That suggestion—especially at the end of COVID measures in 2022, when many engaged (or not) in COVID measures primarily for symbolic value—defies this Court's precedents. And the question of context is closely related to the right standard for assessing how "particularized" a conduct's message must be, making it appropriate to consider here.

These questions about a core First Amendment standard are important. Because of the lower court division, the protection of speech rights in conduct varies by jurisdiction. And though it is tempting to dismiss these COVID cases as unlikely to reoccur, their errors will infect cases having nothing to do with COVID—and the assumption that society will never see similar regimes is ill-founded. Last, this case is an ideal vehicle. It was resolved on a motion to dismiss, and the courts below dismissed on the merits with prejudice. Thus, the Court can resolve these pure legal questions about the proper First Amendment standard, leaving factual development for remand.

A mother seeking to protect her special needs children for months at school board meetings was arrested for that expressive advocacy. Her arrest challenges the foundations of the First Amendment. The Court should grant the petition for certiorari.

STATEMENT OF THE CASE

A. Facts

Gwyneth Murray-Nolan was familiar to the Cranford Board of Education. A resident of the Township of Cranford in New Jersey with two young children in the Cranford Public Schools, she had long been an advocate for unmasking children in schools. App. 95. Her advocacy stemmed from her children's experiences. Her son "has autism and needs to see faces to understand, comprehend and communicate as part of his learning and ability to keep up with the world around him." App. 129. Universal mandatory masking for three years had ruined his educational experience. *Ibid.* Her other son "developed deep, bleeding sores in his lips and inside his cheeks" from licking the inside of his constantly-worn mask, and at one point had lost 10% of his body weight. *Ibid.*

These harms originated in a series of executive orders issued by the New Jersey governor, one of which "mandated that New Jersey schools 'maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises.'" App. 6 (quoting N.J. Exec. Order No. 251 (Aug. 6, 2021)). In response, on the dubious assumption that "maintain[ing] a policy regarding" masks required masking everyone all the time, the Cranford Township School District "implemented mandatory indoor masking policies." *Ibid.*

Ms. Murray-Nolan's months-long protest was aimed at these policies. Specifically, she was protesting the Board's failure to "challenge the

Governor's Executive Orders related to masking children," given her view that mandatory masking in schools had been "documented to have significant adverse effects on" many children, "particularly those with special needs." App. 90–91.

Ms. Murray-Nolan had spoken at Board meetings unmasked at least six times about its student mask policies, criticizing the Board for failing to advocate for children with special needs and other issues with constant masking. App. 95. She had also testified about the mask injuries to her children before members of the New Jersey State Assembly and the New Jersey Senate, and had also made many social media posts in community forums and websites seen by the Board and the other defendants. *Ibid.* And in September 2021, Ms. Murray-Nolan had filed a Harassment, Intimidation and Bullying Complaint against the Superintendent, a Cranford school principal, and a Cranford school nurse, for retaliation against her children related to their masks. App. 95–96. That confidential complaint was evidently publicized by some Defendants, as it became a source of public gossip and knowledge. App. 96.

In short, Ms. Murray-Nolan "is well-known to the Board" as "an advocate for parental choice in masking children at school." App. 89. She continued her advocacy against the Board's masking policies at Board meetings on January 24, 2022, and February 14, 2022. At the January meeting, Ms. Murray-Nolan arrived unmasked "in a sign of silent protest against the Cranford Schools masking policies." App. 88. The point of her remaining unmasked was unmistakable: "by not wearing a mask," she "was showing solidarity

with all [school]children in protesting the [Board's] violation of their civil rights." App. 91.

Ms. Murray-Nolan remained unmasked through the presentations at the start of the meeting. App. 89. After ordinary business, but before the public comment portion of meeting started, the Board's legal counsel interrupted multiple times to say that everyone in the room must be masked. *Ibid.* After Ms. Murray-Nolan politely refused to take a mask that was offered to her, legal counsel conferred with the superintendent, then threatened to contact law enforcement on anyone who remained unmasked. *Ibid.* The Board only sought enforcement at the start of the public comment period because Board members "wanted to suppress what they plainly understood was [Ms. Murray-Nolan's] constitutionally protected speech and conduct." App. 92.

Ms. Murray-Nolan did not don a mask, and instead continued to sit silently in protest without obstruction, interference, or disruption. School officials then left the meeting and met in executive session for about ten minutes in violation of state law. App. 89–90. During this time, most other attendees removed their masks in solidarity with Ms. Murray-Nolan, making statements like "if Gwyneth is going to be arrested, they will have to arrest all of us." App. 90.

The Board then returned, and seeing the mass protest that had developed, cancelled the rest of the meeting without allowing the public comment portion of the meeting to proceed, an alleged violation of state law. App. 90. The Board thus prevented Ms. Murray-Nolan and other parents from vocally protesting the

Board's continued mask, quarantine, and close contact policies. *Ibid.*

A few days later, the Board posted a statement on the Cranford Schools' Facebook page entitled, "Statement as to why no Board business was conducted at the Cranford Board of Education Meeting on January 24, 2022." App. 92. Obviously referring to Ms. Murray-Nolan, the post blamed an "individual" who was "offered a mask on more than one occasion." App. 121. According to the post, "[r]ather than contacting the police, the Board chose to end the meeting so it could be in compliance with the executive order." *Ibid.* The statement did not include that Ms. Murray-Nolan sat quietly through the first 20 minutes of the meeting or that the Board had in fact threatened to call the police. App. 92. The Board omitted this information "because it did not want the community to know that" it was "unconcerned [with] the alleged public health and safety with respect to its attempted and alleged mask mandate enforcement, but rather that [it] only sought such enforcement at the commencement of the public comment period because [it] wanted to suppress what [it] plainly understood was [Ms. Murray-Nolan's] constitutionally protected speech and conduct." *Ibid.*

In follow-up exchanges on Facebook, members of the community expressed their understanding that Ms. Murray-Nolan "goes to the BOE meetings because she wants the BOE to 'unmask our kids.'" App. 141; see App. 97–98.

A couple of days after the Board's post, Ms. Murray-Nolan spoke with the Cranford police chief, who told her that the police had not been called to the

January 24 meeting. App. 93. They "had a friendly and respectful conversation" in which the chief conveyed "that no parent would be arrested for refusing to wear a mask at a BOE meeting." App. 93.

Shortly before the February meeting, the Superintendent sent a mass email to all parents and guardians on the entire district email list noting that the government had just "publicly announced that the universal school mask mandate presently in effect in New Jersey would be lifted effective March 7, 2022." App. 126. Thus, the email explained, "the District will not require universal masking, starting on March 7, but" would "enforce masking at the upcoming Board meetings on February 14 and February 28." App. 123. The email threatened that "law enforcement officers" would be called for the "removal of" any person when that person "prevents or disrupts a meeting." App. 94 (quoting App. 124). The email suggested that those who wore masks were "great role models for our children and other communities," with the corollary suggestion that Ms. Murray-Nolan and other unmasked parents "were not acting as a 'great role model for our children.'" *Ibid.* The threat in this message was "retaliatory in nature for [Ms. Murray-Nolan's] filing of the HIB" and advocacy "in multiple public forums and in [Board] meetings[] about unmasking children in schools." App. 97.

Given the Board's threats, Ms. Murray-Nolan filed a verified complaint and an order to show cause the day of the February Board meeting, serving the defendants—Board members, its counsel, and the superintendent—a copy of the filings before the meeting. App. 98. The verified complaint specified

that Ms. Murray-Nolan had entered the building unmasked on January 24, 2022 "in a form of silent protest against the Cranford Schools masking policy, as well as the Board of Education . . . and Superintendent['s] . . . lack of action related to unmasking children in schools, particularly those with medical conditions and special needs." D. Ct. Dkt. 1, ¶ 18.

On February 14, 2022, as usual, Ms. Murray-Nolan arrived unmasked at the meeting, where the high school baseball coach who knew her was seated at the entrance. App. 98–99. Pretending not to know her, the coach informed Ms. Murray-Nolan "that he was 'told' to call the police on [her] if she entered the building unmasked." App. 98. He repeated the threat after Ms. Murray-Nolan informed him of the pending lawsuit "to protect her constitutional rights," given "that not wearing a mask was politically protected free speech." App. 99. The coach's "assertion that he would do as he was 'told' by calling the police confirms that Defendants" "had conspired prior to the February 12, 2022 [Board] meeting to violate" Ms. Murray-Nolan's civil rights: "she was a known target of such purported instruction to [the coach]." *Ibid.* The coach then called the police to have Ms. Murray-Nolan arrested. *Ibid.*

Meanwhile, after handing the Board's secretary a courtesy copy of her complaint, Ms. Murray-Nolan took her seat as usual, "causing no disruption, obstruction, or interference." App. 101. One of the Board's lawyers sat next to her and instructed her "to put on a mask[] in a threatening and intimidating manner." *Ibid.* Ms. Murray-Nolan handed him a copy of her complaint against the Board, the

superintendent, and his law firm, but he threw the complaint across the room and repeated his command to "Put on a mask now!" *Ibid.* Ms. Murray-Nolan explained once again that she was engaging in protected expression by not wearing a mask. *Ibid.*

The legal counsel then signaled three Cranford Police Department officers, who were out of Ms. Murray-Nolan's sight, in the hallway at the back of the room, with an "ok" sign. App. 101–02. The officers accosted Ms. Murray-Nolan and asked her to leave the room, which she did. App. 102. Ms. Murray-Nolan informed them that she "was making a constitutionally protected political statement," with which the sergeant in charge concurred. *Ibid.* The officers told her, that despite her acknowledged constitutional protest, she was violating a "rule of the building," and that "they don't want you here without a mask." *Ibid.* So she was "handcuffed, walked outside," "placed in the back of a police car," and taken to police headquarters, where she was "handcuffed to a metal bench in a metal cage in the processing room" for an extended period of time and left with bruises. App. 102, 104–05. She was charged for defiant trespass under N.J. Stat. Ann. § 2C:18-3b. App. 13.

B. Proceedings below

As noted, Ms. Murray-Nolan initially filed this suit before her arrest on February 14, 2022, alleging claims against the superintendent, Board members, and the Board's legal counsel. App. 12–13. After her arrest, Ms. Murray-Nolan amended her complaint with claims against three groups of defendants under 42 U.S.C. § 1983 and state law: the superintendent and Board members, the Board's two legal counsel, and the

Cranford Police Department and several officers. App. 13–14.[1] She alleged that the defendants "retaliated against her for exercising her First Amendment rights when they canceled the first Board meeting, published 'threats' via email and social media, and arrested her following her maskless attendance at the second meeting." App. 14.[2]

After earlier denying Ms. Murray-Nolan's order to show cause on the initial complaint, the district court dismissed the amended complaint. The court agreed that Ms. Murray-Nolan had standing because "at least some component of her alleged harm remains redressable by her economic damages claim." App. 58. But the court held that she failed to state a First Amendment retaliation claim under § 1983.

The court identified the elements of a First Amendment retaliation claim as "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the

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[1] Defendants Kurt Petschow, Lisa Carbone, Terry Darling, Brett Dryer, William Hulse, Nicole Sherrin Kessler, Maria Loikith, Patrick Lynch, and Kristin Mallon constitute the Board. App. 83–85. Dennis McCaffery is a Board employee. App. 87. Scott Rubin is the Cranford Schools Superintendent. App. 83. The Board was represented by the firm Sciarrillo, Cornell, Merlino, McKeever, and Osbourne, LLC, and two of its attorneys, Jennifer Osbourne and Anthony Sciarrillo, are defendants. App. 85–86. Last, the Cranford Police Department, Sergeant Nadia Jones, and Officers Anthony Giannico and Robert Chamra are defendants. App. 86–87. Ms. Murray-Nolan stipulated to the dismissal of Lesli Rice. App. 41 n.1.

[2] Her amended complaint also alleged violations of 42 U.S.C. §§ 1985–86, but the dismissal of those claims was not appealed. App. 13–14 n.4.

constitutionally protected conduct and the retaliatory action." App. 62–63. The court addressed only the first element because "Defendants do not challenge the second or third element." App. 63 n.11. And the court held that "[s]itting without a mask to protest a mask mandate" did not convey an "overwhelmingly apparent" and "'particularized message'" so was unprotected conduct. App. 63–67 (quoting *Johnson*, 491 U.S. at 404).

The district court also found that the Board's legal counsel were not "state actors" under § 1983, and that Ms. Murray-Nolan's retaliatory arrest claim against the police defendants also failed because they had probable cause to arrest her. App. 67–70.

"[F]or the same reasons" the court dismissed Ms. Murray-Nolan's § 1983 claim, it dismissed her parallel state law claim under N.J. Stat. Ann. § 10:6-2(c). App. 71. The court dismissed the amended complaint with prejudice because Ms. Murray-Nolan "has already had one opportunity to amend and because any further amendment would likely be futile." App. 76, 78.

The Third Circuit affirmed. It agreed with the district court that Ms. Murray-Nolan has standing. App. 22 & n.7. And it agreed with the district court that Ms. Murray-Nolan's conduct was not constitutionally protected. It held that the First Amendment protects only "inherently expressive" conduct, which requires two elements: "the actor must 'intend to convey a particularized message,' and there must be a high 'likelihood' that 'the message will be understood by those who view it.'" App. 24 (cleaned up) (quoting *Johnson*, 491 U.S. at 404).

The court held that Ms. Murray-Nolan "easily" satisfied the first element of an "intent to convey a particularized message." App. 25. But it held that she could not show the second element because "it is unlikely that a reasonable observer would understand her message simply from seeing her unmasked at the Board meeting." App. 25. The court said that a "medical mask" is not "inherently symbolic" but rather "a safety device." App. 27. Thus, Ms. Murray-Nolan's "refusal to wear a mask was not constitutionally protected." App. 27. The court "affirm[ed] on that basis alone." App. 32.

The Third Circuit alternatively held "that the Police Defendants had probable cause to arrest Murray-Nolan for defiant trespass" so could not be liable for retaliation. App. 33. The court reasoned that there was no selective prosecution notwithstanding the failure of the police to arrest other unmasked citizens at the January meeting because Ms. Murray-Nolan was arrested at the February meeting. App. 36. Last, the court alternatively held that the Board defendants did not retaliate against her by cancelling the January meeting, explaining that it apparently did so because of Ms. Murray-Nolan's "refusal to wear a mask at the meeting," which the court said was "not constitutionally protected." App. 37–38.

REASONS FOR GRANTING THE WRIT

I. The decision below implicates a long-running split in the courts of appeals.

The Third Circuit below held that for an action to qualify as expressive, it "must satisfy two elements: the actor must 'inten[d] to convey a particularized message,' and there must be a high 'likelihood' that 'the message [will] be understood by those who view[] it.'" App. 24 (quoting *Johnson*, 491 U.S. at 404). And it held that while Ms. Murray-Nolan "inten[ded] to convey a particularized message," those who viewed her protest would not "know what 'particularized message' [she] sent by refusing to wear a mask." App. 25–27. That led it to conclude that not wearing a mask "is not" "inherently symbolic" so enjoys no First Amendment protection in any circumstance. App. 27.

How "particularized" an act's implied message must be for the act to qualify as expressive has split the courts of appeals. The confusion started in *Johnson*, whose one sentence cited below as the "test" for expressive content said merely that "we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11). *Johnson* did not say whether this is the right or only question. And the Court in *Spence* did not even *ask* that question, as *Johnson* suggests—it was merely a conclusion about the facts of that case, without explanation of whether that conclusion was necessary or sufficient for a finding of expressive content. See *Spence*, 418 U.S. at 410–11. The Third Circuit itself previously recognized this point:

"*Spence* . . . contained no language of necessity." *Troster* v. *Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1090 n.1 (CA3 1995).

Later, in *Hurley*, this Court appeared to reject *Spence*'s "particularized message" language, relied on by *Johnson*. *Hurley* held that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569. If that protection were "confined to expressions conveying a 'particularized message,' [it] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569 (citation omitted) (quoting *Spence*, 418 U.S. at 411).

The Court has not clarified the status or nature of the "particularized message" requirement since. Many of its decisions, before and after *Hurley*, ignore the *Spence-Johnson* "test" in deciding whether conduct is expressive. See, *e.g.*, *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 476 (2009); *Rumsfeld* v. *F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989); *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

Unsurprisingly, confusion has reigned in the lower courts. As the Tenth Circuit explained, "Our sister circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test." *Cressman* v. *Thompson*, 798 F.3d 938, 955 (CA10 2015). "[T]he Second Circuit has 'interpreted *Hurley* to leave intact the Supreme

Court's test for expressive conduct in *Texas* v. *Johnson*.'" *Id.* at 955 (quoting *Church of Am. Knights of the Ku Klux Klan* v. *Kerik*, 356 F.3d 197, 205 n.6 (CA2 2004)).

By contrast, the Third Circuit—in an opinion with the same author as the decision below—had previously held that "*Hurley* eliminated the 'particularized message' aspect of the *Spence-Johnson* test." *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 160 (CA3 2002). Earlier it had held that that "restrictive test is no longer viable" after *Hurley*. *Troster*, 65 F.3d at 1090. Yet here it applied that precise test. App. 24.

The First Circuit too has offered contradictory holdings. Compare *Casey* v. *City of Newport*, 308 F.3d 106, 110 (CA1 2002) (using *Hurley*'s test), with *Gun Owners' Action League, Inc.* v. *Swift*, 284 F.3d 198, 211 (CA1 2002) (using *Johnson*). So there is confusion even within circuits.

The Ninth Circuit has also declined to "rely[] on the *Spence* test," citing *Hurley* for the point. *Anderson* v. *City of Hermosa Beach*, 621 F.3d 1051, 1060 (CA9 2010); see *Green* v. *Miss United States of Am., LLC*, 52 F.4th 773, 785 (CA9 2022) (noting "the First Amendment's protection for non-particularized messages"); *White* v. *City of Sparks*, 500 F.3d 953, 956 (CA9 2007).

"Other circuits fall somewhere in the middle." *Cressman*, 798 F.3d at 956; see, *e.g.*, *Holloman* v. *Harland*, 370 F.3d 1252, 1270 (CA11 2004) ("[I]n determining whether conduct is expressive, we ask whether the reasonable person would interpret it as

some sort of message, not whether an observer would necessarily infer a *specific* message."); *Fort Lauderdale Food Not Bombs* v. *City of Fort Lauderdale*, 901 F.3d 1235, 1245 (CA11 2018) ("We decline the City's invitation to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, and it is not appropriate for us to bring it back to life." (citations omitted)); *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (CA6 2005) (claimants must show that their conduct conveys a particularized message, but that "[t]he threshold is not a difficult one"); *Baribeau* v. *City of Minneapolis*, 596 F.3d 465, 475, 477 (CA8 2010) (mentioning both, but seeming to apply *Hurley*); *Cressman*, 798 F.3d at 957 (CA10 2015) (declining to take a firm position between other circuits' "differing approaches" but requiring "an identifiable inference").

Scholars have echoed this confusion. See, *e.g.*, A. Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 322 (2018) ("[I]t is well recognized that neither courts nor scholars have articulated a coherent theory of the First Amendment's boundaries."); D. Carpenter, *Unanimously Wrong*, 2006 Cato Sup. Ct. Rev. 217, 241 ("The Court has never had a satisfying theory of what conduct should get free-speech protection."); R. Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1255 (1995) ("The *Spence* test . . . fails because it does not articulate a necessary condition for bringing the First Amendment into play.").

The sustained confusion in the lower courts—ongoing now for decades and exacerbated by the

decision below—calls out for this Court's consideration of whether conduct must convey a particularized message to be protected as expressive under the First Amendment.

II. The decision below contradicts this Court's precedents.

The Third Circuit held that, as a matter of law and no matter the circumstances, "refusing to wear a face mask is not expressive conduct protected by the First Amendment." App. 38. Its holding was based on its view that "[a] medical mask is not" "inherently symbolic." App. 27. The Third Circuit's analysis defies this Court's precedents, which make the question of expressive content context- and fact-dependent. Whatever the standard, Ms. Murray-Nolan alleged sufficient facts to show that, in context, her refusal to wear a mask communicates a sufficiently identifiable message about her views on mandatory mask policies in schools.

This Court has "long recognized that [the First Amendment's protection does not end at the spoken or written word." *Johnson*, 491 U.S. at 404. That is because "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Again, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Ibid.* Nor must the message be universally recognized. Instead, the question is "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play." *Johnson*, 491 U.S. at 404; see *FAIR*, 547 U.S. at 66 ("sufficiently expressive").

To "decid[e] whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," this Court has (supposedly) "asked whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 404 (brackets omitted) (quoting *Spence*, 418 U.S. at 410–11). The Third Circuit held that "[t]he first element—the intent to convey a particularized message—is easily met here," as Ms. Murray-Nolan "alleged she refused to wear a mask to 'silent[ly] protest' the Board and Superintendent's 'lack of action related to unmasking children in schools, particularly those with medical conditions and special needs.'" App. 25; see App. 88.

But the Third Circuit held that Ms. Murray-Nolan "cannot satisfy the second element because it is unlikely that a reasonable observer would understand her message simply from seeing her unmasked at the Board meeting." App. 25. Without citation, the court asserted that "going maskless is not usually imbued with symbolic meaning," so observers could not know that Ms. Murray-Nolan was unmasked "because she intended to express her dismay with the Board's inaction related to unmasking of school children," as opposed to say, "because she was medically exempt." App. 26. The Third Circuit also said that observers could not "know what 'particularized message' Murray-Nolan sent by refusing to wear a mask." *Ibid.* Again without factual citation, the court concluded that "wearing a medical mask—or refusing to do so—is not the type of thing someone typically does as 'a form of symbolism.'" *Ibid.* (quoting *Spence*, 418 U.S. at 410).

The Third Circuit's analysis defies this Court's precedents in several respects. First, it disregards the importance of context. As this Court has explained, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410. For that reason, "the nature of [the] activity" must be considered in light of "the factual context and environment in which it was undertaken." *Id.* at 409–10. Burning an American flag, for instance, may imply various messages. See *Johnson*, 491 U.S. at 405 (rejecting the proposition that "any action taken with respect to our flag is [automatically] expressive"); accord *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943) (noting that "[s]ymbolism is a primitive . . . way of communicating ideas"). Even *sleeping* "may be expressive." *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); accord, *e.g.*, *Porter* v. *Martinez*, 68 F.4th 429, 440 (CA9 2023) (holding that honking a car horn could be expressive because "the nature and circumstances of the honk will sometimes provide the necessary context for the message intended by the honk to be understood").

Context is key. Here, Ms. Murray-Nolan's claim is intensely context-specific. Of course whether one wears a mask is not *always* inherently expressive. But sometimes, it is. The Third Circuit's opinion disregards all context, broadly asserting that "refusing to wear a face mask is not expressive conduct." App. 38. This *per se* rule flouts this Court's precedents and ignores the significant contextual elements here pointing toward symbolic expression. Consideration of those elements shows that Ms.

Murray-Nolan's message "would reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294.

Start with the timing. The February meeting occurred in 2022, when mask mandates even in places like New Jersey were being lifted. The New Jersey governor had announced that the executive order about schools would be allowed to expire in a few weeks. At this point, years into the pandemic, it strains credulity to suggest that the decision whether to wear a mask was simply a medical choice. Indeed, it is more likely that, for many people, the mask choice by 2022 was significantly driven by a desire to communicate a message. Even requiring masks for the short period until the beginning of March appeared "symbolic." App. 106.

As one legal academic explained, "[m]asks are (1) highly visible (unlike other tools used to fight the pandemic, such as social distancing measures); (2) connected to a specific individual (unlike other symbols of political authority such as flags, buildings, and statues); and (3) easy to put on and remove"—making them "highly potent symbol[s]." R. Kahn, *Masks, Culture Wars, and Public Health Expertise: Confessions of A Mask "Expert,"* 17 U. St. Thomas L.J. 900, 906, 921 (2022). Studies too have "demonstrated that face masks signal strong social identity." N. Powdthavee, *When face masks signal social identity: Explaining the deep face-mask divide during the COVID-19 pandemic*, PLOS One (2021), p. 10.

Many commentaries confirm the point. See, *e.g.*, B. Smith, *Face Masks Are Our COVID-19 Memorial*, Foreign Policy (March 24, 2023), https://tinyurl.com/

5n8f5buh ("[Masks] became team symbols."); E. Kilgore, *Are Masks Just for Liberals?*, New York Magazine (Apr. 20, 2020), https://tinyurl.com/2s3hnr3p ("[W]earing or not wearing masks has become a political act."); D. Davis & N. Lichtenberg, *'I really don't care, do U?': How the act of refusing to wear a mask became the new symbol of American fear*, Business Insider (Aug. 16, 2020), https://tinyurl.com/32s5vye4 ("In this pandemic, the mask has become a symbol of defiance and freedom for those who refuse to wear it."); R. Lizza & D. Lippman, *Wearing a mask is for smug liberals. Refusing to is for reckless Republicans.*, Politico (May 1, 2020), https://tinyurl.com/yavfzyxp ("The mask has become the ultimate symbol of this new cultural and political divide."); W. Weissert & J. Lemire, *Face masks make a political statement in era of coronavirus*, Associated Press (May 7, 2020), https://tinyurl.com/mu2yjnbp (noting "the powerful symbolism of the mask"); M. Fisher et al., *Will Americans wear masks to prevent coronavirus spread? Politics, history, race and crime factor into tough decision*, Washington Post (Apr. 18, 2020), https://tinyurl.com/y4797m7z ("[D]eclining to wear a mask is a visible way to demonstrate 'that "I'm a Republican," or "I want businesses to start up again," or "I support the president,"' said Robert Kahn, a law professor . . . ."); I. Bunosso et al., *Keeping a Business Safe without a Mask Mandate Requires a Nuanced Approach*, Scientific American (May 27, 2022), https://tinyurl.com/2a6nh9jf (study finding that

"consumers use mask policies, or lack thereof, as a proxy for a company's political identity").[3]

Thus, it is plausible—especially given the timing at the tail-end of COVID measures—that mask wearing had become message-oriented in some contexts. Ms. Murray-Nolan alleged that her refusal to mask in 2022 "was openly political in nature." App. 100.

Next turn to Ms. Murray-Nolan's history of protests against mandatory masking of children in schools. In the preceding months, she had spoken to the Board at least six times, all unmasked, to advocate against keeping children forcibly masked in schools. App. 95; see, *e.g.*, *Cranford Board of Education Meeting for August 23, 2021*, CranfordTV35, YouTube (Aug. 25, 2021) (starting around 1:50.00). She had testified to legislators and advocated in public along the same lines. App. 95. Moreover, before her arrest, the Board, Superintendent, and board attorney all had a verified complaint in hand that expressed the particular nature of her maskless protest. D. Ct. Dkt. 1, ¶ 18; App. 98. Further, before arresting her, the police officers had been specifically advised by the board attorney that Ms. Murray-Nolan had filed a federal lawsuit asserting that her constitutional

[3] The existence of these publications may be judicially noticed, see Fed. R. Evid. 201(b), and they provide a firmer foundation for an understanding of the symbolism of masks than the Third Circuit's apparent reliance on its own intuition. See, *e.g.*, App. 26 (asserting without factual citation that "wearing a medical mask—or refusing to do so—is not the type of thing someone typically does as 'a form of symbolism'"). To the extent these materials are not noticeable, vacatur is appropriate for amendment of the complaint, as the district court dismissed with prejudice. See App. 76, 78.

rights were being violated as related to being unmasked. D. Ct. Dkt. 39-1, ¶ 3. So it was "public knowledge that [she] had been an advocate of unmasking children in schools" all the way back to September 2020. App. 95.

In these circumstances, a "reasonable viewer" is not a random member of the public from another town or state. It is the type of person likely to be at the Cranford school board meetings, including Board members, the Superintendent, the board attorney, police, and parents. See App. 89 (noting about 20 attendees at the January meeting); *Cranford Board of Education Minutes* 2 (Feb. 14, 2022), https://perma.cc/HR3A-G633 (noting 12 members of the public attending in person and 17 via Zoom). And *that* reasonable observer would have understood Ms. Murray-Nolan's choice to remain unmasked as an expression of protest about the schools' policies.

The Board understood the point, and other attendees would have too. Consider the reaction of attendees at the January meeting when, right before the public comment portion, the Board's counsel demanded that everyone be masked. After Ms. Murray-Nolan silently declined, counsel threatened to call law enforcement and then the Board recessed for ten minutes. App. 89–90. During that time, "almost all parents and/or citizens in attendance at the meeting removed their masks in solidarity with" Ms. Murray-Nolan, making comments like, "if Gwyneth is going to be arrested, they will have to arrest all of us." App. 90. These citizens took off their masks for the same reason that Ms. Murray-Nolan had: to express a message. And they, like the Board, understood perfectly well the

message that Ms. Murray-Nolan's choice not to wear a mask conveyed: that she "was showing solidarity with [Cranford] children in protesting the BOE's violation of their civil rights." App. 90–91. Sworn declarations from other attendees at the January meeting (ignored by the court below) confirm that they understood Ms. Murray-Nolan's refusal to wear a face mask as a "silent protest of the masking policies adopted by the" Board. D. Ct. Dkt. 2-2, ¶¶ 5, 21; see D. Ct. Dkt. 2-3, ¶¶ 4, 10–11; accord App. 141.

Given Ms. Murray-Nolan's history of identical protests, the Board reasonably understood the same. They cancelled the public comment portion not because of "alleged public health and safety" but because they "wanted to suppress what they plainly understood" as Ms. Murray-Nolan's protest against their policies. App. 92. And in a follow-up email, they again conveyed that they understood the symbolic nature of mask-wearing, suggesting that "those wearing a mask were 'great role models for our children and other communities.'" App. 94; see J. Fee, *The Freedom of Speech-Conduct*, 109 Ky. L.J. 81, 125 n.16 (2021) ("Not only do those opposed to wearing masks see them as symbolic, but mask supporters have been recommending wearing them for reasons beyond immediate health effects—such as to show respect for fellow citizens, to set an example, or to indicate that we should take the pandemic is seriously.").

Ms. Murray-Nolan's choice to appear at the February meeting unmasked can be considered only in light of this important context. That choice continued her months-long unmasked advocacy against

mandatory school masking policies. Again, that other people might wear (or not) masks for other reasons does not deprive Ms. Murray-Nolan's unmasked protest, in context, of its expressive meaning. By analogy, people might wear (or not) armbands for many reasons, yet this Court had no trouble ruling that, in the context of schools during the Vietnam War, wearing a black armband was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). So too here, where Ms. Murray-Nolan's months-long refusal to wear a mask was part of her advocacy against mandatory masking policies.

Of course, the Board knew that fact, but not just because she told the Board—and had even sued them making it clear that her refusal to wear a mask was part of her protest. App. 98, 100. Contrary to the Third Circuit's opinion, the point is not that her conduct was "transform[ed] . . . into 'speech' simply by talking about it." App. 24 (quoting *FAIR*, 547 U.S. at 66). Instead, the point is that Ms. Murray-Nolan's long history of unmasked protests, in the context of discussions of school policies occurring at the tail end of COVID measures, was already likely to be understood by a reasonable observer as expressing a message. Even if Ms. Murray-Nolan had *not* specifically described her protest or sued about it, it was reasonably obvious to meeting observers. In other words, her conduct was *not* "expressive only because [she] accompanied [her] conduct with speech explaining it." *FAIR*, 547 U.S. at 66. It was expressive because, in context, it conveyed a message. That Board

members in fact *knew* of that message is icing on the cake.

The Court has never held that expressive conduct is deprived of its meaning because the communicator also orally explains the meaning. Consider the library sit-in in *Brown* v. *Louisiana*, where "[t]he sheriff had been notified that morning that members of the Congress of Racial Equality 'were going to sit-in' at the library." 383 U.S. 131, 137 (1966). Despite that explanation, the Court did not doubt the expressive value of the sit-in, emphasizing "the manifest fact that [the black protestors] intended to and did stage a peaceful and orderly protest demonstration." *Id.* at 139–40. Here, given Ms. Murray-Nolan's long history, the communicative meaning of her choice to remain peacefully unmasked was as manifest.

The Third Circuit also defied this Court's precedents by issuing its *per se* rule about the symbolic meaning of masking at the motion-to-dismiss stage. Though expressive meaning is a question of law, it can be intensely factual, for "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley*, 515 U.S. at 567. That gives courts "a constitutional duty to conduct an independent examination of the record as a whole." *Ibid.* At the motion-to-dismiss stage, the factual universe of the case is limited. That limitation is no reason to rely on mere judicial intuition to resolve contested questions of expressive meaning—but that is how the Third Circuit appeared to approach those questions. The court simply assumed that "[a] medical mask is not" "inherently symbolic"—ever, in any circumstances. App. 27. As discussed above, much

evidence suggests that is wrong, at least in specific contexts. Ms. Murray-Nolan should at least have the opportunity to present these facts and have them adjudicated before her expressive claims are dismissed on the merits. See, *e.g.*, *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 57 (1988) (relying on a jury finding about the meaning of communication).

Indeed, the Third Circuit's disregard of the proper standards under Rule 12(b)(6) compounds its other departures from this Court's precedents. A complaint need not offer "detailed factual allegations," but must merely "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up); see *Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary . . . ."). Under these standards, Ms. Murray-Nolan's factual allegations make it at least *plausible* that her months-long unmasked protest "would reasonably be understood by the viewer[s]" in the Board meetings "to be communicative." *Clark*, 468 U.S. at 294. Dismissal with prejudice of her complaint under Rule 12(b)(6) flouted this Court's precedents.

The Third Circuit last relied on a parade of horribles, explaining that "[o]ne could not . . . refuse to pay taxes to express the belief that 'taxes are theft,'" or "refuse to wear a motorcycle helmet as a symbolic protest against a state law requiring them." App. 27. But these two examples miss the point. Neither involves conduct that would reasonably be understood as inherently communicative. Both involve laws set by legislatures and not controversial emergency authorization by governors acting single-handedly

during a pandemic. Nor does the mere fact that a government sets a policy render it non-expressive to violate the policy—see, for instance, the library sit-in in *Brown* and the black armbands in *Tinker*. What would matter is whether the conduct, in context, is likely to communicate a message to reasonable observers. Ms. Murray-Nolan's months-long unmasked advocacy did so. Thus, it is protected expression. The Third Circuit's contrary decision contradicts this Court's precedents requiring a full consideration of context when determining the expressive nature of conduct.[4]

III. The questions presented are important.

Together, the questions presented provide the Court an opportunity to clarify the appropriate standards when determining whether conduct counts as sufficiently expressive. Those standards are important. Applying the wrong standards in adjudicating the expressive nature of conduct threatens systematic underenforcement of First Amendment protections. This Court has not addressed in many years the proper standards. Nor has this Court ever addressed how that standard applies at the motion-to-dismiss stage. And as noted above, the lower courts continue to disagree about these issues, meaning that the First Amendment's

[4] The defendants have not argued, and could not show at this stage, that Ms. Murray-Nolan's conduct was expressive but nonetheless unprotected because of some compelling government interest in enforcing a mask policy that was imminently expiring. Compare *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968); *Clark*, 468 U.S. at 294–99. That hypothetical argument could be considered on remand.

protections depend on the jurisdiction. That result is impermissible for such a core right as free speech.

It is tempting to gloss over COVID cases like this as functionally moot, the product of a bygone era whose policies will not be repeated. That temptation is misplaced. Put aside that COVID continues to circulate and that government entities still trot out masking policies at times. App. 6; see M. Cerullo, *As COVID cases flare, some schools and businesses reinstate mask mandates*, CBS News (Aug. 25, 2023). Put aside too that Ms. Murray-Nolan suffered—she was arrested in an alleged violation of her core First Amendment rights—and should have redress. The constitutional standards that the COVID cases announced—often on short time frames with the pressure of a spiraling pandemic—are not limited to the COVID context. Errors like the ones committed by the court below will infect future cases raising First Amendment issues outside of COVID's madness. And unfortunately, the threat to constitutional rights may be most severe at local institutions like the Cranford Board of Education, as "small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account." *Barnette*, 319 U.S. at 637. "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *Id.* at 638; see M. Moore, *Murphy says he 'wasn't thinking' of Bill of Rights for coronavirus measures*, N.Y. Post (Apr. 16, 2020), https://tinyurl.com/973p73m5 (New Jersey governor explaining that "I wasn't thinking of the Bill of Rights when we did this" because "[t]hat's above my pay grade").

Even within the context of disease transmission, it is highly likely that society will only see more COVID-like issues arise. Once governments have seized a power, they are likely to wield it again. Resolving cases like this now, before another emergency arises, would help forestall the problems seen during COVID. "While executive officials issued new emergency decrees at a furious pace, state legislatures and Congress—the bodies normally responsible for adopting our laws—too often fell silent." *Arizona* v. *Mayorkas*, 143 S. Ct. 1312, 1315 (2023) (statement of Gorsuch, J.). And "[c]ourts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them." *Ibid.* Sometimes, courts "even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes." *Ibid.* One way for the judiciary to not "allow itself to be part of the problem" (*id.* at 1316) is to correct the excesses still trickling through the courts.

Thus, the Court should address "this issue now in the ordinary course, before the next crisis forces [it] again to decide complex legal issues in an emergency posture." *Dr. A.* v. *Hochul*, 142 S. Ct. 2569, 2571 (2022) (Thomas, J., dissenting). These important and recurring questions about how to determine the expressive nature of conduct warrant review.

IV. This case is an ideal vehicle.

This case presents an ideal vehicle to resolve the pure legal questions presented. The Third Circuit squarely took a side on the questions, albeit the opposite as it had taken before. The relevant facts are not in dispute, as the case was resolved on a motion to dismiss. So this case provides an opportunity to

resolve the important legal questions at issue, offering clarity for courts, speakers, and government entities going forward.

The Third Circuit purported to affirm on alternative grounds, but those grounds would not affect this Court's consideration of the questions presented even if they were right. And they are not. First, the Third Circuit said that the cancellation of the January 24 public comment period could not have been retaliation for Ms. Murray-Nolan's "refusal to wear a mask" because "[t]hat act is not constitutionally protected conduct and thus provides a straightforward, non-retaliatory explanation for the Board's decision to cancel the session." App. 37–38. But as explained above, Ms. Murray-Nolan's longstanding mask protest was constitutionally protected, so this alternative ground fails.

Second, the Third Circuit said that the police defendants were not liable for retaliation because they had probable cause to arrest Ms. Murray-Nolan. App. 33. That holding does not affect the other defendants. And it too is suspect once one understands the protected nature of Ms. Murray-Nolan's advocacy. Ms. Murray-Nolan need not "prove the absence of probable cause to maintain a claim of retaliatory arrest." *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 101 (2018). That is because she alleges that the defendants "formed a premeditated plan to intimidate [her] in retaliation" for her protected expression. *Id.* at 100. After the police chief informally told her in January "that no parent would be arrested for refusing to wear a mask," later communications and conduct showed a behind-the-scenes plan to address one and only one

person for that conduct: Ms. Murray-Nolan. App. 93–94, 98–104. So when Ms. Murray-Nolan entered the February meeting, a defendant who knew her immediately advised her "that he was 'told' to call the police on [her] if she entered the building unmasked." App. 98–99. The plan to arrest her "had been pre-authorized in conspiracy with the [Board]." App. 103–04, 108–09.

On top of that, probable cause does not "defeat a retaliatory arrest claim" "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1727 (2019). "[T]he no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ibid.* Ms. Murray-Nolan alleges that others who were unmasked during the same period at Board meetings were not arrested. App. 89–90. The Third Circuit's reliance on a difference in timing—the January versus February meeting—is unavailing, because the charged offense (defiant trespass) did not change between those months and does not depend on a showing of "repeat[]" offense. App. 36; see N.J. Stat. Ann. § 2C:18-3b.

In short, this case is an ideal vehicle to resolve the persistent divisions in the courts of appeals on important questions of federal constitutional law.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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