NO. 23-1203

In the Supreme Court of the United States

TERPSEHORE MARAS,

Petitioner,

v.

MAYFIELD CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF OF PETITIONER

I. NOTHING SET FORTH IN RESPONDENTS' OPPOSITION PROPERLY CHALLENGES THE CONTINUED VIABILITY OF PETITIONER'S CLAIMS.

According to Respondents, this Petition only offers a "run-of-the-mill" case that provides a "straightforward application of the mootness doctrine." Respondents' Brief at 13. They view the Sixth Circuit's decision as "nothing more than a routine application of the mootness doctrine." Respondents' Brief at 10.

Respondents are only half right.

The Sixth Circuit applied mootness here based on two outside events that occurred during litigation:

> On appeal, the parties debate weighty questions about when parents who cannot afford lawyers may sue to protect their children's rights. But we need not answer those questions. *The school district has since rescinded its mask mandate, and Maras's daughter has now graduated from high school.* So this case is moot. We affirm the dismissal on that alternative ground.

Sixth Cir. Op. at 1, App.2a (emphasis added). *See also* Respondents' Brief at 1.

Regarding Petitioner's *daughter*, the mootness doctrine as applied by the Sixth Circuit was straightforward and "run-of-the-mill". Petitioner's daughter no longer attends high school so there is nothing further for her to gain by this action. She was never alone

in this case, however, and Petitioner's separate claims live on.

Applying the mootness doctrine to bar *Petitioner's claims* is not "run-of-the-mill." Unraveling the mootness dismissal of *those claims*–coupled with a ruling confirming that the unbundling of Petitioner's parental rights from 28 U.S.C. § 1654 can bracket her substantive due process claims, are what largely justify granting this Petition.

Should the Court grant her the opportunity, Petitioner will continue with her action and assures the Court that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

A. Petitioner's Claims Are Not Impacted by Her Daughter's Graduation.

In contrast to Petitioner, her daughter is more like former law student Marco DeFunis, Jr. whose Equal Protection case was rendered moot by this Court given the law school he sued decided to admit him during the pendency of his case. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974). That he was "irrevocably admitted to the final term of the final year of the Law School course", rendered moot his requested injunctive relief seeking admission. *Id*. at 317.

Similarly, Petitioner's daughter's graduation from high school renders her requested injunctive relief moot *but only as to her*. *See Id*. at 319 ("But DeFunis

will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not "capable of repetition" *so far as he is concerned*.") (emphasis added).

Petitioner's daughter is no longer obliged by any mask requirements emanating from a high school she no longer attends. In other words, an event outside the courtroom has rendered her own case moot. In sharp contrast, however, Petitioner never had to wear a mask so neither her daughter's graduation nor the purported rescission of the mask policy can alter Petitioner's independent claims.

Petitioner's *pro se* filings may not have been artful but she sought more than injunctive relief by virtue of her action. Unlike her daughter, Petitioner did not "secure outside of litigation all the relief [s]he might have won in it." *FBI v. Fikre*, 144 S.Ct. 771, 777 (2024).

Petitioner consistently asserted her own rights flowing from her status "[a]s the mother of P.M." and which made her "empowered to assert *her* <u>*own fundamental constitutional rights*</u>." Dist. Ct. Op at 7, App.18a (emphasis added). For example, Petitioner's Amended Complaint ("PAC") asserts her own independent claims under 42 U.S.C. § 1983 <u>*in two separate Counts*</u>. PAC ¶¶ 53–66, App.73a–75a. Moreover, in her Prayer for Relief, Petitioner sought "relief as may be just, equitable, and proper <u>*including without limitation*</u>, an award of attorneys' fees and costs to Plaintiffs." PAC, Prayer for Relief, App.83a (emphasis added).[1]

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[1] At first glance, it may appear that Petitioner should be held to a lesser standard for her *pro se* filings. *See Haines v. Kerner*, 404 U.S. 519, 520 – 521 (1972) ("We cannot say with assurance that

Respectfully, Petitioner standing without her daughter alongside her remains entitled to a ruling on the merits regarding whether Respondents' mask mandate violated Petitioner's constitutional rights as a parent. Petition at 23–24. *See Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 408 (6th Cir. 2019).

B. Petitioner's Claims Are Not Impacted by Respondents' Purported Rescission of Its Mask Policy.

The second outside event relied on by the Sixth Circuit, namely that the mask mandate was "rescinded", is equally of no help to Respondents. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

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under the allegations of the *pro se* complaint, *which we hold to less stringent standards than formal pleadings drafted by lawyers*, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.") (emphasis added). Contrary to such authority, however, Petitioner should receive no special accommodation or any favorable inferences by virtue of her non-attorney status. If this Court were to rule Petitioner was improperly denied the opportunity to represent her child, such honor under 28 U.S.C. § 1654 provides no commensurate preferential treatment. In other words, if certain cases do allow for conjoined rights between parent and child under 28 U.S.C. § 1654, there must be strict adherence to the Rules in any such representation – including to all general rules of pleading and to any baseline standards such as Fed. R. Civ. P. 11.

recur." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

In *DeFunis* the Court recognized that its mootness result would be different if "the question of mootness here had arisen by reason of a unilateral change in the *admissions* procedures of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance that 'there is no reasonable expectation that the wrong will be repeated.'" *DeFunis*, 416 U.S. at 318 (emphasis in original) (citation omitted).

Respondents never addressed their "formidable burden" that "there is no reasonable expectation that the wrong will be repeated". *FBI*, 144 S.Ct. at 774. By way of recent example, in the unanimous decision of *FBI v. Fikre*, the Court decided whether Yonas Fikre's removal from a "No Fly List" rendered his lawsuit moot given the action was brought solely because he was improperly placed on the list.

Before ruling that the action was *not moot*, the Court counterbalanced the "virtually unflagging obligation" of federal courts to hear and resolve questions properly before them with the recognition that "[s]ometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation *all the relief he might have won in it*. When that happens, a federal court must dismiss the case as moot." *Id.* at 777 (emphasis added).

At no time did Petitioner herself secure "all the relief" sought in the underlying action. Before dismissal,

Petitioner informed the District Court in her Declaration in Opposition to the Motion to Dismiss, of the lack of efficacy in masks and associated health dangers to her daughter by way of Respondents' mandate–all of which undergirded Petitioner's personal substantive federal and Ohio constitutional claims. *See* Declaration in Opposition to Motion to Dismiss, dated October 29, 2021 ("Decl.") at ¶¶ 3–33, Reply.App.2a-18a.

Indeed, Petitioner clarified she did not even see the need in having her daughter continue as a party. *Id*. at ¶ 2, Reply.App.2a ("*I have a personal stake in this action as a single parent* who will sustain all medical costs attributable to injuries sustained by my minor daughter by virtue of the mask mandate. . . . *I agree to have her dismissed as a named party given by my personally moving forward with this matter I can adequately protect her rights*.") (emphasis added); *Id*. at ¶ 45, Reply.App.22a ("I can only hope that the Court allows my case to proceed so that I can demonstrate using evidence and testimony how *my constitutional rights* have been violated due to this unlawful mask mandate forced on students without parental consent.") (emphasis added). *See also* PAC ¶ 52, App.72a.

Respondents' purported rescission of its mandate in February 2022 does nothing to erase Petitioner giving Respondents notice of these compensable claims in October 2021. *See Kanuszewski*, 927 F.3d at 408.

Almost beside the point, Respondents' current position that "the masking policy was rescinded over two years ago" is misleading given the policy was not "rescinded" over two years ago. Respondent's Brief at 1. Instead, Respondents' mask mandate was curiously "modified" at the exact height of the second wave of

the pandemic and before the District Court dismissed the underlying action due to her daughter's lack of legal representation. Petition at 23–24.

The resolution passed on February 23, 2022 expressly leaves intact several aspects of Respondents' mask mandate:

> **MASK POLICY *MODIFICATION***
>
> The Mayfield Board of Education *modifies* its mask requirement in accordance with its Board Policy 8450.01 (see attached) for grades Preschool through 12th grade as evidenced below.
>
> The Mayfield Board of Education *modifies* its mask requirement in accordance with its Board Policy 8450.01(see attached) for grades K through 12, as indicated below
>
> WHEREAS, the Superintendent, in accordance with Board Policy 8450.01, is recommending a modification of the District's current mask policy; and
>
> WHEREAS, this Board has reviewed such recommendation by the Superintendent; now, therefore
>
> BE IT RESOLVED, that this Board hereby *modifies* its mask mandates authorized by its January 19, 2022 Resolution as follows:
>
> 1. Effective February 7, 2022, *this Board replaces its mask mandate with a mask recommendation* for grades K through 12, including all school staff, volunteers and visitors to all buildings.

2. For clarification purposes only, this Board confirms that *its mask mandate for Pre-School remains unchanged, including such mandate for school staff, volunteers and visitors to our Pre-School building.*

3. *The Board will continue* to comply with the Centers for Disease Control and Prevention (CDC) order *requiring masks on transportation vehicles, including school busses and vans.*

BE IT FURTHER RESOLVED, that this Resolution will remain in effect until such time as this action is revoked.[2]

Faced with similar incongruous changes in policy mid-litigation, the United States Court of Appeals for the Ninth Circuit recently ruled on mootness in a manner contrary to what was done here by the Sixth Circuit. *See Health Freedom Def. Fund, Inc. v. Carvalho,* No.22-55908, Slip. Op at 15 (9th Cir. Ct. App. June 7, 2024) (recognizing that "*the Board expressly reserved the option to again consider imposing a vaccine mandate.* This confirms that LAUSD has not carried its heavy burden to show that there is no reasonable possibility that it will again revert to imposing a similar

[2] https://www.mayfieldschools.org/Downloads/2022-02-23%20Regular%20Mtg%20Minutes.pdf (emphasis added) and https://go.boarddocs.com/oh/mayoh/Board.nsf/files/CBQNLA606C4F/$file/8450.01%20PROTECTIVE%20FACIAL%20COVERINGS%20DURING%20PANDEMIC-EPIDEMIC%20EVENTS.pdf.

policy.") (emphasis added) (reversing lower court dismissal on mootness grounds) (emphasis added).[3]

Respondents kept most of their mask mandates in place until February 2022 even though Ohio lifted its statewide masking requirements months earlier in June 2021. In other words, months after litigation began–but before any dispositive ruling, Respondents decided to "modify" the policy. Petition at 23–24. This change in mask policy was also done during the second highest peak of the entire pandemic. Petition at 23.[4]

As with the LAUSD regarding its "on again, off again" vaccine mandate, Respondents' reservation of all options going forward, including the potential to reimplement a full mask mandate, shows Respondents have not met their "formidable burden" on this point. *See FBI*, 144 S.Ct. at 774; *Health Freedom Def. Fund, Inc. v. Carvalho,* No.22-55908, Slip. Op at 15 (9th Cir. Ct. App. June 7, 2024).

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[3] https://Cdn.Ca9.Uscourts.Gov/Datastore/Opinions/2024/06/07/22-55908.Pdf.

[4] Petitioner raises this issue of timing and motivation given her constitutional claims manifest from different angles – including by her demonstrating Respondents improperly elevated the importance of federal funding over proper consideration of student safety. PAC ¶ 50, App.71a–72a ("The guidelines suggest that a school board would forfeit ARP allocations by making masks optional, and states that have prohibited mask mandates in schools have received letter [sic] notifying them that they will not receive ARP funds, [sic] Accordingly, it seems Defendants have a financial incentive for implementing the mask mandate, despite that such a requirement serves no scientific purpose and subjects individuals who wear masks to the health risks discussed above.").

II. RESPONDENTS' IMPLEMENTATION OF A MEDICAL DEVICE REQUIREMENT ON PETITIONER'S DAUGHTER WITHOUT FIRST OBTAINING PARENTAL CONSENT GIVES RISE TO PETITIONER'S DAMAGES AND THE NEED FOR A MERITS DETERMINATION.

Petitioner's rights as a parent were unconstitutionally infringed upon because Respondents–even during a pandemic, cannot simply usurp parental authority on important medical decisions. *See* Petition 9–19. *See c.f.*, *Alabama Association of Realtors v. Dept of HHS*, 141 S.Ct. 2485, 2490 (2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

At its essence, Respondents' policy set in motion a mandatory requirement that students use a specific Class 2 medical device. 21 U.S.C. § 321(h)(1) ("The term "device" . . . means an instrument, apparatus, implement, machine . . . intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals"). *See also* Decl. ¶¶ 10–11.

Unlike with standard medical devices, however, proof of efficacy to mitigate disease was admittedly never considered by Respondents before issuing its mask mandate. Instead, Respondents blindly following flawed guidance. Respondents' Brief at 2. When it comes to the safety of children, blind adherence to governmental authority is never enough–which is why parents, like Petitioner, have always had superseding authority to make healthcare decisions for their children.

III. PETITIONER IS NOT BARRED FROM REFERENCING ALL HER CONSTITUTIONAL ARGUMENTS IN SUPPORT OF THE PETITION.

In violation of her substantive due process rights, neither the District Court nor its cited Sixth Circuit authority viewed 28 U.S.C. § 1654 as giving Petitioner the right to represent her daughter. Moreover, Petitioner's pleadings, including her Prayer for Relief, were not properly interpreted as requesting damage.

Respondents do not want the Court to even hear these arguments because "Petitioner did not reference 28 U.S.C. § 1654 in any of her briefing in the District Court or Sixth Circuit Court of Appeals" and "Petitioner asserts for the first time that, if she succeeded on her Section 1983 claims, she would be entitled to attorneys' fees." Respondents' Brief at 11, n. 8, 12. In support of their position, Respondents cite a 1940 case but ignore that in that case the deciding factor was that it was certified from a state's highest court and not a federal court. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434–435 (1940).

Respondents disregard that the Court has come a long way since 1940 and there is no current bar against the Court considering every argument now before it—especially given that the pleadings contain the factual and legal framework for each argument. *See e.g.*, *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 2525 (2011) (Thomas, J., dissenting) ("In some cases, the Court properly affirms a lower court's judgment on an alternative ground or accepts the persuasive argument of an *amicus* on a question that the parties have raised. . . . But it transforms a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an *amicus*

and outside the question on which the petitioner sought (and this Court granted) review.") (citation omitted) (Court majority rules arguments found in an *amicus* filing can be considered despite not being raised by any party).

Respectfully, Petitioner's case is live and rife with significant issues worthy of this Court's resolution. The Petition should be granted.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be granted and the decision of the U.S. Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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