NO. 23-_____

In the Supreme Court of the United States

CYNTHIA STEPIEN, ET AL.,

Petitioners,

v.

PHILIP MURPHY,
GOVERNOR OF NEW JERSEY, ET AL.,

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 the Court of Appeals erred in refusing to hear the merits of a First Amendment challenge to the forced masking of schoolchildren where the evidence demonstrated the absence of virtually all communication, speech and association among schoolchildren during the period of forced masking.

2. Whether the Court's holdings following *Tinker* recognize a First Amendment right to protection from state intrusion into ordinary or common speech that is non-political and whether schoolchildren are protected from the absolute loss of such rights by the effect of forced masking and isolation.

PARTIES TO THE PROCEEDINGS

Petitioners

- Cynthia Stepien, on behalf of herself and her minor child;
- Stamatia Dimatos Schreck on behalf of herself and her three minor children;
- Ryan Cody, on behalf of himself and his minor child J.C.;
- Kelly Ford, on behalf of herself and her minor child A.F.;
- Simona Chindea, on behalf of herself and her two minor children;
- Gabe Mcmahon;
- M.F.;
- M.K.N.;
- K.B.;
- B.W.;
- L.R.;
- J.V.P.;
- V.P.;
- D.M.;
- B.M.;
- A.M.;
- Danielle Escayg

Respondents

- Philip Murphy, Governor of New Jersey;
- New Jersey Commissioner of Education;
- New Jersey Commissioner of Health

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 21-3290

Cynthia Stepien, et. al., *Appellants,* v. Governor of New Jersey, et al.

Date of Final Judgment: April 6, 2023

United States District Court for the District of New Jersey

Civ. No. 21-CV-13271 (KM) (JSA)

Cynthia Stepien, et. al., *Plaintiffs,* v. Philip D. Murphy, Governor, et al. *Defendants.*

Date of Final Opinion: October 7, 2021

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The ruling of the United States Court of Appeals for the Third Circuit dated April 6, 2023 dismissing the complaint for lack of jurisdiction on ground of mootness but not reaching the merits is reported as 2023 U.S. App. LEXIS 8197 and is reproduced at App.1a.

The decision and order of the United States District Court for the District of New Jersey denying preliminary injunctive relief dated December 7, 2021 is reported at 574 F. Supp. 3d 229 and is reproduced at App.13a.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on April 6, 2023. This petition is timely under 28 U.S.C. § 2102(c) because it is being filed within the 90 day period allowed under the statute as extended for a period of 60 days by order of Justice Alito pursuant to Supreme Court Rule 13.5. This court has jurisdiction to review the order of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. I.

> 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.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction).

In the Second Amended Complaint (SAC), plaintiffs alleged that New Jersey's executive orders mandating full-day masking and isolation of school-children violated First Amendment speech and associational interests of schoolchildren. The SAC alleged that forced masking and isolation caused the loss of virtually all speech, communication and association in the schools. (App.44a-65a) Plaintiffs' claims were supported by ten uncontested declarations from teachers and older children who testified to the

complete absence of speech, communication and association in New Jersey schools during forced masking.[1]

Plaintiffs also asserted equal protection claims that the executive orders subjected only schoolchildren and teachers to forced masking and isolation while all other groups and citizens in New Jersey were free from restraints (except in the limited venue of medical offices and mass transit facilities). (App.132a-134a)

A. Summary of Allegations

Teachers and students testified (via declarations) as to "silent" hallways with children moving and acting robotically (App.122a, 144a, 145a, 152a), cafeterias where children rarely spoke and classrooms in which children refused to participate, conduct diametrically contrary to their pre-masking behavior. (App.110a, 113a-115a, 119a, 122a-123a, 141a-142a, 155a-156a)

Students suffered a near-total loss of friendship and association during masking; *see generally* App. 108a-123a, 138a-164a. Children and teachers testified that they were physically isolated and surrounded at all times by plexiglass cages on three sides. (App.108a, 117a-119a, 150a-155a, 119a). Student K.B.'s experience is typical of the loss of all emotional communication from the absence of facial cues and signaling, a heightened state of anxiety, a loss of well-being and

[1] For ease of reference, three representative declarations are included in the appendix: Wilbur, Zammit and Mindas. (App.138a, 149a, 157a)

loss of comfort in communicating with her teachers. (App.110a-111a).[2]

Seventh grade teacher John Zammit testified as to his observations of the impact of masking on virtually all communication, participation and association of students and teachers. (App.139a-148a) Zammit testified that the masking discipline negated school as the "safe place" for children and that "with the masks" student life and vitality was "reduced to the point where it was almost non-existent"; school, Zammit said, became "a Zombie apocalypse". (App.-147a) Zammit said that continuous face covering prevented teaching by the complete absence of facial expression and non-verbal cues:

> "With the mask on you are just nodding your head like a robot and cannot give these non-verbal cues". (App.144a)

Face covering, Zammit said, "completely removes the social and emotional well-being of any school experience, . . . " and caused the absence of the "most common feedback I receive as a teacher [] observing the grin, the smirk, the smile, the not biting your lip, the 'I kind of get it' gesture . . . [w]ith masking, I lose all of that feedback and so does the student." (App.145a-146a) Others spoke to the isolation and loss of association under masking and isolation. (App.108-115a, 119a, 122a-123a, 140a-142a, 155a-156a); *see generally* App.108a-123a, 138a-164a)

Teacher Rhianon Mindas, *see generally* App. 158a-164a, spoke to the isolation induced among

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[2] All of the references appear in both the SAC and the filed declarations and reference is made to both sources.

children by masking; the absence of normal communication among children; the loss of attention span and inhibition on student speech; she said she witnessed the same issues with her own children and that her high school daughter reported the "monotony" under masking, that "there's no more joy left in school" and went from an A student to "barely passing". (App.161a-162a). Mindas testified as to the complete loss of normal communication among her fifth grade students, a fundamental part of their school experience. (App.162a-163a).

The record before the district court was replete with such references by students and teachers (App.108a-123a, 138a-164a) that were wholly uncontroverted by the State. No witness from any school in New Jersey or the state Department of Education disputed the teacher and student declarations. This record, unique among virtually all judicial challenges to masking mandates, demonstrated the complete interruption and elimination of communication, speech and association in the school forum caused by forced masking and isolation.

B. Summary of the Relevant Executive Orders

Among New Jersey's 9.5 million citizens only schoolchildren and teachers were forced into a masking and isolation regimen from May 24, 2021 to July 4, 2021 and from August 26, 2021 to March 2022 (and beyond in certain districts). During these eight months (a lifetime for a child), no other people, groups and places in New Jersey were subject to any masking or COVID measures (except for medical and mass transit facilities). The history of New Jersey's

complex, convoluted and overlapping executive orders is set forth in the SAC. (App.102a-105a)

Initially, on July 4, 2021 the masking orders as to children and teachers expired (App.104a) but, four weeks later, via Executive Order 251, the governor reimposed the orders on all of New Jersey's 1.4 million schoolchildren and their teachers. (App.56a-57a, 105a)

No metric or criteria appeared in EO 251 to explain *why* the governor reimposed forced masking on children except the vague reference that "significant upticks" in COVID cases required reinstatement of such rules. (App.56a) The executive orders did not explain what was meant by this vague terminology nor did the State's experts explain to the district court just how the "upticks" uniquely affected only schoolchildren and teachers *but no one else among the State's 9.5 million citizens*.

EO 251 (and all of its successors) is silent as to *why* the remainder of the State's people and its vast public and private facilities—stores, offices, malls, house of worships, bars, restaurants, catering halls, movie theaters and the like—were all deemed free of risk from the "significant upticks" while children, with almost no adverse health concerns from the virus, were burdened by full day forced masking eight to ten hours, every school day for nearly a year.

C. The District Court Decision

1. The Equal Protection Claims

Without any evidentiary hearing, the district court rejected plaintiffs' equal protection arguments,

holding that the state demonstrated a "rational basis" for such disparate treatment since it was imposing a health measure to fight an epidemic condition. (App.29a) Left unsaid was *why* such "rational basis" applied *only* to schoolchildren and teachers when everyone else in the state was free to go about unmasked and unprotected. The court did refer to certain generalized figures of child hospitalizations and deaths (App.29a-31a) but all of those figures were from early in the pandemic—no evidence was offered that these early statistics still had any relevance nearly two years later and the court conducted no evidentiary hearing to determine the validity of such statistics.

2. First Amendment Speech and Association

As to the First Amendment claims, the district court concluded that the masking program—imposed and forced on nearly 1.4 million children—was "*narrowly* tailored" to achieve a valid state objective, namely the protection of public health. (App.47a). The trial court held no evidentiary hearing to determine whether forced student masking was truly necessary and why no restrictive means were imposed on *the rest of the population.*

Judge McNulty treated serious constitutional questions concerning the complete loss of speech and association among New Jersey schoolchildren with a casualness touching on disdain, suggesting that "muffling" or "muzzling" did not impede speech and that students could still "text, tweet, Snapchat", adding the sardonic remark, "hopefully not during class". (App.49a) The district court's summary of the allegations in the complaint demonstrates the degree

to which the court ignored the extensive well-developed affidavit testimony filed by plaintiffs:

> Common experience suggests that students, when masked, nevertheless remain free to talk, gesticulate, and otherwise make themselves understood; to be "muffled" is not to be gagged. What is more, students are able to communicate in many ways other than unmasked, face-to-face conversation. They are free to text, tweet, Snapchat, and so on (hopefully not during class). The EOs, then, do not deprive them of their ability to communicate, generally; they only make it marginally more difficult to communicate face-to-face while in school. (App.49a)

Just *how* the trial judge discerned that children could still engage in normal communication by such methods was left unstated. Declarants testified that virtually all communication in schools had ceased; that class participation was markedly depressed or non-existent; that hallways were silent and "zombie-like"; that friendships were interrupted; that new friendships and associations were not being made; that students were isolated for months on end in plexiglass cages, even at lunch; that they lost all joy and happiness in school. *See generally* App.108a-123a, 138a-164a.

Teacher Zammit declared bluntly that during these many months he observed students throughout his school "looking down, looking deflated, quiet, and very isolated." (App.147a)[3] Students and teachers

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[3] Teacher Mindas testified that because they were inhibited from speaking due to masking students would use the class

testified that the hallways, ordinarily a place of lively talk and activity, as described by teacher Zammit and student AM were "zombie" zones during masking. No witness testified that students were able to replace the loss of normal communication by "text, tweet, Snapchat" as the district judge blithely concluded.

The district judge's conclusion that "students, when masked [] remain free to talk, gesticulate, and otherwise make themselves understood" and are "able to communicate in many ways other than unmasked, face-to-face conversation" (App.48a-49a) is contrary to the teachers' own testimony that they and their students lost all such abilities while masked. Zammit (App.140a-148a); Mindas (App.159a-164a)[4]

Without hearing from a single witness, the trial judge concluded that the children had an adequate alternative forum "outside of school" for association:

> Plaintiffs claim that "schools are the forum in which children seek (and obtain) conversation, friendship, dating, exchanges of ideas

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"chat" format but her declaration makes it clear this was *not* an adequate substitute for speech. In her view as a professional, the interference in actual speech prevented students from normal interpersonal development. (App.159a-160a)

[4] The judge also opined that "clear" masks were available to minimize the impact on First Amendment interests, noting that he had occasionally used them for short periods for adults in his courtroom. (App.41a, n.19) But no evidence was presented that "clear" masks could be used practically for 8-10 hours a day for young children and adolescents for months on end. Nor did the district judge take testimony from any teachers to evaluate how his experience as a judge with adult witnesses would comport with children and adolescents.

> and association with others." . . . ***Many young people, however, find joy, conversation, romance, and friendship outside of school. Nothing in the EOs affects their ability to do so***. (App.48a.) [emphasis added]

This sweeping statement disregards the reality known to any parent: that school *is* the primary forum for children and adolescents to form friendships and associations, often for life. Children and teachers alleged the complete loss of friendship formation and association during the period of forced masking. *See generally* App.108-123a, 138a-164a. Having failed to hold a hearing to test this evidence, the trial judge simply rejected their views, substituting his own.

D. The Third Circuit's "Mootness" Decision

On appeal, the Third Circuit ignored the merits, found the matter was moot and that the court was without jurisdiction, holding that "while this appeal was pending, the Governor withdrew the mandate" and there was no longer "a live dispute between adverse parties." (App.2a) The entirety of the Third Circuit's decision centers on the absence of a "case" or "controversy" under Article III. (App.4a-5a) Paradoxically, the Third Circuit found that the "challenged mandate here 'was a product of the pandemic's early stages'", *see* App.6a, citing *Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022), but, in actuality, the masking order was reinstated on August 6, 2021, in the very last stage of the pandemic, at a time when no other groups or public or private places in New Jersey were subject to masking orders. The appellate court did not explain this discrepancy.

The Third Circuit also concluded there was no basis on which to suggest that the masking mandate would resurface in any way similar to the challenged mandate because the Governor had said he would not reinstate the mandate "unless COVID takes a dramatic turn for the worse". (App.7a) On this basis, the appellate panel rejected the "capable of repetition, evading review" doctrine, reasoning that any future change in the pandemic

> "would create an altogether different fit between any *new* mask mandate and the reality on the ground, birthing a different controversy between the parties."

(App.7a) [emphasis supplied by the court].

Such conclusion is built on a weak, if non-existent structure: masking is not likely to be "different" in the future if COVID worsens since the remedy is self-defining. No witness testified that there were *other* means of masking schoolchildren than those challenged in the complaint. Logic and common sense dictate that future masking will take a similar form as it did when the Governor reinstated the orders last August. Judicial guidance as to these constitutional questions would still be capable of informing the community and the nation as to the limits of such powers and the conditions under which they may be executed in any future epidemic.

Additionally, the Third Circuit found the claims to be moot on the ground "that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *See* App.6a, citing and relying upon *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (quotation

omitted). The essence of this holding is the following conclusion:

> Public health conditions have changed dramatically since the dawn of the pandemic. Infection rates are down, vaccination rates are up, and officials have more arrows in their quiver to mitigate and treat COVID-19. Those increased options have borne fruit that undermines Plaintiffs' argument: despite a surge in infection rates during the Omicron wave, the Governor did not reimpose masking restrictions. *The record shows that the Governor withdrew and refused to reimpose the mandate because of the changed health conditions, not this lawsuit.* (App.8a) [emphasis added]

This is manifestly in error. The actual record shows that the child masking orders were renewed by the governor in August 2021 via EO 251 in the last stage of the pandemic, *even though the pandemic had begun to wane.* The very fact that the governor *did* reinstate the orders at such time, undermines the Third Circuit's conclusion that changes in the pandemic made the issue moot.[5]

In fact, forced student masking was continuing in New Jersey at the very time the Third Circuit was considering the appeal, even *after* EO251 had been

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[5] The Third Circuit also misread the record when it said the governor refused to reinstate the masking mandate after "a surge in infection rates during the Omicron wave . . . " *Id.* To the contrary, Executive Order No. 281 signed by the governor on January 11, 2022, continued the child masking orders in EO 251, reciting "the increased prevalence of the Omicron variant" as the basis for the order. (App.76a) Plainly, these matters were still ripe and the complaint should not have been dismissed as moot.

rescinded in March 2022. This occurred following the February 22, 2022 "Guidance" from defendant Commissioner of Health instructing that school districts may issue their own masking orders after the executive order expired, a fact the Court of Appeals recited in its decision:

> On March 4, 2022, after Plaintiffs filed this appeal, Governor Murphy issued EO 292, ending the mask mandate. Around the same time, the Department of Health issued "guidance" to districts about when and how to impose new mask mandates, but it explained that "individual school districts and school boards" could "make the determination as to whether universal masking is appropriate for their schools." (App.5a).

It is undisputed that following the "Guidance", multiple school districts in New Jersey continued "universal masking", including, *inter alia*, the Camden City School District, Newark Public Schools; Patterson Public Schools; Passaic Public Schools and West Windsor-Plainsboro Public Schools. Even though these districts issued their own masking orders under the authority of the Commissioner of Health, who was a defendant in the case, the Third Circuit held that this evidence of continued masking did not present a "case" or "controversy" but reflected the decisions of "'independent actors not before the court,' namely the school districts". *See* App.11a-12a, citing *R.K. v. Lee*, 53 F.4th 995, 999 (6th Cir. 2022) (internal citation omitted).[6]

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[6] This, too, is incorrect. Plaintiffs had from the beginning maintained a claim that it was unconstitutional for the state to

What is most troubling about the Third Circuit's decision is that it rejected ripeness due to "*uncertainty* about whether any New Jersey school district will impose a mask mandate in the future," (App.12a) [emphasis added], despite the very *certain* (and undisputed) evidence then before the appeals court that five major school districts had used the Commissioner's "supervisory authority" to re-impose forced masking. Treating this evidence as non-material, the Third Circuit concluded:

> "Until the threat of such a mandate becomes 'sufficiently concrete,' Plaintiffs' constitutional challenge is premature and thus 'unfit for judicial resolution.'"

App.11a, quoting, in part, *Sherwin-Williams Co. v. Cnty. of Delaware, Pa.*, 968 F.3d 264, 272 (3d Cir. 2020).

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authorize school districts to impose their own masking orders. Such allegation was *always* a part of the relief sought by the *Stepien* plaintiffs, as stated in the Second Amended Complaint:

> "Governor Murphy and Commissioner of Education Angelica Allen-Mcmillan announced June 28, 2021 that Executive Order 175 will be allowed to expire on July 4, 2021 *but that school districts were authorized to continue mask mandate and other Covid restrictions in their discretion*."

Second Amended Complaint at ¶37 (App.104a) [emphasis added].

REASONS FOR GRANTING THE PETITION

I. THE NATION REQUIRES JUDICIAL GUIDANCE AS TO THE CONSTITUTIONAL LIMITS ON FORCED CHILD MASKING

Justice Gorsuch, in a recent concurrence, observed that through the gateway of the pandemic the United States has experienced the greatest peacetime intrusion into civil liberties in the nation's history. *Arizona v. Mayorkas*, *Secretary of Homeland Security,* 143 S. Ct. 1312*,* 1314 (2023). Judicial challenges to these intrusions have been nearly all declared moot by the state and federal courts and grave constitutional questions arising from the masking orders have been allowed to languish without adjudication. The transitory nature of this, or any biological condition, effectively leaves the nation without judicial guidance as to repeated and long-running intrusions into civil liberties.

After two years of emergency rule, and an endless flow of gubernatorial orders, all entered by the mere swipe of a governor's pen, without hearings or, in most cases, legislative input, the nation has been left in a state of effective non-justiciability. As Justice Gorsuch described it,

> Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders

forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighbor-hoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.

Federal executive officials entered the act too. Not just with emergency immigration decrees. They deployed a public-health agency to regulate landlord-tenant relations nationwide. They used a workplace-safety agency to issue a vaccination mandate for most working Americans. They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement. Along the way, it seems federal officials may have pressured social-media companies to suppress information about pandemic policies with which they disagreed.

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. Courts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them. In some cases, like this one, courts even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking- by-litigation.

Arizona v. Mayorkas, 143 S. Ct. at 1314-1315.

Mootness findings have repeatedly deprived the nation of judicial teaching as to the constitutionality of such orders, with special harm from those orders impressed and forced upon children. The "transitory" nature of the orders, meaning that the constitutional violation exists only as long as the "emergency" persists, can unjustly deprive plaintiffs of adjudication, as the Court has recognized in other contexts. *See e.g. County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980), citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)("[S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.")

Important questions—in this case a constitutional issue of near-universal impact derived from the widespread use of forced masking in schools—are left unaddressed simply because of their assumed short-term duration. In several contexts, the Court has recognized the need to preserve jurisdiction to allow important cases to be heard, including, for

instance, constitutional questions arising out of state labor law:

> . . . the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. U.S. Dept. of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages 1971, Table A-3, p. 16 (1973). A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 126-127 (1974). As the Court in *McCorkle* noted, the critical factor in determining that mootness is not a barrier to adjudication is "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Id*. at 126.

In *Gerstein*, the Court recognized that many claims of constitutional importance will naturally expire before a court can reach the merits but that plaintiffs are still entitled to a holding on the merits:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain

> that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

Gerstein v. Pugh, 420 U.S. at 110, n.11. This is hardly new doctrine. The Court held more than a century ago that where the

> "case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here "'capable of repetition, yet evading review,' so that petitioners are adversely affected by government 'without a chance of redress.'"

Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

The Third Circuit's finding of mootness runs counter to this long line of cases in which the Court has held that important constitutional questions must still be adjudicated even if the cause of action has been resolved. New Jersey's masking orders certainly fall into the category of governmental action "directly . . . and continuing to affect, the "behavior of [children] in our society". *McCorkle*, 416 U.S. at 126.

Just as constitutional claims as to pre-trial detention (*Gerstein*), labor issues (*McCorkle*), and many other fields[7] are by nature short-term but worthy

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[7] The Court in *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 126, has noted the long history of rejecting claims of mootness where issues of great import would be left unresolved. *See e.g. Roe v. Wade*, 410 U.S. 113, 166 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973), where the pregnancies were long resolved by

of adjudication, so, too, New Jersey's nearly 1.4 million school children, burdened by executive orders not imposed on other groups, must have their day in court. The alternative is a future of continued executive orders burdening citizens in emergency conditions that naturally expire as a factor of biology, forever evading review, resulting in "repeated deprivations", *Gerstein*, *supra*, at 110, n.11, and significant constitutional intrusions but with no remedy for millions of citizens.

For these reasons, certiorari should be granted.

II. AN IMPORTANT DIMENSION OF THE FIRST AMENDMENT HAS BEEN PREVENTED FROM BEING DETERMINED—THE QUESTION OF STATE ORDERS THAT ELIMINATE THE ENTIRETY OF STUDENT SPEECH AND ASSOCIATION

A need for adjudication exists here and is compelling. The SAC and the declarations presented graphic evidence of the complete destruction of speech and association in the schools but the trial judge breezily dismissed such claims as merely asserting "a First Amendment right to untrammeled *social* communication . . . " (App.42a) [emphasis added]. In so ruling, the district judge overlooked the near-complete destruction of student communication and association under forced masking, as demonstrated by the declarants. Holding that *Tinker* applied only

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the time the cases reached the Court. In *McCorkle*, the Court noted that "[s]imilar and consistent results were reached" in *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972); and *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

to "political" speech (App.42a-43a), the district court misunderstood this Court's teachings as to the scope and scale of First Amendment rights, particularly as to minors.

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), the Court did address political speech in the form of students wearing armbands to protest the Vietnam War, but *Tinker* recognized the far greater right of generalized dialogue and discussion between students:

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours.

Tinker, 393 U.S. at 512-13.

By speaking to "personal intercommunication" outside the classroom, the Court in *Tinker* was speaking to speech and communication in the ordinary sense, not solely as to political expression. Surely, the Court cannot be said have been so blinkered as to think that students in their free time speak only of Kant and Nietzsche rather than more mundane or petty subjects common to all children and adolescents. The conversation of children runs the gamut of

mundane, ideological, sexual, religious, irreverent, petty, childish, philosophical, harmless, entertaining, gossipy, complaining and even mean-spirited; all of it is vital to their development and their basic constitutional rights, as Teacher Mindas testified. (App.163a)

Following *Tinker*, the Court's jurisprudence has tended towards greater protection for ordinary, non-political speech, including children's speech.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), coming nearly 20 years after *Tinker*, the Court made it clear that the First Amendment looks to "a *broad range* of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Id*. at 620 [emphasis added]. Following this reasoning, the Second Circuit has described the "range" of protected speech as a "sliding scale analysis rather than a bright-line test." *Matusick v. Erie County Water Auth.*, 757 F.3d 31, 58 (2d Cir. 2014). As *Roberts* recognized, such interests are not limited to "political" discussions but attach to the "broad range" of communication and association that naturally arises between individuals. *Roberts v. United States Jaycees*, 468 U.S. at 620.

In *McCullen v. Coakley*, 134 S. Ct. 2518, 2535-37, 573 U.S. 464, 189 L. Ed. 2d 502 (2014), a Massachusetts statute was described as "truly exceptional" in its intrusion into speech and associational rights. In *McCullen*, the law criminalized the mere act of *standing* within 35 feet of an entrance or driveway to any abortion facility so as to allow patients unhindered entrance. *Id.* at 2525. Although the Massachusetts statute was content neutral, the Court concluded that the law was not narrowly tailored to further the state's substantial interest in "patient access to

healthcare" because the practical effect of the law was to prohibit all face-to-face interaction and "even normal conversation". *McCullen* at 2535-37. Face-to-face interaction, the Supreme Court noted, is "the essence of First Amendment expression" and has no adequate substitute. *Id.* at 2536, quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

In *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011), the Court recognized that the First Amendment extended protection for minors even to a "harmless pastime", such as violent video games. The Court held that a California law banning the sale of "violent" video games to minors

> "abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are *a harmless pastime*.")

Brown, 564 U.S. at 805 [parenthetical text is the Court's; emphasis added]. Pointedly, *Brown* did not condition the state's duty to refrain from intrusion to political or ideological speech but gave protection to the minor's right to a "harmless" (and even foolish) activity, a holding that contradicts the trial court's view that only student "political" speech is protected.

In *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 210 L. Ed. 2d 403 (2021), the Court even protected what it called "superfluous" speech of a student who used vulgarity in combination with posted photographs to mock and insult the cheerleading team and its faculty advisor. The student's speech obviously had nothing to do with politics or ideology but reflected the angst of adolescence, in other words,

"personal intercommunication", *Tinker, supra*, of an ordinary non-political type. As such, the Court found the child's speech to be fully protected regardless of its "superfluous" nature:

> It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. *But sometimes it is necessary to protect the superfluous in order to preserve the necessary*.

Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. at 2048, citing *Tyson & Brother v. Banton*, 273 U. S. 418, 447, 47 S. Ct. 426, 71 L. Ed. 718 (1927) (Holmes, J., dissenting) [emphasis added].

Teacher Rhianon Mindas testified that the ordinary speech of her fifth grade students is fundamental to their development and usually concerns little that one could call political or ideological. (App.163a) As Mindas explained, the ordinary "goofing around and typical 10-year old behavior", the learning to solve "conflicts" through conversation and the "joking around is important to their education because it allows them to find humor in things"; Mindas testified that speaking of "sports" or "Pokemon" is all fundamental to a child's development. As Mindas made clear, for the child "social" conversation *is* fundamental speech. (App.160a-164a) The district court woefully misconstrued these claims by suggesting plaintiffs were merely complaining of "muffling" or "muzzling" of voices and by diminishing the constitutional value of "social" conversation. (App.39a)

When viewed in the combined lens of *Tinker*, *Roberts*, *Brown and Mahoney Area Sch. Dist*, the Court's jurisprudence has come to recognize that pro-

tected speech (for adults *and* children) is not limited to *political* speech but covers the "broad range" of communication between people (*Roberts*), "normal conversation" (*McCullen*), "harmless pastime[s]" (*Brown*) and even "superfluous" speech (*Mahoney*). In other words, the First Amendment applies to all of the speech in which ordinary people (including children) engage. The district court's contrary holding would strangle the life from these decisions by dismissing a widespread constitutional intrusion into *all* student speech on the singular ground that only *political* speech is protected in the schools. (App.43a-45a).[8]

Plainly, the Court's cases since *Tinker* make Judge McNulty's reasoning untenable and require review by this Court.

III. CONVENIENCE OR EFFICIENCY CANNOT BE THE BASIS FOR JUDICIAL APPROVAL OF A REGIMEN THAT STRANGLES AND STIFLES VIRTUALLY ALL SPEECH AND ASSOCIATION

One of the great controversies that emerged from COVID-era measures is the question of what means may be used (or how far may the state go) to protect the public health. *McCullen* observed that the Constitution "prevents the government from too readily 'sacrific[ing] speech *for efficiency*.'" *McCullen*

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[8] The district court (App.43a) undoubtedly contorted the statement in *Tinker* that students do not have protection for conduct that "disrupts classwork or involves substantial disorder . . . ." *Tinker*, 393 U.S. at 513. In *Mahanoy Area Sch. Dist. v. B.L.*, the Court cautioned that this was a "highly general statement about the nature of a school's special interests," 141 S. Ct. at 2045, and was not intended to have dispositive effect either for or against the school's disciplinary powers.

at 486, quoting *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988) [emphasis added]. The district judge ignored this principle, accepting a massive First Amendment intrusion on the ground that "masks are a low-cost, effective way to prevent the spread of COVID." (App.47a) However, *McCullen* rejected this very argument, holding that mere "efficiency" was not a sufficient state interest to intrude upon First Amendment rights: "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech *for efficiency*.'" *Id.*

Whether masking of students (and only students) is a "low cost" means of combatting illness cannot be the fulcrum for constitutional analysis. As Justice Gorsuch pointed out in his concurrence in *Arizona v. Mayorkas*, it is just such isolated (and truncated) reasoning that invited a vast and nearly unlimited array of restraints on fundamental liberties:

> Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat. A leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force. We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship,

> to gather with friends and family, or simply to leave our homes. We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms. Of course, this is no new story. Even the ancients warned that democracies can degenerate toward autocracy in the face of fear.

Arizona v. Mayorkas, 143 S. Ct. at 1315 (Gorsuch, J. concurring).

Undoubtedly, some may believe that masking and isolating schoolchildren (and only schoolchildren) every day for nearly a year may have prevented *some* spread of disease, but such arguments play upon the "fear and desire for safety", *id.*, that justifies efficiency over basic liberties. *McCullen* would bar such casual treatment of protected interests. Complete destruction of meaningful communication and association in the schools cannot be constitutionally supported merely because *some* health benefits may emerge. Any such conclusion requires the "close fit between ends and means", *McCullen* at 486, as to whether children pose such a unique source of disease spread, or suffer so uniquely from the disease, to justify the draconian burden imposed on this class of citizen *and only this class of citizen*.

This balancing test was never undertaken by the district court, or by the Third Circuit that took recourse in "mootness", a holding that averted, yet again, any adjudication of paramount and grave constitutional questions.

For these further reasons, certiorari should be granted.

IV. THE THIRD CIRCUIT DISREGARDED AND REPLACED THIS COURT'S HOLDINGS AS TO THE "CAPABLE OF REPETITION" STANDARD WITH ITS OWN CIRCUIT DOCTRINE

Contrary to this Court's prior holdings, the Third Circuit held that to avoid mootness "[t]he action that must be repeatable is the *precise* controversy between the parties." App.9a, citing and quoting *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 517 (D.C. Cir. 2019) (internal quotation marks omitted) [emphasis supplied].

This is plain error and is contrary to this Court's mootness doctrine.

In *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), the Court held that the "capable of repetition" exception to mootness requires only a "'*reasonable* expectation' or a 'demonstrated *probability*' that 'the same controversy will recur involving the same complaining party.'" *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 464 (2007) [emphasis added]. In *FEC*, the Court rejected an agency's claim that a challenge to blackout regulations after the election season had ended required a showing that plaintiff would run future commercials "sharing <u>*all*</u> 'the characteristics . . . '" of the original ads. *Id.* [emphasis added]. Rejecting this as too narrow and restrictive, the Court held that to avoid mootness a plaintiff need only show the likelihood of "materially similar" conduct in the future. *FEC*, 551 U.S. at 463.[9]

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[9] *See also Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 740, 209 L. Ed. 2d 164 (2021) citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (Thomas, J. dissenting) (noting that the capable of repetition" standard does not require the "exact"

In other words, this Court has rejected the Third Circuit's new doctrine that to avoid mootness plaintiff must show that the "precise" controversy will arise in the future. Not only does the Third Circuit's innovative holding disregard this Court's holding in *FEC* but it is fundamentally illogical: no two controversies will ever be *precisely* the same and the Third Circuit's doctrine will *always* result in mootness and a denial of due process.

Certiorari should be granted, in part, because the Third Circuit replaced this Court's "capable of repetition" based on reasonableness, *FEC*, *supra*, with an impossible "precise" controversy standard.

V. THE THIRD CIRCUIT DISREGARDED THIS COURT'S TEACHINGS AS TO MOOTNESS AND VIABILITY OF REMEDIES

The Third Circuit also overlooked this Court's holdings about the persistence of a viable remedy. In *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), the Court held that where a parent sent their child to Scotland and remained in the U.S., our "courts continue to have personal jurisdiction . . . may command [the parent] to take action even outside the United States, and may back up any such command with sanctions." 133 S. Ct. at 1025. In other words, if the defendant who has committed the alleged wrongful act remains within the jurisdiction of the court and can be compelled to act by the court's order, the matter remains ripe and viable. As in *Chaffin*, defendant Commissioner of

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circumstances of the prior case to support continued jurisdiction: "In order for a question to be capable of repetition, it is not necessary to predict that history will repeat itself at a very high level of specificity.")

Health is still in office and the court could compel the Commissioner to withdraw the "Guidance" that allows school districts to continue to re-impose masking, thereby providing a remedy for the plaintiffs.

Moreover, under the "Guidance" every student and teacher is subject to continuing re-imposition of forced masking so that each "continue to have a 'personal stake in the ultimate disposition of the lawsuit.'" *Moore v. Harper*, 143 S. Ct. 2065, 2077 (2023), citing and quoting *Chaffin*, *supra*, 568 U.S. at 172. As such, it cannot be said that it is "impossible for the court to grant 'any effectual relief whatever'", *Chaffin*, *supra*, and the Court of Appeals erred in refusing to adjudicate important constitutional questions arising from forced student masking.

In this same way, the Third Circuit breached this Court's mootness doctrine by treating the five districts that continued masking as non-material to the claims. Fifty years ago in *Powell v. McCormick* the Court recognized that mootness will not arise where subsidiary questions remain even if the primary issue has been resolved. In *Powell*, the issue of a member of Congress's right to take his seat may have been settled but questions over lost seniority and salary gave rise to a continuing controversy and were not mere "incidents" of the mooted issues. *Powell v. McCormick*, 395 U.S. 486, 496-500 (1960). Similarly, the fact that five school districts continued forced masking under the "Guidance" is not a mere "incident" but is a branch that grows out of the main trunk of constitutional infirmity presented by the plaintiffs. Mootness of a "primary" question does not moot out "secondary" questions. *Powell*, *supra*, at 499, citing *Bond v. Floyd*, 385 U.S. 116 (1966).

For these additional reasons, certiorari should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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