No. 23-507

In the Supreme Court of the United States

RITA C. SIMPSON-VLACH, ET AL.,
PETITIONERS,
v.
MICHIGAN DEPARTMENT OF EDUCATION, ET AL.,
RESPONDENTS

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners' reliance on speculation and conjecture related to the hypothetical possibility that another long-term school closure event due to COVID-19 fails to support injury-in-fact standing where there is no imminent possibility of such a closure occurring in the foreseeable future.

2. Whether Petitioners' claims are moot because there is not a fair prospect that a similar COVID-19 school closure as occurred in March 2020 will recur in the foreseeable future given the two and half years of all but uninterrupted in-person instruction.

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INTRODUCTION

The COVID-19 pandemic hit in March 2020. Upon orders of the Governor of Michigan, all Michigan public schools closed for health and safety reasons to protect all students and staff from the impact of a previously unseen virus sweeping the globe.

Respondent Washtenaw Intermediate School District ("Washtenaw ISD") complied with these orders. As did other school districts like Respondent Ann Arbor Public Schools ("AAPS"). Petitioners' children attended AAPS at the time of the statewide closures, not Washtenaw ISD. Washtenaw ISD did not provide any educational or special education services to any of the Petitioner students.

During this unprecedented global pandemic, the U.S. Department of Education issued guidance in March 2020. That guidance expressly stated that the Individuals with Disabilities Education Act permitted schools to provide special education students with instruction and services as practical during the pandemic closures.

The closures ended when the 2019-2020 school year was completed. For the 2020-2021 school year, the Michigan Legislature required schools to consider various instructional models including remote, virtual, or hybrid instruction. Petitioners' students again attended AAPS, none attended Washtenaw ISD.

Petitioners admit that each of the students returned to in person instruction at the latest in May 2021. The 2021-2022 school year was in-person except for a very brief six-day period in January 2022 when AAPS temporarily reverted to remote instruction when a COVID-19 variant was surging.

The remainder of the 2021-2022 school year was in person. As was the 2022-2023 school year. And now the first half of the 2023-24 school year has also been exclusively in-person. There have been no recent recommendations from any local, state, or national health entities or experts that school close to in-person instruction. In short, the closures having long since ended and the dispute is moot.

Against this backdrop of two and half years of near continuous in-person instruction, Petitioners claim that the mere speculation of another pandemic related closure of schools provides sufficient injury-in-fact to support standing. This is incorrect. The Sixth Circuit correctly applied the well-settled elements of standing with respect to prospective relief based on a fear of a future harm. It correctly held that speculation, conjecture, and the various attenuated chain of events that would have to occur before another unprecedented closure came to pass failed to support Petitioners' standing in this case.

The Sixth Circuit also correctly held that it was the province of the students' Individual Education Plan team to determine in the first instance whether their instruction or programs and services were required to be in-person. The IDEA provides that a student's placement, or "stay-put", determination can be reviewed by an administrative law judge during proceedings initiated under the IDEA. Thus, contrary to Petitioners' rhetoric, both administrative and federal court review is expressly provided for this decision under the IDEA.

Lastly, the issue of COVID-19 school-related closures is moot. The Sixth Circuit correctly held that there was not a fair prospect that any similar,

widescale and long-term closure as occurred in March 2020 would recur in the foreseeable future. The two and half years of all but uninterrupted in-person instruction demonstrated that. As did the changed circumstances that included new and updated vaccines, boosters, natural immunities, and new medical remedies that could be prescribed. Petitioners reliance on conjecture and speculation was properly rejected.

The Court should therefore deny review.

STATEMENT

A. Legal background

1. In passing the IDEA, Congress "intended to open the door of public education to all qualified children and required participating States to educate handicapped children with nonhandicapped children whenever possible." *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.,* 526 U.S. 66, 78 (1999) (citations and internal markings omitted). The statute "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 52 (2005) (citation omitted).

The IDEA places responsibility for providing required programs and services with states and school districts. Relevant to this action is the statutory requirement that both states and school districts create administrative procedures to review decisions regarding the "identification, evaluation, . . . educational placement, or the provision of free appropriate education." 20 U.S.C. § 1415(b)(1)(E). Michigan implements these requirements through the Michigan Mandatory

Special Education Act ("MMSEA"), Michigan Compiled Laws § 380.1701, et. seq. Michigan regulations provide that state agencies are also bound by federal IDEA regulations. *See* Mich. Admin. Code R. § 340.1851. The corollary to the above requirement is that parents are required to exhaust such administrative procedures before seeking review in court. 20 U.S.C. § 1415(l).

2. The IDEA requires that "during the pendency of any proceedings conducted pursuant to this section" that a disabled student "shall remain in the then-current educational placement of the child[.]" 20 U.S.C. § 1415(j). The "proceedings conducted pursuant to this section" refers to an adversarial due process administrative hearing. 20 U.S.C. § 1415(c)(2), (f). A special education student's "placement" is committed in the first instance to the student's Individual Education Plan ("IEP") team. 34 C.F.R. § 300.116(a).

B. Factual and procedural background

1. On March 13, 2020, Governor Gretchen Whitmer, claiming authority under the Emergency Management Act ("EMA"), 1976 PA 390, as amended, Mich. Comp. Laws 30.401-.421, and Emergency Powers of the Governor Act of 1945("EPGA"), 1945 PA 302, as amended, Mich. Comp. Laws 10.31-.33,* issued Executive Order 2020-5 ordering the closure of all

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* The Governor's authority was later held to be unconstitutional. See *House of Representatives & Senate v Governor*, 333 Mich. App. 325, 365 (2020) (affirming that Executive Orders based on EMA were *ultra vires* and those based on the EPGA constitutional); *House of Representatives v Governor*, 506 Mich. 934 (2020) (reversing Court of Appeals on constitutionality of EPGA).

Michigan "public, nonpublic, and boarding schools in the state" from March 16, 2020 through April 5, 2020.†

On April 2, 2020, Governor Whitmer suspended "*in-person instruction* for pupils in kindergarten through grade 12 ("K-12") . . . for the remainder of the 2019-2020 school year and school buildings used for the provision of K-12 education must remain closed for *the purpose of* providing K-12 education *in person* for the remainder of the 2019-2020 school year[.]" Executive Order 2020-35, Section I, ¶ A. (emphasis added).‡ These orders applied to **both** general education students and special education students. Stated differently, students with disabilities were not being treated differently from their non-disabled peers.

Executive Order 2020-35 required school districts to "strive in *good faith and to the extent practicable*, based upon existing resources, technology, training,

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† All cited Executive Orders previously issued by the Governor remain available at https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-orders (last accessed December 26, 2023).

‡ The Governor also ordered each person in the state, unless expressly permitted, "to stay at home or at their place of residence" from March 13, 2020 until April 13, 2020. Executive Order 2020-21, ¶ 2. The "stay at home" order for most "non-essential" individuals was extended until April 30, 2020, Executive Order 2020-42, and again through May 15, 2020, Executive Order 2020-59. While the Governor eventually reopened certain "segment[s]" of Michigan, this did not apply to school districts, and the "stay at home" restrictions continued through May 28, 2020 and into June 2020. Executive Order 2020-77, 2020-96, 2020-110. Thus, independent from the Orders closing schools, all Washtenaw's employees were prohibited by state law from coming to the district to provide in-person instruction or special education services through the end of the 2019-2020 school year.

and curriculum, as well as the circumstances presented by any *state of emergency or state of disaster*, to provide equal access to alternative modes of instruction to students with disabilities for the remainder of the 2019-2020 school year." Section VI, ¶ A. (emphasis added). It also required school districts to follow federal and state guidance relating to the delivery of special education programs and services, Section VI, ¶ B.

2. The U.S. Department of Education released contemporary guidance related to the delivery of special education programs and services. It emphasized that complying with the Individuals with Disabilities Education Act ("IDEA") "**should not prevent any school from offering educational programs through distance instruction**."[§] (emphasis original). The Fact Sheet went on to state that "FAPE may include, as appropriate, special education and related services provided through **distance learning** provided virtually, online, or telephonically." *Id*., pp. 1-2 (emphasis added). It further advised and acknowledged that "it may be unfeasible or unsafe" in certain circumstances to provide services in-person and thus providing "hands-on physical therapy, occupational therapy," or other services. *Id*., at p. 2.

3. In accordance with Governor Whitmer's then valid executive orders, Respondent Ann Arbor Public Schools ("AAPS") closed to in-person learning in

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[§] U.S. Department of Education, *Supplemental Fact Sheet*, March 21, 2020 (available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf) (last accessed December 26, 2023).

March 2020. (Pet. App. p. A2.) Petitioner students only attended AAPS. None attended Respondent Washtenaw Intermediate School District ("Washtenaw ISD"). And none of the Petitioner students' IEPs specified whether any particular programs or service was to be delivered in-person. (Pet. App. p. A3).

AAPS delivered instruction remotely through the end of the 2019-2020 school year. AAPS then provided instruction through a hybrid approach (combining in-person with remote or virtual instruction) until May of the 2020-21 school year. (Pet. App. p. A3). By this time, the School had reopened and classroom instruction returned to normal.

In June of 2021, Petitioners filed a putative class action complaint in the district court (although they never sought class certification) asserting eight claims. Count 1 alleged four distinct "systemic" violations of the IDEA for the (1) failure to provide prior written notice, (2) lack of meaningful participation by Petitioners in IEP decisions, (3) failure to convene IEP meetings prior to or after the school closures, and (4) failing to provide FAPE on the same level as non-disabled peers. (Pet. App. p. A4). Count 2 alleged that AAPS and perhaps Respondent Michigan Department of Education ("MDE") violated Michigan's Administrative Rules for Special Education. Count 3 claimed a violation of Section 504 of the Rehabilitation Act. Count 4 asserted that AAPS and MDE violated the ADA. Count 5 claimed a violation by AAPS of the Michigan Persons with Disabilities Civil Rights Act. Count 6 alleged the Respondent entities violated the Petitioner's Equal Protection rights. Count 7 contended that the individual Respondents violated

RICO with a corresponding Count 8 alleging a conspiracy to violate RICO. (Pet. App. pp. A3-A4).

Petitioners voluntarily dismissed Counts 3, 6, and 8 prior to the district court's decision on the Respondents' motions to dismiss the complaint. (Pet. App. p A3 n. 2). Petitioners also dismissed MDE from Counts 2 and 5. (Id.)

4. The district court considered the motions to dismiss filed by AAPS, Washtenaw ISD, and MDE noting that it was focusing on the issue of standing with respect to all of the Petitioners' claim. (Pet. App. p. A50-A51). For Count 1, the district court held that while there may have been allegations of past harm, Petitioners failed to show injury-in-fact for declaratory or injunctive relief because they failed to show an ongoing, future harm or a substantial risk of such a harm. (Pet. App. pp. A52-A53). Similarly, the district court held that Count 2 (under state law) also failed to allege a real or imminent threat of ongoing harm. (Id., pp. A54-A57). Count 4 (solely against AAPS and possibly MDE) suffered the same infirmity. Petitioners lacked standing because they failed to allege any injury at all related to future or ongoing harm. (Id., pp. A57-A59). Likewise, in Count 5 (under state law solely against AAPS and possibly MDE) the district court held that Petitioners lacked standing to pursue injunctive and declaratory relief due to no future or ongoing harm being alleged. (Id., pp. A59-A60).

Lastly, with respect to Count 7 asserting violations of RICO against the individual Respondents, the district court held while there may be sufficient allegations of injury-in-fact, the Petitioners failed to properly allege sufficient facts to meet the causation and redressability prongs. (Id., p. A66).

The district court dismissed all of Petitioners' remaining claims without prejudice. (Id., p. A73).

5. The Sixth Circuit affirmed. (Pet. App. pp. A2-A22). It began by citing this Court's well-established elements for standing where prospective declaratory and injunctive relief are requested. (Id., p. A7-A8). For remaining Counts 1, 2, 4 and 5, it explained that relief depended on whether the future harm was a "substantial risk", citing *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) (which quoted *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013)), and that it "must be 'certainly impending", relying on *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014). It further noted that past injury when accompanied by "continuing present adverse effects" could support declaratory or injunctive relief and cited to a prior decision that quoted *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

The Sixth Circuit first dispensed with the latter possibility for standing by holding that Petitioners failed to allege that the past injuries remained ongoing. (Pet. App. p. A9).

The court then turned to Petitioners' assertion that they had alleged a risk of future harm because another closure associated with COVID-19 remained uncertain due to potentially emerging variants. (Id., p. A10). In rejecting this argument, the Sixth Circuit first examined and applied this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983). (Id., pp. A10). It explained that Petitioners' basis for possible future harm rested on a chain of events that was too attenuated to support standing. (Id.)

The court then examined and applied *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). This Court's decision there involved a similar chain of attenuated events. Like that sequence, the Sixth Circuit held that even if the "ever-present, ever-changing COVID-19 circumstances" could cause future school closures, the Petitioners failed to allege how such would lead to the same alleged injuries of skill and competency regression. (Id., p. A11).

The court next declined to address whether the IDEA's "stay-put" provision, 20 U.S.C. §1415(j), would be implicated in the future. (Id., pp. A11-A12). The court explained that making a determination that any of the Petitioner students' IEPs required in-person learning was premature because their respective IEP teams had not considered the issue. (Id., pp. A12-A13). It went on to question whether COVID-19 closures even implicated the "stay-put" provision. It noted that other Circuit decisions had ruled that closures affecting all disabled and non-disabled students alike did not amount to a change in placement under the IDEA. (Id., p. A13). Lastly, with respect to the claims of error raised in the petition, the court held that the Petitioners' administrative settlements provided all the compensatory relief they sought, thus making that basis for standing moot. (Id., pp. A13-A15).**

The Sixth Circuit then provided an alternative basis for dismissal – mootness. Consideration of mootness entailed determining whether "there is 'a fair prospect" that the challenged school closures

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** The Sixth Circuit affirmed the dismissal of Petitioners' RICO claim. Petitioners do not seek review of that part of the decision.

would reoccur in the future. Relying on its recent precedent in a similar case involving COVID-19 mandates, the Sixth Circuit held that it was unlikely any closure related to COVID-19 would occur or that if it did it would lead to the same alleged violations. Even a short closure in January 2022 did not indicate that the "unprecedented closures" from a year and a half prior would again be presented. (Id., pp. A20-21).

6. The Sixth Circuit then denied en banc review. No judge voted to rehear the case. (Pet. App. p. A75).

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Opinion correctly held that Petitioners' speculative and hypothetical assertion of an imminent school closure due to COVID-19 failed to demonstrate injury in fact.

A. Prospective relief

Petitioners challenge the Sixth Circuit's application of *Lyons* and *Clapper*. They argue that each is distinguishable from their allegations of injury-in-fact that support prospective relief. The Sixth Circuit correctly analyzed and applied both cases, and its holding is supported by the First Circuit's more recent dismissal of the same claims brought by Petitioners' counsel for other similarly situated plaintiffs.

This Court's pronouncements of what suffices to meet the injury-in-fact element of standing are well-settled. To demonstrate such an injury, a plaintiff must have suffered a "concrete and particularized" injury that is " 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations omitted). The prohibition on

conjectural or hypothetical claims has been uniformly recognized for over one hundred years. To demonstrate injury-in-fact, a plaintiff must show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). See also *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674 (1974) (citing *Mellon*).

This Court more recently reiterated this prohibition by holding that "[a]bstract injury is not enough" because the "threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983) (citations omitted).

This Court further explained in *Clapper v. Amnesty International, USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L.Ed. 264 (2013), that "imminence is concededly a somewhat elastic concept" but it nonetheless "cannot be stretched beyond its purpose[.]" That purpose being "that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." *Id*. (emphasis original) This Court emphasized that it had "**repeatedly reiterated**" this fundamental principal "and that allegations of *possible* future injury are not sufficient." *Id*. (alteration and citation omitted; italics original; bold added). See also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n. 2, 112 S. Ct. 2130, 2138, 119 L. Ed. 2d 351 (1992) (stating "the **settled requirement** that the injury complained of be, if not actual, then at least *imminent*") (italics original, bold added). The Court warned that for purpose of imminent injury, it

can be "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time[.]" *Lujan*, 504 U.S. at 564 n. 2. Thus, there is a need for "a high degree of immediacy" to reduce the chance of issuing a decision on a case "in which no injury would have occurred at all." *Id*. (citation omitted).

The Sixth Circuit correctly followed this well-settled body of case law. It first held that, as in *Lyons*, the Petitioners' claims failed because they relied on an attenuated chain of events precluding any certainty or imminency. (Pet. App. p. A10). *Lyons* described a similar chain of events that had multiple "ifs" that had to occur before the alleged future injury would occur. *Lyons*, 461 U.S. at 102-03. Similarly, the Sixth Circuit held that the "hypothetical sequence of events" required several links requiring speculative assumptions as well as legal assumptions – (1) whether COVID-19 will again present the need to close school for any length of time, (2) that closure would be a change in placement, (3) a widespread failure to follow procedural rules, and (4) a harm similar to what allegedly occurred. The first is speculative given the wide availability of preventative medicine for all ages, boosters to maintain that level of immunity, natural immunities built up in the community at large, and new pharmaceutical options. The second is a legal assumption that is refuted by case law. The third requires the speculation that a school district would not seek to hold IEP meetings if a similar pandemic occurred. And the last is similarly speculative because the Petitioner students here will be older, have received more services, and may not suffer in the same way as alleged here when they are young.

Petitioners argue *Lyons* does not support this finding. To do so, they rely on an assumption in that case that the plaintiffs would follow the law. (Pet. Brief, p. 11). They argue COVID-19 does not get that assumption and that the "COVID-19 numbers" may again rise potentially leading to a future school closure. They also argue that Washtenaw ISD authorized the closures. (Id.) And they speculate that if COVID-19 numbers rise, then Washtenaw ISD will again violate the IDEA in the way alleged via another school closure. And if that occurs, then "a future shutdown *will likely* apply to all schools." (Pet. Brief, p. 12) (emphasis added).

In essence, Petitioners argue that if the sequence of events laid out by the Sixth Circuit occurs, then there will be a violation of the IDEA. But their reasoning relies on what the injury-in-fact question prohibits – speculative, hypothetical, uncertain, non-concrete, and non-imminent claims of a future injury. For example, Petitioners assert without any basis that Washtenaw ISD, and all Michigan schools, "will again" violate the IDEA "in the event of another shutdown." (Pet. Brief, p. 12). But this concedes the hypothetical nature of the issue. By hinging their argument on the *possibility* of a future school closure – i.e., "in the event of" – they acknowledge that their injury is speculative and hypothetical. The Sixth Circuit correctly rejected this argument, and applied *Lyons* to hold that Petitioners' reliance on that exact sequence is too speculative to support the claim of future injury.

Turning to *Clapper*, the Sixth Circuit correctly applied the settled injury-in-fact principles stated in that case. The key in *Clapper* was that the chain of possible events those plaintiffs feared occurring was too attenuated to support injury-in-fact. *Clapper*, 568

U.S. at 410-11. The Sixth Circuit outlined a similar chain of possible events here that was too attenuated. To which could be added a preliminary event that COVID-19 must again become such a health threat that the second event, students switching to remote learning, became reality.

Petitioners attempt to distinguish the various steps in the chain of possibilities in *Clapper* to argue against its applicability here. (Pet. Brief, pp. 12-14). But even if the exact chain of events can be factually differentiated that does not mean that the settled principles of law pertaining to injury-in-fact are not applicable. For example, that federal agencies are not at issue does not lessen the requirements of concreteness, imminence, or the need for a substantial risk. *Clapper*, 568 U.S. at 409; *Lujan*, 504 U.S. at 564 n. 2. Further, it is not certain that schools in Michigan will again close. The Legislature could pass laws restricting or curtailing a school district's ability to close for health or safety reasons or prohibit it from closing in-person instruction for special education students in particular. While hypothetical, it is no more than the Petitioners' assertion that schools "can close" in future. (Pet. Brief, p. 13). Overall, Petitioners still frame their argument about *Clapper*'s inapplicability on central assumptions of "if" something happens then they may suffer further injury, which this Court's holdings make clear is insufficient to support injury-in-fact.

Petitioners next contend *Clapper* is inapplicable because it was at the summary judgment stage. But this Court and the Sixth Circuit have frequently applied *Clapper* at the motion to dismiss stage without drawing any distinction about the differing procedural posture. See, e.g., *Susan B. Anthony*, 573 U.S. 149, 157-158 (2014) and *Susan B. Anthony List v.*

Driehaus, 525 Fed. App'x 415, 416 (2015) (motion to dismiss stage); *Weiser v. Benson*, 48 F.4th 617 (6th Cir. 2022) (same); *Barber v. Charter Township of Springfield, Michigan*, 31 F.4th 382 (6th Cir. 2022) (same); *Buchholz v. Meyer Njus Tanick, PC*, 946 F.3d 855, 860, 865-66 (6th Cir. 2020) (same). The distinction is therefore irrelevant to the application of the settled rules of law.

That the Sixth Circuit correctly and properly relied on and applied both *Lyons* and *Clapper* is evident from the First Circuit's recent decision in *Roe v. Healy*, 78 F.4th 11 (2023). A case involving the same allegations as Petitioners make here and involving the Petitioners' counsel.

The plaintiffs in *Roe* alleged that the COVID-19 related school closures deprived their children of FAPE. *Id.*, at 15. They claimed, like here, that the Governor's closure orders, and the school districts switch to remote learning altered their IEPs without prior written notice or parental participation. *Id.*, at 17-18. These actions and other failures allegedly caused skill regression and loss of competencies. *Id.*, at 18. In other words, the exact same claims Petitioners brought here.

Addressing the defendants' arguments that plaintiffs there lacked standing, the First Circuit cited the well-settled principles for showing injury-in-fact by citing to this Court's decision in *Transunion LLC v. Ramierz*, __ U.S. __, 141 S. Ct. 2190, 2210, 210 L. Ed. 568 (2021). There, this Court reiterated that for "future harm" claims to support standing for prospective injunctive relief "the risk of harm" must be "sufficiently imminent and substantial." *Id.*, at 2210. That is, as the Sixth Circuit stated, the "threatened injury

is 'certainly impending' or there is a 'substantial risk' that the harm will occur. *Roe*, 78 F.4th at 20 (quoting *Susan B. Anthony*, 573 U.S. 149, 158, in turn quoting *Clapper*, 568 U.S. 398, 409). *Roe* explained, based on *Clapper*, that an attenuated threat of harm that is too speculative fails to demonstrate standing. *Id*. (citing *Clapper*, 568 U.S. at 410). It also relied on *Lyons*, in part, for the statement that past harms fail to confirm standing absent an "ongoing injury or a sufficient threat that the injury will recur." *Id*., at 21 (citing *Lyons*, 461 U.S. at 111; other citation omitted).

As here, the plaintiffs in *Roe* contended that the "ever present" COVID-19 virus "with the imminent *possibility* of further variants" (emphasis added) provided standing. *Id*., at 21. The First Circuit, like the Sixth Circuit, rejected these arguments explaining that "merely invoking the possibility of these events is not enough to show that they are 'certainly impending' or that there is a 'substantial risk' they will occur." *Id*. The *Roe* court relied on the Sixth Circuit's recitation of the attenuated series of events that would have to occur in order for the claim harm to recur. *Id*. Like the Sixth Circuit, it held that the plaintiffs there lacked standing and dismissed their case. *Id*., at 23.

Roe demonstrates that the Sixth Circuit properly and correctly relied on both *Lyons* and *Clapper* to affirm the dismissal of Petitioners' case due to the failure to demonstrate injury-in-fact. Petitioners' claims are not concrete, not imminent, and based wholly on speculation and conjecture. Petitioners also ignore that since the COVID-19 based closures ended in mid-2021, no school district in Michigan has closed for over ten days because of the threat of COVID-19. Their claims here are simply too conjectural and

speculative to support injury-in-fact, and their petition on this basis should be denied.

B. Pendency determination

Petitioners next contend that the Sixth Circuit erred by dismissing their request to determine that their "stay put" placement was in-person instruction. (Pet. Brief., pp. 16-19). As the Sixth Circuit noted, the "stay put" concept derives from 20 U.S.C. § 1415(j)'s language stating that "during the *pendency* of any proceedings" (emphasis added) under the IDEA special education students remain in their current "placement". The primary example of a change in placement is a suspension lasting longer than 10 days. *Honig v. Doe*, 484 U.S., 305, 325, n. 8 (1988). Key in that language is that there must be a "proceeding[ ]" pending under the IDEA for the "stay put" requirement to be invoked. Petitioners here did not start any proceedings under the IDEA until after they filed this suit. (Pet. App. p. A10). In their due process complaints, see 20 U.S.C. § 1415(b)(6), (f), Petitioners did not seek a determination from the administrative law judge that their placement was in-person. (Pet. App. p. A10). And they settled their administrative complaints, thus ending any proceeding under § 1415. *Bills v. Virginia Dep't of Educ.*, 605 F. Supp. 3d 744, 754 (W.D. Va. 2022), *appeal filed* Case. No. 22-1709 (July 2022) ("Where there are no pending proceedings under § 1415, the stay-put provision is inapplicable.")

The Sixth Circuit correctly held that the Petitioner students' IEP teams are given the authority to define the current educational placement in the first instance. (Pet. App. pp. A12). The IDEA's regulations expressly grant that responsibility and authority to a special education student's IEP team. 34 C.F.R.

§ 300.116(a)(1) ("placement decision – [i]s made by a group of person including the parents, and other persons knowledgeable about the child").

In addition, Petitioners' argument that *N.D. v. Hawaii Department of Education*, 600 F.3d 1004 (9th Cir. 2010), is not applicable is misplaced. The essential holding in *N.D.* was that system-wide or school-wide changes affecting all students – disabled and non-disabled alike – does not implicate the IDEA's stay put provisions. *Id.*, at 1116 ("teacher furloughs and concurrent shut down of public schools is not a change in the educational placement of disabled children"). This holding comes **after** the general statement by that court that a move from a regular classroom to, for example, home instruction (i.e., homebound for medical or other reasons) for an individual student could be a change in placement. *Id.* But that general statement did not implicate "**heart of the case**" before the Ninth Circuit, which was "whether the furloughs are a change in the educational placement of the disabled children" to invoke the stay put provision. *Id.*, at 1113 (emphasis added).

Beyond the Sixth Circuit's reliance on *N.D.* in this case, the consensus of courts addressing this issue in the context of COVID-19 school closures relies on *N.D.* For example, in another legal and factually similar case, a district court relied on *N.D.* when plaintiffs there argued, as here, that the COVID-19 closures resulted in a change in placement. *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 188 (S.D.N.Y. 2020), *aff'd in part, appeal dismissed in part sub nom. K.M. v. Adams*, No. 20-4128, 2022 WL 4352040 (2d Cir. Aug. 31, 2022), *cert. denied* 143 S. Ct. 2658 (June 26, 2023). And Petitioners' argument that *N.D.* supports them has

already been rejected by another district court. In *Bills*, the district court noted that the plaintiffs there (represented by the Petitioners' counsel here) "confusingly rely on" *N.D.* as supporting their position. *Bills*, 605 F. Supp. 3d at 754. That district court held, as the Sixth Circuit did here, that *N.D.* "cut against" finding that COVID-19 school closures worked a change in placement. *Id*., at 754-55. Other courts have similarly relied on *N.D.*'s holding in this context. See, e.g., *Horelick, supra*; *Roe v. Baker*, 624 F. Supp. 3d 52, 58-59 (D. Mass. 2022); *Carmona v. New Jersey Dep't of Educ.*, No. CV 21-18746, 2022 WL 3646629, at *5 (D.N.J. Aug. 23, 2022), *aff'd* Case No. 22-2874, 2023 WL 5814677 (3rd Cir., Sept. 8, 2023).

The Sixth Circuit correctly dismissed this argument as a basis for injury-in-fact standing, and the petition should be denied.

II. Petitioners' case is moot.

Petitioners' final argument for review is that the case is not moot as found by the Sixth Circuit. The Sixth Circuit held, under the voluntary cessation exception to mootness, that there was no "fair prospect that the [challenged] conduct will recur in the foreseeable future." (Pet. App. pp. A20-A21). (citing *Resurrection School v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022)). Reasonably expected to recur "does not mean the case remains live if the challenged conduct *might* recur at any time in the future, *no matter how distant*." *Ohio v. United States Env't Prot. Agency*, 969 F.3d 306, 310 (6th Cir. 2020) (italics added).

The need for a foreseeable probability is echoed in other COVID related cases. "[T]hat the government once imposed a particular COVID restriction does not necessarily mean that litigation over a defunct

restriction presents a live controversy in perpetuity." *Hawse v. Page*, 7 F.4th 685, 692 (8th Cir. 2021). "Where it is absolutely clear that the County's disputed conduct could not reasonably be expected to recur, an action challenging a superseded public health order is moot." *Id*. (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). That COVID-19 related orders or mandates, such as here where school closed at the order of the Michigan Governor, ended in the distant past leads many Circuits to hold that cases about whether a particular order will be reinstated to be moot. See, e.g., *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163-64 (4th Cir. 2021) (holding that order expiring in June 2021 were moot in December 2021 when state of emergency ended and the availability of vaccines, boosters, and other health measures changed whether similar restrictions would recur); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 11 (1st Cir. 2021) (even if COVID-19 flared up again, citing Delta variant, "unrealistically speculative" that the Governor "would *again* declare a state of emergency, *again* close businesses, and *again* put arcades in a less favorable reopening phase than casinos") (emphasis original).

The common thread to the foregoing cases and the Sixth Circuit's analysis here, is that each found it key that (1) the challenged conduct ended months earlier, (2) recent changes to vaccines and other health protective measures was critical, and (3) even the presence of and the possibility of new variants did not overcome the speculation and conjecture that was needed to hold that restrictions akin to school closures would recur. The unprecedented nature of the COVID-19 pandemic two and half years ago is also a factor other

Circuits take into account. In *Clark v. Governor of New Jersey*, 53 F.4th 769, 778 (3d Cir. 2022), *cert. denied sub nom. Clark v. Murphy*, 143 S. Ct. 2436, 216 L. Ed. 2d 417 (2023), the Third Circuit stated that it was "absolutely clear" that "the pandemic such as it presented in 2020 and 2021" were not "reasonably likely to recur." It also, like other cases, noted that the public health situation improved in the years since that first impact because of "[o]ur knowledge of the virus and its vectors of transmission, the rollout of vaccines," and "therapeutic responses". *Id.* In short, "[t]he accumulation of those changed circumstances thus make the return of the same pandemic and the same restrictions unlikely." *Id.* (citations omitted). These are the same considerations the Sixth Circuit highlighted – "changed circumstances" included lower "case numbers, vaccination rates, and treatment options." (Pet. App. p. A21). See also *Brach v. Newsom*, 38 F.4th 6, 15 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 854, 215 L. Ed. 2d 87 (2023) (COVID-19 school related closures not capable of repetition and evading review because "no 'reasonable expectation' that California will once again close" schools because, among other factors, "the trajectory of the pandemic has been altered by the introduction of vaccines, including for children, medical evidence of the effect of vaccines, and expanded treatment options").

Petitioners seek to change their argument by asserting that any closure, not just one related to COVID-19 as they have been arguing all along, could lead to a cumulative closure of over ten days. But this relies on the argument above that a closure for all students – disabled and non-disabled alike – is a change in placement. That argument has been rejected. *Supra*, I.B. And the issue here is not one or two day

closures for all students in a school due to, for example, a water pipe break or a heating system failure, but the unprecedented multi-month closures that occurred in 2019-20 and in parts of 2020-21. It is the latter that the Sixth Circuit, and other Circuit decisions, focused on when determining that claims of a recurrence were not reasonable and thus the respective cases were moot.

Lastly, the time between the last closure and now is the most relevant and probative to the question of whether such closures could reasonably recur. Petitioners focus on a six-day temporary closure. That occurred in January 2022, months after the AAPS returned to in-person instruction in 2021, and now two years ago at the time of this Court's review. The nearly two and half years of no further long-term closures related to COVID-19, despite the surges of Delta and Omicron variants and other variants since, is dispositive that there is not a fair prospect that similar closures are foreseeable in the future. The Sixth Circuit correctly held the Petitioners' claims were moot, and the petition should be denied on this alternative basis.

CONCLUSION

The Sixth Circuit correctly applied this Court's well-settled precedent on the issue of prospective relief based on a claim of future harm. It also correctly determined that any "stay-put" decision was properly reserved for a student's IEP team under the IDEA, with administrative review and ultimately judicial review available. Lastly, the Sixth Circuit correctly held that there is not a fair prospect that another school closure event as occurred in March 2020 would recur

in the foreseeable future thereby mooting Petitioners' claims.

The petition should therefore be denied.

Respectfully submitted.

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