23-89

No.

IN THE

Supreme Court of the United States

JENNIFER REINOEHL—*Petitioner*

v.

GOVERNOR GRETCHEN WHITMER, ROBERT GORDON, and YOUNG MEN'S CHRISTIAN ASSOCIATION OF GREATER MICHIANA, INC.—*Respondents*

On Petition For Writ Of Certiorari
To The *UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a case involving COVID-19 emergency powers is moot, even though the same emergency powers can be reinstated at any time for COVID-19 or any other disease and due to the quick nature of emergencies can escape court review.
2. Whether individual capacity is the correct method of suing state government Respondent-Appellee-Defendants by non-residents under the Americans with Disabilities Act.
3. Whether the Complaint, which the Sixth Circuit Court of Appeals said stated a claim against Respondent Young Men's Christian Association of Greater Michiana, Inc., also states any claim against Respondents Governor Gretchen Whitmer and Robert Gordon.

PARTIES TO THE PROCEEDINGS

Petitioner, Jennifer Reinoehl, was the plaintiff in the district court and the appellant in the Sixth Circuit Court of Appeals. Respondents Governor Gretchen Whitmer, Robert Gordon, and the Young Men's Christian Association of Greater Michiana, Inc. were defendants in the district court and appellees in the Sixth Circuit.

RELATED CASES

The proceedings in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

- *Reinoehl v. Whitmer, et al.,* 1:21-cv-61 (W.D. Mich. Mar. 23, 2022), published March 23, 2022.
- *Reinoehl v. Whitmer, et al.,* No. 22-1343, U.S. Court of Appeals for the Sixth Circuit. Judgement entered April 17, 2023. Petition for panel rehearing and rehearing en banc denied on May 30, 2023.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Jennifer Reinoehl respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. (App.1A-9A). The opinion of the District Court is *Reinoehl v. Whitmer*, 1:21-cv-61 (W.D. Mich. Mar. 23, 2022). (App.10A-16A).

JURISDICTION

The date on which the Court of Appeals decided the case was April 17, 2023.(App.1A). A timely petition for rehearing was denied by the Court of Appeals on May 30, 2023.(App.28A) The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provisions are reprinted in Appendix E. (App.29A).

STATEMENT OF THE CASE

Despite the fact that COVID-19 had been much milder than the 2008-2009 H1N1 flu season and the 2017-2018 flu season, from April 2020 until June 2021, Governor Whitmer, Robert Gordon, and the YMCA created recommendations, policies, orders, and mandates requiring all persons to wear "non-medical" masks that are only emergency use authorized and not being regulated as medical devices by the FDA—without explaining the risks of mask use and without allowing persons the right to refuse their use in accordance with 21 U.S.C.§

360bbb. (First Amended Complaint, herein "FAC,' App.62A,83A,103A;29A-34A). These recommendations, policies, orders, and mandates were enacted without scientific data showing masks would prevent disease transmission and were enforced in ways that deliberately discriminated against the medically disabled in violation of the Americans with Disabilities Act (herein "ADA"). (FAC, App.51A:¶11).

There are, however, 100 years of published scientific and U.S. military data showing cloth masks are ineffective at controlling disease and potentially dangerous (e.g. they spread diseases).(App.49A-59A). In early 2020, the U.S. Surgeon General stated masks could not prevent disease spread, citing scientific studies on medical students.(App.64A). On April 8, 2020, the National Academies of Sciences, Engineering, and Medicine published a paper, concluding there was not good scientific evidence to support the claim cloth masks could prevent COVID-19 from spreading.(App.59A-60A)

The Food and Drug Administration ("FDA") decided to "Authorize" cloth and non-medical masks under Emergency Use Authorization ("EUA"), which has many restrictions including but not limited to 21U.S.C.§360bbb–3(e)(1)(A)(ii)(III).(App.62A). Although the FDA is required to help manufacturers work toward full approval of all items authorized under EUA, at no point did the FDA do this for cloth and "non-medical" masks—nor could they have ever fully authorized them because all the scientific data showed they were ineffective and dangerous. However, the FDA used the EUA to classify cloth and "non-medical" masks as if they were apparel (and not medical devices), with strict instructions that manufacturers could not make claims the masks would prevent disease transmission.(App.62A).

21U.S.C.§360bbb–3(e)(1)(A)(ii)(III), also specifically states that all "individuals to whom the product is administered [must be] informed of the option to accept or *refuse* administration of the product..."(Emphasis added).(App.29A-34A). Instead of following the Food, Drug, and Cosmetic Act and the EUA requirements, Governor Gretchen Whitmer and later Robert Gordon, Michigan government officials began mandating cloth and "non-medical" masks for the prevention of disease in direct violation of the EUA and 21U.S.C.§360bbb–3(e)(1)(A)(ii)(III). (App. 86A-87A). Neither Governor Gretchen Whitmer nor Robert Gordon, who was then the Director of the Michigan Department of Health and Human Services, have medical degrees or any formal training in medicine.(App.78A, 85A). However, they not only gave medical advice in violation of Michigan state law, but also pressured real doctors to ignore their medical training and to enforce their mandates. In their mandates, Governor Gretchen Whitmer and Robert Gordon nominally stated that businesses could allow exemptions for the medically disabled who could not wear masks. However, in all media publications, they portrayed those who could not wear masks because of disability as if they were uncaring, disease spreaders who were putting their loved ones at risk.(App.89A). They stated people with disabilities could wear masks and discouraged doctors from giving the disabled written waivers. At no point did they scientifically determine if the statements they made were accurate, nor did they scientifically determine if mask apparel with large holes that allow viruses to easily pass through them could prevent diseases transmission.(App.89A). They did not follow any requirements of 21U.S.C.§360bbb–3.(App. 29A-34A).

In response to these mandates, the Young Men's Christian Association of Greater Michiana, Inc. (herein "YMCA") decided to enact policies that discriminated against the medically disabled—preventing them from entering their public accommodations in violation of the Americans with Disabilities Act ("ADA").(App.65A-66A). Their policies were not made based on scientific evidence that mask apparel could prevent disease transmission.

All Respondent-Appellee-Defendants' recommendations, policies, orders, and mandates were enacted without scientific data showing masks would prevent disease transmission, were enacted in violation of the Food, Drug, and Cosmetics Act and the EUA law requirements, in violation of Constitutional Rights, and in violation of the ADA.(App.85A-110A).

Jennifer Reinoehl, petitioner, is a medically disabled person whose asthma and heart problems are exacerbated from wearing mask apparel.(App.92A). Her disabilities qualify her for protection under the ADA.(App.141A-142A). On January 4, 2021, Jennifer Reinoehl, was prohibited from entering Respondent-Appellee-Defendant YMCA's facility in Niles, Michigan because of her disability, which makes wearing face masks dangerous for her. Jennifer Reinoehl spent the next three months, in cold weather, sitting in her car waiting for her daughter to complete her swim lessons. Jennifer Reinoehl was greatly distressed by this incident because she enjoys watching her daughter learn to swim and because she usually changes her daughter in the female locker rooms. Her husband had to care for her daughter completely during this time.(App.65A).

Unfortunately, Reinoehl was not the only person to suffer discrimination. She has heard similar stories from many other disabled persons. One friend with traumatic brain injury, who cannot medically wear a mask and agreed to submit an affidavit for Reinoehl's case, documented being stopped at the door of a retail business and being physically grabbed by the security guard—this incident put her in great fear. She had to hide while shopping because customers threatened her and yelled at her. Her friend's disability is more visibly noticeable than Reinoehl's.

After being subjected to discrimination and harassment, Reinoehl filed this lawsuit January 19, 2021, with evidence supporting her claim pursuant to 29 U.S.C. 794(a) (The Rehabilitation Act of 1973), Titles II and III of the ADA, 45 U.S.C.§ 46.116, 21 U.S.C.§ 331, 21 U.S.C.§ 360bbb, 42 U.S.C.§1983, Michigan Public Health Code Act 368 of 1978§ 333.17011, Michigan's Persons with Disabilities Civil Rights Act 220§§ 37.1102 & 37.1302, Michigan State Constitution of 1963 Art. 1§§ 4,5,&17, Michigan Public Health Code Act 368§ 333.5207, the U.S. Constitution Article IV: §2, the 1st, 4th,5th, and 14th Amendments.(App.85A-110A).

Upon receipt of the Magistrate's Report and Recommendation to deny Reinoehl's Motion for Preliminary Injunction, filed January 21, 2021, Reinoehl submitted a First Amended Complaint, February 3, 2021, attempting to fix issues with the Complaint pointed out by the Magistrate Judge. (Dkt.#7,8,16). The YMCA filed its Motion to Dismiss March 17, 2021, and Governor Whitmer and Robert Gordon filed their join Motion to Dismiss March 19, 2021. (Dkt. #19,22,23). The Court denied Reinoehl's Motion for Preliminary Injunction March 26, 2021. (Dkt.#25).

On September 29, 2021, the YMCA filed a (second) "Brief in Support of Motion to Dismiss," claiming the case was moot, which Reinoehl opposed. (Dkt.#33,34). From March 36, 2021 until February 3, 2022, the Court did not respond to any Motions filed by either party in this case. (Dkt. generally) On February 3, 2022, the Magistrate filed an order denying the Motion to File Under Seal and filed his Report and Recommendation in support of the Motions to Dismiss, which Reinoehl opposed. (Dkt.#36, 37,38,39,40; App.17A-27A). The YMCA filed its Response to Reinoehl's opposition March 2, 2022, and Governor Whitmer and Robert Gordon filed theirs March 8, 2022. (Dkt.#42,43). On February 19, 2022, Reinoehl had mailed the Second Amended Complaint to the Court by U.S.P.S. Priority Mail, but it was returned for reasons unknown as undeliverable almost one month later. She delivered it in person to the court March 16, 2022 with her replies to the Responses. ("Motion for Leave to File Second Amended Complaint" Dkt.#47, p.2-3¶8; Dkt.#45,46).

On March 23, 2022, the District Court entered its final order granting all Motions to Dismiss. (Dkt.#48,49; App.10A-16A). On April 19, 2022, a timely Appeal and timely Notice of Appeal was filed. (Dkt.#51). The Court of Appeals upheld the District Court ruling April 17, 2023.(App.1A-9A). A timely petition for rehearing was denied by the Court of Appeals on May 30, 2023.(App.28A) Reinoehl timely petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case concerns important and recurring questions: (1) whether emergency authorization disputes arising because of COVID-19 are now moot, despite being capable of repetition and having short emergency periods that avoid Court review; (2)

whether Reinoehl's Complaint states a claim upon which relief can be granted; and (3) whether disabled citizens of the United States have any right to sue officials under the ADA when those officials are not the officials of that citizen's state but are acting under the color of law to discrimination against the disabled.

The Court of Appeals overturned the District Court's opinion that Reinoehl had not stated a claim against the YMCA, but upheld the dismissal on grounds of its own precedent that all cases involving emergency powers during COVID-19 are moot.(App.1A-9A). Although that ruling conflicts with this Court's precedent, the Seventh Circuit has also used mootness to dismiss COVID-19 emergency power rights violations. *See Troogstad v. The City of Chicago,* 576 F. Supp. 3d 578 (N.D. Ill. 2021); *Halgren v. City of Naperville,* 577 F. Supp. 3d 700 (N.D. Ill. 2021)*; Klaassen v. Trustees of Indiana University,* No. 21-2326 (7th Cir. 2022).

"The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' [Fed.R.Civ.P.]1." *Foman v. Davis,* 371 U.S.178(1962). In this case, Rule 12 is being used to dismiss cases simply because they go against precedent—without a single hearing or discovery. The way Rule 12 was construed here and in other cases cited in the Opinions of the District Court and Sixth Circuit in a manner that delays court processes, ties up appellate resources, and is expensive as litigants have only their Complaint and responses to Motions to Dismiss to argue their case in full. If the purpose of Fed.R.Civ.P.8 is to ensure defendants have notice of a case, that is all a Complaint should be required to do.

Finally, the Sixth Circuit's decision bars disabled citizens of other states from seeking any Court relief when the government agents and agencies in other states set out to unlawfully discriminate against them. In this case, the laws of Michigan specifically prohibit Governor Gretchen Whitmer and Robert Gordon from doing what they did in addition to Federal laws. The District Court and Sixth Circuit state that Reinoehl cannot seek relief against them in their individual capacity when they were acting outside of the law. This Court's precedent is that individual capacity is the only method for citizens of other states to halt unlawful practices.

A. Certiorari Is Warranted To Consider If Rights Violations Under Emergency Declarations Are Moot Once The Emergency Is Over Because It Goes Against Current Precedent And Is Of National Significance.

At the beginning of the COVID-19 emergency, Courts and court cases slowed to a crawl. In this instant case, the District Court was silent on various motions filed for over a year (and in the end never ruled on some of them). Had this case been able to be quickly decided, the new precedent on mootness set by the Sixth Circuit would not have been in place. In this case, Congress had to bring an end to the COVID-19 emergency because the National Institute of Health would not. Even after the emergency was officially over, the current presidential administration again tried to enact mask mandates at one of its gatherings.

Since COVID-19 is killing more people today than when this case was originally filed, the government could resurrect the emergency at any time and reinstate mask mandates. Even though cloth and "non-medical" mask apparel should no longer be able

to be sold at all in the United States since they were only authorized for sale under the 21 U.S.C.§ 360bbb, which is no longer valid since there is no longer an official emergency, these masks are still readily available on store shelves without FDA regulation because they are escaping review of the Court.

In addition, the ability of government and public agencies to mandate masks can be reused for any disease in the future, including seasonal flu. Again, government agencies and public institutions could enact these for short periods of time and then repeal them them as soon as citizens took them to court for rights violations. Without a Court decision, disabled people will continue to live in fear of the next epidemic and the rights violations that will be directed at them during it.

This Court has repeatedly held that when a party voluntarily ceases an unlawful practice that does not moot its opponent's challenge to that practice. (See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Knox v. Service Employees Union, Local 1000*, 567 U.S. 298, 307 (2012); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–89 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 662 (1993); *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).) For example, this Court has stated, "a defendant cannot automatically moot a case by simply ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.* (1993). And, "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." *City of Mesquite v. Aladdin's Castle, Inc.* (1982).

Further, this Court ruled in *Roe v. Wade* (1973) that disputes which are "capable of repetition, yet evading review" also cannot be dismissed for mootness. See *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). ("[W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us.")

Like a pregnant woman, who is capable of becoming pregnant at any time and whose pregnancy, long as it seems, is shorter than the length of time it takes for Courts to determine a case, diseases, such as COVID-19 or flu or ebola, arise and become health concerns at any time and frequently have short durations. Even if COVID-19 itself had been conquered through medicine—and it has not—that would not stop the governments or businesses such as the YMCA from enacting similar measures in the future during flu season or the next time ebola made its way across the ocean to the United States.

Here, Petitioner-Appellant-Plaintiff's injuries have not been sufficiently addressed. Damages have been inflicted upon Petitioner-Appellant-Plaintiff who filed the Complaint not because she was barred from entering the YMCA because of her disability once but because repeated, discrimination occurred.

Petitioner-Appellant-Plaintiff has suffered injuries from the Respondent-Appellee-Defendant's policies and continues to seek relief—especially declaratory relief that all Respondent-Appellee-Defendants' actions (by preventing the breathing disabled from entering its facilities) were unlawful under the circumstances. This relief is needed to prevent future wrongs that could be recommended or enacted in the name of "public health" without any researched relation to public health.

Like pregnancy, new diseases come more than once to the same country and its citizens—consider SARS, zika, H1N1 influenza, and ebola, for example. New viruses and new viral strains are discovered every year, some more deadly and more transmissible than others (i.e., masks would have no effect on a Zika outbreak, which is a mosquito-borne disease; most of the "prevention" or "flattening the curve" methods that were enacted from the first case of COVID-19 in Michigan, including mask mandates, did not stop or slow its transmission nor have these methods been effective for previous disease outbreaks, such as SARS).

Without a final Court decision, claims for injunctive relief would only be moot until the next time the Respondent-Appellee-Defendants felt like enacting a policy that prevents those with breathing disabilities from entering places of public accommodation and government buildings. This would require another Court case to be filed, and valuable Court resources to be wasted. See *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911) (controversies that are "capable of repetition, yet evading review" are not moot) See also *Roe v. Wade.*

As this Court has ruled numerous times, voluntarily stopping an action does not moot a case.

If it did, any Respondent-Appellee-Defendants could also voluntarily "return to his old ways." *United States v. W. T. Grant Co.*, 345 U. S. 629, 345 U. S. 632 (1953). Respondent-Appellee-Defendants have shown they will repeatedly change their mask policies, wavering between more restrictive and less restrictive without scientific basis for their decisions. Under current precedent, a lawsuit can become moot when "(1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions." (*County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). A case becomes moot only "when the challenged conduct ceases such that ' " 'there is no reasonable expectation that the wrong will be repeated,' " ' then it becomes impossible for the court to grant ' " ' any effectual relief whatever' to the prevailing party," '." *Erie v. Pap's A. M., 529 U.S. 277* (2000) (first quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) and then quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (in turn quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). See also, *Chafin v. Chafin*, 568 U.S. 165 (2013).

B. Certiorari Is Warranted To Consider If A Complaint States A Claim Under Fed.R.Civ.P.12 Because It Is Precedential And Of National Significance.

The Sixth Circuit upheld that Reinoehl's Complaint failed to state a claim against Governor Gretchen Whitmer and Robert Gordon. However, both the Sixth Circuit and District Court failed to

acknowledge in their opinions the cited Michigan laws, including Michigan's Persons with Disabilities Civil Rights Act 220§ 37.1102, which specifically establishes a right for the disabled to be protected from discrimination:

> "The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right."

Reinoehl has maintained throughout her Complaint and in her appeal that Governor Gretchen Whitmer and Robert Gordon violated both Federal and State Laws and were acting under the color of law. Neither the Sixth Circuit nor District Court address, for example, that both Governor Gretchen Whitmer and Robert Gordon were violating Michigan Public Health Code Act 368 of 1978§ 333.17011, by practicing, teaching, and researching medicine without a license.

The Sixth Circuit dismisses Reinoehl's substantiative due process rights on grounds "Reinoehl cites no authority that she has a fundamental right to enter a privately owned recreational facility." The YMCA, like most recreational facilities, has members, like Reinoehl, which means Reinoehl has a contractual agreement that allows her to enter any YMCA at any time during regular business hours. Contract Law is a fundamental right specifically named in and protected by the U.S. Constitution's Contract Clause. "No State shall...pass any...Law impairing the Obligation of Contracts."

Further, in dismissing, for example, Reinoehl's substantiative due process claims and upholding the Magistrates statement that,

> "State action involving public health emergencies will be struck down on substantive due process grounds only "if it has no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *TJM 64, Inc. v. Harris*, 475 F.Supp.3d 828, 834-35 (W.D. Tenn. 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))"

neither the District Court or the Sixth Circuit Court of Appeals explained how a "non-medical" mask, which the FDA specifically stated could not make claims about it being able to prevent disease transmission and which was authorized under a federal law that specifically gives citizens the right to refuse anything so authorized, had any relation, real, substantial, or otherwise, to preventing disease transmission and how it could be mandated in violation of the law under which it was authorized by prohibiting citizens the right to deny it. While acknowledging that Reinoehl spent a large portion of her Complaint citing scientific data, including data from the Federal government and quotes from the FDA itself that cloth and "non-medical" masks could not claim to prevent disease transmission, the Sixth Circuit glanced over these documented facts and accepted that since cloth masks were used 100 years ago to prevent disease transmission, and not used in the United States since that time because they failed to do that, it was "rational" for modern, government officials who had no medical training to resurrect

that ancient practice. They quote *FCC v. Beach Commc'ns, Inc.*, 508US307, 314-315 (1993) stating "a regulation 'may be based on rational speculation unsupported by evidence or empirical data." In this case, however, there was a plethora of evidence and empirical data that showed cloth masks were ineffective at preventing disease transmission including experiments conducted by the United States military during other pandemics. The key word in the quote used by the Sixth Circuit is "rational," which is defined as "based with reason or logic." Consider these further definitions:

"Rational thinking is defined as thinking that is consistent with known facts."[1]

"Irrational thinking defies reason, logic, and empirical evidence to rely on emotions, personal biases, and beliefs. It is the opposite of rational thinking."[2]

"Rational means based on reason i.e. proof through evidence. Irrational means belief based on emotion or superstition."[3]

According to both the District Court and the Sixth Circuit, it is perfectly rational for people who are not trained in medicine to make medical decisions for an entire state in violation of numerous laws as long as those same medical decisions were made at some time in distant history—regardless of whether those same decisions failed in history or not. Had Governor Gretchen Whitmer and Robert Gordon resurrected blood-letting as treatment for COVID-19, simply because Benjamin Rush, a trained doctor and

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[1] https://www.smartrecovery.org/smart-recovery-toolbox/rational-versus-irrational/

[2] https://www.wallstreetmojo.com/irrational-thinking/

[3] https://sites.google.com/site/thepoliticsteacherorg/rational-v-irrational

founding father, approved of it, under the District Court and Sixth Circuit's same line of reasoning blood-letting would have been allowed.

A person who is rational would not allow someone who is not a doctor to head the state's highest health position in violation of state law. A person who is rational would only make medical decisions based on evidence-especially when those decisions affect millions of people. A person who is rational would look at Emergency Use Authorization law and understand what restrictions were placed upon devices so authorized before mandating them. A person who is rational would—at the least—see that cloth and "non-medical" masks cannot, according to the FDA by its own publication authorizing them, make claims they prevent disease transmission. A person who is rational would understand that holes in cloth masks are millions of times bigger than a virus. And if that person does not understand how small viruses are and has no knowledge about the differences between a cloth mask, a surgical mask, and an N-95, than it is irrational for him or her to make any medical decisions concerning masks—especially decisions that affect not only an entire state, but also visitors to that state. Rational thought is based on facts—if a person is not aware of the facts, that person cannot make a rational decision.

Finally, in determining whether or not Governor Gretchen Whitmer and Robert Gordon acted rationally, the Respondent-Appellee-Defendants never explained why they went against the specific requirements of 21 U.S.C.§ 360bbb including but not limited to the provision that allowed citizens to refuse things so authorized.

It has taken more than two years for this case, which has not advanced beyond the Motion to Dismiss stage, to get to a position where it can be

reviewed by this Court. Precedents that are set by cases, such as this one and the ones cited in the opinions of the District Court and Sixth Circuit, will be used, as they are now being used, to prevent persons in the future from seeking Court relief from oppressive government agents and agencies that are not qualified to practice medicine and who are mandating things in violation of State and Federal laws. Instead of allowing plaintiffs to seek discovery and better prove their positions, cases such as this one are being decided solely based on precedent. See for example *Mongielo v. Hochul*, No. 22-CV-116-LJV (W.D.N.Y. Mar. 1, 2023). (Motion to Dismiss upheld primarily on grounds of other court decisions related to COVID-19.)

Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022) was allowed to proceed even though it challenged the precedent set in *Roe v. Wade*, 410 U.S. 113 (1973). However, in the opinion of the Sixth Circuit and the District Court in this instant case and other District Courts and Courts of Appeals, cases challenging court precedent should be dismissed as soon as legally possible.

In this case, the District Court went beyond relying on precedent, though. There is no law stating that the First Amendment cannot have a literal interpretation nor is there precedent on the matter. In this case the District Court stated that the First Amendment cannot be interpreted literally because doing so would somehow limit it, which was the sole reason one of Reinoehl's claims was dismissed.

Other claims were dismissed on new precedent. For example, there is no law stating that refusing to wear a mask in protest is not a protected form of free speech. The District Court digresses on this claim stating that the message must be clear, but what clear message comes from burning a flag? There can

be many reasons a flag is being burned, including that it is old or that it has touched the ground. Still, burning a flag is protected free speech while refusing to wear a mask is not. The District Court opined and Sixth Circuit upheld it is not protected free speech to the extent that it is not grounds for a Complaint.

This Court has explained Fed.R.Civ.P.8 is to be interpreted liberally for pro se litigants. *See* Fed.R.Civ.P.8(e); *Conley v. Gibson*::355 U.S. 41 (1957); *Haines v. Kerner*::404 U.S. 519 (1972); *Erickson v. Pardus*::551 U.S. 89 (2007) .(App.47A-48A). However, even a case with represented parties could suffer having to go through the additional cost and time of appealing a Motion to Dismiss that is accepted not on basis of law but rather on basis of established precedent or a Magistrate judge's personal beliefs about the First Amendment. This instant case gives this Court a chance to better define its rulings on Motions to Dismiss.

C. Certiorari Is Warranted To Consider If Officials Acting Under The Color Of Law Can Be Sued In Their Individual Capacity For Violating Title II of the ADA.

The Sixth Circuit upheld the District Court's ruling that neither Governor Gretchen Whitmer nor Robert Gordon could be sued in their individual capacities. Reinoehl is the citizen of another state and can **only** sue the state representatives in their individual capacities. *Ex parte Young*, 209 U.S. 123 (1908). Any lawsuit against Defendants in their official capacities would be prohibited by the 11th Amendment and sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159 at 167 (1985). Further, since both Governor Gretchen Whitmer nor Robert Gordon acted in violation of State and Federal Law and, therefore, were acting under the color of law, individual capacity is the way to sue them.

In the cited *Everson v. Leis*, 556 F.3d 484 at 495 (6th Cir. 2009) plaintiff and defendants were from the same state, and Everson did not allege any clearly established constitutional right was violated. (Dkt.#48; PageID1189). See also *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008). Unlike *Everson v. Leis*, Reinoehl has alleged violations of several clearly established constitutional rights through the indifferent and discriminatory actions of Governor Whitmer and Robert Gordon. Further, even in ADA cases, damages are recoverable when Constitutional rights (in addition to the ADA) have been violated. *United States v. Georgia*, 126 S. Ct. 877 (2006). Reinoehl has alleged that her constitutional rights were violated in addition to the rights violated under the ADA.(Ap.85A-110A).

CONCLUSION

Reinoehl knows this Court is extremely busy. Reinoehl begs this Court to please issue a Writ of Certiorari. In addition to the questions in this Petition, which all have national importance and which once they are answered for this case will set precedent for other cases, Reinoehl's Complaint, itself, has national importance because although she was discriminated against in two states across two U.S. Districts, millions of others were also harassed and discriminated against because of their medical disabilities and those citizens sit in fear that during the next flu season or the next round of COVID-19, they will have to live through that hatred, harassment, and discrimination all over again. Many of them may have struggled to find a lawyer to represent them, as Reinoehl did, and none of the persons whom Reinoehl personally knows who suffered this discrimination have the ability, knowledge, or stamina to file a lawsuit on their own

behalf. Others, who have tried to file *pro se* complaints are being kicked out for failure to state a claim because "Defendants are not required by the ADA to alter their mask policy for the [disabled]." *Hernandez v. Hunger*, No.3:21-CV-00055-DCG (W.D.Tex. Apr.22, 2021), see also *Cangelosi v. Sizzling Caesars LLC*, No.CV20-2301, 2021WL291263 at*3 (E.D.La. Jan.28, 2021), *Pro se* litigants spend a lot of time and sometimes also a good portion of their incomes on filing cases and appeals.

Reinoehl, like many other citizens who end up filing *pro se*, just wants her case to be heard. For the foregoing reasons, this Writ of Certiorari should be granted.

Respectfully submitted,

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