

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION**

**G.S., by and through his parents and next friends,
BRITTANY AND RYAN SCHWAIGERT; S.T.,
by and through her mother and next friend,
EMILY TREMEL; J.M., by and through her
mother and next friend, KIMBERLY MORRISE;
and on behalf of those similarly situated,**

Case: 2:21-cv-02552-SHL-atc

Plaintiffs,

v.

**GOVERNOR BILL LEE, in his official capacity
as GOVERNOR OF TENNESSEE, SHELBY
COUNTY, TENNESSEE,**

Defendants.

**DEFENDANT SHELBY COUNTY, TENNESSEE’S ANSWER TO PLAINTIFFS’ FIRST
AMENDED COMPLAINT**

COMES NOW the Defendant Shelby County, Tennessee, (hereinafter “Shelby County”), and submits the following Answer to Plaintiffs’ Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act as follows:

FIRST DEFENSE

Plaintiffs Complaint fails to state a claim against Shelby County, Tennessee.

SECOND DEFENSE

No action or inaction by Shelby County is the cause of the exclusion of Plaintiffs from participation in public education, in violation of the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act of 1973 (“Section 504”). In fact, Shelby County issued a

health order specifically designed to protect its residents' ability to freely and equally participate in public education.

THIRD DEFENSE

Shelby County is not legally responsible for Plaintiffs' harm because the actions taken by Governor Bill Lee constitute a superseding cause of the harm sustained by Plaintiffs. Any and all damages asserted herein are attributable to the actions taken by Governor Bill Lee.

FOURTH DEFENSE

As a political subdivision, Shelby County lacks the legal authority to circumvent an Executive Order issued by the Governor of the State of Tennessee, absent judicial intervention, and is thus itself harmed by the actions in this suit.

FIFTH DEFENSE

Shelby County reserves the right to raise any additional defenses, affirmative or otherwise, as they may become known to it during the course of discovery in this case.

SIXTH DEFENSE

Shelby County answers the individually numbered paragraphs of the Amended Complaint as follows:

I. INTRODUCTION

1. Paragraph 1 states no allegations against this Defendant and, therefore, no response is required. To the extent a response is required, Shelby County states that Executive Order No. 84 speaks for itself, and admits that the currently enacted Shelby County mask mandate through Amended Health Order No. 25 was intended to protect the health and safety of Shelby County residents in line with Plaintiffs' allegations.

2. Admitted, upon information and belief, that the State of Tennessee has seen a dramatic rise in the increase of COVID-19 cases, mostly driven by the Delta variant. The remaining allegations of Paragraph 2 are admitted upon information and belief.

3. Admitted.

4. Admitted, upon information and belief.

5. Paragraph 5 contains no allegations specific to this Defendant and, therefore, no response is required.

6. Paragraph 6 contains no allegations specific to this Defendant and, therefore, no response is required.

7. Admitted.

8. Admitted.

9. Admitted. Throughout the pandemic, the Shelby County Health Department has utilized public health metrics to determine necessary mitigation responses.

10. Admitted that the CDC updated its “Guidance for COVID-19 Prevention in K-12 schools” to recommend universal indoor masking in response to the Delta variant. Shelby County also admits that, to its knowledge, the American Academy of Pediatrics and Le Bonheur Children’s Hospital have the same recommendations.

11. Admitted, on information and belief.

12. Admitted.

13. Shelby County agrees with the allegations contained in Paragraph No. 13 as they pertain to Defendant Governor Bill Lee and purports that the allegations in Paragraph 13 support Shelby County’s affirmative defenses.

14. Shelby County denies in part the allegations contained in Paragraph 14. Shelby County Health Department's Amended Health Order No. 24 remained in place until August 31, 2021 at 12:00 p.m., when Amended Health Order No. 25 became effective. Shelby County denies that the Shelby County Health Department "refused" to enforce the mask requirement in Amended Health Order No. 24—as a political subdivision of the State of Tennessee, Shelby County was without the legal authority to override Executive Order No. 84 absent court intervention. Admitted that Shelby County issued Amended Health Order No. 25 on August 27, 2021, which was effective August 31, 2021 at 12:00 p.m. Shelby County states that Amended Health Order No. 25 speaks for itself. Shelby County admits on information and belief, that upon the issuance of Executive Order No. 84 by Governor Lee, in the weeks that followed, hundreds of parents in the Germantown Municipal School District and Collierville Municipal School Districts utilized the ability to "opt-out" of Shelby County's mask mandate.

15. Paragraph 15 contains no allegations specific to this Defendant and, therefore, no response is required. To the extent a response is required, Shelby County has previously indicated that it agrees with the proposed class in this matter as against Defendant Governor Bill Lee; however, Shelby County denies that it caused the harm sustained by Plaintiffs in this action, and also denies that it shares in any liability arising from said harm.

16. Shelby County admits that Amended Health Orders No. 24 and 25 recommend (and require) universal indoor masking, subject to certain exemptions outlined by the CDC and as required by Executive Order No. 84. Shelby County is currently not permitting exemptions from its mask mandate based on Executive Order No. 84, as required by this Court's Preliminary Injunction. The remaining allegations contained in Paragraph 16 are not particular to this Defendant, and, therefore, no response is required.

17. Paragraph 17 contains no allegations specific to this Defendant and, therefore, no response is required.

II. JURISDICTION AND VENUE

18. Shelby County admits that jurisdiction is proper in this Court.

19. Shelby County admits that venue is proper in this Court.

III. PARTIES

20. Admitted, on information and belief.

21. Admitted, on information and belief.

22. Admitted, on information and belief.

23. Admitted.

24. Admitted.

IV. FACTS

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Shelby County lacks the requisite knowledge to admit or deny all of the allegations contained in Paragraph 29 but admits, on information and belief, the accuracy of the assertions contained therein.

30. Shelby County lacks the requisite knowledge to admit or deny all of the allegations contained in Paragraph 30 but admits, on information and belief, the accuracy of the assertions contained therein.

31. Admitted.

32. Admitted, on information and belief.

33. Admitted, on information and belief.

34. Admitted, on information and belief.

35. Admitted, on information and belief.

36. Admitted, on information and belief.

37. Admitted, on information and belief.

38. Admitted, on information and belief.

39. Admitted, on information and belief.

40. Shelby County agrees with the allegations contained in Paragraph No. 40 as to Defendant Governor Bill Lee. Shelby County denies that it caused the harm sustained by Plaintiffs in this action, and also denies that it shares in any liability arising from said harm.

41. Admitted, on information and belief.

42. Admitted, on information and belief.

43. Admitted, on information and belief.

44. Admitted, on information and belief.

45. Admitted, on information and belief.

V. CLASS ALLEGATIONS

46. Shelby County does not dispute the proposed class by Plaintiffs. To the extent Shelby County is required to admit or deny the allegations contained in Paragraph 46, the allegations are admitted. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

47. Shelby County does not dispute the proposed class by Plaintiffs. To the extent Shelby County is required to admit or deny the allegations contained in Paragraph 47, the

allegations are admitted. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

48. Shelby County does not dispute the proposed class by Plaintiffs. To the extent Shelby County is required to admit or deny the allegations contained in Paragraph 48, the allegations are admitted. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

49. Shelby County does not dispute the proposed class by Plaintiffs. To the extent Shelby County is required to admit or deny the allegations contained in Paragraph 49, the allegations are admitted. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

50. Shelby County does not dispute the proposed class by Plaintiffs. To the extent Shelby County is required to admit or deny the allegations contained in Paragraph 50, the allegations are admitted. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

51. Shelby County does not dispute the proposed class by Plaintiffs and joins in the allegation against Defendant Governor Bill Lee, which Shelby County states is the sole cause of the harm alleged by Plaintiffs and the proposed class in this action. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act.

52. Shelby County specifically denies that it took any action or inaction that violates Plaintiffs' rights under the ADA and/or the Rehabilitation Act. Subject to that denial, Shelby County does not dispute the remaining allegations in Paragraph 52, and, therefore, admits the same.

53. Shelby County does not dispute the adequacy of the class or the adequacy of class counsel.

54. Shelby County does not dispute the proposed class by Plaintiff but denies that Shelby County took any action or inaction that violates the ADA or the Rehabilitation Act.

55. Shelby County does not dispute the proposed class by Plaintiff but denies that Shelby County took any action or inaction that violates the ADA or the Rehabilitation Act.

VI. CLASS OF ACTION

First Cause of Action: Discrimination on the Basis of disability in Violation of the ADA

56. Shelby County incorporates and re-alleges all responses to the allegations contained above, as if set forth in full herein.

57. Shelby County states that the ADA speaks for itself, and expressly denies that it has violated any provision of the ADA.

58. Shelby County does not dispute the characterization of the ADA contained in Paragraph No. 58 but denies that it has violated any provision of the ADA.

59. Shelby County does not dispute the characterization of the ADA contained in Paragraph No. 58 but denies that it has violated any provision of the ADA.

60. Shelby County states that the ADA speaks for itself but admits that the quoted paragraph is contained within the cited section. Shelby County expressly denies that it has violated any provision of the ADA.

61. Shelby County agrees with the allegations contained in the main Paragraph 61. Shelby County would state that the main paragraph supports Shelby County's affirmative defense that Executive Order No. 84 is the sole cause of the harm alleged by Plaintiffs, and that any liability arising from said harm rests with Governor Lee. Plaintiffs make an allegation against Defendant

Governor Lee, then in subparts (a) through (d) include Shelby County in their allegations of harm. Shelby County denies the allegations against it contained in subparts (a) through (d), which are legal conclusions.

62. Shelby County states that the ADA speaks for itself but admits the allegations contained in Paragraph 62. Shelby County expressly denies that it has violated any provision of the ADA.

63. Shelby County denies that it has taken any action or inaction that circumvents the ADA and, at all times, has acted in good faith. Shelby County states that any violation of the ADA was the result solely of the actions taken by Defendant Governor Bill Lee through the issuance of Executive Order No. 84.

64. Paragraph No. 64 contains a legal conclusion to which no response is required. To the extent a response is required, Shelby County does not dispute the general characterization of the ADA contained in Paragraph No. 64, subject to guiding case law interpreting the scope of the ADA. Shelby County expressly denies that it has violated any provision of the ADA.

**Second Cause of Action:
Violation of Section 504 of The Rehabilitation Act of 1973
Against All Defendants**

65. Shelby County incorporates and re-alleges all responses to the allegations contained above, as if set forth in full herein.

66. Admitted, on information and belief.

67. Admitted, on information and belief.

68. Admitted.

69. Shelby County denies that it has violated Section 504 and/or caused Plaintiffs' school districts to violate Section 504. Shelby County would state that the harm alleged in subparts

(a) through (c) are solely caused by Defendant Governor Bill Lee's issuance of Executive Order No. 84 and not by any action or inaction of Shelby County.

70. Shelby County denies that it has taken any action or inaction that circumvented Section 504 and states that, at all times, it has acted in good faith. Shelby County states that any violation of Section 504 was the result solely of the actions taken by Defendant Governor Bill Lee through the issuance of Executive Order No. 84.

71. Paragraph No. 71 contains a legal conclusion to which no response is required. To the extent a response is required, Shelby County does not dispute the general characterization of Section 504 contained in Paragraph No. 71, subject to guiding case law interpreting the scope of the Rehabilitation Act.

VII. REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

72. Shelby County incorporates and re-alleges all responses to the allegations contained above, as if set forth in full herein.

73. This Court has already issued a Temporary Restraining Order and Shelby County has previously indicated that it did not oppose the requested relief. Therefore, no response is required to Paragraph No. 73. Regardless, Shelby County specifically denies that it took any action or inaction that violates the ADA and/or the Rehabilitation Act.

74. This Court has already issued a Temporary Restraining Order and Shelby County has previously indicated that it did not oppose the requested relief. Therefore, no response is required to Paragraph No. 74. Regardless, Shelby County specifically denies that it took any action or inaction that violates the ADA and/or the Rehabilitation Act.

VIII. PRAYER FOR RELIEF

Shelby County reasserts its answers to the allegations contained in paragraphs 1 through 71 of the Complaint as if set forth verbatim herein.

Shelby County hereby consents to the relief requested against Defendant Governor Bill Lee in his enforcement of Executive Order No. 84. Shelby County also consents to not provide an exception in its governing health orders for Executive Order No. 84. Amended Health Order No. 25 currently provides for the relief requested, and, therefore, Shelby County would state that the requested relief may presently be moot as to this Defendant. As to the remaining relief requested, Shelby County would state that the Shelby County Health Department issues its Amended Health Orders in line with the ever-changing nature of the emergent public health needs of the COVID-19 pandemic, as it has done since March 2020. Consequently, while Shelby County consented to the temporary and preliminary injunctive relief requested in this case, Shelby County cannot consent to permanent injunctive relief to enforce a universal mask mandate. As it has for the past 18 months, Shelby County will follow the public health metrics and guiding scientific evidence to determine the necessity for mask mandates. Shelby County thus denies that Plaintiffs are entitled to any permanent relief as against Shelby County or that Shelby County is responsible for Plaintiffs' reasonable attorneys' fees, costs, and expenses. All allegations not heretofore admitted or denied are hereby expressly denied.

WHEREFORE, PREMISES CONSIDERED, Shelby County, Tennessee prays that the Complaint against it be dismissed.

Respectfully submitted,

BURCH, PORTER AND JOHNSON, PLLC

/s/ Tannera George Gibson

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Counsel for Defendant Shelby County, Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will operate to provide notice of this filing to all counsel of record in this case.

/s/ Tannera George Gibson
