No. 21-51083

In the United States Court of Appeals for the Fifth Circuit

E.T., *by and through her parents and next friends*; J.R., *by and through her parents and next friends*; S.P., *by and through her parents and next friends*; M.P., *by and through her parents and next friends*; E.S., *by and through her parents and next friends*; H.M., *by and through her parents and next friends*; A.M., *by and through her parents and next friends*,
Plaintiffs-Appellees,

v.

KENNETH PAXTON, *in his official capacity as* ATTORNEY GENERAL OF TEXAS,
Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Texas, Austin, Division, No. 1:21-CV-717

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL AND FOR A TEMPORARY ADMINISTRATIVE STAY

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STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. As Defendant-Appellant is a governmental party, he and his counsel have been excluded. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs: E.T., by and through her parents and next friends
J.R., by and through her parents and next friends
S.P., by and through her parents and next friends
M.P., by and through her parents and next friends
E.S., by and through her parents and next friends
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INTRODUCTION AND LACK OF EMERGENCY

Plaintiffs are a group of children with disabilities who sued Texas Attorney General Ken Paxton and others to enjoin them from enforcing Executive Order GA-38 against public schools. GA-38 prevents schools from adopting any kind of mask requirement—even one limited to a classroom or wing of a school building—as part of a reasonable accommodation for disabled students under the Americans with Disabilities Act and the Rehabilitation Act. It also prevents locally elected school officials from exercising their discretion to respond to the needs of their communities under the American Rescue Plan ("ARP") Act by adopting mask requirements as part of a safe plan for returning to schools.

After a full trial on the merits, the district court found that GA-38 was unlawful for five independent reasons and enjoined the Attorney General from enforcing it. To show a likelihood of success in reversing that injunction, the Attorney General must show he is likely to succeed in upsetting all five of those conclusions. Moreover, he must also meet the other requirements for a stay, including by showing that he will

suffer irreparable injury and that the public interest supports a stay. He has not carried his burden on any of these points.

To begin with, the Attorney General does not contend that any of the district court's factual findings are clearly erroneous. Indeed, many of these findings are based on evidence that the Attorney General never challenged at trial. The district court found that Plaintiffs proved—as a factual matter—that the Attorney General's enforcement of GA-38 deprives them of meaningful access to public school. Among other things, Plaintiffs presented uncontroverted evidence from their treating physicians and testimony from medical experts explaining that, because of their particular vulnerabilities, they must avoid being in close proximity to students and staff who are unmasked. For Plaintiffs, avoiding a maskless classroom is *not* a "self-inflicted" choice, as the Attorney General argues; the undisputed evidence showed that it is necessary to preserve Plaintiffs' health and that remote learning is not an adequate substitute for in-person schooling for Plaintiffs. Plaintiffs also presented uncontroverted evidence that the injunction in this case would redress their injuries—because their school districts either *lack* mask requirements but would impose them if the Attorney General's

enforcement of GA-38 were enjoined, or *have* mask requirements but are in imminent jeopardy of losing them because of lawsuits or threats by the Attorney General.

The Attorney General presented no contrary evidence on any of these points. Indeed, he *conceded* that GA-38 eliminated a tool that would otherwise be available to school officials in terms of keeping students safe and making reasonable accommodations for children with disabilities. Thus, the district court concluded that GA-38 violates two federal statues and is preempted by three. The Attorney General has not shown that these findings are clearly erroneous, nor has he identified any legal flaw in the district court's conclusions.

Throughout the trial—and despite having filed 15 separate lawsuits to require compliance with GA-38—the Attorney General insisted that he could not be sued at all because he does not "enforce" GA-38. The district court squarely rejected that argument, and the Attorney General has not asserted it in his stay motion— for good reason. As the district court noted, "[t]hroughout this case Paxton has consistently and forcefully argued that he does not enforce GA-38 and Plaintiffs' asserted injuries will not be addressed by enjoining his

actions. If Paxton is correct, in spite of the overwhelming evidence to the contrary that Paxton is enforcing GA-38, then Paxton has not shown that he or Texas is harmed by this court's injunction because its entry has no effect on either him or GA-38." Dkt. 90 at 4.

Although he no longer asserts that failed argument, the Attorney General persists in mischaracterizing Plaintiffs' claims. As in the district court, he characterizes Plaintiffs' injury as "the increased risk of contracting the disease absent a mask mandate." Mot. at 6. Not so. Plaintiffs' injury was and is the deprivation of meaningful access to in-person school—a deprivation that is imminent, concrete, and not at all speculative. The district court indeed explained that the evidence at trial showed that either currently or imminently, "Plaintiffs are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers." Dkt. 82 at 28. As a result, Plaintiffs "are being denied the benefits of in-person learning on an equal basis as their peers without disabilities." *Id*. This is a concrete, substantial harm, and it weighs heavily against issuing a stay.

On the other side of the scale is . . . *nothing*. The Attorney General does not identify any irreparable injury for himself, nor does he explain how allowing the enforcement of an Executive Order that the district court has found unlawful could serve the public interest. He does not contend—and has never showed—that Texas children will be harmed if their local officials are allowed to decide for themselves whether to require masks in a school or classroom, either as a reasonable accommodation for students with disabilities, or as part of their plan for the safe return of students to in-person school. And before this Court, his only argument for irreparable injury is in a single paragraph, arguing that it is *always* harmful to enjoin government officials from carrying out validly enacted laws. Mot. at 14–15.

This Court has held the opposite. In ordering a stay of enforcement of the federal government's vaccine mandate, this Court rejected the government's argument for irreparable injury, holding that "a stay will do [the government] no harm whatsoever. Any interest [the government] may claim in enforcing an unlawful (and likely unconstitutional) [order] is illegitimate." *BST Holdings, L.L.C., v. Occupational Safety & Health Admin.*, ___ F. 4th ___, 2021 WL

5279381, at *8 (5th Cir. Nov. 12, 2021). Here too, the Attorney General has no legitimate interest in enforcing an Executive Order that the district court has found to violate federal law in multiple respects. As a result, allowing the injunction to stand—and delaying any enforcement of GA-38 pending appeal—will do him "no harm whatsoever." This Court should deny the stay.

STANDARD OF REVIEW

"A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (first quoting *Va. Petrol Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); and then quoting *Va. R.R. Co. v. United States*, 272 U.S. 658, 672 (1926)); *accord Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015). A stay is an "extraordinary remedy," *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968), and "[t]he moving party bears a 'heavy burden' to demonstrate that a stay is appropriate," *David v. Signal Int'l, LLC*, 37 F. Supp. 3d 836, 840 (E.D. La. 2014) (quoting *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6

(5th Cir. 1985)). Courts should stay injunctions only "in exceptional cases," and only where there "is great likelihood, approaching near certainty, that [the moving party] will prevail when [the] case finally comes to be heard on the merits." *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963) (denying motion for stay).

In evaluating a stay, this Court weighs the following factors: "(1) whether the stay applicant has made a strong showing that he [or she] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (citation and internal quotation marks omitted). "The party who seeks a stay bears the burden of establishing these prerequisites." *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982); *accord* Fed. R. App. P. 8(a)(2).

ARGUMENT

The Attorney General's motion should be denied. He is not likely to succeed on the merits because he merely rehashes arguments about standing, disability discrimination, preemption, and the scope of the

injunction that were correctly rejected in the district court's thorough opinion. The injunction does no harm to the Attorney General because following federal law is not an injury. Indeed, the injunction does not require him to *do* anything. At the same time, Plaintiffs would suffer substantial injury from a stay—indeed, injury that is irreparable—because the Attorney General's continued enforcement of GA-38 will deprive them of meaningful and equal access to an in-person education. And finally, the public interest lies in following federal law. The Court should deny a stay pending appeal.

I. The Attorney General is not likely to succeed on appeal because he has not identified any legal error or clearly erroneous finding of fact.

The Attorney General has the burden of showing that he is likely to prevail on appeal. In an appeal following a bench trial, "findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Providence Behav. Health v. Grant Rd. Pub. Util. Dist.*, 902 F.3d 448, 455 (5th Cir. 2018) (quoting *Coe v. Chesapeake Exploration, L.L.C.*, 695 F.3d 311, 316 (5th Cir. 2012)). The Attorney General has failed to show that he is likely to establish any legal error, and he has wholly declined

to argue that any of the court's factual findings amounted to clear error. He therefore has not shown that he is likely to succeed on appeal.

A. Plaintiffs have standing to sue the Attorney General.

The district court was correct that Plaintiffs have proven an injury in fact, caused by GA-38, and redressable by an injunction. Dkt. 82 (Dist. Ct. Op.) at 13–15; *see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021); *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016). The enforcement of GA-38 denies Plaintiffs reasonable access to the classroom by preventing schools from adopting masking requirements, either as a reasonable accommodation or as part of a safe return-to-school plan. The district court's injunction removes this impediment by enjoining enforcement of GA-38 against public schools.

To avoid acknowledging that the injury is real and imminent, the Attorney General continues to misstate Plaintiffs' injury. Plaintiffs have a legally protected interest in access to public education on par with their peers without disabilities. *See* Tex. Const. art. VII, § 1 (entrusting the Texas Legislature with the duty to establish a public school system); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 291 (5th Cir. 2005) (noting that the Americans with Disabilities Act ("ADA")

prohibits exclusion from public school by reason of a disability); *cf. also Goss v. Lopez*, 419 U.S. 565, 574 (1975) (recognizing that a "student's legitimate entitlement to a public education as a property interest . . . is protected by the Due Process Clause"). Plaintiffs are injured because GA-38 imposes a barrier between them and the classroom. *Cf. Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756 (2017). Plaintiffs do not claim that they are injured by the risk of contracting COVID-19. The Attorney General is simply wrong to frame this as an "increased-risk-of-harm" case. Mot. at 5 (citing *Shrimpers & Fisherman of RGV v. Tex. Comm'n of Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020)). This case is about reasonable access to the classroom.

Plaintiffs' injury is akin to the lack of a ramp at the entrance of a school. *See Disability Rts. S. C. v. McMaster*, No. 3:21-2728, 2021 WL 4444841, at *10 (D. S.C. Sept. 28, 2021) ("Today, a mask mandate works as a sort of ramp to allow children with disabilities access to their schools. Thus, the same legal authority requiring school to have ramps requires that school districts have the option to compel people to wear masks at school."), *appeal docketed*, No. 21-2070 (4th Cir. Sept. 29, 2021). Under the Attorney General's argument, the legal injury arising

from the absence of a ramp would be the risk of falling down the stairs and being seriously injured. That misses the point; the injury lies in not having a reasonable way to access the building. When it comes to non-discriminatory access to education, the legal injury is the denial of reasonable access itself. *Cf. Frame v. City of Arlington*, 657 F.3d 215, 227 (5th Cir. 2011) ("When a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, disabled individuals are denied the benefits of that city's services, programs, or activities.").

The barrier to accessing the classroom imposed by GA-38 is not a self-inflicted injury. Taking the ramp analogy further, the Attorney General's position that Plaintiffs' injury is self-inflicted would amount to saying that a person who uses a wheelchair imposes his own injury if he declines to crawl up the stairs in the absence of a ramp. But that is simply not a reasonable position, and it ignores the requirement of the ADA to make public services just as available to persons with disabilities as they are to persons *without* disabilities. *See* 28 C.F.R. § 35.130(b)(2); *cf. also E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 696–97 (5th Cir. 2014) (stating, in the context of Title I rather than Title II,

that the ADA requires employment opportunities to be available to persons with disabilities to the same extent as persons without disabilities).

Finally, the Attorney General contends that Plaintiffs lack standing because enjoining the enforcement of GA-38 would not require local schools to impose mask mandates. This too misses the point; the evidence at trial showed unequivocally (and without contradiction) that every one of Plaintiffs' school districts either *already has* a mask requirement—and has been sued by the Attorney General to stop it—or would immediately consider implementing one, if the enforcement of GA-38 were enjoined. Dkt. 82 at 6–7. And moreover, the Attorney General conceded that GA-38 eliminates the possibility of a mask requirement—even in a given classroom or part of a building—as a reasonable accommodation. Dkt. 82 at 14, 26. The district court's injunction cures this injury by removing the Attorney General's unlawful impediment to reasonable accommodations, whether they are individualized or—like wheelchair ramps—granted to disabled students as a group. *See Uzuegbunam*, 141 S. Ct. at 801 (stating that even a

"'partial remedy' satisfies the redressability requirement") (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

The Attorney General has not shown that he is likely to prevail on the issue of standing on appeal.

B. GA-38 violates both the ADA and the Rehabilitation Act.

The Attorney General is also not likely to succeed in reversing the district court's conclusion that GA-38 violates the ADA and Section 504 of the Rehabilitation Act. Based on a full factual record, the court found that "because GA-38 precludes mask requirements in schools, Plaintiffs are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers." Dkt. 82 at 28. The Attorney General does not attempt to show any clear error in this conclusion. Instead, he argues that Plaintiffs have not exhausted their administrative remedies and that they can resort to alternative accommodations. The first of these arguments mistakes the law; the second mistakes the facts.

On the first point, the Attorney General is simply wrong to say that a plaintiff must obtain a formal denial of an accommodation before bringing suit under the ADA. The ADA permits private causes of action

to "require [a public entity] to make reasonable modifications" even before the actual denial of an accommodation. *See Frame*, 657 F.3d at 231–32. Recognizing this, the district court concluded that GA-38 violates the ADA by barring a reasonable accommodation in the form of mask requirements—which the Attorney General did not dispute would constitute a reasonable accommodation under the right circumstances. Further, there is no administrative exhaustion requirement under the ADA. And the Individuals with Disabilities Education Act ("IDEA") requires exhaustion of administrative remedies only when the accommodation sought goes to the quality or appropriateness of the plaintiff's education. *Fry*, 137 S. Ct. at 754. When the accommodation is sought simply to access the school building, there is no need to seek an individualized education plan under the IDEA. *Id.* at 749, 753, 754 n.8. Rather, the remedy is to seek a reasonable accommodation under the ADA, just as one would for an accommodation to access "say, a public theater or library." *Id.* at 756.

Moreover, the district court found that "even if a school were to determine based on an individualized assessment that requiring masks is a reasonable modification necessary to enable a student with

disabilities to have equal access to a safe, integrated, in-person learning environment, the school would be prohibited from providing that accommodation under GA-38." Dkt. 82 at 26. The Attorney General conceded at trial that GA-38 removes mask requirements as a tool for accommodation; it does not help him to point now to other measures that might also reduce the risk of COVID-19. There is no dispute that GA-38 prevents schools from requiring masks when they determine that masking is the individualized accommodation merited by the situation. This is not a matter of getting a preferred accommodation; it is a matter of schools being prohibited by GA-38 from providing a reasonable accommodation when the situation calls for it.

C. GA-38 is preempted by the ADA, the Rehabilitation Act, and the ARP Act.

The Attorney General is also not likely to succeed in defeating the district court's finding that GA-38 is preempted by the ADA and Section 504, as well as the American Rescue Plan Act of 2021 ("ARP Act"). Indeed, the Attorney General must show a likelihood of success of reversing *all three* preemption conclusions to satisfy his burden in seeking a stay. He has not shown a likelihood of success on any one of them, much less all three.

The Attorney General says "[t]he district court *assumed* that GA-38 prevents school districts from complying with the ADA or Section 504 to some extent," but that is not true. Mot. at 12 (emphasis added). The court *found* after a *bench trial* that GA-38 prevents school districts from complying with the ADA and Section 504 when a mask requirement is called for as a reasonable accommodation. Dkt. 82 at 18–19, 26, 28 ("[T]he evidence further establishes that even if a school were to determine based on an individualized assessment that requiring masks is a reasonable modification . . . the school would be prohibited from providing the accommodation under GA-38."). Recharacterizing a finding of fact as an "assumption" will not satisfy the Attorney General's burden to show that the court clearly erred in this factual determination. *See Deloach Marine Servs., L.L.C. v. Marquette Transp. Co., L.L.C.*, 974 F.3d 601, 603, 606 (5th Cir. 2020) (affirming district court judgment in the absence of clear error).

The district court also correctly concluded that "GA-38 is in direct conflict with the ARP Act" because it denies local governments the discretion granted to them by that act. Dkt. 82 at 21. GA-38 is thus preempted because it "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." *Id.* (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)). The Attorney General contends that there is no private right of action under the ARP Act, but he ignores the district court's exercise of equitable jurisdiction to grant injunctive relief. *Compare* Dkt. 82 at 21 (citing *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 327 (2015)) *with* Mot. at 12–13. Without addressing and engaging the court's actual reasoning, the Attorney General cannot show he is entitled to a stay.

D. The injunction is not overbroad.

Finally, the Attorney General is not likely to succeed in challenging the breadth and specificity of the district court's injunction. The injunction is specific, clear, and unambiguous: it bars the Attorney General from enforcing GA-38 with respect to school districts. It simply prevents the Attorney General from engaging in conduct that conflicts with federal law and that is thus unconstitutional under the Supremacy Clause. It goes no farther than that.

The Attorney General's principal argument on this point seems to be that students other than Plaintiffs will enjoy the benefit of the injunction. Mot. at 14. "An injunction, however, is not necessarily

made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Pro. Ass'n of Coll. Educators, TSTA / NEA v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 273–74 (5th Cir. 1984). In crafting an injunction that is clear and administrable, the district court chose the most straightforward path: it simply enjoined enforcement. And even if the Attorney General's argument supported narrowing the injunction, it certainly does not support setting it aside altogether, as the Attorney General's motion suggests. The Attorney General has not shown he is likely to succeed on this issue.

II. The Attorney General has not shown that he will suffer irreparable harm absent a stay.

The Attorney General has also failed to show that he will suffer any irreparable harm. Complying with federal law—or, here, simply doing nothing, and thus avoiding a *violation* of federal law—is not an injury in the context of injunctions. *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962). The Attorney General's federalism concerns are misplaced because the injunction merely prohibits him from engaging in conduct that violates the Constitution and federal statutes.

Enforcement of the Supremacy Clause is hardly an "institutional injury" to a state as the Attorney General claims. Mot. at 15 (citing *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016)).

Again, this Court itself held just this month that the government has no legitimate interest in enforcing a law that is unlawful and unconstitutional. *BST Holdings, L.L.C. v. Occupational Safety and Health Admin*, No. 21-60845, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021) ("Any interest [the government] may claim in enforcing an unlawful (and likely unconstitutional) [order] is illegitimate."); *see also Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2011 WL 13137818, at *1 (W.D. Tex. Oct. 12, 2011) ("[T]he public interest does not favor enforcement of an unconstitutional act."). Because complying with federal law is not an injury, allowing the injunction to go into effect cannot possibly cause an injury that would be irreparable to the Attorney General.

Moreover, the Court's injunction does not require the Attorney General to *do* anything; it merely requires him to *refrain* from acting to enforce GA-38 with respect to school districts. As a result, it imposes no burden on him at all. Indeed, given that the Attorney General asserted

below (albeit incorrectly) that he "is not tasked with enforcing GA-38," Dkt. 85 at 8, it is unclear what consequences he believes will flow from the injunction, Dkt. 90 at 4.

III. Plaintiffs would be substantially harmed by a stay.

Granting a stay pending appeal would prolong the concrete, particularized, imminent, and redressable injury to Plaintiffs caused by GA-38's prohibition on mask requirements, even as reasonable accommodations. Plaintiffs presented uncontroverted evidence at trial showing that they cannot obtain meaningful access to education if attending school means being in the proximity of unmasked classmates and staff members. Dkt. 82 at 25. Indeed, the Attorney General did not mount any challenge to Plaintiffs' evidence establishing the risks of COVID-19 to these students or the reasonableness of masking as an accommodation. Nor does he on appeal. Instead, he simply reverts to mischaracterizing Plaintiffs' injury and improperly dismissing their exclusion from the classroom as "self-inflicted." Mot. at 15–16.

The factual record at trial proved that GA-38 indisputably places a barrier between Plaintiffs and the classroom. Although the Attorney

General insists that a stay will not harm Plaintiffs, he ignores this Court's finding that:

> because GA-38 precludes mask requirements in schools, Plaintiffs are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers. The evidence presented by Plaintiffs establishes that Plaintiffs are being denied the benefits of in-person learning on an equal basis as their peers without disabilities.

Dkt. 82 at 28. Staying the court's injunction pending appeal would re-impose the very harms that the court properly identified. *See id.* at 12, 14–15 (finding that each of the Plaintiffs' schools either currently has a mask requirement that has been targeted by the Attorney General or would promptly impose or consider imposing mask requirements if there were no risk of enforcement). Each day Plaintiffs are denied the benefits of in-person learning is a day they cannot get back. This is a substantial and irreparable harm.

IV. A stay would be contrary to the public interest.

Finally, the Attorney General has not demonstrated that the public interest favors granting a stay; to the contrary, the public interest strongly supports the district court's injunction. The injunction prevents the Attorney General from enforcing provisions of a state

Executive Order that unconstitutionally conflict with and violate federal law. Staying the injunction would affirmatively *harm* the public interest, not serve it. *De Leon v. Perry*, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014) (holding that an "injunction preventing the enforcement of an unconstitutional law serves, rather than contradicts, the public interest"), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015); *see also Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights." (collecting cases)). The Attorney General's only argument to the contrary is his unsupported insistence that any harm to Plaintiffs is "speculative" or "self-inflicted." Mot. at 15–16. As discussed above, the district court squarely (and correctly) rejected that argument as a factual matter, based on a full record at trial.

At the same time, the Attorney General has never proven—and does not argue today—that it would be against the public interest to allow locally elected school officials to make decisions for themselves. Contrary to the Attorney General's suggestion, GA-38 is *not* a "statute[] enacted by representatives of its people." Mot. at 15 (quoting *Maryland*

v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). It is an Executive Order imposed unilaterally by the Governor, with the express purpose of *limiting* the ability of local elected officials to respond to local public health conditions and the demonstrated needs of children in their communities in a continuing global pandemic. In this context—and when the district court has already found a violation of and preemption by statutes enacted by Congress—the Attorney General cannot credibly say that his interests in enforcement inevitably "merge with that of the public." Mot. at 16 (quoting *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017)). For this reason too, the Attorney General has not carried his burden of showing that he is entitled to a stay.

CONCLUSION

For these reasons, the Court should deny the Attorney General's motion.

Respectfully submitted,

s/ *Brandon W. Duke*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), this document complies with (1) the word limits of Federal Rule of Appellate Procedure 27(d)(2)(A), because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 5,195 words; and (2) the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because this document has been prepared in a proportionally spaced typeface (14 point, Century Schoolbook) using Microsoft Word 2016.

s/ *Brandon W. Duke*
Brandon W. Duke

CERTIFICATE OF SERVICE

On November 24, 2021, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system and via email.

s/ *Brandon W. Duke*
sBrandon W. Duke