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

REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL AND FOR A TEMPORARY ADMINISTRATIVE STAY

(Counsel Listed on Inside Cover)

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General
Judd.Stone@oag.texas.gov

MICHAEL R. ABRAMS
ERIC J. HAMILTON
Assistant Solicitors General

Counsel for Defendant-Appellant Ken Paxton, Attorney General of Texas

INTRODUCTION

Nearly two years into the pandemic, almost no one disputes that students and school districts alike can take any number of steps to mitigate the spread of COVID-19. But the district court permanently enjoined GA-38 based on the possibility that a mask mandate may be the *only* effective means to allow plaintiffs to attend school safely.

Under the ADA and Section 504, a plaintiff is entitled to a reasonable accommodation, but not a preferred accommodation. Plaintiffs did not show, and still have not shown, that GA-38 prevents school districts from offering reasonable accommodations. Instead, the district court rejected potential mitigation options without evaluating them first to determine their feasibility. Plaintiffs cannot show an injury-in-fact or likely success on the merits in the absence of a meaningful record demonstrating that alternative measures to mitigate the spread of COVID-19 would be inadequate.

This Court has already entered a temporary administrative stay of the district court's injunction. It should now stay the injunction pending resolution of the Attorney General's appeal.

ARGUMENT

I. The Attorney General Is Likely to Succeed on Appeal.

A. Plaintiffs' claims fail at the outset because they lack standing. They have not demonstrated a "concrete and particularized" injury that is fairly traceable to the actions of the Attorney General and redressable by an order enjoining his conduct.

Mot. 5-7; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (explaining that an Article III injury must be "concrete" and "particularized"). As the Attorney General noted (at 6-7), the widespread availability of vaccines (including for each of the plaintiffs), plaintiffs' ability to voluntarily wear a mask, and the possibility of additional mitigation measures make plaintiffs' stated injury—the increased risk of contracting the disease absent a mask mandate—speculative, rather than "actual or imminent." *Clapper*, 568 U.S. at 409.

Plaintiffs insist (at 10) that GA-38 "imposes a barrier between them and the classroom." They analogize a school district's decision not to impose a mask mandate to a governmental entity's failure to build an access ramp at the entrance of a building. But an ADA or Section 504 claim premised on the lack of an access ramp would concern a potential bar to access of government services. Plaintiffs' claims, by contrast, are about the comparative safety of one set of policies compared with others. And as this Court has admonished, such increased-risk-of-injury claims are usually insufficient to confer standing. *See Shrimpers & Fisherman of RGV v. Tex. Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020).

That difference proves the flaw in plaintiffs' analogy. It would not be conjectural for a wheelchair-bound individual to assert that she cannot physically enter a building without access to a ramp. By contrast, it was conjectural for the district court to assume that a student cannot safely attend school without a mask mandate. Given the multitude of measures that reduce the risk of the spread of COVID-19, *see* Mot. 6, 10, plaintiffs cannot show an imminent injury.

B. With respect to plaintiffs' ADA and Section 504 claims, the Attorney General explained (at 8-11) that it is "the plaintiff's burden to request reasonable accommodations." *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007). Plaintiffs' failure to make such requests should have been fatal to those claims. *See Smith v. Harris County, Tex.*, 956 F.3d 311, 317-18 (5th Cir. 2020). And plaintiffs' claims also are unlikely to succeed because plaintiffs did not exhaust their administrative remedies under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(*l*).

In response to the Attorney General's exhaustion argument, plaintiffs contend (at 14) that their claims are about access to school buildings rather than about the specifics of their educational programs. But there is no question that plaintiffs are able to access the schools they attend. *See* ECF No. 57 at 5-12. And plaintiffs' current framing of their ADA and Section 504 claims contradicts the parties' joint stipulated facts, which included plaintiffs' concerns about missing "significant educational opportunities" and "positive social interactions." *Id.* Those are the kinds of obstacles to an appropriate public education that school districts are required to address through an "individualized education plan" tailored to the student's particular circumstances. 34 C.F.R. §§ 300.320-323. And the Supreme Court has made clear that exhaustion under the IDEA applies "when the gravamen of a complaint seeks redress for a school's failure to provide a [free appropriate public education], even if not phrased or framed in precisely that way." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017).

On the merits, plaintiffs offer no factual rebuttal to the Attorney General's point that they have not sought reasonable accommodations from their school districts. Mot. 9; *see also* Exhibit D at 147 ("You're right, Your Honor, that we are not asking for a specific accommodation."). That should be dispositive of plaintiffs' ADA and Section 504 claims: determining what is or is not a reasonable accommodation is a fact-specific inquiry "that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it." *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995). The district court erred in making a statewide finding that GA-38 violates the ADA and Section 504 that was divorced from the particulars of each plaintiff's circumstances.

Instead, the district 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." Exhibit C at 28. Plaintiffs stake their likelihood of success on appeal to that aspect of the district court's decision. Resp. 13. But the district court's conclusion lacks sufficient evidentiary support in the absence of *any* finding about alternative accommodations that could reduce those health and safety risks. Instead, the district court appeared to justify its decision by noting that the "evidence here supports that the use of masks *may* decrease the risk of COVID infection in group settings." *Id.* (emphasis added). But other measures may also decrease that risk. The district court made no specific factual findings that measures like voluntary masking, improved ventilation or access to vaccines would be inadequate, whether

individually or when implemented as part of a comprehensive mitigation strategy. In the absence of such findings, plaintiffs did not meet their burden at trial to prove a lack of "meaningful access" to their educations. *See Ruskai v. Pistole*, 775 F.3d 61, 78–79 (1st Cir. 2014).

C. Plaintiffs have also failed to show that GA-38 is preempted by federal law. Their response (at 15-17) rehashes the district court's preemption holdings but fails to grapple with the flaws in the district court's substantive analysis of their ADA and Section 504 claims. And their response likewise does not address the structure of the American Rescue Plan Act, which places significant responsibility on *States* rather than localities, and which plaintiffs conceded does not require school districts to institute mask requirements. *See* 86 Fed. Reg. 21198-21201; ECF No. 56 at 67-68.

D. Finally, the district court issued an impermissibly broad statewide injunction. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added) (citation and quotation marks omitted). This Court has viewed "sweeping" injunctions like the one entered below with disfavor. *See, e.g.*, *TDP v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020). In their response, plaintiffs do not explain how the district court's statewide order was necessary to provide plaintiffs with the complete relief that they sought. Nor could they: plaintiffs do not have an interest in, nor do they claim to have an interest in, how school districts throughout the State implement COVID-19 mitigation measures. The district court's broad injunction awarded relief far greater than necessary to remedy plaintiffs' injuries, and thus should be stayed pending appeal.

II. The Remaining Factors Favor a Stay.

The Attorney General explained in his motion for a stay (at 14-16) that the other considerations this Court must consider favor a stay: he will suffer irreparable harm in the absence of a stay, plaintiffs will not be substantially harmed by a stay, and the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

When the State seeks a stay pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citation omitted). The district court's injunction inflicts an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016). In response, plaintiffs rely (at 19) on this Court's recent decision concluding that OSHA lacked an interest in enforcing an unlawful emergency temporary standard. *BST Holdings, LLC v. Occupational Safety and Health Admin*, No. 21-60845, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021). But there is an enormous difference between OSHA's constitutionally suspect nationwide vaccine mandate, which this Court stayed before the mandate could take effect, and a state-level executive order that the Texas Supreme Court has repeatedly allowed to remain in force, *see, e.g.*, Order at 1, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021), and which plaintiffs have not demonstrated violates or is preempted by federal law.

CONCLUSION

The district court's permanent injunction should be stayed pending appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General
Judd.Stone@oag.texas.gov

MICHAEL R. ABRAMS
ERIC J. HAMILTON
Assistant Solicitors General

Counsel for Defendant-Appellant Ken Paxton, Attorney General of Texas

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Judd E. Stone II

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/s/ Judd E. Stone II
Judd E. Stone II