IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T. by and through her parents and as next friends, et al. *Plaintiffs,* v. Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency; the Texas Education Agency; and Attorney General Ken Paxton, in is official capacity as Attorney General of Texas, *Defendants.*	§ § § § § § § § § § § § § § §	Civil Action No. 1:21-cv-00717-LY

DEFENDANT'S MOTION FOR STAY PENDING APPEAL

Defendant Ken Paxton, in his official capacity as Attorney General of Texas ("Attorney General") files this Motion to Stay the district court's Permanent Injunction and Final Order (Dkt. 83) and is accompanying Memorandum Opinion and Order on Motion to Dismiss (Dkt. 82) (collectively referred to as "Permanent Injunction") pending appeal or, alternatively, requests an order suspending the issued injunction pending appeal pursuant to Fed. R. App. P. 8(a).

The Court's opinion addresses legal issues that are a matter of first impression within the Fifth Circuit, and in some instances, the nation. This Court held that a state law was preempted by not one, but three separate federal statutes, and that the Attorney General violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("Rehab Act") via a state law that the Attorney General is not tasked with enforcing. The Attorney General has raised substantial arguments on the merits of numerous serious legal questions implicated by this Court's Permanent Injunction, and a stay pending appeal is warranted to permit the Fifth Circuit to assess the merits of this Court's

novel rulings. A stay is also supported by the widely recognized principle that enjoining a state law inflicts irreparable harm on the state, and that the public's interest is aligned with the state's interest and harm. Plaintiffs in contrast, will not be irreparably harmed if a stay is granted, given that most Plaintiffs currently attend schools with mask mandates in place, COVID-19 vaccines are now available to all Plaintiffs, and infection rates statewide have continued to drop dramatically since the bench trial in this matter. Importantly, this Court's Permanent Injunction does not redress Plaintiffs' harm and therefore Plaintiffs cannot be irreparably harmed if it is stayed. None of the Plaintiffs have requested a reasonable accommodation in the form of masking, and the Permanent Injunction does not and cannot require any of Plaintiffs' schools to implement a universal mask mandate. For all these reasons, as further set forth below, a temporary stay while the Fifth Circuit considers the merits of this Court's Permanent Injunction is warranted.

BACKGROUND

Plaintiffs brought this challenge to GA-38 under the Americans with Disabilities Act ("ADA") and Rehabilitation Act of 1973 ("Rehab Act"), against the Texas Education Agency's Commissioner, the Texas Education Agency ("TEA"), and the Attorney General seeking a declaration that GA-38 violated federal law and was preempted by federal law, and also requesting that the Court enjoin enforcement of GA-38 statewide. Plaintiffs immediately moved for a temporary restraining order, which this Court denied. Dkt. 7, 38. The State Defendants filed a motion to dismiss, raising justiciability concerns with Plaintiffs' lawsuit: Plaintiffs lack standing and Plaintiffs' claims are barred by sovereign immunity. Dkt. 34. Additionally, Plaintiffs had failed to state a claim for which relief can be granted as a matter of law. Dkt. 34.

Rather than rule on State Defendants' motion to dismiss and the foundational issue of whether this Court had subject-matter jurisdiction to hear this lawsuit, the Court held the motion in abeyance and proceeded to a bench trial on October 6, 2021. On November 10, 2021, the Court issued its

Permanent Injunction. Dkt. 82-83. The Court found that: Plaintiffs had standing to sue only the Attorney General; the claims against the Attorney General were not barred by sovereign immunity; GA-38 was preempted by the ADA, the Rehab Act, and the American Rescue Plan Act of 2021 ("ARP Act"); and the Attorney General had otherwise violated the ADA and Rehab Act via GA-38. Dkt 82.[1].

ARGUMENT

I. LEGAL STANDARD

A party must ordinarily file a motion for stay in the district court seeking a stay of a judgment or order pending appeal or seeking an order suspending an injunction while an appeal is pending before seeking relief from the Fifth Circuit. Fed. R. App. P. 8(a)(1). "The Supreme Court has repeatedly stated that a four-factor test governs a court's consideration of a motion for stay pending appeal: '(1) whether the stay applicant has made a strong showing that he 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."[2] The Fifth Circuit "has refused to apply these factors in a rigid, mechanical fashion," and has "held that the movant 'need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay,'" as opposed to demonstrating a likelihood of success on the merits.[3] A stay is especially warranted when existing case law does not provide clarity or guidance in resolving the serious legal questions involved.[4] A stay pending appeal "simply suspend[s] judicial alteration of the status quo,"

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[1] Each of these holdings will be explored in more detail when discussing the likelihood of success on the merits factor for issuing a stay pending appeal.

[2] *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360 (5th Cir. 2013) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

[3] *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (per curiam) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981)).

[4] *Texas v Ysleta Del Sur Pueblo*, 2019 WL 5589051 (W.D. Tex. March 28, 2019) (district court granting stay given serious legal question raised and lack of clarity or guidance from existing caselaw).

so as to allow appellate courts to bring "considered judgment" to the matter before them and "responsibly fulfill their role in the judicial process."[5]

Similarly, Federal Rule of Civil Procedure 62(d) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction." FED. R. CIV. P. 62(d). The same four factors delineated above are considered when determining whether to suspend an injunction while an appeal is pending from the final judgement granting the injunction.[6]

II. A STAY PENDING APPEAL IS WARRANTED GIVEN THE SERIOUS, NOVEL LEGAL QUESTIONS AT ISSUE IN THIS CASE THAT HAVE NEVER BEEN CONSIDERED BY THE FIFTH CIRCUIT.

A. Defendant Has Raised Serious Legal Questions That Merit a Stay Pending Appeal.

The Attorney General has raised a substantial case on the merits regarding the serious legal questions of standing and sovereign immunity, which both go to the heart of whether this Court had subject-matter jurisdiction to consider Plaintiffs' claims at all. Correspondingly, the Attorney General has demonstrated a likelihood of success on the merits regarding Plaintiffs' ADA and Rehab Act claims.[7] The Court rejected these arguments but recognized that no case law exists addressing these issues under comparable circumstances. No other court in the nation has ruled on the merits of whether a mask mandate prohibition is preempted by federal law or violates the ADA. Therefore, given the novel nature of Plaintiffs' claims and the substantial support for the Defendants' arguments, the Court of Appeals should have an opportunity to consider these issues before the injunction is implemented. The Defendants' significant jurisdictional and merits arguments raise serious legal questions that support staying this Court's permanent injunction pending appeal.

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[5] *Nken v. Holder*, 556 U.S. 418, 427, 429 (2009) (internal quotation marks omitted).
[6] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).
[7] *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

1. *Standing*

As in every case, standing is crucial. Here, respectfully, the Court finding that Plaintiffs have standing is highly questionable. Plaintiffs do not satisfy any of the elements necessary to have standing to assert their claims: an injury in fact fairly traceable to the actions of the Attorney General and redressable by an Order enjoining his conduct.[8] "Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence."[9] The Attorney General has raised substantial, meritorious arguments that Plaintiffs did not meet their burden of proving standing, warranting a stay of the Permanent Injunction pending appeal.

First, Plaintiffs' have not alleged a certainly impending injury. The Attorney General submits that Plaintiffs' injury, per their Amended Complaint, is contracting COVID-19 absent a universal mask mandate in their respective schools. Contrary to the Court's Permanent Injunction, there is no evidence that Plaintiffs are not at heightened risk of contracting COVID-19; rather, there was some evidence that *if* Plaintiffs contracted COVID-19, they were at heightened risk of developing severe symptoms.[10] Such an injury is inherently speculative. Even accepting for the sake of argument the Plaintiffs' theory of injury adopted by this Court, the deprivation of reasonable access to in-person public school, this injury is speculative. First, the only reason Plaintiffs may be deprived of in-person learning is by opting for remote learning due to a fear of contracting COVID-19 in the classroom without a mask mandate. A self-inflicted injury is insufficient for standing purposes.[11] Additionally, the availability of remote learning options provides Plaintiffs with access to public education.[12]

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[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[9] *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020)
[10] Courts are reluctant to confer standing based on increased-risk-of-harm injuries. *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020).
[11] *Glass v. Paxton*, 900 F.3d 233, 238–42 (5th Cir. 2018).
[12] At least one district court has found the availability of remote learning to defeat a Plaintiff's ADA-based challenge to a mask mandate. *L.E., et al. v. Ragsdale, et al.*, No. 1:21-cv-4076-TCB (N.D. Georgia) issued on October 15, 2021.

Next, Plaintiff's alleged injury is not fairly traceable to any action of the Attorney General. Plaintiffs did not substantiate that their schools would provide masking as a reasonable accommodation absent GA-38. They cannot, because no Plaintiff has undergone the interactive process required by the ADA for requesting reasonable accommodations. There is also no evidence that solely GA-38 prevents Plaintiffs from receiving a reasonable accommodation. As this Court recognized, Plaintiffs are not entitled to the reasonable accommodation of their choice. Plaintiffs very well could be accommodated without the need to impose a mask mandate at any level. By way of example, several schools accommodate severe nut allergies by having a voluntary "nut free zone." Similarly, GA-38 does not prohibit any school from instituting a voluntary masking zone, or from school staff interacting with Plaintiffs voluntarily agreeing to wear a mask to accommodate a Plaintiff's disability. But we do not know if reasonable accommodations can be provided with GA-38 intact because Plaintiffs have not tried yet. As this Court aptly noted while considering this issue at trial "we are not there yet." We are not there yet because Plaintiff's lack standing due to their alleged injury not being fairly traceable to GA-38 or the Attorney General's conduct. That Plaintiffs lack standing because the Attorney General lacks the enforcement authority necessary for any alleged injury to be fairly traceable to him will be discussed in the below sovereign immunity section.

Plaintiff's alleged deprivation of reasonable access to in-person learning is not redressed by the Permanent Injunction. Plaintiffs are required to demonstrate that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[13] Plaintiffs claim they lack meaningful access to in-person learning because there are no masks. The Permanent Injunction does not provide Plaintiffs with masks in school. The Permanent Injunction, without more, will not require the Attorney General to redress Plaintiffs' claimed injuries.[14] He cannot do so; only the non-party

[13] *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181 (2000)
[14] See *Reeves v. Nago*, --F. Supp. 3d—, 2021 WL 1602397* 5-6 (D. Hawaii April 23, 2021).

school districts can do so.[15] The Permanent Injunction does not and cannot require Plaintiffs' respective schools to institute a mask mandate of any kind because none of the schools are parties to this action. Redressing Plaintiffs' asserted injury requires action on the part of the school districts,[16] and may well require additional court action. Moreover, the evidence in this case demonstrated that there was no significant difference between COVID-19 positivity rates in schools with mask mandates compared to those without a mask mandate in place. This further demonstrates that Plaintiff's alleged injury, that they have been deprived reasonable access to school due to the absence of mask mandate, will not be redressed by the Permanent Injunction. Mask mandates may not be implemented; mask mandates may not be adequately enforced; a Plaintiff may contract COVID-19 despite a mask mandate.

2. *Sovereign Immunity*

This case is untraditional in the sense that this Court did not rule on the Attorney General's motion to dismiss raising sovereign immunity prior to proceeding to a trial on the merits of Plaintiff's claims, thus depriving the Attorney General of his right to appeal the denial of sovereign immunity and the automatic stay accompanying such an appeal for the Fifth Circuit's consideration before a trial on the merits. This counsels in favor of staying the Permanent Injunction pending appeal so that the Fifth Circuit can consider the merits of this fundamental doctrine of state sovereignty and federal law.

A stay is particularly warranted given that this Court's sovereign immunity determination likely conflicts with Fifth Circuit precedent. The Fifth Circuit has previously held that "it is not enough that the official have a "general duty to see that the laws of the state are implemented."[17] "If the official

[15] That Plaintiffs are not the object of GA-38 and the order does not require Plaintiffs to do or not do anything defeats Plaintiffs' claim of standing. *Lujan*, 504 U.S. at 562 (1992).
[16] Standing is lacking when remedying the injury depends on the decisions of third parties. *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015)
[17] *Texas Democratic Party v. Abbott;* 961 F>3d 389, 400-401 (5th Cir. 2020) (quotation omitted).

sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and our *Young* analysis ends."[18] This Court's determination that the Attorney General was not entitled to sovereign immunity from Plaintiffs' Rehab Act claim was based on his general duty to implement state law. The Attorney General is not tasked with enforcing GA-38, and he has not taken any action to fine a school district for imposing a mask mandate on any individual as permitted by GA-38. Rather, the Attorney General has brought lawsuits against school districts as local governmental units engaging in *ultra vires* acts by openly defying a state law. The Attorney General exercising his general duty to uphold state law does not equate to enforcement authority for purposes of GA-38. Given this serious legal issue and the attorney General's substantive, meritorious arguments, a stay of the Permanent Injunction pending appeal is warranted.

3. *ADA/Rehab Act Claim*

The Court's analysis of Plaintiffs ADA and Rehab Act claims entails a series of "if/then" postulations. This is because Plaintiffs currently have not stated viable claims, but instead have asked the Court to rule on a hypothetical situation. The Court held that GA-38 violated the ADA and the Rehab Act by forbidding school districts from considering masking as a reasonable modification, relying on cases holding that a reasonable modification or accommodation cannot be denied to a person with a disability solely on the basis that it would violate state law.[19] But no Plaintiff has been denied a reasonable accommodation or modification because of GA-38 because no such requests have been made by any Plaintiff. Plaintiffs conceded at trial that no Plaintiff has made a request for reasonable accommodation, and there was no showing that the need for masking is an open, obvious, and apparent necessary accommodation. Rather, the need for masking as a necessary accommodation

[18] *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020).
[19] Citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Barber v. Colo. Dep't of Revenue,* 562 F.3d 1222, 1232 33 (10th Cir. 2009); *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69 70 (1st Cir. 2010).

is undermined by the unrefuted evidence that there is no significant difference in COVID-19 infection rates between schools with mask mandates in place and schools without mask mandates in place.[20] Therefore, Plaintiffs have failed to state a reasonable accommodation claim under either the ADA or the Rehab Act as a matter of law, and the Court overlooking this fatal flaw in Plaintiffs' case warrants a stay pending appeal.

It should also not be overlooked that the Plaintiffs have not been denied "meaningful access" to an education, as is required to support their claims.[21] Plaintiffs remain free to attend school in person while wearing masks and engaging in any other COVID-19 precautions they personally deem appropriate. They are also free to request that school staff or other students they interact with voluntarily agree to wear masks. To be sure, GA-38 highly encourages individual to wear masks. Plaintiffs are also free to make the personal choice, that, to more completely control their potential exposure to COVID-19 (something that cannot be accomplished by any school district even with masking in place), Plaintiff will attend school virtually. Plaintiffs are therefore being provided reasonable and meaningful access to a public education, and a stay pending appeal is warranted to allow the Fifth Circuit to consider and decide these important legal issues.

4. ***Preemption***

There is no evidence that GA-38 prevented school districts from complying with both state and federal law, including the ADA, the Rehab Act, and the ARP Act. The Attorney General

[20] Moreover, this Court's Memorandum opinion supporting the Permanent Injunction failed to appreciate a significant difference in the ADA and Rehab Act's causation standards, namely that a Rehab Act claim of discrimination based on a failure to accommodate requires the plaintiff to prove that the discrimination is "solely by reason of the plaintiff's disability." *Francois v. Our Lady of the Lake Hospital, Inc.*, 8 F.4th 370, 378 (5th Cir. 2021) (citing *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018)). Plaintiffs cannot satisfy this causation standard, which defeats their Rehab Act claim.

[21] *See, e.g.*, *Ruskai v. Pistole*, 775 F.3d 61, 78–79 (1st Cir. 2014) (citing *Alexander v. Choate*, 469 U.S. 287, 299 (1985)).

respectfully submits that the Court erred in finding that GA-38 is preempted because it conflicts with not one but three separate federal regulatory schemes. This is an issue of first impression within this Circuit, and the Court's decision has potentially wide-reaching ramifications. To begin, the Court cites no legal support for its broad proclamation that a state law that allegedly interferes with a school's ability to comply with the ADA is preempted by the ADA. None of the cases[22] cited by the Court held that a state statute was preempted by the ADA or Rehab Act. Rather, each of these cases concluded that a state law is only preempted if it is *impossible* to comply with both the state law and the applicable federal law, and this stringent burden had not been met by any of the plaintiffs. Similarly here, there is no evidence that it is *impossible* for a school to comply with GA-38 and provide reasonable accommodations to a Plaintiff if and as required by the ADA and Rehab Act.[23] No reasonable accommodation has been sought by any Plaintiff. By the same token, no school has denied a reasonable modification solely because the modification would violate state law. There is no evidence to satisfy the heightened burden of impossibility, and a stay pending appeal should be granted because the Attorney General is likely to succeed on the merits of his appeal.

The ARP Act does not require a school to institute indoor masking, it merely requires a school district to report to the state how the district used or considered using funds supplied to the state by the Act. The ARP Act does not provide federal funding directly to school districts, but channels those funds to the states, and charges the states with oversight of the use of funds by way of reporting requirements. Respectfully, the Court's analysis ignores the State's roll under the Act, while enlarging

[22] *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1232 33 (10th Cir. 2009); *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69 70 (1st Cir. 2010) (defendant could not rely on Puerto Rico law to refuse accommodation required under Fair Housing Act for person with disability).

[23] Once again, an issue of standing arises. Each of the cases relied upon by the Court involved a plaintiff directly regulated by the state law challenging that the law was preempted by federal law, not a third party raising a preemption claim on behalf of an independent third party.

both federal and local authority in ways unsupported by the plain language of the Act rendering the court's preemption decision unsupported by—and contrary to—binding legal precedent.

B. <u>The Injunction is Vague and Overbroad.</u>

An injunction must be specific in its terms and describe in reasonable detail the act or acts to be restrained without reference to the complaint or any other documents.[24] The scope of relief must also be limited to the legal violation found, and "an injunction is vague if it does not comply with the specificity requirements in Rule 65(d), and is overbroad if it is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue."[25] Defendants' appeal challenges the substance and breadth of this Court's Permanent Injunction, which presents an independent bases upon which Defendants have substantial arguments raising serious legal questions that are likely to prevail on appeal.

The injunction is overbroad because it exceeds the violations that the Court found and because it is not limited to the least intrusive means of remedying those violations. The Supreme Court has explained that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[26] This principle is particularly relevant here, since dating back to at least 1905 the Supreme Court has recognized that the U.S. Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect."[27] The latitude afforded to a state "must be especially broad" when the challenged rules or regulations touch on "areas fraught with medical and scientific uncertainties."[28] "[T]he States must be equally free to engage in any activity. . . . no matter how unorthodox or unnecessary anyone

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[24] Fed. R. Civ. P. 65(d); *United States Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n. 20 (5th Cir. 1975).
[25] *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam) (citation omitted) (cleaned up).
[26] *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994) (emphasis added).
[27] *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).
[28] *Marshall v. United States*, 414 U.S. 417, 427 (1974) (addressing deference to Congress's Narcotic Addiction Rehabilitation Act).

else—including the judiciary—deems state involvement to be."[29] In making decisions involving medical and scientific uncertainties, officials "should not be subject to second-guessing by an unelected federal judiciary."[30]

Respectfully, this Court's Permanent Injunction failed to afford the State the deference it is entitled to in the arena of public health and safety. It is also not narrowly tailored to this Court's findings. This Court entered a statewide injunction based on a handful of Plaintiffs in a small subset of school districts—many of whom are attending schools with mask mandates in place in spite of GA-38. The evidence shows that each school district's COVID-19 positivity rate is below five percent (5%), that there is no meaningful difference in COVID-19 positivity rate between school districts with and without mask mandates, and that COVID-19 infection rates have been rapidly dropping. This Court's Permanent Injunction should have been limited solely to those school districts attended by Plaintiffs.

Additionally, this Court's primary holding was that school districts must be permitted to consider a mask mandate as a reasonable accommodation under the ADA and as a COVID-19 safety measure under the ARP Act. This could be accomplished by a more narrowly tailored Permanent Injunction: for example, that GA-38 cannot be enforced against a school district that implements a mask mandate as a reasonable accommodation for a student under the ADA or as a safety measure implemented pursuant to ARP Act funding.

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[29] *Garcia v San Antonio Metro. Trans. Auth.,* 469 U.S. 528, 546 (1985).

[30] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (cleaned up); see also *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring) (while not abdicating their roles, federal courts nevertheless "must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic")

C. Defendant Will Be Irreparably Injured Absent a Stay.

Enjoining State officials from carrying out validly enacted laws imposes irreparable harm.[31] Here, the injunction inflicts an "institutional injury" from the "inversion of … federalism principles."[32] Federalism principles recognize that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[33] The constitutional principle of sovereignty does not exist solely for the sake of protecting state officials. Instead, the "ultimate purpose" of the structural provisions of the Constitution and of guarding state sovereignty, "is to protect the liberty and security of the governed."[34] The State has an interest in enforcing its laws, and the status quo should be maintained throughout the pendency of an appeal.

D. The Balance of Equities Weighs In Favor of Granting a Stay.

A stay merely maintains the status quo and will not harm Plaintiffs. During trial Plaintiffs identified their harm for standing purposes as their schools not having mask mandates in place. This Court's Permanent Injunction does not directly provide any Plaintiff with a mask mandate in any way, shape, or form. Plaintiffs' schools are not required to do or not do anything—they cannot be, since they are not parties to this lawsuit.[35] A temporary stay of the Permanent Injunction will not irreparably harm Plaintiffs, because Plaintiffs are not entitled to a mask mandate at their schools regardless of the Permanent Injunction. This is compounded by Plaintiff only alleging a speculative threat of harm in the absence of an injunction. Plaintiffs are all eligible to receive a COVID-19 vaccine, and the infection rates throughout the State of Texas have continued to plummet since the trial in this matter was held.[36]

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[31] *Maryland v. King*, 567 U.S. at 1303; *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").
[32] *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016).
[33] *Maryland*, 567 U.S. at 1303 (alterations omitted) (Roberts, C.J. in chambers).
[34] *Metro. Wash. Air-ports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).
[35] CITE
[36] At least one Plaintiff has verified under oath that he/she will not attend school in person if another student in their class contracts COVID-19, regardless of whether a mask mandate it in place.

Moreover, the status quo is that the majority of Plaintiffs' school districts have mask mandates in place. Any Plaintiff choosing not to access in-person learning while the Permanent Injunction is stayed would be a self-inflicted injury, and the Fifth Circuit has recognized, "a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."[37]

While there is no appreciable chance that any Plaintiff will be harmed if the Permanent Injunction is stayed pending appeal, the irreparable harm the Permanent Injunction inflicts on the public interest and the state tilt the balance of harms sharply in favor of a stay. When the State seeks a stay pending appeal, "its interest and harm merge with that of the public."[38]

CONCLUSION AND RELIEF REQUESTED

The nation has not grappled with responding to pandemic conditions since 1905, and there is a dearth of caselaw to guide this Court's decision on the difficult issues of first impression raised in this lawsuit. The U.S. Constitution primarily entrusts the states with matters of public health, including how to respond to pandemic conditions fraught with medical and scientific uncertainty. The Attorney General has raised substantive and meritorious issues with this Court's Permanent Injunction that encompass serious legal questions. The Fifth Circuit should be provided an opportunity to review the merits of this Court's decision before Texas's law is permanently enjoined and the state—and corresponding public interest—irreparably harmed. For the foregoing reasons, Defendants respectfully request that the Court grant this motion by 5:00 PM, November 12, 2021.

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[37] *State v Biden*, 10 F.4th 538, 558 (5th Cir. 2021) (citing 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021); *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

[38] *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citation omitted).

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that on November 10, 2021 I conferred with counsel for Plaintiffs about the relief sought in this motion, and Plaintiffs are opposed to the relief sought.

/s/ Ryan G. Kercher
RYAN G. KERCHER

CERTIFICATE OF SERVICE

I certify that on November 11, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Ryan G. Kercher
RYAN G. KERCHER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T. by and through her parents and and next friends, et al *Plaintiffs* v. Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency; the Texas Education Agency; and Attorney General Ken Paxton, in is official capacity as Attorney General of Texas, *Defendants*	§ § § § § § § § § § § § § § §	Civil Action No. 1:21-cv-00717-LY

ORDER GRANTING
DEFENDANT'S MOTION FOR STAY PENDING APPEAL

On this day, the Court considered the Motion for Stay Pending Appeal filed by Defendant Attorney General Ken Paxton, in his official capacity as Attorney General of Texas. After consideration of the motion, the Court finds that the Motion has merit and should be, and is,

GRANTED.

SO ORDERED.

SIGNED this _____ day of _____, 2021.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE