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

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CERTIFICATE OF INTERESTED PERSONS

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
H.M., by and through her parents and next friends
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STATEMENT REGARDING ORAL ARGUMENT

The Court has calendared this case for oral argument on February 2, 2022. Appellees agree that oral argument will help the parties clarify the issues and facts necessary for the Court to decide this appeal.

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INTRODUCTION

This Court should decline the Attorney General's invitation to retry this case on appeal. After conducting a full trial on the merits, the district court found that the Attorney General's enforcement of GA-38 against public schools violates two federal statutes and is preempted by three. The evidence presented at trial—uncontroverted by the Attorney General—showed that the children who brought this case suffer from disabilities that place them at increased risk of contracting COVID-19 and experiencing severe symptoms. The evidence also showed—again, without dispute—that because of that risk, these children cannot safely attend school in person at this point in the pandemic if they will be in proximity to students or staff who are unmasked. The Attorney General's enforcement of GA-38 prevents school districts from addressing that issue and is causing or will imminently cause these children injury—the deprivation of their ability to access in-person schooling on an equal basis with their classmates—in violation of federal law. There is no basis for disturbing the judgment.

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, individually or as a group, under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. It also prevents local school officials from exercising their discretion to respond to the needs of their communities under the American Rescue Plan Act of 2021 ("ARP Act") by adopting mask requirements as part of a safe plan for returning to schools.

The Attorney General's brief on appeal does not identify a single factual finding by the district court that is clearly erroneous. Indeed, many of the district court's findings are based on evidence that the Attorney General never controverted at trial.

As for the Attorney General's legal arguments, they depend largely on a persistent mischaracterization of the children's claims and injuries. For example, the injury at issue is *not* the children's increased risk of contracting COVID-19; it is the proven, concrete, and non-speculative deprivation of access to in-person schooling on an equal basis with their non-disabled peers. In addition, the children's claims do *not* arise under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, so the Attorney General cannot avoid

his violations of federal law by arguing that the children failed to comply with the IDEA's exhaustion requirements. Similarly, the children did *not* assert any disparate impact theory under the ADA. And they do *not* contend that the Attorney General could or should order mask mandates himself, nor is that necessary; the children 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 *had* mask requirements at the time of trial but were in imminent jeopardy of losing them because of lawsuits or threats by the Attorney General. When this Court examines the claims these children are actually asserting—rather than the ones that the Attorney General erects as a strawman—it will see that the Attorney General has not established error in *any* of the district court's five independent grounds for relief, much less all of them.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under *Armstrong v. Exceptional Childcare Center, Inc.*, 575 U.S. 320 (2015), *Verizon Bd., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 643 (2002), and *Ex Parte Young*, 209 U.S.

123 (1908),[1] as well as under 28 U.S.C. § 1331, as this action arises under three federal statutes that do not expressly or impliedly indicate that Congress intended to preclude such jurisdiction: Title II of the ADA, 42 U.S.C. §§ 12131–34; Section 504 of the Rehabilitation Act, 29 U.S.C § 794; and the ARP Act, Pub. L. No. 117-2, § 2001. After a bench trial, the district court entered final judgment, so this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Plaintiffs disagree with the Attorney General's assertion that they lack standing to sue and address that issue in detail below.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that the children had standing to sue the Attorney General because their injuries—denial of access to the classroom on an equal basis as their nondisabled peers—may be redressed by an injunction against the Attorney General's enforcement of GA-38 against public schools.

[1] In the district court, the Attorney General challenged the application of *Ex Parte Young* in this case. *See* ROA.452-56, 696-700. The court resolved that issue against the Attorney General based on his actual enforcement of GA-38. *See* ROA.2374-76; Opening Br. 6. He does not challenge that ruling on appeal.

2. Whether the district court erred in finding for the children on their statutory claims, holding that (a) the children were not required to exhaust any remedies under the IDEA before suing the Attorney General under the ADA and the Rehabilitation Act and (b) GA-38 violates the ADA and the Rehabilitation Act, as it denies children with disabilities access to the classroom on an equal basis as their nondisabled peers.

3. Whether the district court erred in concluding that GA-38 is preempted by the ADA, the Rehabilitation Act, and the ARP Act because it prevents public schools from fulfilling their obligations to provide reasonable accommodations and from exercising their discretion to spend federal funds to achieve a safe return to in-person instruction.

4. Whether the district court abused its discretion in terms of the scope of the injunction.

STATEMENT OF THE CASE

Appellees E.T., J.R., S.P., M.P., E.S., H.M., and A.M. are children with disabilities attending schools in Round Rock Independent School District ("ISD"), San Antonio ISD, Richardson ISD, Fort Bend ISD, Killeen ISD, Leander ISD, and Edgewood ISD, respectively. ROA.61-

72, 2879, 2882-89. The children's disabilities include Down Syndrome, asthma, hypogammaglobulinemia, CD 19 deficiency, severe B-cell lymphocyte deficiency, growth hormone deficiency, attention deficit hyperactivity disorder, bronchiectasis, spina bifida, epilepsy, heart defects, and cerebral palsy. ROA.61-72, 269-71, 2879, 2882-89. Their medical treaters have advised that because of their disabilities—and in view of the status of the COVID-19 pandemic—they cannot attend school safely if that attendance means being in proximity with students or staff members who are unmasked. ROA.2380, 2391, 3980, 3982, 3984, 3986, 3989, 3991, 3994, 3998, 4001, 4003,

At the time of trial, the children's school districts had either adopted masking requirements—facing the threat of challenge by the Attorney General as a result—or had dropped any masking requirements because of the Attorney General's enforcement activity, though expressing an intention to consider imposing such a requirement right away, if the Attorney General's enforcement were enjoined. ROA.2879, 2882-89.

The children sued the Attorney General and others to enjoin them from enforcing GA-38 against public schools.[2] ROA.43, 262, 273, 305-06, 314. 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 ADA and the Rehabilitation Act. ROA.44, 2388. It also prevents locally elected school officials from exercising their discretion to respond to the needs of their communities under the ARP Act by adopting mask requirements as part of a plan for safe return to in-person instruction. ROA.45, 2385.

After denying a preliminary injunction and temporary restraining order, the district court held a full bench trial on the merits of the children's claims. ROA.2629-2819. At trial, the evidence introduced by the children included, *inter alia*:

- five data sets and graphics from the Texas Health and Human Services Commission;
- expert declarations from five medical professionals and a special-education teacher and consultant;
- declarations from two local school district officials;

[2] See ROA.2878-89 for facts stipulated by the parties.

- eleven declarations by the parents and next friends of the children;
- the school districts' COVID-19 prevention policies and statements;
- letters from the Office of the Attorney General to school districts, accusing them of violating GA-38;
- pleadings and orders in lawsuits filed by the Attorney General against school districts alleged to be violating GA-38;
- tweets from Attorney General Paxton regarding GA-38 lawsuits;
- data sets and reports from the Texas Health and Human Services Commission, Children's Health System, the Centers for Disease Control and Prevention ("CDC"), the Children's Hospital Association, and the American Academy of Pediatrics;
- health guidance from the CDC and the American Academy of Pediatrics; and
- fifteen studies on the effectiveness of masks against COVID-19 and the spread of COVID-19 in school settings.

ROA.2820-29.

After weighing all this evidence and considering the parties' arguments at trial, the district court issued a 29-page opinion detailing its findings of fact and conclusions of law. ROA.2364-92. The court found that enforcement of GA-38 by the Attorney General[3] denies the

[3] The children also sued Mike Morath in his official capacity as the Commissioner of the Texas Education Agency, as well as the Texas Education Agency itself. ROA.2364. The court dismissed Morath and

children "equal access to the benefits that in-person learning provides to other students." ROA.2388. Further, the court found that "GA-38 conflicts with federal law to the extent that it interferes with local school districts' ability to satisfy their obligations under the ADA and Section 504 and their implementing regulations." ROA.2381-82. On that basis, the court found that the Attorney General's enforcement of GA-38 violates and is preempted by the ADA and the Rehabilitation Act. ROA.2381-82, 2385, 2391. The court also found preemption by the ARP Act, reasoning that "[i]t cannot be more clear that Congress intends that the local school district receiving ARP Act funds be the ultimate decider of the requirements of the safe return to in-person instruction of students within that district"—and that the Attorney General's enforcement of GA-38 prevents the school districts from doing so. ROA.2385. Accordingly, the court enjoined the Attorney General from enforcing "Paragraph 4 of Executive Order GA-38 insofar as Paragraph 4 applies to school districts." ROA.2394.

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the agency because they, unlike the Attorney General, do not enforce GA-38. ROA.2371-76. That dismissal is not at issue on appeal.

The Attorney General timely appealed and moved in the district court for a stay pending appeal. ROA.2396, 2398. The court denied the motion. ROA.2430-34. The Attorney General then filed an emergency motion for a stay pending appeal in this Court. A motions panel of the Court granted the emergency motion on the limited briefing and record before it. ROA.2445-59. The Court then expedited this appeal, adopting the briefing schedule agreed by the parties and setting argument for February 2.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's judgment, rendered following a full bench trial on the merits. The children have standing to sue the Attorney General. Their injury is concrete, particularized, and actual because enforcement of GA-38 against schools effectively denies them the same access to public school that their nondisabled classmates receive. The Attorney General conceded at trial that GA-38 eliminates one of the tools available to schools in facilitating equal access for students with disabilities. Enjoining enforcement of GA-38 against schools clears the way for local decisionmakers to decide how best to accommodate students with disabilities (individually or as a group), as

well as to make the case-by-case inquiry to which the children are entitled under the ADA and the Rehabilitation Act.

This case arises under the ADA and the Rehabilitation Act, not the IDEA, so there was no need to satisfy the IDEA's exhaustion requirement. The gravamen of the children's claims is simply access to the classroom, not the appropriateness of their individual educational plans. Weighing the evidence at trial, the district court correctly found that GA-38 unlawfully discriminates against the children by categorically banning mask requirements on a state-wide level. GA-38 provides no exception for masking as an accommodation. It allows no assessment of the circumstances of these students or the context of their particular school. Instead, it assumes that mask requirements are *never* reasonable accommodations—no matter the student, the community, and the current state of the pandemic. For these reasons, GA-38 violates the ADA and Rehabilitation Act.

GA-38 is also preempted by both of those statutes and the ARP Act. GA-38 stands as an obstacle to Congress's clear statutory preference for case-by-case accommodations and local control over the safe return to in-person instruction. As the district court rightly found,

GA-38 prevents schools from complying with the ADA and Rehabilitation Act, and it hamstrings local school districts' ability to craft health and safety plans.

The district court's injunction is appropriately tailored to GA-38's unlawfulness. But if the district court did abuse its discretion in enjoining enforcement of GA-38 against schools, this Court should merely remand with instruction to enter a narrower injunction. The court's core judgment—that GA-38 unlawfully discriminates against the children and is preempted by federal law—must stand.

STANDARD OF REVIEW

In an appeal from 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 court may "upset the district court's findings of fact only if [it is] 'left with the definite and firm conviction that a mistake has been committed.'" *Luwisch v. Am. Mar. Corp.*, 956 F.3d 320, 326 (5th Cir. 2020) (quoting *Barto v. Shore Constr., LLC*, 801 F.3d 465, 471 (5th Cir. 2015)). "Under clear-error review, '[i]f the district court's view

of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance.'" *Texas v. Biden*, No. 21-10806, 2021 WL 5882670, at *46 (5th Cir. Dec. 21, 2021) (quoting *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021)), *cert. petition filed*, No. 21-954 (Dec. 29, 2021); *accord Great Am. Life Ins. Co. v. Tanner*, 5 F.4th 601, 608 (5th Cir. 2021) (stating that the court "employ[s] a strong presumption that the [district] court's finding must be sustained even though this court might have weighed the evidence differently" (quoting *Deloach Marine Servs. L.L.C. v. Marquette Transp. Co., L.L.C.*, 974 F.3d 601, 607 (5th Cir. 2020))). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

This Court reviews a "grant of a permanent injunction for abuse of discretion." *State v. Ysleta Del Sur Pueblo*, 955 F.3d 408, 413 (5th Cir. 2020). "A district court abuses its discretion if it (1) 'relies on clearly erroneous factual findings' or 'erroneous conclusions of law' when

deciding to grant the injunction, or (2) 'misapplies the factual or legal conclusions when fashioning its injunctive relief.'" *Id.* (first quoting *Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995)). "'Under this standard, the district court's ruling is entitled to deference.'" *Id.* (quoting *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015)). This deference applies to both the decision whether to issue an injunction and the scope of the injunction. *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998) (citation omitted).

ARGUMENT

I. The children have standing because their injury—a deprivation of equal access to the classroom—is redressable by enjoining enforcement of GA-38.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 733 (2008)). "The party invoking federal jurisdiction bears the burden of establishing these elements . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal citations omitted). The

standing requirement may be satisfied by presenting evidence at a bench trial, and factual findings from that evidence are reviewed for clear error. *See Texas v. Biden*, 2021 WL 5882670, at *21 (stating that "clear-error review" "applies to facts that underlie jurisdictional issues like standing").

Critically, the Attorney General does *not* argue that the district court clearly erred in its factual determinations. Indeed no variation of the term "clear error" appears in the argument of his opening brief. *See* Opening Br. 10–48. Accordingly, the Attorney General has forfeited any challenge to the district court's findings of fact, and this Court should take the facts as the district court found them. *United States v. Reed*, 908 F.3d 102, 123 n.81 (5th Cir. 2018); *see also Wise v. Wilkie*, 955 F.3d 430, 438 (5th Cir. 2020) ("[E]ven if [the appellant] didn't forfeit the argument, she failed to prove that the district court clearly erred in this factual finding."). Those facts add up to a concrete, particularized, and actual injury, fairly traceable to the Attorney General's enforcement of GA-38, and redressable by injunction.

A. The children are injured because the enforcement of GA-38 deprives them of equal access to in-person school.

The district court found that the children's injury—denial of access to the classroom on an equal basis as their non-disabled peers—is concrete, particularized, and actual because GA-38 prevents the use of mask requirements as an accommodation when they are reasonable under the circumstances. ROA.2389, 2391. Where "[t]hat finding is 'plausible in light of the record,'" this Court must "not disturb it on appeal." *Texas v. Biden*, 2021 WL 5882670, at *23 (quoting *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021)).

The children have a legally protected interest in access to public education on an equal basis as their peers without disabilities. Tex. Const. art. VII, § 1 (entrusting the Texas Legislature with the duty to establish a public school system); *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"). Under both the ADA and the Rehabilitation Act, public services must be just as available to persons with disabilities as they are to persons without. 28 C.F.R. § 35.130(b)(1)(ii)–(iii). Exclusion from

public school by reason of a disability violates both statutes. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 291 (5th Cir. 2005).

The ADA demands an individualized, case-by-case approach to accommodations because the reasonableness of an accommodation in a particular instance is necessarily "fact specific." *Valentine v. Collier*, 978 F.3d 154, 165 (5th Cir. 2020); *accord Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999); *McCoy v. Tex. Dep't of Crim. Just.*, No. C.A.C 05-370, 2006 WL 2331055, at *9 (S.D. Tex. Aug. 9, 2006) (collecting circuit and district-court cases). Banning a type of accommodation across the board is the opposite of case-by-case decisionmaking. *Cf. Texas v. Biden*, No. 21-10806 (5th Cir. Dec. 13, 2021) ("The statute allows only case-by-case parole. Deciding to parole aliens *en masse* is the opposite of *case-by-case* decisionmaking.").

Denial of case-by-case decisionmaking is the core of the children's injury. Denying the children individualized assessment of their needs for accommodation denies them access to the classroom on an equal basis as their nondisabled peers. 28 C.F.R. § 35.130(b)(1)(ii)–(iii); *Pace*, 403 F.3d at 291 (5th Cir. 2005). For this reason, the children's injury is concrete, particularized, and actual.

The Attorney General erroneously assumes the children can establish concrete injury only if they face an "either/or" decision to be excluded from school or to attend at greater risk to their health and safety. Opening Br. 11. This assumption suffers from two fatal errors.

First, exclusion by reason of a disability does not require that access to school becomes a physical impossibility. Rather, it means that a person with a disability faces barriers not faced by a person without that disability. 28 C.F.R. § 35.130(b)(1)(ii). The children in this case are affected by COVID-19 differently than students without disabilities. ROA.2391. Their vulnerabilities require them to take greater precautions and subject them to greater risk than their peers. ROA.2391 ("Plaintiffs are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers."); ROA.2367, 2633-37, 2894-99, 2908-09, 3020-21. Even if this does not amount to an "either/or" choice, it imposes a barrier that makes the children's access to the classroom "not equal to that afforded" to their classmates. 28 C.F.R. § 351.30(b)(1)(ii). This is why the children's injury is not self-inflicted;

the ADA guarantees *equal* access, not just *possible* access. *See* 28 C.F.R. § 35.130(b)(1)(ii)–(iii).

Second, the Attorney General draws faulty conclusions from facts not in the record. It is true—and very encouraging—that COVID-19 vaccines are now more widely available. But the Attorney General is wrong to suggest that vaccines negate the reasonableness of mask requirements as an accommodation in any given situation. *See* ROA.2639. Such a contention defies the case-by-case analysis required by the ADA and Rehabilitation Act and illustrates the unlawfulness of GA-38. *Cf. McGregor v. Louisiana State Univ. Bd. of Sup'rs*, 3 F.3d 850, 862 (5th Cir. 1993) (the duty to accommodate "is shaped on a case-by-case basis").

The Attorney General's position glosses over the unique needs of each of the children. For example, the Attorney General contends that "[e]ach of the seven Plaintiffs and their classmates can take the vaccine." Opening Br. 12. But that is not necessarily the case. The available evidence does not establish one way or another whether the children's disabilities disqualify them from taking the vaccine notwithstanding its general availability for their age group. At the time

of trial, only one of the children—E.T.—had received a dose of the COVID-19 vaccine, and it was stipulated "that it may not be effective due to her immune deficiency." ROA.2635. Whether the other six children can take the vaccine was not litigated at trial, nor was the question whether vaccination rates at the children's schools foreclose the need for mask requirements in each case, particularly as new, more contagious, and potentially vaccine-resistant variants of the virus emerge. It is beyond the role of this Court to find facts on appeal, and it would be particularly inappropriate for this Court to decide that vaccines always and everywhere displace the need for masks without evidence on the point. *Cf. Texas v. Biden*, 2021 WL 5882670, at *23 ("This is effectively a request that we re-weigh the evidence that was before the district court, and we will not do that. The task of evaluating competing statistics is precisely the kind of task a district court is best situated to undertake.") (internal citation omitted). Both deference to the trial court and the ADA's individualized approach to accommodations forbid such a categorical finding.

Reviewing the evidence presented at trial, the district court properly found that prohibiting the use of mask requirements as a

reasonable accommodation deprives these children of equal access to the classroom. ROA.2391, 2899–2903, 2915–16, 2975–77, 3020–21, 3038. This conclusion, which is necessarily fact-intensive, is supported by the record, *e.g.*, ROA.2391, and the Attorney General does not argue to the contrary on appeal.

Instead, the Attorney General attempts to avoid that conclusion by invoking a red herring: *Shrimpers & Fishermen of RGV v. Texas Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020). Opening Br. 13. *Shrimpers* rejected "'probabilistic standing' based on a non-particularized 'increased risk'—that is, an increased risk that equally affects the general public." 968 F.3d at 424. But enforcement of GA-38 does not equally affect the general public. It particularly affects E.T., J.R., S.P., M.P., E.S., H.M., and A.M. by banning a reasonable accommodation at the outset. Indeed, the underlying rationale of the ADA and the Rehabilitation Act is that certain conditions affect persons with disabilities differently than they affect the general public. And when a particular person is affected in a way that denies them access to a public service because of their disability, that person is entitled to a reasonable accommodation under Title II of the ADA.

The Attorney General asks this Court to stretch *Shrimpers* beyond "increased risk that equally affects the general public" to encompass increased risks that uniquely affect an individual with a disability. 968 F.3d at 424. To do so would gut the protections of the ADA and the Rehabilitation Act. When the reasonableness of an accommodation is at issue, the particular level of risk to the individual with a disability is almost always at issue as well. Extending *Shrimpers* in this manner would foreclose the lion's share of lawsuits under the ADA and the Rehabilitation Act, a result plainly inconsistent with the rights and remedies guaranteed by those statutes.[4]

B. There is no traceability problem here, and the Attorney General forfeited that issue in any event.

The Attorney General does not challenge the traceability element of standing on appeal, and so he has forfeited the issue. *See* Opening Br. 10–21; *cf. United States v. Diaz*, 636 F.3d 592, 604 n.1 (5th Cir. 2011) ("[W]e generally do not address issues not raised in the initial

[4] *See Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) ("It is established that Title II and § 504 are enforceable through an implied private right of action."); *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 573 (5th Cir. 2018) (noting that Title II of the ADA and § 504 of the Rehabilitation Act "have identical remedial schemes").

appellate briefs." (quoting *Untied States v. Lewis*, 412 F.3d 614, 616 (5th Cir. 2005)). Nevertheless, it is worth briefly addressing a statement made by the motions panel in this case. The motions panel asserted that the children's injury likely was not traceable to the enforcement of GA-38 because "the binary choice envisioned by the district court—either stay home or catch COVID-19—is a false one." ROA.2450-51.

The district court envisioned no such binary choice. Rather, it found that "because GA-38 precludes mask requirements in schools, [the children] are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers." ROA.2391. Thus the district court recognized an intermediate possibility overlooked by the motions panel—attend school at a greater risk.

Further, the motions panel suggested that alternative accommodations, such as "distancing, voluntary masking, class spacing, and vaccinations," undermine the need for mask requirements. ROA.2450-51. But even if "this court might have weighed the evidence differently" than the district court, it should not substitute its own

factual findings absent clear error. *Great Am. Life Ins.*, 5 F.4th at 608 (quoting *Deloach Marine Servs.*, 974 F.3d at 607). Moreover, the Court should not decide whether vaccination accommodations are an acceptable alternative to masking accommodations, as the motions panel suggests, because doing so would implicate the lawfulness of a separate executive order banning local vaccination requirements, GA-40.[5] That order is not at issue in this case.

Because the Attorney General forfeited the issue of traceability and because the motions panel's reasoning went beyond the proper scope of the Court's review of this case, the Court should decline to address traceability.

C. An injunction would redress the children's injury by removing an impediment to the use of mask requirements as a reasonable accommodation.

To attack redressability, the Attorney General faults the children for not suing their schools, and he faults the district court for not itself "'requir[ing] the schools' to impose a mask mandate." Opening Br. 20 (quoting ROA.2452). But enjoining the Attorney General does in fact

[5] Exec. Order GA-40, available at https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf.

redress the children's injury by clearing the way for the schools to consider accommodations on an individualized basis and develop plans for safe return to in-person instruction. This suffices to establish redressability. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (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 children's dispute lies with the Attorney General, not with their schools. At the time of trial, each of the children's school districts either already had a mask requirement and was facing a lawsuit by the Attorney General, or would immediately consider implementing a mask requirement if the enforcement of GA-38 were enjoined. ROA.2369-70. Indeed, the Attorney General himself cites evidence supporting the district court's finding and does not contend that the finding was clear error. Opening Br. 16–19 (citing record). Thus, the Attorney General's own brief supports the court's finding that the schools would "likely react in predictable ways" absent enforcement of GA-38. Opening Br. 17 (quoting *California v. Texas*, 141 S. Ct. 2104, 2117 (2021)).

Because the children seek individualized accommodations, and the schools were open to masks as an accommodation, the interests of the schools and the children were aligned. The exclusion of the school districts from this litigation, therefore, is anything but "puzzling." Opening Br. 17. There was no dispute between these children and their school districts.

Developments following the bench trial do not change this fact. To begin, the Court should decline to receive the Attorney General's new evidence regarding standing. Opening Br. 18–20; *see MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 315 (5th Cir. 2019) ("Since at least 1878, the Supreme Court has prohibited us from receiving jurisdictional evidence on appeal."). The Court should be particularly cautious because the Attorney General twice mischaracterizes the district court's permanent injunction as a "preliminary injunction." Opening Br. 19. *But see* ROA.2393-94; *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981) ("This reasoning fails, however, because it improperly equates 'likelihood of success' with 'success,' and what is more important, because it ignores the significant procedural differences between preliminary and permanent

injunctions."). To be clear, this is an appeal from a permanent injunction following an expedited bench trial on the merits, not an interlocutory appeal of a preliminary injunction.

Nevertheless, even if this Court were to receive the Attorney General's new evidence, that evidence does not support the Attorney General's position. The children's ADA, Rehabilitation Act, and preemption claims hinge on the assertion that GA-38 prevents school districts from considering reasonable accommodations and from exercising their discretion to implement plans for the safe return to in-person instruction. PL 117-2, § 2001(i)(1); 28 C.F.R. § 35.130(b)(7)(i); ROA.2382, 2385, 2389. The Attorney General's new evidence shows that, absent enforcement of GA-38, school districts are responding to the changing circumstances of the COVID-19 pandemic to decide whether mask requirements are appropriate under current circumstances. That is exactly what the children seek in this case: removing the Attorney General's interference with decisionmaking by their own school districts based on the current circumstances of these children and their communities. *See* ROA.2382, 2385, 2389.

II. The district court correctly concluded that GA-38 violates the ADA and the Rehabilitation Act.

A. These claims do not arise under the IDEA, so IDEA exhaustion was not required.

The Attorney General is wrong in asserting that the children were required to exhaust their claims under the IDEA. Opening Br. 22–24. This is not an IDEA case. The exhaustion requirement "hinges on whether a lawsuit seeks relief for a denial of a free appropriate public education [FAPE]." *Fry v. Napoleon Comm. Schs.*, 137 S. Ct. 743, 754 (2017). FAPE is the core guarantee of the IDEA by which the adequacy of individualized special education services is measured for every qualified child with a disability. The Attorney General offers no authority for his assertion that exhaustion is required because the "student experience . . . differs from other contexts and requires unique mitigation strategies." Opening Br. 23–24. The law does not permit discrimination against children with disabilities simply because they are at school. To the contrary, the Supreme Court has made clear that children with disabilities are not required to exhaust under the IDEA to seek relief from such discrimination. *Fry*, 137 S. Ct. at 754.

The Attorney General argues that because the children's claims are "inextricably, and explicitly, intertwined with their education," they

necessarily assert a deprivation of FAPE. Opening Br. 23. Not so. If the Attorney General continues to enforce GA-38, these children could not walk into a school in a manner that is equal to their non-disabled peers. Their plight is no different from the situation facing a student who must rely on a wheelchair and whose school lacks any wheelchair ramp. In both cases, the students' medical need is not part of the educational curriculum, even though both situations also involve educational consequences.[6] *Fry*, 137 S. Ct. at 756–57. Moreover, the Court in *Fry* warned against treating IDEA's exhaustion requirement "as a quasi-preemption provision, requiring administrative exhaustion

[6] *See also Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24 (1st Cir. 2019) (refusal to allow use of service dog "involves the denial of non-discriminatory access to a public institution, irrespective of school district's FAPE obligation"); Smith *v. Orcutt Union Sch. Dist.*, No. 2:20-CV-00-87, 2021 WL 527124 at *3–5 (C.D. Cal. Feb. 10, 2021) (district's refusal to permit student's therapist to provide therapy in school did not concern the adequacy of his education but rather his access to school); *A.F. v. Portland Pub. Sch. Dist.*, 3:19-CV-01827, 2020 WL 1693674, at *3–*4 (D. Or. Apr. 7, 2020) (gravamen of claim where district denied student receiving medically necessary therapy at school involved denial of access to a public facility and not denial of access to special education); *A.K.B. v. Indep. Sch. Dist. 194*, No. 19-CV-2421, 2020 WL 1470971, at *6 (D. Minn. Mar. 26, 2020) (exhaustion not required when claim concerns district's failure to provide reasonable accommodations for student's severe asthma).

for any case that falls within the general field of educating disabled students." 137 S. Ct. at 752 n.3.

Fry's two-part hypothetical confirms this conclusion: First, "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school;" and second, "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* at 756 (emphasis added). Because the answer to both is yes, the children's claims do not relate to a FAPE, and IDEA exhaustion is not required.

It is undisputed that GA-38 applies to both educational and non-educational settings. The children experience the same access issues in other public facilities without mask policies due to their heightened health risk. Adults with disabilities at higher risk of severe COVID are likewise jeopardized by bans on mask policies in schools and could also demand that the school require masking. COVID-19 does not infect only students. It is not spread only in schools. Schools are merely the location of the discrimination sustained by these children. *See id.*

This analysis is congruent with the litany of federal court decisions that have addressed mask mandate bans in schools, including

the lower court in the instant case. The Eastern District of Tennessee, for example, rejected the exact argument advanced by the Attorney General because "[t]he crux of Plaintiffs' allegations is safe access to public, brick-and-mortar government buildings and not the denial of a FAPE."[7] *S.B. v. Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 WL 4755619, at *7 (E.D. Tenn. Oct 12, 2021) (explaining that the essence of plaintiffs' request for a school mask mandate involved "equality of access to public facilities and not the adequacy of special education") (quoting *Fry*, 137 S. Ct. at 756). Similarly, the Middle District of Tennessee held it "need not spill significant ink in addressing" IDEA exhaustion because the harm to the plaintiffs clearly stemmed from "education harm" caused by an order that allowed parents to opt their children out of mask mandates, and not "the denial of FAPE." *R.K. v. Lee*, No. 3:21-CV-00725, 2021 WL 4942871, at *16 (M.D. Tenn. Oct. 22, 2021).

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[7] *Accord ARC of Iowa v. Reynolds*, No. 4:21-CV-00264, 2021 WL 4737902, at *6 (S.D. Iowa Oct. 8, 2021); *Douglas Cnty. Sch. Dist. v. Douglas Cnty. Health Dep't*, No. 21-CV-02818, 2021 WL 5104674, at *4 (D. Colo. Oct 26, 2021) (holding that county public health order loosening mask and quarantine requirements for public school students "denies disabled children in Douglas County 'nondiscriminatory access to public institutions'—in this case, to Douglas County public schools."); *see also Disability Rights S.C. v. McMaster*, No. 3:21-02728, 2021 WL 4444841, at *11 (D.S.C. Sept. 28, 2021).

The one outlier decision that reached a different conclusion on exhaustion did so because the plaintiffs themselves raised FAPE claims and expressly couched their claims in IDEA-specific terms. *Hayes v. DeSantis*, No. 21-CV-22863, 2021 WL 4236698, at *7–*8 (S.D. Fla. Sept. 15, 2021). It is undisputed that there are no such allegations here.

Importantly, no other court, including the *Hayes* court, has concluded that "the deprivation of an in-person state-sponsored education" falls under IDEA's exhaustion requirement. In fact, in reviewing other decisions enjoining bans on mask mandates on disability discrimination grounds, the *Hayes* court did not disagree with those courts' rationales but instead noted that those pleadings, like the instant case, did not reference "FAPE." *Id.* at *8 n.3. The court also underscored that the Florida order was limited to children, unlike the other mask mandate bans (and unlike GA-38), which contained no such distinction, thus shifting the court's calculus under *Fry*. *Id.* at *8 n.4.

The Attorney General mistakenly treats *Fry*'s two-part hypothetical inquiry as dispositive of whether a claim requires exhaustion when it is not. *See, e.g., Fry*, 137 S. Ct. at 753 (referring to the hypothetical inquiry as only "[o]ne clue"); *Doe v. Dallas Indep. Sch.*

Dist., 941 F.3d 224, 229 (5th Cir. 2019) ("[T]he Court did not limit analysis of this question to answering those two illustrative hypotheticals."). In fact, *Fry* notes another "clue" to determine exhaustion need not apply: the lack of "prior pursuit of the IDEA's administrative remedies." *Fry*, S. Ct. at 757. It is undisputed that the children did not pursue IDEA's remedies prior to this lawsuit.

The children's claims are even further removed from IDEA because none is suing for the individualized relief that is a hallmark of IDEA and its provision of special education. *See R.K. v. Lee*, No. 3-21-CV-00853, 2021 WL 5860924, at *24 (M.D. Tenn. Dec. 10, 2021) (exhaustion is not required for request for masking in schools since plaintiffs were "not suing for individualized, specific claims under IEPs"); *G.S. v. Lee*, No.21-CV-2552, 2021 WL 4268285, at *10–*11 (W.D. Tenn. Sept. 17, 2021) (highlighting that students claims' and requested relief were not individualized); *S.C. and B.C. v. Round Rock Indep. Sch. Dist.*, No. A-19-CV-1177-SH, 2020 WL 1446857, at *6 (W.D. Tex. Mar. 25, 2020) (distinguishing between IDEA's guarantee of individually tailored educational services and the promise of non-discriminatory access to public institutions). Rather, the remedy requested is the same

for all: to remove the Attorney General as the decisionmaker and reinstate the local districts' power to provide reasonable accommodations, whether on an individual basis or to disabled students as a group.

The Attorney General also overlooks the fact that E.S., one of the six children, does not receive special education at all. The Attorney General has not argued that E.S. would be entitled to a FAPE. *Cf. G.S.*, 2021 WL 4268285, at *12 (not requiring exhaustion, where, *inter alia*, a named plaintiff did "not qualify for an IEP" and did not attempt to seek accommodations through that process). The law is clear that where no nexus exists between a student's disability and their educational need for special education services, IDEA's exhaustion provision does not apply. *Fry*, S. Ct. at 753–54.

B. GA-38 violates the ADA and the Rehabilitation Act, whether or not the children requested or preferred a specific accommodation.

"The ADA is a broad mandate of comprehensive character and sweeping purpose intended to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life." *Frame*, 657 F.3d at 223. As the district

court stated, "[p]ublic education is a 'quintessential governmental service, program, or activity' and all of the children are qualified to participate in and receive the benefits of Texas' public education system." ROA.2386.

The district court correctly noted that "public entities have an affirmative obligation to make reasonable modifications in their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability" unless doing so would fundamentally alter the nature of the service, program, or activity. ROA.2388 (citing 28 C.F.R. § 35.130(b)(7)(i)). The court then found that GA-38 expressly prohibits school districts from requiring any person to wear a mask, including limited mask requirements such as in "one wing of a school building or in one classroom, or by requiring an individual aide to wear a mask while working one-on-one with a student who is at heightened risk of serious illness or death from COVID-19." ROA.2389. Because the children are at a higher risk from COVID-19 and masks decrease this risk, the Attorney General's enforcement of GA-38's prohibition means that students are being denied the accommodation

needed to provide them with meaningful access to public education in violation of the ADA and Section 504. ROA.2391.

Throughout his brief, the Attorney General repeatedly attempts to minimize the impact of his enforcement of GA-38 by stating that he does not have the authority to grant an accommodation request for the children, and thus he cannot have violated the ADA and Rehabilitation Act. But as the district court found (ROA.2388-89), the Attorney General, through enforcement of GA-38, has usurped decisionmaking authority from the school districts, effectively making himself he decisionmaker regarding the particular accommodation of masking.

Through his enforcement of GA-38, the Attorney General has made the determination that masks cannot be used as an accommodation, in violation of the ADA and Section 504. As the district court explained, "GA-38 forbids and [the Attorney General]'s enforcement of GA-38 forcefully prohibits school districts from adopting a mask mandate of any kind, even if a school district determines after an individual assessment that mask wearing is necessary to allow disabled students equal access to the benefits that in-person learning provides to other students." ROA.2388. This Court has explained that

"the reasonable-accommodation inquiry is fact-specific." *Valentine*, 978 F.3d at 165; *accord Cleveland*, 526 U.S. at 803; *McCoy*, 2006 WL 2331055, at *9 (collecting circuit and district-court cases). But with his one-size-fits all approach, the Attorney General has foreclosed school districts from engaging in this inquiry as required by the ADA and Section 504.

It makes no difference under the ADA or the Rehabilitation Act that these children had not specifically requested an accommodation. The law of this Circuit is clear that the children were not required to request the accommodation of masking when this accommodation was in fact being provided, either at the time of trial or prior to the enforcement actions of the Attorney General. ROA.2370. *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 n.4 (5th Cir. 1999) (holding employee was not required to formally request replacement accommodation when provided accommodations were withdrawn).

Moreover, as the Attorney General and the motions panel acknowledge, there is no need to request an accommodation when the disability and necessary reasonable accommodations are open and obvious. As discussed below, the ARP Act specifically requires school

districts to consider the safety recommendations of the CDC, which include the recommendation for universal masking. 86 Fed. Reg. 21195, 21200. These safety recommendations specifically note that individuals with disabilities face increased risks from COVID-19. ROA.2864. The CDC's COVID-19 guidance further notes that people with certain medical conditions, including the conditions of the children, are at a higher risk for serious illness from COVID-19. ROA.3955-59. The need for masking accommodations was so open and obvious that all of the children's districts either had already provided them or desired to provide them. ROA.3070 ("We . . . heard from many parents . . . including those concerned about children with disabilities who needed access to in-person instruction but couldn't safely attend school if we didn't implement safety protocols including masks."); ROA.3076 ("I made these decisions [to implement mask requirements] with care and concern for all of our students, including our students under twelve who could not yet be vaccinated and our students with health concerns who may be at higher risk of serious illness from COVID-19.").

The fact that an accommodation is "preferred" does not mean it is unreasonable. While an individual does not have a right to demand a

preferred reasonable accommodation, the preferred reasonable option is not removed from consideration simply because it is preferred. *See Cadena v. El Paso Cnty.*, 946 F.3d 717, 725 (5th Cir. 2020) (noting that a jury could conclude that a wheelchair, the plaintiff's preferred accommodation, was the reasonable accommodation for the plaintiff's mobility impairment). Reasonableness, not preference, is the correct inquiry. 28 C.F.R. § 35.130(b)(7). As discussed above, GA-38 prevents schools from even asking that question. The district court found that masks are effective at lessening the risks of COVID-19, and that defendants failed to present any evidence that the use of masks fundamentally alters the educational programs of school districts. ROA.2391, 2389. These findings are supported by ample evidence in the record, including expert testimony as to the effectiveness of masks (*e.g.*, ROA.2309, 2913-15) and the successful use of masks in the educational setting (*e.g.*, ROA.2900-01, 2975-77, 3035-39). School districts throughout the state were mandated to use masks during the 2020–21 school year (ROA.3938) until late spring when the school districts were given discretion with regard to masking policies (ROA.3885).

The Attorney General conceded at trial that GA-38 removes mask requirements as a tool for accommodation; it does not help him now to point to other measures that might also reduce COVID risk. 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.

Neither the claims in this case nor the district court's rationale depends on a "disparate impact" theory of liability. *Contra* Opening Br. 28–36. The district court relied on the ADA and Section 504's requirements for reasonable modifications and found that GA-38 expressly prohibits school districts from requiring any person to wear a masks, including in limited situations to address the needs of students with disabilities. ROA.2389. As discussed above, the Attorney General has effectively usurped the decisionmaking role of local school districts and has denied any masking accommodations across the board. Thus the actions of the Attorney General are a direct violation of the affirmative obligation for reasonable accommodation.

The district court also found that the Attorney General's enforcement of GA-38 violates the ADA and Section 504 through disparate *treatment* of students with disabilities. ROA.2382, 2387, 2388; 28 C.F.R. § 35.130(b)(1)(i)–(ii), (vii); 34 C.F.R. § 404.4(b)(1)(i)–(ii), (vii); 28 C.F.R. § 35.150.[8] The Attorney General's actions here result in the exclusion of children with disabilities from in-person learning, and a denial of meaningful access to the children who are forced to attend school at significant risk of severe illness. The district court's findings related to these provisions were specific to the individual children and not based on a theory of disparate impact.

Finally, the Attorney General does not and cannot challenge the district court's finding that "because GA-38 precludes mask requirements in schools, the children are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers." ROA.2391. Key to the court's analysis was the recognition that the ADA and Section 504 "require more than mere access to programs, services, or activities."

[8] In 42 U.S.C. § 12134(b), Congress mandated that the ADA's Title II regulations conform to Section 504's "program access" requirement at 28 C.F.R. § 39.150(a), which it does.

ROA.2389. Thus, even if an individual is not "wholly precluded from participating in [a] service, if he is at risk of incurring serious injury each time he attempts to take advantage of [the service], surely he is being denied the benefits of this service." ROA.2390 (quoting *Allah v. Goord*, 405 F. Supp. 2d 265, 280–81 (S.D.N.Y. 2005)).

The court's factual finding is fully supported by the record. Five of the children either were forced out of in-person learning or would have been forced out if masks were not permitted as an accommodation. For the other two, E.S. and S.P., enforcement of GA-38 has denied or will deny them equal access to their education. As their parents testified, they will have to attend school without masking because they did not make adequate progress with virtual learning and have no other options. ROA.3980, 3998.

For all the children, being forced to attend school at significant risk of severe illness is not the same opportunity provided to other children. This conclusion has been reached by multiple courts considering similar claims brought by students with disabilities who need mask policies. As found by the district court in *ARC of Iowa*, "Plaintiffs have demonstrated that school programs, services, and

activities are not 'readily accessible' to the disabled minor children involved here because these children cannot attend in-person learning at their schools without the very real threat to their lives because of their medical vulnerabilities." *ARC of Iowa v. Reynolds*, No. 4:21-CV-00264-RP-SBJ, 2021 WL 4166728, at *37 (S.D. Iowa Sept. 13, 2021). Similarly, the court in *R.K.* found the plaintiffs were "entitled to the anti-discrimination protections in the ADA and Section 504" because they were forced "to face a prevalent threat of infection every time they access public educational programs and services," which meant the programs were not readily accessible to those with disabilities. *R.K. v. Lee*, No. 3:21-CV-725, 2021 WL 4391640, at *6 (M.D. Tenn. Sept. 24, 2021).[9]

[9] Courts have recognized that accommodations in other contexts can be required to address a risk of injury or health consequence under Title I of the ADA. *See Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 68–69 (1st Cir. 2021) (finding plaintiff needed accommodation because although he was physically able to perform his job, he did so at risk of injury); *Gleed v. AT&T Mobility Servs., LLC*, 613 F. App'x 535, 539 (6th Cir. 2015) (reasonable accommodation needed to work "without great pain and a heightened risk of infection"); *Kleyman v. SUNY Downstate Med. Ctr.*, No. 18CV3137PKCST, 2020 WL 5645218, at *10 (E.D.N.Y. Sept. 21, 2020) (finding dispute whether plaintiff could perform her job without accommodation only by "seriously endangering her health"); *U.S. E.E.O.C. v. AutoZone, Inc.*, 822 F. Supp. 2d 824, 830 (C.D. Ill. 2011),

In this way, mask requirements—when appropriate under the circumstances—are akin to wheelchair ramps. Ramps give students with mobility impairments the same easy and ready access to the school building that students without mobility impairments have. That is, the ADA and Section 504 require not only that students with mobility impairments be able to get in the building somehow (like by climbing or being carried up the stairs) but rather that they have an easy, safe, and available route into the buildings. So too with masks. The ADA requires not only that students particularly vulnerable to COVID-19 can access the classroom somehow, but that their access is as close to equal as students without a disability who do not have the same vulnerability. *See Disability Rts. S. C. v. McMaster*, No. 3:21-2728,

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aff'd in relevant part sub nom. E.E.O.C. v. AutoZone, Inc., 707 F.3d 824 (7th Cir. 2013) (reasonable accommodation of avoiding task causing injury); *Sturz v. Wisconsin Dept. of Corrections*, 642 F. Supp. 2d 881, 888 (W.D. Wis. 2009) ("[D]efendant's argument suggests a disturbing standard for determining whether an accommodation is reasonable. It may be that plaintiff could open the front door with great difficulty or make her way through the parking lot without falling each time, but should she have to?"); *Nawrot v. CPC Int'l*, 259 F. Supp. 2d 716, 726 (N.D. Ill. 2003) ("To hold that a person with potentially life threatening diabetes is not entitled to accommodations . . . would force diabetics like Nawrot to choose between working while risking physical harm and death, or unemployment. The ADA was created to prohibit placing disabled persons in this position.").

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).

The Attorney General has not challenged *any* of the district court's factual findings as clearly erroneous, and his legal arguments misapprehend both the nature of the claims and the applicable law. There is no reason to set aside the district court's conclusion on the statutory claims.

III. The district court did not err in concluding that the ADA, Rehabilitation Act, and ARP Act all preempt GA-38.

As the district court explained, the children have a cause of action in equity to make their preemption arguments under the ARP Act, Rehabilitation Act, and ADA. GA-38's mask provision stands as an obstacle to the ends Congress sought to achieve in these acts. The court's conclusions with regard to preemption provide an independently sufficient basis to affirm the district court's injunction.

A. The district court correctly ruled that the ARP Act preempts GA-38.

1. The Attorney General is incorrect that the ARP Act must confer a specific right on the children for them to argue that the Act preempts GA-38.

The children can maintain a claim for equitable preemption based on the ARP Act without any requirement to show that the Act grants them any substantive legal rights. The Attorney General's argument to the contrary is based on a misreading of governing Supreme Court precedent.

In *Armstrong*, the Supreme Court held that although the Constitution's Supremacy Clause includes no implied right of action for preemption claims, the federal courts nevertheless have a longstanding equitable power to hear preemption claims in some circumstances. 575 U.S. at 326–27.

Armstrong does *not* require a showing that a federal statute grants a claimant a substantive right in order for the claimant to invoke the federal courts' equitable power to enjoin conduct preempted by that statute. The Attorney General's contrary argument relies on a reading the Tenth Circuit (in the *Safe Streets* case) incorrectly added to *Armstrong*—not on any language or reasoning from *Armstrong* itself.

Opening Br. 38–39 (citing *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 902 (10th Cir. 2017)).

But as the *Safe Streets* concurrence explains, *Armstrong* itself provides no basis for the purported substantive-right requirement divined by the *Safe Street* majority and the Attorney General. *See Safe Sts. All.*, 859 F.3d at 914 ("In my view, however, *Armstrong* provides no support for the majority's requirement of a private right created by federal law.") (Hartz, J., concurring).

First, both Justice Scalia's majority opinion and the part of his opinion that did not garner majority support recognized that the federal statute at issue did not create a federal right, but even so did not reject the plaintiffs' claim on that basis. *Id.* at 917 (Hartz, J., concurring); *see Armstrong*, 575 U.S. at 330 n.*. Moreover, in his plurality opinion joined by three other Justices, Justice Scalia stated that the statute at issue in *Armstrong* "lack[ed] the sort of rights-creating language needed to imply a private right of action." *Id.* at 331. But the Court never concluded that this "lack[] . . . of rights-creating language" foreclosed the plaintiffs' equitable claim. Rather than rejecting the plaintiffs' claim on that basis, the majority analyzed whether the statute at issue

evinced a congressional intent to foreclose equitable relief. *See id.* at 328–29. Had the plurality viewed rights-creating language as a prerequisite for an equitable preemption claim, it would have stopped its analysis there rather than analyzing whether the statute displayed an intent to foreclose equitable relief. *Safe Sts. All.*, 859 F.3d at 917 (Hartz, J., concurring). In short, the plurality could have based its conclusion on a substantive-right requirement as in *Safe Streets*, but chose not to.

Second, as the *Safe Streets* concurrence explained, the *Armstrong* dissent stated—without disagreement from an otherwise critical plurality—that the search for a substantive right has no place in determining the scope of the federal courts' equitable powers. *Id.* at 915–16. According to Justice Sotomayor's dissent, "the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through § 1983, are not transferable to [this] context." 575 U.S. at 340. Those principles include gleaning a "specific congressional intent to create a statutory right"—which the *Safe Streets* majority and the Attorney General contend is required for an equitable preemption claim to proceed. *Id.*; *Safe Sts. All.*, 859 F.3d

at 898–99; Opening Br. 38–39. But while the *Armstrong* plurality criticized other aspects of the dissent, Justice Sotomayor's distinction between the implied-right-of action and equitable-preemption analyses remained unscathed. *See* 575 U.S. at 329–31 (criticizing dissent). Had the *Armstrong* majority intended to reject the dissent's premise, it would have done so or would have explicitly adopted the substantive-right requirement the Attorney General proposes. *See Safe Sts. All.*, 859 F.3d at 916 (Hartz, J., concurring). It did neither. *Id.*

Moreover, if it were really necessary to plead the violation of a federal right in a statute to maintain an equitable preemption claim based on that statute, *Armstrong*'s holding and reasoning would have been different. *Id.* at 917–18. Rather than analyzing the statute at issue for a congressional intent to foreclose equitable relief, the Court would have rejected the plaintiffs' claim upfront based on the majority's observation that the statute contained no rights-creating language. *Id.* Thus, the Attorney General and the *Safe Streets* majority are incorrect that the Supreme Court requires a plaintiff to plead the violation of a federal right in order to maintain an equitable preemption claim.

2. The ARP Act does not "implicitly preclude" the children's claim.

Armstrong established that a plaintiff can maintain a preemption claim in equity *unless* the putative preempting statute evinces a congressional intent to *foreclose* equitable relief. 575 U.S. at 328. The statute at issue in that case foreclosed equitable relief for two reasons: (1) Congress expressly provided a sole remedy for its enforcement, and (2) the plaintiffs' requested relief was judicially unadministrable. *Id*. at 328. The Attorney General contends that the ARP Act forecloses the children's preemption claim for these same two reasons and no others. Opening Br. 40–42. He is wrong on both points.

a. No enforcement mechanisms in the ARP Act evince any congressional intent to foreclose equitable enforcement.

Under *Armstrong*, the question is whether "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 575 U.S. at 328 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). The Attorney General contends that two alleged "enforcement mechanisms" in the ARP Act show congressional intent to foreclose equitable relief: (1) the Act is a spending statute and (2) Congress allocated money to the Department

of Education to conduct "oversights, investigations, and audits" of "programs, grants, and projects funded under this part." Opening Br. 40–41 (quoting Pub. L. No. 117-2, § 2012). Neither argument is persuasive.

First, the fact that the ARP Act is a spending statute is insufficient on its own to foreclose equitable relief. *See Armstrong*, 575 U.S. at 328 ("The provision for the Secretary's enforcement by withholding funds might not, by itself, preclude the availability of equitable relief."). Indeed, the Supreme Court allowed an equitable preemption claim in *Virginia Off. for Prot. & Advoc. v. Stewart* even though the preempting statute was a spending statute. 563 U.S. 247, 250–51, 261 (2011).

Second, the appropriation to the Department of Education for oversight, on which the Attorney General relies, indicates no intent to monopolize enforcement power or foreclose equitable relief. Opening Br. 40–41 (citing Pub. L. No. 117-2, § 2012). Section 2012 does nothing more than allocate money to the Department of Education. The ARP Act contains no provision pertaining to enforcement in the wake of the investigations Section 2012 may fund, nor any provision like the one in

Armstrong that expressly allowed for the withholding of funds. *See Armstrong*, 575 U.S. at 328 (citing 42 U.S.C. § 1396c). Thus, nothing in the ARP Act evinces a congressional intent to foreclose equitable enforcement.

b. The children's ARP preemption claim will not require courts to wade into judicially unadministrable territory.

In *Armstrong*, the majority found the statutory requirement at issue to be judicially unadministrable because of its broad and complex nature. *Id.* at 328. According to the Attorney General, this case is like *Armstrong* because the ARP Act allows school districts to spend the appropriated funds in many ways and therefore will require the Court to apply a similarly "judgment-laden standard." Opening Br. 41 (quoting *Armstrong*, 575 U.S. at 328.).

The children's claim will not require the Court to apply any "judgment-laden" standard like the one in *Armstrong*. The plaintiffs in that case contended that the State of Idaho set Medicaid reimbursement rates below what was permitted by Section 1396a(a)(30)(A) of the Medicaid Act. *Armstrong*, 575 U.S. at 323–24 (citing 42 U.S.C. § 1396a(a)(3)(A)). But that provision said only that

payments must be "consistent with efficiency, economy, and quality of care and [ ] sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." *See id*. The "sheer complexity" of that "judgment-laden standard" led the Supreme Court to conclude that Congress intended to leave its enforcement exclusively to the agency. *Id*. at 329.

The children in this case are not seeking to apply anything remotely like the nebulous standard in *Armstrong*. Rather, the children asked the district court to determine only that the enforcement of GA-38 impermissibly takes away from school districts the discretion Congress intended them to have when spending ARP Act funds. ROA.305-06, 2371. That is a simple question, to which the answer is indisputably yes. Thus, the Attorney General's judicial-unadministrability argument provides no basis for reversal.

3. Because GA-38 stands as an obstacle to the purposes of the ARP Act, it is preempted.

The Supremacy Clause of the United States Constitution makes federal law the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a result, "any state law, however clearly within a State's

acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). A federal law preempts a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" with respect to the federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

In particular, a federal funding statute preempts a state law that deprives local government units of the discretion Congress intended them to have when spending funds received under that statute. In *Lawrence County v. Lead-Deadwood School District Number 40-1*, the issue was whether "a State may regulate the distribution of funds that units of local government in that State receive from the Federal Government in lieu of taxes under 31 U.S.C. § 6902." 469 U.S. 256, 257–58 (1985). The Payment in Lieu of Taxes Act "compensat[ed] local governments for the loss of tax revenues resulting from the tax-immune status of federal lands located in their jurisdictions, and for the cost of providing services related to these lands." *Id.* The act also stated that local governments could "use the payment for any governmental

purpose." *Id.* at 258–59 (quoting 31 U.S.C. § 6902(a)). South Dakota enacted a statute that "requir[ed] local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues." *Id.* at 259.

The Supreme Court held that the Payment in Lieu of Taxes Act preempted the South Dakota law. The Court began from the premise that a federal law preempts a state law that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* at 260 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). Then the majority turned to the federal law, which "endow[ed] local governments with the discretion to spend in-lieu payments for any governmental purpose." *Id.* at 261. Ultimately, the majority held, "[t]he attempt of the South Dakota legislation to limit the manner in which counties or other qualified local governmental units may spend federal in-lieu-of-tax payments obstructs this congressional purpose and runs afoul of the Supremacy Clause."

The ARP Act preempts GA-38's mask provision for the same reason the Payment in Lieu of Taxes Act preempted the South Dakota law in *Lawrence County*. That reason is that, as explained below,

Congress intended to endow school districts with discretion to choose how to use ARP Act funds, and GA-38 impermissibly attempts to constrain that discretion.

The ARP Act shows that Congress intended school districts to have discretion as to how to spend ARP Act funds. In the ARP Act, Congress appropriated approximately $122 billion for the Department of Education to allocate to states and obligated the states to allocate 90% of their ARP funding to local school districts. Pub. L. No. 117-2, § 2001(a), (d)(1).

Congress required the school districts to use the funds for certain purposes and imbued the school districts with discretion on how to use those the funds to achieve those purposes. Under Section 2001(e), school districts must use some of the funds to address learning loss and "shall use the remaining funds for any of" a list of categories that includes:

- "(F) Activities to address the unique needs of . . . children with disabilities [and certain other populations] . . . including how outreach and service delivery will meet the needs of each population";
- "(Q) Developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and

Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff"; and

- [D]evelop[ing] . . . a plan for the safe return to in-person instruction and continuity of services."

Id. §§ 2001(e)(2)(F), (Q), (i)(1). Moreover, the referenced guidance from the Centers for Disease Control specifically recommends universal indoor masking in K-12 schools. ROA.2866-67. Thus, Congress prioritized local control of schools' COVID-19 response and the safe return to in-person instruction—with an eye to CDC recommendations and the special circumstances of children with disabilities.

GA-38's attempt to "limit the manner in which [school districts] may spend federal [ARP Act funds] obstructs this congressional purpose and runs afoul of the Supremacy Clause." *See Lawrence Cnty.*, 469 U.S. at 470. By prohibiting school districts from requiring masking in any circumstances, GA-38 deprives school districts of the discretion Congress intended them to have and from considering the CDC guidance Congress intended them to consider.

And GA-38's mask provision is no "modest impediment" to the achievement of Congress's purposes—as the Attorney General contends. *See* Opening Br. 56. The children presented ample evidence to the

district court, and the district court found, that (1) mask requirements are necessary to protect the safety of children with disabilities like the Plaintiffs and (2) in-person education is crucial to the development of Plaintiffs. ROA.2388, 2391. By prohibiting school districts from requiring masks in any circumstances, therefore, GA-38's mask provision stands as an obstacle to Congress's intent to let school districts decide how to spend ARP Act funds to provide a safe return to in-person schooling—particularly for children with disabilities. Thus, the district court correctly found that the ARP Act preempts GA-38's mask provision.

B. The Rehabilitation Act and the ADA preempt GA-38.

GA-38's mask provision also stands as an obstacle to the achievement of the ends Congress sought to achieve in the Rehabilitation Act and the ADA. For the reasons explained in Section II.B above, the Attorney General has violated both statutes. He has done so by enforcing GA-38's mask provision against school districts so as to prevent the districts from making individualized, case-by-case determinations on whether mask requirements are needed to make in-person education reasonably available to the children. Thus, GA-38's

mask provision stands as an obstacle to the achievement of the objectives of the Rehabilitation Act and the ADA because it prohibits school districts from considering an accommodation those statutes require them to consider and, in some circumstances, implement.

The Attorney General makes two scant arguments that the district court erred in ruling that the Rehabilitation Act and the ADA preempt GA-38: (1) the children have no cause of action in which to argue their Rehabilitation Act and ADA preemption claims and (2) the acts do not preempt GA-38 for the reasons in the motions panel's opinion.

First, as to the availability of the cause of action for preemption, the Attorney General merely asserts that the Rehabilitation Act and the ADA preclude Plaintiffs' equitable claim. Opening Br. 45. He provides no reasoning in support of this assertion, which is incorrect under *Armstrong* and the (incorrectly decided) *Safe Streets* case on which he relies. Under *Armstrong*, a statute forecloses an equitable preemption claim only if it evinces that Congress intended to foreclose equitable relief. 575 U.S. at 328. And far from evincing a congressional intent to prohibit equitable relief, both the Rehabilitation Act and the

ADA explicitly provide for equitable relief by authorizing injunctions. 42 U.S.C. § 12188 (a)(2); 29 U.S.C. § 794a(a)(1). Thus, there is no basis for the Court to conclude that Congress intended to foreclose equitable enforcement of the Rehabilitation Act or the ADA. The district court therefore properly allowed the children's Rehabilitation Act and ADA preemption claims.

Second, the Attorney General and the motions panel are incorrect that the Rehabilitation Act and the ADA do not preempt GA-38.[10] The motions panel's conclusion on this issue depended on its conclusions regarding the children's claims that the Attorney General has violated the Rehabilitation Act and the ADA. Mem. Op. & Order on Mot. to Stay. But those conclusions are incorrect for the reasons stated in Section II.B above. Thus, the Court should affirm the district court's ruling that the Rehabilitation Act and the ADA preempt GA-38.

[10] The motions panel's preliminary conclusions as to the Attorney General's likelihood of success are not binding for purposes of this Court's final resolution on the merits. *See Texas Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020) ("[U]nder our circuit's procedures, opinions and orders of a panel with initial responsibility for resolving motions filed in an appeal are not binding on the later panel that is assigned the appeal for resolution.").

IV. The district court did not abuse its discretion in defining the scope of the injunction.

The district court enjoined the "Attorney General of Texas as well as his employees, agents, servants, designees, and successors in office . . . from imposing any fines, withholding state and federal educational funds, bringing any legal action to enforce or in any way attempt[] to enforce Paragraph 4 of Executive Order GA-38 insofar as Paragraph 4 applies to school districts." ROA.2394. This Court reviews the district court's "decision whether to grant or deny an injunction and the scope and form of the injunction for abuse of discretion." *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998) (quoting *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 550 (5th Cir. 1998)).

The relief here is properly tailored to the nature of GA-38's unlawfulness, which is the categorical denial of masks as an accommodation in schools. The injunction 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—[because its] breadth is necessary to give [the children] 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).

Thus, the mere fact that other students in other schools benefit does not itself mean that the injunction is overbroad.

Nevertheless, the Attorney General suggests that the injunction could be narrowed by limiting it either to the seven school districts attended by E.T., J.R., S.P., M.P., E.S., H.M., and A.M. or to instances in which masking is required as a reasonable accommodation. *See* Opening Br. 46–47. Should the Court conclude that the injunction is overbroad, the proper remedy is to narrow the injunction rather than reverse the district court's judgment.

The Court could either narrow the injunction itself, or it could vacate the injunction and remand to the district court with an instruction to enter a narrower injunction consistent with the Court's opinion. *Compare M. D. by next friend Stukenberg v. Abbott*, 929 F.3d 272, 280 (5th Cir. 2019) (modifying a district court's injunction to add qualification condition), *with Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 696 (5th Cir. 1995) (remanding for district court to modify injunction to remove a location restriction). The latter would be preferable in this case because the district court "has the personal knowledge, experience, and insight necessary to evaluate" the

appropriate scope of the injunction, given this Court's instructions. *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987). Further, the district court—unlike this Court—can consider new factual developments. *See Delaughter v. Woodall*, 909 F.3d 130, 134 n.3 (5th Cir. 2018). ("[O]ral argument drew out additional factual developments that should be explored by the district court. . . . Deciding disputed facts is not the office of a court of review.").

The Attorney General also objects that the district court issued a "permanent" injunction which, in his view, "wrongly presumes eternal masking." Opening Br. 47–48. The Attorney General misunderstands the significance of the term "permanent injunction." The fact that this injunction is "permanent" does not reflect the scope of the injunction but rather distinguishes it (final relief following trial) from a "preliminary" injunction (temporary relief pending litigation). *Univ. of Texas*, 451 U.S. at 394 (noting "the significant procedural differences between preliminary and permanent injunctions"). Moreover, the injunction does not mandate masking, as the Attorney General himself recognizes. Opening Br. 20. Instead, it simply returns the decision whether to require masks to local school districts. And the district court always

retains jurisdiction to modify its injunction "as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). The district court's issuance of a "permanent" injunction was not an abuse of discretion.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the district court or, in the alternative, vacate and remand with instructions to enter a more limited injunction.

Respectfully submitted,

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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 12,591 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.

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On January 7, 2022, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system and via email.

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