No. 21-51083

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

Appeal from the United States District for the Western District of Texas, Case No. 1:21-CV-717

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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January 14, 2022

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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S.P., by and through her parents and next friends
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are 21 members of United States law school faculties who teach and write in the fields of Constitutional Law and Disability Law.[2] We have no personal interest in the outcome of this case, but a professional interest in preserving children with disabilities' access to reasonable accommodations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. A complete list of Amici's names, titles, and affiliations is set forth in the appendix to this brief.

The motion panel's decision on December 1, 2021, and concern for the wellbeing of the children who brought this case, compels Amici to offer their perspective as to why this Court should find that (1) federal law preempts GA-38 and (2) GA-38 violates the ADA because it prohibits schools from providing an individualized reasonable accommodation that would permit the children to fully participate in, and not be excluded from, school.

SUMMARY OF ARGUMENT

GA-38 places a categorical ban on mask mandates and in so doing, forbids Texas school districts from implementing the very form of reasonable

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation of this brief. No person other than the Amici Curiae or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented, by and through their counsel, to the filing of this brief.

[2] The full list of Constitutional Law and Disability Law Professors joining this brief is in the Appendix.

accommodation that the children with disabilities who brought this case need to stay in school. The ADA requires individualized assessment of disability and the implementation of accommodations that respond to individual needs. The federal courts have consistently held that categorically eliminating certain accommodations without conducting an individualized assessment of what individuals with disabilities themselves require runs counter to the ADA's purpose—integrating *individuals* into each aspect of public life on terms that fit their needs. GA-38 frustrates this purpose by forcing the children's schools to ignore their individual needs. As a result, the ADA preempts GA-38.

In addition, GA-38 violates the ADA because its categorical ban constitutes disability discrimination. The ADA requires school districts to make reasonable modifications and accommodations, but to be reasonable, the modifications and accommodations must be individualized. For the same reason, just because others might be adequately protected by non-masking measures does not render mask mandates any less reasonable of an accommodation for the children. The masks are an individualized response to what the children need and exactly what the ADA requires. Banning mask mandates violates the ADA.

INTRODUCTION

The COVID-19 pandemic continues to wreak havoc around the world. It has severely impacted people with disabilities, who are often more high-risk for serious

death or illness from COVID-19 than the general population. COVID-19, and its extremely contagious variants, can have devastating consequences for individuals like the children who brought this case. As a result of certain underlying conditions, if the children contract COVID-19, they are more likely to experience severe acute biological effects and to require admission to a hospital and the hospital's intensive-care unit. Consequently, to protect their wellbeing, the children, and those who interact with them, must take precautions the general public may not need to take, chief among them following the instructions of government agencies like the Center for Disease Control and Prevention (CDC) and the sound judgment of their own schools. The CDC recommends "universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status."[3] The children's schools want to require masks.

Masks are cheap, safe, and scientifically proven to provide a reasonable level of protection for children like the ones who brought this case. Yet on July 29, 2021, Texas Governor Greg Abbott issued Executive Order GA-38 (GA-38) and prohibited governmental entities, including the children's school districts, from

[3] *Guidance for COVID-19 Prevention in K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html (updated Jan. 6, 2021).

imposing mask requirements. This prohibition puts the children's lives at risk and violates federal disability law.

Amici write to provide the Court with their insight and knowledge on two issues in the present case: (1) how GA-38 is preempted by the ADA and (2) how GA-38 violates the ADA by discriminating against the children who brought this case.[4] In so doing, we focus on the concept of individualized assessment, a cornerstone of the ADA. When an accommodation is at issue, the ADA requires a personalized, case-by-case assessment of disabled individuals, their needs, and their requested accommodations. The individualized assessment requirement is a thread that runs through the Supreme Court's ADA decisions, as well as those of this Circuit and others.

A categorical ban on mask mandates, like the one in GA-38, is entirely incompatible with the individualized assessment requirement. Allowing GA-38 to interfere with the ADA's requirement that children with disabilities have their individual needs considered on a case-by-case basis would set a dangerous precedent. GA-38 substitutes the Texas Governor's judgment for a school district's judgment, casting aside individualized accommodations assessments and replacing them with political whim.

[4] Amici's second argument, that GA-38 violates the ADA, applies equally to § 504 of the Rehabilitation Act. *See, e.g., Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005); *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012).

ARGUMENT

I. The ADA Preempts GA-38 Because Its Categorical Ban on Mask Mandates Interferes with the Implementation of the ADA's Individualized Assessment Requirement.

GA-38 is preempted by the ADA because it frustrates the ADA's purpose. *City of Morgan City v. S. Louisiana Elec. Co-op. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994). The purpose of the ADA, and Title II of the ADA in particular, is well-known. In *Tennessee v. Lane*, the landmark decision upholding the constitutionality of Title II, the Supreme Court noted that Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). A "pattern of unequal treatment" occurred in every aspect of state services and programs, including public education. *Id*. at 525. The ADA relied upon "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," and was designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id*. at 516 (quoting §§ 12101(b)(1), (b)(4)).

Reasonable modifications are local manifestations of the ADA's national mandate. They combat exclusion, a form of disability discrimination the ADA prohibits. *See* 42 U.S.C. § 12132 (West) (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"). Reasonable modifications are tools of integration and inclusivity that prevent the discrimination that would otherwise result from the exclusion of disabled people. *See* 28 C.F.R. § 35.130(b)(7)(i) (stating that public entities must make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity").

A. Under the ADA, Reasonable Modifications Must Focus on Each Individual's Particularized Needs; Categorical Bans Violate This Requirement.

Reasonable modifications only further the purpose of the ADA when they focus on each individual's particularized needs. Evaluating a disabled person's reasonable modification needs on an individual basis is a "basic requirement" of the ADA. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). In *Martin*, the PGA Tour required players to walk the golf course during its tournaments and banned the use of golf carts. *Id.* In assessing whether Title III of the ADA required the PGA Tour to provide professional golfer Casey Martin with a golf cart as a reasonable modification to accommodate his disability, the Supreme Court emphasized the importance of considering Martin's personal circumstances. *Id.* at 689. But rather

than assessing whether Martin's use a golf cart would fundamentally alter the nature of the PGA's tournaments, the PGA argued that waiving its walking rule would always create a fundamental alteration. *Id*. at 686. That is, it would never permit the use of golf carts at the competition level Martin sought to use one.

The Court rejected the PGA's categorical ban on golf carts, and instead emphasized that the PGA had to assess how Martin's *own* performance would be impacted by use of a golf cart. In so doing, the Court explained that the ADA as a whole was enacted to eliminate discrimination against "individuals" with disabilities, and that reasonable modifications are not determined in the abstract but are granted to disabled "individuals." *Id*. at 688 (quoting 42 U.S.C. §§ 12101(b)(1), 12182(b)(2)(A)(ii)). The Court was emphatic: to comply with Title III, "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." *Id*. at 688. The Court then performed its own individual assessment of Martin's requested modification. First, it identified the purpose of the PGA's walking rule as being "to subject players to fatigue, which in turn may influence the outcome of tournaments." *Id*. at 690. Next, it concluded that the walking rule's purpose was not "compromised in the slightest" by allowing Martin to use a golf

cart because Martin "'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.'" *Id*.

Like Title III, Title II of the ADA is concerned with individuals. *See* 42 U.S.C. § 12132 (West) (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity"). The Second Circuit has held that *Martin's* "individualized inquiry" requirement applies to both Title III and Title II claims. *See Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) ("Although *Martin* was decided in the context of Title III of the ADA, we conclude that the individualized inquiry requirement is applicable to failure to accommodate actions under Title II of the ADA as well."). In *Wright*, the New York State Department of Corrections refused to provide a disabled inmate with access to a motorized wheelchair because of its blanket ban on motorized wheelchairs. *Id*. at 77. The court applied *Martin's* individualized inquiry requirement to Wright's Title II claim to hold that "once a disabled prisoner requests a non-frivolous accommodation, the accommodation should not be denied without an individualized inquiry into its reasonableness." *Id*. at 78. The court instructed the Department that it could not rely upon "general safety and security concerns" to demonstrate that allowing use of a motorized wheelchair would constitute an undue burden. *Id*. at 79.

Rather, it had to provide "specific reasons why allowing Wright the use of *his* motorized wheelchair would be unduly burdensome." *Id*.

This Circuit has also rejected accommodation denials that rely on categorical bans. In the context of employment accommodations, for instance, the ADA's "individual assessment requirement" must be followed. *Kapche v. City of San Antonio*, 304 F.3d 493, 497 (5th Cir. 2002). Case-by-case inquiries are mandated by the ADA for purposes of determining whether an individual is disabled and also for direct threat analyses. *Id*. at 497–98. *Kapche* cited *Martin* in noting that "Supreme Court cases consistently point to an individualized assessment mandated by the ADA under various sections of the Act." *Id*. at 499.

Kapche also rejected previous holdings in which the Circuit "appeared to abrogate the need to conduct an individual assessment, at least in the case of persons with [insulin-treated diabetes mellitus] applying for positions in which driving was an essential function." *Id*. at 494. *Per se* rules cannot substitute for individualized assessments. *See also Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782–83 (6th Cir. 1998); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004).

The weight of authority is clear: places of public accommodation, public services and programs, and employers cannot impose categorical bans on certain forms of accommodations and modifications.

B. GA-38 Frustrates the ADA's Purpose by Preventing Schools from Determining Whether a Mask Mandate Is a Reasonable Accommodation Based on Each Individual's Particularized Needs.

The ADA was designed to integrate *individuals* with disabilities into all aspects of public life, and for that reason, the tools that achieve each individual's integration—here, reasonable accommodations that make school accessible to children with disabilities—must respond to their specific needs. GA-38 deprives Texas school districts of the ability to evaluate the reasonableness of masking accommodations based on individualized assessments of the actual needs of each child.

A categorical ban on certain types of reasonable accommodations in schools assumes that all disabled children can be accommodated in the same way. Yet each disabled child is an individual. Their disabilities vary, and their personal responses to those disabilities, even more so. The ADA's policy of individualized assessment recognizes and meets that variety because when it comes to disabilities, one size cannot fit all.

School districts complying with the ADA must make individualized assessments considering a variety of individualized factors, including: the nature,

history, and treatment of a child's disability; how the disability impacts the child's experiences at school; what kind of accommodations would be reasonable under the circumstances, taking into account the child's school district and even school building; and whether certain modifications would create a fundamental alteration of the service being provided. By categorically forbidding mask mandates as reasonable modifications for Texas public school children with disabilities, GA-38 restricts the case-specific inquiry the ADA requires of the public schools. In doing so, GA-38 interferes with the implementation of federal legislation and is therefore preempted.

II. GA-38 Violates the ADA Because It Bars Reasonable Accommodations Based on Individualized Assessments of the Children's Obvious Needs.

Mask mandates are reasonable accommodations for the children's disabilities that allow them to fully participate in, and not be excluded from, school. Failure to provide a reasonable accommodation is a form of disability discrimination prohibited by Title II. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7)(i). As explained *infra*, decisions regarding reasonable modifications and accommodations cannot be made in a vacuum. Rather, they become reasonable and therefore ADA-compliant when they account for a person with disabilities' individual circumstances. *See, e.g., Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 78 (2nd Cir. 2016) (stating that Title II does not permit a state entity to deny a request for an accommodation "without an individualized inquiry into its reasonableness").

Yet GA-38 imposes its ban on mask mandates no matter what the underlying circumstances or disability. Its categorical ban violates the ADA's individualized assessment mandate and prohibits the children's school districts from providing them with the very reasonable accommodations they need.

A. GA-38's Ban on Mask Mandates Denies School Districts' Ability to Provide Open and Obvious Reasonable Accommodations.

GA-38 has the effect of denying reasonable accommodations that are open and obvious. Since the beginning of the COVID-19 pandemic, its impact on people with disabilities, and the need to protect them with measures specifically tailored to their disabilities, has been well-documented. *See, e.g.*, ROA.3955-59. It is well-known that masks are essential to protecting high-risk people with disabilities like the children here. *See, e.g.*, ROA.2864. Throughout the pandemic, masks have remained an essential part of COVID-19 prevention efforts. *See, e.g.*, ROA.2866, ROA.2913-14, ROA.2976. They are now a commonplace feature of pandemic existence for people who are high-risk and those around them. That the use of masks has become politicized does not diminish their well-known and documented usefulness.

B. The ADA Mandates that the Children Receive Individualized Reasonable Accommodations, Not Merely Measures Suitable to the General Public.

Focusing on what works best for individuals with disabilities, and not the public at large, is a hallmark of the ADA's accommodations regime. The Fourth

Circuit has emphasized the importance of focusing on an individual with disability's needs, and not what best suits the majority, when evaluating reasonable accommodations. *See J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 666 (4th Cir. 2019). J.D., an eleven-year-old with celiac disease, required a strictly gluten-free diet. *Id*. While on a school field trip, J.D. requested a reasonable accommodation to a restaurant's ban on outside food, seeking to bring his own homemade gluten-free meal into "Shields Tavern," a restaurant offering a "traditional, 18th-century experience." *Id*. at 668. On prior restaurant outings, J.D. had consumed meals that restaurants represented to be gluten-free, yet still caused him to experience symptoms consistent with having ingested gluten. *Id*. at 667. Shields Tavern offered to prepare him a gluten-free meal, but because of his past experiences, J.D. refused it. The restaurant forced him to eat his homemade meal outside, separated from his classmates. *Id*.

The Fourth Circuit explained that Shields Tavern's offer to prepare its own gluten-free meal may not suffice to reasonably accommodate J.D., even if its "rigorous protocols for preparing gluten-free meals" would accommodate "the majority of people with a gluten intolerance." *Id*. at 673. In reversing the district court's grant of summary judgment, it held that J.D. still might be entitled to "something more" if he could show that the offered accommodation "does not account sufficiently for his disability." *Id*. at 673, 674 (stating that the district court

should not have overlooked testimony that J.D. "repeatedly became sick after eating purportedly gluten-free meals prepared by commercial kitchens").

The Texas Education Agency has recognized the need for individualized accommodations that go beyond what the average student needs. In Texas schools, students with food allergies receive accommodations to generally applicable policies. For example, when a student is allergic to peanuts, in their classrooms, peanuts may be eliminated. *See Guidelines for the Care of Students with Food Allergies At-Risk for Anaphylaxis*, at 25–26, TEX. EDUC. AGENCY (2012), *available at* https://tea.texas.gov/sites/default/files/Anaphylaxis.pdf (identifying potential accommodations, including "[l]imiting, reducing, and/or eliminating food from classroom(s) and other learning environments used by children with food allergies at risk for anaphylaxis"). Just as Texas would never consider categorically prohibiting food restrictions sensitive to the needs of students with life-threatening food allergies, it also should not be able to categorically ban mask mandates.

C. The Availability of Other Accommodations Does Not Render GA-38's Ban Immune to an ADA-based Challenge.

Finally, contrary to the motions panel's suggestion, the availability of other means to control the spread of COVID-19 in school settings does not make GA-38's ban immune to an ADA-based challenge. *See E.T. v. Paxton*, No. 21-51083 at *6, *10 (5th Cir. Dec. 24, 2021). The availability of other COVID-19 preventive measures, including plexiglass, social distancing and increased hygiene protocols,

does not sufficiently account for the children's disabilities here.[5] Not all techniques employed to control the spread of COVID-19 are equally effective. Individuals with disabilities like the children here do not have the luxury of relying on less effective measures upon which others can comfortably rely. Though some members of the public may be able to mix and match COVID-19 prevention strategies, the children here cannot.[6] And as a result of the ADA, they are not required to. The ADA entitles them to reasonable accommodations tailored to ensure *their* safe and equal participation in public life, including public education.

Even if measures other than masks may be suitable for the majority of children who Texas wants to protect from COVID-19, they are still unreasonable for the children here, whose disabilities render them more high-risk. *See also Martin*, 532 U.S. at 688 (stating that the PGA's "refusal to consider Martin's personal

[5] While it is true that CDC guidance indicates that schools should use multiple prevention strategies in a layered approach to promote safer in-person learning, this point does not support Appellant's position because consistent and correct use of masks is a part of such strategies. *See, e.g.*, *Transmission of SARS-CoV-2 in K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html (last updated Dec. 17, 2021); *see CDC Updates Operational Strategy for K-12 Schools to Reflect New Evidence on Physical Distance in Classrooms*, CTRS. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/media/releases/2021/p0319-new-evidence-classroom-physical-distance.html (last updated March 17, 2021) (recommending "all students remain at least 3 feet apart in classrooms *where mask use is universal*") (emphasis added). There is no evidence to support Appellant's speculation that physical distancing, screening testing, improved ventilation, and other similar measures are sufficient without mask-wearing.

[6] In the present case, E.T., who has been diagnosed with Down syndrome, moderate to severe asthma, hypogammaglobulinemia, a CD19 deficiency, a severe B-cell lymphocyte deficiency, and compromised immune system, has received a dose of the COVID-19 vaccine. However, it has been stipulated "that [the vaccine] may not be effective due to her immune deficiency" ROA.2635.

circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA"). Because the children have a right to attend school in-person, and because it is reasonable to require those around them to wear masks to facilitate their in-person attendance, the ADA is violated if GA-38 is permitted to ban the very accommodation that ensures *their* in-person attendance.

CONCLUSION

GA-38 is preempted because it frustrates the ADA's individualized assessment requirement, instead enforcing a categorical ban on mask mandates, the very reasonable accommodation that would best suit the needs of the children with disabilities who brought this case. GA-38 also violates the ADA by denying the children reasonable accommodations tailored to their individual needs. As such, GA-38 is deeply troubling to Amici, who join Appellees in urging the Court to affirm the district court's judgment.

Submitted: January 14, 2022

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1. This document complies with the type-volume limit of FED. R. APP. P. 29(a)(5) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and Fifth Circuit Rule 32.2, this document contains 3,674 words.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit on January 14, 2022 by using the appellate CM/ECF system, and that service on all parties through their registered counsel will be accomplished by the appellate CM/ECF system.

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