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

BRIEF FOR APPELLANT

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Certificate of Interested Persons

No. 21-51083

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellant, as a governmental party, need not furnish a certificate of interested persons.

/s/ Judd E. Stone II
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Statement Regarding Oral Argument

The Court has calendared this case for oral argument on February 2, 2022. Appellant agrees that this case warrants oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other Authorities:

Introduction

The decision below permanently enjoins enforcement of Governor Greg Abbott's executive order requiring public schools to make masks optional. Plaintiffs want their schools to mandate masks and claim they cannot safely attend school without universal masking. They allege the order discriminates against them and is preempted by federal law. On that basis, the district court granted them an injunction. But the court's injunction runs against an official, the Attorney General, who has no power to mandate masks in Plaintiffs' schools. As a consequence, Plaintiffs' litigation proved futile in the end as, contrary to their assurances to the district court, Plaintiffs' mask-optional schools did not mandate masks after the injunction issued.

The flaws in Plaintiffs' case stretch from beginning to end. To start, they lack standing. In all three iterations of their complaint, Plaintiffs adjusted the cast of plaintiff and defendant characters, but they never joined the only parties capable of redressing their injuries: their school districts. Plaintiffs' disability-discrimination claims fail as a matter of law. They accuse the Attorney General of a failure to accommodate Plaintiffs' conditions, but he cannot grant Plaintiffs an accommodation or rewrite the Governor's order. In addition, a federal exhaustion requirement obligated Plaintiffs to try to work through their COVID-19 concerns with their schools before resorting to litigation. Their failure to do so bars these claims.

Plaintiffs also allege the Governor's order is preempted by a federal grant program's requirement that school districts publicize their COVID-19 safety plans. This argument wrongly relies on an expansive statutory interpretation that Congress did not intend. The claim also fails at the threshold because Plaintiffs are third parties to

the grant program and have no rights under it. Finally, the district court granted overbroad relief. It enjoined enforcement of the order statewide when an order limited to Plaintiffs' seven schools would have sufficed. The chain of reasoning for Plaintiffs' poorly conceived claims does not withstand scrutiny, and the district court erred in granting the injunction.

Statement of Jurisdiction

Because Plaintiffs' claims arise under the U.S. Constitution and federal statutes, subject-matter jurisdiction rests on 28 U.S.C. § 1331. The district court, however, lacked subject-matter jurisdiction because Plaintiffs failed to show standing.

The district court entered a permanent injunction and final judgment disposing of all parties' claims on November 10, 2021, ROA.2393-95, and the Attorney General timely filed his notice of appeal the next day, ROA.2396-97. This Court has appellate jurisdiction under 28 U.S.C. § 1292.

Issues Presented

1. Whether Plaintiffs have standing.
2. Whether Plaintiffs' failure to exhaust remedies precludes their Americans with Disabilities Act (ADA) and Rehabilitation Act claims under the Individuals with Disabilities Education Act.
3. Whether the Attorney General violated the ADA and the Rehabilitation Act.

4. Whether Plaintiffs proved preemption causes of action in connection with the American Rescue Plan Act of 2021, the ADA, and the Rehabilitation Act.
5. Whether the permanent injunction is overbroad.

Statement of the Case

I. Governor Abbott Requires Public Schools to Make Masks Optional.

On March 13, 2020, as governments around the world increased measures to respond to the COVID-19 pandemic, Governor Greg Abbott signed an executive order invoking his emergency powers to protect Texans from the virus. ROA.16340. Nine months later, the pandemic paradigm permanently changed with the U.S. Food & Drug Administration's (FDA) approval of the first vaccine for the prevention of COVID-19. *See COVID-19 Vaccines*, FDA, https://tinyurl.com/2p92bdcx. Approval for two additional vaccines followed. *See id.*

On May 18, 2021, Governor Abbott issued an executive order making masks optional in most government buildings. ROA.16340. The order, GA-36, provided that "[n]o governmental entity, including a . . . school district, . . . and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering[.]" ROA.16341. The order exempted state-supported living centers, government hospitals, and criminal justice facilities. ROA.16341. It further "supersede[d] any face-covering requirement imposed by any local governmental entity or official." ROA.16341. The order stated that "the imposition of any such face-covering requirement by a local governmental entity or official constitutes

a 'failure to comply with' this executive order that is subject to a fine up to $1,000." ROA.16341. For public schools, the mask-optional order became effective on June 4, 2021. ROA.16341.

The order in question, GA-38, followed on July 29, 2021. ROA.16334. That order repeats all pertinent aspects of GA-36's mask-optional requirement. ROA.16337. It also "encourage[s]" individuals to "wear[] face coverings over the nose and mouth" when distancing is not possible and COVID-19 transmission rates are high. ROA.16336. GA-38 "strongly encourage[s] [Texans] as a matter of personal responsibility to consistently follow good hygiene, social-distancing, and other mitigation practices" and to follow Texas Department of State Health Services health recommendations. ROA.16334, 16336.

Governor Abbott issued each of the above orders pursuant to the Texas Disaster Act, which authorizes him to issue "[e]xecutive orders . . . hav[ing] the force and effect of law" following a triggering declaration. Tex. Gov't Code §§ 418.012, .014. As both GA-36 and GA-38 note, violations are punishable as crimes. *See id.* § 418.173; ROA.16337, 16341. Locally elected district attorneys prosecute all violations; the Attorney General lacks authority to prosecute on his own. *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (per curiam).

Most school districts have complied with GA-38, but there are exceptions. *See* ROA.2369. Some school districts violating the order have faced civil litigation in Texas state courts challenging their mask mandates as *ultra vires*. *See* ROA.2369, 2405. Both private parties and the State of Texas through the Attorney General have brought such suits, and both have succeeded in some of them. Order, *State of Texas*

v. Paris Indep. Sch. Dist., No. 90612 (6th Dist. Ct., Lamar County, Tex. Sept. 13, 2021); Temporary Injunction, *Treger v. Scribner*, No. 141-327449-21 (141st Dist. Ct., Tarrant County, Tex. Sept. 3, 2021). As illustrated by private parties' similar litigation, the Attorney General's GA-38 litigation relies on no special enforcement power. In addition to litigation, the Attorney General publishes on his website a list of non-compliant school districts and has sent letters to some of these school districts. ROA.2856-59. This and other GA-38 litigation continues in Texas state courts, but the Texas Supreme Court has stayed certain lower court orders enjoining GA-38. *See, e.g.*, Order, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021).

II. The District Court Permanently Enjoins the Attorney General.

On August 17, 2021, three months after Governor Abbott signed GA-36, 14 Plaintiffs filed a complaint and sought emergency relief from the U.S. District Court for the Western District of Texas. ROA.43. Plaintiffs identified Governor Abbott, the Texas Education Agency, and the Commissioner of the Texas Education Agency as defendants. ROA.43. The complaint pleaded three causes of action: (1) a violation of Title II of the Americans with Disabilities Act (ADA), (2) a violation of section 504 of the Rehabilitation Act, and (3) federal preemption under the American Rescue Plan Act of 2021 (ARP Act). ROA.72-78. In pertinent part, the ARP Act creates a grant program for schools to spend money on COVID-19 safety measures, among other things, if they publish a public plan identifying their COVID-19 protocols. ROA.625-27. Plaintiffs amended their complaint on September 1 and added the Attorney General as a defendant. ROA.262. They then sought a temporary restraining order, which the district court denied on September 15. ROA.2608.

One week before trial and on the same day the parties filed trial briefs, Plaintiffs filed a second amended complaint with leave of court that added a cause of action and subtracted plaintiffs and a defendant. ROA.590. The new claim alleged the ADA and Rehabilitation Act preempted GA-38. ROA.627. Seven plaintiffs exited the suit, and the seven remaining plaintiffs dropped their claims against Governor Abbott. ROA.590. The remaining plaintiffs range in age from seven to 12 and have underlying conditions that expose them to a greater risk of COVID-19 complications. ROA.2074-81. They attend seven different public schools in Texas, each subject to GA-38. ROA.2074-81. The Attorney General has initiated litigation against or sent letters to some of their schools. ROA.2074-81.

The district court held a bench trial on October 6 and entered a permanent injunction and final judgment against the Attorney General on November 10. ROA.2393, 2629. First, the court held the Texas Education Agency and its commissioner were immune from litigation because of state sovereign immunity. ROA.2372-74. The court characterized the Attorney General's litigation of *ultra vires* claims as enforcement and for that reason held the *Ex parte Young*, 209 U.S. 123 (1908), exception applied. ROA.2374-76. Second, the court held Plaintiffs had standing to sue the Attorney General. ROA.2376-78. Third, the court ruled the exhaustion requirements of the Individuals with Disabilities Education Act (IDEA) did not apply to Plaintiffs' claims because they did not allege the denial of a free and appropriate public education. ROA.2378-80. Fourth, the court held Plaintiffs prevailed on each of their four claims against the Attorney General. ROA.2380-91. Finally, the court entered a permanent injunction—unlimited in time or scope. ROA.2392.

The Attorney General sought a stay of the injunction pending appeal, ROA.2398, which the district court denied, ROA.2430-34. Following that denial, the Attorney General obtained a stay pending appeal in this Court. ROA.2445-59. Addressing Plaintiffs' likelihood of success on the merits, the Court first held that Plaintiffs likely lacked standing. ROA.2449-52. Plaintiffs likely had no injury because "the various accommodations available to the plaintiffs (e.g., distancing, voluntary masking, class spacing, plexiglass, and vaccinations) . . . ensure a safer learning environment, regardless of GA-38's prohibition of local mask mandates." ROA.2450-51. Moreover, Plaintiffs' injury likely was not redressable by the injunction since "nothing in the relief afforded by the district court would require the schools to remedy plaintiffs' alleged injury via local mask mandates." ROA.2452.

The IDEA also likely barred Plaintiffs' claims. ROA.2452-54. That law's exhaustion requirement likely applied because "Plaintiffs do not really center their claims on a deprivation of physical access." ROA.2453. "[A]t base," they "allege . . . the deprivation of an in-person state-sponsored education." ROA.2453. Next, Plaintiffs' ADA and Rehabilitation Act claims likely failed since they did not request an accommodation and their proposed accommodation, a mask mandate, was not necessary and obvious. ROA.2454.

The panel held Plaintiffs' preemption claims also likely failed. ROA.2455-57. First, their ADA and Rehabilitation Act preemption claims suffered the same errors as their first two claims: "Other means exist to control the spread of COVID-19 in school settings," and "Plaintiffs are not entitled to their preferred accommodation under the ADA and Rehabilitation Act if other reasonable accommodations are

available." ROA.2455. Second, the ARP Act preemption claim likely failed because GA-38 posed no obstacle to the ARP Act. ROA.2456-57. The Act "requires local education agencies to *communicate* with the public regarding what requirements, if any, it maintains regarding masking, and why." ROA.2456. "[R]emoving localized mask mandates from the range of policies and practices" available did not result in preemption. ROA.2456-57. Finally, the motions panel held that, "at a minimum, the district court's blanket injunction prohibiting the enforcement of GA-38 in all public schools across the State of Texas is overbroad." ROA.2457.

Summary of the Argument

Multiple defects in Plaintiffs' case preclude the district court's permanent injunction against the Attorney General. First, Plaintiffs lack standing to sue the Attorney General. They cannot prove an injury in fact because, especially after the recent expansion of vaccine eligibility to include schoolchildren, Plaintiffs cannot show that GA-38 leaves their schools unsafe. They also failed to prove redressability given the Attorney General's inability to mandate masks in Plaintiffs' schools.

Second, Plaintiffs' ADA and Rehabilitation Act claims fail. As another court analyzing a similar suit recognized, federal law requires Plaintiffs to attempt to reach a solution with their schools before initiating civil litigation in federal court. *See Hayes v. DeSantis*, No. 1:21-cv-22863-KMM, 2021 WL 4236698, at *5-12 (S.D. Fla. Sept. 15, 2021). Plaintiffs have not attempted an out-of-court resolution with their schools, and their claims are barred for that reason. On the merits, Plaintiffs' failure-to-accommodate claim fails because Plaintiffs never sought an accommodation, and the necessity of a mask mandate is not "open, obvious, and apparent." *Smith v. Harris*

County, 956 F.3d 311, 318 (5th Cir. 2020). The district court never grappled with Plaintiffs' failure to seek an accommodation and instead appeared to rule for Plaintiffs on a disparate-impact theory of liability that Plaintiffs never argued. Neither the ADA nor the Rehabilitation Act permit disparate-impact claims, but even if they did, Plaintiffs never proved that GA-38 causes a disparate impact.

Third, Plaintiffs' preemption claims lack merit. They cannot maintain an ARP Act preemption claim because they have no substantive right under the law and the Act implicitly precludes equitable enforcement. But even if they could litigate such a claim, GA-38's mask-optional order does not stand as an obstacle to the ARP Act grant program's requirement that school districts publicize their COVID-19 safety plans. Plaintiffs' ADA and Rehabilitation Act preemption claim fares no better for the same reasons their disability-discrimination claims fail. Finally, by granting statewide relief, the district court did not appropriately tailor its injunction to these seven Plaintiffs' claims. This Court should vacate the district court's permanent injunction.

STANDARD OF REVIEW

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Bd. of Trs. New Orleans Emps. Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 529 F.3d 506, 509 (5th Cir. 2008) (quoting *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)). "A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this

court is convinced that the findings are against the preponderance of credible testimony." *Id.*

ARGUMENT

I. Plaintiffs Lack Standing to Sue the Attorney General.

Plaintiffs' claims fail at the threshold because Plaintiffs lack standing. Each plaintiff must prove three elements to establish standing: "(1) an 'injury in fact,' (2) that is 'fairly . . . trace[able] to the challenged action of the defendant,' and (3) that is 'likely . . . redress[able] by a favorable decision.'" *Ghedi v. Mayorkas*, 16 F.4th 456, 464 & n.29 (5th Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 US. 555, 560-61 (1992)). Because "this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020). Plaintiffs failed to prove both an injury in fact and redressability. At bottom, they rely on an increased-risk-of-harm injury that is not concrete, actual, or imminent. And given the Attorney General's inability to mandate masks in Plaintiffs' schools, an injunction would not redress their injury.

A. Plaintiffs failed to prove an injury in fact.

As the motions panel recognized, Plaintiffs' alleged injury fails this Court's injury-in-fact requirements. *See* ROA.2450-51. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at

560). Plaintiffs' injury satisfies neither prong; it is not concrete, and it is neither actual nor imminent.

1. Plaintiffs' alleged injury is not concrete.

A concrete injury is "real and not abstract." *Id.* at 340 (cleaned up). "[I]t must actually exist." *Id.* The district court held Plaintiffs satisfied this element and characterized their injury as "the deprivation of reasonable access to in-person public schooling." ROA.2377. According to Plaintiffs and the district court, that deprivation exists because "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.2391; *see also* ROA.609. But, as the motions panel recognized, "plaintiffs have not shown that they face such an 'either/or' choice as a result of GA-38." ROA.2450.

That is because, as all understand after the last two years, no one strategy eliminates the risk of infection in social situations, but the combination of a few goes a long way. Each of Plaintiffs' schools takes a multi-pronged approach to mitigating the risk of infection, and Plaintiffs, if they choose to work with their schools, can further protect themselves. Plaintiffs have a protected right to wear masks. ROA.16351. Plaintiffs and their schools can ask the students and staff with whom Plaintiffs interact to voluntarily mask. ROA.2450. The addition of plexiglass barriers, ventilation, and increased distancing around Plaintiffs' desks would also mitigate risk. *See* ROA.2450. Policies already in place in Plaintiffs' schools further reduce the risk. For example, Plaintiffs' schools must exclude any student suspected of a COVID-19 infection, and parents cannot send to school a child exhibiting COVID-

19 symptoms. ROA.16352. When a student or staff member tests positive for COVID-19, Plaintiffs' schools must notify all students and staff in that person's classes and activities. ROA.16351. And Plaintiffs' schools are authorized to screen for asymptomatic cases by administering rapid COVID-19 tests on students and staff. ROA.16352.

The above summarizes the landscape at the time of trial, but Plaintiffs' claim to an injury in fact is substantially weaker today because of the FDA's November 2021 approval of the Pfizer vaccine for school-age children. *See* ROA.2368. This was, as President Joe Biden put it, "a giant step forward." *Remarks by President Biden on the Authorization of the COVID-19 Vaccine for Children Ages 5 to 11*, The White House (Nov. 3, 2021), https://tinyurl.com/yc5saw6m. The director of the Centers for Disease Control and Prevention (CDC) called it a "monumental" development. *Press Briefing by White House COVID-19 Response Team and Public Health Officials*, The White House (Nov. 3, 2021), https://tinyurl.com/ywcphdsp. Indeed, as Plaintiffs explained in their complaint, "full vaccination is the '*leading* public health prevention strategy to end the COVID-19 pandemic.'" ROA.605 (emphasis added). "[V]accines provide a much better defense against infection than any judicial order could do." *United States v. Ugbah*, 4 F.4th 595, 597 (7th Cir. 2021) (Easterbrook, J.).

This development affects the analysis. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413 (5th Cir. 2013). Each of the seven Plaintiffs and their classmates can take the vaccine. Though some of the Plaintiffs' conditions *may* reduce the vaccine's

effectiveness, *see* ROA.2635, each Plaintiff will benefit from their classmates' and teachers' vaccination and the safer classroom environment that results. The motions panel, noting Plaintiffs' vaccine eligibility, correctly concluded that "the binary choice envisioned by the district court—either stay home or catch COVID-19—is a false one." ROA.2450.

2. Plaintiffs' alleged injury is not actual or imminent.

In addition to failing to show concreteness, Plaintiffs have not shown an actual or imminent injury. "The 'actual or imminent' requirement is satisfied only by evidence of a 'certainly impending' harm or a 'substantial risk' of harm." *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (per curiam) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 & n.5 (2013)). Neither apply to Plaintiffs' alleged injury. Properly understood, each Plaintiff claims to be injured by the risk of becoming infected by COVID-19. This Court does not recognize increased-risk injuries of this type.

"Increased-risk claims . . . often cannot satisfy the 'actual or imminent' requirement." *Id.* "Much government regulation slightly increases a citizen's risk of injury—or insufficiently decreases the risk compared to what some citizens might prefer." *Id.* (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007)). "Opening the courthouse to these kinds of increased-risk claims would drain the 'actual or imminent' requirement of meaning." *Id.*

Two Plaintiffs transparently proceed on an increased-risk injury. E.S. attends school in person even though E.S.'s school does not mandate masks, and S.P., whose school mandates masks, will remain in-person even if masks become optional.

ROA.2076, 2081, 2715. E.S. and S.P. do not claim an infection is certainly impending; instead, they allege a "significant risk of injury." ROA.974. But the same reasons Plaintiffs fail to show concreteness also demonstrate the absence of a "substantial risk."

Beyond that defect, in choosing to allege a "substantial risk," "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." *Clapper*, 568 U.S. at 414 n.5. Plaintiffs never proved that GA-38 caused a substantial risk of harm. At trial, the Attorney General showed that among the seven schools and school districts at issue, mask mandates did not materially improve COVID-19 positivity rates. ROA.16403. At the time of trial, two of the Plaintiffs' schools did not mandate masks while the remaining five did. ROA.2677. Among Plaintiffs' seven school districts, all but one had a COVID-19 positivity rate between 2.6 and 3.9 percent between the beginning of the school year and September 26. ROA.16467. The two mask-optional school districts had positivity rates of 3.0 and 3.9 percent while the five school districts mandating masks registered rates of 0.4, 2.6, 2.8, 2.9, and 3.9 percent. ROA.16467.

Among the individual schools that Plaintiffs attend, COVID-19 positivity rates varied, with one exception, between 1.1 and 5.4 percent. ROA.16467. The two mask-optional schools had positivity rates of 1.9 and 3.0 percent while the five schools requiring masks logged rates higher, lower, and in-between those figures. ROA.16467. They measured at 0.3, 1.1, 2.3, 4.9, and 5.4 percent. ROA.16467. The district court called this data "important" and "persuasive" and did not hold that the absence of

universal masking causes a substantial risk. ROA.2702. It merely held masking "may decrease" the risk of infection. ROA.2391.

Five Plaintiffs disclaim any increased-risk injury, instead characterizing their injury as the forced exclusion from in-person education. But, as the motions panel recognized, "GA-38 does not bar plaintiffs' physical access to school or require them to resort to virtual learning." ROA.2451. Instead, "any deprivation [of access to in-person education] appears to be attributable to choices made by plaintiffs." ROA.2451. Those choices do not transform a speculative increased-risk injury into an injury in fact. Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

In repackaging their increased-risk injuries, these five Plaintiffs repeat errors observed in the so-called "self-inflicted injury" line of cases. The *Clapper* plaintiffs argued the possibility of government surveillance of their communications injured them by forcing them to "take costly and burdensome measures to protect the confidentiality of their international communications." *Id.* at 402. The Court did not allow the plaintiffs to "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* This Court turned away a similar alleged injury in *Glass v. Paxton*, 900 F.3d 233, 242 (2018) ("Glass cannot manufacture standing by self-censoring her speech based on what she alleges to be a reasonable probability that concealed-carry license holders will intimidate professors and students in the classroom."). In the end, all seven Plaintiffs rely on an increased-risk injury that does not meet this Court's test for standing.

Plaintiffs' fundamental injury, the risk of a COVID-19 infection, is neither actual nor imminent. They cannot establish GA-38 has caused them a substantial risk of harm, and they cannot argue otherwise by choosing to avoid in-person education. The motions panel correctly held that "given the other preventative measures available to plaintiffs and the schools they attend, any injury-in-fact arising from the enforcement of GA-38 appears speculative or tentative, not actual or imminent." ROA.2451.

B. An injunction will not redress Plaintiffs' alleged injury.

Plaintiffs also failed to establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Inexplicably, Plaintiffs excluded from this litigation the only authorities capable of redressing their injuries: Plaintiffs' school districts. The Attorney General is powerless to mandate masks in Plaintiffs' schools, and Plaintiffs do not argue otherwise. Instead, Plaintiffs represented that if their suit succeeded, each of their seven schools would mandate masks, thereby redressing their injuries. But those representations amounted to nothing more than speculation, as confirmed by later facts. Plaintiffs' speculation cannot establish redressability.

The showing required "to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue." *Lujan*, 504 U.S. at 561. "When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action

or inaction—and perhaps on the response of others as well." *Id.* at 562. "To satisfy that burden, the plaintiff must show at the least 'that third parties will likely react in predictable ways.'" *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019)). "Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 568 U.S. at 414 n.5 (quoting *Lujan*, 504 U.S. at 562) (cleaned up).

GA-38 does not apply to Plaintiffs, and Plaintiffs do not argue otherwise. It does not regulate their conduct. They face no threat of enforcement from the Attorney General or anyone else. Only Plaintiffs' schools can comply with or violate GA-38. Recognizing this, Plaintiffs attempted to prove redressability by arguing a chain of events: "The reason [Plaintiffs] are unable to have" "meaningful equal access to education. . . . is because of GA-38, which has stopped their school districts from doing what they would have done otherwise, which is have a mask mandate." ROA.2786. The district court found that "[i]f GA-38 were not enforced, school districts would have the discretion to implement a mandatory mask policy." ROA.2377. But it never addressed the likelihood that Plaintiffs' schools would mandate masks. The school districts' additional discretion changes nothing for Plaintiffs unless it is exercised.

Plaintiffs' exclusion of their school districts from this litigation remains a puzzling choice. Plaintiffs offered the opinions of five district courts' rulings in similar cases in other circuits as a "road map" for the district court. ROA.2159. But the plaintiffs litigating each of those cases also sued local authorities empowered to mandate masks. *S.B. ex rel. M.B. v. Lee*, No. 3:21-cv-00317, 2021 WL 4755619, at *2 (E.D.

Tenn. Oct. 12, 2021); *Disability Rts. S.C. v. McMaster*, No. 3:21-02728, 2021 WL 4444841, at *1 (D.S.C. Sept. 28, 2021) (mem. op.); *R.K. v. Lee*, No. 3:21-cv-00725, 2021 WL 4391640, at *1 (M.D. Tenn. Sept. 24, 2021); *ARC of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 WL 4166728, at *1 (S.D. Iowa Sept. 13, 2021); *G.S. ex rel. Schwaigert v. Lee*, No. 21-cv-02552, 2021 WL 4057812, at *1 & n.1 (W.D. Tenn. Sept. 3, 2021).[1]

Without a defendant capable of mandating masks, Plaintiffs resorted to impermissible speculation to prove redressability. They repeatedly promised the court that an injunction would result in seven mask mandates in Plaintiffs' seven schools: "[W]e know exactly what [the schools] would do, because the evidence tells us. And the evidence tells us that, but for GA-38, these seven schools would have a universal mask mandate." ROA.2780. "If GA-38 were not in place, there would be masking, and it wouldn't be an issue. These students would be able to go to school as a factual matter." ROA.2777. For support, Plaintiffs principally relied on the declaration of Denetta Williams, one of seven members of the board of trustees governing M.P.'s school district, Fort Bend I.S.D. ROA.2663, 2664, 2714. Ms. Williams averred that

[1] Noting that "it's not a foregone conclusion that an individual school district would allow masks or disallow masks," the court remarked at trial that "it's clear to me that if the plaintiffs prevail here and the court in some way restricts GA-38, that *we won't know whether there's discrimination until potentially the second lawsuit*, because a school district might not compel masking even though it could." ROA.2726 (emphasis added). The court correctly described the situation but failed to see the flaw in Plaintiffs' failure to press claims against their school districts. No plaintiff has standing to a sue a defendant for disability discrimination on the premise it will tee up another disability-discrimination suit for another day against another defendant.

"[i]f the AG stopped enforcing GA-38, or there is an order barring enforcement of GA-38, the FBISD mask requirement would immediately go back into effect." ROA.1227. Plaintiffs also relied on the representation of a media report's unnamed source that E.S.'s school district, Killeen I.S.D., would "call a special board meeting to reconsider enforcing a mandate" "[i]f there is a change in the executive order." ROA.2664, 4395.

The district court's preliminary injunction proved Plaintiffs' prediction of seven mask mandates to be incorrect. Two of Plaintiffs' schools did not mandate masks at the time of trial, ROA.2677, and neither imposed a mask mandate after the injunction issued. Fort Bend I.S.D.'s board of trustees met five days after the entry of the preliminary injunction and voted to *rescind* its mask mandate. Claire Shoop, *Fort Bend ISD Unanimously Rescinds Mask Mandate, Leaving Masks Optional in Schools*, ABC-13 (Nov. 16, 2021), https://tinyurl.com/yc8yc27m. Plaintiffs' declarant abstained from the six-to-zero vote. *Id.* And though the issue came up during a Killeen I.S.D. board meeting held while the district court's preliminary injunction was in effect, that district also did not implement a mask mandate. Lauren Dodd, *Killeen ISD Stays Mum on Mask Mandate Changes*, Harker Heights Herald (Nov. 19, 2021), https://tinyurl.com/43xswjse.

Beyond the Fort Bend and Killeen districts, three of the five school districts that had been violating GA-38 have lifted their mask mandates. Richardson I.S.D. cited school-children's eligibility for vaccination in announcing it would no longer require masks. Dr. Jeannie Stone, *Superintendent Update*, YouTube (Nov. 11, 2021), https://tinyurl.com/2p8nh3k3. Leander I.S.D. also does not presently mandate

masks though a mask mandate could go back into effect if case numbers rise. *COVID-19: Safe Return to In-Person Instruction and Continuity of Service (RIPICS) Plan*, Leander I.S.D., https://tinyurl.com/5xvbyj2j (last accessed Dec. 23, 2021). Round Rock I.S.D. plans to lift its mask mandate on January 18. *Round Rock ISD to Lift Mask Mandate After Winter Break*, KVUE (Dec. 19, 2021), https://tinyurl.com/2p95ayeu. Among Plaintiffs' school districts, only the Edgewood and San Antonio districts appear to still require masks. San Antonio I.S.D. plans to evaluate its mask mandate in January. Brooke Crum, *SAISD Reinstates Mask Mandate, Anticipating Rise in COVID-19 Cases*, San Antonio Report (Dec. 7, 2021), https://tinyurl.com/yycpa9te.

Plaintiffs cannot establish standing on this demonstrably speculative theory of redressability. As another court recognized in analyzing a similar suit against the Florida governor, it "is anything but guaranteed" that "an injunction would even have Plaintiffs' desired effect." *Hayes*, 2021 WL 4236698, at *16. At least today, Plaintiffs' schools are trending away from mask mandates. That, of course, could change. But the fatal flaw in the district court's finding of standing to enjoin the Attorney General will remain: "[N]othing in the relief afforded by the district court would require the schools" to impose a mask mandate, and Plaintiffs cannot show redressability by speculating about what their schools will do. ROA.2452; *see also Binno v. Am. Bar Ass'n*, 826 F.3d 338, 345 (6th Cir. 2016) (injury for plaintiff's ADA challenge to LSAT was not redressable because "law schools still could choose to require the LSAT in their admissions process").

GA-38 regulates Plaintiffs' schools, and the Attorney General has directed his litigation and compliance correspondence towards those regulated by the order. Those schools' students, as third parties, are not proper plaintiffs to challenge this order.[2]

II. Plaintiffs' ADA and Rehabilitation Act Claims Fail.

Even if Plaintiffs had standing, they cannot prove the Attorney General violated the ADA or Rehabilitation Act. Their claims fail at the threshold because the IDEA's exhaustion requirement applies, and they have not even attempted to obtain an accommodation from their schools. Their claims fail on the merits for essentially the same reason: None of the plaintiffs have ever sought an accommodation from either the Attorney General or their schools, and their preferred accommodation, a mask mandate, is not so open, obvious, and apparent that Plaintiffs did not need to seek an accommodation. The district court ignored this element of Plaintiffs' claims and instead held the Attorney General liable on what appears to be a disparate-impact theory. This Court has never found disparate impact to be a permissible theory of relief under Title II of the ADA or the Rehabilitation Act, and Plaintiffs never sought to

[2] In addition, there remains real doubt Plaintiffs will choose to attend school even if their schools mandate masks. All seven Plaintiffs chose to avoid in-person education last year even though their schools mandated masks. ROA.2074-81, 2755. H.M. will be withdrawn from in-person education if a classmate tests positive for COVID-19 even if H.M.'s school mandates masks. ROA.2078. On similar facts, another district court expressed "concerns as to whether an injunction of [the Florida governor's executive order] would provide redress to Plaintiffs' alleged injuries." *Hayes*, 2021 WL 4236698, at *12.

enjoin the Attorney General on that basis. Neither statute authorizes liability of the sort the district court found.

A. The IDEA requires Plaintiffs to exhaust administrative remedies, and they have not sought accommodations from their schools.

Plaintiffs' choice to seek an injunction against the Attorney General before even requesting an accommodation from their schools precludes their claims. Congress has barred plaintiffs from litigating ADA and Rehabilitation Act claims if their suit "seek[s] relief that is also available under" the IDEA and the plaintiffs have not exhausted administrative remedies. 20 U.S.C. § 1415(l). The policy reflects a judgment that "school officials, teachers, and parents" should work together to craft a personalized plan meeting a student's needs before parents seek a federal court injunction. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017).

The Supreme Court interprets this statute to require exhaustion whenever "the substance, or gravamen, of the plaintiff's complaint" "seek[s] relief for the denial of a [free appropriate public education]"—commonly termed a "FAPE." *Id.* at 752. A FAPE includes a child's "'meaningful' access to education based on her individual needs." *Id.* at 753-54 (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982)). "One clue" to the gravamen of a complaint comes from the answers to two "hypothetical questions." *Id.* at 756. "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" such as a "a public theater or library?" *Id.* "And second, could an *adult* at the school," like "an employee or visitor[,] have pressed

essentially the same grievance?" *Id.* Affirmative answers suggest the case does not concern the denial of a FAPE. *Id.*

The district court held the IDEA did not require exhaustion of Plaintiffs' claims because "Plaintiffs seek to allow their public-school districts the discretion to impose mask mandates and provide children with 'non-discriminatory access to public institutions' under the ADA and [the Rehabilitation Act]." ROA.2380. Answering *Fry*'s hypothetical questions, the court held that plaintiffs could litigate their claims against "another public facility, such as a library," and that adults at public schools "could also bring the claims alleged by Plaintiffs." ROA.2380.

While Plaintiffs do not allege the "denial of a [free appropriate public education]," *Fry*, 137 S. Ct. at 752, word-for-word, they do repeatedly allege GA-38 is "depriving them of meaningful access to an in-person public education." ROA.963; *see also, e.g.*, ROA.973-74; ROA.977-79. Their case is inextricably, and explicitly, intertwined with their education. Plaintiffs do not separate their injuries from their education. J.R., for example, claims they cannot participate in choir and field trips. ROA.2078. M.P. claims they are missing speech and reading support. ROA.2074. And H.M. alleges they have been deprived of "direct, face-to-face instruction." ROA.2079. Plaintiffs also allege their complaint's tie to education amplifies their injuries: "[S]tudents with disabilities need in-person schooling more than other student groups." ROA.605. Library patrons and school teachers cannot litigate upon allegations like these.

The district court's analysis wrongly focuses on Plaintiffs' preferred accommodation of a mask mandate instead of the overall thrust of their claims. The student

experience—classroom instruction and activities ranging from shop class to physical education for seven hours a day, five days a week, nine months a year—differs from other contexts and requires unique mitigation strategies. That is why the CDC and Texas Education Agency both issue school-specific guidance. *See, e.g.*, ROA.2836, 2862. COVID-19 mitigation measures in place in one Plaintiff's classroom may differ from the measures needed during J.R.'s choir rehearsal and field trips or H.M.'s one-on-one instruction. The motions panel correctly cast aside Plaintiffs' mischaracterization of their complaint as the "deprivation of physical access." ROA.2453.[3]

The motions panel's decision aligned with *Hayes*, 2021 WL 4236698, at *5-12, which held the IDEA's exhaustion requirement applied to a group of students' similar suit challenging the Florida governor's executive order prohibiting mask mandates. The *Hayes* plaintiffs, as with Plaintiffs here, brought ADA and Rehabilitation Act claims without exhausting administrative remedies with their schools. *Id.* at *6. In holding the IDEA barred their claims, the court found that the plaintiffs "would benefit more from the exhaustion of their administrative remedies to reach individualized accommodations than the enjoining of [the Governor's] Executive Order." *Id.* at *16. And while the *Hayes* plaintiffs made the IDEA's application obvious by admitting in their pleadings that their suit alleged the denial of a FAPE, *id.* at *7, the

[3] As the motions panel recognized, the district court's erroneous holding effectively invites far-reaching mask-mandate litigation. If the district court correctly interpreted Plaintiffs' complaint to seek access to a public space, then "any plaintiff could insist upon a mask mandate at any public facility or assert an ADA or Rehabilitation Act claim based on the entity's failure to impose one." ROA.2453.

Fry "inquiry . . . does not ride on whether a complaint includes (or, alternatively, omits) the precise words[] 'FAPE' or 'IEP [individualized education plan].'" *Fry*, 137 S. Ct. at 755. That "'magic words' approach would make § 1415(l)'s exhaustion rule too easy to bypass." *Id.* Plaintiffs could have and should have attempted to work out a solution with their schools before seeking a federal court's statewide injunction against the Attorney General. Their failure to do so bars their claims now.

B. Plaintiffs' claims fail on the merits.

Even if the IDEA exhaustion requirement did not apply to their claims, Plaintiffs failed to prove ADA and Rehabilitation Act violations. They did not prove a failure-to-accommodate claim, and they cannot defend the judgment below by shifting to a disparate-impact theory of liability. Neither the ADA nor the Rehabilitation Act permit relief on that basis, and even if they did, Plaintiffs did not make the showing needed to establish disparate-impact liability.

The ADA provides that "[n]o 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." 42 U.S.C. § 12132. The Rehabilitation Act's rule mirrors the ADA in all pertinent respects except the exclusion, denial of benefits, or discrimination must be "*solely* by reason" of the disability. 29 U.S.C. § 794(a) (emphasis added). Thus, to make out an ADA or Rehabilitation Act claim, "a plaintiff must show '(1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being

discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability." *Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020) (quoting *Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 671-72 (5th Cir. 2004)).[4] "The remedies, procedures, and rights available under the Rehabilitation Act parallel those available under the ADA." *Id.*; *see also* 42 U.S.C. § 12133. Courts often analyze such claims together, as the district court did below.

1. The Attorney General did not fail to accommodate Plaintiffs.

Plaintiffs cannot prove the Attorney General failed to accommodate their disabilities—the sole theory for relief Plaintiffs offered at trial. *See* ROA.2761. The district court did not rule for Plaintiffs on this basis, and Plaintiffs cannot defend the judgment below on failure-to-accommodate grounds.

"'To succeed on a failure-to-accommodate claim, a plaintiff must prove: (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered entity; and (3) the entity failed to make reasonable accommodations.'" *Smith*, 956 F.3d at 317 (quoting *Ball v. LeBlanc*, 792 F.3d 584, 596 n.9 (5th Cir. 2015)). "Plaintiffs ordinarily satisfy the knowledge element by showing that they identified their disabilities as well as the resulting limitations to a public entity or its employees and requested an accommodation in direct and specific terms." *Id.* "When a plaintiff fails to request an accommodation in this manner, he can prevail only by showing that 'the disability, resulting limitation, and necessary reasonable accommodation' were 'open, obvious, and apparent' to the entity's

[4] The parties agree each Plaintiff satisfies the first element. ROA.2070.

relevant agents.'" *Id.* at 317-18 (quoting *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996)).

As an initial matter, this claim and this defendant do not pair. The Attorney General cannot give Plaintiffs their desired accommodation of a mask mandate. He did not sign GA-38. He cannot amend it. And he cannot order Plaintiffs' schools or anyone to mandate masks. But even if he had this authority, Plaintiffs did not "identif[y] their disabilities" to him and "request[] an accommodation" of him. *Id.* at 317. The record contains no evidence that any of the Plaintiffs requested a COVID-19 accommodation of anyone. *See* ROA.2454. In the district court, Plaintiffs initially argued the objective alternative to the knowledge element. When they sought a temporary restraining order, Plaintiffs contended: "I don't think anything could be more than open and obvious than masking." ROA.2573. But three weeks later at trial, Plaintiffs abandoned this argument. They never responded to the Attorney General's argument that Plaintiffs' failure to seek an accommodation required them to make an "open, obvious, and apparent" showing. ROA.2744-45, 2752. They did not argue the knowledge element was inapplicable. They ignored it. The district court's opinion also does not address it.

In any event, Plaintiffs' "disability, resulting limitation, and necessary reasonable accommodation" are not "open, obvious, and apparent." *Smith*, 956 F.3d at 318. As the motions panel held, "there are any number of other ways schools could accommodate plaintiffs' disabilities without traversing either GA-38 or federal law." ROA.2454. Public entities are "not duty bound to acquiesce in and implement every accommodation a disabled student demands." *Campbell v. Lamar Inst. of Tech.*, 842

F.3d 375, 381 (5th Cir. 2016). So long as offered "accommodations are reasonable," plaintiffs are "not entitled to [their] preferred accommodation." *Id.* at 382.[5] Plaintiffs' failure-to-accommodate claim "rests on the faulty premise that the *only* accommodation available to Plaintiffs is their schools' ability to impose mask mandates." ROA.2454. For the same reasons Plaintiffs lack an injury in fact, the necessity of a mask mandate is not open, obvious, and apparent.

2. A disparate-impact theory of liability does not support the judgment below.

Instead of analyzing Plaintiffs' claims under the failure-to-accommodate theory that Plaintiffs offered, the district court held GA-38 "is unlawful because it 'ha[s] the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.'" ROA.2388 (alteration in original) (quoting 28 C.F.R. § 35.130(b)(3)). The district court's holding appears to rely on a disparate-impact concept that this Court has never approved and Plaintiffs implicitly ruled out. Plaintiffs accurately described the legal landscape at trial: "To state the claim that we are making here . . . there's two aspects of the kind of discrimination that you can have. One is intentional discrimination, which we are not seeking, we have not pled or proven. The other is failure to accommodate and—or modify or reasonably

[5] Plaintiffs' concession that the necessity of a mask mandate requires a "fact-specific inquiry" also undermines the claim a mask mandate is an "open, obvious, and apparent" accommodation. At trial, Plaintiffs admitted: "[W]e're not suggesting that schools must adopt mask requirements as a reasonable accommodation regardless of circumstance. . . . [W]hat constitutes such a modification is of course a fact-specific inquiry." ROA.2723.

accommodate." ROA.2761; *see also* ROA.2725. Plaintiffs cannot now defend the district court's judgment by arguing this Court should expand Title II of the ADA and the Rehabilitation Act to reach disparate-impact claims. Even if this Court did recognize such a claim, Plaintiffs could not prove its elements.

a. Neither the ADA nor the Rehabilitation Act encompass disparate-impact claims.

Neither Title II of the ADA nor the Rehabilitation Act permit a disparate-impact theory of liability. The Supreme Court rejected the "boundless notion" that every showing of a disparate impact can establish a Rehabilitation Act claim in *Alexander v. Choate* while also "assum[ing] without deciding" that the Rehabilitation Act may authorize some subset of disparate-impact claims. 469 U.S. 287, 299 (1985). The courts of appeals have disagreed on the correctness of that assumption.[6] *See, e.g.*, *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 734-37 (9th Cir. 2021); *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 241-43 (6th Cir. 2019). This Court has not yet considered the question.[7]

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[6] This summer, the Supreme Court granted a petition for a writ of certiorari to resolve the split. The parties agreed to a voluntary dismissal of the appeal last month, and the Court has removed the case from its calendar. *See* Joint Stipulation to Dismiss, *CVS Pharm., Inc. v. Doe*, No. 20-1374 (U.S. Nov. 11, 2021).

[7] *T.O. v. Fort Bend Independent School District*, which affirmed the dismissal of ADA and Rehabilitation Act claims, states in passing that "[e]vidence of intentional discrimination is necessary to support a claim for monetary damages, but a plaintiff seeking only equitable relief may succeed on a disparate impact theory." 2 F.4th 407, 417 (5th Cir. 2021). It cites *Miraglia v. Board of Supervisors of Louisiana State Museum*, 901 F.3d 565, 574 (5th Cir. 2018), for this proposition. *Miraglia* held that damages

"The always primary . . . interpretive tool is the text itself." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020). Once again, Title II of the ADA provides: "[N]o qualified individual with a disability shall, *by reason of* such disability, be excluded from participation in or be denied . . . benefits . . . , or be subjected to discrimination. . . ." 42 U.S.C. § 12132 (emphasis added). The Rehabilitation Act is identical in all pertinent respects except causation is "*solely* by reason of." 29 U.S.C. § 794(a) (emphasis added). "Nothing in the text remotely suggests that it encompasses a disparate impact theory, which holds that even facially neutral laws are discriminatory if they have an unintended disproportionate effect on certain groups." *Payan*, 11 F.4th at 741 (Lee, J., dissenting). The Rehabilitation Act makes this even clearer, given its "solely by reason of" limitation. *See Doe*, 926 F.3d at 242.

The two statutes' lineage confirms the law's exclusion of disparate-impact liability. "The ADA was modeled after the Rehabilitation Act," *Frame v. City of Arlington*, 616 F.3d 476, 482 n.4 (5th Cir. 2010) (en banc), and "[the Rehabilitation Act] was patterned after Title VI of the Civil Rights Act of 1964," *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983). Similar to its statutory progeny, Title VI provides: "No person in the United States shall, *on the ground of* race, color, or national origin, be excluded . . . , be denied . . . benefits . . . , or be subjected to discrimination . . . ." 42 U.S.C. § 2000d (emphasis added). Title VI does not reach disparate-impact claims. *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). Thus,

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claims under these statutes require evidence of intentional discrimination, but it did not analyze the issue discussed in this subsection. *Id.*

"there is a domino effect: If Title VI does not allow a disparate impact claim, then the Rehabilitation Act cannot (because it derives its remedies and rights from Title VI), and the ADA cannot either (because it, in turn relies on the Rehabilitation Act for its remedies and rights)." *Payan*, 11 F.4th at 743 (Lee, J., dissenting).

"A comparison to other antidiscrimination statutes leads to the same conclusion." *Doe*, 926 F.3d at 242. As this Court observed in an unpublished opinion, "[w]hen Congress wants to allow disparate impact claims, it uses particular language" usually touching upon a policy's effects. *Kamps v. Baylor Univ.*, 592 F. App'x 282, 285 (5th Cir. 2014). Both Title I and Title III of the ADA authorize disparate-impact claims by prohibiting "standards, criteria, or methods of administration—that *have the effect of* discrimination on the basis of disability." 42 U.S.C. §§ 12112(b)(3)(A), 12182(b)(1)(D)(i) (emphasis added); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). Both bar criteria that "screen out or *tend to screen out* an individual with a disability or a class of individuals with disabilities" unless necessary for other legitimate goals. 42 U.S.C. §§ 12112(b)(6), 12182(b)(2)(A)(i) (emphasis added).

Looking outside the ADA, Title VII of the Civil Rights Act includes disparate-impact claims by making it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015). The Age Discrimination in

Employment Act copies Title VII's "otherwise adversely affect" language and authorizes disparate-impact liability because it "focuses on the *effects* of the action." *Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005) (plurality opinion). The Fair Housing Act of 1968 embraces disparate-impact claims with its "otherwise make unavailable or deny," 42 U.S.C. § 3604(a), language. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534 (2015). That language is of "central importance" because, like "otherwise adversely affect," this phrase "refers to the consequences of an action rather than the actor's intent." *Id.* Title II of the ADA and the Rehabilitation Act, by comparison, omit disparate-impact terms. Congress presumably intended this omission. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013).[8]

The atextual expansion of Title II of the ADA and the Rehabilitation Act to reach disparate-impact claims would license a new species of litigation challenging the policies of school districts, universities, state Medicaid plans, hospitals, prisons, and other federal funding recipients. Nearly any facially neutral policy would be susceptible to disability-discrimination litigation, as this Court has recognized the possibility that conditions ranging from psoriasis to chronic fatigue can constitute disabilities. *See E.E.O.C. v. Chevron Phillips Chem. Co.,* 570 F.3d 606, 615-19 (5th Cir.

[8] The district court's quotation from 28 C.F.R. § 35.130(b)(3) does not change the analysis. *See* ROA.2388; *see also Payan*, 11 F.4th at 743 (Lee, J., dissenting); *cf Doe*, 926 F.3d at 240 (discussing Affordable Care Act federal guidance). "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291.

2009). "Even entertaining the idea of disparate-impact liability in this area invites fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions." *Doe*, 926 F.3d at 242. The district court's willingness to find a disparate-impact claim even in a governor's exercise of emergency powers raises a separate concern for how litigation of this type could frustrate government policymaking in exigencies. Consistent with the text and structure of the statutes at issue, this Court should not permit the district court's extension of Title II of the ADA and the Rehabilitation Act.

b. Plaintiffs cannot prove GA-38 caused a significant disparate effect.

Even if this Court allowed disparate-impact litigation under the ADA and Rehabilitation Act, Plaintiffs did not prove causation by the standard necessary for such a claim. "To prove a case of disparate impact discrimination, the plaintiff must show that 'a specific policy caused a significant disparate effect on a protected group.'" *Cinnamon Hills Youth Crisis Ctr, Inc. v. Saint George City*, 685 F.3d 917, 922 (10th Cir. 2012) (Gorsuch, J.). "This is generally shown by statistical evidence . . . involving the appropriate comparables necessary to create a reasonable inference that any disparate effect identified was caused by the challenged policy and not other causal factors." *Id.* (cleaned up). The district court never found GA-38 "caused a significant disparate effect." *Id.* It merely concluded "[t]he evidence here supports that the use of masks *may* decrease the risk of COVID infection in group settings." ROA.2391 (emphasis added). That finding does not create disparate-impact liability.

Plaintiffs bear the burden of proof on this element, and the only statistical evidence Plaintiffs produced at trial showed a higher number of COVID-19 cases in

schools in the present school year as compared to the 2020-21 school year. *See* ROA.2645. Plaintiffs claimed this comparison proved GA-38's harmful effect since the order was issued this summer. ROA.2703. But their logic suffers several defects. First, Plaintiffs' methodology does not control for "other causal factors." *Cinnamon Hills*, 685 F.3d at 922. As the district court's opinion notes, this school year's increase in case numbers "appears to be due to two principal factors: the resumption of in-person schooling and the emergence of the Delta variant of COVID-19." ROA.2366. Plaintiffs' comparison does not control for the number of students who relied on virtual learning during the previous school year. ROA.2683. And Plaintiffs undermined their own logic at trial in explaining that "the delta variant has caused the spreading of COVID at a higher rate." ROA.2644; *see also* ROA.2537. Case numbers rose and fell before GA-38, and they will continue to fluctuate under GA-38.

Second, the fundamental premise of Plaintiffs' comparison is incorrect. Though Governor Abbott issued GA-38 this summer, school districts had substantial discretion to make masks optional throughout the 2020-21 school year. Before March 2021, Governor Abbott's order mandated masks only for students ages 10 or older. ROA.2368, 3885, 3938, 4013. Decisions on mandatory masking for younger students were left to local leaders. ROA.2368, 3885, 3938, 4013. Governor Abbott's March 2021 order allowed schools to decide whether to enforce mandatory masking for students of all ages. *See Weatherford ISD Votes to Make Face Coverings Optional*, Weatherford Democrat (Mar. 9, 2021), https://tinyurl.com/yc5mmter; Executive Order GA-34 (Mar. 2, 2021), https://tinyurl.com/5ddnhnvy. Thus, Plaintiffs' evidence

wrongly compared post-GA-38 conditions to conditions when schools had considerable discretion to make masks optional.

By comparison, the Attorney General presented evidence controlling for a school's choice to mandate masks. As discussed, the Attorney General compared COVID-19 positivity rates in Plaintiffs' seven schools and seven school districts. *See* p. 14, *supra*. That data showed immaterial differences between COVID-19 positivity rates in Plaintiffs' two mask-optional schools and five mask-mandate schools. *Id.* At trial, the district court recognized the Attorney General's evidence was "more important and more persuasive to the Court regarding what the result you ultimately get is than the data [Plaintiffs] present[ed]." ROA.2702. It was also "more focused" than Plaintiffs' evidence. ROA.2702. Had the district court required Plaintiffs to prove causation under the standard applicable to disparate-impact claims, Plaintiffs could not have carried their burden of proof.

c. GA-38 does not deny Plaintiffs meaningful access to their schools.

The district court also erred because Plaintiffs have not been denied meaningful access to their schools. The district court concluded that GA-38 "prevents local school districts from satisfying their ADA obligations to provide students with disabilities" equal access to in-person education because "even if a school district determines after an individual assessment that mask wearing is necessary to allow disabled students equal access" they cannot mandate masks. ROA.2388. But the district court assumes facts that do not exist. No plaintiff has even sought a reasonable

accommodation from their school districts. GA-38 has not prevented any of Plaintiffs' schools "from satisfying their ADA obligations." ROA.2388.

GA-38 does not prevent any Plaintiff from meaningfully accessing their schools. For E.S. and S.P., this conclusion is irresistible. They concede they will continue to attend school in-person even without a mask mandate. ROA.2076, 2081, 2715. M.P. attended class in-person this year even though their school was mask optional at the time. ROA.2074. The other four Plaintiffs also failed to show their denial of meaningful access to in-person education for the same reasons they lack an injury in fact. *See* pp. 11-16, *supra*.

The district court relied on three out-of-circuit decisions for the proposition that meaningful access may be absent where an "increased risk of harm" "effectively excludes people with disabilities." ROA.2390. All are poor analogues. *Allah v. Goord*, 405 F. Supp. 2d 265 (S.D.N.Y. 2005), and *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), both involved wheelchair-bound persons in police custody who fell during police transportation. The *Allah* plaintiff suffered injuries to his head, neck, and back when the officer driving his van increased his speed before slamming on the brakes. 405 F. Supp. 2d at 275-76. The *Gorman* plaintiff's instructions for his safe transportation were ignored and the resulting fall was "severe[] enough to require surgery and [to break] his urine bag, leaving him soaked in his own urine." 152 F.3d at 910. Finally, the plaintiff in *J.D. by Doherty v. Colonial Williamsburg Foundation* was turned away from a restaurant when, because of his severe gluten allergy, he attempted to bring a homemade, gluten-free meal into the restaurant. 925 F.3d 663, 666 (4th Cir. 2019).

By contrast, each of the plaintiffs in this case have a variety of options to reduce their risk of infection, and the Attorney General's evidence showed no statistically significant differences between Plaintiffs' mask-optional and mask-mandate schools. *See* p. 14, *supra*. Plaintiffs have not proven their disability-discrimination claims against the Attorney General.

III. Plaintiffs' Preemption Claims Fail.

The district court also erred in holding the ARP Act, ADA, and Rehabilitation Act all preempt GA-38. The court's errors are multiple. First, Plaintiffs have no right of action in connection with the ARP Act because that statute gives them no substantive rights. Second, the statute implicitly precludes Plaintiffs' equitable preemption cause of action. Third, even if Plaintiffs had a cause of action, they have not shown GA-38 stands as an obstacle to the ARP Act. And fourth, Plaintiffs' late ADA and Rehabilitation Act preemption claim fails as a matter of law.

A. Plaintiffs' ARP Act preemption claim fails.

1. Plaintiffs have no substantive rights under the ARP Act.

The district court found equity supplied Plaintiffs with a cause of action to claim the ARP Act preempts GA-38, citing the Supremacy Clause and *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015). ROA.2382-85. That conclusion is wrong. As the motions panel recognized, Plaintiffs' claim to a "private cause of action is tenuous at best," and "the district court's bald invocation of the Supremacy Clause and its equitable jurisdiction fails to fill the gap." ROA.2456 n.3.

"The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limits" and "constitutional requirements." *Armstrong*, 575 U.S. at 327. "'[T]o invoke the' Article III courts' equitable powers, a plaintiff . . . must have 'a federal right that [he or she] possesses against' the defendant." *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 902 (10th Cir. 2017) (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 260 (2011)). "'Such litigation *cannot occur* unless the' plaintiff 'has been *given* a *federal right of*' his or her '*own* to vindicate . . . under the . . . statute at issue' in the case." *Id.* (quoting *Va. Office*, 563 U.S. at 261 n.8) (emphases in original); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) ("[W]e presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'") (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). "Equity . . . may not be used to create new substantive rights." *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823 (4th Cir. 2004).

Before a court can apply *Armstrong*'s test for an implied equitable cause of action, it must ascertain the plaintiff's federal right. "*Armstrong* itself relied on an initial determination that the providers claimed to be vindicating their federal substantive rights by enforcing the very federal statute that allegedly created those rights." *Safe Streets*, 859 F.3d at 901. The *Armstrong* plaintiffs were Medicaid service providers claiming Idaho violated the Medicaid law's requirements for their reimbursement. 575 U.S. at 323-24. "They thus attempted to vindicate their averred *federal property rights* to those funds." *Safe Streets*, 859 F.3d at 899 (emphasis in original).

Plaintiffs, unlike the *Armstrong* plaintiffs, have no federal right under the ARP Act. The ARP Act is an appropriations bill. The section in question establishes a grant program under which states receive grants and make subgrants to school districts. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001, 135 Stat. 4, 19. Plaintiffs have not received or sought a grant, and they are ineligible to do so.

Plaintiffs' plea to equity jurisdiction repeats the cause-of-action theory that the Tenth Circuit turned away in *Safe Streets*. The *Safe Streets* plaintiffs pleaded "causes of action 'in equity'" seeking a declaratory judgment against the State of Colorado and a county holding that a state constitutional amendment creating a marijuana regulatory regime, among other things, was preempted by the federal Controlled Substances Act (CSA), which forbids the manufacture, distribution, and sale of marijuana. 859 F.3d at 877. The plaintiffs claimed they could "enforce the CSA's preemptive effects 'in equity' so long as they have been injured—in any way—by official conduct that *also* violates a federal statute." *Id.* at 895. But the plaintiffs did not allege the defendants regulated their conduct or that federal law recognized their property rights—or any substantive right at all. *Id.* at 892. The "absence of any *private substantive right* in the CSA foreclose[d] federal relief based on alleged violations of the CSA, in equity or otherwise." *Id.* (emphasis in original).

The district court's citation to *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), also lends no support. *See* ROA.2384-85. Verizon "[sought] to vindicate federally recognized property rights by enjoining" a "State commission's order to pay reciprocal compensation charges." *Safe Streets*,

859 F.3d at 905 n.17 (distinguishing *Verizon*). By contrast, Plaintiffs lack any private substantive right to vindicate and for that reason lack an equitable cause of action.

2. The ARP Act implicitly precludes Plaintiffs' equitable preemption claim.

Even if Plaintiffs had a substantive right under the ARP Act, they still lack an equitable cause of action because the ARP Act implicitly precludes one. The district court misapplied *Armstrong* in holding otherwise.

Implied equitable causes of action are available only "in some circumstances" constituting "a proper case." *Armstrong*, 575 U.S. at 326-27. Where a statute "implicitly precludes private enforcement," plaintiffs "cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." *Id.* at 328. In *Armstrong*, the Supreme Court found "two aspects" of the Medicaid law at issue "establish[ed] Congress's 'intent to foreclose' equitable relief." *Id.* (quoting *Verizon*, 535 U.S. at 647). First, Congress provided a remedy for enforcement. *Id.* "[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Sandoval*, 532 U.S. at 290)). Second, the statute in question was "judicially unadministrable [in] nature." *Id.*

The ARP Act, as with the Medicaid law at issue in *Armstrong*, implicitly precludes private enforcement. The ARP Act, like the Medicaid law, is Spending Clause legislation. *Id.* at 332; ROA.2384. And as with the Medicaid law, the federal government's authority to enforce spending conditions suggests an intention to preclude other remedies. *See Armstrong*, 575 U.S. at 332; 20 U.S.C. §§ 1234 *et seq.* (Department of Education grant enforcement authority). Even the ARP Act itself explicitly

contemplates the federal government's enforcement. Just a few sections down from the ARP Act section Plaintiffs rely upon, Congress authorizes the Department of Education's Inspector General to spend $5 million on "oversight, investigations, and audits" of "programs, grants, and projects funded under this part." Pub. L. No. 117-2, § 2012. As in *Armstrong*, Congress has already provided for enforcement of the ARP Act grant program's conditions.

Moreover, the ARP Act section at issue is judicially unadministrable. That section directs the Secretary of Education to distribute $121 billion in grants to each state's educational agency. *Id.* § 2001(a), (b)(2). State grant recipients then must issue subgrants to local education agencies (i.e., school districts). *Id.* § 2001(d). And those subgrant recipients have wide latitude in how they spend their subgrants. *Id.* § 2001(e). The statute enumerates 17 permissible uses for the funds plus a residual clause. *Id.* § 2001(e)(2). Possible spending ranges from "address[ing] the unique needs of low-income children" to "[p]lanning and implementing activities related to summer learning." *Id.* § 2001(e)(2)(F), (M). The specific subsection Plaintiffs identify for their argument is similarly nebulous: "[d]eveloping strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the [CDC]." *Id.* § 2001(e)(2)(Q). Plaintiffs separately cite section 2001's requirement that subgrant recipients "develop and make publicly available . . . a plan for the safe return to in-person instruction and continuity of services." *Id.* § 2001(i). Both subsections create "judgment-laden standard[s]" appropriate for the Department of Education—not a court of equity—to enforce. *Armstrong*, 575 U.S. at 328.

Nothing in the ARP Act suggests Congress expected third parties to section 2001's grant program could bring quasi-*qui tam* litigation against states. The ARP Act's status as appropriations legislation, which is so ephemeral it is not even codified, reinforces that conclusion. Equity does not provide a basis for this claim.

3. GA-38 is not an obstacle to the ARP Act.

The district court also erred because the ARP Act and GA-38 do not conflict. *See* ROA.2456-57. Conflict preemption exists "where it is impossible . . . to comply with both state and federal law" or "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (cleaned up). In an obstacle preemption analysis, courts "start[] with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Courts "examin[e] the federal statute as a whole and identify[] its purpose and intended effects." *Crosby*, 530 U.S. at 373. "The mere fact that a state program imposes an additional 'modest impediment' . . . does not provide a sufficient basis for preemption." *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 336-37 (5th Cir. 2005) (quoting *Pharm. Res. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 667 (2003)).

The district court held that GA-38 stood as an obstacle to the ARP Act's public plan requirement and the Department of Education's regulation implementing that requirement. ROA.2384. The public plan requirement obligates school districts receiving ARP Act dollars to "develop and make publicly available . . . a plan for the safe return to in-person instruction and continuity services." Pub. L. No. 117-2,

§ 2001(i)(1). The Department of Education's interim final requirements add that the public plan must, among other things, "describe . . . the extent to which [the school district] has adopted policies . . . on each of the following safety recommendations established by the CDC: . . . Universal and correct wearing of masks. . . ." American Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21,195-01, 21,201 (2021). Plaintiffs also argued in the district court that GA-38 stood as an obstacle to the ARP Act's authorization of discretionary spending on "[d]eveloping strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the [CDC]." Pub. L. No. 117-2, § 2001(e)(2)(Q).

Analyzing the statute "as a whole," Congress enacted section 2001 to ensure schools had sufficient financial resources to respond to the pandemic and would make public their COVID-19 mitigation measures.[9] *Crosby*, 530 U.S. at 373. Nine states' laws presently prohibit mask mandates in schools, and nothing in this appropriations bill evinces a congressional purpose to take the politically sensitive step of superseding each of them. Stacey Decker, *Which States Ban Mask Mandates In Schools, and Which Require Masks?*, Education Week (Dec. 10, 2021), https://tinyurl.com/2vhsrxdn. The word "mask" does not even appear anywhere in any of the law's sections concerning schools. Congress does not "hide elephants in

[9] The Department of Education's *Federal Register* notice makes clear the statute "only requires that the [school district] describe in its plan the extent to which it has adopted . . . [CDC] guidance" and "does not mandate that [a school district] adopt the . . . guidance." 86 Fed. Reg. at 21,200.

mouseholes"—or in obstacle preemption. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In addition, "[t]here is indeed a presumption against pre-emption in areas of traditional state regulation," *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001), and "education is a traditional concern of the States," *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

The district court concluded the ARP Act and this regulation preempt GA-38 by ascertaining a congressional purpose that school districts be "the ultimate decider" of COVID-19 safety requirements. ROA.2385. The district court never explained how it derived this purpose, and that purpose is belied by the statute's plain text. The law literally inserts states in the middle of the grant-making process, charging states with the responsibility of making federally funded subgrants to school districts. Pub. L. No. 117-2, § 2001(b)(2). Moreover, Congress's contemplation of school districts' partnership with outsiders is clearly seen from the statute's authorization of school spending on "[c]oordination of preparedness and response efforts" with other "agencies." *Id.* § 2001(e)(2)(E). Even if the district court accurately discerned the ARP Act's purpose, GA-38's mask-optional requirement is at best a "modest impediment." *Sanchez*, 403 F.3d at 336.

The district court cited *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 258 (1985), for the proposition that state laws restricting discretion to spend federal dollars are preempted. ROA.2384. But the state law *Lawrence County* examined actually directed funding recipients to spend federal dollars in a specific way. GA-38 says nothing about how school districts spend ARP Act subgrants. They remain free even to purchase masks. Nothing in the ARP Act or its

purposes overcome "the basic assumption that Congress did not intend to displace" nine states' mask-optional laws. *Maryland*, 451 U.S. at 728.

B. Plaintiffs' ADA and Rehabilitation Act preemption claim fails.

On the day the parties submitted their trial briefs, Plaintiffs filed a second amended complaint adding a new ADA and Rehabilitation Act "federal preemption" claim. ROA.627. Plaintiffs remained vague on this claim's legal foundation during its short lifespan, though their trial brief implies that this claim, like the ARP Act claim, springs from equity. ROA.943. The district court's opinion does not explain whether its ADA and Rehabilitation Act preemption analysis fits under a standalone claim or Plaintiffs' disability-discrimination claims. ROA.2381-82.

Plaintiffs are wrong to the extent they believe equity provides them a platform to take a second swing at GA-38 without proving the elements of a disability-discrimination claim. Individuals protected by the ADA and the Rehabilitation Act already have an opportunity to vindicate their rights and challenge conflicting state laws under those statutes. That right, which Plaintiffs exercised in their first two claims, implicitly precludes an equitable claim to attack GA-38 on nothing more than the invocation of preemption. *See Armstrong*, 575 U.S. at 328.

In any event, the district court's holding that GA-38 conflicts with the ADA and Rehabilitation Act is wrong for the reasons the motions panel recognized. ROA.2455-56. GA-38 does not "render[] it a 'physical impossibility' for schools to comply with the ADA or the Rehabilitation Act" and it does not "'disturb, interfere with, or seriously compromise the purposes of' either law." ROA.2455-56 (quoting *City of Morgan City v. S. La. Elec. Co-op. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994)).

Neither the ADA nor the Rehabilitation Act give Plaintiffs a right to their preferred accommodation if other reasonable accommodations exist. *See Campbell*, 842 F.3d at 381. Given that "[o]ther means exist to control the spread of COVID-19 in school settings like vaccination, social distancing, plexiglass, and voluntary mask wearing," ROA.2455, GA-38's mask-optional requirement does not conflict with the ADA or the Rehabilitation Act.

IV. The District Court's Statewide and Permanent Injunction Is Overbroad.

Even if Plaintiffs succeed on their claims, they are not entitled to a statewide injunction against the Attorney General. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Thus, an injunction "is overbroad if it is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam) (cleaned up).

Against these precedents, the district court broadly enjoined the Attorney General from enforcing the mask-optional order on school districts without limitation. ROA.2394. The motions panel correctly concluded that the district court's injunction "could have been tailored to address only the seven plaintiffs in this action, as well as their school districts." ROA.2457. In addition, it could "have been tailored to require only individualized accommodations by schools, on a case-by-case basis, while leaving GA-38's general ban on mask mandates in place." ROA.2457.

Plaintiffs defended the statewide injunction at the stay-of-injunction stage by citing this Court's decision in *Professional Association of College Educators v. El Paso County Community College District*, which held that an injunction "is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." 730 F.2d 258, 274 (5th Cir. 1984). But Plaintiffs never proved the condition. Plaintiffs' complaint specifies their seven schools and identifies no connections to any other schools. The injunction's breadth is not "necessary" to give them relief. *Id.*

Plaintiffs also lack standing to obtain a statewide injunction. "The Art. III judicial power exists only to redress or otherwise protect against injury *to the complaining party*." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (emphasis in original). Plaintiffs are not class representatives, but even if they were, they would still lack standing to obtain statewide relief. While Plaintiffs wrongly asserted that the district court's injunction would snap into place seven mask mandates in their schools, they did not even attempt to make a redressability argument with respect to other schools in Texas. They confessed complete ignorance: "[W]hat's going to happen on a statewide basis, you're right, we don't know that." ROA.2727.

The district court's injunction also goes too far in permanently enjoining GA-38. Implicit is the premise that COVID-19 conditions will never change enough for Plaintiffs' schools to entirely rule out mask mandates. But Plaintiffs never argued COVID-19's permanence, and scientists remain cautiously optimistic about an end to the pandemic. Just two weeks ago, the director of the CDC told a reporter,

"Masks are for now, they're not forever." Sony Salzman, *CDC Director Rochelle Walensky Discusses How Pandemic May End*, ABC News (Dec. 11, 2021), https://tinyurl.com/339rz76s. "We have to find a way to be done with them." *Id.* The district court's injunction wrongly presumes eternal masking and is not appropriately tailored.

Conclusion

The Court should vacate the judgment and permanent injunction and remand with instructions that the case be dismissed.

Respectfully submitted.

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On December 24, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,757 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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