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 his 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 his parents and next friends; A.M., by and through his 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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES ON THE ISSUES ADDRESSED HEREIN

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MISCELLANEOUS:

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INTEREST OF THE UNITED STATES

This case involves a challenge to an Executive Order issued by the Governor of Texas that bars public school districts from adopting masking requirements, no matter the circumstances. The United States has a substantial interest in this appeal, which concerns the proper interpretation and application of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* (Title II),

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), and the relationship between those statutes and the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (IDEA).

Congress gave the Attorney General express authority to issue regulations under Title II, see 42 U.S.C. 12134(a), and directed all federal agencies to issue regulations implementing Section 504 with respect to programs or activities that receive federal financial assistance, see 29 U.S.C. 794(a). Additionally, the Department of Education administers the IDEA and has promulgated regulations implementing that statute. See 20 U.S.C. 1406; 34 C.F.R. Pt. 300. The Attorney General has authority to bring civil actions to enforce both Title II and Section 504, see 42 U.S.C. 12133; 29 U.S.C. 794a, and may bring actions to enforce the IDEA upon referral from the Department of Education, see 20 U.S.C. 1416(e)(2)(B)(vi), 1416(e)(3)(D).

The Department of Justice has designated the Department of Education as an agency responsible for investigating possible violations of Title II involving public schools. See 28 C.F.R. 35.190(b)(2); 28 C.F.R. 35.170-35.173. The Department of Education's Office for Civil Rights is currently investigating whether, in light of the state law challenged here, the Texas Education Agency is discriminating against students with disabilities who are at heightened risk of suffering severe illness from COVID-19.

The United States filed a Statement of Interest in the district court (ROA.655-675) and files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following:

1. Whether plaintiffs have established their standing to challenge the Texas Governor's Executive Order GA-38 (GA-38).

2. Whether plaintiffs were required to exhaust administrative procedures under the IDEA, 20 U.S.C. 1415(*l*), before filing their complaint in federal court.

3. Whether GA-38 is preempted to the extent it prevents school districts from imposing any masking mandates even when required as a reasonable modification by Title II and Section 504.[1]

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

The Rehabilitation Act prohibits discrimination on the basis of disability in federally funded programs or activities. Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

[1] The United States takes no position on any other issue presented in this case.

subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). The Department of Education's Section 504 regulations, for example, describe several acts that constitute discrimination, see 34 C.F.R. 104.4, and courts have interpreted Section 504 "as demanding certain 'reasonable' modifications to existing practices in order to 'accommodate' persons with disabilities," *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017) (citation omitted).

Similarly, Title II, which extends Section 504's prohibition to all public entities, provides 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." 42 U.S.C. 12132. Under Title II's implementing regulations, public services must be equally available to persons with disabilities and to persons without. 28 C.F.R. 35.130(b)(1)(i)-(iii). In addition, these regulations require "[a] public entity [to] 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." 28 C.F.R. 35.130(b)(7)(i).[2]

2. Factual Background

This case concerns the ability of certain students with disabilities to obtain reasonable modifications at school during the COVID-19 pandemic without obstruction by the State of Texas.[3]

To mitigate the risks posed by the ongoing COVID-19 public health crisis, the Centers for Disease Control and Prevention (CDC) recommends universal indoor masking for students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status. ROA.2367; CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (last updated Jan. 6, 2022), https://perma.cc/W7WB-NWSC.[4] Beyond its general recommendations, the CDC also recognizes that COVID-19 poses a heightened risk of severe complications to persons with certain

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[2] The terms "reasonable accommodation" and "reasonable modification" are "used interchangeably" in the case law for Title II and Section 504 "without apparent distinction." *Berardelli* v. *Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 116-117 (3d Cir. 2018); *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807, 816 n.26 (9th Cir. 1999).

[3] Our discussion of the factual background relies on facts established in the record and those found by the district court.

[4] "ROA.__" refers to the Record on Appeal by page number. "Br. __" refers to defendant-appellant's opening brief by page number.

disabilities, including Down syndrome, heart conditions, immunocompromised states, and chronic lung diseases such as moderate to severe asthma. ROA.2367; CDC, *People with Certain Medical Conditions* (last updated Dec. 14, 2021), https://perma.cc/CR5W-3Q63.

Plaintiffs are seven elementary-school-aged children who are enrolled in public school districts throughout Texas. ROA.2368-2370. The record demonstrates that each plaintiff has at least one disability, including various genetic, heart, respiratory, or immunocompromising conditions, that puts that child at increased risk for contracting COVID-19, developing severe COVID-19 symptoms, or dying from the disease. ROA.2368, 2894-2899. Plaintiffs presented unchallenged evidence that, because of this risk, they should go indoors only in places where universal masking is enforced. See, *e.g.*, ROA.1997, 2003, 2010, 2014, 2020, 2024, 2027, 2075-2076, 2080, 2893-2903.

Plaintiffs' schools are aware of their disabilities and have instituted various measures to address their particular needs. ROA.2074-2081. At some point, each of plaintiffs' school districts instituted mask mandates for the 2021-2022 school year. ROA.2074-2081, 2369-2370. In doing so, at least two of these districts specifically considered evidence that children with certain disabilities could not safely attend school without mask requirements. ROA.1226, 1230.

On July 29, 2021, Texas Governor Greg Abbott issued Executive Order GA-38. The Executive Order states, in relevant part:

> No governmental entity, including a * * * school district, * * * may require any person to wear a face covering or to mandate that another person wear a face covering.

ROA.98. Since July and through the time of trial, Texas Attorney General Kenneth Paxton has taken several steps to enforce GA-38 against school districts: he maintained a publicly available list of districts requiring masks despite GA-38; he sent letters to 98 such districts threatening to sue them; and he filed lawsuits against at least 15 districts to enforce GA-38. ROA.2369-2370, 2375. He also tweeted numerous times about his efforts to enforce GA-38, including announcing when the Texas Supreme Court required school districts that he sued to comply with GA-38, and repeatedly expressing his intent to sue every noncompliant entity "until we have law and order." ROA.1833-1841, 2370.

Plaintiffs' school districts responded to GA-38 differently. At the time of trial, two school districts had rescinded masking requirements because of GA-38, although they would reinstate or were likely to reinstate them if GA-38 were not in effect. ROA.1227, 2074, 2081, 2370, 4395. The other five school districts had adopted mask mandates but were met with Paxton's lawsuits or threats of suit. ROA.2074-2080, 2375.

3. Procedural Background

Plaintiffs, through their parents, filed a complaint in the Western District of Texas, alleging in relevant part that GA-38 is preempted by Title II and Section 504, and seeking declaratory and injunctive relief. ROA.590-630 (Second Am. Compl.). They claim, *inter alia*, that GA-38 prevents school districts from implementing mask mandates as a reasonable modification for students with disabilities who are at greater risk of contracting COVID-19 and suffering severe illness as a result of the disease. ROA.615-624.

After a bench trial, the district court concluded, as relevant here, that GA-38 is preempted "to the extent that it interferes with local school districts' ability to satisfy their obligations under the ADA and Section 504 and their implementing regulations." ROA.2381-2382. The court recognized that the ADA and Section 504 impose "an affirmative obligation [on public entities] to make reasonable modifications in their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless they can show that so doing would fundamentally alter the nature of the service, program, or activity." ROA.2388 (citing 28 C.F.R. 35.130(b)(7)(i)). The court found that GA-38 prohibits the use of mask mandates, including targeted and limited ones, even when a school district determines that "requiring masks is a reasonable modification necessary to enable

a student with disabilities to have equal access to a safe, integrated, in-person learning environment." ROA.2389.

Accordingly, the district court concluded that "to the extent that school districts cannot comply with GA-38's ban on mask requirements and at the same time meet their obligations under the ADA and Section 504, the ADA and Section 504 supersede any conflicting provisions of GA-38." ROA.2382. To that end, the court issued a final judgment declaring, in relevant part, that GA-38's ban on mask mandates as applied to school districts is preempted by Title II and Section 504, and enjoining Paxton and his office from enforcing GA-38 as applied to school districts. ROA.2394.

Paxton filed a timely notice of appeal. ROA.2396-2397. A panel of this Court granted Paxton's motion to stay the district court's injunction pending appeal. ROA.2445-2459.

ARGUMENT

I

PLAINTIFFS HAVE STANDING

Standing requires proof of three elements: (1) a concrete and particularized injury that is actual or imminent, (2) that is fairly traceable to or caused by the defendant's actions, and (3) that is likely to be redressed by the relief plaintiffs seek. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Defendant contests only the first and third elements.[5] Br. 10-21. But plaintiffs have proven both.

A. Plaintiffs Have Suffered, Or Imminently Will Suffer, An Injury-In-Fact

Plaintiffs proved that they have been, or imminently will be, injured by GA-38's ban of mask requirements, because that ban denies them an opportunity to participate in public education—in which they have a legally protected interest, see *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975)—that is equal to that enjoyed by students without disabilities. While all students bear some health risks by attending school in person during the ongoing pandemic, the district court found, and it is undisputed, that these plaintiffs face a much higher risk to their health because of their disabilities. See, *e.g.*, ROA.2367-2368, 2894-2899. Plaintiffs presented evidence that they each require mask mandates to remain safe while they are indoors, see p. 6, *supra*, and defendant neither challenged that evidence nor offered evidence of another effective option that would protect them. Despite this, GA-38 forbids school districts from requiring masks as a reasonable modification—no matter the circumstances—and instead leaves plaintiffs in the position of having to accept a greater risk to their health and safety to go to school.

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[5] Paxton no longer contests traceability, and for good reason. Plaintiffs offered unchallenged evidence that the two school districts that had revoked their mask mandates did so because of GA-38. ROA.1225-1227, 4394-4395. As to the five districts that still have mask mandates, plaintiffs are at risk of losing the benefit of those mandates because of Paxton's lawsuits and threats of suit.

Two plaintiffs have already suffered this injury: both M.P. and E.S. are enrolled in schools that rescinded their masking requirements in response to GA-38. The remaining five plaintiffs' injuries are imminent. To demonstrate imminence, plaintiffs had to prove that their injuries were "certainly impending"—that is, that there is a "substantial risk that the harm will occur." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (citation and internal quotation marks omitted). And here, where plaintiffs' school districts "*have* engaged in conduct" covered by GA-38 by implementing mask mandates, and they are "*now* vulnerable to * * * attack" of litigation and threats of suit, plaintiffs have sufficiently demonstrated a substantial risk of injury. See *Brackeen* v. *Haaland*, 994 F.3d 249, 371 n.17 (5th Cir. 2021) (en banc), petition for cert. pending, Nos. 21-380, 21-376, 21-378 (filed Sept. 8, 2021).

All these vulnerable students are suffering (or are at substantial risk of suffering) an injury sufficient to confer standing: if they choose in-person school, they are compelled to accept a far higher risk to their health than is required of students without disabilities. See, *e.g.*, *Matthews* v. *Pennsylvania Dep't of Corr.*, 613 F. App'x 163, 169 (3d Cir. 2015) (holding that plaintiff sufficiently pleaded an ADA violation when he alleged that absent reasonable modifications, he was "forced to choose between food and safety" because he could not safely make it to meal time). These students need not prove that access to school is impossible; it is

enough that GA-38 removes the tool that the record shows would afford them an opportunity to participate in in-person schooling equal to that enjoyed by students without disabilities. See 28 C.F.R. 35.130(b)(1)(i)-(iii).

B. Plaintiffs' Injury Is Redressable

Plaintiffs have established that, unless enjoined, Paxton plans to "sue every entity that violates [GA-38]." ROA.612. Their injury can be redressed by an injunction barring Paxton from enforcing GA-38 when such enforcement would prevent school districts from adopting reasonable modifications under Title II and Section 504.

As established at trial and found by the district court, five of plaintiffs' school districts have mask mandates and are at risk of being forced to abandon them because Paxton has sued or threatened to sue them. ROA.2074-2080; 2377-2378. If Paxton is enjoined from interfering with school districts' adoption of masking requirements, those districts would be free to maintain their mask mandates as necessary to comply with Title II and Section 504. See *Allstate Ins. Co.* v. *Abbott*, 495 F.3d 151, 159 & n.19 (5th Cir. 2007) (finding that "redressability prong satisfied where actors who were not parties to the lawsuit could be expected to amend their conduct in response to a court's declaration," thereby freeing plaintiff from "penalties and lawsuits" (citing *Franklin* v.

Massachusetts, 505 U.S. 788, 802-803 (1992))), cert. denied, 552 U.S. 1184 (2008).

For the two school districts that rescinded their mask mandates in response to GA-38, plaintiffs presented unrebutted evidence that those districts are likely to reinstitute mask mandates if enforcement of GA-38 does not bar them from doing so. ROA.1227, 4395. This showing is sufficient for redressability. As the Supreme Court explained in *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), plaintiffs can properly rely on the "predictable effect of Government action on the decisions of third parties" as an element of their standing. *Id.* at 2566; see also *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 152 (2010) (holding that parties had standing to challenge an injunction preventing an agency from deregulating their conduct because there was a "strong likelihood" that the agency would deregulate if the injunction were lifted).

C. Appellant's Arguments To The Contrary Do Not Withstand Scrutiny

Paxton argues that plaintiffs lack standing because their injuries are not (a) concrete, (b) actual or imminent, or (c) redressable. Br. 10-21. He is wrong on all fronts.

1. Paxton's argument that plaintiffs' injury is not concrete is both factually and conceptually flawed. He characterizes their injury as being "forced out" of public education and argues plaintiffs have not been "forced out" because, as the

motions panel suggested, school districts remain free to implement safety measures other than masking. Br. 11-13 (citing ROA.2450); ROA.2449-2451.

But, as discussed below, the record is devoid of evidence that these substitute measures would adequately protect these endangered students and thus serve as viable and effective modifications. See 28 C.F.R. 35.130(b)(1)(iii) and (b)(7)(i); see also Part III.C, *infra*. Equally important, Paxton's argument ignores the fact that GA-38's categorical bar on mandatory masking denies plaintiffs the opportunity to benefit from a measure that the record demonstrates may be a necessary and reasonable modification. There is no factual dispute that without the masking plaintiffs need, plaintiffs risk their lives if they go to school—to a degree that children without disabilities do not. Barring school districts from implementing a reasonable modification that could equalize plaintiffs' access by minimizing that risk inflicts a sufficient injury. See *Fulton* v. *Goord*, 591 F.3d 37, 42 (2d Cir. 2009) (concluding that refusal to implement or even consider a reasonable accommodation "is plainly an injury in fact that is sufficient to form the basis for Article III standing").

2. Paxton next attacks plaintiffs' standing by arguing that "[p]roperly understood," each plaintiff claims to be injured by the risk of becoming infected by COVID-19, and that "increased-risk injuries" are not "actual or imminent." Br. 13 (citation omitted). The motions panel preliminarily agreed. ROA.2450-2451.

But Paxton and the motions panel take an overly narrow view of the protection offered by Title II and Section 504. Properly construed, these laws protect the rights of individuals with disabilities to have equal access to public facilities and institutions, which means that these students have the right to access schools without taking on a far greater risk to their health than other students face. Thus, it is precisely *because* plaintiffs are at higher risk of contracting COVID-19 and experiencing severe illness or death from the disease that they may need a reasonable modification such as mandatory masking to afford them equal access to in-person school. Cf. *J.D.* v. *Colonial Williamsburg Found.*, 925 F.3d 663, 668-669 & n.6, 672-674 (4th Cir. 2019) (finding that restaurant could be required under Title III of the ADA and Section 504 to allow a patron to bring in his own food as a reasonable modification to "ensure [his] full and equal enjoyment of the restaurant").

And because GA-38 bars school districts from adopting *any* masking requirements—no matter the factual circumstances—GA-38 injures these vulnerable plaintiffs by rejecting up front the modification that their heightened sensitivities may require "to avoid discrimination on the basis of disability." 28 C.F.R. 35.130(b)(7)(i); see also *Fulton*, 591 F.3d at 42 (rejecting defendant's "narrow" conception of plaintiff's injury stemming from defendants' refusal to

consider a reasonable accommodation, given that the ADA and Rehabilitation Act "generously confer the right to be free from disability-based discrimination").[6]

3. Relatedly, Paxton argues, and the motions panel preliminarily accepted, that any injury alleged by plaintiffs would be "self-inflicted" because any deprivation of access to school "appears to be attributable to choices made by plaintiffs, not Attorney General Paxton." ROA.2451 n.2; Br. 15. But creating a situation where students with disabilities have no "choice" but to risk their safety in order to attend school on an equal basis to that of their peers has been expressly prohibited by Congress. As a district court found in a related context, adopting a defendant's argument that a plaintiff inflicted harm upon herself because she chose not to attend school without a necessary modification (there, a service animal) "would subvert the very purpose of the [Rehabilitation Act] and the ADA." *C.G.*

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[6] This Court's decision in *Shrimpers & Fishermen of RGV* v. *Texas Commission on Environmental Quality*, 968 F.3d 419 (5th Cir. 2020), cited by Paxton and the motions panel (Br. 13; ROA.2451), did not foreclose the possibility that an increased-risk-of-harm theory could support a plaintiff's injury-in-fact. It simply found that based upon the facts presented—which involved no claim of discrimination—those plaintiffs failed to allege a risk of harm that was particular to them and failed to present more than "mere allegations" that they might experience an increased risk of harm at some future point. *Shrimpers*, 968 F.3d at 425 (citation omitted). But here, as the motions panel recognized and the district court found, "plaintiffs may well allege particularized harm given that each of them alleges a disability that leaves them particularly vulnerable during the pandemic." ROA.2449; see also ROA.2368.

v. *Saucon Valley Sch. Dist.*, No. 5:21-cv-03956, 2021 WL 5399920, at *11 (E.D. Pa. Nov. 18, 2021).

Paxton's citations (Br. 14-15) to *Clapper* v. *Amnesty International USA*, 568 U.S. 398 (2013), and *Glass* v. *Paxton*, 900 F.3d 233 (5th Cir. 2018), do not require otherwise. As an initial matter, *Glass* and *Clapper* did not involve an invasion of a legally protected interest in the way that plaintiffs' suit does. See pp. 3-5, 8-9, *supra*. Thus, their holdings that a teacher could not inflict her own injury by choosing not to teach certain subjects, or that businesspersons could not do the same by choosing not to communicate with persons abroad, is not remotely applicable to plaintiffs here potentially deciding not to attend school if enforcement of GA-38 blocks the masking mandates that their disabilities require.

Further, plaintiffs' injury—the denial of an equal opportunity to attend school—is not "self-inflicted." The plaintiffs in *Glass* and *Clapper* failed to prove a sufficient injury because they censored themselves based upon a "highly speculative and attenuated chain of possibilities"—in *Glass*, that an unknown student might shoot them if the student disagreed with their comments, and in *Clapper*, that the government might intercept communications that plaintiffs might have with foreign contacts. *Glass*, 900 F.3d at 239-242 (citation and internal quotation omitted); *Clapper*, 568 U.S. at 410-414.

Here, however, plaintiffs' injury of having to accept a higher risk to their health than children without disabilities is not speculative or based upon a chain of mere "possibilities." Their injury is occurring *right now* in the school districts that have lifted their mask mandates, and it is certainly impending in the remaining five districts that Paxton is seeking to force to abandon their mask mandates. Thus, plaintiffs' injuries are not "self-inflicted" harms; GA-38 and Paxton have inflicted them.

4. Finally, Paxton argues, and the motions panel preliminarily concluded, that plaintiffs' injuries are not redressable because he lacks the authority to impose mask mandates (Br. 16-19, ROA.2452), and because some of plaintiffs' school districts (the entities that have such authority) did not require masks during the 21 days that the district court's injunction was in place, and others reconsidered such requirements based on evolving facts. Br. 19-20. Both arguments must fail.

First, plaintiffs did not ask the district court to impose a mask mandate or order Paxton to impose one. They asked the court to order Paxton to stand down so that Title II and Section 504 could operate in their usual way: School districts that determined that mask mandates were reasonable modifications required by federal law could impose them. Obtaining that relief would suffice to satisfy the redressability requirement. See *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 801

(2021) (even a "partial remedy" satisfies redressability requirement) (citation omitted).

Second, during trial, Paxton did not contest plaintiffs' evidence that, but for GA-38, plaintiffs' school districts would, or likely would, reinstate (or retain) their mask mandates. ROA.1226-1227, 1230-1231, 4395. Now, he points to alleged developments post-dating trial, all outside the record, to argue that plaintiffs' redressability proof was speculative. Br. 19-20. But "[a]n appellate court may not consider new evidence furnished for the first time on appeal" or "facts which were not before the district court." *In re Deepwater Horizon*, 739 F.3d 790, 798 (5th Cir.) (citations omitted), cert. denied, 574 U.S. 1054 (2014). As the district court found, relying on the evidence presented at trial, if Paxton were barred from enforcing GA-38, "school districts would have the discretion to implement a mandatory mask policy on school grounds," and thus "it is not merely speculative" that an injunction would redress plaintiffs' injuries. ROA.2377-2378, 2381-2382.

II

PLAINTIFFS WERE NOT REQUIRED TO EXHAUST THE IDEA'S ADMINISTRATIVE PROCEDURES

The IDEA "ensures that children with disabilities receive needed special education services." *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). A plaintiff who "seek[s] relief that is also available" under the IDEA, even if brought under a different statute, must exhaust the IDEA's administrative procedures. 20

U.S.C. 1415(*l*). The Supreme Court has held that the only relief available under the IDEA, and thus the only relief plaintiffs could seek that would trigger its exhaustion requirement, is for the denial of a free appropriate public education (FAPE). *Fry*, 137 S. Ct. at 753.

1. To determine whether the plaintiff seeks relief for the denial of a FAPE, a court must look to the "gravamen" of the plaintiff's complaint. *Fry*, 137 S. Ct. at 755; see also *Doe* v. *Dallas Indep. Sch. Dist.*, 941 F.3d 224, 227 (5th Cir. 2019). Because the complaint here does not seek relief for the denial of a FAPE, plaintiffs were not required to exhaust administrative remedies under the IDEA.

First, the gravamen of plaintiffs' complaint turns on the equality of their *access* to in-person education rather than the *adequacy* of the education they receive once they are attending school in person. A plaintiff seeking relief for the denial of a FAPE "is in essence contesting the adequacy of a special education program." *Fry*, 137 S. Ct. at 755. These plaintiffs are not. Plaintiffs' complaint contains no mention of a FAPE or the adequacy of any student's individualized education program (IEP)—the standard way of ensuring a student receives a FAPE under the IDEA. See generally ROA.590-630. Instead, plaintiffs allege that GA-38 "prohibit[s] school districts from requiring the use of masks for students and staff, thereby preventing Plaintiffs and other students with disabilities from safely

returning to school in-person, in violation of the [ADA] and Section 504." ROA.608.

Second, the same basic suit could be brought in other public settings in which there is no FAPE obligation. As a further "clue" to help distinguish between complaints that "concern[] the denial of a FAPE" and those that "instead address[] disability-based discrimination," the Court in *Fry* posed two hypothetical questions: (1) "[C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?" and (2) "[C]ould an *adult* at the school—say an employee or visitor—have pressed essentially the same grievance?" 137 S. Ct. at 756. Here, the answer to both questions is "yes"—a child seeking to use a library or an adult at a public school similarly could challenge a state law barring the public facility from adopting masking requirements as a reasonable modification when necessary to ensure an equal opportunity to participate in the facility's services. Given these affirmative answers, "a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject." *Ibid.*

Third, nothing in the procedural history suggests plaintiffs sought relief for a FAPE denial. *Fry* recognized that "[a] plaintiff's initial choice to pursue [the IDEA's administrative procedures] may suggest that she is indeed seeking relief for the denial of a FAPE." 137 S. Ct. at 757. As the motions panel noted in this

case, though, "nothing in the record establishes that plaintiffs pursued any administrative remedies before filing suit." ROA.2453-2454. Indeed, one plaintiff, whose only disability is asthma, is not eligible for a FAPE under the IDEA because she does not need special education services. ROA.2081; see also 34 C.F.R. 300.8(a)(2)(i). Because this plaintiff "did not otherwise seek or receive special education," "or, for that matter, an IEP," she cannot be said to be seeking relief for the denial of a FAPE for which exhaustion is required. *McIntyre* v. *Eugene Sch. Dist. 4J*, 976 F.3d 902, 914-915 (9th Cir. 2020).

2. Paxton argues, and the motions panel thought it "likely," that plaintiffs' claims nevertheless required exhaustion. ROA.2452-2454; see Br. 22-25. The motions panel reasoned that "[p]laintiffs do not really center their claims on a deprivation of physical access," but rather on "the deprivation of an in-person state-sponsored education because of their risk of contracting COVID-19 without a mask mandate." ROA.2453. In the same vein, Paxton argues that plaintiffs' claims and injuries are "inextricably, and explicitly, intertwined with their education." Br. 23. The motions panel and Paxton doubted whether "[l]ibrary patrons and school teachers" could bring a similar suit given "[t]he essential aspect of plaintiffs' claim, access to in-person learning." ROA.2453; Br. 23-24.[7]

[7] Paxton also suggests that exhaustion is somehow required because "[t]he student experience * * * differs from other contexts and requires unique

(continued…)

This reasoning, however, cannot be squared with the Supreme Court's decision in *Fry*. There, the Court made clear that "ask[ing] whether [the student]'s injuries were, broadly speaking 'educational' in nature," was "not the same as asking whether the gravamen of [the student]'s complaint charges, and seeks relief for, the denial of a FAPE." 137 S. Ct. at 758.

To illustrate this point, the Court provided an example in which a child who uses a wheelchair "sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps." *Fry*, 137 S. Ct. at 756. Of course, the lack of access ramps "has educational consequences" because the student "cannot receive instruction" if he "cannot get inside the school." *Ibid.* But "the child could file the same basic complaint if a municipal library or theater had no ramps" and "an employee or visitor could bring a mostly identical complaint against the school." *Ibid.* Exhaustion is not required because the "essence" of the complaint is "equality of access to public facilities, not adequacy of special education." *Ibid.*; see also *id.* at 758-759 (suggesting that

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(…continued)
mitigation strategies," such that accommodations may differ among students. Br. 23-24. This argument has no basis in the analysis set forth in *Fry*. The issue is not whether the required modifications are individualized across students, but whether the modifications are sought to ensure that students receive adequate special education services. See *Fry*, 137 S. Ct. at 756-757 (providing example of an individual reasonable-accommodation claim that required exhaustion because "its essence * * * is the provision of a FAPE").

exhaustion requirement likely did not apply to the plaintiff's claim against her school for refusing to allow her to use a service dog).

Here, too, plaintiffs' lawsuit "seek[s] relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Fry*, 137 S. Ct. at 756. Because plaintiffs' complaint—"the principal instrument by which [they] describe [their] case," *id.* at 755—does not seek relief for the denial of a FAPE, they were not required to exhaust the IDEA's administrative procedures.[8]

III

GA-38 IS PREEMPTED TO THE EXTENT IT OBSTRUCTS SCHOOL DISTRICTS' ABILITY TO IMPOSE MASKING REQUIREMENTS WHEN NEEDED TO COMPLY WITH THEIR OBLIGATIONS UNDER FEDERAL LAW

Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, "Congress may implicitly pre-empt a state law, rule, or other state action" through conflict preemption. *Oneok, Inc.* v. *Learjet, Inc.*, 575 U.S. 373, 376-377 (2015). "[C]onflict pre-emption exists where compliance with both state and federal law is

[8] In any case, "administrative exhaustion generally is not required if bringing those claims would be futile." *Reyes* v. *Manor Indep. Sch. Dist.*, 850 F.3d 251, 256 (5th Cir. 2017) (citing *Honig* v. *Doe*, 484 U.S. 305, 327 (1988)). Paxton does not suggest that Texas's hearing officers have the authority to order school districts to disregard GA-38, and, absent such authority, it would have been futile for plaintiffs to seek relief through the IDEA's administrative process. See *Heldman* v. *Sobol*, 962 F.2d 148, 159 (2d Cir. 1992) (exhaustion is not required when challenge is to state law and regulation that hearing officers lack the authority to alter).

impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 377 (citation and internal quotation marks omitted). "In either situation, federal law must prevail." *Ibid.*

A. Title II And Section 504 Require School Districts To Make Reasonable Modifications When Necessary To Ensure Equal Access For Students With Disabilities

Title II and Section 504 "aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs." *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756 (2017). As the district court recognized, these statutes and their implementing regulations place an "affirmative obligation" on public entities "to make reasonable modifications in their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability." ROA.2388; see *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 454-455 (5th Cir. 2005), cert. denied, 547 U.S. 1098 (2006).

Here, there is no dispute that Texas school districts are subject to the requirements of Title II and Section 504 as public entities that receive federal funding. See 42 U.S.C. 12131(1)(B); 29 U.S.C. 794(b)(2)(B). Accordingly, to comply with their federal obligations, school districts must make reasonable

modifications when necessary to ensure equal access for their students with disabilities, absent a showing that the modifications would constitute a fundamental alteration.

Depending on the circumstances, for example, schools may need to make such changes as allowing a service animal to accompany a student with a seizure disorder, see, *e.g.*, *Alboniga* v. *School Bd. of Broward Cnty.*, 87 F. Supp. 3d 1319, 1323, 1344-1345 (S.D. Fla. 2015); providing a one-to-one aide supported by a special education teacher to assist a student with autism, see, *e.g.*, *K.N.* v. *Gloucester City Bd. of Educ.*, 379 F. Supp. 3d 334, 352 (D.N.J. 2019); or requiring students to wash their hands before and after meals to protect one student in their classroom with severe food allergies, see, *e.g.*, *Ridley Sch. Dist.* v. *M.R.*, 680 F.3d 260, 281 (3d Cir. 2012) (noting provisions of "a § 504 Service Agreement"). And, in this context, again depending on the circumstances, a school district may need to adopt masking requirements as a reasonable modification to ensure that students with disabilities have equal access to in-person schooling, without incurring an elevated risk of hospitalization or death due to COVID-19. See 28 C.F.R. 35.130(b)(7)(i).

B. GA-38 Conflicts With School Districts' Obligations Under Federal Law

GA-38 is preempted to the extent it obstructs school districts' ability to meet these obligations under Title II and Section 504. GA-38 forbids any school district

from requiring anyone to wear masks under any circumstances. As a result, even if a school district makes a fact-specific determination that mandating masks to some extent is necessary to comply with Title II and Section 504, GA-38 flat-out blocks school districts from acting on that determination. GA-38 bars a school district from imposing even "limited mask requirements," such as requiring masking in one wing, in one classroom, or even for one individual aide working one-on-one with a student acutely vulnerable to serious illness or death from COVID-19. ROA.2389.

As the Supreme Court has noted, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct" federal law requirements, "it must fall." See *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) (addressing state statute, enacted in the midst of a school desegregation case, that prohibited involuntary busing despite a constitutional obligation to eliminate existing dual school systems). And specific to the federal statutes at issue here, the Second Circuit has recognized that "[t]he natural effect of Title II's reasonable modification requirement * * * requires preemption of inconsistent state law when necessary to effectuate a required reasonable modification." *Mary Jo C.* v. *New York State & Loc. Ret. Sys.*, 707 F.3d 144, 163 (2d Cir.) (citation and internal quotation marks omitted), cert. dismissed, 569 U.S. 1040 (2013).

At base, state law cannot stand as an obstacle to a school district's ability to adopt masking requirements when needed to comply with their federal-law obligations to make reasonable modifications for their students with disabilities. GA-38 is preempted to the extent it has that effect.

To be clear, this conclusion does not mean that students with disabilities are always unsafe in schools without masks or that universal masking will always be required to ensure them equal access. Rather, GA-38 is preempted to the extent that it bars school districts from adopting masking requirements after they make a fact-specific assessment that such mandates are necessary as reasonable modifications under federal law for their students with disabilities.

C. Paxton Did Not Demonstrate That Preventative Measures Other Than Masking Requirements Will Keep These Plaintiffs Safe

Paxton argues, and the motions panel preliminarily agreed, that plaintiffs' claim of preemption under Title II and Section 504 must fail because there is no conflict between GA-38 and federal law. Br. 45-46; ROA.2455. They say this is so because plaintiffs' school districts can "control the spread of COVID-19 in school settings [with] vaccination, social distancing, plexiglass, and voluntary mask wearing." Br. 46 (quoting ROA.2455); see also Br. 11. They contend that because plaintiffs are not entitled to their "preferred accommodation," the mere existence of these other options defeats their preemption claim. Br. 46; ROA.2455-2456. Not so.

School districts are required to provide plaintiffs with modifications that are reasonable, see *Cadena* v. *El Paso Cnty.*, 946 F.3d 717, 725 (5th Cir. 2020), and while it is true that "a reasonable accommodation need not be perfect or the one most strongly preferred by the plaintiff, * * * it still must be effective," *Wright* v. *New York State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (brackets, citation, and internal quotation marks omitted); see also 28 C.F.R. 35.130(b)(1)(iii) and (b)(7)(i).

Whether or not preventative measures other than mandatory masking would suffice in some circumstances to ensure the safety of students with disabilities, GA-38 assumes that masking requirements are *never* necessary accommodations for *any* student. To justify such a blanket ban, Paxton would have needed to present evidence that alternatives short of masking would *always* be effective in protecting these plaintiffs. He did not.

To the contrary, plaintiffs introduced (unchallenged) evidence that voluntary masking does not adequately protect children such as plaintiffs and thus is not an effective modification. ROA.1084-1085, 1144-1145. Additionally, plaintiffs presented evidence that vaccines may not sufficiently protect from infection children who are immunocompromised. ROA.1144, 2075. There is simply no basis to conclude on this record that vaccination, social distancing, plexiglass, and

voluntary masking are measures that can adequately substitute for masking requirements in every instance.

Accordingly, GA-38 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 575 U.S. at 377. To that extent, the Executive Order is preempted.

CONCLUSION

For the foregoing reasons, plaintiffs have standing to pursue these claims and were not required to exhaust the IDEA's administrative procedures before filing suit. On the merits, Title II and Section 504 preempt GA-38 to the extent that it obstructs school districts' ability to impose masking requirements when necessary to comply with their federal obligation to provide a reasonable modification to students with disabilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,475 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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