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

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

DEFENDANTS' BRIEF ADDRESSING PROPRIETY OF CURRENT PARTIES

Defendants Governor Greg Abbott, in his official capacity as Governor of Texas, Mike Morath Morath, in his official capacity as the Commissioner of the Texas Education Agency, the Texas Education Agency, and Attorney General Ken Paxton, in his official capacity as Attorney General of Texas (collectively "Defendants") file this Brief Addressing Propriety of Current Parties. In support, Defendants offer the following for the Court's consideration:

I. INTRODUCTION

Pursuant to the Court's instructions, Defendants file this brief to address whether Plaintiffs have brought suit against the correct parties and, if successful on the merits, whether the relief they seek from Defendants will redress their alleged injuries. Further pursuant to the Court's instructions, and pursuant to the agreement of the parties, the instant brief is not a waiver of defenses, affirmative

or otherwise, under due order of pleadings or similar procedural requisites. The Court has requested that the parties use the instant briefing to provide notice of their respective positions and the leading case law supporting those positions with minimal argument. Defendants have endeavored to comply with these instructions.

II. RELEVANT FACTS

This case arises out of Governor Abbott's July 29, 2021 Executive Order GA-38 ("GA-38") prohibiting governmental entities, including school districts, from requiring anyone to wear a mask and TEA's August 5, 2021 Public Health Guidance ("Public Health Guidance") publishing the requirements for the operation of public schools in compliance with GA-38.[1] GA-38's prohibition on mask mandates expressly supersedes contrary requirements issued by local governmental entities or their officials, and those who fail to comply with this executive order are subject to a criminal penalty of up to $1,000. Dkt. 21.1 ¶4.b. GA-38 also provides that public schools may operate in compliance with the Governor's executive order and by the guidance issued by TEA. *Id.* ¶3.e. While the Public Health Guidance does set forth the prohibitions and requirements of GA-38, it also recommends "that public school systems consult with their local public health authorities and local legal counsel **before making final decisions regarding the implementation of this guidance**." Dkt 21.2 at 2.

Plaintiffs in this case attend Texas public schools and assert that they are individuals with disabilities as defined under the Americans with Disabilities Act ("ADA") and Section 504 the Rehabilitation Act of 1973 ("Section 504"). They allege their disabilities make them particularly susceptible to COVID-19, and that their susceptibility makes attending public school alongside others

[1] The Public Health Guidance attached to Plaintiffs' Complaint as Exhibit 2 (Dkt. 21.2) has been superseded. The section relating to masks now states: "mask provisions of GA-38 are not being enforced as the result of ongoing litigation. Further guidance will be made available after the court issues are resolved." The version currently in effect can be found at https://tea.texas.gov/sites/default/files/covid/SY-20-21-Public-Health-Guidance.pdf.

who do not wear masks so dangerous as to preclude their in-person attendance. Plaintiffs have brought suit claiming that Defendants Abbott, Morath, and Paxton, in their official capacities, have violated the ADA, Section 504, and that GA-38 and TEA's Public Health Guidance are preempted by the American Rescue Plan Act of 2021. Plaintiffs request the following relief from this Court:

1. A declaration that GA-38 and TEA's Public Health Guidance violate Plaintiffs' rights under the ADA and Section 504, and are pre-empted by the American Rescue Plan Act;

2. A temporary restraining order, as well as preliminary and permanent injunctive relief, enjoining Defendants from violating the ADA, Section 504, and the American Rescue Plan Act by prohibiting local school districts from requiring masks for their students and staff; and

3. Preliminary and permanent injunctive relief enjoining Defendants from violating the ADA, Section 504, and the American Rescue Plan Act by withholding state and federal educational funds from districts that elect to require students and staff to wear masks.

For the reasons set forth below, Defendants assert they are not the proper parties to this lawsuit.

III. AUTHORITY

The issue upon which the Court requested briefing is whether the Governor, the Attorney General, the Commissioner of the Texas Education Agency, and the Texas Education Agency are proper parties to this suit. For the reasons stated below, Defendants are not proper parties and should be dismissed from this case for lack of jurisdiction.

A. The Governor

Governor Abbott is not a proper party. GA-38 is enforceable by criminal prosecution of the $1,000 fine. Governor Abbott does not enforce GA-38 and therefore the injury is not fairly traceable to him, nor can it be redressed against him. In support of this conclusion, Governor Abbott respectfully directs the Court's attention to the following authorities:

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) ("the irreducible constitutional minimum of standing contains three elements": injury in fact; causation such that the injury is "fairly … trace[able] to the challenged action of the defendant"; and redressability by favorable decision)

- *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him.")

- *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (holding that the Governor's disclaim of intent to enforce an executive order based on his acknowledgment that it would be enforced by local district attorneys meant that the plaintiffs had not established the credible threat of prosecution required to establish standing for their pre-enforcement challenge)

- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that, in the context of a statutory challenge, to demonstrate standing to sue the governor and attorney general, the plaintiffs needed to demonstrate how those state officials played a causal role in their injury or could redress their actual or threatened injury)

- *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that the Governor was not a proper defendant in a challenge to an executive order because "the power to promulgate law is not the power to enforce it" and the Governor has authority to "'issue,' 'amend,' or 'rescind' executive orders, not to 'enforce' them"), *cert. granted, judgment vacated on other grounds sub nom. Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021)

- *6th Street Business Partners LLC v. Abbott*, No. 1:20-CV-706-RP, 2020 WL 4274589, at *3–4 (W.D. Tex. 2020) (Pitman, J.) (holding that the plaintiffs had not demonstrated Article III standing because their injuries could not be fairly traced to nor redressed by the Governor as the Governor lacked authority to enforce his executive order)

- *Morris v. Livingston*, 739 F.3d 740, 756 (5th Cir. 2014) (holding that the Governor was not a proper defendant in a challenge to a state law because he lacked a particular duty to enforce the statute in question)

B. The Attorney General

The Attorney General is not a proper party. Again, GA-38 is enforceable by criminal prosecution of the $1,000 fine. The Attorney General does not enforce GA-38 and therefore the injury is not fairly traceable to him, nor can be it be redressed again him. Even if this Court were to issue an injunction against the Attorney General, GA-38 would still be enforceable by local district attorneys—parties who are not before the Court. In support of this conclusion, the Attorney General respectfully directs the Court's attention to the following authorities:

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) ("irreducible constitutional minimum of standing contains three elements": injury in fact; causation such that the injury is "fairly … trace[able] to the challenged action of the defendant"; and redressability by favorable decision)

- *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (holding that the Attorney General's disclaim of intent to enforce an executive order based on his acknowledgment that it would be enforced by local district attorneys meant that the plaintiffs had not established the credible threat of prosecution required to establish standing for their pre-enforcement challenge)

- *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that the Attorney General was not a proper defendant in a challenge to an executive order because his authority to prosecute a violation of an executive order was insufficient to demonstrate the requisite enforcement connection), *cert. granted, judgment vacated on other grounds sub nom. Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021)

- *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976) ("It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.")

- *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.") (emphasis in original)

- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he "might represent the state in litigation involving the enforcement of its statutes")

- *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) ("It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.")

- *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794, at *5 (N.D. Tex. 2012) (Fitzwater, C.J.) ("[T]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* and not of a third party.") (emphasis in original), *aff'd*, 2013 WL 3783751 (5th Cir. 2013)

- *Inclusive Cmty's Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (holding that when a plaintiff is not the direct object of government action, it is difficult to establish standing)

C. The Commissioner of the Texas Education Agency

Commissioner Morath is not a proper party. By its own terms, the Public Health Guidance is neither mandatory nor binding. Commissioner Morath does not "enforce" the Public Health

Guidance and has made no effort to do so, and therefore Plaintiffs' alleged injury is not fairly traceable to him, nor can it be redressed by him. Commissioner Morath did not issue GA-38, which contemplates no enforcement role for Commissioner Morath, and has neither threatened nor sought to enforce the order.

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) ("irreducible constitutional minimum of standing contains three elements": injury in fact; causation such that the injury is "fairly … trace[able] to the challenged action of the defendant"; and redressability by favorable decision)

- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that plaintiffs did not have standing to bring statutory challenge against government officials who did not have "any duty or ability to do *anything*" relating to enforcement of the statute)

- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he "might represent the state in litigation involving the enforcement of its statutes")

- *K.P. v. LaBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (holding that "[e]nforcement typically involves compulsion or constraint")

- *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (showing the requisite "connection to the enforcement" of the challenged provision requires "some scintilla of enforcement by the relevant state official with respect to the challenged law")

- *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976) ("It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.")

D. The Texas Education Agency

The TEA is not a proper party for substantially the same reasons as Commissioner Morath. The Public Health Guidance is not mandatory, and the TEA has not sought to enforce it. Plaintiffs' alleged injury is therefore not fairly traceable to the TEA, nor could such injury be redressed by it. As with Commissioner Morath, the TEA did not issue GA-38. GA-38 contemplates no enforcement role for TEA. TEA claims no such role, and has not sought to enforce GA-38 in any way.

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) ("irreducible constitutional minimum of

standing contains three elements": injury in fact; causation such that the injury is "fairly … trace[able] to the challenged action of the defendant"; and redressability by favorable decision)

- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that plaintiffs did not have standing to bring statutory challenge against government officials who did not have "any duty or ability to do *anything*" relating to enforcement of the statute)

- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he "might represent the state in litigation involving the enforcement of its statutes")

- *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794, at *5 (N.D. Tex. 2012) (Fitzwater, C.J.) ("[T]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* and not of a third party.") (emphasis in original), *aff'd*, 2013 WL 3783751 (5th Cir. 2013)

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IV. CONCLUSION

For the reasons stated above, Defendants believe they are not proper parties. Should this Court disagree, Defendants look forward to briefing the issues more fully in the context of a full motion to dismiss that also includes arguments regarding Plaintiff's failure to state a claim more generally, apart from the named parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 3, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Ryan G. Kercher
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