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. 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' RESPONSE TO PLAINTIFFS' TRIAL BRIEF

Defendants 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 Response to Plaintiffs' Trial Brief. In support, Defendants would respectfully show:

I. INTRODUCTION

Plaintiffs spend much of their voluminous trial brief and exhibits arguing against the policy underlying Executive Order GA-38 and—they allege—the TEA's Public Health Guidance (together, the "Challenged Orders"). But this lawsuit is not a debate on the merits of the policy, and Plaintiffs cannot overcome the numerous legal hurdles to obtain the relief they seek. Plaintiffs' attempts to recast their standing and sweep away Supreme Court and Fifth Circuit precedent do not cure their standing and *Ex parte Young* problems. Plaintiffs cannot prevail on their ADA or Section 504 claims because they have failed to exhaust administrative remedies, and because they can neither prove the

Challenged Orders exclude them from public education, or that they have been denied reasonable accommodations. Finally, Plaintiffs' claims under the American Rescue Plan Act (the "ARPA") fail because (1) Plaintiffs have no private right of action to bring such claims; and (2) even if they did, Plaintiffs have failed to prove the ARPA preempts the Challenged Orders.

II. ARGUMENT AND AUTHORITY

A. Standing

Below, Defendants will address the eight main problems with Plaintiffs' standing and *Ex parte Young* analyses.

The "Equitable Relief" Issue: Plaintiffs repeatedly try to slip into the more lenient standing test for "actual" injuries.[1] But binding precedent dictates that requests for equitable relief implicate the stricter standing test for "imminent" injuries.[2]

Plaintiffs Mischaracterize Their Injury: Plaintiffs frame their injury as the denial of meaningful access to in-person public education.[3] This framing cannot be reconciled with *Amnesty International*[4] and *Glass v. Paxton*.[5]

Put simply, Plaintiffs cannot self-inflict an injury out of concern for some future harm and thereby avoid Article III's strict analysis for "imminent" injuries. Plaintiffs cannot choose to stay home and then claim that the Challenged Orders are "actually" preventing them from attending school in person. Rather, it is the harm Plaintiffs sought to avoid by staying home—a COVID-19 exposure—that is the proper focal point of this standing analysis.

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[1] *See*, e.g., ECF 56 at 43–53.
[2] *See* ECF 48 at 13, n.114-115 (citing *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (hereinafter "*Amnesty International*").
[3] ECF 56 at 43–44.
[4] 568 U.S. 398 (2013).
[5] 900 F.3d 233 (5th Cir. 2018).

In *Amnesty International*, the respondents claimed they suffered actual injuries as they incurred "present costs and burdens that are based on a fear of surveillance" attributable to the challenged statute.[6] The Supreme Court rejected this end-run around an Article III's "imminent" analysis:

> Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.[7]

The Supreme Court reasoned that "[i]f the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear."[8]

Glass is also instructive. There, a college professor ("Glass") claimed she would censor her speech due to a set of laws and policies effectively allowing handguns on college campuses.[9] The Fifth Circuit, applying *Amnesty International*, focused the analysis on the "catalyst" for Glass's self-censorship—i.e., the harm she sought to avoid by curbing her speech.[10] The Court reasoned that "Glass's fear of potential violent acts by firearm-carrying students prompts her to self-censor by avoiding topics she worries might incite such violence or intimidation, which would be unnecessary but for the law and policy that prevent her from banning firearms in her classroom."[11] The Court then subjected this "catalyst" to *Amnesty International*'s test for imminent injuries.[12] *Amnesty International's* and *Glass's* analyses reflect courts' traditional concerns about conferring standing to a plaintiff's "self-inflicted" injuries.[13]

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[6] 568 U.S. at 416.
[7] *Id.*
[8] *Id.*
[9] 900 F.3d at 236–38.
[10] *Id.* at 239.
[11] *Id.* at 240.
[12] *Id.* at 239–41.
[13] *See id.* at 238 (citing *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018)).

In sum, Plaintiffs' injuries are properly framed as their concern about contracting COVID-19 due to the Challenged Orders. Plaintiffs, who never grapple with *Amnesty International* or *Glass*,[14] never meaningfully argue otherwise.

Object of the Government Action: "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is . . . ordinarily substantially more difficult to establish."[15] The Challenged Orders do not require Plaintiffs to do (or not do) anything. Plaintiffs are not the object of the Challenged Orders; they do not claim otherwise.

Injuries Depending on Third Parties: "It is well settled that a claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties."[16] Plaintiffs' "risk-of-contracting-COVID" injury turns on speculation about the acts of third parties not before this Court. Would school districts impose mask mandates in the absence of the Challenged Orders? What would those mask mandates look like (i.e., would they be strict or riddled with loopholes)? Would those mandates be enforced? What percentage of students would comply with those mandates and what would the rate of disobedience be? What alternative COVID-19 safety protocols do the schools districts have in place? Would the school districts have these alternative measures in place, or enforce them as strictly, if they had mask mandates? Etc. Plaintiffs acknowledge they "must introduce facts showing that [these] third party[] choices have been or will be made in such manner as to produce causation and permit redressability of injury."[17] Plaintiffs do not make the required showing.

"**Increased Risk" Injuries:** Courts are reluctant to confer standing to "increased-risk-of-harm" injuries like Plaintiffs'. In *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Envtl. Quality*, the

[14] *See* ECF 56 at 48 n.41 (relegating these decisions to a footnote with no substantive analysis or other cites finding Plaintiffs' "distinction" meaningful).
[15] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (quotations omitted).
[16] *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015) (quotations and brackets omitted).
[17] ECF 56 at 49.

Fifth Circuit explained: "We do not recognize the concept of 'probabilistic standing' based on a non-particularized 'increased risk'—that is, an increased risk that equally affects the general public."[18] The Court emphasized that, even when such injuries are particularized, they still "often cannot satisfy the 'actual or imminent' requirement."[19] Indeed, almost any government regulation "'slightly increases a citizen's risk of injury—or insufficiently decreases the risk compared to what some citizens might prefer.'"[20] Opening courts to these increased-risk-of-harm injuries "would drain the 'actual or imminent' requirement of meaning" and invade "some part of the Executive's responsibility to take care that the law be faithfully executed."[21] Due to these and other concerns, such "increased risk" injuries have generally (if not exclusively) been limited to "exposure to environmental harm[]" cases.[22] To even begin to claim standing for such an injury, the plaintiff must present evidence quantifying the increased risk he or she faces due to the challenged government action.[23]

Shrimpers and the line of cases cited therein create three hurdles to Plaintiffs' claim to standing.

First, Plaintiffs' injury is a quintessential generalized grievance, as any alleged increased risk would be shared equally by millions of other children attending public school in Texas.

Second, for traceability reasons, Plaintiffs must quantify how much the Challenged Orders increase the risk of COVID-19 exposure for their school districts. This question turns on numerous variables. What is the expected rate-of-COVID-transmission if a school district merely encourages mask wearing (like GA-38 does)? How much would that rate increase if that school district mandated masks? What sort of mask mandate would that school impose? How would it be enforced? What is

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[18] 968 F.3d 419, 424 (5th Cir. 2020).
[19] *Id.*
[20] *Id.* (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007)).
[21] *Id.* (quoting *Pub. Citizen, Inc.*, 489 F.3d at 1295) (quotations omitted).
[22] *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) ("Outside of increased exposure to environmental harms, hypothesized 'increased risk' has never been deemed sufficient 'injury' [for standing purposes].").
[23] *See Shrimpers & Fishermen of RGV*, 968 F.3d at 425 ("Even if Petitioners' members did identify specific risks, there is no evidence of the extent to which those risks would be increased for those members by the expected emissions. Without actual evidence from the Petitioners, we will not wade" into the morass of such empirical questions.") (quotations omitted).

the level of voluntary mask compliance in that district? What is the level of mask disobedience in that district? And so on. Plaintiffs come nowhere close to making the required statistical showing on these and related points.

Finally, to even begin to overcome the generalized grievance hurdle, Plaintiffs must connect their injury (contracting COVID-19) to their disabilities. This creates other speculative variables, such as (1) would Plaintiffs have contracted COVID-19 regardless of their disabilities, and (2) did the nature of Plaintiffs' disabilities result in an increase in the severity of their infections? If Plaintiffs would have contracted COVID-19 regardless of the Challenged Orders, or if their COVID-19 infection results in an asymptomatic case, it is hard to see how they suffered a concrete and particularized injury fairly traceable to the Challenged Orders.

The "Imminent" Issue: This Court must identify each contingency underlying Plaintiffs' injuries and analyze whether each link in the chain of contingences is certainly impending.[24] Defendants identified eight contingencies underlying Plaintiffs' claim to standing.[25] More can reasonably be found. Plaintiffs neither explain how they satisfied each of these contingences nor argue that the identified contingencies are invalid. Plaintiffs cannot overcome the "imminent" standing analysis required by binding precedent.

The "Pre-Enforcement" Issue: Plaintiffs repeatedly cite *Susan B. Anthony List v. Driehaus*.[26] Yet they never explain how they can meet *Driehaus's* test for establishing standing in the context of the threatened enforcement of a law.[27] As to their claims for "actual" enforcement of GA-38 by Attorney General Paxton, GA-38 never was, and never could be, "enforced" against Plaintiffs, and

[24] ECF 34 at 9–10; ECF 48 at 14; *Glass*, 900 F.3d at 239.
[25] ECF 34 at 10–13; ECF 48 at 15–18.
[26] 573 U.S. 149 (2014); ECF 56 at 48.
[27] *See* ECF 56 at 48; ECF 48 at 22 (explaining that Plaintiffs cannot meet the second and third parts of *Driehaus's* test as the Challenged Orders do not prohibit their conduct in any way and as the Challenged Orders will never be "enforced" against them).

they don't argue otherwise. Plaintiffs cite no Supreme Court or Fifth Circuit caselaw finding that a plaintiff has standing to challenge a civil lawsuit filed against an independent third party.

The "Enforcement" Connection Issue: For redressability reasons, Plaintiffs must sue an official with proper enforcement authority over the Challenged Orders.[28] This is because, in our judicial system, remedies operate "with respect to specific parties," not "on legal rules in the abstract."[29] In the equitable relief context, suing the official tasked with enforcing the challenged law ensures that the court's order will likely redress the plaintiff's injury, as opposed to being an impermissible advisory opinion.[30] Here, the standing and *Ex parte Young* analyses overlap,[31] a point Plaintiffs do not appear to dispute.

Plaintiffs' *Ex parte Young* analysis, and thus their redressability analysis, is flawed for the following five reasons.

First, Plaintiffs argue the source of an official's "enforcement" authority is effectively irrelevant.[32] But Fifth Circuit precedent dictates that an officials' "general duty to enforce state law cannot render them suable under *Young*."[33] Other binding decisions confirm that the source of the alleged "enforcement" authority can be dispositive on the *Ex parte Young* issue.[34] Indeed, the Fifth

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[28] ECF 48 at 19–26.
[29] *California v. Tex.*, 141 S. Ct. 2104, 2115 (2021) (quotations omitted).
[30] *Id.*
[31] ECF 48 at 19–26.
[32] *See, e.g.*, ECF 56 at 38 ("[The *Ex parte Young* analysis] turns on the ***possibility*** and ***fact*** of the official's enforcement powers, not on any technical question about the powers' source.").
[33] *Whole Woman's Health v. Jackson*, 21-50792, 2021 WL 4128951, at *4 (5th Cir. Sept. 10, 2021).
[34] *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) ("Although the precise scope of the requirement for a connection has not been defined, the plaintiff at least must show the defendant has 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'") (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)), cert. denied, 141 S. Ct. 1124 (2021); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), cert. denied, 141 S. Ct. 1124 (2021) ("Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis, *i.e.*, the official must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation.") (citing *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), cert. granted, judgment vacated *sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021)); *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017) ("This 'some connection' requirement is designed to ensure defendant is not merely being sued as a representative of the state, and thereby attempting to make the state a party. For example, a state governor with a broad duty to uphold state law is not a proper defendant.") (quotations and citation omitted).

Circuit has found that Attorney General Paxton does not enforce the Governor's COVID-19-related emergency orders[35] and spoken about enforcement of such orders coming in the form of fines imposed by "local authorities."[36] Plaintiffs' argument cannot be reconciled with these binding decisions. And none of Plaintiffs' cited cases support their conclusion this Court can freely ignore the source of Defendants' enforcement connection to the Challenged Orders.

Second, Plaintiffs argue that Attorney General Paxton's litigation of the Challenged Orders is itself sufficient to create the requisite enforcement connection.[37] But Fifth Circuit precedent requires both "the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty."[38] Plaintiffs' argument ignores the need to show a "particular duty" to enforce the statute in question; a connection they cannot establish for Defendants and the Challenged Orders.

Third, Plaintiffs mischaracterize the Supreme Court's decision in *Ex parte Young*. There, the Minnesota attorney general *had authority to enforce the penalties set by the challenged statute*. Plaintiffs acknowledge this fact,[39] but then overlook its importance. In *Ex parte Young*, the Minnesota attorney general had an actual enforcement connection to the challenged statute, meaning he had the particular duty to enforce the statute's penalties.[40] Here, there is no such particular enforcement connection.[41] Under the Fifth Circuit precedents noted above, this distinction is not just meaningful, it is dispositive of the *Ex parte Young* issue.

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[35] *In re Abbott*, 956 F.3d at 709.
[36] *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467–68 (5th Cir. 2020).
[37] *See, e.g.*, ECF 56 at 39–40.
[38] *Tex. Democratic Party v. Abbott*, 978 F.3d at 179 (quotations omitted) (emphasis added).
[39] ECF 56 at 34 ("The attorney general proceeded to violate the injunction *by attempting to enforce the rates in state-court actions* . . . .") (emphasis added).
[40] *See Ex parte Young*, 209 U.S. 123, 131 (1908) (noting that the challenged statute contained an averment that failure to comply with the law would result in "Edward T. Young, as attorney general of the state of Minnesota . . . institute[ing] mandamus or other proceedings *for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof*") (emphasis added); *see also Okpalobi v. Foster*, 244 F.3d 405, 414 (5th Cir. 2001) (summarizing *Ex parte Young* and noting that the injunction prevented the attorney general "from enforcing unconstitutional state penalties against the railroad").
[41] ECF 56 at 39 (relying solely on Attorney General Paxton's status as the "chief law officer" for the State of Texas).

Fourth, Plaintiffs' argument, that the source of enforcement authority is irrelevant, would create glaring redressability problems. Plaintiffs complain about *ultra vires* lawsuits Attorney General Paxton filed against school districts.[42] In this context, "*ultra vires*" means "without legal authority"[43]; Paxton's suits allege that school districts acted unlawfully when they issued a mask mandate in violation of GA-38, which is a state law.[44] Yet *any person, public or private, can file such an ultra vires suit* so long as he or she is injured by the school district's mask mandate.[45]

This creates a serious redressability problem. Because Defendants do not enforce GA-38's fine, the only remedy available to Plaintiffs is an injunction preventing Defendants from filing *ultra vires* suits against school districts. Yet GA-38 would remain on the books—it would still be a valid law that that could be "enforced"—at least in the way Plaintiffs use the term—by the millions of other Texas-based children and parents impacted by these school mask mandates. Regardless of how this Court rules, these millions of potential litigants will remain free to file millions of potential "enforcement" actions in the form of *ultra vires* lawsuits against school districts that impose mask mandates in violation of GA-38. Indeed, these additional litigants are not merely potential—several have already begun filing their own *ultra vires* lawsuits against school districts over mask mandates.[46]

Finally, Plaintiffs come nowhere close to establishing an "enforcement" connection between TEA Defendants and the Challenged Orders. Plaintiffs' sole argument is that TEA Defendants act as "detective[s]" as they gather the names of school districts with mask mandates and report them to

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[42] *See, e.g.*, ECF 56-21.

[43] *See, e.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017) (noting that there are "two general means of proving an *ultra vires* claim: (1) an action 'without legal authority' or (2) failure to 'perform a purely ministerial act'").

[44] *See, e.g.*, ECF 56-21.

[45] *See, e.g.*, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368 (Tex. 2009) (noting that *ultra vires* claims are actions aimed at "protect[ing] a private party's rights against a state official who has acted without legal or statutory authority"); *Garcia v. City of Willis*, 593 S.W.3d 201 (Tex. 2019), reh'g denied (Oct. 4, 2019) (analyzing *ultra vires* claims brought by a private citizen); *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1 (Tex. 2015) (same).

[46] *See, e.g., Treger v. Scribner*, Cause No. 352-327449-21; In the 352nd Judicial District Court; Tarrant County, Texas (filed 08/12/2021); *Austin Parents for Medical Choice v. Austin Independent School District*, Cause No. D-1-GN-21-005603; in the 455th Judicial District Court; Travis County, Texas (filed 09/22/2021); *Parents for Crowley Education v. Crowley Independent School District*, Cause No. 067-329194-21; In the 67th Judicial District Court; Tarrant County, Texas (filed 09/22/2021).

Attorney General Paxton's office.[47] Plaintiffs cite no caselaw finding this to be a sufficient connection for *Ex parte Young* purposes. And any argument to the contrary is belied TEA Defendants' numerous sworn statements specifying that they did not, and realistically could not, enforce the Challenged Orders under the circumstances.[48]

B. ABA and Section 504 Claims

1. Plaintiffs Have Failed to Exhaust Their Administrative Remedies

The Individuals with Disabilities in Education Act (IDEA) provides parents with extensive procedural safeguards to ensure that each student is provided the free appropriate public education ("FAPE") that Plaintiffs seek.[49] These procedures must meet detailed requirements set out in federal regulations, 34 C.F.R. Part 300, and govern all aspects of providing educational services to students with disabilities—from ensuring prompt identification and evaluation, to constituting school-based teams to develop an individualized plan for each student, to providing efficient dispute resolution options. Before suing under "the Americans with Disabilities Act of 1990, title V [including Section 504] of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under [the IDEA], the procedures under [20 U.S.C. § 1415] subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]."[50] In *Fry v. Napoleon Community School*, the Supreme Court clarified when § 1415(l) requires a plaintiff to exhaust claims under statutes other than the IDEA.[51] *Fry* first held that to meet the statutory standard, "a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'"[52] As the Court explained:

> § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff

[47] ECF 56 at 37–38.
[48] *See, e.g.*, Jernigan Tr., 22:3–13, 23:6–13, 23:17–24, 40:4–54:23, 71:2–73:19.
[49] 20 U.S.C. § 1400 et seq.
[50] 20 U.S.C. § 1415(*l*).
[51] 137 S. Ct. 743, 752 (2017)
[52] *Id.*

> cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in *Smith* claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises. But if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: A hearing officer, as just explained, would have to send her away empty-handed. And that is true even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education. A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule because, once again, the only "relief" the IDEA makes "available" is relief for the denial of a FAPE.[53]

Fry next ruled that to determine whether a suit seeks relief for the denial of a FAPE, "a court should look to the substance, or gravamen, of the plaintiff's complaint."[54] That inquiry makes central the plaintiff's own claims, as § 1415(l) explicitly requires. Section 1415(l) "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." *Id.*

In determining whether a complaint fits that description, courts should also look to the purpose of the statute at issue.[55] *Fry* noted that the IDEA protects only children and adolescents, and its goal is to provide each child with meaningful access to education by offering individualized instruction and related services.[56] In contrast, Section 504 and Title II of the ADA cover people with disabilities of all ages, inside and outside of school, and "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."[57] "In short, the

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[53] *Id.* at 754-55.
[54] *Id.* at 752.
[55] *S.C. v. Round Rock Indep. Sch. Dist.*, No. A-19-CV-1177-SH, 2020 WL 1446857, at *5–6 (W.D. Tex. Mar. 25, 2020).
[56] *Id.*
[57] *Id.*, *citing Fry*, 137 S.Ct. at 756.

IDEA guarantees individually tailored educational services, while Title II and § 504 promise non-discriminatory access to public institutions."[58]

The reason the administrative process is critical in this case is at the very heart of Plaintiffs' concerns—reducing the risk of exposure to Covid while in school. At the center of this process is the IEP—the "individualized education plan" (or "program") developed for each student by an "IEP team" including individuals with knowledge of the student, such as parents, teachers, and a qualified representative of the school or district, among others.[59] This team must meet at least once a year, but more frequent meetings may be convened by members of the team, including parents.[60]

Each IEP is tailored to the student's particular circumstances, the instruction, related services, and necessary accommodations. Some, for example, may provide for accommodations within the general-education classroom, while others may place the student at a specific school or facility, and others may require services be provided in a hospital or home setting.[61] And if a particular service or setting is not assisting a student in making sufficient progress, the IEP team must consider other accommodations and revise the IEP as appropriate.[62] While universal masking is one option to reduce the risk of Covid infection, it is not the *only* option. Plaintiffs have failed to present any evidence or even make the generalized assertion that they have attempted to work with their individual schools to develop IEPs for these students to reduce their risk of exposure to Covid. Plaintiffs thus fail to show that adequate relief is unavailable within their individual schools.

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[58] *Id.*
[59] 34 C.F.R. §§ 300.320–322.
[60] *Id.* § 300.324.
[61] See 20 U.S.C. § 1401(29) (defining "special education" to include "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings"); *cf. Renee J. v. Hous. Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019) ("If a child is unable to attend classes due to his or her disability, the school district must offer homebound instruction to provide the child with a FAPE.").
[62] See 34 C.F.R. § 300.324(b).

Plaintiffs assert "the ban on mask requirements has created or will create an absolute barrier to the school building and to in-person learning."[63] If, as the Plaintiffs argue, alternatives to in-person learning are not acceptable, then any barrier to in-person learning amounts to a denial of a free appropriate public education ("FAPE"). Therefore, in deciding whether § 1415(l) applies, this Court must examine whether Plaintiffs' complaint seeking relief for "denial of access and benefits" is an artfully pled complaint that actually seeks relief for the denial of an appropriate education.

2. Plaintiffs' Claim of Exclusion is Not Discriminatory

To establish a *prima facia* case for disability discrimination under Section 504, a plaintiff must show: (1) a qualifying disability; (2) that the plaintiff is being excluded from participation in, denied the benefits of, or otherwise discriminated against by a covered entity; and (3) such discrimination is solely by reason of the plaintiff's disability.[64] "Discrimination includes a failure to make accommodations."[65] To establish a *prima facie* reasonable accommodation claim under Section 504, the plaintiff must have either (1) identified his disability and resulting limitation and requested an accommodation in direct and specific terms, or (2) his disability, the resulting limitation, and the necessary reasonable accommodation must have been "open, obvious, and apparent" to the entity's relevant agents.[66] Plaintiffs mistakenly assert that Attorney General Paxton's actions have resulted in the denial of access and benefits, and prevent the provision of reasonable modifications.

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[63] ECF. 56 at 48.

[64] *Francois v. Our Lady of the Lake Hospital, Inc.*, 8 F.4th 370, 378 (5th Cir. 2021) (citing *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018)); *Smith v. Harris Cnty., Tex.*, 956 F.3d 311, 316 (5th Cir. 2020) (discussing the difference between the Rehabilitation Act "solely by reason of" causation standard and the ADA "by reason of" causation standard).

[65] *Campbell v. Lamar Institute of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016).

[66] *Id.* (citing *Smith v. Harris Cnty.*, 956 F.3d 311, 317 (5th Cir. 2020) and *Windham v. Harris Cnty.* 875 F.3d 229, 236 (5th Cir. 2017)).

a. Risk of exposure is not exclusion.

Plaintiffs' reliance on *Helling v. McKinney* highlights the very important distinction between eliminating a risk and reducing a risk.[67] In *Helling*, a Nevada state prisoner filed suit against prison officials claiming that his involuntary exposure to environmental tobacco smoke ("ETS") from his cell mate's 5 pack-a-day habit posed an unreasonable risk to his health, thus subjecting him to cruel and unusual punishment in violation of the 8th Amendment.[68] While the prisoner did not have a constitutional right to a smoke-free prison environment, the appellate court held that he had stated a valid cause of action under the Eighth Amendment by alleging that he had been involuntarily exposed to levels of ETS that posed an unreasonable risk of harm to his future health.[69] In remanding the case, the Supreme Court held that McKinney must show that he himself was being exposed to *unreasonably high levels* of ETS.[70] *Helling* and the other Title I cases cited by Plaintiffs do not stand for the proposition that risk must be completely eliminated.

Plaintiff M.P. attended school in Fort Bend ISD. Fort Bend ISD began the school year on August 11, 2021 without a mask mandate in place.[71] On August 23, 2021, the FBISD school board voted for a mask mandate that took effect on August 26, 2021, but the school board rescinded the mandate two days later.[72] Plaintiffs state that "M.P.'s parents had no choice but to pull M.P. from in-person school given the rising number of cases and Fort Bend ISD's adherence to GA-38."[73] According to data reported to DSHS by Fort Bend ISD, at M.P.'s school, which has a student body population of 1,360, there have been a total of 26 students test positive for Covid, or 1.8% of the

[67] ECF 56 at 51 (citing *Helling v. McKinney*, 509 U.S. 25 (1993)).
[68] *Helling*, 509 U.S. at 28.
[69] *Id.* at 29.
[70] *Id.* at 35 (emphasis added).
[71] https://www.fortbendisd.com/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=12&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=174622&PageID=1 (last visited 10/04/2021).
[72] https://www.fortbendisd.com/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=12&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=175699&PageID=1 (last visited 10/04/2021).
[73] ECF 56 at 48.

student population, since school began.[74] At A.M.'s school, which has had a mask mandate in place since August 16, 2021,[75] 5.4% of the student population has tested positive for Covid since school began on August 9th.[76] State-wide, the rate of infection among kindergarten – 12th grade students has decreased by 70% since it peaked at the beginning of September.[77]

Report 1: Self Reported COVID-19 Cases in Public Schools, Weekly Cases Reported, Texas, August 2, 2021 - September 26, 2021 Time Current Report Period:September 20, 2021- September 26, 2021

Week Ending	Positive Student Cases Reported on School Campuses During the Week	Positive Staff Cases Reported on School Campuses During the Week	Total Student Enrollment*	2019-2020 Staff Count
08Aug2021	1,297	1,426	5,340,108	800,078
15Aug2021	5,271	2,956	5,340,108	800,078
22Aug2021	19,244	4,682	5,340,108	800,078
29Aug2021	38,048	6,082	5,340,108	800,078
05Sep2021	42,552	6,184	5,340,108	800,078
12Sep2021	31,504	4,899	5,340,108	800,078
19Sep2021	21,745	3,282	5,340,108	800,078
26Sep2021	12,614	2,019	5,340,108	800,078

What these statistics demonstrate is that Covid is complicated and there is no cognizable connection between OAG, TEA and Commissioner Morath's actions and Plaintiffs' purported exclusion from in-person learning. These statistics also demonstrate that it is the Plaintiffs' fear of COVID-19 that poses the barrier.

b. Reasonable modifications are determined on a case-by-case basis.

Plaintiffs rely on *Staron v. McDonald's Corporation* for the proposition that determination of a reasonable modification or accommodation is a fact-specific inquiry requiring individualized consideration.[78] "[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it."[79] What Plaintiffs are seeking in this case, a state-wide change to the law, is the

[74] https://dshs.texas.gov/coronavirus/schools/texas-education-agency/ (last visited 10/04/2021).
[75] https://www.saisd.net/upload/page/0925/2021-08-16%20mask%20mandate-letterhead2.pdf (last visited 10/04/2021).
[76] https://dshs.texas.gov/coronavirus/schools/texas-education-agency/ (last visited 10/04/2021).
[77] https://dshs.texas.gov/coronavirus/schools/texas-education-agency/ (last visited 10/04/2021).
[78] 51 F.3d 353 at 356 (2nd Cir. 1995)
[79] *Id.*

opposite of a fact specific, case-by-case analysis. That analysis is appropriate at the local level, specifically tailored to each child. Having failed to seek reasonable modifications from their schools, Plaintiffs cannot show that such modifications are unavailable.

C. Preemption Under the ARPA

Plaintiffs cannot prevail on their claims under the ARPA. First, they have no right of action allowing them to bring a preemption claim either under the ARPA or under the doctrine or preemption itself. Second, even if Plaintiffs had a procedural vehicle by which to raise such a claim, they have failed to prove that ARPA preempts the Challenged Orders.

1. Plaintiffs Have No Preemption Cause of Action

Plaintiffs have no private right of action under a preemption theory, and the ARPA forecloses equitable relief. As Defendants argued in their Trial Brief, Plaintiffs have no private right of action under the ARPA, and a claim of preemption does not otherwise provide a right of action under which Plaintiffs can seek relief.[80] Plaintiffs' argument to the contrary relies on an incomplete reading of *Armstrong v. Exceptional Child Center, Inc.*[81]

Armstrong was a suit against two Idaho state officials, claiming the state violated the Medicaid Act by underpaying health service providers.[82] The District Court entered summary judgment for the providers, holding that Idaho had set rates contravening Medicaid provisions.[83] The Ninth Circuit affirmed, holding the Supremacy Clause contained an implied right of action.[84] The Supreme Court reversed, holding the Supremacy Clause does not contain a private right of action.[85] In so holding, the Court noted that courts may "in some circumstances grant injunctive relief against state officers who

[80] ECF 48 at 32.
[81] 575 U.S. 320 (2015).
[82] *Id.* at 323-24.
[83] *Id* at 324.
[84] *Id.*
[85] *Id.* at 326.

are violating, or plan to violate, federal law."[86] It is upon this sentence that Plaintiffs hang their argument that they may seek private redress under an ARPA preemption theory.[87] However, just two paragraphs later, the Court crucially notes, "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."[88] The Court then held that the providers could not bring suit because (1) the specific Medicaid provision's only remedy was administratively withholding funds; (2) the provision's broad and non-specific mandate for state provider plans made it "judicially unadministrable"; and (3) the Medicaid statute itself did not contemplate private rights of action.[89]

Like Medicaid, the ARPA evidences Congressional intent to foreclose equitable relief because (1) the only apparent remedy for violation is the withholding of funds; (2) the statute is judicially unadministrable; and (3) the ARPA's text creates no private right of action.[90] First, the plain text of the ARPA pertaining to school funding contemplates no enforcement mechanism other than the conditions upon which funding may be received.[91] Although the ARPA lacks the express reservation of administrative enforcement contained the Medicaid provision at issue in *Armstrong*, the ARPA does provide that LEAs must report to the State on the nature of plans adopted using ARPA funds. Second, the ARPA affords broad and non-specific discretion to LEAs to utilize the funds distributed under the statute, and for State to impose their own additional requirements, which is precisely the sort of "judgement-laden standard" conferred by the Medicaid provision at issue in *Armstrong*. Third, like the Medicaid Act, the ARPA itself lacks the sort of "rights-creating language needed to imply a private

[86] *Id.* (internal citations omitted).
[87] ECF 56 at 60.
[88] *Armstrong*, 575 U.S. at 327 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)).
[89] *Id.* at 328, 331-32.
[90] Pub. L. No. 117-2, § 2001.
[91] *Id.*

right of action."[92] Like the Medicaid Act, the ARPA is phrased as a directive for the issuance of funds to sectors in need due to the pandemic.

Plaintiffs argue that, "[g]iven the absence of any statutory indication to the contrary, this Court has the equitable power to enjoin Defendants' enforcement of [the Challenged Orders]…"[93] But *Armstrong* expressly rejects this formulation for reading an equitable right of action into a statute, refusing to find an implied right of action "simply because the statute at issue did not 'affirmatively' preclude the availability of a judge-made action at equity."[94]

Therefore, not only does *Armstrong* not stand for the proposition that a Court must hear an equitable claim for preemption absent a right of action, it also precludes reading an implied right of action into the ARPA. Plaintiffs therefore cannot prevail on their preemption claim under the ARPA.

2. Plaintiffs Cannot Show the ARPA Preempts the Challenged Orders

Even if Plaintiffs had a private right of enforcement allowing this Court to address the ARPA's alleged preemption of the Challenged Provisions, Plaintiffs have failed to prove such a claim.

Federal law can preempt state law in three ways. First, a federal law may state its preemption of state law in express terms.[95] Second, a federal law may preempt state law if Congress intends to supersede state law through a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[96] Third, federal law preempts state law to the extent the two conflict, where (1) compliance with both state

[92] *Armstrong*, 575 U.S. at 331 (citing *Alexander v. Sandoval*, 532 U.S 275, 286-87 (2001)).
[93] ECF 56 at 62.
[94] *Armstrong*, 575 U.S. at 329 (citing *Seminole Tribe*, 517 U.S. at 75).
[95] *Pac. Gas & Elec. Co. v. State Energy Resources Conservations & Development Com'n*, 461 U.S. 190, 203 (1983) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).
[96] *Id.* at 204 (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

and federal provisions is physically impossible, or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[97] With respect to the Challenged Orders, the ARPA meets none of these criteria.

a. The ARPA does not expressly preempt the Challenged Orders.

The ARPA contains no express preemption language. Plaintiffs do not argue otherwise.

b. The ARPA is not a pervasive federal scheme of schools or masking.

The ARPA does not create a scheme of federal regulation so pervasive that Congress has left no room to supplement it. Plaintiffs' argument treats the ARPA as if the statute were designed to set out a new and robust federal regime for public education, but it doesn't. A perusal of the statute's table of contents reveals the ARPA is not designed to create a federal scheme for regulating health measures in schools, but instead details aid policies for a wide spectrum of affected national interests. The ARPA creates programs to aid in agriculture,[98] nutrition,[99] the National Endowment for the Arts,[100] youth suicide prevention,[101] continued assistance to rail workers,[102] the Defense Production Act of 1950,[103] airlines,[104] pensions,[105] Department of State operations,[106] and the Bureau of Indian Affairs,[107] to name only a relative handful. In the statute's more than 105,500 words, the word "mask"—or any of its variants—appears just twice.[108] Without mentioning masking specifically, the ARPA only asks that local education agencies ("LEAs") follow CDC guidance "to the greatest extent

[97] *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).
[98] Pub. L. No. 117-2, Title I, Subtitle A.
[99] *Id.* at Title I, Subtitle B.
[100] *Id.* at Section 2021.
[101] *Id.* at Section 2710.
[102] *Id.* at Title II, Subtitle J.
[103] *Id.* at Title III, Subtitle A.
[104] *Id.* at Title VII, Subtitle C.
[105] *Id.* at Title IX, Subtitle H.
[106] *Id.* at Title X.
[107] *Id.* at Section 11002.
[108] *See id.*, Title III, Subtitle A – Defense Production Act of 1950, § 3101 COVID-19 Emergency Medical Supplies Enhancement.

practicable."[109] Nor do the Department of Education's "interim final requirements" transform such sparse mention of masking into a comprehensive regulatory scheme requiring universal or near-universal masking in state-run public schools. Those requirements mention masks just four times. The first mention is worth reviewing in full:

> An LEA may use its ARP ESSER funds for a wide variety of activities related to educating students during the COVID–19 pandemic and addressing the impacts of the COVID–19 pandemic on students and educators. For example, an LEA may use the ARP ESSER funds to maintain the health and safety of students and school staff as they return to in-person instruction (e.g., adopting policies consistent with guidance on reopening schools from the Centers for Disease Control and Prevention ("CDC"), available at https:// www.cdc.gov/coronavirus/2019-ncov/ community/schools-childcare/ operation-strategy.html, including universal and correct wearing of masks; modifying facilities to allow for physical distancing (e.g., use of cohorts/ podding); handwashing and respiratory etiquette; cleaning and maintaining healthy facilities, including improving ventilation; contact tracing in combination with isolation and quarantine, in collaboration with the State, local, territorial, or Tribal health departments; diagnostic and screening testing; efforts to provide vaccinations to school communities; appropriate accommodations for children with disabilities with respect to health and safety policies; and coordination with State and local health officials).[110]

The ARPA does not mention masking in the context of schools, and the Department of Education's requirements under the ARPA note that masking policies are among a nonexclusive list of "activities related to educating students during COVID-19" on which school districts "may use" ARPA funds.[111] The remaining three references to masks in the Department of Education's final interim requirements are as part of the funding uses school districts must *describe* when reporting how they spent funds received under the ARPA.[112] Indeed, Plaintiffs concede that while ARPA creates a requirement for fund recipients to describe their safety measures, the statute does not require adopting universal masking.[113] The ARPA's bare mention of masking is insufficient to create a federal regulatory

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[109] *Id.* (citing Pub. L. No. 117-2, §2001(e)(2)(Q)).
[110] 86 Fed. Reg. 21195, 21196.
[111] *Id.*
[112] *Id.* at 21200-21201.
[113] ECF 56 at 58-59 ("To be clear, the plan requirement 'does not mandate that [a local educational agency] adopt the CDC guidance, but only requires that [it] describe in its plan the extent to which it has adopted the key prevention and mitigation

scheme sufficient to supplant the longstanding State regulation of public schools.[114] Indeed, the Department of Education's administrative regulations require LEAs to report certain information regarding use of the ARPA funds to…the State.[115]

c. Compliance with the Challenged Orders does not preclude compliance with the ARPA, and the Challenged Orders are not obstacles to the full purpose and intent of Congress.

Compliance with the Challenged Orders and the ARPA is not physically impossible. Plaintiffs' argument to the contrary rests on the hope that 0 + 0 + 0 = 3. The ARPA does not mention—much less require—universal masking in schools; the Department of Education interim final requirements do not require universal masking in schools; and the CDC Guidance does not *require* indoor masking.[116] Stacking three provisions that do not require masking in schools does not evidence that the full purpose and objective of Congress is to require masking in schools.

Plaintiffs' argument that the ARPA preempts the Challenged Orders because the latter conflicts with LEA *discretion* over the use of ARPA funds is also unsupported. Plaintiffs argue that "[i]t is well settled that when a federal funding statute expressly gives local authorities discretion over how to spend federal money, a state law that purports to restrict that discretion is preempted."[117] In support of this "well settled" proposition, Plaintiffs cite a single case, *Lawrence Co. v. Lead-Deadwood School Dist.*[118] That case does not support Plaintiffs' argument.[119]

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strategies identified in the guidance…In sum, the [ARPA] does not require local schools to adopt CDC guidance on universal masking…) (quoting 86 Fed. Reg. 21195, 21200).

[114] *See Pac. Gas & Elec Co.*, 461 U.S. 190, 222-223 (holding that expansive federal regulation of nuclear waste management did not preempt State regulation of nuclear power development for economic reasons); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981) (holding that Congressional policy to favor coal as a fuel source did no preempt state laws that adversely affect coal use).

[115] 86 Fed. Reg. 21195, 21198 ("*Interim Final Requirement:* Under this requirement, each LEA that receives ARP ESSER funds must develop, submit to the [State Education Agency] on a reasonable timeline determined by the SEA, and make publicly available on the LEA's website, a plan for the LEA's use of ARP ESSER funds. The plan, and any revisions to the plan submitted consistent with procedures established by the SEA, must include a t a minimum a description of….").

[116] ECF 56.10, Exh. 13, p. 1 ("CDC recommends universal indoor masking…").

[117] ECF 56 at 59.

[118] 469 U.S. 256 (1984).

[119] As the dissent notes, the *Lawrence County* majority appears to depart from "the settled doctrines of [the Supreme] Court" that local government authorities were created as "convenient agencies for exercising such of the governmental powers of

Lawrence County concerned a federal payment-in-lieu-of-taxes statute. In places where federal ownership of land meant local governments collected less in property taxes, Congress provided for payment in lieu of those taxes.[120] Under the federal statute, local governments could use the payment for "any governmental purpose."[121] The South Dakota state legislature enacted a statute requiring local governments to use those federal funds exactly as they would have been used if collected as taxes, including using 60% of the funds for public school districts.[122] The Court determined that the discretionary language with which Congress allowed local governments to allocate the funds was not dispositive of whether the State could enact statutes constraining spending of such funds, and noted that regulations adopted by the Department of the Interior (charged with administrating the statute) suggested local governments had exclusive discretion on the spending of funds provided under the statute.[123] The Court then embarked on a lengthy evaluation of the legislative record, determining that record supported the conclusion that Congress intended that local governments have exclusive discretion over the spending of the federal funds at issue.[124]

Lawrence County is distinguishable in several important ways. Unlike the *Lawrence County* federal funding to local authorities, the ARPA provides funds to the States, which then allocate those funds to LEAs.[125] Thus, the ARPA already contemplates a larger role for the State than did the statute at issue in *Lawrence County*. Moreover, the Challenged Orders do not—unlike the state law in *Lawrence County*—adopt a comprehensive restriction on local authorities' use of all ARPA funds they receive. And, unlike *Lawrence County*, Plaintiffs in this case offer no legislative history demonstrating Congressional intent to foreclose State authority.

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the State as may be entrusted to them." *See, Id.* at 270 (C.J. Rehnquist, dissenting) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

[120] *Id.* at 258.

[121] *Id.*

[122] *Id.* at 259.

[123] *Id.* at 261.

[124] *Id.* at 262-68.

[125] Pub. L. No. 177-2, § 2001(c)-(d).

Perhaps most importantly, the Department of Education regulations expressly provide that State government is "best situated to determine what additional requirements to include in the LEA ARP ESSER plan."[126] And, as noted above, those same regulations contemplate LEAs report not to the federal government, but to the State.[127] Given the express reservation of power to State government under ARPA made by the statute's administrating federal agency, it is little wonder the Department of Justice does not address—much less endorse—Plaintiffs' ARPA preemption argument it its Statement of Interest.[128] Plaintiffs fail to establish either that (1) compliance with the ARPA and the Challenged Orders is physically impossible; or (2) that the Challenged Orders frustrate the accomplishment and execution of the full purposes and objectives of Congress.

Plaintiffs have failed to show the ARPA preempts the Challenged Orders.

III. CONCLUSION

For the foregoing reasons, Defendants request the Court DENY Plaintiffs the relief they seek.

Respectfully submitted,

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[126] 86 Fed. Reg. 21196, 21199.
[127] *Id.* at 21198.
[128] ECF 47.

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CERTIFICATE OF SERVICE

I certify that on October 4, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

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