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January 26, 2022

Lyle W. Cayce
United States Court of Appeals, Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: 21-51083, *E.T. v. Paxton*, 28(j) Letter Submitting *Arc of Iowa v. Reynolds* (8th Cir. Jan 25, 2022) and *Disability Rights S.C. v. McMaster* (4th Cir. Jan 25, 2022).

Dear Mr. Cayce:

Yesterday, the Eighth Circuit affirmed in part a preliminary injunction of an Iowa law prohibiting mask requirements in schools. The same day, the Fourth Circuit determined that plaintiffs lacked standing to sue South Carolina's attorney general over a similar law because he had not enforced or threatened to enforce the law against the plaintiffs' school districts. We submit both opinions under FRAP 28(j).

In the Eighth Circuit case, *Arc of Iowa v. Reynolds*, plaintiffs had standing because their injuries were "the foreseeable result of Defendants' threatened enforcement of Section 280.31: the schools and school districts have gone without mask mandates because of the law and the threat of enforcement, and Plaintiffs have been forced to choose between their children's lives and the quality of their education." No. 21-3269, at 9 (8th Cir. Jan 25, 2022) (Exhibit A). Exhaustion under the IDEA was not required because plaintiffs sought "authority for their school districts to require mask-wearing in schools that would ensure a safe school environment for their children," and "[f]ace masks, like wheelchair ramps, render school buildings accessible to a part of the public." *Id.* at 14–15. The gravamen of plaintiffs' complaint was access to a public accommodation rather than the appropriateness of a special-education plan. *Id.* The court found plaintiffs likely to succeed under the ADA and Rehabilitation Act and remanded solely for the district court to narrow its preliminary injunction. *Id.* at 24–25. The Eighth Circuit's decision on the standing, exhaustion, and merits issues supports Plaintiffs' arguments in this case.

In the Fourth Circuit case, *Disability Rights S.C. v. McMaster*, the Court found no standing to sue the attorney general because plaintiffs' injuries were not traceable to any enforcement. No. 21-2070, at 11 (4th Cir. Jan. 25, 2022) (Exhibit B). The facts showed that Attorney General Wilson had not enforced the law against any district that plaintiffs' children attended, nor had any district rescinded its mask mandate in response to threats of enforcements from the attorney general. *Id.* at 13–14. We submit this decision for completeness, though given its facts, there is no inconsistency between it and Plaintiffs' position here.

Sincerely,

Linda Coberly

EXHIBIT A

United States Court of Appeals

For the Eighth Circuit

No. 21-3268

The Arc of Iowa; Charmaine Alexander, Individually and on behalf of C.B.; Johnathan Craig, Individually and on behalf of E.C. on behalf of J.C.; Michelle Croft, Individually and on behalf of J.J.B.; Amanda Devereaux, Individually and on behalf of P.D.; Carissa Froyum Roise, Individually and on behalf of H.J.F.R.; Lidija Geest, Individually and on behalf of K.G.; Melissa Hadden, Individually and on behalf of V.M.H.; Lisa Hardisty Sithonnorath, Individually and on behalf of A.S.; Heather Lynn Preston, Individually and on behalf of M.P. on behalf of S.P.; Rebekah Stewart, Individually and on behalf of E.M.S.; Erin Vercande, Individually and on behalf of S.V.

Plaintiffs - Appellees

v.

Kimberly Reynolds, In her official capacity as Governor of Iowa; Ann Lebo, In her official capacity as Director of the Iowa Department of Education

Defendants - Appellants

Ankeny Community School District; Council Bluffs Community School District; Davenport Community School District; Decorah Community School District; Denver Community School District; Des Moines Public Schools; Iowa City Community School District; Johnston Community School District; Linn Mar Community School District; Waterloo Community School District

*Defendant*s

American Academy of Pediatrics; American Academy of Pediatrics, Iowa Chapter

Amici on Behalf of Appellees

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: November 18, 2021
Filed: January 25, 2022

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

Plaintiffs, the Arc of Iowa and Iowa parents whose children have serious disabilities that place them at heightened risk of severe injury or death from COVID-19, sued to enjoin enforcement of Iowa's law prohibiting mask requirements in schools. The district court ruled that the law violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. It granted a preliminary injunction completely enjoining the law.

Having jurisdiction under 28 U.S.C. § 1292(a)(1), this Court holds that Plaintiffs are entitled to a preliminary injunction because mask requirements are reasonable accommodations required by federal disability law to protect the rights of Plaintiffs' children. However, the injunction imposed by the district court sweeps more broadly than necessary to remedy Plaintiffs' injuries. This Court therefore vacates, in part, and remands to allow the district court to enter a tailored injunction that prohibits Defendants from preventing or delaying reasonable accommodations and ensures that Plaintiffs' schools may provide such reasonable accommodations.

I.

In early 2020, many schools and school districts in Iowa moved to remote learning in response to the COVID-19 pandemic. When they later reopened for in-person classes, the Iowa Department of Education recommended mask-wearing at

schools, and many districts imposed broad mask mandates. On May 20, 2021, Iowa Governor Kim Reynolds signed into law Iowa Code Section 280.31, prohibiting schools and school districts from requiring anyone wear masks on school grounds unless otherwise required by law. In response, all Iowa schools and school districts with mask mandates ended them. One district expressly stated it would have maintained mask requirements but for Section 280.31.

Where some Plaintiffs previously sent their children to schools with mask mandates, many withdrew their children due to the health risks, or were forced to send their children despite the risks due to no viable alternative.

Plaintiffs sued on September 3, 2021, under the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at scattered sections of 42 U.S.C.); Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. §§ 701-18; and the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2, 135 Stat. 4. Plaintiffs named as Defendants Governor Reynolds, who vowed to enforce Section 280.31, and Ann Lebo, the Director of the Iowa Department of Education, which also stated it would enforce the new law. Plaintiffs also named as Defendants the ten school districts they attend. Plaintiffs primarily seek as relief (1) declaration that the Defendants' enforcement of Section 280.31 violates the ADA and RA; (2) declaration that ARPA preempts the Iowa law and Defendants' enforcement; and (3) a permanent injunction stopping "Defendants from enforcing [Section 280.31] and thereby violating the ADA, Section 504 of the Rehabilitation Act, and ARPA." **Compl.** at 37, DCD 1.

The district court granted a temporary restraining order against the law on September 13, 2021. The court granted a preliminary injunction on October 8, 2021. Once Section 280.31 was enjoined, 24 school districts—including most of Plaintiffs'—reimposed some form of mask requirements. Only Defendants Reynolds and Lebo appeal the district court's entry of the preliminary injunction. They argue Plaintiffs lack standing, failed to exhaust administrative remedies, and that the district court abused its discretion in granting the preliminary injunction.

This Court reviews de novo Plaintiffs' standing, ***Miller v. Thurston***, 967 F.3d 727, 734 (8th Cir. 2020), and exhaustion of administrative remedies, ***J.M. v. Francis Howell Sch. Dist.***, 850 F.3d 944, 947 (8th Cir. 2017). This Court reviews the grant of a preliminary injunction for abuse of discretion. ***Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC***, 953 F.3d 1041, 1044 (8th Cir. 2020).

II.

Plaintiffs have standing. "[A]t least one plaintiff must have standing to sue." ***Dep't of Com. v. New York***, 139 S. Ct. 2551, 2565 (2019). To have standing, a plaintiff must (1) "suffer[] an injury in fact," (2) "fairly traceable to the challenged conduct of the defendant," and (3) "likely to be redressed by a favorable judicial decision." ***Sarasota Wine Mkt., LLC v. Schmitt***, 987 F.3d 1171, 1178 (8th Cir. 2021) (quotations omitted). Standing is measured at the commencement of the suit; it cannot be created retroactively. *See* ***Lujan v. Defs. of Wildlife***, 504 U.S. 555, 569-70 nn.4 & 5 (1992); ***Iowa League of Cities v. EPA***, 711 F.3d 844, 869 (8th Cir. 2013).

A.

Plaintiffs have demonstrated an adequate injury in fact. "Parents have standing to sue when practices and policies of a school threaten their rights and interests and those of their children." ***Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis***, 894 F.3d 959, 965-66 (8th Cir. 2018). This includes parents who "allege an injury to their children's educational interests and opportunities." ***Id.*** at 965.

Plaintiffs documented that Section 280.31's ban on mask requirements forces them to forgo critical educational opportunities, including in-person learning with their peers. For example, one Plaintiff's child, "S.V.," "has a brain injury, cerebral palsy, and a history of strokes and epilepsy." **Compl.** ¶ 15, DCD 1. His doctors warned that contracting COVID-19 would create a "risk of severe complications,"

including "more severe seizures and further brain damage." **Vercande Decl.** ¶ 11, DCD 3-6. Because of his conditions and cognitive limitations, "he is nonverbal" and "cannot follow instructions easily" which makes it "much more difficult for him to adhere to . . . wearing a mask . . . so it is even more important that others wear a mask . . . around him." ***Id.*** ¶ 12. Staff at his school wore masks to ensure his safety, but that policy ended when Section 280.31 took effect and his parents removed him from school to ensure his safety. ***Id.*** ¶¶ 13-16. Not attending in-person poses a "risk to [students'] physical, psychological, emotional and developmental well-being." **Waddell Expert Decl.** ¶ 7, DCD 3-1. Remote learning in many school districts also does not provide "even nominally equivalent educational services" to in-class education. **Srinivas Expert Decl.** ¶ 28, DCD 3-2. *See* **Basham Expert Decl.** ¶¶ 17-23, DCD 48-4 (detailing how online learning fails some disabled students).

Other Plaintiffs demonstrated a substantial risk of bodily harm, which independently satisfies the injury requirement. *See* ***Dep't of Commerce***, 139 S. Ct. at 2565 (recognizing injury requirement may be fulfilled by potential future injury if "there is a substantial risk that the harm will occur" (quoting ***Susan B. Anthony List v. Driehaus***, 573 U.S. 149, 158 (2014))). *See also* ***Liddell***, 894 F.3d at 965 (holding allegations of likely future harm from adversary winning a motion were "neither conjectural nor hypothetical and [were] sufficiently imminent to constitute an injury in fact"). For example, one Plaintiff's son, "H.J.F.R.," has "congenital central hypoventilation syndrome," which causes breathing problems and forces him to use a ventilator when sleeping. **Roise Decl.** ¶ 3, DCD 3-5. Because contracting COVID-19 places him at "higher risk of severe complications," and the vast majority of students and staff did not wear masks at his school after Section 280.31 was enacted, his parents removed him from school last year. ***Id.*** ¶¶ 3, 9. This was feasible because the school offered remote classes last year. ***Id.*** ¶¶ 8, 13. This year, the school stopped offering remote classes, forcing his parents to send him to school in-person, where most children and some of his teachers are unmasked and there is no "social distancing." ***Id.*** ¶¶ 11, 13-14. Another Plaintiff's son, "K.G.," has asthma, **Geest Decl.** ¶ 4, DCD 3-12, which also presents a high risk for severe illness from COVID-19. **Waddell Expert Decl.** ¶ 17, DCD 3-1. K.G.'s asthma sometimes

requires a "school nurse [to] administer [his] inhaler" but "she does not wear a mask," the school rejected a request to have her wear a mask, and his teacher also does not "wear[] a mask when interacting with him one-on-one." **Geest Decl. ¶¶** 4-5, 10, DCD 3-12. His gym "instructor even made [him] take off his mask to run indoors." ***Id.*** ¶ 10.

These facts are different than those in *E.T. v. Paxton*, 19 F.4th 760 (5th Cir. 2021). There, the plaintiffs challenged an executive order that prohibited mask requirements in Texas schools on the grounds that it violated federal disability law. ***E.T.***, 19 F.4th at 763-64. The Fifth Circuit held that the plaintiffs "likely failed to demonstrate standing" because other possible accommodations—such as voluntary masking, vaccination, and social distancing—meant that the plaintiffs had not shown that they faced an "either/or" choice between being "either forced out of in-person learning altogether or" taking greater health risks than their peers. ***Id.*** at 765-66, *quoting* ***E.T. v. Morath***, No. 1:21-CV-717-LY, 2021 WL 5236553, at *14 (W.D. Tex. Nov. 10, 2021).

Even assuming that the establishment of an "either/or" choice is a meaningful way to assess injury-in-fact for present purposes, Plaintiffs here have shown they are forced into that very situation. In fact, H.J.F.R. faces an even starker choice because his school offers no remote-learning option and other interventions have failed: take extreme health risks or receive no education at all. Voluntary masking has achieved little, given the behavior of his classmates and teachers. Vaccinations against COVID-19 are voluntary. *See* Iowa Dep't of Pub. Health, **COVID-19 and K-12 School Update for Fall 2021/Winter 2022**, *available at* https://idph.iowa.gov/Portals/1/userfiles/282/Updated_Guidance_1.pdf (last visited Jan. 20, 2022). "The children and teachers in H.J.F.R's class are not socially distancing." **Roise Decl.** ¶ 11, DCD 3-5. Alternative interventions have proven insufficient; Defendants do not argue otherwise. Without some mask requirements, H.J.F.R. must take great health risks in order to receive an education. Similarly, a mask requirement for K.G.'s nurse, when administering his inhaler, and for his teachers, when interacting one-on-one, appear the only option. Defendants'

threatened enforcement has forced Plaintiffs into an "either/or" choice, and provides an adequate injury.[1]

B.

Defendants do not contest that heightened risk of severe injury or death from COVID-19, or inferior remote learning constitute injuries sufficient to provide standing. *See generally* **Reynolds Br.** at 23-25. Rather, they argue that "Plaintiffs are not harmed by 280.31 because it permits schools to mandate facial coverings

[1]An injury in fact must be "'concrete and particularized' and 'actual or imminent.'" ***Liddell***, 894 F.3d at 965, *quoting* ***Spokeo, Inc. v. Robins***, 578 U.S. 330, 339 (2016). Defendants have not challenged these aspects of Plaintiffs' injuries, so this Court does not belabor them. Indeed, the preceding facts reflect the concrete and particularized nature of Plaintiffs' injuries. Further, their injuries are imminent because "there is a substantial risk that the harm will occur." ***Driehaus***, 573 U.S. at 158, *quoting* ***Clapper v. Amnesty Int'l USA***, 568 U.S. 398, 414 n.5 (2013). Unlike those cases where plaintiffs relied on a series of speculative inferences unsupported by empirical evidence, Plaintiffs here thoroughly documented their substantial risk of contracting COVID-19 and incurring serious illness. *Compare* ***Clapper***, 568 U.S. at 411-14 (finding injury not imminent where it required five different, necessary assumptions, but plaintiffs could "only speculate" as to the likelihood of each and "substantially undermine[d] their standing" by "fail[ing] to offer any evidence" to support the first assumption), *and* ***In re SuperValu, Inc.***, 870 F.3d 763, 771 (8th Cir. 2017) (holding complaint did not adequately allege substantial risk of injury where it asserted harm from risk of identity theft due to stolen credit-card data but lacked "more detailed factual support" than a single, unhelpful, decade-old report on identity-theft that had found "most [data] breaches have not resulted in . . . identity theft"), *with* Waddell Expert Decl. ¶¶ 1-9, 17-27, DCD 3-1 (documenting rates of COVID-19 Delta variant transmission in Iowa, impact on children, risks due to preexisting conditions, and efficacy of masking to prevent transmission), Srinivas Expert Decl. ¶ 24, DCD 3-1 (discussing study predicting between 91% and 75% of students would be infected with COVID-19 within three months without adequate preventative measures, including masks), *and* Srinivas Expert Decl. ¶¶ 7-9, DCD 48-2 (discussing further evidence of heightened transmission risk in schools without mask requirements).

when required by federal law" but also assert that federal law does not require this, so Plaintiffs have not shown traceability. ***Id.*** at 23. Defendants are incorrect.

Plaintiffs' injuries are fairly traceable to Section 280.31. "An injury is fairly traceable to a challenged statute when there is a causal connection between the two." ***Sarasota Wine Mkt., LLC***, 987 F.3d at 1178, *quoting* ***Alexis Bailly Vineyard, Inc. v. Harrington***, 931 F.3d 774, 779 (8th Cir. 2019). "Proximate causation is not a requirement of Article III standing." ***Lexmark Int'l, Inc. v. Static Control Components, Inc.***, 572 U.S. 118, 134 n.6 (2014). Traceability "requires no more than de facto causality." ***Dep't of Com.***, 139 S. Ct. at 2566, *quoting* ***Block v. Meese***, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). *See* ***Block***, 793 F.2d at 1309 (holding plaintiff had standing to sue government for harms caused by possibly "irrational" third-party response to government action because, although irrationality may have been relevant to the merits and "legal cause" of injury, it was "irrelevant" to standing, which requires only "de facto causality"). Thus, a plaintiff has standing to sue for injuries caused by "the predictable effect of Government action on the decisions of third parties." ***Dep't of Com.***, 139 S. Ct. at 2566. *See also* ***Parsons v. U.S. Dep't of Just.***, 801 F.3d 701, 714 (6th Cir. 2015) ("In the nebulous land of 'fairly traceable,' where causation means more than speculative but less than but-for, the allegation that a defendant's conduct was a motivating factor in the third party's injurious actions satisfies the requisite standard.").

Here, Plaintiffs' schools' decision to stop requiring students and staff to wear masks on school grounds were a predictable effect of the enforcement of Section 280.31 threatened by Defendants Reynolds and Lebo. These Defendants interpret the law to completely prohibit schools from requiring anyone wear masks on their property and interpret federal law to never require masks in schools. The Iowa Department of Education, which Defendant Lebo heads, has threatened violators of the law with referral to the State Board of Education, which even can take control of districts and strip them of accreditation. *See* **Prelim. Inj. Order** at 17, DCD 60; **TRO** at 7, 17, DCD 32. *See also* **Pls.' Prelim. Inj. Br.** at 7-8 & n.25, DCD 17, *citing* Ian Richardson, ***Can Iowa Schools Defy the State's COVID Mask Ban Like***

Florida and Texas Schools Are? Des Moines Reg. (Aug. 16, 2021), *available at* https://www.desmoinesregister.com/story/news/politics/2021/08/16/what-backlashcould-schools-face-if-they-defy-iowas-mask-mandate-ban-kim-reynolds-cdc-covid/5512069001/. Some Iowa schools and school districts previously had mask requirements. After Section 280.31, none of them did, including Plaintiffs' schools. *See* **Pls.' Decls.**, DCDs 3-3 to -13 (describing lack of mask requirements in schools). Defendants themselves acknowledge that each "school may fear that it will be subject to enforcement action by the State and not want to risk waiting until [imposing a mask mandate and litigating the issue] to find out if the State is correct in its interpretation of federal disability law." **Reynolds Br.** at 25.

Plaintiffs' injuries are the foreseeable result of Defendants' threatened enforcement of Section 280.31: the schools and school districts have gone without mask mandates because of the law and the threat of enforcement, and Plaintiffs have been forced to choose between their children's lives and the quality of their education. Plaintiffs have shown traceability because their injuries are caused by "the predictable effect of Government action on the decisions of third parties." ***Dep't of Com.***, 139 S. Ct. at 2566.

C.

Plaintiffs' injuries are likely to be redressed by a favorable judicial decision. The redressability element of standing requires only that it be "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." ***Lujan***, 504 U.S. at 561 (quotations omitted). *See* ***Liddell***, 894 F.3d at 966. A plaintiff may satisfy redressability by "show[ing] that a favorable decision will relieve a discrete injury" but "need not show that a favorable decision will relieve his every injury." ***Massachusetts v. EPA***, 549 U.S. 497, 525 (2007), *quoting* ***Larson v. Valente***, 456 U.S. 228, 244 n.15 (1982). When a plaintiff's "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," "causation and redressability ordinarily hinge on the response of the . . . third party," and the

plaintiff must show that third party will act "in such a manner as to produce causation and permit redressability of injury." ***Lujan***, 504 U.S. at 562.

Plaintiffs have established redressability for three reasons. First, the facts showed that many schools, including Plaintiffs', stopped their mask requirements only when Section 280.31 became effective. This establishes causation and the strong inference that enjoining Section 280.31 will lead these schools to return to some form of mask requirements. Second, some of Plaintiffs' schools previously had mask requirements for people around their children to ensure their safety. This suggests the schools recognized the need to accommodate Plaintiffs' disabilities and, if the ADA or RA require some masking, that schools will implement mask requirements to avoid violating federal disability law. Third, when the district court entered the preliminary injunction, 24 different Iowa school districts implemented mask requirements, affecting roughly 30% of Iowa students. **Srinivas Expert Decl.** ¶¶ 3-4, DCD 48-2. This includes eight of the ten districts attended by Plaintiffs. *Compare* ***id.*** ¶ 3 (listing districts that reimplemented mask requirements), *with* **Pls.' Decls.**, DCDs 3-3 to 3-13 (identifying Plaintiffs' districts). This corroborates that Plaintiffs' injuries will be redressed by enjoining Defendants' enforcement of Section 280.31.

Defendants cite Supreme Court precedent to assert that redressability is "too speculative," **Reply** at 12-13, but redress here differs from those cases because it does not depend on a third party with unconstrained discretion. *See* ***DaimlerChrysler Corp. v. Cuno***, 547 U.S. 332, 344-45 (2006) (finding taxpayers lacked redressability where establishing it "require[d] speculating" what the legislature would do but "the courts cannot presume either to control or predict" the legislature's use of its "broad and legitimate discretion" (quoting ***ASARCO Inc. v. Kadish***, 490 U.S. 605, 615 (1989))); ***Simon v. E. Kentucky Welfare Rts. Org.***, 426 U.S. 26, 42-43 (1976) (holding plaintiffs who sued IRS lacked standing where they hoped reversal of IRS rule would "'discourage' hospitals from denying their services to" plaintiffs, but whether hospitals had denied services based on the existing rule remained unclear and, even if the rule were reversed, hospitals would remain free to

not provide services to plaintiffs). Here, the Defendant school districts have scant discretion. If federal law requires schools impose some mask requirements to accommodate disabled students, then these Defendants, including Plaintiffs' own school districts, likely would provide those accommodations.

Defendants also err in claiming that only an "injunction requiring everyone in [Plaintiffs'] children's schools to wear a mask" would redress their injury. **Reynolds Br.** at 26. Plaintiffs' core injury is that their schools, under Section 280.31 as enforced, could not enact any mask requirements that would help ensure their children's safety during in-person learning. The children's circumstances and needs are varied; some cannot wear masks. *See, e.g.*, **Vercande Decl. ¶¶** 11-16, DCD 3-6 (explaining child's limited ability to follow instructions means that he cannot wear a mask so his school previously had the staff members that help him wear masks); **Sithonnorath Decl. ¶¶** 6, 11, DCD 3-7 (stating child's Down syndrome makes it difficult for her to consistently wear a mask so others' mask-wearing is critical). Enjoining the current enforcement allows schools to craft mask requirements tailored to Plaintiffs' children's needs and those of other students who may require accommodations related to masks. In contrast, an absolute universal mask mandate might violate disability law by forcing students unable to wear masks due to disabilities—including some of Plaintiffs' children—to do so. Thus, Plaintiffs sought to enjoin Defendants from enforcing of Section 280.31 to prohibit any mask requirements, and did not seek to impose specific masking requirements on their schools, *see* **Compl.** at 37, DCD 1.

Plaintiffs have standing: they established injuries that are fairly traceable to Defendants' conduct and likely to be redressed by a favorable judicial decision.

III.

Plaintiffs need not administratively exhaust under the Individuals with Disabilities Education Act because its exhaustion requirement does not apply to their claims.

The Individuals with Disabilities Education Act ("IDEA"), Pub. L. No. 101-476, 104 Stat. 1142 (codified as amended in scattered sections of 20 U.S.C.), guarantees a "free appropriate public education" ("FAPE") to "all children with disabilities . . . between the ages of 3 and 21." **20 U.S.C. § 1412(a)(1)(A)**. A "FAPE comprises 'special education and related services'—both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." ***Fry v. Napoleon Cmty. Schs.***, 137 S. Ct. 743, 748-49 (2017), *quoting* **20 U.S.C. §§ 1401(9), (26), (29)**. The primary means of providing a child with a FAPE is an "individualized education program" ("IEP"), which documents the child's "current levels of academic achievement, specifies measurable annual goals for how she can make progress in the general education curriculum, and lists the special education and related services to be provided so that she can advance appropriately toward those goals." ***Id.*** at 749 (cleaned up), *citing* **20 U.S.C. § 1414(d)(1)(A)(i)**.

The IDEA requires administrative exhaustion even for some non-IDEA suits. The IDEA does not restrict the "rights, procedures, and remedies available under . . . the American with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities" but it requires "that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." **20 U.S.C. § 1415(l)**. Those subsections, in turn, require that a parent submit a complaint to the state or local education agency, and then provide for: (1) a "preliminary meeting" between parents and the local education agency to informally resolve the parents' complaint; (2) an "impartial due process hearing" before the relevant State or local education agency that allows the hearing officer to decide a resolution, if any; (3) an appeal to the State educational agency by the losing party. *See* ***id.*** **§ 1415(f)-(g)**. If the parent finds the outcome insufficient, they may sue in federal court. ***Id.*** **§ 1415(i)(2)(A)**.

Under *Fry v. Napoleon Community Schools*, the IDEA requires exhaustion only if a suit "seek[s] relief for a denial of a FAPE," and "a court should look to the substance, or gravamen, of the plaintiff's complaint" to determine whether a plaintiff seeks relief for such a denial. 137 S. Ct. at 752. "[P]rior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE" but this is a fact-dependent inquiry. ***Id.*** at 757.

The Supreme Court has identified two questions for assessing the gravamen of the complaint: (1) could "the plaintiff have brought essentially the same claim" if the conduct occurred at "a public facility that was not a school," such as a public theater or library; and (2) could an adult at the school, such as an employee, "have pressed essentially the same grievance?" ***Id.*** at 756. If the answer to both questions is yes, then "a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject." ***Id.*** *See* ***E.D. By & Through Dougherty v. Palmyra R-I Sch. Dist.***, 911 F.3d 938, 941 (8th Cir. 2019) ("*E.D.*") (describing *Fry*'s two questions as "critical to determining whether" IDEA exhaustion requirement applies); ***Nelson v. Charles City Cmty. Sch. Dist.***, 900 F.3d 587, 592 (8th Cir. 2018) (answering "no" to both *Fry* questions and concluding IDEA exhaustion requirement applied to plaintiffs).

Fry hypothesized that IDEA exhaustion requirements do not apply to a complaint by a wheelchair-bound child against his school for failing to provide access ramps because the child could bring a similar suit against a city library, and an adult employee could bring a similar suit against the school. ***Fry***, 137 S. Ct. at 756. This is true even though "that architectural feature has educational consequences" and could have been brought under the IDEA because the child "cannot receive instruction" at the school, and simply carrying him inside "may not achieve the sense of independence conducive to academic (or later to real-world) success." ***Id.*** In contrast, IDEA exhaustion requirements apply to a suit alleging a school's failure to provide math tutoring to address a learning disability because the

child could not bring such a suit against a public theater, and an employee could not sue the school for not providing math tutoring to the employee. ***Id.*** at 756-57.

In *Fry* itself, the plaintiffs were parents and their child, a five-year old with severe cerebral palsy, whose trained service dog helped her "live as independently as possible" by retrieving dropped items, supporting her when walking and getting on and off the toilet, opening and closing doors, turning on lights, and other tasks. *See* ***id.*** at 751. The school refused to admit her dog, insisting an adult provide this assistance instead. *See* ***id.*** The Court held that the Frys need not exhaust administrative options under the IDEA where the complaint "allege[d] only disability-based discrimination, without making any reference to the adequacy of the special education services" provided by the school, and "the nature of the Frys' suit" did not suggest "any implicit focus on the adequacy of [the child's] education." ***Id.*** at 758. The Frys themselves acknowledged that the school satisfied their daughter's "educational needs." ***Id.***

Here, Plaintiffs seek authority for their school districts to require mask-wearing in schools that would ensure a safe school environment for their children. They challenged their school's failure to require any masks on the premises, which forced them to choose between having children physically attend school, with a significant risk of serious injury or death, or not attend in-person, if at all. The answer to both of *Fry*'s questions is yes. First, the Plaintiffs could have brought essentially the same claim against a public hospital or other facility if it failed to require others to wear face masks because this would similarly exclude their children from the facility. Second, an adult, such as a teacher at the school, could press the same grievance if failing to require others at the school to wear masks put the adult at significantly increased risk of illness or death. Thus, the gravamen of Plaintiffs' Complaint does not seek relief from a denial of a FAPE. Indeed, Plaintiffs have not challenged the adequacy of their individual, special education services, or their IEPs. *See* **Pls.' Decls.,** DCDs 3-2, -4, -7, -8, -10, -12.

Face masks, like wheelchair ramps, render school buildings accessible to a part of the public—students and adults alike—that otherwise could not access them as the rest of the public does. Thus, face masks are a public health feature with "educational consequences," and although suit could have been brought under the IDEA because Plaintiffs may not be able to "receive instruction" at their schools, these facts do not trigger the IDEA's exhaustion requirements, just as they did not for *Fry*'s "architectural feature" of missing wheelchair ramps. ***Fry***, 137 S. Ct. at 756.

The experiences of H.J.F.R. and K.G. crystalize why the IDEA does not require exhaustion here. H.J.F.R.'s school offers no fully online learning option. His injury stems not from the relative quality of online or in-person education, but the danger that his school's physical environment—which he must brave—poses to his health unless some masking is required. Similarly, K.G. does not challenge the substantive quality of his education; only the physical safety associated with it. His only disability is asthma. *See* **Geest Decl. ¶** 4, DCD 3-12. He does not have an individualized education plan; only an inhaler that requires administering as needed. *See* ***id.*** ¶ 5; **Geest Sealed Ex. A** at 25, DCD 11. His complaint is not about the appropriateness or adequacy of his public education, but that his school places him at heightened risk of severe illness by not requiring a few individuals to sometimes wear masks. Indeed, it makes little sense to pursue an IEP—that documents K.G.'s "current levels of academic achievement, specifies measurable annual goals for how []he can make progress in the general education curriculum, and lists the special education . . . to be provided so that []he can advance appropriately toward those goals," ***Fry***, 137 S. Ct. at 749 (quotations omitted)—where K.G.'s challenge is not academic achievement, but that his nurse refuses to wear a mask when administering his inhaler, and his teacher when interacting one-on-one. Plaintiffs' focus on the threat to their health during their in-person attendance highlights that the gravamen of their complaint is about safe physical access and not subject to exhaustion, unlike the plaintiffs in *E.T.* *See* ***E.T.***, 19 F.4th at 767 (requiring exhaustion where "[p]laintiffs d[id] not really center their claims on a deprivation of physical access").

Defendants assert that the "proper" inquiry under *Fry* is "whether a teacher or visitor could bring a claim that they're being forced to choose between their health or receiving an *equal education*." **Reynolds Br.** at 37 (emphasis added). This attempts to make educational quality dispositive for *Fry*'s questions. However, *Fry* itself prohibits this approach. There, the Supreme Court reversed the Court of Appeals for the Sixth Circuit, which "went wrong" by using a more sweeping standard that required exhaustion where the plaintiff's injuries "were, broadly speaking, 'educational' in nature." ***Fry***, 137 S. Ct. at 753, 758. The Court rejected the Sixth Circuit's reasoning that the "value of allowing" the dog at the school was "educational"—and thus required exhaustion—because the dog would bolster the plaintiff's "sense of independence and social confidence," which was "the sort of interest the IDEA protects." ***Id.*** at 758, *quoting* ***Fry v. Napoleon Cmty. Schs.***, 788 F.3d 622, 627 (6th Cir. 2015), *vacated*, 137 S. Ct. 743 (2017). *See also* ***id.*** at 756 n.9 (suggesting "the plausibility of bringing other variants of [a] suit" is the focus of the gravamen inquiry, not "the particular circumstances of such a suit (school or theater? student or employee?)"). Defendants' proposed inquiry here would lead to the very conclusion that the Supreme Court reversed in *Fry*: that IDEA exhaustion is required because the plaintiff's claim is "broadly speaking, 'educational' in nature." Indeed, *Fry* would have answered "no" to its second question if the inquiry were whether an adult at the school could have pressed a grievance for the lost educational benefit from a support dog. This implication shows Defendants' proposed focus is misplaced.

Finally, this Court's post-*Fry* precedent reinforces that exhaustion is not required here. Plaintiffs have not made IEP compliance "a central dispute of this litigation." ***J.M.***, 850 F.3d at 949 (holding IDEA exhaustion required where claims were "based on the failure to implement [plaintiff's] IEP, specifically regarding discipline," including that the defendant used disciplinary techniques "which were not permitted within [the plaintiff's] IEPs"). Nor is Plaintiffs' suit a type they could not bring against another public facility, and which an adult could not bring against a school. *See* ***Nelson***, 900 F.3d at 592 (holding IDEA exhaustion required where Plaintiff "could not have sued a public theater or library for the mishandling of an

application to open-enroll in online educational programming in a neighboring school district," and an adult employee of the district could not have brought such a claim); ***E.D.***, 911 F.3d at 941 (holding IDEA exhaustion required where plaintiffs could not have sued other public facilities for "greater incorporation of [child's] iPad into the classroom or additional time to complete his assignments," and a visitor could not have brought such a claim). Because the gravamen of Plaintiffs' complaint does not seek relief from a denial of a FAPE, the IDEA's exhaustion requirements do not apply.[2]

IV.

Plaintiffs meet each requirement for a preliminary injunction and are therefore entitled to one. "A plaintiff seeking a preliminary injunction must establish" that (1) "he is likely to succeed on the merits"; (2) "he is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." ***Winter v. Nat. Res. Def. Council, Inc.***, 555 U.S. 7, 20 (2008). *See also* ***Jet Midwest***, 953 F.3d at 1044 (stating similar test);

[2]Even if the gravamen of Plaintiffs' complaint sought relief from the denial of a FAPE, exhaustion likely would have been futile and not required because "adequate relief likely could not have been obtained through the administrative process." ***Barron ex rel. D.B. v. S. Dakota Bd. of Regents***, 655 F.3d 787, 792 (8th Cir. 2011). *See also* ***Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.***, 297 F.3d 195, 199 (2d Cir. 2002) ("Congress specified that exhaustion is not necessary if . . . it is improbable that adequate relief can be obtained by pursuing administrative remedies."). Iowa code provides merely for "an administrative law judge's determination of whether a child received [a] FAPE." **Iowa Admin. Code r. 281-41.513(1)(a)**. Where schools and school districts were refusing to require masks due to Defendants' threatened enforcement of Section 280.31, an administrative law judge would have had scant power to provide adequate relief. *Cf.* ***Tindal v. Norman***, 427 N.W.2d 871, 873 (Iowa 1988) (finding futility exception to state law exhaustion requirement for challenges to agency decisions applied because "agencies cannot decide issues of statutory validity"). Defendants have not identified contrary authority, while their unsupported assertion that such a judge could impose "any number of reasonable modifications . . . including mask mandates," Reply at 19, contradicts their own interpretation of Section 280.31 and federal disability law.

Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d 724, 731 (8th Cir. 2008) (en banc) ("[A] party seeking a preliminary injunction of the implementation of a state statute must demonstrate [it] is likely to prevail on the merits." (quotations omitted)). "The party seeking a preliminary injunction bears the burden of establishing the necessity of this equitable remedy." ***Gen. Motors Corp. v. Harry Brown's, LLC***, 563 F.3d 312, 316 (8th Cir. 2009). A district court abuses its discretion when granting a preliminary injunction if it "relies on clearly erroneous factual findings," commits "an error of law," fails to consider "a relevant factor that should have been given significant weight," gives "significant weight" to an "irrelevant factor," or "commits a clear error of judgment" in weighing all proper factors. ***Dixon v. City of St. Louis***, 950 F.3d 1052, 1055 (8th Cir. 2020) (quotations omitted).

Under the first factor, Plaintiffs are likely to succeed on the merits because mask requirements constitute a reasonable modification and schools' failure to provide this accommodation likely violates the RA.

Section 504 of the Rehabilitation Act states, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." **29 U.S.C. § 794(a)**. "[P]ublic entities discriminate in violation of the Rehabilitation Act if they do not make reasonable accommodations to ensure meaningful access to their programs." ***DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.***, 126 F.3d 1102, 1106 (8th Cir. 1997). *See also* ***Layton v. Elder***, 143 F.3d 469, 472 (8th Cir. 1998). For a failure-to-accommodate claim under the RA, a plaintiff must show that (1) she is a qualified individual with a disability, (2) the defendant receives federal funding, and (3) the defendant failed to make a reasonable modification to accommodate her disability. ***Durand v. Fairview Health Servs.***, 902 F.3d 836, 841 (8th Cir. 2018); ***Mershon v. St. Louis Univ.***, 442 F.3d 1069, 1076-77 & n.5 (8th Cir. 2006). "[A]n accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental

alteration in the nature of the program." ***DeBord***, 126 F.3d at 1106. *See* ***Pottgen v. Missouri State High Sch. Activities Ass'n***, 40 F.3d 926, 930 (8th Cir. 1994).

Defendants do not contest that they receive federal funding, or that Plaintiffs are otherwise qualified individuals with disabilities who are excluded from meaningful access due to those disabilities. Rather, they argue the accommodations sought are unreasonable. *See* **Reynolds Br.** 42-47. However, Plaintiffs' requested accommodation—that schools require some others wear masks—is reasonable. It does not constitute a "fundamental alteration" of the nature of schools' educational programs. Before Section 280.31 was enacted, the Iowa Department of Education maintained "guidance on face coverings . . . in line with CDC" recommendations, and "defer[red] to local districts" on how to conduct school activities. Iowa Dep't Educ., **Reopening Guidance for Schools: Frequently Asked Questions** (June 30, 2020), *available at* http://web.archive.org/web/20201028011619/https://educateiowa.gov/sites/files/ed/documents/COVID-19%20Reopening%20FAQ%206%2030%2020.pdf (last visited Jan. 20, 2022); Iowa Dep't Educ., **COVID-19 Guidance and Information** (Oct. 7, 2020), *available at* http://web.archive.org/web/20210109052728/https://educateiowa.gov/article/2021/01/07/covid-19-guidance-and-information (last visited Jan. 20, 2022). After the district court enjoined Defendants' enforcement, Iowa public schools enrolling "approximately 30% of students in Iowa" imposed mask requirements. **Srinivas Expert Decl.** ¶ 4, DCD 48-2. Similarly, most of the schools that Plaintiffs attend imposed mask requirements, at least as necessary around Plaintiffs, before Section 280.31 was enacted and reimposed mask requirements after the law was enjoined. Where these schools can, did, and do impose mask requirements, continuing to maintain some mask requirements does not constitute a "fundamental alteration." Further, Defendants have not produced any evidence that mask requirements would create a significant financial or administrative burden.

Requiring masks also is not an unreasonable infringement on third parties' rights. First, this argument is undercut by the fact that some Iowa schools have

already imposed the requirement. Second, the Eighth Circuit has found reasonable a modification that imposed on third parties without injuring their health. *See* ***Buckles v. First Data Res., Inc.***, 176 F.3d 1098, 1100-01 (8th Cir. 1999) (finding employer's accommodations of employee's condition that resulted in sinus attacks from environmental irritants "were reasonable," including ban on "the use of nail polish in his department"). Third, schools and the State routinely impose similar requirements, including protective headwear, and immunization. *See* **Iowa Code §§ 280.10, 280.11** (requiring eye and ear protection in some classes); ***id.* § 139A.8(2)** (prohibiting enrollment in "elementary or secondary school in Iowa without evidence of adequate immunizations" against various communicable diseases). Because Plaintiffs' requested accommodation is reasonable, they are likely to succeed on their Rehabilitation Act claim.[3]

Because Section 504 of the RA likely requires mask wearing as a reasonable accommodation for plaintiffs' disabilities, this Court need not consider how ARPA or Title II of the ADA applies to Plaintiffs' claims.

Given the likely reasonable accommodation requirement, the next question is whether federal disabilities law preempts Section 280.31. The district court held that federal law conflicted with and therefore preempted Section 280.31. Conflict preemption occurs "where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." ***In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Pracs. Litig.***, 621 F.3d 781, 794 (8th Cir. 2010) (quotations omitted).

[3]In the ADA employment context, a plaintiff must request the "accommodation[] or assistance for his or her disability" before filing suit. *See* ***Ballard v. Rubin***, 284 F.3d 957, 960 (8th Cir. 2002). To the extent that this requirement may apply here, many Plaintiffs—including the parents of H.J.F.R., K.G., and S.V.—did seek face mask requirements for their children's disabilities. *See* **Roise Decl. ¶** 10, DCD 3-5; **Vercande Decl. ¶** 14, DCD 3-6; **Devereaux Decl. ¶** 10, DCD 3-10; **Preston Decl. ¶** 18, DCD 3-11; **Geest Decl. ¶** 5, DCD 3-12.

This Court holds that Section 280.31 allows mask requirements that are necessary to comply with the RA or ADA, and is thus not conflict-preempted by these laws. Section 280.31 prohibits schools from requiring anyone "to wear a facial covering for any purpose . . . unless the facial covering . . . is required by . . . any other provision of law." **Iowa Code § 280.31**. Neither the Eighth Circuit nor Iowa courts have assessed how to interpret statutory prohibitions that except compliance with other laws. As a result, this Court follows Iowa state rules of statutory interpretation. *See* ***Brandenburg v. Allstate Ins. Co.***, 23 F.3d 1438, 1440 (8th Cir. 1994). Iowa courts interpret a law according to its plain language when that language is unambiguous. ***Rhoades v. State***, 880 N.W.2d 431, 446 (Iowa 2016). Here, the phrase "unless . . . required by . . . any other provision of law" states unambiguously that Section 280.31 does not apply where "any other provision of law" requires masks. "Unless" and "required by" need no elaboration. "Any," meanwhile, makes "provision of law" a broad category and does not distinguish between state or federal laws. *See* **Any**, Merriam-Webster Dictionary (defining "any" as "one or some indiscriminately of whatever kind" or "EVERY—used to indicate one selected without restriction"), *available at* https://www.merriam-webster.com/dictionary/any (last visited Jan. 20, 2022). Thus, the plain meaning of Section 280.31 is that where federal law requires masks in school, Section 280.31 allows them. *Cf.* ***Shamrock Farms Co. v. Veneman***, 146 F.3d 1177, 1180 (9th Cir. 1998) (interpreting federal statutory provision, which stated "[n]othing in this Act or any other provision of law shall be construed to preempt" California from regulating milk, to mean that California could promulgate milk standards despite dormant Commerce Clause precedent because, with "any," "Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law"). Defendants themselves acknowledge that if "federal law requires some masks in schools, section 280.31 doesn't prohibit it." **Reynolds Br.** at 23. Because Section 280.31 allows mask requirements to comply with the ADA or RA, it does not conflict with and is not preempted by these laws.

The district court did not interpret Section 280.31 before concluding that federal disability law preempted it. Instead, the court assumed that Section 280.31

banned mask requirements regardless of federal disability law. This incorrect interpretation of Section 280.31 is an error of law, which this Court reverses for the reasons stated above. Regardless, the first preliminary injunction factor favors Plaintiffs because they are likely to prevail on the merits of their RA claim.

Under the second factor for a preliminary injunction, a plaintiff must demonstrate "that irreparable injury is likely in the absence of an injunction." ***Winter***, 555 U.S. at 22. Plaintiffs have met this burden. They have provided evidence, including expert affidavits, that exposure to COVID-19 places them at heightened risk of severe illness or death, and that alternatives to in-person attendance, when available, are inadequate and provide inferior education opportunities. *See* **Waddell Expert Decl. ¶** 7, DCD 3-1 (noting harms to "emotional" and "developmental well-being" from staying out school); **Srinivas Expert Decl. ¶** 28, DCD 3-2 (discussing need for in-person instruction and failings of remote instruction); **Sithonnorath Decl. ¶** 13, DCD 3-7 (stating daughter with Down syndrome has trouble learning online, needs "visual and hands on" learning which is "near impossible" for her remotely, and "regressed" during remote learning).

These harms suffice as irreparable. *See* ***Plyler v. Doe***, 457 U.S. 202, 221 (1982) (noting the "lasting impact of [education's] deprivation on the life of a child"); ***Harris v. Blue Cross Blue Shield of Missouri***, 995 F.2d 877, 879 (8th Cir. 1993) (concluding "life threatening illness" unquestionably constitutes "irreparable injury"); ***Issa v. Sch. Dist. of Lancaster***, 847 F.3d 121, 142 (3d Cir. 2017) (recognizing "even a few months in an unsound [educational] program can make a world of difference in harm to a child's educational development" and finding irreparable harm from inadequate educational programs). *Cf.* ***Monahan v. State of Neb.***, 645 F.2d 592, 598 (8th Cir. 1981) (finding irreparable harm from educational placement not met where plaintiff's present placement "provide[d] an adequate educational program" but not challenging premise that educational placement could constitute irreparable harm). Further, Defendants do not argue the contrary.

The third factor, the balance of the equities, also favors Plaintiffs. For this factor, the court weighs "the threat of irreparable harm shown by the movant against the injury that granting the injunction will inflict on other parties litigant." ***MPAY Inc. v. Erie Custom Computer Applications, Inc.***, 970 F.3d 1010, 1020 (8th Cir. 2020) (quotations omitted). Plaintiffs have documented serious health and educational harms. Defendants assert injuries that are minimal. First, they assert an interest in enforcing the law, but this is not a valid interest, let alone injury, where their enforcement is not required by state law and violates federal law. Defendants have no interest in forcing schools to not impose mask requirements insofar as federal law requires some mask requirements as a reasonable accommodation for disabled students. Second, Defendants assert that imposing a "universal mask mandate" may harm other disabled students who cannot wear masks. *See* **Reynolds Br.** at 45. However, Plaintiffs do not request this relief, so the hypothetical harm is irrelevant. Because Defendants' injuries are minimal, while Plaintiffs' have shown a likelihood of irreparable harm, including serious injury and educational impairment, this factor favors Plaintiffs.

The fourth factor, the public interest, also favors Plaintiffs. Defendants raise comity in state-federal relations, which is relevant to the public interest inquiry. *See* ***Dixon***, 950 F.3d at 1056. Although the present injunction entered by the district court may implicate comity concerns, an injunction of proper scope, as discussed below, would not implicate comity because it would maintain Section 280.31's ban on mask requirements where this ban does not violate federal law. This interest therefore does not weigh against an injunction. Finally, the public interest also benefits from enjoining current enforcement because it enables schools to require masks that reduce the spread of a dangerous, highly transmissible disease. *See* **Waddell Expert Decl. ¶** 22, DCD 3-1 (stating CDC recommends "universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status" due to concerns about "highly transmissible nature" of Delta variant).

Because all four factors favor Plaintiffs, they are entitled to a preliminary injunction.

V.

Plaintiffs are entitled to a preliminary injunction but the district court abused its discretion by entering an overbroad one. This Court reverses as to the scope of the injunction.

An injunction must be tailored to remedy the specific harm suffered. *See*, *e.g.*, ***St. Louis Effort for AIDS v. Huff***, 782 F.3d 1016, 1022-23 (8th Cir. 2015) ("[A] preliminary injunction 'must be narrowly tailored to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.'" (quoting ***Price v. City of Stockton***, 390 F.3d 1105, 1117 (9th Cir. 2004))); ***Rogers v. Scurr***, 676 F.2d 1211, 1214 (8th Cir. 1982) ("An injunction must be tailored to remedy specific harm shown."); ***Rizzo v. Goode***, 423 U.S. 362, 378 (1976) ("[T]he nature of the violation determines the scope of the remedy." (quoting ***Swann v. Charlotte-Mecklenburg Bd. of Ed.***, 402 U.S. 1, 16 (1971))).

Here, the harm suffered is that Plaintiffs' schools cannot require masks as necessary to accommodate their children's disabilities because of Defendants Reynolds's and Lebo's incorrect interpretation and threatened enforcement of Section 280.31. Plaintiffs are not harmed by the absence of mask requirements at schools their children do not attend. Further, to the extent that some schools in Iowa do not encounter anyone whose disabilities require the schools to make others wear masks, Section 280.31 may prohibit those schools from imposing mask requirements without violating federal disability law. A proper injunction therefore would: (1) establish that federal disability law requires mask wearing as a reasonable accommodation and that Section 280.31 allows this; (2) prohibit Defendants from imposing a contrary reading of Section 280.31, or otherwise preventing, delaying, or failing to provide such reasonable accommodations; and (3) thereby ensure that Plaintiffs' schools may impose mask requirements as reasonable accommodations.

The district court could provide further relief as applicable, or sanction any Defendants that violate such an injunction.

The district court, however, did not tailor the present injunction to remedy Plaintiffs' harms. The court enjoined Defendants "from enforcing Iowa Code section 280.31 banning local public school districts from utilizing their discretion to mandate masks for students, staff, teachers, and members of the public." **Prelim. Inj. Order** at 27, DCD 60. By barring Defendants Reynolds and Lebo from enforcing Section 280.31 in all contexts, the court prevented them from enforcing Iowa's law against schools that encounter no one with disabilities that require masks as a reasonable accommodation. This sweeps broader than the relief necessary to remedy Plaintiffs' injuries and is an abuse of discretion.

* * * * * * *

Plaintiffs are entitled to a preliminary injunction, but the district court erred in its interpretation of Section 280.31 and in the scope of its injunction. The issues presented by Plaintiffs involve a discrete group of students: those whose disabilities require accommodations in the form of mask requirements in order to safely be present in their schools. Defendants' enforcement of Section 280.31 has prevented schools, including those attended by Plaintiffs' children, from providing accommodations required by federal law. To remedy Plaintiffs' injury, an injunction is necessary only as applied to their schools and districts. Accordingly, the preliminary injunction is vacated to the extent that it applies to those schools and districts that Plaintiffs do not attend. The case is remanded to the district court for further proceedings consistent with this opinion.

ERICKSON, Circuit Judge, dissenting.

I disagree with the majority's reasoning and ultimate conclusion that the IDEA does not require administrative exhaustion in this case. Accordingly, I believe

the majority prematurely found the plaintiffs are entitled to a preliminary injunction and I respectfully dissent.

We are instructed by Fry v. Napoleon Community Schools, 137 S. Ct. at 752, to examine and consider the substance of the plaintiffs' complaint. And if we do so, it is evident that the plaintiffs' claims concern the denial of a FAPE. Certainly, the IDEA makes plain that parents can pursue relief under multiple statutes. Even so, the IDEA still requires parents to first exhaust their administrative remedies. E.D., 911 F.3d at 940. Plaintiffs' complaint is rife with two concepts: (1) prohibiting schools from imposing a universal mask mandate forces parents to choose between education and their child's health, and (2) the lack of a mask mandate in schools precludes or "effectively exclude[s]" their children from participation in the public education system. The complaint also expressly references the adequacy of alternatives to in-person education.

In my view, the gravamen of the plaintiffs' claims is that Section 280.31's ban on enacting mask requirements in schools deprives children with disabilities from receiving a FAPE, triggering the exhaustion requirement. The claims in this case are narrow and do not so easily transcend into other areas of the children's lives as is suggested by the majority. I am dubious about the majority's contention that the same claims against a public hospital or other facility that fails to require others to wear face masks would be cognizable. Likewise, I have doubts about whether a teacher could successfully press the same grievance.

I find the majority's alternative finding that exhaustion would have been futile unpersuasive. As noted by the Supreme Court, sound policy reasons exist for the exhaustion requirement, including "preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." Bowen v. City of New York, 476 U.S. 467, 484 (1986) (quoting

Weinberger v. Salfi, 422 U.S. 749, 765 (1975)). I see nothing in this record warranting waiver of the exhaustion requirement.

Finally, by conclusively determining that mask requirements are reasonable accommodations required by federal disability law, the district court broadens our law and fails to give appropriate weight to the requirement that "governmental policies implemented through legislation and developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." Libertarian Party of Ark. v. Thurston, 962 F.3d 390, 399 (8th Cir. 2020) (cleaned up). I do not believe face masks are the equivalent of wheelchair ramps and I do not believe that we should automatically excuse exhaustion and assume the process or relief would be inadequate.

This case is about children's ability to receive instruction while attending school. Courts should not act so quickly to intervene in the resolution of conflicts which arise in the daily operation of school systems. The majority noted this action could have been brought under the IDEA. The plaintiffs should not be permitted to circumvent the exhaustion requirement of the IDEA and have their claims adjudicated for the first time in federal court. I respectfully dissent as to the majority's resolution of the exhaustion requirement and premature finding that the plaintiffs are entitled to a preliminary injunction.

EXHIBIT B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2070

DISABILITY RIGHTS SOUTH CAROLINA; ABLE SOUTH CAROLINA; AMANDA MCDOUGALD SCOTT, individually and on behalf of P.S., a minor; MICHELLE FINNEY, individually and on behalf of M.F., a minor; LYUDMYLA TSYKALOVA, individually and on behalf of M.A., a minor; EMILY POETZ, individually and on behalf of L.P., a minor; SAMANTHA BOEVERS, individually and on behalf of P.B., a minor; TIMICIA GRANT, individually and on behalf of E.G., a minor; CHRISTINE COPELAND, individually and on behalf of L.C., a minor; HEATHER PRICE, individually and on behalf of H.P., a minor; CATHY LITTLETON, individually and on behalf of Q.L., a minor,

Plaintiffs - Appellees,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of South Carolina; ALAN WILSON, in his official capacity as Attorney General of South Carolina,

Defendants - Appellants,

and

MOLLY SPEARMAN, in her official capacity as State Superintendent of Education; GREENVILLE COUNTY SCHOOL DISTRICT; HORRY COUNTY SCHOOL DISTRICT; LEXINGTON COUNTY SCHOOL DISTRICT ONE; OCONEE COUNTY SCHOOL DISTRICT; DORCHESTER COUNTY SCHOOL DISTRICT TWO; CHARLESTON COUNTY SCHOOL DISTRICT; PICKENS COUNTY SCHOOL DISTRICT,

Defendants.

AMERICAN ACADEMY OF PEDIATRICS; SOUTH CAROLINA CHAPTER OF AMERICAN ACADEMY OF PEDIATRICS; UNITED STATES OF AMERICA,

Amici Supporting Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Mary G. Lewis, District Judge. (3:21-cv-02728-MGL)

Argued: December 9, 2021 Decided: January 25, 2022

Before NIEMEYER, WYNN, and THACKER, Circuit Judges.

Vacated in part, remanded with instructions by published opinion. Judge Thacker wrote the opinion, in which Judge Niemeyer joined. Judge Wynn wrote a dissenting opinion.

ARGUED: William Grayson Lambert, OFFICE OF THE GOVERNOR OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. John A. Freedman, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Appellees. **ON BRIEF:** Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, J. Emory Smith, Jr., Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellant Attorney General Wilson. Thomas A. Limehouse, Jr., Chief Legal Counsel, Michael G. Shedd, Deputy Legal Counsel, OFFICE OF THE GOVERNOR OF SOUTH CAROLINA, Columbia, South Carolina, for Appellant Governor McMaster. David Allen Chaney Jr., AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA, Charleston, South Carolina; Adam Protheroe, SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, Columbia, South Carolina; B. Randall Dong, Anna Maria Conner, Amanda C. Hess, DISABILITY RIGHTS SOUTH CAROLINA, Columbia, South Carolina; Rita Bolt Barker, WYCHE, P.A., Greenville, South Carolina; Elisabeth S. Theodore, Anthony J. Franze, Tara Williamson, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C.; Louise Melling, Jennesa Calvo Friedman, New York, New York, Susan Mizner, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, San Francisco, California, for Appellees. Jeffrey B. Dubner, Jessica Anne Morton, Samara M. Spence, Sean A. Lev, DEMOCRACY FORWARD FOUNDATION, Washington, D.C., for Amici South Carolina Chapter of American Academy of Pediatrics and American Academy of Pediatrics. Kristen Clarke, Assistant Attorney General, Bonnie I. Robin-Vergeer, Alisa C. Philo, Sydney A.R. Foster, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE,

Washington, D.C.; Elizabeth M. Brown, General Counsel, Francisco Lopez, Mary Rohmiller, Office of the General Counsel, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C.; M. Rhett DeHart, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Amicus United States.

THACKER, Circuit Judge:

The South Carolina legislature included a provision in the South Carolina state budget that prohibits school districts from using appropriated funds to impose mask mandates. Nine parents of students with disabilities who attend South Carolina public schools and two disability advocacy organizations filed suit against seven school districts, the state superintendent of education, the governor, and the attorney general to challenge this law. The district court granted a preliminary injunction enjoining the law's enforcement, and the governor and the attorney general appealed.

Because we conclude that the parents and the disability advocacy organizations lack standing to sue the governor and the attorney general, we vacate the district court's order granting the preliminary injunction as to those defendants and remand with instructions to dismiss them from this case.

I.

In the appropriations act for the 2021–2022 fiscal year, the South Carolina General Assembly included a budget proviso that precludes primary and secondary schools' use of appropriated funds to impose mask mandates for students and staff:

> No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

Act of June 21, 2021, pt. IB, § 1.108, 2021 S.C. Acts 1, 256 (the "Proviso"); *see* J.A. 144.[1]

For the school year immediately preceding the Proviso's enactment -- that is, the 2020–2021 school year -- the South Carolina Department of Education instituted a policy "requiring face coverings to be worn on school buses and within public school facilities." S.C. Dep't of Educ. Face Covering Guidelines for K-12 Public Schools (Aug. 3, 2020), https://ed.sc.gov/state-board/state-board-of-education/additional-resources/south-carolina-department-of-education-face-covering-guidelines-for-k-12-public-schools/. Shortly after the Proviso was ratified, however, South Carolina Superintendent of Education Molly M. Spearman ("Spearman") issued a memorandum to the superintendents of local school districts that explained, "The South Carolina Department of Education . . . interprets the [Proviso] to mean that school districts are prohibited from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021–2022 school year. . . . [D]istricts may not create or enforce any policy[] which would require the wearing of face coverings." J.A. 146.

Despite the Proviso and Spearman's interpretation of it, some school districts continued to follow universal masking requirements, consistent with medical guidance from the federal Centers for Disease Control and Prevention. In response, South Carolina Attorney General Alan Wilson ("Wilson") filed suit against the City of Columbia, South Carolina, asserting that its ordinances requiring masks to be worn in primary and secondary schools violated the Proviso. *See Wilson* ex rel. *State v. City of Columbia*, 863 S.E.2d 456

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

(S.C. 2021). The Supreme Court of South Carolina held that the Proviso was a valid exercise of the South Carolina General Assembly's legislative power and struck down the ordinances as inconsistent with the Proviso because "the enforcement provisions in the . . . ordinances make clear that school personnel -- paid at least in part with 'funds appropriated or authorized pursuant to the [2021–2022 Appropriations Act]' -- are responsible for enforcing the . . . mask mandate." *Id.* at 461, 462–63. The court nonetheless left open "the possibility that a local government could impose a mask mandate without contravening [the Proviso]." *Id.* at 461.

Thereafter, a local school district, Richland County School District Two, which had not itself imposed a mask mandate but was subject to the ordinances struck down in *Wilson*, also filed suit challenging the Proviso. *See Richland Cnty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920 (S.C. 2021). At issue in *Richland* was whether the Proviso prevented the school district "from (1) apportioning its budget so that any mask requirement is funded by federal or local funds, (2) functionally announcing and enforcing a mask requirement without using any funding whatsoever, and (3) designating an employee or series of employees to enforce mask requirements who would be paid exclusively with federal or local funds." *Id.* at 924. The Supreme Court of South Carolina reiterated its *Wilson* holdings and specifically explained, "[The Proviso] prohibits the use of funds appropriated or authorized by the 2021–2022 Appropriations Act to announce or enforce a mask mandate. . . . [W]e do not reject the possibility that funds not appropriated or authorized by that act may be used to announce or enforce a mask mandate." *Id.*

On August 24, 2021, before the Supreme Court of South Carolina issued its decisions in *Wilson* and *Richland*, two nonprofit advocacy organizations for individuals with disabilities -- Disability Rights South Carolina and Able South Carolina -- and nine parents of students with disabilities who attend South Carolina public schools (collectively, "Appellees") brought this action against Spearman, Wilson, seven local school districts -- the Greenville County School District, the Horry County School District, Lexington County School District One, the Oconee County School District, Dorchester County School District Two, the Charleston County School District, and the Pickens County School District -- and South Carolina Governor Henry McMaster ("McMaster"), seeking to enjoin the Proviso's enforcement. Appellees contend that the Proviso prohibits local school districts from imposing mask mandates, which violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act because children with disabilities are at increased risk of severe symptoms from COVID-19 compared to other children, and without mask mandates for students and staff, children with disabilities cannot safely attend in-person schooling and are deprived of its benefits.

Several weeks after the Supreme Court of South Carolina issued its opinion in *Wilson*, and two days before it issued its opinion in *Richland*, the district court in this case granted Appellees' request for a preliminary injunction and enjoined the named defendants from enforcing the Proviso. McMaster and Wilson (collectively, "Appellants") -- but none of the other named defendants -- timely appealed the district court's order.

II.

Our "judicial Power" extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" that "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "To satisfy the irreducible constitutional minimum of standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (alterations and internal quotation marks omitted). Appellees, as "the part[ies] invoking federal jurisdiction, bear[] the burden of establishing these elements." *Spokeo, Inc.*, 578 U.S. at 338.

The existence of standing is a legal issue that we review de novo. *Buscemi v. Bell*, 964 F.3d 252, 258 (4th Cir. 2020) (citing *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019)). "When a question of standing is apparent, but was not raised or addressed in the lower court,[2] it is our responsibility to raise and decide the issue sua

[2] Before the district court granted Appellees' motion for preliminary injunction, Wilson moved to dismiss this action for lack of standing, but the district court denied his motion. *Disability Rights S.C v. McMaster*, No. 3:21-cv-02728-MGL, 2021 WL 4449446 (D.S.C. Sept. 28, 2021). The district court held that Appellees' alleged injuries were "fairly traceable" to Wilson "due to his enforcement of [the Proviso]" via a letter he wrote to the City of Columbia threatening legal action against the ordinances that were the subject of the *Wilson* case before the Supreme Court of South Carolina. *Id.* at *3. The district court also held, without further elaboration, that "a partial remedy for plaintiffs will satisfy the redressability prong here." *Id.* (citing *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021)). Wilson has not appealed the district court's order. *See* J.A. 297–98. However, since Appellants filed their notice of appeal, they both have filed motions to dismiss (Continued)

sponte." *Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005)). "If we conclude that [Appellees'] lack of standing deprived the district court of jurisdiction, 'we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *Id.* (quoting *Stephens v. City of Albemarle*, 524 F.3d 485, 490 (4th Cir. 2008)).

III.

Appellees do not have standing to pursue this action against Appellants. Even assuming Appellees possess standing against some of the individuals and entities named as defendants in this case, the standing inquiry must be evaluated separately as to each defendant. *See Bostic v. Schaefer*, 760 F.3d 352, 370–71 (4th Cir. 2014) ("The Plaintiffs' claims can therefore survive Schaefer's standing challenge as long as one couple satisfies the standing requirements with respect to each defendant."); *see also Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) ("Article III standing to sue each defendant . . . requires a showing that each defendant caused [the plaintiff's] injury and that an order of the court against each defendant could redress the injury." (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992))); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012)

Appellees' claims against them that assert lack of standing as a reason for dismissal. Governor McMaster's Motion to Dismiss Plaintiffs' Amended Complaint at 6–8, *Disability Rights S.C. v. McMaster*, No. 3:21-cv-2728-MGL (D.S.C. filed Oct. 22, 2021); Motion of Attorney General to Dismiss Amended Complaint at 1, *Disability Rights S.C. v. McMaster*, No. 3:21-cv-2728-MGL (D.S.C. filed Oct. 29, 2021). Those motions remain pending before the district court.

(rejecting plaintiff's argument that "Article III . . . permits suits against non-injurious defendants as long as one of the defendants in the suit injured the plaintiff").

Appellees assert that the Proviso has injured them by increasing the risk that their disabled children will contract COVID-19, denying their children meaningful access to in-person education, and causing them to enroll their children in private schools that are not subject to the Proviso.[3] Although Appellees have alleged a nexus between their claimed injuries and the Proviso -- at least prior to the Supreme Court of South Carolina's decisions in *Wilson* ex rel. *State v. City of Columbia*, 863 S.E.2d 456 (S.C. 2021), and *Richland County School District 2 v. Lucas*, 862 S.E.2d 920 (S.C. 2021) -- they have not established that such injuries are fairly traceable to Appellants' conduct or would be redressed by a favorable ruling against Appellants.

A.

Traceability

A plaintiff's injury satisfies the traceability element of standing when there is "a causal connection between the injury and the [defendant's] conduct complained of by the plaintiff." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018) (internal

[3] Appellees' claimed injuries focus on the plaintiff parents. Appellees do not endeavor to explain how the two plaintiff nonprofit disability advocacy organizations have been injured or have standing to sue. Still, "once it is established that at least one party has standing to bring the claim, no further inquiry is required as to another party's standing to bring that claim." *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 209 (4th Cir. 2020) (citing *Horne v. Flores*, 557 U.S. 433, 446–47 (2009); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981)). We therefore do not analyze whether the plaintiff organizations have standing to bring this action.

quotation marks omitted). "While the defendant's conduct need not be the last link in the causal chain, the plaintiff must be able to demonstrate that the alleged harm was caused by the defendant, as opposed to the 'independent action of some third party not before the court.'" *Id.* (quoting *Frank Krasner Enters., Ltd. v. Montgomery Cnty.*, 401 F.3d 230, 234 (4th Cir. 2005)).

Appellees' traceability arguments focus on Superintendent of Education Spearman, who "directed that, pursuant to [the Proviso], 'school districts are *prohibited* from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021-22 school year,'" and one of the defendant school districts, the Greenville County School District, which "directly attributed its no-mask requirement to [the Proviso]." Appellees' Resp. Br. at 22. Critically, however, unlike the defendants that Appellees focus on, Appellants have not taken any action enforcing the Proviso relative to Appellees -- and Appellees do not assert that they plan to.

1.

Appellees' complaint alleges that McMaster signed the appropriations act containing the Proviso and "has publicly advocated for [the Proviso] to remain in effect and be vigorously enforced." J.A. 32. As we have made clear in the Eleventh Amendment context, however, "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)). The same is true with respect to "[t]he fact that [the governor] has publicly endorsed and defended the

challenged statutes." *Id.* Rather, in order to be a proper defendant in an action to enjoin an allegedly unconstitutional state law, the governor must have "a specific duty to enforce" that law. *Id.*; *see Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014) ("The *Ex parte Young* exception to Eleventh Amendment immunity applies only where a party 'defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional' has 'some connection with the enforcement of the act.'" (quoting Ex parte *Young*, 209 U.S. 123, 157 (1908))).

These principles apply with equal force in the standing context. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) ("The requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute."). To establish standing, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury *as a result of the statute's operation or enforcement*." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis supplied) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). When a defendant has no role in enforcing the law at issue, it follows that the plaintiff's injury allegedly caused by that law is not traceable to the defendant.

The dissent suggests that we should reject McMaster's assertion that he has no authority to enforce the Proviso because McMaster has also argued in this appeal that he would be irreparably harmed by an injunction barring the Proviso's enforcement. *Post* at 34–35. The dissent views this argument as an "admission" that McMaster can enforce the Proviso. *Id.* But even if we accept this so-called "admission," it is based on nothing more

than McMaster's status as the Governor of South Carolina and his general duty to execute state laws. As we have just explained, and as the dissent recognizes, *see id.* at 33, this general duty does not make McMaster a proper defendant in this action.

Moreover, the dissent overlooks the most critical fact in the case at this point -- Appellees bear the burden to demonstrate that they have standing to sue McMaster. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). And they have failed to do so. Appellees do not even purport to allege that McMaster has any duty to enforce the Proviso or that he has attempted to enforce it in a manner that directly affects them. They certainly do not argue, as the dissent does, that there are unresolved factual issues or questions of state law that first need to be evaluated by the district court before we can determine that McMaster is not equipped with the authority to enforce the Proviso. Therefore, Appellees have not demonstrated that their alleged injuries caused by the Proviso are fairly traceable to McMaster.

2.

By contrast, Appellees' complaint alleges that Wilson has authority to enforce the Proviso and has filed suit against the City of Columbia to declare its ordinances imposing mask mandates in primary and secondary schools invalid because of the Proviso. J.A. 32; *see Wilson* ex rel. *State v. City of Columbia*, 863 S.E.2d 456 (S.C. 2021). But, significantly, the City of Columbia was not a defendant in this action below, and counsel for Appellees acknowledged at oral argument that none of the plaintiff parents in this case have children who attend school there. Oral Argument at 35:27–35:53, *Disability Rights S.C. v. McMaster*, No. 21-2070 (4th Cir. Dec. 9, 2021), http://www.ca4.uscourts.gov/oral-

argument/listen-to-oral-arguments. Appellees have also not alleged that any of the districts where their children attend school have rescinded a mask mandate pursuant to a threat from Wilson that he would seek to enforce the Proviso to void that mask mandate.

The dissent asserts that we "fail[] to appreciate the predictable chilling effect" that Wilson's enforcement of the Proviso against the City of Columbia has on other school districts that seek to impose mask mandates. *Post* at 32 n.8. But the dissent's contention "that Wilson's efforts to enforce the Proviso for some districts chilled other school districts from imposing their own mask mandates," *id.*, has not borne out to be true. As detailed below, to date, very few school districts in South Carolina have implemented mask mandates, even after the district court in this case enjoined the Proviso's enforcement. This indicates that the claimed "chilling effect" is not as strong as the dissent suggests.

When a criminal statute is at issue, a plaintiff has standing to sue if he shows that "there exists a credible threat of prosecution" pursuant to that statute. *Babbitt*, 442 U.S. at 298. However, "imaginary or speculative" fears of prosecution are not sufficient to convey standing. *Id.* Although the Proviso is not a criminal statute, these principles are nonetheless pertinent in this case. Essentially, Appellees have not demonstrated a "credible threat" that Wilson will enforce the Proviso in a manner that directly affects them. Therefore, even if we agree with the dissent that Wilson has made some implausible arguments about his ability or intentions to enforce the Proviso, the connection between Appellees' claimed injuries and Wilson's enforcement of the Proviso against the City of Columbia is weak, and Appellees have not established that those claimed injuries are fairly traceable to Wilson.

B.

Redressability

"An injury is redressable if it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)), *cert. denied*, 572 U.S. 1015 (2014). A plaintiff's burden to establish redressability "is not onerous": he must only "show that [he] personally would benefit in a tangible way from the court's intervention." *Deal*, 911 F.3d at 189 (quoting *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018)). To that end, "[t]he removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Id.* at 190 (quoting *Sierra Club*, 899 F.3d at 285). But redressability is "problematic when third persons not party to the litigation must act in order for an injury to arise or be cured." *Doe*, 713 F.3d at 755.

An order enjoining Appellants' enforcement of the Proviso would not redress Appellees' claimed injuries. As we have already explained, McMaster has no responsibility for enforcing the Proviso, so such an order would have no effect on his conduct. And Wilson has neither implemented nor threatened to implement his enforcement authority against the districts where Appellees' children attend school, so it is wholly speculative that proscribing his ability to enforce the Proviso would cause the school districts where Appellees' children attend school to impose mask mandates and thereby enable Appellees' children to return to classes in person.

In fact, counsel for Appellants represented at oral argument that even with the injunction in place, the overwhelming majority of school districts in South Carolina have not imposed universal masking for students and staff. Oral Argument at 54:15–54:30, *Disability Rights S.C. v. McMaster*, No. 21-2070 (4th Cir. Dec. 9, 2021), http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. Appellees' children do not attend school in any of the districts that have imposed mask mandates since the injunction was issued, although two children have returned to in-person schooling as a result of a "citywide [mask] mandate." *See* Appellees' Resp. Br. at 25. This suggests that the Proviso -- and Wilson's onetime enforcement of it against a municipality where none of Appellees' children attend school -- is not the significant barrier to universal masking in the schools Appellees' children attend that Appellees contend it is.

Moreover, as the Supreme Court of South Carolina made clear in *Wilson* and *Richland*, the Proviso does not prohibit a school district from imposing a mask mandate. This, of course, is contrary to Appellees' interpretation of the Proviso in their complaint, which was filed before the decisions in those cases were issued. But consistent with that interpretation, Appellees sought, in part, relief preventing Appellants from "prohibiting school districts from requiring masks for their students and staff" via their enforcement of the Proviso. J.A. 57. Arguably, *Wilson* and *Richland* have already provided Appellees this relief: Following these decisions, a school district can, in fact, use funds other than those appropriated in the 2021–2022 appropriations act to implement a mask mandate. Indeed, at least one school district -- the Charleston County School District, which was named as a defendant below -- has done so, although its initial mask mandate was lifted beginning

November 10, 2021. *See* Update on CCSD Board of Trustees' Decision About Face Coverings, Charleston County School District (last visited Jan. 13, 2022), https://www.ccsdschools.com/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=488&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=32769&PageID=1. In response to increasing COVID-19 cases in the area, the Charleston County School District also imposed a temporary mask mandate in effect from January 4 until January 14, 2022. *See* Facemasks Enforcement, Charleston County School District (last visited Jan. 13, 2022), https://www.ccsdschools.com/facemasks. Clearly, the school districts where Appellees' children attend school have chosen not to impose ongoing mask mandates. This demonstrates that ultimately, the injunction enjoining Appellants' enforcement of the Proviso has not served to return Appellees' children to the classroom, which is the only way Appellees assert their claimed injuries can be redressed. Therefore, Appellees have not established that an order enjoining Appellants' enforcement of the Proviso would redress their claimed injuries.

IV.

For the foregoing reasons, we vacate the district court's order as it relates to Appellants and remand this action to the district court with instructions to dismiss Appellees' claims against Appellants for lack of standing.

VACATED IN PART, REMANDED WITH INSTRUCTIONS

WYNN, Circuit Judge, dissenting:

The Appellants in this matter are Henry McMaster in his capacity as the Governor of South Carolina and Alan Wilson in his capacity as Attorney General for South Carolina ("McMaster and Wilson"). The Appellees in this matter are disability-rights groups, parents, and South Carolina public school students with medical disabilities, but like my colleagues in the majority, I address only whether the plaintiff-parents have standing to sue individually and on behalf of their children ("Parents"). *See* Majority Op. at 10 n.3 ("Appellees do not endeavor to explain how the two plaintiff nonprofit disability advocacy organizations have been injured or have standing to sue.").

McMaster and Wilson urge us to conclude that the Parents lack standing to sue them. But McMaster and Wilson's inconsistent—and demonstrably false—arguments must be rejected. Because I believe that the Parents have standing to enjoin McMaster and Wilson from enforcing a clearly discriminatory budget proviso, I must, respectfully, dissent.

I.

To establish standing, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992)).

The Parents persuasively allege that they and their children are injured by South Carolina budget proviso § 1.108 ("the Proviso").[1] The Proviso states that "[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to [the 2021–2022 Appropriations Act] to require that its students and/or employees wear a facemask at any of its education facilities."[2] 2021 S.C. Acts No. 94, pt. IB, § 1.108. This prohibition also extends "to the announcement or enforcement of any such policy." *Id.*

The Parents produced convincing record evidence showing that (1) a prohibition on mask mandates increases their children's risk of contracting COVID-19; and (2) disabled students like the Parents' children are more susceptible to contract and suffer serious effects from COVID-19. Under our precedent, there is "no doubt" that this "increased risk . . . constitutes cognizable harm."[3] *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc); *see also, e.g.*, *ARC of Iowa*

[1] The majority opinion does not dispute that the Parents have alleged an adequate injury. *See* Majority Op. at 10.

[2] Though the Proviso refers to "school district[s]" *and* "schools," I refer to them collectively as "school districts."

[3] The Parents also allege that the Proviso effectively denies disabled students meaningful access to in-person education and financially harms parents by forcing them to enroll their children in more expensive schools. They claim that these injuries are "independent" of the increased risk of contracting COVID. Response Br. at 21. Not so. If there was no increased threat of contracting COVID, then the Parents could not manufacture an "independent" injury by pulling their children out of class or enrolling them in different schools. Of course, there could be other reasons parents might make such decisions that would support an injury, but the Parents have not alleged any such reasons. *Cf. Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 190 (4th Cir. 2018) (noting, in the First Amendment Establishment Clause context, that a student's "feelings of marginalization" by a school can "constitute an independently actionable injury").

v. Reynolds, No. 4:21-CV-00264, 2021 WL 4166728, at *7 (S.D. Iowa Sept. 13, 2021) (finding disabled students alleged a "concrete and particularized injury" from the operation of a ban on school mask mandates).

McMaster and Wilson wisely focus their arguments instead on the causation and redressability requirements. After all, "when the plaintiff is not himself the object of the government action or inaction he challenges," causation and redressability are "ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (citation and internal quotation marks omitted). That is the situation here: the Parents are complaining about the Proviso's regulation of third parties—the school districts—not the Proviso's regulation of the Parents or their children directly.

But while it may be more difficult to establish causation and redressability in such a situation, "standing is not precluded." *Id.* In fact, it is well established that a plaintiff may properly allege an "injury produced by *determinative or coercive effect* upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (emphasis added). This coercive effect need not be certain to succeed; so long as a plaintiff can show that that their injury flows from "the *predictable* effect of Government action on the decisions of third parties," the elements of standing are satisfied. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (emphasis added). And it is certainly "predictable" here that school districts forbidden from using state funds to impose mask mandates will not impose such mandates—especially when Attorney General Wilson has already demonstrated a marked willingness to sue to enforce compliance with the Proviso.

Nonetheless, McMaster and Wilson counter that this relatively straightforward conclusion is improper for three reasons. None are persuasive.

A.

McMaster and Wilson first claim that the Proviso does not do what it was clearly intended to do: bar school districts from requiring, announcing, or enforcing mask mandates *period*. They seize on the fact that the Proviso, by its terms, "prevents *only* the use of *state*-authorized or -appropriated funds to announce o[r] enforce [mask] mandates." Opening Br. at 13 (emphases added). Thus, according to McMaster and Wilson, school districts still have the option of using "*federal* or *local* funds, rather than *state* funds, if they [wish] to enforce a mask mandate." Reply Br. at 7 (emphases added). And since the "Proviso does not actually prohibit all mask mandates in public schools," they argue that we cannot trace the Parents' injuries to McMaster and Wilson's enforcement of the Proviso or find those injuries would likely be redressed by enjoining said enforcement. Opening Br. at 13–14.

This argument is flatly inconsistent with prior statements made by nearly every entity to consider the Proviso. To start, Harvey Peeler, Jr., President of the South Carolina Senate, and Jay Lucas, Speaker of the South Carolina House, have stated that the Proviso—which is fittingly entitled a "Mask Mandate Prohibition," 2021 S.C. Acts No. 94 § 1.108—"is clear and unambiguous": it "*prohibits face-covering mandates* in public schools no matter where in the state they are located," J.A. 200 (emphasis added). Similarly, the U.S. Secretary of Education believes the Proviso categorically "*prohibit[s]* local [school districts] from adopting requirements for the universal wearing of masks." J.A. 214

(emphasis added). So does South Carolina's Director of Health and Environmental Control. *See* J.A. 40 (observing that the Proviso "*prohibits* the implementation of mask mandates in schools" (emphasis added)).

Even the other defendants in the case below—South Carolina Superintendent of Education Molly Spearman and several school districts—have interpreted the Proviso "to mean that school districts are *prohibited* from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021–22 school year." J.A. 146 (statement of Superintendent Spearman) (emphasis added); *accord Safe Return to In-Person Instruction & Continuity of Services Plan*, Greenville Cnty. Sch. Dist. (2021), https://www.greenville.k12.sc.us/greerhs/Upload/Uploads/SafeReturntoInPersonInstruction82020[1].pdf ("[M]asks cannot be required under a State Budget Proviso."); *Back-to-School 2021-22 FAQs*, Horry Cnty. Schs. (Aug. 26, 2021), https://www.horrycountyschools.net/Page/16552 ("According to South Carolina Law (Proviso 1.108), neither students nor employees can be required by a public school district to wear a face mask at any of its educational facilities.").

Governor McMaster and Attorney General Wilson are not exceptions. For months, they argued in letters, public statements, and legal filings—including documents filed with the court below—that the "Proviso simply prohibits mask mandates in public schools." D. Ct. Docket No. 58 at 2–3 (Governor McMaster legal memorandum) (emphasis omitted);[4]

[4] "D. Ct. Docket No. ___" refers to documents filed in the underlying matter, *Disability Rts. S.C. v. McMaster*, No. 3:21-02728-MGL (D.S.C.).

accord D. Ct. Docket No. 55 at 6 (Attorney General Wilson legal memorandum) ("Proviso 1.108 . . . prohibits mask mandates by school districts."); *see also* J.A. 114 ("The terms of the Proviso . . . overwhelmingly demonstrate the legislature's intent that schools funded with State appropriations must not impose or implement mask mandates." (quoting Attorney General Wilson's Pet. for Original Jurisdiction and Expedited Consideration at 13, *Wilson ex rel. State v. City of Columbia*, 863 S.E.2d 456 (S.C. 2021) (No. 2021-000889) [hereinafter "Wilson Petition"])); J.A. 107 ("The Proviso is quite clear that masks are not to be mandated by government for the schools of this State." (quoting Wilson Petition at 6)); J.A. 192 (statement of Governor McMaster) ("State law now prohibits school administrators from requiring students to wear a mask.").

The reason why all these sophisticated parties believed—and evidently still believe, *see infra*—that the Proviso effectively bans mask mandates is obvious: while the Proviso may only bar the use of state funding for mask mandates, it is "nearly impossible to entirely separate activity within public schools from state-appropriated funds." Meg Kinnard, *Gov: SC Law 'Very Clear' in Banning School Mask Mandates*, Associated Press (Aug. 6, 2021), https://apnews.com/article/business-health-coronavirus-pandemic-only-on-ap-d59d210e30de0b7b39a3b8b9d4666437 (paraphrasing Governor McMaster); *see also* J.A. 188–97 (media sources discussing the purpose of the Proviso as expressed by Governor McMaster).

Governor McMaster recognized as much in filings with the district court, where he acknowledged that "while it is theoretically possible that a local government could impose a mask mandate without running afoul of the Proviso, practically speaking, *virtually any*

enforcement or announcement of a mask mandate in a public school would require some use of state-appropriated funds." D. Ct. Docket No. 58 at 3 n.1 (emphasis added).

Similarly, in briefing before the Supreme Court of South Carolina, Attorney General Wilson wrote that "[t]he Proviso *cannot be avoided* through a bookkeeping ploy such as the use of federal or local funds." Brief for Petitioner at 6, *Wilson*, 863 S.E.2d 456 (No. 2021-000889) (emphasis added); *accord id.* at 14 ("Other funds such as federal monies or local revenues or the provision of masks cannot circumvent the prohibition of a mask mandate."); *see also* J.A. 114 (arguing that the "expenditure of public funds will necessarily be involved in a school district's" attempt to enforce a City of Columbia mask mandate, "even if the City provide[d] the masks" to the schools (quoting Wilson Petition at 13)). He further argued that "[i]f Petitioners *could* evade the Proviso, based upon a bookkeeper's tracing of the funding source, the law would be *eviscerated* and the appropriations power marginalized." Brief for Amicus Att'y Gen. Wilson at 5, *Richland Cnty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920 (S.C. 2021) (No. 2021-000892) (emphases added). Thus, if we take McMaster and Wilson at their word, the Proviso *is* the source of the Parents' injuries because it forbids school districts from enforcing *virtually any* mask mandate and "cannot be avoided through the back door" use of federal or local funding. *Id.*

Fast-forward a few months and McMaster and Wilson now claim that the "Proviso does not actually prohibit all mask mandates in public schools," Opening Br. at 13, and that given the availability of "federal and local funds, it is hard to fathom that a [school] district that wanted to enact a mask mandate could not do so," Reply Br. at 12 n.2. According to McMaster and Wilson, the reason for this stunning 180-degree reversal is the

Supreme Court of South Carolina's decision in *Richland County School District 2 v. Lucas*. There, the court rejected a state constitutional challenge to the Proviso. 862 S.E.2d at 924. Along the way, it *declined* to hold that school districts could impose mask mandates "funded by federal or local funds"; instead, it simply noted that its opinion did "*not reject the possibility* that funds not appropriated or authorized by [the 2021–2022 Appropriations Act] may be used to announce or enforce a mask mandate." *Id.* (emphasis added).

McMaster and Wilson seize on this "do not reject the possibility" language, arguing that the Supreme Court of South Carolina "has spoken" and held "that the Proviso does not actually prohibit all mask mandates in public schools." Opening Br. at 13; *see also id.* ("Whatever trepidation any district may have initially had about enacting one while the Proviso was in effect, *Richland* . . . necessarily removes it."); Reply Br. at 4–5 ("[T]his Court should take the S.C. Supreme Court at its word: The Proviso does not ban mask mandates in public schools . . . ." (cleaned up) (citation omitted)); *id.*at 10 (arguing that the state Supreme Court "has left *no doubt* that mask mandates" are enforceable with federal or local funds (emphasis added)).

But that simply does not follow. Choosing not to reject the possibility of a proposition is not the same thing as accepting that proposition. For example, not rejecting the possibility that Bigfoot might exist surely does not mean accepting that Bigfoot *does* exist. *See* Courtney Taylor, *What 'Fail to Reject' Means in a Hypothesis Test*, ThoughtCo. (Jan. 28, 2019), https://www.thoughtco.com/fail-to-reject-in-a-hypothesis-test-3126424 (observing that as a matter of mathematics and logic, the "'failure to reject' a [proposition] should not be confused with acceptance"). Likewise, the Supreme Court of South

Carolina's comment that it did not reject the possibility that a purely federally or locally funded mandate could be imposed does not mean that court endorsed or accepted that approach.

In fact, just weeks before its decision in *Richland*, the Supreme Court of South Carolina in *Wilson ex rel. State v. City of Columbia* likewise declined to "*outright reject* the possibility that a local government could impose a mask mandate without contravening [the] Proviso"—but nevertheless suggested that attempting to partition federal or local funds for a mask mandate would likely be an exercise in futility. 863 S.E.2d at 461 (emphasis added). The court noted that it "*strains credulity*" to argue that a mask mandate could be imposed on public schools "without *any* assistance from school personnel and *without [expending] a penny of state funds*."[5] *Id.* (emphases added).

After all, as Governor McMaster previously explained, "state funds permeate just about everything that the school [system] does." Kinnard, *supra*. That's why Attorney General Wilson believes that any "schools *funded* with State appropriations must not

[5] McMaster and Wilson argue that this language was aimed at the specific mask mandate in *Wilson*, "which sought to fine school officials for violations of the city's ordinance." Reply Br. at 4. Not so. The Supreme Court of South Carolina *first* found it improbable that the City of Colombia "will itself fund and enforce the mandate in the City's public schools" without "using any state-appropriated funds to do so." *Wilson*, 863 S.E.2d at 461. It then *separately* noted that, as a factual matter, the City's ordinance actually required school personnel to help enforce the mask mandate or face fines. *Id.* Therefore, the attempt by McMaster and Wilson to limit *Wilson* to its facts must fail—especially given that Governor McMaster himself has argued that *Wilson* should be read to apply broadly to bar "virtually *any*" mask mandate. D. Ct. Docket No. 58 at 3 n.1 (emphasis added).

impose or implement mask mandates." J.A. 114 (emphasis added) (quoting Wilson Petition at 13).

The Supreme Court of South Carolina cases of *Wilson* and *Richland* did not change this calculus. At best, they left open the question of whether a purportedly federally or locally funded mandate would violate the Proviso. At worst, they suggested that it would be virtually impossible to impose such mandates "without [spending] a penny of state funds." *Wilson*, 863 S.E.2d at 461. Either way, there remains reason to doubt that school districts will be able to partition their funding streams in a way that avoids legal liability, which creates a predictable chilling effect on school districts that might otherwise consider implementing mask mandates.[6]

McMaster and Wilson counter that segregating funding streams is not as difficult as *Wilson* made it out to be. Reply Br. at 11. Perhaps so. But the Parents are not required to show that it would be *impossible* for school districts to impose mask mandates with the Proviso in place. They are merely required to show that the Proviso has a "*predictable*"

[6] To be sure, at least one school district—Charleston County—tempted fate by purporting to implement a mask mandate using only federal or local funding after *Wilson* was decided. *See Update on CCSD Board of Trustees' Decision about Face Coverings*, Charleston Cnty. Sch. Dist., https://tinyurl.com/nw2s9c3e (last visited Jan. 5, 2022). But soon after, private plaintiffs sued to block the school district's mask mandate. *See* Compl., *Cooke v. Charleston Cnty. Sch. Dist.*, No. 2021-CP-10-04295 (S.C. Ct. Com. Pl.). And as support for their subsequent motion for a temporary restraining order, those plaintiffs cited a letter from Attorney General Wilson that (1) suggested that private litigants may sue to enforce the Proviso and (2) interpreted the *Wilson* decision as holding that the Proviso "leave[s] to *parents* the masking decision." Mot. for TRO, Ex. B at 2, *Cooke v. Charleston Cnty. Sch. Dist.*, No. 2021-CP-10-04295 (S.C. Ct. Com. Pl.) (emphasis added). Litigation is currently ongoing, but the plaintiffs recently filed a notice of voluntary dismissal without prejudice.

coercive effect on school districts. *Dep't of Com.*, 139 S. Ct. at 2566 (emphasis added). And again, it is "predictable" that school districts barred from using state funds to impose mask mandates won't impose such mandates, especially given the uncertainty over whether the comingled nature of school funding streams would make a federally or locally funded mandate vulnerable to legal challenge. *See, e.g.*, Chase Laudenslager, *Dorchester District Two Not Moving Forward with Mask Requirement Despite Majority Support*, Count on 2 News (Sept. 28, 2021), https://www.counton2.com/news/local-news/dorchester-county-news/dorchester-district-two-not-moving-forward-with-mask-requirement-despite-majority-support/ (Dorchester School District Two noting the "difficult[y of] separat[ing] funds for [a mask mandate] due to comingling of funds" and "[l]egal challenges connected to [the] Proviso" as "support for not implementing a face covering requirement"). In the end, McMaster and Wilson never account for the predictable chilling effect that the Proviso, its enforcement by them, and their own statements have had on curbing school mask mandates.

Even setting aside their previous assertions that the Proviso bans *all* mask mandates in public schools, McMaster and Wilson have taken inconsistent positions on this matter before *this* Court. To be sure, when it suits them, McMaster and Wilson eagerly argue that since federal and local funding is available, school districts retain "the *ultimate authority* to decide whether to require all teachers, students, staff, and visitors to wear masks." Supp. Br. at 17–18 (emphasis added); *see also* Reply Br. at 9 (opining that "the decision whether to enact a mask mandate remains where it has always been: with the school districts");

Opening Br. at 13 (arguing whether students will be required to wear masks "turns on what that school district chooses to do").

But in the same breath, McMaster and Wilson repeatedly state that the "Proviso represents the General Assembly's preference to leave the *ultimate decision* on whether children wear masks in schools *to parents*, *rather than have [schools] decide* whether children must wear masks." Supp. Br. at 5 (emphases added) (citation and internal quotation marks omitted); *accord id.* ("The state legislature has elected to leave the decision [over masking] to parents." (quoting *Wilson*, 863 S.E.2d at 459)); Reply Br. at 13 ("[T]he Proviso represents 'the policy of the state legislature to leave to parents the masking decision' . . . ." (quoting *Wilson*, 863 S.E.2d at 459)); *see also* D. Ct. Docket No. 58 at 8 ("[T]he Governor's consistent message about masks in schools is that parents should have the ultimate say in whether their children wear masks."). But if *parents* have ultimate decision-making authority over whether their children wear masks at school, then *school districts* must lack the ability to impose mask mandates. McMaster and Wilson cannot have it both ways.

In sum, McMaster and Wilson have spent months telling the public, school districts, state courts, and federal courts that the Proviso leaves school districts with no choice: they cannot impose mask mandates, period. McMaster and Wilson have also forcefully argued that any attempt to work around the Proviso by using federal and local funds must fail, since it would be virtually impossible to enforce any mandate without spending a penny of state funds.

Now McMaster and Wilson shamelessly claim exactly the opposite: school districts can still decide to impose mandates, and federal and local funds can easily be used to enforce such mandates. As a result, they argue, the injuries alleged by the Parents are due to the independent decisions made by each school district to impose or not impose a mandate—not the entirely predictable effects of the Proviso or their enforcement of the Proviso. We should not condone this blatant—and convenient—flip-flopping.

B.

A similar flip-flopping gambit underlies McMaster and Wilson's second argument against causation and redressability. To wit, they claim that under our related Eleventh Amendment jurisprudence, "a proper defendant must be an official who has 'some connection with the enforcement of the act.'" Supp. Br. at 13 (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). And they contend neither the "'Governor's general authority' as the State's chief executive [nor] 'the Attorney General's role as a legal advisor'" are sufficiently connected to the enforcement of the Proviso "to make them proper defendants" in this action. *Id.* (quoting *Doyle v. Hogan*, 1 F.4th 249, 255 (4th Cir. 2021)). Remarkably, in proceedings below, Attorney General Wilson went so far as to say that he "has *no* enforcement responsibility as to the Proviso." D. Ct. Docket No. 55 at 1 (emphasis added). And since McMaster and Wilson are not connected to the enforcement of the Proviso, their

argument goes, their actions cannot truly be the cause of the Parents' injuries, nor would enjoining them redress those injuries.[7]

That argument flies in the face of McMaster and Wilson's previous statements and actions. Only a few months ago, Attorney General Wilson told the Supreme Court of South Carolina, in no uncertain terms, that "it is the Attorney General's role to bring to the Court's attention violations of the Constitution and the rule of law." J.A. 116 (quoting Wilson Petition at 15). For that reason, "the executive branch, via the Attorney General, *must enforce*" the Proviso's "prohibiti[on] [on] mask mandates in the schools." J.A. 112–13 (emphasis added) (quoting Wilson Petition at 11–12).

True to his word, Attorney General Wilson then sued the City of Columbia to enforce the Proviso in *Wilson* and joined in the defense of the Proviso as an amicus in *Richland*. But "Wilson cannot take such action to specifically enforce the laws at issue and then hope to [defeat causation and redressability] under a theory that he simply has" no

[7] McMaster and Wilson baldly claim that a "self-executing funding decision like the Proviso has *no official* subject to federal jurisdiction charged with enforcing it, so there is *no way* for a federal court to review the [Proviso]" at all. Supp. Br. at 13 (emphases added). In other words, no one could *ever* have standing to sue to enjoin the enforcement of the Proviso and budget provisions like it, no matter how blatantly unlawful or unconstitutional they may be. The majority opinion does not address this breathtakingly broad argument, which would seemingly allow state officials to have their cake and eat it too: they can sue to enforce the Proviso when they wish but then retreat behind the fact that the Proviso does not specifically *charge* them with enforcing it when sued themselves.

ability or responsibility to enforce the Proviso.[8] *Bradacs v. Haley*, 58 F. Supp. 3d 499, 513 (D.S.C. 2014) (criticizing Attorney General Wilson for a similar about-face).

[8] The majority opinion fails to appreciate the predictable chilling effect of Attorney General Wilson's enforcement efforts. Though it acknowledges that a state official may be properly sued if they have "some connection with the enforcement of the [Proviso]"—which Wilson obviously does—it faults the Parents for failing to *also* show that "any of the districts where their children attend school have rescinded a mask mandate pursuant to a threat from Wilson that he would seek to enforce the Proviso to void that mask mandate." Majority Op. at 12, 14 (quoting *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014)).

In effect, the majority opinion is asking for the Parents to produce a smoking gun when Article III only requires that their injuries be "fairly traceable" to McMaster and Wilson's enforcement efforts. *See Gaston Copper*, 204 F.3d at 161 ("[T]raceability does not mean that plaintiffs must show to a scientific certainty that [a] defendant's [conduct] . . . caused the precise harm suffered by the plaintiffs." (citation and internal quotation marks omitted)); *Dep't of Com.*, 139 S. Ct. at 2566 (stating that "Article III 'requires no more than de facto causality'" (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.))).

Requiring the Parents to show that "Wilson will enforce the Proviso in a manner that *directly* affects them" misunderstands the *indirect* nature of the injury alleged by the Parents: that Wilson's efforts to enforce the Proviso for some districts chilled other school districts from imposing their own mask mandates. Majority Op. at 14. Put differently, the Parents are injured regardless of whether Wilson has sued their children's school districts specifically or the districts next door; his enforcement efforts will predictably deter schools from sticking their own necks out to impose mask mandates. *See* Laudenslager, *supra* (reporting this precise effect on Dorchester District Two).

The majority opinion dismisses this chilling effect as evidently "not [very] strong," since "very few school districts" implemented mandates after the injunction was entered. Majority Op. at 14. If the majority is criticizing the Parents for failing to allege a big enough injury, that is irrelevant to our Article III inquiry. *See Gaston Copper*, 204 F.3d at 156 (holding an injury "need not be large"—"an identifiable trifle will suffice" (citation omitted)). What's more, the fact that *some* school districts—including Chester, Hampton, Jasper, Marlboro, Richland, Sumter, and certain districts in Florence County—*did* impose mandates following the injunction suggests that Wilson's enforcement efforts *were* stopping them from enforcing mask mandates.

Attorney General Wilson weakly counters that the "Attorney General's suit to invalidate Columbia's ordinance did not implicate federal law" but rather only "ensured a municipality followed state funding law." Reply Br. at 6. That's a distinction without difference or relevance. Whether the Attorney General's efforts to enforce the Proviso "implicate[d]" federal or state law is immaterial for standing purposes; the point is that he sought to, and succeeded in, enforcing the Proviso. The fact that it was a municipality sued, rather than a school district, does not dissipate the chilling effect his enforcement efforts may have had on school districts. Under our precedent, in order for a plaintiff "to sue a state officer for an injunction" in an *Ex parte Young* action, "the officer sued must be able to enforce, if he so chooses, the specific law the plaintiff challenges." *Doyle*, 1 F.4th at 254–55. That is unquestionably the case for Attorney General Wilson.

Governor McMaster has a slightly better argument that he is an improper defendant. Though the Parents note that Governor McMaster "is responsible under South Carolina law for ensuring [that] 'the laws be faithfully executed,'" J.A. 32 (quoting S.C. Const. art. IV, § 15), we have consistently held that the "mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the [validity] of a state statute." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)). After all, "it is not enough that the officer [sued] possesses the '[g]*eneral authority* to enforce the laws of the state' broadly if the officer cannot enforce the [specific] law at issue." *Doyle*, 1 F.4th at 255 (quoting *Waste Mgmt. Holdings*, 252 F.3d. at 331). However, other

arguments made by *McMaster and Wilson themselves* suggest that the Governor *can* enforce the Proviso.

Critically, in their opening brief, McMaster and Wilson argue that the public interest and other equities weigh against an injunction because "the Governor and Attorney General, as well as the State, are *irreparably harmed* . . . whenever 'a State is enjoined by a court *from effectuating statutes* enacted by representatives of its people.'" Opening Br. at 32 (emphases added) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). In other words, McMaster and Wilson admit that (1) they have the power to "effectuat[e]" (enforce) the Proviso and (2) the injunction harms them by barring said enforcement. But McMaster and Wilson cannot simultaneously claim that they have *no* obligation or ability to enforce the Proviso and that they will *also* be irreparably harmed if they are enjoined from enforcing the Proviso.

That's like saying I have no obligation or ability to make my friend stop eating broccoli, but I will be irreparably harmed if you prevent me from stopping him from eating broccoli. If that makes no sense, it's because I just cannot have it both ways—either I *have* the obligation and ability to force my friend to cease his broccoli eating and I *will* be harmed if you stop me from doing so, or I have *no* obligation or ability to do so and I will suffer *no* consequences if you stop me from policing my friend.

Likewise, if Governor McMaster had no responsibility or ability to enforce the Proviso, then he wouldn't suffer any harm from the injunction at all. The injunction would simply prevent him from doing something he already cannot do.

But according to McMaster and Wilson, that is not the case; the Governor *can* effectuate the Proviso and, in their words, will be "irreparably harmed" if he is not allowed to. Opening Br. at 32. Thus, the Governor, by his own admission, has "the ability . . . to enforce the [Proviso] under his statutory or constitutional powers," and has "demonstrated[, by negative implication, a] willingness . . . to enforce the [Proviso]." *Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) (en banc). That is enough to establish standing to sue him.[9]

[9] The majority opinion ducks this conclusion because it assumes—without any citation to the record, the parties' briefs, or legal authority—that the enforcement powers McMaster claims to wield over the Proviso are "*nothing more* than [his] status as the Governor of South Carolina and his general [constitutional] duty to execute state laws," which is insufficient to confer standing to sue him. Majority Op. at 12–13 (emphasis added). But unlike the majority, I do not presume to know the source of authority McMaster claims gives him the power to enforce the Proviso, nor do I presume to know South Carolina law well enough to know whether his claim has merit. I only know that he *himself* claims to wield that authority, which is enough for Article III.

If we are unsure about this conclusion, the proper course of action would be to remand to the district court, not dismiss the Governor from the case entirely. The Governor did not raise standing as a defense in his first motion to dismiss; only the Attorney General did. As a result, the district court only had the opportunity to consider Attorney General Wilson's Eleventh Amendment–adjacent arguments regarding traceability and redressability. Governor McMaster did raise similar concerns as a defense in his second motion to dismiss, but we assumed jurisdiction before the district court had a chance to rule on it.

Typically, we have held "that the district court should have the opportunity to address [Eleventh Amendment–adjacent] issue[s] [like this] in the first instance." *Lytle v. Griffith*, 240 F.3d 404, 411 (4th Cir. 2001). This seems especially appropriate when, as here: (1) the Governor's own inconsistent statements about the scope of his enforcement powers make his "connection, if any, to the enforcement of the [Proviso]" a "disputed" question of state law, *id.* at 410, and (2) the Parents have alleged numerous facts that suggest McMaster may be likely to pursue enforcement, *see* J.A. 32 (reporting that "Defendant McMaster signed the budget legislation containing Proviso 1.108"; McMaster (Continued)

Ultimately, McMaster and Wilson are asking us to dismiss them from the case because they say they are not sufficiently connected to the enforcement of the Proviso—even though Attorney General Wilson has said he "*must enforce*" the Proviso, Wilson *has sued to enforce the Proviso*, and both of them claim they will be *irreparably harmed* if we stop them from enforcing the Proviso. We should reject their inconsistent legal arguments to the contrary.

C.

Finally, McMaster and Wilson engage in a bit of Monday-morning quarterbacking using extra-record evidence to prop up their redressability argument. Specifically, they say that "after the preliminary injunction was entered," six of the seven "school districts named as defendants in this case did not impose mask mandates,"[10] and "[a]t least three of them . . . *affirmatively* decided not to impose a mandate." Opening Br. at 11 (emphasis added). These developments allegedly confirm that "enjoining the Proviso does not make it more likely that the school districts where [the Parents'] children attend school will enact

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"encouraged the Legislature to enact Proviso 1.108"; the Governor "has publicly advocated for Proviso 1.108 to remain in effect and to be vigorously enforced"; and "Defendant McMaster enacted an Executive Order containing a similar prohibition on mask mandates").

Because the "District Court is [likely] in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the [Governor's enforcement powers,] . . . we [should] remand for that purpose." *Id.* (quoting *Keller v. Prince George's Cnty.*, 827 F.2d 952, 964 (4th Cir. 1987)).

[10] The exception was Charleston County School District, which implemented a mask mandate but allowed it to lapse later in the fall.

a mask mandate," so the Parents' injuries must not be redressable by the injunction. *Id.* at 14.

This argument fundamentally misunderstands the law of standing. A plaintiff "need not show that a favorable decision will relieve [their] every injury." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (quoting *Larson v. Valente*, 456 U.S. 228, 242–44, 243 n.15 (1982)). Rather, a plaintiff need only show that they "personally would benefit in a tangible way from the court's intervention." *Gaston Copper*, 204 F.3d at 162 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). For that reason, "removal of even one obstacle to the exercise of one's rights, *even if other barriers remain*, is sufficient to show redressability." *Sierra Club*, 899 F.3d at 285 (emphasis added).

That is precisely what the district court's injunction accomplished. True, the Parents have not gotten *complete* relief from some of the school districts they sued—at least so far[11]—but enjoining the Proviso at least removed "one obstacle" standing in the way of the

[11] After letting its earlier mask mandate expire, the Charleston County School District recently decided to temporarily reimpose a mask mandate for the start of classes following winter break. Charleston County School District, *Masks Requirement Effective January 3, 2022*, https://www.ccsdschools.com/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=488&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=38473&PageID=1 (last visited Jan. 6, 2021). With infections from the omicron variant of the novel Coronavirus surging, I doubt it will be the last district or school to do so. *See* Caitlin Herrington, *Positive COVID Rates Jump Sharply Across South Carolina Over Holiday Weekend, DHEC Says*, Greenville News (Dec. 29, 2021), https://www.greenvilleonline.com/story/news/2021/12/29/cdc-covid-19-cases-rate-sharp-increase-omicron-sc/9037711002/ (explaining that the percent positive test rate "jump[ed] up from the 9.2% last reported on Dec. 22" to "23.8%" five days later and attributing this increase to the omicron variant).

mask mandates that the Parents say will protect their children from a dangerous disease.[12] *Id.* Under our precedent, that "is surely a tangible benefit sufficient to confer standing." *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 190 (4th Cir. 2018) (citation and internal quotation marks omitted) (holding that a plaintiff who had left her home school district due to a Bible-study program had standing to seek an injunction against the program because it would provide her the "opportunity" to return to her home district, even though she did not avow that she *would* return to that district).

McMaster and Wilson struggle to counter this point. First, they acknowledge that while "a partial remedy is sufficient for redressability[,] . . . that remedy must provide relief by force of law." Reply Br. at 10. And since the injunction "does not require a single school district to change its mask policy," it "does not" provide such relief. *Id.* But this is just a recycled way of saying that the Parents will not get complete relief via an injunction against the Proviso. And again, that is not required under our precedent. *See Sierra Club*, 899 F.3d at 284–85.

Second, trying a slightly different tack, McMaster and Wilson argue that an injunction "must redress an injury-in-fact 'through a decree of a conclusive character,'"

[12] The majority opinion also fails to appreciate this nuance. Like McMaster and Wilson, it faults the Parents for failing to allege that an injunction "would cause the school districts where [the Parents]' children attend school *to impose mask mandates* and thereby enable [the Parents]' children to *return to classes in person*." Majority Op. at 15–16 (emphases added). In effect, the majority opinion is requiring the Parents to show that an injunction would "relieve [their] every injury" and return their children to class. *Sierra Club*, 899 F.3d at 284. In doing so, it neglects to note that enjoining a ban on mask mandates is a "tangible benefit" that gets the Parents one step closer to returning their children to in-person classes. *Deal*, 911 F.3d at 190. That is all that Article III requires.

which did not occur here "because school districts already had the authority to enact mask mandates, which is what would redress any injury from schools being too dangerous without mask mandates." Reply Br. at 10 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). But this is just a recycled way of saying that school districts are free to use federal and local funds for a mandate, which, as explained above, is likely illusory.

In the end, satisfying the redressability "requirement is not onerous." *Deal*, 911 F.3d at 189. The Parents need only show that "granting the requested relief [is likely to] at least mitigate . . . the alleged harm." *Sierra Club*, 899 F.3d at 285. And no amount of extra-record, post-hoc evidence can paper over the fact that an injunction against the Proviso would mitigate the Parents' injuries.

II.

Disabled students already face numerous barriers to fully participating in school. McMaster and Wilson urge us to allow them to escape comeuppance for erecting and enforcing yet another barrier—one that will keep countless children from being able to participate in in-person classes. Shamelessly, they seek to do so based on a series of fatally flawed legal positions supported by baldly inconsistent evidence. Because that undermines the integrity of the judicial process, I must, respectfully, dissent.