No. 21-51083

In the United States Court of Appeals for the Fifth Circuit

E.T., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; J.R., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; S.P., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; M.P., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; E.S., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; H.M., BY AND THROUGH HER PARENTS AND NEXT FRIENDS; A.M., BY AND THROUGH HER PARENTS AND NEXT FRIENDS,

Plaintiffs-Appellees,

v.

KENNETH PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

REPLY BRIEF FOR APPELLANT

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Introduction

This Court should vacate the district court's deeply flawed injunction. Plaintiffs have not established standing for any claim or exhaustion of remedies under the Individuals with Disabilities Education Act (IDEA). Regardless, their four claims fail on the merits. As for their Americans with Disabilities Act (ADA) and Rehabilitation Act claims, Plaintiffs disavow the disparate-impact theory that the district court implicitly relied upon. But they cannot prove an alternative theory. The Attorney General lacked subjective and objective knowledge of Plaintiffs' conditions, limitations, and needs, so he could not have failed to accommodate Plaintiffs. Nor is there evidence that the Attorney General intentionally discriminated against Plaintiffs. Even the United States, which supported Plaintiffs' ADA claim in the district court, has abandoned its arguments favoring that claim. *See* ROA.664-67.

Plaintiffs' preemption claims also do not support the judgment. Their American Rescue Plan Act (ARP Act) preemption claim fails because Plaintiffs lack a substantive right under the ARP Act, and that law implicitly precludes equitable enforcement. The ARP Act also does not conflict with GA-38, the Governor's executive order making masks optional in schools. Notably, the United States, which funds and operates the ARP Act grant program in question, does not argue the ARP Act preempts GA-38 or that Plaintiffs can equitably enforce the statute. The ADA and Rehabilitation Act even more clearly preclude an equitable enforcement claim given their express provision of remedies. But even if Plaintiffs could litigate such a claim, those statutes also do not preempt GA-38. The United States argues the ADA and Rehabilitation Act preempt GA-38 "to the extent it obstructs school districts' ability

to meet [their ADA and Rehabilitation Act] obligations." U.S. Br. 26. However, neither Plaintiffs nor the United States show Plaintiffs' school districts cannot meet their federal law obligations. The United States does not argue Plaintiffs can equitably enforce disability discrimination statutes, and it never explains how this case tees up a preemption analysis. It does not defend the injunction, which this Court should vacate.

ARGUMENT

I. Plaintiffs Lack Standing to Sue the Attorney General.

Plaintiffs lack standing because they have not demonstrated that their alleged injury is both concrete and actual or imminent. Their alleged injury also is not redressable because the district court cannot order Plaintiffs' schools to mandate masks.

A. Plaintiffs failed to prove an injury in fact.

Plaintiffs have not suffered a legally cognizable injury. The district court erred in holding Plaintiffs satisfied this element by claiming "the deprivation of reasonable access to in-person public schooling." ROA.2377. But all seven Plaintiffs have reasonable access to their schools. *See* Att'y Gen. Br. 11-13. E.S. and S.P. admit they will attend class in-person even without a mask mandate. ROA.2076, 2081, 2715. As for their co-plaintiffs, the decision to receive instruction at home is a choice that does not create standing. *See* ROA.2451. GA-38 does not change the fact that Plaintiffs can wear masks, social distance, use plexiglass barriers, and mitigate the risk of an infection in other ways. ROA.2450-51.

In the face of this argument, Plaintiffs have abandoned the "reasonable access" injury they argued below despite previously telling this Court that "[t]his case is about reasonable access to the classroom." Resp. to Stay Mot. 10. Instead, Plaintiffs claim GA-38 deprives them of "*equal* access." Pls. Br. 14-22. Plaintiffs assert the district court "found" that Plaintiffs' "denial of access to the classroom on an equal basis . . . is concrete, particularized, and actual," *id.* at 16, but it did not, ROA.2377. Plaintiffs' brief cites only the district court's analysis of one of Plaintiffs' claims—not the court's analysis of the now-discarded "reasonable access" standing theory. ROA.2377.

Regardless, Plaintiffs' claimed equal-access injury fails. According to Plaintiffs, "the core" of the equal-access injury is GA-38's "[d]enial of case-by-case decisionmaking" by preventing Plaintiffs' schools from mandating masks. Pls. Br. 17. This alleged injury is neither concrete nor actual or imminent. A concrete injury is "real" and "actually exist[s]." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). But this injury is not real: No Plaintiff has been denied an accommodation because of GA-38, and no Plaintiff has even sought case-by-case decisionmaking. While GA-38 does forbid mask mandates, it does not prevent a school from developing an individualized plan to mitigate the risk of infection.

This alleged injury also is not actual or imminent. "'The 'actual or imminent' requirement is satisfied only by evidence of a 'certainly impending' harm or a 'substantial risk' of harm." *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (per curiam) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 & n.5 (2013)). Plaintiffs' claimed injury is not actual because

there is no evidence that any Plaintiff has ever sought a COVID-19 accommodation from their school. And it is not imminent because there is no evidence showing any Plaintiff will do so soon. For months, the Attorney General has argued Plaintiffs should seek individualized COVID-19 accommodations from their schools as the law requires, but Plaintiffs have not done so. *See* ROA.705-06. None of the declarations submitted by Plaintiffs' parents even hint at an intention to seek an individualized accommodation. ROA.3979-4004. Their choice to forego a discussion of individualized accommodations is a self-inflicted injury. Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 416.

In truth, Plaintiffs' risk of infection lies at the heart of their alleged injury and is of the type that *Shrimpers*, *Clapper*, and *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018), repudiated. Plaintiffs' brief does not distinguish *Clapper* or *Glass*. And while it attempts to distinguish *Shrimpers* as a case concerning "increased risk that equally affects the general public," Pls. Br. 22, *Shrimpers* also considered and rejected Plaintiffs' argument that they "will suffer an increased risk of harm that [others] will not suffer," 968 F.3d at 425.

Plaintiffs accuse the Attorney General of "a persistent mischaracterization of the children's . . . injuries," saying "the injury at issue is *not* the children's increased risk of contracting COVID-19." Pls. Br. 2 (emphasis in original). But *Plaintiffs* repeatedly identified this risk in the district court as the basis for E.S. and S.P.'s alleged equal-access injury. *See, e.g.*, ROA.2774 ("E.S. . . . is facing an unequal experience and unequal access *because of the heightened risk of COVID-19.*") (emphasis added). Plaintiffs even invoked "substantial risk" standing at trial. *See* ROA.974. That

argument, as explained, is wrong. Att'y Gen. Br. 14-16. But given their failure to argue a substantial risk in this Court, it also has been forfeited. *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 937 F.3d 533, 542 (5th Cir. 2019) ("Arguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived."). In addition, holding disability discrimination plaintiffs to proof of a substantial risk does not "foreclose the lion's share" of ADA and Rehabilitation Act claims as Plaintiffs argue. *See* Pls. Br. 22.

Even if the record did contain evidence of an injury in fact, the U.S. Food & Drug Administration's (FDA) expansion of vaccine eligibility to include school-age children raises the question whether that injury still exists. *See* Att'y Gen. Br. 12-13. December brought more good news with the FDA's approval for children of all ages of monoclonal antibodies, which treat COVID-19 infections in high-risk individuals. Joseph Walker, *Lilly's Covid-19 Antibody Treatment Authorized for Use in Children*, Wall St. J. (Dec. 3, 2021), https://tinyurl.com/4xsknpvt. Even more recently, the FDA cleared the "highly effective" therapeutic Paxlovid for high-risk children age 12 and older. Jared S. Hopkins & Joseph Walker, *Pfizer's Covid-19 Pill is Authorized in U.S.*, Wall St. J. (Dec. 22, 2021), https://tinyurl.com/2uyb5fkb. E.T., the sole plaintiff thus far identified who may not enjoy the full benefits of vaccination, falls within the drug's approved age group. *Id.*; ROA.2074-75.

Plaintiffs do not dispute that a plaintiff can lose their personal interest while a case is on appeal. Instead, they ask this Court to avoid fact finding and close its eyes to these admittedly "very encouraging" developments. Pls. Br. 19. This Court does not need to hear testimony or "evaluat[e] competing statistics" to decide whether

the FDA's recent approvals change Plaintiffs' alleged injury. *Id.* at 20. No one disputes the FDA expanded vaccine eligibility, and Plaintiffs know whether there is some reason they cannot take the vaccine. This Court should ignore their argument that "[t]he available evidence does not establish" whether they can take the vaccine until they choose to disclose these facts. *Id.* at 19. Moreover, considering these developments is appropriate because of this case's highly accelerated timeline and its consequences for the Governor's pandemic policymaking. This Court has recognized its authority to receive non-record information. *See Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984). The Seventh Circuit, in a different context, relied on a party's COVID-19 vaccine eligibility even though that party only became eligible on appeal. *United States v. Broadfield*, 5 F.4th 801, 802-03 (7th Cir. 2021). And the Supreme Court has accepted and even solicited non-record facts from parties in considering standing and mootness. Order, *Kingdomware Techs., Inc. v. United States*, No. 14-916 (U.S. Nov. 4, 2016); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007).

Finally, Plaintiffs' lead argument declares the Attorney General "forfeited any challenge" to the district court's factual findings. Pls. Br. 15. No such forfeiture occurred, as the Attorney General raised the clear-error standard on pages 9 and 10 of his brief. But even if it had, it would not be Plaintiffs' silver bullet given the district court's silence on multiple issues of fact. The only disputed and arguable factual finding that Plaintiffs identify as meriting deference is the district court's statement that "because GA-38 precludes mask requirements in schools, Plaintiffs are either

forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks than their nondisabled peers." ROA.2391; *see also* Pls. Br. 23.[1] The motions panel correctly declined to apply the clear-error standard in refuting this statement. ROA.2448-51. This Court "owe[s] no deference to the district court's factual findings" where, as here, its "legal errors evince[] 'a misunderstanding of the governing rule of law.'" *Whole Woman's Health v. Paxton*, 10 F.4th 430, 445 (5th Cir. 2021) (en banc) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)). Because this statement underlies the district court's entirely wrong treatment of Plaintiffs' ADA and Rehabilitation Act claims on a disparate-impact theory that neither statute authorizes and Plaintiffs do not defend, this Court should disregard it. *See* Att'y Gen. Br. 28-37.

This statement also would not withstand clear-error scrutiny. "A finding of the trial judge 'is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Guzman v. Hacienda Recs. & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015). Both the Attorney General's opening brief and the motions panel definitively showed this statement's wrongness. *See* Att'y Gen. Br. 11-13; ROA.2448-51.

[1] "The district court['s] f[inding] that the children's injury . . . is concrete, particularized, and actual," Pls. Br. 16, is a conclusion of law subject to de novo review. So too is the question whether Plaintiffs have been "deprive[d] . . . of equal access," which Plaintiffs wrongly claim, *id.* at 20-21, the Attorney General does not dispute, *see* Att'y Gen. Br. 11-16, 35-37.

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

Plaintiffs also lack standing because it is not "likely, as opposed to merely speculative," that an injunction will redress their injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up). Unlike each of the school mask mandate cases they cited as a "road map," ROA.2159, Plaintiffs have not joined a defendant capable of mandating masks in their schools. Att'y Gen. Br. 17-18. At trial, Plaintiffs promised the district court an injunction would trigger seven mask mandates in Plaintiffs' seven schools, but that proved incorrect. *Id.* at 18-20. The two schools not mandating masks at the time of trial continued to make masks optional, and three of the five schools mandating masks announced they would also make masks optional. In the last month, two of those three schools have reinstated mask mandates. *COVID-19 Guidelines*, Round Rock Indep. Sch. Dist., https://tinyurl.com/449tuz6n (last visited Jan. 21, 2022); *Richardson ISD Keeping Mask Mandate in Place at its Schools for Now*, FOX 4 (Jan. 7, 2022), https://tinyurl.com/2jcv92sb. All these developments show Plaintiffs' redressability arguments impermissibly speculate whether their seven schools will mandate masks.[2]

Unable to argue that an injunction will trigger seven mask mandates, Plaintiffs contend an injunction would "redress the children's injury by *clearing the way* for the schools to consider accommodations on an individualized basis and develop plans for safe return to in-person instruction." Pls. Br. 25 (emphasis added). To be sure, an

[2] The United States is mistaken in asserting the Attorney General did not contest at trial whether Plaintiffs' school districts would mandate masks. U.S. Br. 19. He did. ROA.2125.

injunction would grant Plaintiffs' school districts discretion they presently lack. But would Plaintiffs' schools exercise this discretion? Plaintiffs claim the district court "f[ound] that the schools would 'likely react in predictable ways' absent enforcement of GA-38," *id.*, but Plaintiffs offer no citation to the district court's opinion for this proposition.[3] The district court never addressed this question, correctly ignoring Plaintiffs' speculation about what their schools would do. It erred in failing to recognize redressability hinged on that showing. Moreover, by shifting on appeal to an equal-access injury with "case-by-case decisionmaking" at the "core," Pls. Br. 17, redressability now depends on whether Plaintiffs will seek case-by-case decisionmaking from their schools. The district court never found Plaintiffs would, the record contains no evidence they have or will, and as discussed, there are reasons to doubt they will. *See* p. 4, *supra*.

Plaintiffs' citation to *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021), does not help their case. While *Uzuegbunam* held that a partial remedy satisfies this element, a wholly speculative remedy is not partial. No one disputed some money (albeit a small amount) would change hands if the *Uzuegbunam* plaintiffs prevailed. By contrast, Plaintiffs failed to show an injunction in this case would give them *anything*.

This Court does not need to recognize this case's post-trial developments to reverse the district court for its failure to judge whether Plaintiffs' school would mandate masks and hold Plaintiffs impermissibly rely on speculation. However, these

[3] Plaintiffs also mischaracterize the district court in saying it found the two GA-38-compliant schools "would immediately consider implementing a mask requirement if the enforcement of GA-38 were enjoined." Pls. Br. 25. It did not.

facts merit consideration for the same reasons the Court should note Plaintiffs' eligibility for vaccination. *See* pp. 5-6, *supra*. These post-trial facts were not before the district court because they did not exist. Plaintiffs know whether their schools mandate masks, and they do not dispute the Attorney General's characterization. Plaintiffs' reliance on *MidCap Media Finance, L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 315-16 (5th Cir. 2019), is unhelpful because it dealt with disputed facts that could have been developed in the district court. Plaintiffs lack standing.[4]

II. Plaintiffs' ADA and Rehabilitation Act Claims Fail.

The district court erred in holding Plaintiffs proved violations of the ADA and Rehabilitation Act. Plaintiffs' claims fail at the threshold because federal law requires the pre-suit exhaustion of remedies, which Plaintiffs have not done. These claims also lack merit. Plaintiffs have not proven either a failure to accommodate or disparate treatment.

[4] Relatedly, Plaintiffs are wrong in arguing that this Court can treat standing's traceability element as forfeited. "Article III standing . . . can be neither waived nor assumed." *Rohm & Hass Tex., Inc. v. Ortiz Brothers Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir. 1994) (footnote omitted). Where, as here, a plaintiff alleges injury based on the government's regulation of a third party, both "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party." *Lujan*, 504 U.S. at 562. The Attorney General has not separately pressed traceability, both in seeking a stay and at present, to avoid duplicative briefing. But many of the flaws in Plaintiffs' redressability argument also belie traceability.

A. The IDEA requires Plaintiffs to exhaust administrative remedies, which they have not done.

Plaintiffs' ADA and Rehabilitation Act claims are barred because they failed to exhaust remedies as required by the IDEA. *See* 20 U.S.C. § 1415(l). The exhaustion requirement applies when a plaintiff "fil[es] . . . a civil action under [the ADA or Rehabilitation Act] seeking relief that is also available under" the IDEA. *Id.* The statute requires exhaustion when a plaintiff "seek[s] relief for the denial of a [free appropriate public education]," also known as a "FAPE." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017). That standard includes "'meaningful' access to education based on . . . individual needs." *Id.* at 753-54 (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982)).

Plaintiffs' assertion that their claims seek "individualized assessment of their needs," Pls. Br. 17, only strengthens the conclusion that the IDEA applies. "[T]he IDEA guarantees individually tailored educational services." *Fry*, 137 S. Ct. at 756. Plaintiffs forfeited the argument that exhaustion would be futile, nor would it be given the availability of numerous COVID-19 accommodations. Instead, they argue the IDEA does not apply "because [no one] is suing for the individualized relief that is a hallmark of IDEA and its provision of special education." Pls. Br. 33. Why IDEA individualized relief could not accommodate their needs remains unexplained.

Six of the seven Plaintiffs already have IDEA individualized education plans with their schools. ROA.2074-80. Plaintiffs suggest the IDEA might not guarantee a FAPE to the seventh plaintiff, E.S., who suffers from moderate to severe asthma,

Pls. Br. 34; ROA.2081, but they never established E.S.'s ineligibility.[5] The IDEA's implementing regulations identify asthma as a possible disability, 34 C.F.R. § 300.8(c)(9)(i), and Plaintiffs do not claim a "determin[ation]" has been made "through an appropriate evaluation" that E.S. is not eligible for a FAPE, *id.* § 300.8(a)(2)(i).

Finally, Plaintiffs claim that their avoidance of administrative remedies is a "clue" the exhaustion requirement does not apply. Pls. Br. 33. It is not. *Fry* recognized the inverse: "[A] court may consider that a plaintiff *has* previously invoked the IDEA's formal procedures to handle the dispute." 137 S. Ct. at 757 (emphasis added). If Plaintiffs were correct, every plaintiff who failed to exhaust remedies could, as Plaintiffs do, paradoxically cite their failure to exhaust remedies as a reason they did not need to exhaust remedies. *Fry* does not endorse that argument. The IDEA required each of the seven Plaintiffs to seek accommodations from their schools before suing the Attorney General.

[5] To rule for E.S. on this ground, this Court would need to take a side in the circuit split over whether the IDEA's exhaustion requirement deprives a court of subject-matter jurisdiction. *See, e.g.*, *T.B. ex rel. Bell v. Nw. Indep. Sch. Dist.*, 980 F.3d 1047, 1050 n.2 (5th Cir. 2020); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002). Because the requirement is jurisdictional, E.S. bore the burden to develop facts establishing their ineligibility for special education, which they have not done. The parties stipulated E.S. presently does not receive special education services, but not that they are ineligible for such services. ROA.2081. And even if there was a basis on which to distinguish E.S. from their co-plaintiffs, E.S. presents the weakest claim to standing because E.S. attends class in-person even though their school makes masks optional. *See* Att'y Gen. Br. 13-14.

B. Plaintiffs' claims fail on the merits.

Plaintiffs have not reconciled their fundamentally flawed ADA and Rehabilitation Act claims with this Court's precedents. The district court wrongly found disability discrimination under a disparate-impact-like theory that neither the ADA nor the Rehabilitation Act authorize and neither Plaintiffs nor their amici defend. Plaintiffs claim the district court did not rely on disparate impact, but they also do not defend the district court's conclusion that GA-38 "is unlawful because" of its "effect." ROA.2388 (quoting 28 C.F.R. § 35.130(b)(3)(i)). Their brief does not even cite subsection (b)(3). The United States also urged the district court to hold GA-38 violates subsection (b)(3)'s effects test, but it too has abandoned this argument on appeal. *See* ROA.662-65.

Plaintiffs claim for the first time they can prove disparate *treatment* and contend the district court ruled for them on that basis, which it did not. Pls. Br. 41. Tellingly, Plaintiffs never disclose the elements for such a claim. "Liability in a disparate-treatment case 'depends on whether the protected trait . . . actually motivated the [defendant's] decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003). In other words, "[t]he ultimate question" for "a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000). At trial, Plaintiffs admitted they "have not pled or proven" "intentional discrimination" and represented they were "not seeking" such a finding. ROA.2761. Consistent with Plaintiffs' concession, the district court stated it did not "think the governor's executive order set out to discriminate against anybody." ROA.2728. Plaintiffs cannot show disparate treatment.

Having ruled out disparate impact in this Court and disparate treatment in the district court, Plaintiffs are left to defend the judgment on a failure-to-accommodate theory. But Plaintiffs' allegations only fit under disparate impact—not a failure to accommodate. "The important difference between these two theories is that a reasonable accommodation claim is focused on an accommodation based on an individualized request or need, while a reasonable modification in response to a disparate-impact finding is focused on modifying a policy or practice to improve systemic accessibility." *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021). At trial, Plaintiffs confirmed they were "not asking for a specific accommodation." ROA.2775.[6] Instead, Plaintiffs say their ADA and Rehabilitation Act claims allege "the Attorney General has effectively usurped the decisionmaking role of local school districts and has denied any masking accommodations across the board." Pls. Br. 40. That accusation does not belong under a failure-to-accommodate theory.

Indeed, Plaintiffs cannot prove the elements for such a claim. A failure-to-accommodate claim requires proof of the defendant's subjective or objective knowledge. "Plaintiffs ordinarily satisfy the knowledge element by showing that they identified their disabilities as well as the resulting limitations to a public entity or its employees and requested an accommodation in direct and specific terms." *Smith v.*

[6] The district court did not perceive a failure to accommodate: "I don't see the plaintiffs here seeking an accommodation at this point. I see that to be the next step. I see the plaintiffs here objecting to the fact that the school district, by state law, is barred from considering something that the school district would otherwise consider in determining what an appropriate accommodation would be. . . . [N]obody has argued to me that there is a particular accommodation demanded here." ROA.2753.

Harris County, 956 F.3d 311, 317 (5th Cir. 2020). "When a plaintiff fails to request an accommodation in this manner, he can prevail only by showing that 'the disability, resulting limitation, and necessary reasonable accommodation' were 'open, obvious, and apparent' to the entity's relevant agents." *Id.* at 317-18 (quoting *Windham v. Harris County*, 875 F.3d 229, 237 (5th Cir. 2017)).

Plaintiffs argue for the first time in this litigation that the knowledge element does not apply when the requested accommodation was "being provided, either at the time of trial or prior to the enforcement actions of the Attorney General," citing a footnote in *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 n.4 (5th Cir. 1999). Pls. Br. 37. *Loulseged*'s footnote "recogni[zed]" disability-discrimination defendants cannot "read minds" and that plaintiffs need "to remain active in the development of solutions to their concerns." 178 F.3d at 735 n.4. It also held that "[u]nder the circumstances of [the] case," where the plaintiff had already requested and received an accommodation from the defendant and the defendant "was generally aware" of her medical restrictions, the plaintiff did not need to formally request a replacement accommodation when the previous accommodation was withdrawn. *Id.* Plaintiffs, however, never requested or received an accommodation from the Attorney General or established he was "generally aware" of their medical restrictions. Plaintiffs have never stated precisely what accommodation they expect the Attorney General to make, but their brief confirms it is not a mask mandate. Pls. Br. 3. Thus, the mask mandates imposed by third parties, Plaintiffs' schools, would not even satisfy the rule Plaintiffs read *Loulseged*'s footnote to create.

Plaintiffs offer another argument not made at trial or addressed by the district court: their disabilities, resulting limitations, and the necessary reasonable accommodations were "open, obvious, and apparent" to the Attorney General. *Smith*, 956 F.3d at 317-18; *see also* Pls. Br. 37. But at the same time, Plaintiffs' brief makes clear the necessary reasonable accommodations are not open, obvious, and apparent. Plaintiffs claim they need an "individualized assessment of their needs for accommodation" and admit some "circumstances" may not require a mask mandate. Pls. Br. 17, 44.[7]

Plaintiffs compare the Governor's requirement that schools make masks optional to a ban on wheelchair ramps, but this analogy only highlights a fundamental flaw in their allegations. Pls. Br. 29, 44-45. The ADA does not "requir[e] school[s] to have ramps" as Plaintiffs claim. *Id.* at 45 (quoting *Disability Rts. S.C. v. McMaster*, No. 3:21-cv-2728, 2021 WL 4444841, at *10 (D.S.C. Sept. 28, 2021); 28 C.F.R. § 35.151(b)(4)(ii)(A) ("An accessible path of travel may consist of . . . interior or exterior pedestrian ramps; . . . elevators and lifts; or a combination of these elements."). Just as elevators and platform lifts also enable wheelchair-bound students to access classes, GA-38 leaves schools with wide discretion to employ a combination of other COVID-19 mitigation measures.

[7] Plaintiffs are also wrong in claiming "the Attorney General does not and cannot challenge the district court's finding" that Plaintiffs "are either forced out of in-person learning altogether or must take on unnecessarily greater health and safety risks." Pls. Br. 41 (quoting ROA.2391). Pages 11-12 of the Attorney General's opening brief refute this statement which, as explained, does not merit deference. *See* pp. 6-7, *supra.*

The parties agree "the ADA and the Rehabilitation Act . . . 'impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals.'" *Smith*, 956 F.3d at 317 (quoting *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005)). But that affirmative obligation applies only if the defendant knew or should have known of the need for an accommodation. *Id.* Plaintiffs' disparate-impact-like allegations do not prove a failure to accommodate under the ADA or Rehabilitation Act.

III. Plaintiffs' Preemption Claims Fail.

The district court erred in ruling for Plaintiffs on their ARP Act preemption claim, and Plaintiffs cannot defend the judgment on their ADA and Rehabilitation Act preemption claim. Plaintiffs lack a substantive right under the ARP Act to vindicate, and the ARP Act implicitly precludes equitable enforcement of its discretionary spending provisions. Moreover, GA-38 does not conflict with the ARP Act. The ADA and Rehabilitation Act also implicitly preclude equitable enforcement. Nor do they preempt GA-38.

A. Plaintiffs' ARP Act preemption claim fails.

1. Plaintiffs cannot litigate the ARP Act's alleged preemption of GA-38 because the ARP Act gives them no substantive right and it implicitly forecloses equitable enforcement. Plaintiffs invite this Court to create a circuit split and hold plaintiffs can bring quasi-*qui tam* suits to enforce conditions in federal appropriations laws. This Court is "always chary to create a circuit split," and parties seeking splits face a "high hurdle" that Plaintiffs' arguments do not clear. *Alfaro v. Comm'r of Internal*

Revenue, 349 F.3d 225, 229-30 (5th Cir. 2003). "'[T]o invoke the' Article III courts' equitable powers, a plaintiff . . . must have 'a federal right that [he or she] possesses against' the defendant." *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 902 (10th Cir. 2017) (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 260 (2011)). Because Plaintiffs cannot identify an ARP Act substantive right to vindicate, their claim fails as a matter of law.

Plaintiffs argue the Tenth Circuit misread *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), citing *Armstrong*'s dissent and the plurality portion of Justice Scalia's opinion. But Plaintiffs never respond to *Virginia Office*'s recognition that litigation of this type "cannot occur unless the [plaintiff] has been given a federal right of its own to vindicate." 563 U.S. at 261 n.8. The plaintiff must have "a federal right that it possesses." *Id.* at 260; *id.* at 263 (Kennedy, J., concurring) ("it must be assumed that [the plaintiff] has a federal right"). Justice Scalia authored both *Virginia Office* and *Armstrong*, confirming his later *Armstrong* opinion at least assumed *arguendo* that the providers had a substantive right. *Cf. Safe Sts. All.*, 859 F.3d at 899 n.9.

Plaintiffs have not cited a single equitable enforcement case brought by a plaintiff lacking a substantive right. The only authority Plaintiffs cite for the proposition that equitable enforcement does not require a substantive right is Justice Sotomayor's dissent and the majority opinion's silence in response. First, a "majority's silence does not transform the dissent's conclusion into a binding holding." *Strange ex rel. Strange v. Islamic Republic of Iran*, 964 F.3d 1190, 1197 (D.C. Cir. 2020). And second, Justice Sotomayor's dissent did not posit, as Plaintiffs say, that "the search for a

substantive right has no place in determining the scope of the federal courts' equitable powers." Pls. Br. 48. The paragraph quoted by Plaintiffs distinguished "equitable preemption actions" from "suits brought by plaintiffs invoking . . . an implied right of action to enforce a federal statute." *Armstrong*, 575 U.S. at 340 (Sotomayor, J., dissenting). Justice Scalia's opinion separately analyzed the statute's foreclosure of equitable enforcement from the question whether the statute implied a right of action, implicitly recognizing the distinction. *Id.* at 327-32.

2. Even if Plaintiffs had a substantive right, the ARP Act implicitly forecloses equitable enforcement because, as in *Armstrong*, the statute already provides for federal enforcement and is judicially unadministrable. The ARP Act did not need to "expressly allow[] for the withholding of funds," Pls. Br. 52, because that authority already exists. Just as the Secretary of Health and Human Services had the authority to "withhold[] . . . funds" for the *Armstrong* statute, 575 U.S. at 328, the Secretary of Education has the authority to seek the recovery of grant money, 20 U.S.C. § 1234a, "withhold further payments," and "issue a complaint to compel compliance through a cease and desist order," *id.* § 1234c(a)(1), (2). The ARP Act even expands the Department of Education's budget to police compliance with the statute. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2012, 135 Stat. 4, 28.

In addition, the "judgment-laden standard" of the ARP Act section in question implicitly forecloses equitable enforcement. *Armstrong*, 575 U.S. at 328. Plaintiffs argue GA-38 conflicts with the statute's subsection setting the breadth of sub-grant recipients' spending discretion. Pls. Br. 56-57. That discretion is "broad[]" and not "specific." *Armstrong*, 575 U.S. at 328. Whereas the *Armstrong* statute imposed one

indisputably applicable standard on reimbursement payments, this statute's "text" is even more "judicially unadministrable," *id.*, by authorizing 18 ill-defined categories of school spending, Pub. L. No. 117-2, § 2001(e)(2). Because of the "[s]heer complexity" of this statute, *Armstrong*, 575 U.S. at 329, and because Congress vested the Department of Education with enforcement authority, this statute implicitly forecloses equitable enforcement.

3. Finally, GA-38 does not conflict with the ARP Act. The district court held GA-38 stood as an obstacle to the ARP Act's requirement that school districts make public their COVID-19 safety plans and the Department of Education's implementing regulation. ROA.2383-84. Plaintiffs do not defend this conclusion and have abandoned their arguments that those provisions preempt GA-38. Instead, they argue two of the ARP Act's 18 categories of allowable discretionary spending conflict with GA-38. One of these subsections allows schools to spend sub-grant dollars on "[d]eveloping strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff." Pub. L. No. 117-2, § 2001(e)(2)(Q). The other subsection, which Plaintiffs assert for the first time on appeal, allows spending on "[a]ctivities to address the unique needs of . . . children with disabilities" and five other expansive classes of students, ranging from "low-income children or students" to "racial and ethnic minorities." *Id.* § 2001(e)(2)(F).

GA-38 does not stand as an obstacle to sub-grant recipients' discretionary spending. Plaintiffs argue GA-38 "attempt[s] to 'limit the manner in which [a school district] may spend federal [ARP Act funds] . . . .'" Pls. Br. 57 (quoting *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985)). But nothing in GA-38 touches school spending. That fact distinguishes *Lawrence County*, which concerned a state law directing federal funding recipients to spend funding in a specific way. 469 U.S. at 258. Even if GA-38 could be read to limit school spending, it would impose at most a "modest impediment" to a school district's spending under the ARP Act's 18 categories. *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005). The ARP Act does not preempt GA-38.

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

Plaintiffs' ADA and Rehabilitation Act preemption claim also fails. The district court held these statutes preempted GA-38 but did not hold that Plaintiffs could litigate an equitable preemption cause of action. They cannot. Regardless, GA-38 does not conflict with either the ADA or the Rehabilitation Act.

1. Congress's creation of a remedial scheme for the ADA and Rehabilitation Act forecloses this claim. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). Both the ADA and the Rehabilitation Act expressly provide for enforcement through the right of action implied by title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a; 42 U.S.C. § 12133; *see also Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Decades of litigation has elucidated the limitations on

equitable relief under this right of action. It strains credulity to believe Congress intended to allow plaintiffs to use equitable jurisdiction to erase those boundaries.

Even the *Armstrong* dissent recognized that a statute's "detailed remedial scheme" implicitly precludes equitable enforcement. 575 U.S. at 337 (Sotomayor, J., dissenting). That rule emerged from *Seminole Tribe of Florida v. Florida*, which held the Indian Gaming Regulatory Act's remedial scheme implicitly precluded equitable enforcement. 517 U.S. 44, 73-76 (1996). The Court recognized that "[i]f [the Act's requirements] could be enforced in a suit under *Ex parte Young*, [its remedial scheme] would have been superfluous." *Id.* at 75. Allowing Plaintiffs' equitable enforcement of the ADA and Rehabilitation Act would similarly nullify those laws' allowance of equitable remedies, including the express equitable remedies identified by Plaintiffs. *See* Pls. Br. 59-60 (citing 29 U.S.C. § 794a(a)(1); 42 U.S.C § 12188(a)(2)). Plaintiffs' claim also would negate Congress's choice to exclude disparate-impact claims from these statutes. Plaintiffs provide no reason to infer such an intent. They cite nothing for the proposition that a plaintiff can obtain equitable relief under a civil rights law without proving the elements of a claim under that statute.

2. GA-38 also does not conflict with the ADA or the Rehabilitation Act. Plaintiffs argue obstacle preemption applies because GA-38 prevents individualized decisionmaking, Pls. Br. 58-59, but as explained, it does not, *see* p. 3, *supra*. Plaintiffs also argue "GA-38 prevents schools from complying with the ADA and Rehabilitation Act," Pls. Br. 12, but they have never shown this. Neither Plaintiffs nor the United States cite anything in the record showing even one of Plaintiffs' schools have

concluded they cannot meet their ADA or Rehabilitation Act obligations. The United States only argues a mask mandate "may be" required by those laws. U.S. Br. 14. Plaintiffs have not proven their preemption claims.

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

The district court entered an overbroad injunction by granting statewide relief and not tailoring the injunction to conditions requiring a mask mandate. Plaintiffs offer no reason why they need relief beyond their seven schools. They quote *Professional Association of College Educators, TSTA/NEA v. El Paso County Community College District*, 730 F.2d 258 (5th Cir. 1984), but one of their alterations to the quote dilutes this case's force. That case held an injunction is "not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . *if such* breadth is necessary to give prevailing parties the relief to which they are entitled." *Id.* at 274 (emphasis added). Thus, the injunction's statewide reach can stand only "if" it is "necessary." *Id.*

The district court also should not have enjoined GA-38 in perpetuity. "[T]he Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Andino v. Middleton*, 131 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (cleaned up). "When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad" and "ordinarily should not be subject to second-guessing by an unelected federal judiciary." *Id.* (Kavanaugh, J., concurring) (cleaned up). The district court's injunction wrongly eliminates *all* of the Governor's authority to make masks

optional in schools regardless of the COVID-19 risk at a given time. Even Plaintiffs admit some "circumstance[s]" may not require a mask mandate. ROA.2723; *see also* Pls. Br. 44. The district court should have tailored its injunction to exclude those situations.

Conclusion

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

Respectfully submitted.

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Certificate of Service

On January 21, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,388 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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