No. 21-3268

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE ARC OF IOWA, et al.,
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, et al.,
Defendants.

On Appeal from the United States District Court
for the Southern District of Iowa (Case No. 4:21-cv-00264-RP-SBJ)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 8th Circuit Rule 26.1A, Plaintiff-Appellee The Arc of Iowa states that it has no parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

This case is about whether Iowa school districts should be stripped of their discretion to adopt masking policies as needed to protect the health, welfare, and educational opportunities of students with disabilities who face increased risks of serious health consequences from COVID-19. The Defendant school districts, which are on the front lines of educating Iowa's children, have not appealed the district court's decision restoring their discretion. Only the Governor and her education department director ("Defendants") urge this Court to order schools—including the dozens of school districts that reinstated universal masking after the district court enjoined enforcement of Section 280.31—to terminate any masking policy or risk disaccreditation or loss of funding. Defendants urge this course knowing that it is contrary to the overwhelming consensus of the medical and scientific community. And they do so knowing its discriminatory consequence: forcing Plaintiffs' children and many other Iowa students with disabilities to choose between their health and their education.

Defendants do not dispute the substantial record evidence proving that Section 280.31's mask-mandate ban increased risks to the life and health of Plaintiffs' children, as well as loss of educational opportunities and other irreparable harms. Rather, relying largely on procedural arguments and radical legal theories that would gut federal anti-discrimination laws, Defendants ask this

Court to strike down all existing masking requirements in Iowa schools and to forbid other schools from exercising their discretion to protect children when and where needed. That is an affront to clear public health guidelines, federal disability rights laws, and the children these laws are intended to protect.

Based on these uncontested equities and clear violations of federal anti-discrimination laws, the district court enjoined enforcement of Section 280.31. In doing so, the court joined many other courts considering similar mask-mandate bans that have enjoined these laws. The district court acted well within its discretion, and this Court should affirm.

STATEMENT OF THE CASE

A. Conditions in Iowa Before Section 280.31

After shutting down in-person instruction in the spring of 2020, Iowa's schools began reopening for the 2020-21 school year, with all schools resuming in-person instruction by February 2021. Local schools during this period made their own masking decisions. Iowa's Department of Education had "adopt[ed] … CDC guidelines in all of [its] training manuals," "encourage[d] the use of cloth face coverings when feasible," and "deferred to local districts … to determine how and when" school activities could be conducted. JA149 & n.16; R.Doc.17 at 8.[1] Consistent with Department policy, numerous school districts around the state

[1] "JA##" refers to the Joint Appendix. "Add.##" refers to Appellants' Addendum.

implemented universal masking, including Des Moines, West Des Moines, Waukee, Sioux City, Urbandale, Linn-Mar, and Norwalk. JA149 & n.17; R.Doc.17 at 8.

Universal masking—a basic public health preventive measure—was particularly important to protect the 12.9% of Iowa students with disabilities, because many disabilities increase the risk from COVID-19. JA146 & n.2; R.Doc.17 at 5. As the CDC recognized, "current evidence suggests [that] children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease," as well as "children with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression," can "be at increased risk for severe illness from COVID-19." JA146 & nn.3-4; R.Doc.17 at 5; JA59 ¶ 17; R.Doc.3-1 at 6; JA80 ¶ 27; R.Doc.3-2 at 9. This risk also extends to individuals with intellectual disabilities. As a study in the *New England Journal of Medicine* found, individuals with intellectual disabilities are more likely to contract COVID-19; more likely to be admitted to the hospital if they contract COVID-19; and more likely to die following admission. JA146 & n.5; R.Doc.17 at 5; JA59-60 ¶ 19; R.Doc.3-1 at 6-7.

B. Conditions in Iowa After Section 280.31

On May 20, 2021, as the COVID-19 pandemic appeared to be waning, the Legislature passed Section 280.31. *See* Act of May 20, 2021 (H.F. 847), ch. 139,

2021 Iowa Acts § 28 (to be codified at Iowa Code § 280.31). The statute took effect immediately, with approximately two weeks left in the school year, banning schools from requiring masks to protect against the spread of COVID-19:

> The board of directors of a school district, the superintendent or chief administering officer of a school or school district, and the authorities in charge of each accredited nonpublic school shall not adopt, enforce, or implement a policy that requires its employees, students, or members of the public to wear a facial covering for any purpose while on the school district's or accredited nonpublic school's property unless the facial covering is necessary for a specific extracurricular or instructional purpose, or is required by section 280.10 or 280.11 or any other provision of law.

Id. § 28.

But soon after Section 280.31 took effect, conditions in Iowa began looking very different. By August 2021, with the emergence of the Delta variant, new COVID-19 cases had ballooned, hospitalizations reached the highest point for the year to date, and COVID-19 related deaths were increasing rapidly. JA149-50 & n.19; R.Doc.17 at 8-9. Over the week of August 18 to 25, 2021, more than 7,000 new cases were reported in Iowa. JA150 & n.20; R.Doc.17 at 9. The trends were particularly pronounced among children. Between the end of July and the end of August, Iowa reported 3,500 new COVID-19 cases among children, accounting for 22% of all new cases. JA146-47 & nn.6-7; R.Doc.17 at 5-6.

With summer ending and the new school year approaching, public health and education officials reiterated their calls for universal masking in primary

schools. The CDC recommended "universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status." JA147 & n.9; R.Doc.17 at 6; JA61 ¶ 22; R.Doc.3-1 at 8; JA419 ¶ 28; R.Doc.48-2 at 11. As the CDC observed, "[a]t least ten studies have confirmed the benefit of universal masking in community level analyses," and"[e]ach analysis demonstrated that, following directives … for universal masking, new infections fell significantly." JA147 & n.10; R.Doc.17 at 6. Other studies have confirmed that wearing masks is among the most powerful tools to thwart the transmission of COVID-19 in indoor settings, including schools in particular. JA147-48 & nn.13-14; R.Doc.17 at 6-7; JA62 ¶ 25; R.Doc.3-1 at 9 (describing Duke University study of in-school transmission); JA78-79 ¶¶ 23-24 & Figure 2; R.Doc.3-2 at 7-8; JA413-14 ¶¶ 6-8; R.Doc.48-2 at 5-6.

The American Medical Association, the Infectious Disease Society of America, the American Academy of Family Physicians, the Iowa Medical Society, the Iowa Chapter of the American Academy of Pediatrics, and the health departments of Iowa's three most populous counties all joined the call for universal masking in schools. JA147-48 & nn.11-12; R.Doc.17 at 6-7; JA61-62 ¶¶ 23-24; R.Doc.3-1 at 8-9; JA81-82 ¶¶ 29, 32; R.Doc.3-2 at 10, 11.

Nonetheless, Governor Reynolds and Department of Education Director Lebo repeatedly publicly vowed to enforce Section 280.31, warning school

districts that continuing or adopting universal masking would be at their peril. JA150 & nn.21, 24; R.Doc.17 at 9. For example, on August 30, 2021, after the U.S. Department of Education announced an investigation into whether Iowa's mask ban required schools to violate federal disability law, Governor Reynolds proclaimed, "In Iowa, we will continue to support individual liberty over government mandates." JA150 & n.22; R.Doc.17 at 9.

Likewise, Director Lebo's office warned that "school districts that choose not to follow the ban could receive citations" and "be referred to the State Board of Education," thereby risking their accreditation. JA150-51 & n.25; R.Doc.17 at 9-10.

Fearing loss of accreditation and funding, Add.34; R.Doc.32 at 7, schools that had adopted universal masking before Section 280.31 reported that the law was preventing them from reinstating their policies for the 2021-22 school year. As the Iowa City Superintendent said, school officials "don't have the tools we need right now other than simply defying the law." JA25-26 ¶ 53 & nn.50-51; R.Doc.1 at 18-19. And, predictably, mask usage went down and COVID-19 rates in Iowa schools went up, with many Iowa school districts reporting COVID-19 cases at rates far exceeding those experienced during the 2020-21 school year. JA184-86 ¶¶ 3(a)-(h); R.Doc.28 at 2-4; JA266-67; R.Doc.37 at 12-13.

C. Plaintiffs' Lawsuit Seeking to Enjoin the Mask-Mandate Ban

On September 3, 2021, eleven parents (on behalf of thirteen children with disabilities) as well as The Arc of Iowa (on behalf of its members)[2] brought this action against Governor Reynolds, Director Lebo, and ten school districts, seeking to enjoin enforcement of the mask-mandate ban. The children have a wide range of medical conditions that put them at heightened risk of severe illness should they contract COVID-19. JA80 ¶ 27; R.Doc.3-2 at 9. Their conditions include Down syndrome (JA100 ¶¶ 6, 10; R.Doc.3-7 at 1; JA88 ¶¶ 2, 3; R.Doc.3-3 at 1), sickle cell anemia (*id.*), functional asplenia (*id.*), autism (JA92 ¶ 2; R.Doc.3-4 at 1), cerebral palsy (*id.*; JA97-98 ¶¶ 4, 8, 9, 11; R.Doc.3-6 at 1-2), asthma (JA119 ¶¶ 5, 7; R.Doc.3-13 at 1; JA106 ¶ 3; R.Doc.3-9 at 1; JA117 ¶¶ 4, 6; R.Doc.3-12 at 1), Williams Syndrome (JA103 ¶¶ 3-4; R.Doc.3-8 at 1), heterotaxy (JA113 ¶¶ 4-6; R.Doc.3-11 at 1), congenital central hypoventilation syndrome (JA94 ¶ 3; R.Doc.3-5 at 1), chronic respiratory problems (JA88 ¶¶ 2, 3; R.Doc.3-3 at 1), hypertension (JA113-14 ¶¶ 8-9, 11; R.Doc.3-11 at 1-2), heart disease (JA92 ¶ 2; R.Doc.3-4 at 1), brain injury with history of strokes and epilepsy (JA97-98 ¶¶ 4, 8, 9, 11; R.Doc.3-6

[2] Several individual Plaintiffs are also members of The Arc of Iowa, a statewide organization that advocates for people with intellectual and developmental disabilities and their families. JA11-12 ¶10; R.Doc.1 at 4-5.

at 1-2), symptomatic congenital cytomegalovirus (JA109-10 ¶¶ 3, 7; R.Doc.3-10 at 1-2), and compromised immune system (JA88 ¶ 3; R.Doc.3-3 at 1).

Section 280.31 placed Plaintiffs, as parents, in an untenable position: expose their medically vulnerable children to an unsafe educational environment or remove them from in-person schooling and thereby deprive them of a safe and integrated public school education. Some Plaintiffs pulled their medically vulnerable children out of school. JA89-90 ¶¶ 10, 14; R.Doc.3-3 at 2-3; JA98 ¶ 15; R.Doc.3-6 at 2. Others had no choice but to send their children to school at a significant threat to their health, either because their schools did not offer virtual learning or because virtual learning was unsuited for children with disabilities who have developmental and educational delays. JA119 ¶ 9; R.Doc.3-13 at 1; JA107 ¶ 12; R.Doc.3-9 at 2; JA111 ¶ 13; R.Doc.3-10 at 3; JA92-3 ¶¶ 6, 11; R.Doc.3-4 at 1-2; JA114-15 ¶ 15; R.Doc.3-11 at 2-3; JA96 ¶ 13; R.Doc.3-5 at 3; JA104 ¶ 11; R.Doc.3-8 at 2. For instance, for many of Plaintiffs' children, virtual school is nothing more than prerecorded videos, a mode of education that is inferior to in-person learning and highly inappropriate for many children with disabilities. JA110-11 ¶¶ 8, 13; R.Doc.3-10 at 2-3; JA117-18 ¶ 7; R.Doc.3-12 at 1-2; JA114-15 ¶ 15; R.Doc.3-11 at 2-3; JA101 ¶ 15; R.Doc.3-7 at 2; JA103-04 ¶¶ 8, 11; R.Doc.3-8 at 1-2. For other parents, financial constraints prevented homeschooling, remote

learning, or private instruction. As one Plaintiff explained, "either my husband or I would have to quit our jobs to teach" their children. JA115 ¶ 15; R.Doc.3-11 at 3.

Plaintiffs' Complaint accordingly alleged that Section 280.31 violated Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act.

D. Entry of the Temporary Restraining Order

Plaintiffs sought a Temporary Restraining Order ("TRO"), supported by substantial evidence, including testimony from Plaintiffs as well as expert testimony from Dr. Joel Waddell, a pediatric infectious disease specialist at Blank Children's Hospital, and Dr. Megan Srinivas, an infectious disease specialist for Broadlawns Medical Center. JA54-71; R.Doc.3-1; JA72-87; R.Doc.3-2.

On September 13, 2021, the district court entered a TRO enjoining enforcement of Section 280.31. Add.28-56; R.Doc.32. In a lengthy opinion, the district court rejected Defendants' procedural arguments, holding that Plaintiffs had standing and that administrative exhaustion was not required. Add.43; R.Doc.32 at 16. The court made factual findings that Plaintiffs had suffered three distinct types of "irreparable harm," including that section 280.31 (1) "substantially increases Plaintiffs' children's risk of … severe illness or death"; (2) deprives them of "a safe in-person learning option"; and (3) violates federal civil rights laws. Add.45-49; R.Doc.32 at 18-22. The court further held that

Plaintiffs were likely to succeed on the merits because "section 280.31 seems to conflict with the ADA and section 504 of the Rehabilitation Act because it excludes disabled children from participating in and denies them the benefits of public schools' programs, services, and activities to which they are entitled." Add.54; R.Doc.32 at 27. And the court found that the equities and public interest weighed in favor of a TRO. Add.55; R.Doc.32 at 28.

E. Entry of the TRO Restored the Status Quo Ante

Following entry of the TRO, more than 24 school districts reintroduced universal masking. JA409-13 ¶¶ 2-3; R.Doc.48-2 at 1-5. These measures have been adopted in eight of the ten school districts attended by Plaintiffs. While most of these efforts cover all students, a number cover only certain grades, *see* JA409-13 ¶¶ 3(b, d, f, o, p, r, u, v, x); R.Doc.48-2 at 1-5, and some apply only for a limited duration, such as until 60 days after the COVID-19 vaccine is available for children age 5 to 11, JA499 ¶ 2; R.Doc.48-10 at 1; *see also* JA509 ¶¶ 2-3; R.Doc.48-15 at 1; JA497 ¶ 2; R.Doc.48-9 at 1. Children who have disabilities that make masking inappropriate can obtain medical exemptions, and some of the policies include exemptions for religious beliefs. JA507 ¶ 2; R.Doc.48-14 at 1; JA505 ¶ 2; R.Doc.48-13 at 1; JA499 ¶ 2; R.Doc.48-10 at 1.

Consistent with expert testimony setting forth the public health recommendations and medical studies confirming that universal masking makes

schools safer, JA61-63 ¶¶ 22-26; R.Doc.3-1 at 8-10; JA78-79 ¶¶ 23-24 & Figure 2; R.Doc.3-2 at 7-8; JA413-14 ¶¶ 6-8; R.Doc.48-2 at 5-6, Plaintiffs reported that the injunction made their children safer returning to school. JA489-90 ¶¶ 4, 6; R.Doc.48-5; JA507 ¶¶ 3-5; R.Doc.48-14 at 1; JA506 ¶¶ 4-5; R.Doc.48-13 at 2; JA501-02 ¶¶ 6, 10; R.Doc.48-11; JA493-94 ¶¶ 4, 6, 8; R.Doc.48-7; JA491-92 ¶¶ 4, 5, 7; R.Doc.48-6; JA499-500 ¶¶ 4-6; R.Doc.48-10.

F. Extension of the TRO and Entry of the Preliminary Injunction

On September 22, 2021, Plaintiffs moved for extension of the TRO, and during those proceedings sought a preliminary injunction. JA343-50; R.Doc.44; JA372-659; R.Doc.48:1-48:27. Plaintiffs presented evidence establishing that new COVID-19 cases continued to climb and were occurring at a rate 50% higher than when this action was filed and 38% higher than when the TRO was entered. JA417-18 ¶¶ 21-24; R.Doc.48-2 at 9-10. As of September 22, 2021, COVID-19 cases and hospitalizations were at their highest level in 2021, and children were more than a quarter of the state's new reported cases. *Id.*; JA514-16 ¶¶ 5-9; R.Doc.48-16 at 4-6; JA586-612; R.Doc.48:20-48:25. Plaintiffs also submitted additional expert evidence from Dr. Srinivas (JA409-19; R.Doc.48-2), as well as Dr. James Basham, a Professor of Special Education at the University of Kansas (JA465-88; R.Doc.48-4), and Dr. David Lewkowicz, a psychologist at the Yale School of Medicine (JA420-64; R.Doc.48-3).

On October 8, 2021, the district court granted a preliminary injunction, reaffirming its prior findings of facts and setting forth additional findings concerning events since the TRO was entered. Add.1-27; R.Doc.60. The court observed that, after the TRO, "at least twenty-four school districts around Iowa implemented mask mandates, including eight of the ten Defendant school districts." Add.7; R.Doc.60 at 7. The court noted that Defendants "do not dispute" the court's prior finding of irreparable harm "and have offered no evidence to contradict it." Add.14-15; R.Doc.60 at 14-15. The court further noted that Defendants did not dispute that Section 280.31 violated the ADA and Rehabilitation Act's requirements to make services "readily accessible" to people with disabilities or to provide education in the "most integrated setting appropriate." Add.16; R.Doc.60 at 16. And the court rejected Defendants' arguments concerning the ADA and Rehabilitation Act's reasonable modification requirement. Add.16-20; R.Doc.60 at 16-20. In light of the "irreparable harm," Plaintiffs' "likelihood of success on the merits," "and the important public interests at stake," the court issued the preliminary injunction. Add.27; R.Doc.60 at 27.

On October 8, 2021, Governor Reynolds and Director Ledo appealed the district court's preliminary injunction order. The Defendant school districts—most of which had adopted universal masking—did not appeal.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in enjoining the enforcement of Section 280.31, and this Court should affirm.

Defendants primarily seek to evade review of the merits, arguing that Plaintiffs lack Article III standing or failed to exhaust administrative remedies. But this is not some hypothetical dispute that cannot be redressed. To the contrary, after the injunction was entered two dozen schools exercised their newly-restored discretion and implemented masking policies—proving that the harm is redressable. And Defendants do not meaningfully dispute the other two elements of standing—injury and causation. Beyond that, the IDEA exhaustion requirement exists only for claims challenging the adequacy of special education, not for the claims here of equality of access to schools. Multiple courts in other mask-related litigation have rejected nearly identical standing and exhaustion arguments, and the district court did not abuse its discretion in doing the same.

Defendants' only remaining argument is that Plaintiffs do not have a likelihood of prevailing on the merits. But the district court correctly found that Plaintiffs were likely to succeed on their claims under Title II of the ADA and Section 504 of the Rehabilitation Act for multiple independent reasons. The court concluded that Section 280.31 fails to make public education "readily accessible" to disabled students, and prohibits school districts from providing education "in the

'most integrated setting' appropriate to the needs of qualified disabled students," as required by federal law and regulations. Defendants do not dispute that Section 280.31 in fact has the effect of preventing Plaintiffs' children from safely attending school. They argue instead that federal law prohibiting disability discrimination only prohibits intentional discrimination targeted at individuals with disabilities, and does not reach policies with a disparate impact. That argument is irreconcilable with this Court's precedents, with decades of history, and with the text and purpose of Title II and the Rehabilitation Act. As the Supreme Court has recognized, disability discrimination is more often the product of thoughtlessness than animus, and Defendants' view would gut federal disability law.

Disparate impact aside, the district court correctly found that Plaintiffs are likely to succeed on their claim that Section 280.31 violates Title II and the Rehabilitation Act by barring schools from providing reasonable accommodations. This is a separate theory of disability discrimination that does not depend on proof of disparate treatment or disparate impact. Defendants' argument that the "reasonable accommodation" requirement does not reach facially neutral policies is radical, wrong, and unprecedented. Here too, Defendants' theory would upend decades of antidiscrimination law, freeing schools and other public facilities to deny requests for interpreters from deaf parents or requests for ramps from individuals who use wheelchairs. And Defendants offer no evidence that allowing

schools to require masking would create an "undue burden" or cause a "fundamental alteration" in Iowa's educational program. Nor could they, given how many school districts across Iowa have required masks under various circumstances before Section 280.31 and after the district court's TRO.

To be sure, vaccines for children under 12 are on the way and hopefully will help beat back the scourge that is COVID-19. But that underscores the reason why school districts need Section 280.31 enjoined: So that they can respond to requests for reasonable modifications and can calibrate policies to best address ever-changing health conditions, including policies that set benchmarks for when universal masking is no longer required. Defendants' blanket ban on masking policies is at odds with the record, the risks, and the need for schools to have authority to adopt policies to best protect students, including disabled students who are the most vulnerable to COVID-19. This Court should affirm.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of a preliminary injunction for abuse of discretion, giving deference to the discretion of the district court." *Jet Midwest Int'l Co. v. Jet Midwest Group LLC*, 953 F.3d 1041, 1044 (8th Cir. 2020). This Court "generally will not disturb the district court's decision if it 'remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error

of judgment.'" *Id.* (citation omitted). "A district court has broad discretion when ruling on a request for preliminary injunction, and it will be reversed only for clearly erroneous factual determinations, an error of law, or an abuse of its discretion." *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017). "In every case, an appellate court must remain mindful as to the district courts being closer to the facts and parties." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'r*, 826 F.3d 1030, 1036 (8th Cir. 2016).

With respect to standing, this Court reviews the district court's legal conclusions *de novo*, *Miller v. Thurston*, 967 F.3d 727, 733 (8th Cir. 2020), and its findings on disputed jurisdictional facts for clear error, *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

ARGUMENT

I. Plaintiffs Have Standing To Challenge The Mask-Mandate Ban

"To establish standing, plaintiffs must show that they: (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." *Sarasota Wine Market LLC v. Schmitt*, 987 F.3d 1171, 1177-78 (8th Cir. 2021).

The district court correctly held that Plaintiffs satisfy all three requirements. *See* Add.41-44; R.Doc.32 at 14-17; Add.10-12; R.Doc.60 at 10-12. Defendants do not meaningfully dispute that Plaintiffs established injury-in-fact and traceability.

Instead, they argue only that the harm is not redressable, Br. 26-31, and that Section 280.31's savings clause deprives this Court of jurisdiction, Br. 23-25. These arguments fail.

A. Plaintiffs Have Suffered Actual and Imminent Injuries Because Their Children Have Been Deprived of Safe In-Person Educational Opportunities

To establish an injury-in-fact, a plaintiff must allege that they "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, *Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quotation marks omitted). The injury requirement "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Based on the record evidence—none of which is disputed by Defendants—there is no question that Plaintiffs have a personal stake in the outcome here.

1. It is settled law that parents, like Plaintiffs here, who assert "an injury to their children's educational interests and opportunities" satisfy Article III's injury-in-fact requirement. *Liddell v. Special Admin. Bd. of the Transitional Sch. Dist.*, 894 F.3d 959, 965 (8th Cir. 2018). Put simply, "[p]arents have standing to sue when practices and policies of a school threaten their rights and interests and those of their children." *Id.* at 965-66.

That is the case here. Relying on record evidence, the district court found that the mask-mandate ban "effectively forces medically vulnerable children to lose out on much-needed educational opportunities," including a safe "in-person learning option." Add.48; R.Doc.32 at 21; Add.36-40; R.Doc.32 at 9-13 (discussing evidence). For instance, after the mask-mandate ban took effect, S.V.'s parents pulled him out of school because his neurologist warned that he would face a substantial risk of more seizures and further brain damage if he were to contract COVID-19. JA97-8 ¶¶ 4, 8, 11, 15; R.Doc.3-6 at 1-2. H.J.F.R.'s parents too pulled him out of school because his rare, life-threatening breathing disorder put him at higher risk if he were infected with COVID-19. JA94-5 ¶¶ 3, 9; R.Doc.3-5 at 1-2.

The district court found that "not attending school with their peers risks these children's 'physical, psychological, emotional, and developmental well-being,'" and that "children with disabilities need … in-person instruction." Add.48; R.Doc.32 at 21 (quoting expert testimony). Like the parents in *Liddell*, Plaintiffs have standing because the mask-mandate ban injures "their children's educational interests and opportunities." 894 F.3d at 965.

2. The district court also found that the mask-mandate ban "substantially increases Plaintiffs' children's risk of severe illness or death, Add.46; R.Doc.32 at 19; *accord* Add.9,14; R.Doc.60 at 9, 14—an independent injury-in-fact. The

Supreme Court repeatedly has recognized that a substantial risk of harm satisfies Article III. *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2565 (2019). Applying this standard, courts in other mask-mandate-ban cases have held that the injury-in-fact requirement is readily satisfied because "the imminent threat of COVID-19 is 'real, immediate, and direct' in Plaintiffs' schools." *R.K. v. Lee*, No. 21-cv-00725, 2021 WL 4942871, at *9 (M.D. Tenn. Oct. 22, 2021).[3]

Here, too, the district court made factual findings that the "ban on mask mandates in schools substantially increases [Plaintiffs' children's] risk of contracting the virus that causes COVID-19 and that due to their various medical conditions they are at an increased risk of severe illness or death." Add.47; R.Doc.32 at 20; *accord* Add.2-7; R.Doc.60 at 2-7 (additional findings on studies and data). Thus, for the many Plaintiffs who had no choice but to send their children to school—because remote learning was not available,[4] or resulted in

[3] *E.g.*, *G.S. v. Lee*, No. 21-cv-02552-SHL, 2021 WL 4268285 at *6 (W.D. Tenn. Sept. 17, 2021) (plaintiffs had standing to challenge law allowing parents to opt out of any mask mandate); *S.B. v. Lee*, No. 3:21-cv-317, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021) (same).

[4] JA92-3 ¶¶ 2, 6, 11; R.Doc.3-4 (3-year-old with heart disease, periventricular leukomalacia, autism, cerebral palsy, cortical digital impairments, and optic nerve hypoplasia attending in-person because remote learning not offered for preschool students); JA94, 96 ¶¶ 3, 8, 13; R.Doc.3-5 at 1, 3 (10-year-old with congenital central hypoventilation syndrome attending in-person because remote learning not offered); JA119 ¶¶ 2-3, 5-6, 9; R.Doc.3-13 at 1 (11-year-old with asthma and ADHD attending in-person because remote learning not offered).

serious developmental, communications, or academic regression,[5] or did not accommodate the students' disabilities[6]—their children face a "substantial" increased risk to their health. Add.46; R.Doc.32 at 19.

The district court further found that "Iowa's mask mandate ban makes it not only dangerous for disabled or immunocompromised children to attend school," but also dangerous for remote students with siblings who attend in-person and who "risk carrying the virus back to their disabled or immunocompromised siblings." Add.39; R.Doc.32 at 12.

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[5] JA100-01 ¶¶ 4, 6, 12-14, 16; R.Doc.3-7 at 1-2 (5-year-old with Down's syndrome, hypothyroidism, and previous history of viral induced asthma attending in-person to address "serious negative consequences" of remote learning such as academic "regression in several areas" and "significant expressive communication regression"); JA103-04 ¶¶ 3, 9, 11; R.Doc.3-8 at 1-2 (10-year-old with Williams Syndrome attending in-person after year of remote learning yielded no gains in learning and increased behavioral problems); JA106-07 ¶¶ 3, 9, 12; R.Doc.3-9 at 1-2 (9-year-old with asthma, ADHD, and other disabilities attending in-person after dual learning program of online learning and homeschooling by parent lacked sufficient socialization with peers); JA113-15 ¶¶ 2, 4-5, 8, 12-14, 16; R.Doc.3-11 at 1-3 (11-year-old with Heterotaxy and 11-year-old with hypertension, seizures and range of other disabilities, including ADHD, attending in-person after struggling "with mental health as well as academics with the online program"); JA117-18 ¶¶ 2, 4, 8; R.Doc.3-12 (6-year-old with asthma attending in-person after "mental health suffered greatly" from remote learning).

[6] JA109-11 ¶¶ 3, 8, 13; R.Doc.3-10 at 1-3 (nonverbal 5-year-old with many health conditions and developmental delays attending school in-person because of child's inability to self-pace as required for Edgenuity, a third-party vendor providing remote learning through pre-recorded videos and parental oversight).

Defendants "offered no evidence to contradict" any of these findings in the district court. Add.15; R.Doc.60 at 15. Nor did they "dispute Plaintiffs … have suffered an injury in fact." Add.10-11; R.Doc.60 at 10-11. Likewise, in this Court, they do not dispute that Plaintiffs suffered the injuries discussed above. The reason is clear: Plaintiffs have actual and imminent injuries under Article III.

B. Plaintiffs' Injuries Are Traceable to the Mask-Mandate Ban

To satisfy the traceability requirement, plaintiffs "must establish that their injury is fairly traceable to the challenged conduct of the defendant." *Liddell*, 894 F.3d at 966 (citations omitted). This is a lower threshold than establishing "[p]roximate causation," which 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); *see Parsons v. United States*, 801 F.3d 701, 715 (6th Cir. 2015) ("[C]ausation to support standing is not synonymous with causation sufficient to support a claim.").

Where, as here, a plaintiff's injury can be traced to "the predictable effect of Government action on the decisions of third parties, … traceability is satisfied." *Dep't of Commerce*, 139 S.Ct. at 2566 (cleaned up); *Parsons*, 801 F.3d at 714 (traceability satisfied if defendant's conduct is "motivating factor in the third party's injurious actions").

Here, the undisputed record evidence shows that Plaintiffs' injuries are fairly traceable to enforcement of the mask-mandate ban. Before the ban, many school districts had masking requirements, allowing for safer in-person instruction. JA149 & n.17; R.Doc.17 at 8. After the ban took effect, Defendant Lebo "made it clear that violators of section 280.31 will 'be referred to the State Board of Education' and risk a loss of funding." Add.34; R.Doc.32 at 7. Defendant Reynolds warned that she would "hold strong and vigorously enforce" the statute. *Id.* Predictably, school districts that had mask mandates—including Des Moines, West Des Moines, Waukee, Sioux City, Urbandale, Linn-Mar, and Norwalk—rescinded them. JA149 & n.17; R.Doc.17 at 8. And, predictably, mask usage went down, and COVID-19 rates in schools went up. Add.35; R.Doc.32 at 8; JA184-86 ¶¶ 3(a)-(h); R.Doc.28 at 2-4; JA266-67; R.Doc.37 at 12-13; JA514-16 ¶¶ 5-9; R.Doc.48-16 at 4-6; JA586-612; R.Doc.4:20-4:25.

Absent the ban, schools would have continued to have discretion to implement mask mandates, including schools attended by Plaintiffs. JA25-26 ¶ 53 & nn.50-51; R.Doc.1 at 18-19. The injury is plainly traceable, and courts in similar mask-mandate ban lawsuits repeatedly have found traceability. *R.K.*, 2021 WL 4942871, at *10; *G.S. v. Lee*, 2021 WL 4268285, at *9 (W.D. Tenn. Sept. 17, 2021); *S.B. v. Lee*, 2021 WL 4755619, at *9 (E.D. Tenn. Oct. 12, 2021).

Again, in the district court, Defendants did not contest these factual findings, and did "not dispute Plaintiffs … have suffered an injury in fact or that it is fairly traceable to Defendants' conduct in enforcing Iowa Code section 280.31." Add.10-11; R.Doc.60 at 10-11. Likewise, in this Court they do not argue that the injuries are not traceable. They are.

C. The Record Confirms That The Harm Is Redressable

1. To satisfy the redressability requirement, a plaintiff need only show that it will "be likely, as opposed to merely speculative," that a favorable decision would redress the harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *accord Liddell*, 894 F.3d at 966 (similar).

Here, Plaintiffs showed that redress was more than "likely." Indeed, after the district court entered the TRO, numerous school districts across the state took "swift action" and adopted universal masking. Add.11; R.Doc.60 at 11. The record evidence proved that this included eight of the ten school districts where Plaintiffs' children attended school (Des Moines, Iowa City, Linn-Mar, Davenport, Waterloo, Decorah, Ankeny, and Johnston) as well as sixteen other school districts (Cedar Rapids, Ames, Urbandale, West Burlington, West Des Moines, Grinnell-Newburg, Muscatine, Cedar Falls, Burlington, Fort Dodge, Fairfield, Marshalltown, Mount Vernon, Boone, Van Buren, and College Community). JA409-13 ¶¶ 3(a)-3(x); R.Doc.48-2 at 1-5. As the district court found, "many of

the largest school districts in the state, as well as several smaller districts, quickly acted to adopt universal masking policies to ensure the protection of almost one-third of Iowa's public school children." Add.11; R.Doc.60 at 11.

This establishes redressability: "Most of the Individual Plaintiffs acknowledge that with universal masking policies in effect in their children's schools their children can now engage in in-person learning without sacrificing their safety and education." *Id*. The fact that the preliminary injunction has actually abated some of the Plaintiffs' injuries suffices to establish the injury is redressable. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013) (redressability satisfied even where there is only "some possibility that the requested relief [would] prompt [reconsideration of] the decision that allegedly harmed" plaintiffs (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007))).

2. Defendants acknowledge that, "since the district court issued its temporary restraining order, some schools in Iowa have imposed a universal mask mandate. And this includes some of the schools attended by Plaintiffs' children." Br. 28. Nevertheless, Defendants argue that redressability is not satisfied because only an "injunction requiring everyone in their children's schools to wear a mask" would provide Plaintiffs relief. *Id.* at 26. They further argue that because not all districts have imposed mask mandates the "injunction did not remedy their harms." *Id.* at 28. Defendants are incorrect.

First, it is black letter law that, for "a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of the suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185-86 (2000). Enjoining enforcement of Section 280.31 clearly abated the harm. As noted, promptly after entry of the TRO, at least two dozen Iowa school districts implemented mask mandates. Add.7; R.Doc.60 at 7. Thus, Plaintiffs' "theory of standing … does not rest on mere speculation about the decisions of third parties" but "relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce*, 139 S.Ct. at 2566.

Second, that some districts have not yet adopted mask mandates does not render the harm here non-redressable. The Supreme Court recently confirmed that a remedy need not completely redress an injury to meet the redressability requirement. In *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 797 (2021), the Court held that a plaintiff seeking only nominal damages could satisfy redressability, even though "a single dollar often cannot provide full redress, but the ability to effectuate a partial remedy satisfies the redressability requirement." *Id.* at 801 (quotation marks omitted). And, in any event, if the injunction redressed the harm for even one Plaintiff—and it is undisputed that it did, Br. 28—that is sufficient to

provide this Court jurisdiction to resolve this dispute. *Dep't of Commerce*, 139 S.Ct. at 2565 (only one plaintiff needs standing).[7]

D. Section 280.31's Savings Clause Does Not Defeat Standing

Defendants alternatively argue that the injunction here is unnecessary because "section 280.31 permits schools … to mandate the wearing of masks if it 'is required by … any other provision of law,'" and "thus doesn't prevent schools from complying with the ADA and section 504." Br. 18. This argument is directly contrary to Defendants' position that "the ADA and section 504 do not require schools to impose—or to have the discretion to impose—universal mask mandates." *Id.* at 19. It is also directly contrary to their recognition that after Section 280.31's enactment "schools in Iowa did not believe that they were allowed to implement mask mandates." *Id.* at 24. And it is directly contrary to

[7] Defendants have not challenged The Arc of Iowa's associational standing. "An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Kuehl v. Sellner*, 887 F.3d 845, 851 (8th Cir. 2018). That standard is satisfied: The Arc's members, including several of the Plaintiff parents, have standing to sue in their own right; this lawsuit furthers The Arc's purpose of advocating for people with disabilities and their families; and claims for injunctive relief "do not require the participation of individual members." *Arkansas Med. Soc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993).

their threats that schools implementing mandates did so at their peril. Add.34; R.Doc.32 at 7; JA150-51 & n.25; R.Doc.17 at 9-10.

In any case, Defendants' internally inconsistent argument does not deprive this Court of jurisdiction to review the lawfulness of the mask-mandate ban. For starters, Defendants' argument goes to the merits—whether Section 280.31 is unlawful—not standing. This Court repeatedly has held that "[s]tanding analysis does not permit consideration of the actual merits of a plaintiff's claim." *Graham v. Catamaran Health Sols. LLC*, 940 F.3d 401, 407 (8th Cir. 2017); *accord Am Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) (similar). "Therefore if a claim presents a question of statutory interpretation under which one interpretation leads to possible relief and the other does not, standing exists." *Graham*, 940 F.3d at 408. Here, Plaintiffs' claims present a question under which Plaintiffs' view would lead to relief, and Defendants' view would not; therefore, standing exists.

More fundamentally, laws and executive orders cannot be insulated from judicial review simply by adding a savings clause. *Cf. City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) ("[T]he Administration's interpretation would simply lead us into an intellectual cul-de-sac. If 'consistent with law' [provision of executive order] precludes a court from examining whether the Executive Order is consistent with law, judicial review is a meaningless

exercise, precluding resolution of the critical legal issues."). Indeed, courts in other mask-mandate ban litigation have rejected similar too-clever efforts to evade judicial review. *S.B.*, 2021 WL 4755619, *9 (rejecting "shrewd argument" that would preclude judicial review of mask law). This Court should do the same.

II. The IDEA's Exhaustion Requirement Does Not Apply

Defendants alternatively seek to evade review of the merits, arguing that "Plaintiffs failed to exhaust their administrative remedies under the Individuals with Disabilities Education Act ('IDEA')." Br. 31. Following straightforward Supreme Court precedent, the district court correctly held that IDEA exhaustion is not required for Plaintiffs' ADA and Rehabilitation Act claims here. Add.13-14; R.Doc.60 at 13-14. Other courts in mask litigation likewise have rejected any exhaustion requirement. *E.g.*, *G.S.*, 2021 WL 4268285, at *9; *R.K.*, 2021 WL 4942871, at *15; *S.B.*, 2021 WL 4755619, at *7.

A. *Fry*'s Test for IDEA Exhaustion Confirms That It Is Not Required Here

The IDEA ensures that physically or intellectually disabled students receive "special education and related services" by requiring states to provide a free appropriate public education (FAPE). *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 748 (2017). "Under the IDEA, an 'individualized education program' called an IEP for short, serves as the 'primary vehicle' for providing each child with the promised FAPE." *Id.* at 752. A plaintiff can bring claims for the denial of a FAPE

under the IDEA so long as the plaintiff first exhausts his or her administrative remedies under IDEA. 20 U.S.C. § 1415(*l*). But when an ADA or Section 504 claim's "remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required" because "the plaintiff could not get any relief from those procedures." *Fry*, 137 S.Ct. at 754.

To determine which claims fall under the IDEA, "a court should look to the substance, or gravamen, of the plaintiff's complaint," not whether a plaintiff's claim may have "educational consequences." *Id.* at 572. Where the "essence" of a lawsuit "is equality of access to public facilities, not adequacy of special education," exhaustion under the IDEA is unnecessary. *Id.* at 756, 758. To determine whether the gravamen of a case falls within the IDEA, the Supreme Court directed courts to assess two questions: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* at 754. If the answer to both questions is *yes*, the IDEA is inapplicable and exhaustion is not required.

The district court correctly held that the answer to both questions in this case is *yes*. Add.13-14; R.Doc.60 at 13-14. *First*, the court found that "Plaintiffs could bring their claims for the alleged discriminatory conduct occurring at another

public facility, like a library." *Id.* Plaintiffs would experience the same risks to their health in other public facilities, and could bring the same claim for lack of equal access to a library, a doctor's office, or an airplane, if those facilities were banned from requiring masks. As one court rejecting a similar exhaustion argument explained, "G.S. could have a need to attend a form of therapy at a public gym, or S.T. could need to access the public library that could only be obtained with protection from exposure to COVID-19." *G.S.*, 2021 WL 4268285, at *10; *S.B.*, 2021 WL 4755619, at *6 ("The crux of Plaintiffs' allegations is safe access to public, brick-and-mortar government buildings and not the denial of a FAPE.").

Second, the district court concluded that "an adult, such as a teacher or a staff member at a public school, could also bring the claims alleged by Plaintiffs." Add.13-14; R.Doc.60 at 13-14. Adults with disabilities that make them vulnerable to severe complications from COVID-19, including teachers, staff, and parents, are similarly endangered by Section 280.31, and could equally sue to be able to access the school safely. Again, as *G.S.* explained in rejecting IDEA exhaustion, "a teacher with similar health concerns within a school setting could raise a reasonable accommodation claim if she needed to be protected from unmasked children." *G.S.*, 2021 WL 4268285, at *11; *see also S.B.*, 2021 WL 4755619, at

*6 ("A medically compromised teacher, custodian, parent, grandparent, or visitor could bring an identical grievance in this case.").

Defendants' argument that "the proper level of comparison [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*," Br. 37 (emphasis added), rewrites *Fry*'s questions and is obviously wrong. A teacher or visitor could never bring a claim if the inquiry were phrased in that way, and *Fry* held that whether a teacher or visitor could bring a claim is the relevant inquiry. *See Fry*, 137 S.Ct. at 758 (identifying relevant conduct for the hypothetical question analysis as "a public facility's policy of precluding service dogs"). Defendants' effort to rewrite *Fry*'s question about libraries and other public accommodations has the same flaw. Br. 37.

Based on the straightforward test from *Fry*, the district court correctly held that "Plaintiffs need not fulfill the administrative exhaustion requirement of the IDEA because 'the gravamen of Plaintiffs' Complaint is not for the denial of a FAPE.'" Add.14; R.Doc.60 at 14.

B. Defendants' Remaining Exhaustion Arguments Fail

Defendants argue that, because Plaintiffs assert that enforcement of Section 280.31 effectively excludes their disabled children from receiving an education, they necessarily allege the denial of a FAPE. Br. 34-35. But that proves too much.

As the Supreme Court recognized in *Fry*, "even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to [be] relate[d] in some way to [the child's] education"—the "school's conduct toward [the] child … might injure [the child] in ways unrelated to [the] FAPE." 137 S.Ct. at 754. The district court correctly held that that's the case here: "Plaintiffs do not seek the type of special education services that the IDEA guarantees. Rather, Plaintiffs seek to allow their public school districts the discretion to impose mask mandates and provide their children with 'non-discriminatory access to public institutions' under the ADA and the Rehabilitation Act." Add.14; R.Doc.60 at 14.

Plaintiffs do not seek to modify an IEP or educational placement; indeed, a number of plaintiffs do not even have an IEP. *See Moore v. Kansas City Pub. Sch.*, 828 F.3d 687, 692 (8th Cir. 2016) (concluding under *Fry* that the gravamen of complaint was not denial of a FAPE where plaintiff "did not request any change or amendment to [student's] IEP or educational placement"). That makes this case unlike *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944 (8th Cir. 2017), on which Defendants rely. Br. 33. In *J.M.*, the claims were "based on the failure to implement J.M.'s IEP" and "fail[ure] [to] provide proper sufficient supportive services to permit J.M. to benefit from instruction." *Id.* at 949.

Defendants' argument that the Court should convert Plaintiffs' claims to ones for denial of a FAPE because four Plaintiffs started to seek individualized

solutions is meritless. *See* Br. 37-38. As noted above, several Plaintiffs do not have IEPs.[8] And "the reasonable modification inquiry [under Title II of the ADA] is highly fact-specific and varies depending on the circumstances of each case." *Bahl v. Cnty. of Ramsey*, 695 F.3d 778, 784-85 (8th Cir. 2012); *see also Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("[T]he determination of whether a particular modification is "reasonable" involves a fact-specific, case-by-case inquiry"). That some of the Plaintiffs sought modifications that match the facts of their particular disability and circumstance is a common feature of requests for reasonable modifications under federal disability rights laws, and does not transform a discrimination claim into a complaint about the sufficiency of an IEP that could be remedied by the IDEA.

Finally, the IDEA's administrative remedies could not possibly provide adequate relief for Plaintiffs' charge of disability discrimination, which independently supports the absence of an exhaustion requirement, because Plaintiffs' claims are systemic in nature and seek only injunctive relief. *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 593 (8th Cir. 2018). In *Barron v. S.D. Bd. of Regents*, this Court rejected an exhaustion requirement because

[8] Defendants' citations to the record misleadingly suggest that all four children cited have IEPs. *Compare* Br. 38 (suggesting Preston and Geest children have IEPs and citing JA115 & JA118) *with* JA115; R.Doc.3-11 at 3 (Preston) (no reference to IEP) & JA118; R.Doc.3-12 at 2 (Geest) (same).

"adequate relief likely could not have been obtained through the administrative process." 655 F.3d 787, 792 (8th Cir. 2011). So too here. An administrative law judge, with the limited authority to adjudicate a proposal or refusal to "initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child[,]" Iowa Admin. Code r. 281-41.503; *see* Iowa Admin. Code r. 281-41.507(a), could not enable a school district to require masking, nor could an ALJ enjoin Defendant Governor Reynolds from enforcing Section 280.31. *See, e.g.*, *Tindal v. Norman*, 427 N.W.2d 871, 873 (Iowa 1988).

III. The District Court Did Not Abuse Its Discretion In Holding That Plaintiffs Have a Likelihood of Prevailing on the Merits of Their ADA and Rehabilitation Act Claims

District courts consider four factors in deciding whether to grant a preliminary injunction, including "the probability that [the] movant will succeed on the merits." *Jet Midwest*, 953 F.3d at 1044.

The district court correctly held that Plaintiffs are likely to prevail on their claim that Section 280.31 violates Title II of the ADA and Section 504 of the Rehabilitation Act. *First*, Section 280.31 has an impermissible disparate impact on children with disabilities that put them at risk of severe illness should they contract COVID-19, because Section 280.31 makes it uniquely unsafe for such children to attend school. *Second*, Section 280.31 independently violates Title II and Section 504 by prohibiting schools from adopting the reasonable modifications or

accommodations that both statutes require. Add.15; R.Doc.60 at 15; Add.53; R.Doc.32 at 26.

A. Section 280.31 Violates the ADA and the Rehabilitation Act Because It Has the Effect of Making In-Person School Dangerous for Children With Disabilities

The district court concluded that Section 280.31 fails to make public education "readily accessible" to disabled students and prohibits school districts from providing education "in the 'most integrated setting' appropriate to the needs of qualified" disabled students. Add.15; R.Doc.60 at 15 (citing 28 C.F.R. §§ 35.130(d), 35.150 and 34 C.F.R. § 104.34(a)). Defendants do not dispute these findings. Given the overwhelming evidence that allowing masking policies enables Plaintiffs' children to more safely attend school, Defendants' concession (and waiver) is unsurprising.

Instead, Defendants contend that Title II and the Rehabilitation Act only apply to policies that are motivated by animus against disabled people or expressly target disabled people, not policies that are facially "neutral" but have a disparate impact. *See* Br. 39-41. That is wrong because it is (1) directly contrary to this Court's precedents; (2) would upend decades of settled law; and (3) contravenes the text and purpose of both statutes.

1. In *DeBord v. Bd. of Educ.*, 126 F.3d 1102, 1105 (8th Cir. 1997), this Court held that "[d]isparate treatment is not the only way to prove unlawful

discrimination" under Title II and the Rehabilitation Act. Rather, a plaintiff can alternatively show that a facially neutral "policy has the effect of discriminating against the disabled or the severely disabled," such as by showing that the "facially neutral policy" draws distinctions "on the basis of any trait that the disabled or severely disabled are less or more likely to possess." *Id.* The Court explained that Congress was concerned in the ADA not just about intent, but "discriminatory effects." *Id.* at 1106. Although *DeBord* ultimately affirmed summary judgment against plaintiffs, it did so because they "ha[d] not *tried* to show [that] the policy"—a ban on administering drug dosages at school that exceeded the recommended maximum in the Physicians' Desk Reference—"has the effect of discriminating against the disabled." *Id.* at 1105 (emphasis added).

The Court's decision in *Durand v. Fairview Health Servs.*, 902 F.3d 836 (8th Cir. 2018), confirms the point. *Durand* held that Title II and the Rehabilitation Act require public institutions and recipients of federal funding to provide an otherwise qualified disabled individual with "meaningful access to the benefit" at issue, because one goal of the ADA was "to remedy … discriminatory effects" from facially neutral barriers facing disabled people. *Id.* at 842 (cleaned up); *see also Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968, 972 (8th Cir. 1999) (recognizing availability of disparate impact under Rehabilitation Act

but finding no "basis for concluding that the school district's policy has a discriminatory impact upon the disabled").

Defendants suggest that *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754 (8th Cir. 1998), is to the contrary, Br. 39-43, but it is not. That decision merely relied on *DeBord* to reject a challenge to the same drug dosage policy that was at issue in *DeBord*. *Id.* at 756. *Davis* quotes *DeBord*'s language about how the policy "applies to all students regardless of disability." 126 F.3d at 1105; *see* Br. 40. But it doesn't question *DeBord*'s express conclusion that if such a generally applicable policy had a different *impact* on disabled students, the policy would violate the law. *Id.* at 1105-06. Section 280.31, which applies differently to disabled students by making them risk disease and severe health consequences in comparison to their non-disabled peers, discriminates under the test from *DeBord* and *Durand*.

2. *DeBord* and *Durand* are correct. They are aligned with holdings from nine other circuits over the last 34 years recognizing that the plain language and purpose of federal anti-discrimination laws mandates disparate impact liability.[9]

[9] *Ruskai v. Pistole*, 775 F.3d 61, 78-79 (1st Cir. 2014); *Disabled in Action v. Bd. of Elections in the City of N.Y.*, 752 F.3d 189, 196-97 (2d Cir. 2014); *Nathanson v. Medical Coll. of Pa.*, 926 F.2d 1368, 1384 (3d Cir. 1991); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502-04, 510 (4th Cir. 2016); *Brennan v. Stewart*, 834 F.2d 1248, 1261-62 (5th Cir. 1988); *McWright v. Alexander*, 982 F.2d 222, 228-29 (7th Cir. 1992); *Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (9th Cir. 2008); *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), cert. denied, 539 U.S.

Defendants' failure to acknowledge—much less address—any of these cases confirms their position is a radical departure from decades of established law.

Defendants likewise ignore *Alexander v. Choate*, 469 U.S. 287 (1985). *Choate* explained that "[d]iscrimination against the handicapped was perceived by Congress [in enacting the Rehabilitation Act] to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." 469 U.S. at 295. The Court observed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent," citing the example of architectural barriers. *Id.* at 296-97. Although the Court formally left open the question whether the Rehabilitation Act reached conduct with an "unjustifiable disparate impact" because it was unnecessary to decide the case, *id.* at 299, it is impossible to square Defendants' argument with *Choate*'s reasoning.

3. The plain text of Title II and the Rehabilitation Act also forecloses Defendants' interpretation. Title II states that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or

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926 (2003); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1268-69 (D.C. Cir. 2008).

be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Rehabilitation Act is materially identical. 29 U.S.C. § 794(a).[10]

Both texts focus on the *impact* on the disabled individual, not the *intent* of those behind the law or policy—whom the text does not mention. "[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015); *see also Tennessee v. Lane*, 541 U.S. 509, 527 (2004) (holding, in the context of interpreting Title II to require reasonable accommodations, that "by reason of" encompasses impacts of facially neutral policies like the absence of interpreters).

Both statutes include additional text confirming that they reach policies with a disparate impact. The ADA's findings and purpose section explains that

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria,

[10] "No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794.

> segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a). Every item but the first involves disparate impact (or a reasonable accommodation). And Congress's stated goal was to "address" the entire array of identified discrimination. 42 U.S.C. § 12101(b).

As for the Rehabilitation Act, § 794(c) states that § 794(a) requires "significant structural alterations to … existing facilities" to avoid discrimination, except in the limited circumstances exempted by § 794(c). 29 U.S.C. § 794(c). Since the set of structural barriers adopted for the purpose of denying access to people with disabilities is very likely a null set, § 794(c) confirms that § 794(a) reaches disparate impact.

Defendants offer essentially no textual analysis. They note that the Supreme Court is currently considering whether the Rehabilitation Act reaches disparate impact liability. Br. 42 (citing *CVS Pharmacy, Inc., et al. v. Doe*, No. 20-1374 (U.S. July 2, 2021)). The Supreme Court took that case after a recent outlier Sixth Circuit decision split with ten other circuits and rejected disparate impact liability under the Rehabilitation Act. But given this Court's precedent recognizing disparate impact liability and the fact that *CVS* does not even involve Title II of the ADA, the district court did not abuse its discretion in following existing law. Defendants also point to *Alexander v. Sandoval*, 532 U.S. 275 (2001), which rejected disparate impact claims under a different statute, Title VI. Br. 42. But

Sandoval is not relevant because its holding turned on purposive and historical considerations unique to Title VI. *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 735 (9th Cir. 2021); *see also Choate*, 469 U.S. 294 n.11 (Title VI and the Rehabilitation Act should not be read "in pari materia").

In short, the district court did not abuse its discretion in holding that Plaintiffs are likely to succeed in showing that Title II and the Rehabilitation Act reach disparate impact. Because Defendants did not dispute that Section 280.31 has a disparate impact on the basis of disability, and make no such argument here, the Court may affirm the injunction on this basis alone.

B. Section 280.31 Violates the ADA and the Rehabilitation Act's Reasonable Modification Requirement

Even if Title II and the Rehabilitation Act did not reach disparate impact, the Court has an independent basis to affirm. Both statutes separately require covered institutions to make "reasonable modifications," also known as "reasonable accommodations," to enable equal access by people with disabilities. As the district court correctly held, giving schools the discretion to require masking in appropriate settings is a reasonable modification within the meaning of Title II and the Rehabilitation Act.

1. Title II and the Rehabilitation Act Require Reasonable Modifications

A covered entity violates Title II of the ADA and the Rehabilitation Act if it "(1) intentionally discriminate[s] against the disabled, (2) engage[s] in conduct that had an unlawful disparate impact on the disabled, *or* (3) fail[s] to provide a reasonable accommodation for the disabled." *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 919 (10th Cir. 2012) (Gorsuch, J.) (emphasis added). Although Defendants offer a cursory argument to the contrary (Br. 42), it is well-established that "[a] plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim." *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

This is because a failure-to-accommodate, in and of itself, means that disabled individuals are excluded "by reason of" their disability. 29 U.S.C. § 794; 42 U.S.C. § 12132. Then-Judge Gorsuch cited the example of a blind woman who needs a seeing-eye dog but whose apartment complex has a "no pets" policy: "[W]ithout an accommodation, those individuals cannot take advantage of the opportunity … to live in those housing facilities," and "they cannot *because* of conditions created by their disabilities." *Cinnamon Hills*, 685 F.3d at 923 (emphasis original).

The Supreme Court and this Court's precedent dispose of Defendants' argument. In *Tennessee v. Lane*, the Supreme Court confirmed that Title II imposes a "duty to accommodate," citing the example of structural barriers that are not the result of intentional discrimination, because Congress "[r]ecogniz[ed] that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion." 541 U.S. at 531-32. Likewise, this Court has squarely held that "public entities discriminate in violation of the Rehabilitation Act if they do not make reasonable accommodations to ensure meaningful access to their programs." *DeBord*, 126 F.3d at 1106 (citing *Choate,* 469 U.S. at 301). *Debord* and *Davis* did leave open the question whether *Title II* requires a reasonable modification in the absence of other evidence of discrimination. *See* Br. 42; *DeBord*, 126 F.3d at 1106; *Davis*, 138 F.3d at 756-57. But *Tennessee v. Lane* subsequently held that it does. So did this Court in *Layton v. Elder*, concluding that a failure to accommodate wheelchair access to the county courthouse violated the ADA and Rehabilitation Act, even without intentional discrimination. 143 F.3d 469, 472 (8th Cir. 1998).[11]

[11] The Supreme Court's pending *CVS* case concerns only the disparate impact theory, and petitioners there do not dispute that failure-to-accommodate claims are distinct from disparate impact and available in the absence of evidence of discriminatory intent. Brief for Petitioners at 23-24, *CVS v. Doe*, No. 20-1374 (U.S. Sept. 3, 2021).

Defendants do not cite a single decision of any court adopting their view of reasonable accommodation, and it is hard to overstate just how extreme and erroneous that view is. Even the Sixth Circuit—the only circuit to hold that the Rehabilitation Act does not reach disparate-impact claims—acknowledges that "[a] claim based on a denial of a reasonable accommodation differs from a disparate-impact claim" and that the "denial of [a] requested accommodation may [itself] amount to unlawful discrimination." *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 243 (6th Cir. 2019). Defendants' theory would mean that a veteran with a mobility disability could lawfully be excluded from a county courthouse without wheelchair access, *but see Layton*, 143 F.3d at 472, or deaf parents could lawfully be denied the services of a sign-language interpreter to allow them to attend parent-teacher conferences, *but see Rothschild v. Grottenthaler*, 907 F.2d 286, 289 (2d Cir. 1990), or a blind student could lawfully be denied access to required textbooks needed to attend college, *but see Payan,* 11 F.4th at 729. This is not the law.

2. Allowing Schools to Impose Mask Mandates Is a Reasonable Modification

A public entity is required to "make reasonable modifications in policies … when the modifications are necessary to avoid discrimination on the basis of disability." *DeBord*, 126 F.3d at 1105 (quoting 28 C.F.R. § 35.130(b)(7)); *see also* 28 C.F.R. § 35.150. A modification is reasonable unless "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. "The reasonable modification inquiry is highly fact-specific and varies depending on the circumstances of each case." *Bahl*, 695 F.3d at 784-85. The district court did not abuse its discretion in conducting this fact-specific inquiry and determining that, in light of public health guidance and high COVID-19 rates, masking policies, including "universal masking policies[,] are a reasonable modification that will allow [disabled] children the meaningful access to education that they seek." Add.17; R.Doc.60 at 17.

a. Allowing Schools to Make Masking Decisions Would Accommodate Plaintiffs' Children's Disabilities By Making It Safer to Attend School

As an initial matter, Defendants do not dispute the district court's findings that Section 280.31 prevents Plaintiffs' children from safely attending school, and that restoring schools' ability to impose mask mandates would be a key step to accommodate Plaintiffs' children's disabilities and enable them to more safely attend school. The district court found, and Defendants do not dispute, that Section 280.31's ban on mask mandates "substantially increases Plaintiffs' children's risk of contracting SARS-CoV-2," "which in turn substantially increases Plaintiffs' children's risk of severe illness or death." Add.46; R.Doc.32 at 19. As a result, the court found, and Defendants do not dispute, that "in-person learning at

schools [is] available only under conditions that are dangerous to children with disabilities." Add.52; R.Doc.32 at 25.

The district court further found, and Defendants do not dispute, that requiring masks "will allow [Plaintiffs'] children the meaningful access to education that they seek." Add.17; R.Doc.60 at 17. The court found that "multi-layer cloth masks are effective at reducing transmission," and that "it is simply insufficient for only those with special health needs to wear masks to be protected." Add.5-6; R.Doc.60 at 5-6; *see also* Add.46; R.Doc.32 at 19. "The recommendations by the CDC and the AAP and other medical organizations support th[e] conclusion" that masks are a "reasonable modification." Add.17; R.Doc.60 at 17; *see also* JA61-62 ¶¶ 23-24; R.Doc.3-1 at 8-9 (detailing medical groups supporting universal masking in schools). Academic studies reinforce the efficacy of masks to protect students and the community from COVID-19. JA62 ¶ 25; R.Doc.3-1 at 9; JA78-79 ¶¶ 23-24 & Figure 2; R.Doc.3-2 at 7-8; JA413-14 ¶¶ 6-8; R.Doc.48-2 at 5-6.

To the extent Defendants are claiming that the district court's order requires all schools to impose a universal mask mandate, Br. 30, 42, that characterization is incorrect. The court's injunction merely "restore[s] local public school district's *discretion* to act in the best interests of public health" and to make time-sensitive fact-specific determinations about how to best meet the requirements of federal

disability laws, taking into account factors such as the incidence of infection in the local community, architectural design of school facilities, whether the school has students vulnerable to infection, and the availability of other safety protocols. Add.7; R.Doc.60 at 7 (emphasis added); Add.23-24; R.Doc.60 at 23-24.

The injunction allows schools to calibrate any masking requirements to account for this range of fact-specific circumstances, including whether students are ultimately vaccinated. The varying response to the injunction demonstrates as much. Some schools have adopted universal masking for grades K-12, JA409-13 ¶¶ 2-3; R.Doc.48-2 at 1-5, while others adopted masking only for lower grades like K-6, *see id.*, and others for a limited duration until vaccines are available to children under 12, JA499 ¶ 2; R.Doc.48-10 at 1. For some schools, masking in particular classrooms, bathrooms, and in the hallways might be sufficient to ensure equal access for students with disabilities, and thus adequate to comply with the ADA. For other schools, *e.g.,* a small school without any students at risk of severe illness from COVID-19, no reasonable modifications might be required. But until the district court enjoined Section 280.31, Iowa law foreclosed even the most obvious and narrowly targeted mask requirements.

b. The District Court Did Not Abuse its Discretion in Rejecting Defendants' Undue Burden or Fundamental Alteration Arguments

Defendants advance four theories as to why a mask mandate is unreasonable as an undue burden or a fundamental alteration. None holds water. Indeed, when the reasonable modification that is requested is merely for the school to follow public health guidelines, Defendants have little room to argue that such a request is not reasonable.

First, Defendants assert in a conclusory sentence that masking requirements create "administrative" and "potential financial and legal burdens." Br. 44. But, as the district court found, Defendants "provided no evidence showing that the universal mask mandates impose 'undue financial and administrative burdens." Add.17; R.Doc.60 at 17. Though Defendants bear the burden of proof, 28 C.F.R. § 35.150(a)(3), they do not cite any evidence of such undue burdens on appeal, nor do they argue that the district court's conclusion was an abuse of discretion.

Defendants assert that mask requirements impose "potential" burdens on teachers and school administrators by "distracting" them from core educational duties. Br. 44. But nothing in the record suggests teachers and administrators find mask mandates "distracting." No Defendant school district makes this argument. To the contrary, most adopted masking and none appeal the decision below. As the district court found, there is "little harm to Defendants in enjoining section

280.31 and permitting the individual public school districts to return to the way in which they were operating prior to its passage by leaving a universal mask mandate to their discretion." Add.55; R.Doc.32 at 28. That factual finding was not erroneous, much less clearly erroneous.

Second, Defendants assert that the injunction fundamentally alters Iowa's education program because it prevents the state from making a "policy decision" to ban local decision-making on the "highly contentious and emotional issue of masks." Br. 44. The relevant question is not whether a state legislature's policy preference is frustrated, but whether an otherwise reasonable modification would fundamentally alter the program—in this case public education. And the record evidence shows that during the 2020-2021 school year, over a third of public school districts in Iowa, enrolling nearly 70% of public school students in the state, enforced mask requirements without fundamentally altering the provision of education. JA409-13 ¶¶3-4; R.Doc.48-2 at 1-5. School districts across the country, including in Illinois, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, are all permitted to, and have successfully implemented, masking requirements without fundamentally altering their educational programs. JA386; R.Doc.48-1 at 14. Since the court issued the TRO in this case, at least twenty-four school districts in Iowa have adopted mask requirements. Such a widely-deployed public health measure cannot be a fundamental alteration.

Third, Defendants contend that a universal masking requirement is unreasonable because "it infringes on the rights of third parties—other students, teachers, and visitors to the school." Br. 44. Defendants did not articulate below and do not on appeal articulate any specific right violated by a mask requirement. As the district court explained, "courts have routinely upheld the ability of schools to implement health requirements that intrude on individuals' rights." Add.18; R.Doc.60 at 18 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 16 (1905) and *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002)). This conclusion was well supported: Iowa schools routinely impose various requirements on students, teachers, and visitors to facilitate functioning and equitable learning environments. Iowa Code § 139A.8(2)(b)-(e) (requiring proof of immunizations for enrollment in school); Iowa Admin. Code r.641-7.6 (agency regulations requiring proof of immunization for students enrolled in elementary, secondary, and other types of schools).[12]

[12] Defendants' cases about third-party harms are inapposite. Br. 44. Two stand for the proposition that it is not a reasonable modification to require employers to fire other employees or violate union agreements in order to accommodate an employee in need of light duty. *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Mason v. Frank*, 32 F.3d 315, 320 (8th Cir. 1994). And the third cuts against Defendants: the employer required that employees in the plaintiffs' department not wear nail polish, which the court described as a reasonable accommodation. *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999).

Fourth, Defendants argue that "there are disability interests on both sides" of this case, citing affidavits from parents of disabled children who cannot mask. Br. 45. Plaintiffs agree that some children with disabilities cannot mask, but the relief Plaintiffs sought and won does not require them to. Add.19; R.Doc.60 at 19. The district court's preliminary injunction, by its own terms, "does not require universal mask mandates in schools and certainly not without exception." *Id*. It allows for medical exemptions, and the districts that have reinstated masking requirements have routinely granted accommodations to children with disabilities. *Id.;* JA391-92; R.Doc.48-1 at 20-21; JA499 ¶ 2; R.Doc.48-10 at 1; JA505 ¶ 2; R.Doc.48-13 at 1 JA507 ¶ 2; R.Doc.48-14 at 1 JA512-14 ¶ 4; R.Doc.48-16 at 2-4.

The rights of children with disabilities are not in conflict here. Indeed, the fact that some disabled students have difficulty with or cannot mask (including children of three of the Plaintiffs, JA97; R.Doc.3-6; JA101; R.Doc.3-7; JA499; R.Doc.48-10) bolsters the case for enjoining Section 280.31: where some students cannot wear masks for medical reasons, they must rely on the conscientious observance of public health protocols from others in order to stay safe. *See generally* JA489-506; R.Doc.48:5-48:13. Instead of pitting disabled students against each other, the district court properly granted relief that accommodates all of them.

C. The Preliminary Injunction Raises No Constitutional Concerns

Finally, the Court should reject Defendants' argument that interpreting the ADA and the Rehabilitation Act to reach decisions relating to "education and public health policy" raises "constitutional concerns" concerning state sovereignty. Br. 48.[13]

The text of the ADA and Rehabilitation Act expressly covers activities of "State and local government[s]," including specifically a "local educational agency" or "school system." *See, e.g.,* 42 U.S.C. § 12131(1)(A); 29 U.S.C. § 794(b)(1)-(2). The Supreme Court has held that Title II was intended to and does apply directly to states and local governments to address "unequal treatment of persons with disabilities by States and their political subdivisions." *Tennessee*, 541 U.S. at 526; *United States v. Georgia*, 546 U.S. 151 (2006).

Such an interpretation does not, as Defendants argue, "significantly alter the balance between federal and state power." Br. 48 (citing *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021)). Federal courts have

[13] Defendants did not raise this issue below. Instead, they raised a separate Tenth Amendment argument, contending that Section 280.31 was not preempted by the American Rescue Plan Act of 2021. JA331; R.Doc.42 at 22. The district court reserved judgment on that question, Add.15 n.7; R.Doc.60 at 15, which is not on appeal.

long held that the nation's schools are subject to requirements of federal law. *See*, *e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

And this lawsuit has nothing to do with "the allocation of authority between the State and local governments." Br. 49. Enjoining Section 280.31 would return discretionary authority to school districts because state law provides for local control of schools, not because the ADA and Rehabilitation Act require local control. The ADA and Rehabilitation Act merely require that whatever entity has decision-making authority over school services must be permitted to eliminate discriminatory policies and grant reasonable modifications.

IV. The District Court Did Not Abuse Its Discretion In Finding That the Remaining Factors Supported A Preliminary Injunction

The district court correctly held that the remaining preliminary injunction factors—"the threat of irreparable harm to the movant," the balance of equities, and "the public interest," *see Jet Midwest*, 953 F.3d at 1044—reinforced the need for an injunction here. Add.14-15; R.Doc.60 at 14-15; Add.21-22; R.Doc.60 at 21-22.

A. Defendants Did Not Submit Any Evidence or Dispute That Plaintiffs Suffered Irreparable Harm

In order to show irreparable harm, a Plaintiff need only demonstrate that harm "is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). In the proceedings below and in this Court, Defendants do

not contest that Plaintiffs have established irreparable harm. *See* JA310-35; R.Doc.42.

With good reason: Plaintiffs submitted substantial expert and other evidence demonstrating that enforcement of the mask-mandate ban caused Plaintiffs irreparable harm. JA54-120; R.Doc.3:1-3:13; JA183-89; R.Doc.28; JA409-612; R.Doc.48:2-48:25. Relying on this evidence, the district court made factual findings and concluded that Plaintiffs suffered at least three discrete types of irreparable harm: (1) the heightened risk of severe illness because of exposure to a deadly viral contagion; (2) loss of educational opportunities; and (3) the violation of their civil rights under federal anti-discrimination laws. Add.46-49; R.Doc.32 at 19-22; Add.14-15; R.Doc.60 at 14-15. Each type of harm is plainly irreparable. *See, e.g.*, *Harris v. Blue Cross Blue Shield of Mo.*, 995 F.2d 877, 879 (8th Cir. 1993) (threat to health or life); *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) (loss of educational opportunity); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (violation of civil rights statute).

Where, as here, a defendant does not contest a preliminary injunction factor, this Court can assume the factor is satisfied. *Richland/Wilkin Joint Powers Auth.*, 826 F.3d at 1036 n.2 ("The Authority does not challenge the district court's determination regarding the fourth factor, the public interest, so we do not address

it."). And even if Defendants had contested the irreparable harm findings (they do not), the argument would be waived. *See, e.g.*, *Vreeland v. Huss*, No. 20-1301, 2021 WL 4544077, at *2 (10th Cir. Oct. 5, 2021); *Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294-95 (5th Cir. 2020); *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015).

B. The District Court Did Not Abuse Its Discretion in Finding the Other Equities Supported Injunctive Relief

In entering the preliminary injunction, the district court found that enjoining enforcement of Section 280.31 was in the public interest:

> [T]he national public interest in enforcing the ADA wins out over the state's interest in enforcing Iowa Code section 280.31. . . . It is in the public's interest to allow local public school districts to exercise their discretion to adopt universal masking policies in an effort to inhibit the spread of COVID-19 and protect the children in their schools.... Moreover, there is little harm to Defendants in enjoining section 280.31 and permitting the individual public school districts to return to the ways in which they were operating prior to its passage by leaving a universal mask mandate to their discretion. It is no great burden for individual school boards to make these types of decisions for the children within their districts.

Add.21, 24; R.Doc.60 at 21, 24. These findings were sound, and largely uncontested, both in the trial court below and on appeal. Defendants offer no argument in their brief that the district court erred in balancing the equities. As noted, Defendants submitted no testimony or evidence that the injunction is causing any administrative burden or cost. Nor did school districts come to the

district court with an argument that the injunction is causing any administrative burden or cost. To the contrary, the only school district to address the injunction below supported its continuation. JA184 ¶ 2; R.Doc.28 at 2; JA190; R.Doc.28-1. "A district court's decision to issue a preliminary injunction depends upon a flexible consideration of" the factors discussed above. *Jet Midwest*, 953 F.3d at 1044. Defendants have not demonstrated any abuse in the district court's consideration of the relevant factors.

* * *

The FDA and CDC have recently approved vaccines for children ages 5 through 11, many children will be vaccinated in the months to come, and Plaintiffs eagerly await the day when it will be safe for their children to attend school without masking. But nothing about the approval of the vaccine lessens the need for an injunction of Section 280.31's rigid, universal ban on any form of mask mandates. Rather, schools can and should consider the vaccine and vaccination rates—as well as the specific circumstances of children with disabilities in their districts, schools, and classrooms—as they discuss whether and to what degree masking is required to protect students with disabilities who are at risk from COVID-19. Indeed, in the absence of the injunction, a school with low vaccination numbers and a COVID-19 breakout would not even be permitted to require a school nurse to mask when treating an immunocompromised child as to

whom the vaccine is ineffective. The injunction today continues to provide critical and legally-required protection to disabled students who are the most vulnerable to COVID-19. This Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f), the brief contains 12,991 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

3. Pursuant to Eighth Circuit Local Rule 28A(h), undersigned counsel hereby certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ John A. Freedman
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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