

No. 21-51083

**In the United States Court of Appeals
for the Fifth Circuit**

*E.T., by and through her parents and next friends, et al.,
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
Trial Court No. 1:21-CV-717

**BRIEF OF *AMICI CURIAE* THE TEXAS PEDIATRIC SOCIETY
AND THE AMERICAN ACADEMY OF PEDIATRICS
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. As Defendant-Appellant is a governmental party, he and his counsel have been excluded.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

**Plaintiffs /
Appellees:**

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; and
A.M., by and through her parents and next friends

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT REGARDING PARTIES' CONSENT	2
INTRODUCTION.....	3
ARGUMENT	9
I. Children With Special Health Needs Are Especially Vulnerable To Injury And Death From COVID-19.	9
II. The Medical Literature Uniformly Supports Masking As A Way To Prevent Injury And Death From COVID- 19.	13
A. The AAP's Review of the Scientific Research.	13
B. Masking Policies Are Highly Effective at Reducing Transmission of COVID in Children.	18
C. Masks Do Not Harm Children.	22
III. The Availability of Vaccines Does Not Vitiating The Harm To Plaintiffs-Appellees From GA-38.	23
IV. The Availability of Other Accommodations Cannot Eliminate The Increased Risk of Serious Illness and Death Caused by Prohibiting Masking Requirements	28
V. GA-38 Increases the Risk of Serious Illness and Death to Plaintiffs-Appellees and Thereby Effectively Denies Them Access to Services	30
CONCLUSION.....	32
CERTIFICATE OF COMPLIANCE.....	34
CERTIFICATE OF SERVICE.....	35

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arc of Iowa v. Reynolds</i> , No. 21-cv-264, 2021 WL 4737902 (S.D. Iowa Oct. 8, 2021).....	32
<i>BNSF Ry. Co .v Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.</i> , 973 F.3d 326 (5th Cir. 2020).....	5, 30
<i>Disability Rights S.C. v. McMaster</i> , No. 21-cv-2728, 2021 WL 4444841 (D.S.C. Sept. 28, 2021)	32
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<i>E.T. v. Paxton</i> , 19 F.4th 760 (5th Cir. 2021)	7, 28
<i>G.S. v. Lee</i> , No. 21-cv-2552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021).....	32
<i>McDonald v. Longley</i> , 4 F.4th 229 (5th Cir. 2021)	7
<i>R.K. v. Lee</i> , No. 21-cv-725, 2021 WL 4942871 (M.D. Tenn. Oct. 22, 2021).....	32
<i>S.B. v. Lee</i> , No. 21-cv-317, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021).....	32
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	7

STATUTES, RULES & REGULATIONS

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INTEREST OF *AMICI CURIAE*¹

The Texas Pediatric Society (“TPS”), also known as the Texas Chapter of the American Academy of Pediatrics, is a non-profit educational organization and professional society comprising more than 4,600 members, including pediatricians, residents, and medical students from Texas. TPS works to ensure that children in Texas are safe and healthy and that its members are well-informed about medical research and best practices for children.

The American Academy of Pediatrics (“AAP”) was founded in 1930 and is a national, not-for-profit professional organization dedicated to furthering the interests of child and adolescent health. The AAP’s membership includes over 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past twenty-two months, the AAP has devoted substantial resources to researching the scientific literature regarding how to treat COVID-19 and reduce its spread so that the AAP can provide up-to-date, evidence-based guidance for pediatricians and public health officials.

¹ No party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund this brief, and no person other than *Amici*, their members, and their counsel contributed money to fund this brief.

STATEMENT REGARDING PARTIES' CONSENT

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, on January 4, 2022, counsel for *Amici* conferred with counsel for Plaintiffs-Appellees and counsel for Defendant-Appellant, and all parties consented to the filing of this brief.

INTRODUCTION

Over the past 22 months, *Amici* have worked ceaselessly to evaluate the dangers of COVID-19 and to assess potential public health measures for reducing its deadly spread. The AAP has conducted a comprehensive review of the medical literature to determine what public health measures can effectively reduce the risk that COVID-19 poses to America's children. This comprehensive review and the experiences of the front-line pediatric practitioners who make up the AAP's membership prove three relevant facts beyond any doubt:

- (1) COVID-19 poses grave risks to children;
- (2) Universal masking policies in schools significantly reduce the spread of COVID-19 and protect all children; and
- (3) Masks do not harm children.

In his Executive Order GA-38, Texas Governor Greg Abbott acknowledged the efficacy of masking, encouraging individuals in areas with high COVID-19 transmission rates "to follow safe practices" including "wearing face coverings over the nose and mouth wherever it is not feasible to maintain six feet of social distancing from another

person not in the same household.”² Despite this acknowledgment, the Governor also *barred* public school districts from implementing mask requirements,³ effectively putting Plaintiffs-Appellees in a no-win scenario: either forego the benefits of in-person learning altogether, or attend school in person and risk their health and safety.

Appropriately taking stock of the grave danger COVID-19 presents for school children—and in particular, those with special health needs who face a “higher risk of contracting COVID than their non-impaired peers”⁴—the District Court enjoined Texas Attorney General Ken Paxton (the “AG”) from enforcing or giving any effect to the provisions of GA-38 that prohibit school districts from requiring masks. The District Court catalogued the troubling surge in cases of COVID-19 in children since the school year began and correctly found that the evidence “supports that the use of masks may decrease” the risk of contracting COVID-19 in a school setting.⁵

² Electronic Record on Appeal (“ROA”).97.

³ ROA.98.

⁴ *E.T. v. Morath*, No. 1:21-CV-717-LY, --- F. Supp. 3d ---, 2021 WL 5236553, *14 (W.D. Tex. Nov. 10, 2021).

⁵ *Id.* at **2, 14.

The District Court’s factfinding was not clearly erroneous and is entitled to deference. *BNSF Ry. Co .v Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 973 F.3d 326, 334 (5th Cir. 2020). If anything, the District Court’s commonsense finding understates the value of masking. The undisputed scientific evidence does not merely *support* that the use of masks “may” decrease the spread of COVID-19; rather, the scientific literature establishes beyond any doubt that mask requirements *significantly mitigate* the spread of the virus in schools, period. This brief provides an overview of the AAP’s comprehensive review of that literature and explains why universal mask policies are so crucial in the ongoing fight against COVID-19.

What is more, the stakes in that struggle have only been heightened of late with the emergence of the highly transmissible Omicron variant. Omicron arrived in Texas shortly after the motions panel stayed the injunction, with the first Omicron-related death in Texas following only a couple of weeks later.⁶ In just the two weeks

⁶ Karen Brooks Harper, *Texas reports its first case of the omicron COVID-19 variant*, Texas Tribune (Dec. 6, 2021), <https://bit.ly/3qOadC3>; Mychael Schnell, *Texas death believed to be first in US linked to Omicron*, The Hill, (Dec. 21, 2021), <https://bit.ly/3pQ9f9c>.

between December 23 and January 6, over 905,000 children in the United States were newly diagnosed with COVID-19.⁷ In Texas, Omicron is already “really hitting kids hard,” according to Dr. Stanley Spinner, vice president and chief medical officer at Texas Children’s Pediatrics and Children’s Urgent Care in Houston, who reportedly has seen the number of children hospitalized with COVID-19 quadruple.⁸ This precipitous increase in pediatric COVID-19 cases only intensifies the urgency of affirming an injunction against GA-38, since children impacted by the new variant will run a markedly greater risk of transmitting the virus to their classmates, teachers, and families than they otherwise would if public school districts were able to implement masking requirements.

Defending GA-38, the AG wrongly characterizes as “speculative” the increased risk of contracting COVID-19 that Plaintiffs-Appellees face by attending school without a universal masking policy. (App. Br. at 15.) Without the benefit of full briefing or argument, the motions

⁷ *Children and COVID-19: State Data Report* at Fig. 6, Children’s Hosp. Ass’n & Am. Acad. of Pediatrics (Jan. 6, 2022), <https://bit.ly/3K30hxl>.

⁸ Nicole Villalpando, “*Hitting Kids hard*”: *What to know about children and the omicron COVID-19 variant*, Austin American Statesman (Dec. 30, 2021), <https://bit.ly/34mgHRb>.

panel likewise believed that Plaintiffs were not likely to be harmed because their injury is “tenuous and speculative.”⁹ As the district court found and this brief explains, the risk of contracting COVID-19 without masks in schools is *actual* and *imminent*. Sound science simply does not support a contrary view.

In evaluating whether to affirm the district court’s discretionary imposition of an injunction, this Court must consider whether it “is in the public interest.” *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Here, the public’s interest is firmly in favor of affirming the District Court’s injunction and giving school districts the choice to require masks in appropriate cases—just as this Court has recently done.¹⁰ Universal school masking policies substantially reduce the risk of death and serious illness among Texas’s school-age population and their families, without any meaningful harm to mask-wearers. Schools

⁹ *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021).

¹⁰ Fifth Circuit Court of Appeals Order, General Docket No. 2021-12 (Dec. 29, 2021) (closing the John Minor Wisdom Courthouse as of Jan. 3, 2022 “as part of the court’s continued effort to prevent the spread of COVID-19 and variants” and continuing to require counsel appearing for in-person oral argument to “wear a mask while in the courthouse and courtroom, except when presenting argument”).

that lack such policies experience significantly higher rates of COVID-19 transmission, and effectively deny a safe education to all children, but particularly the medically vulnerable.

Accordingly, the Court should affirm the permanent injunction so that Texas public school districts will be able to protect their students and communities through universal mask policies.

ARGUMENT

I. Children With Special Health Needs Are Especially Vulnerable To Injury And Death From COVID-19.

The risk of children contracting COVID-19 is undeniably serious, and the risk to children with special health needs who contract COVID-19 is even more severe. The AAP and the Children's Hospital Association have collaborated throughout the pandemic to collect and share all publicly available data on COVID-19 cases among children. These data fully support allowing Texas schools the choice to require masks if in the school's discretion it would benefit children to do so.

As of January 6, 2022, more than 8,471,000 total child COVID-19 cases have been reported in the United States, representing more than 17.4% of the total U.S. cases.¹¹ The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with almost 48% of all child cases since the beginning of the pandemic 22 months ago diagnosed in the fewer than five months between August 13 and January 6.¹² This surge appears to be due to two principal factors: the

¹¹ *Children and COVID-19: State-Level Data Report, Summary of Findings*, AAP, <https://bit.ly/2Y5UTGq> (data available as of Jan. 6, 2022).

¹² *Children and COVID-19: State Data Report*, *supra* note 7, at Appx. Tab. 2A.

resumption of in-person schooling (and particularly schooling in places without masks), and the emergence of the Delta and Omicron variants, which are more contagious than previous variants.¹³

As the rate of COVID-19 has soared, so has the number of serious cases; just among the 24 states and one city that report child hospitalizations, nearly 13,000 children were hospitalized due to COVID-19 between August 13 and January 6, more than 42% of the total child hospitalizations to date.¹⁴ Across the country, as of January 11, an average of 870 children are being hospitalized each day, a 20% increase from the average of the previous week.¹⁵ Before August 13, no more than 16 children had died from COVID-19 in any week of the pandemic; from August 13 to January 6 that grim figure was matched or eclipsed in 14 out of 21 weeks.¹⁶

¹³ See *Omicron Variant: What You Need to Know*, CDC (Dec. 20, 2021), <https://bit.ly/3G0LSPS>; *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/3kDl7sc>.

¹⁴ *Children and COVID-19: State Data Report*, *supra* note 7, at Appx. Tab. 2B.

¹⁵ See *COVID Data Tracker*, CDC (last updated Jan. 11, 2022), <https://bit.ly/3G2PmBA>; see also Melody Schreiber, *Covid hospitalizations among US children soar as schools under pressure*, *The Guardian* (Jan. 5, 2022), <https://bit.ly/3t1gzRe>.

¹⁶ *Children and COVID-19: State Data Report*, *supra* note 7, at Appx. Tab. 2C.

As the hospitalization rate reflects, COVID-19 can cause severe symptoms and potentially fatal outcomes, including in children.

COVID-19 infections can produce multisystem inflammatory syndrome in children (MIS-C).¹⁷ MIS-C involves clinically severe levels of fever, inflammation, and dysfunction or shock in multiple organ systems (including cardiac, renal, respiratory, hematologic, gastrointestinal, dermatologic, and/or neurological).¹⁸ Among other symptoms, it can cause coronary artery enlargement; aneurysm; meningitis; colitis; hepatitis; symptoms akin to toxic shock syndrome; acute kidney injury; stroke; encephalitis; congestive heart failure; and pulmonary embolism.¹⁹

COVID-19 infections can also lead to many secondary conditions, ranging from subacute to severe. Several studies have shown that long-

¹⁷ See *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 2019 (COVID-19)*, CDC (May 14, 2020), <https://bit.ly/3niE5WG>; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP (last updated Nov. 15, 2021), <https://bit.ly/3Cp8Nlu>.

¹⁸ *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, *supra* note 17.

¹⁹ *Id.*

term symptoms can occur in children and adolescents.²⁰ Indeed, even cases with mild initial symptomatology can produce significant long-term effects. These include:

- respiratory symptoms ranging from chest pain, cough, and exercise-induced dyspnea to pulmonary emboli;
- myocarditis (i.e., inflammation of the heart muscle), shortness of breath, arrhythmia, and/or fatigue, potentially leading to heart failure, myocardial infarction, stroke, or sudden cardiac arrest;
- loss of the sense of smell (anosmia) or taste (ageusia), which can affect the nutritional status and quality of life of children and adolescents;
- neurodevelopmental sequelae, both including the consequences of significant acute injuries such as stroke and subtle but persistent sequelae in cognitive, language, academic, motor, mood, and behavioral domains;
- cognitive fogginess or fatigue;
- physical fatigue; and
- mental or behavioral health impacts.²¹

²⁰ See, e.g., Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, 110(7) *Acta Paediatrica* 2208 (2021), <https://bit.ly/2YMGcsj> (studying 129 children in Italy and reporting that 42.6% experienced at least one symptom more than 60 days after infection); Helen Thomson, *Children with long covid*, 249(3323) *New Scientist* 10 (2021), <https://bit.ly/3DquZgo> (U.K. Office of National Statistics estimate that 12.9% of children 2-11 years of age and 14.5% of children 12-16 years of age experienced symptoms 5 weeks after infection).

²¹ Trisha Koriath, *AAP urges post-COVID-19 follow-up to monitor for residual symptoms*, *AAP News* (Aug. 2, 2021), <https://bit.ly/3JJolj8>.

The risks are especially high for children with certain underlying conditions who contract COVID-19. Those children are more likely to experience severe symptoms and require admission to the hospital or intensive care unit.²² This group includes children with, for example, lung conditions, heart conditions, and weakened immune systems.²³

As far as AAP is aware, no party has presented any scientific support for a contrary view. The risks of COVID-19 are undisputed.

II. The Medical Literature Uniformly Supports Masking As A Way To Prevent Injury And Death From COVID-19.

A. The AAP's Review of the Scientific Research.

One of the AAP's chief functions is to provide evidence-based guidance to America's pediatric professionals and public health officials. To do so, the AAP issues Policy Statements that report the most up-to-date, evidence-based expert consensus on key issues of pediatric practice and public health. These Policy Statements are written by recognized pediatrician experts who undertake a comprehensive review of the medical literature and available data. They are then peer-

²² *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Dec. 1, 2021), <https://bit.ly/3oqebRG>.

²³ *People with Certain Medical Conditions*, CDC, (last updated Dec. 14, 2021), <https://bit.ly/3D3vL1Z>.

reviewed by additional experts across the AAP and approved by the AAP's executive staff and board of directors.

Since the spring of 2020, the AAP's primary focus has been supporting practicing pediatricians and public health policymakers in treating COVID-19 and reducing its spread, particularly among children. The AAP has issued Interim Guidance Statements on several topics related to COVID-19, including guidance on when and how pediatricians should test patients for COVID-19;²⁴ on providing clinical care to patients with COVID-19;²⁵ on treating post-COVID conditions;²⁶ on how to safely provide routine medical care such as check-ups, screenings, laboratory exams, treatment, and immunizations during the COVID-19 pandemic;²⁷ on caring for youth with special health needs during the COVID-19 pandemic;²⁸ on supporting the emotional and

²⁴ *COVID-19 Testing Guidance*, AAP (last updated Nov. 17, 2021), <https://bit.ly/3cfroFQ>.

²⁵ *COVID-19 Interim Guidance*, AAP (last updated Jan. 6, 2022), <https://bit.ly/3Djk1Jx>.

²⁶ *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated Dec. 17, 2021), <https://bit.ly/3cuLhJj>.

²⁷ *Guidance on Providing Pediatric Well-Care During COVID-19*, AAP (last updated Jan. 6, 2022), <https://bit.ly/3Dqxlfe>.

²⁸ *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, *supra* note 22.

behavioral health needs of children, adolescents, and families during the COVID-19 pandemic;²⁹ and—most relevant to this case—on (1) the use of face masks as an infection-control measure³⁰ and (2) on operating safe schools during the COVID-19 pandemic to foster the overall health of children, adolescents, educators, staff, and communities.³¹ These Interim Guidances were drafted and reviewed by numerous pediatricians with expertise in a wide variety of disciplines, and have been continually reviewed and updated since spring of 2020. By this point, the AAP’s experts have reviewed hundreds of articles related to the efficacy and safety of masks, as well as their effects (or lack thereof) on the cognitive, social, and psychological development of children.

As a pediatrician organization, the AAP recognizes that not being able to attend school in person can negatively affect children’s cognitive, educational, and social development, as well as children’s short- and

²⁹ *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, AAP (last updated Dec. 9, 2021), <https://bit.ly/3qGi5r2>.

³⁰ *Face Masks*, AAP (last updated Jan. 6, 2022), <https://bit.ly/30p9qOD>.

³¹ *COVID-19 Guidance for Safe Schools and Promotion of In-Person Learning*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3DkCrcM>.

long-term mood, behavior, and mental health.³² These harms fall disproportionately on children with disabilities.³³

Based on the need to protect children against the harms caused by long-term remote learning, along with AAP’s expert review of the scientific literature and TPS and AAP’s members’ collective expertise as pediatricians and researchers, the AAP has concluded that “all local, state, and federal policy considerations for school COVID-19 plans should start with a goal of keeping students safe, physically present, and emotionally supported *in school*.”³⁴ “At this point in the pandemic,

³² See, e.g., Jorge V. Verlenden, et al., *Association of Children’s Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic—COVID Experiences Survey, United States, October 8–November 13, 2020*, 70(11) *Morbidity & Mortality Weekly Rep.* 369 (2021), <https://bit.ly/3sWRxCL>; Dimitri A. Christakis, et al., *Estimation of U.S. Children’s Educational Attainment and Years of Life Lost Associated with Primary School Closures During the Coronavirus Disease 2019 Pandemic*, 3(11) *J. Am. Med. Ass’n Network Open* e2028786 (2020), <https://bit.ly/3pVoT2W>; Meira Levinson, et al., *Reopening Primary Schools during the Pandemic*, 383 *New Eng. J. Med.* 981 (2020), <https://bit.ly/3mZjG8y>; Megan Kuhfeld, et al., *Projecting the Potential Impact of COVID-19 School Closures on Academic Achievement*, 49(8) *Educ. Researcher* 549 (2020), <https://bit.ly/3eRv2qy>; Emma Dorn, et al., *COVID-19 and Education: The lingering effects of unfinished learning*, McKinsey & Co. (July 27, 2021), <https://mck.co/3FX0H63>.

³³ See, e.g., Ramkumar Aishworiya & Ying Qi Kang, *Including Children with Developmental Disabilities in the Equation During this COVID-19 Pandemic*, 51 *J. Autism & Dev. Disorders* 2155 (2021), <https://bit.ly/34opBxy>; Amy Houtrow, et al., *Children with disabilities in the United States and the COVID-19 pandemic*, 13(3) *J. of Pediatric Rehabilitation Med.* 415 (2020), <https://bit.ly/3G46A1c>.

³⁴ *COVID-19 Guidance for Safe Schools and Promotion of In-Person Learning*, *supra* note 31 (emphasis added).

given what we know about low rates of in-school transmission *when proper prevention measures are used*, together with the availability of effective vaccines for those eligible, . . . the benefits of in-person school outweigh the risks in almost all circumstances.”³⁵ Among the recommended prevention measures (such as immunization of all eligible individuals and adequate and timely COVID-19 testing), one of the most important is that “[a]ll students older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use), regardless of vaccination status.”³⁶

Although the AAP has modified some of its other recommendations as further information is learned about COVID-19, its strong recommendation of universal masking for students, teachers, and support staff in school has remained consistent from the beginning—because masks are a safe, effective, and critical infection-control measure. This conclusion has been consistently reinforced by all relevant data and credible research, leading the Centers for Disease

³⁵ *Id.* (emphasis added).

³⁶ *Id.* (emphasis original).

Control (the “CDC”) to recommend “universal indoor masking for all ... students (ages 2 years and older), teachers, staff, and visitors to K-12 schools, regardless of vaccination status.”³⁷ In November, after reviewing all scientific evidence to date on the transmission and prevention of COVID-19 during the current school year, the AAP reaffirmed its recommendation that masks are an important infection-control measure.³⁸

B. Masking Policies Are Highly Effective at Reducing Transmission of COVID in Children.

While there are several reasons for the AAP’s recommendation of universal masking in school,³⁹ the most important is that the research has confirmed that masks are both effective and safe. Masks “reduce the emission of virus-laden droplets . . . , which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and

³⁷ *Guidance for COVID-19 Prevention in K-12 Schools*, CDC (last updated Jan. 6, 2022), <https://bit.ly/3HD2lKs>. The CDC’s recommendations provide that exceptions can be made for persons who cannot wear a mask or cannot safely wear a mask because of a disability as defined by the Americans with Disabilities Act (the “ADA”) and persons for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

³⁸ *COVID-19 Guidance for Safe Schools and Promotion of In-Person Learning*, *supra* note 31.

³⁹ *See id.* (identifying eight bases for AAP’s mask recommendation).

may be unaware of their infectiousness to others (estimated to account for more than 50% of SARS-CoV-2 transmissions).”⁴⁰ “Cloth masks not only effectively block most large droplets (i.e., 20-30 microns and larger), but they can also block the exhalation of fine droplets and particles (also often referred to as aerosols) smaller than 10 microns”⁴¹ “Multi-layer cloth masks can both block 50-70% of these fine droplets and particles[,]” with “[u]pwards of 80% blockage” recorded in some studies.⁴² To a lesser extent, masks also “help reduce inhalation of these droplets by the wearer”; multi-layer cloth masks can filter out “nearly 50% of fine particles less than 1 micron.”⁴³

This difference between a mask’s ability to block *exhalation* and *inhalation* of viral particles explains why it is so important for schools to have the ability to make masking policies universal. A mask’s primary benefit is as “source control,” preventing infected carriers from spreading viral particles widely. As the CDC has explained, “masks are

⁴⁰ *Science Brief: Community Use of Masks to Control the Spread of SARS-CoV-2*, CDC (last updated Dec. 6, 2021), <https://bit.ly/3utvxOA> (citations omitted).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

not designed to reduce the particles that the wearer will inhale

The purpose of wearing masks is to help reduce the spread of COVID-19 by reducing the spread of the virus through respiratory droplets from asymptomatic individuals.”⁴⁴ Because wearing a mask provides only limited protection against contracting COVID-19 if the wearer is near one or more *unmasked* carriers, universal masking is needed as source control for COVID-19 carriers (who may be asymptomatic and not know they are shedding viral particles), thereby protecting vulnerable children.

Numerous studies have shown that increasing the rate of mask-wearing, including through universal masking policies in particular, significantly reduces the spread of COVID-19.⁴⁵ Specifically, studies

⁴⁴ *Respiratory Protection vs. Source Control—What’s the Difference?*, CDC (Sept. 8, 2020), <https://bit.ly/3pn0y6s>.

⁴⁵ See, e.g., Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, 118(4) Proc. of the Nat’l Acad. of Servs. of the United States of America, e2014564118 (2021), <https://bit.ly/3ndJVsl>; John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325(10) J. of Am. Med. Ass’n 998 (2021), <https://bit.ly/3Fi8Hh7>; Heesoo Joo, et al., *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates—10 States, March–October 2020*, 70(6) Morbidity & Mortality Weekly Rep. 212 (2021), <https://bit.ly/3cgPrEd>; Derek K. Chu, et al., *Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis*, 395 Lancet 1973 (2020), <https://bit.ly/3kEj1YU>; Christopher T. Leffler, et al., *Association of Country-wide Coronavirus Mortality with Demographics, Testing, Lockdowns, and Public Wearing of Masks*, 103(6) Am. J. Tropical Med. Hygiene 2400 (2020),

have shown that masking and similar mitigation measures can limit transmission in schools.⁴⁶ As the ABC Science Collaborative, a 13-state initiative coordinated by the Duke Clinical Research Institute at the Duke University School of Medicine, said: “[p]roper masking is the most effective mitigation strategy to prevent COVID-19 transmission in schools when vaccination is unavailable or there are insufficient levels of vaccination among students and staff[.]”⁴⁷

<https://bit.ly/2YMIszO>; Miriam E. Van Dyke, et al., *Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate—Kansas, June 1-August 23, 2020*, 69(47) *Morbidity & Mortality Weekly Rep.* 1777 (2020), <https://bit.ly/31SbU8H>; Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US*, 39(8) *Health Aff.* 1419 (2020), <https://bit.ly/3Ho9VJw>.

⁴⁶ See, e.g., Patrick Dawson, et al., *Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies—St. Louis County and City of Springfield, Missouri, December 2020*, 70(12) *Morbidity & Mortality Weekly Rep.* 449 (2021), <https://bit.ly/3HsAL3w>; Darria L. Gillespie, et al., *The Experience of 2 Independent Schools With In-Person Learning During the COVID-19 Pandemic*, 91(5) *J. Sch. Health* 347 (2021), <https://bit.ly/3kAEtxR>; Rebecca B. Hershov, et al., *Low SARS-CoV-2 Transmission in Elementary Schools - Salt Lake County, Utah, December 3, 2020-January 31, 2021*, 70(12) *Morbidity & Mortality Weekly Rep.* 442 (2021), <https://bit.ly/3cb48ZE>; Amy Falk, et al., *COVID-19 Cases and Transmission in 17 K-12 Schools - Wood County, Wisconsin, August 31-November 29, 2020*, 70(4) *Morbidity & Mortality Weekly Rep.* 136 (2021), <https://bit.ly/3qFvxeD>; Fiona Russell, et al., *COVID-19 in Victorian ECEC and Schools: An analysis of COVID-19 in ECEC and schools and evidence-based recommendations for opening ECEC and schools & keeping them open*, The Royal Children’s Hosp. Melbourne, Murdoch Children’s Rsch. Inst. & The Univ. of Melb. (2020), <https://bit.ly/31TpNU6>; see generally *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated*, CDC (Dec. 17, 2021), <https://bit.ly/2YRMJCe>.

⁴⁷ ABC Science Collaborative, *The ABCs of North Carolina’s Plan*, <https://bit.ly/3nhUYkr> (last visited Jan. 13, 2021); see also ABC Science

C. Masks Do Not Harm Children.

Though the AG does not expressly make the argument, some in Texas and elsewhere have touted bans on masking like GA-38 on the false premise that masks harm children. If that argument is raised in this appeal, the scientific evidence squarely refutes it.

As shown by the AAP's comprehensive review of the medical research, masking does not harm children. Masking has no significant effect on respiratory function,⁴⁸ does not meaningfully impede social and speech development,⁴⁹ and is not linked to emotional or psychological harm, particularly when caregivers promote positive associations around mask-wearing.⁵⁰ What's more, not being able to see part of a person's face is not a significant impediment to social and speech

Collaborative, *Final Report for NC School Districts and Charters in Plan A*, at 3 (June 30, 2021), <https://bit.ly/3cgHMWs>.

⁴⁸ See, e.g., Ricardo Lubrano, et al., *Assessment of Respiratory Function in Infants and Young Children Wearing Face Masks During the COVID-19 Pandemic*, 4(3) J. Am. Med. Ass'n Netw. Open e210414 (2021), <https://bit.ly/3iHIGik>.

⁴⁹ See, e.g., *Do Masks Delay Speech and Language Development?*, AAP (last updated Aug. 26, 2021), <https://bit.ly/3B3c8GH>; see also Ashley L. Ruba & Seth D. Pollak, *Children's emotion inferences from masked faces: Implications for social interactions during COVID-19*, 15(12) PLoS ONE e0243708 (Dec. 23, 2020), <https://bit.ly/2ZJk9Tv>.

⁵⁰ See, e.g., *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, *supra* note 29; *Face Masks*, *supra* note 30; *Supporting your child's mental health during COVID-19 school returns*, UNICEF (Oct. 1, 2021), <https://uni.cf/3iX1FG2>.

development—as the experience of children who are blind from birth confirms. “[V]isually impaired children develop speech and language skills at the same rate as their peers.”⁵¹ Indeed, being unable to see speakers’ mouths for a portion of the day may help children use other clues to understand and learn language and non-verbal communication, such as gestures, changes in tone of voice, and the like.⁵² And in the rare cases where masking is genuinely contraindicated by an individual child’s developmental or physical conditions, that particular child can be exempted from the policy without undermining the overall risk mitigation brought about by universal masking.⁵³

III. The Availability of Vaccines Does Not Vitate The Harm To Plaintiffs-Appellees From GA-38.

In the face of this scientific evidence, the AG argues that even if GA-38 may have posed problems when it was first enacted, the masking ban might pass muster today “because of the FDA’s November 2021 approval of the Pfizer vaccine for school-age children.” (App. Br. at 12.) The scientific evidence, however, is to the contrary.

⁵¹ *Do Masks Delay Speech and Language Development?*, *supra* note 49.

⁵² *Id.*

⁵³ *Guidance for COVID-19 Prevention in K-12 Schools*, *supra* note 37.

While pediatric vaccines are now *available* for children as young as five years old, few children between five and eleven have been fully vaccinated to date. Indeed, only about 13.2% of Texas children between the ages of 5 and 11 have been fully vaccinated thus far.⁵⁴ Only 23.3% of children ages 5 to 11 have had at least one dose of the vaccine.⁵⁵ And it will take time for all or even a majority of children to receive the vaccine; even among 12- to 17-year-old Texas children, who have been eligible for the vaccine for months, only 53.2% are fully vaccinated.⁵⁶ Thus, the fact that school-age children “*can* take the vaccine” does not diminish the very real danger to Plaintiffs-Appellees of attending school in a maskless environment, where they will surely encounter those who are not vaccinated and may expose them to COVID-19 and its attendant risks. (App. Br. 12-13) (emphasis added). It is no answer to say that if a

⁵⁴ *Compare COVID-19 Vaccination in Texas*, Texas Health & Human Servs., <https://bit.ly/3nh4qEc> (last visited Jan. 13, 2022) (noting that 382,937 children between the ages of 5 and 11 have been fully vaccinated), *with* Maeve Ashbrook, *Texas DSHS already ordered one wave of Pfizer COVID-19 vaccines for children ages 5 to 11*, KVUE (updated Oct. 26, 2021), <https://bit.ly/33d0ehP> (noting that there are 2.9 million children in Texas between the ages of 5 and 11).

⁵⁵ *Id.*

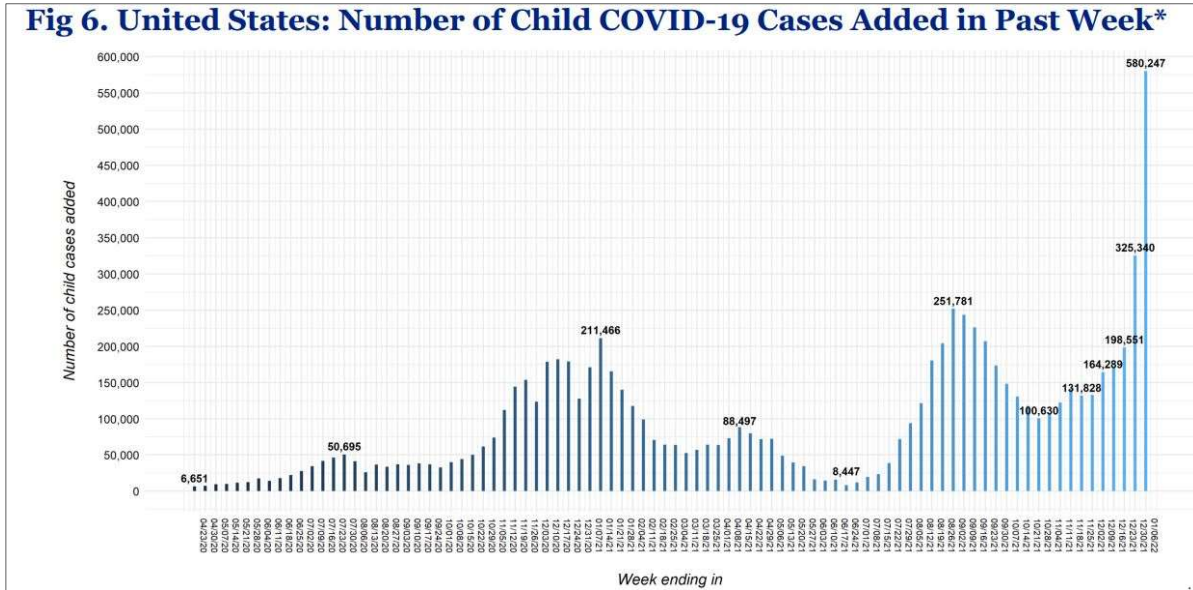
⁵⁶ Mayo Clinic, *U.S. COVID-19 vaccine tracker: See your state's progress*, <https://mayoclinic.in/3r6IWuR> (last visited Jan. 13, 2022); *see also Children and COVID-19 Vaccinations Trends*, AAP, at 3 (Dec. 29, 2021) (finding that nationwide, only 53% of children ages 12-17 have been fully vaccinated), <https://bit.ly/3FUNIS9>.

child is concerned about infection, they themselves can simply get vaccinated: many children are at high risk of severe consequences if they have a breakthrough infection, and still others have medical conditions that prevent them from obtaining the full benefit of immunization. For these children, the low rate of vaccination means that universal masking remains the most effective and least intrusive means of protecting them from COVID-19.

The emerging Omicron variant underscores the need for masks to remain part of the toolkit combating COVID-19, even as vaccines become more readily available for school-age children. Omicron has been particularly infectious, and especially infectious for children, compared to previous variants. The first case of the Omicron variant was detected in the United States on December 1, 2021.⁵⁷ By the end of December, over 858,000 children were newly diagnosed with COVID-19.⁵⁸ This troubling trend continued into the new year. Indeed, in the first week of January alone, over 580,000 children were diagnosed with COVID-19, as shown in the following figure:

⁵⁷ *First Confirmed Case of Omicron Variant Detected in the United States*, CDC (Dec. 1, 2021), <https://bit.ly/3rdvQMx>.

⁵⁸ *Children and COVID-19: State Data Report*, *supra* note 7, at Fig. 6.



That is over 376,000 cases more than the week that Plaintiffs-Appellees filed the suit below.⁵⁹

Omicron also appears to be infecting more children than previous variants. Between the last week of 2021 and the first week of 2022, there was a 12% increase in the cumulated number of child COVID-19 cases since the beginning of the pandemic.⁶⁰ These numbers are particularly concerning given the comparatively low vaccination rates for school-aged children. And even for children, teachers, and staff who

⁵⁹ *Id.*

⁶⁰ *Children and COVID-19: State-Level Data Report, Summary of Findings, supra* note 11.

are fully vaccinated, there is a risk of breakthrough infections that can lead to illness or further spread of the virus.⁶¹

Moreover, this harm is not limited to vulnerable schoolchildren: the continued transmission of COVID-19 through unmasked students and teachers amplifies the spread of the disease more broadly, with severe consequences for the public interest. As Omicron surges, dozens of hospitals in Texas have full ICUs,⁶² preventing access to even *non-COVID*-related healthcare. And the rise in cases among students and faculty has led to the closures of schools across Texas,⁶³ disrupting children's education and parents' ability to work. Mask requirements mitigate each of these harms, and thus promote the public interest even beyond protecting individual schoolchildren.

⁶¹ See *The Possibility of COVID-19 after Vaccination: Breakthrough Infections*, CDC (Dec. 17, 2021), <https://bit.ly/3GmWXe8>.

⁶² Carla Astudillo & Karen Brooks Harper, *At least 52 Texas hospitals were out of ICU beds last week, according to the latest federal data. Look up the ones near you.*, Tex. Trib. (last updated Jan. 10, 2022), <https://bit.ly/3FjzSaQ>.

⁶³ See, e.g., NBCDFW, *Amid Omicron, North Texas Schools Report Cancellations, Bus Delays Monday Morning* (updated Jan. 11, 2022), <https://bit.ly/3tjESu6>; Cynthia Miranda & Patrick Cunningham, *LIST: Number of schools closing due to COVID-19 in East Texas continues to grow*, KETK (updated Jan. 12, 2022), <https://bit.ly/3HXhBC0>.

In short, while the FDA’s approval of the Pfizer vaccine for children is a welcome development, it does not alleviate the harm GA-38 poses for Plaintiffs-Appellees or the public at large. Rather, that harm is alleviated only by implementing the one solution GA-38 forbids: universal masking policies.

IV. The Availability of Other Accommodations Cannot Eliminate The Increased Risk of Serious Illness and Death Caused by Prohibiting Masking Requirements

The motions panel’s principal basis for staying the District Court’s injunction was that other “accommodations,” such as “distancing, voluntary masking, class spacing, plexiglass, and vaccinations” might reduce the risk of COVID-19 transmission so significantly that Plaintiffs (and, by extension, all other students with heightened vulnerability) could attend school without an imminent risk of acquiring the virus. *E.T.*, 19 F.4th at 766. For similar reasons, the AG argues that Plaintiffs-Appellees “cannot establish that GA-38 has caused them a substantial risk of harm.” (App. Br. at 13-16.) Unfortunately, this is scientifically incorrect: universal masking requirements are a critical component of layered prevention strategies, without which the risk of transmission remains high. The degree of

COVID-19 risk faced by children attending in-person school is *directly* traceable to whether the child’s school has a universal mask policy.

The AAP highlighted this research above, but it bears repeating given the AG’s arguments and the motions panel’s initial order. All research in the trial record (and, indeed, all credible published research to date) has confirmed that masks are an effective and safe method to measurably reduce the transmission of COVID-19.⁶⁴ The available research likewise confirms that increasing the rate of mask-wearing, including through universal mask policies in particular, significantly reduces the spread of the virus.⁶⁵ And while studies have found universal masking *requirements* effective at reducing transmission, there are *no studies* finding mask “*recommendations*”—akin to what the AG implicitly suggests schools should be limited to using (App. Br. at 11)—to be effective in schools. While layered prevention strategies, in which multiple interventions are used, provide the most comprehensive protection against transmission, the available scientific evidence

⁶⁴ *Science Brief: Community Use of Masks to Control the Spread of SARS-CoV-2*, *supra* note 40.

⁶⁵ *Supra* nn. 45, 46.

indicates that such strategies are significantly less effective if the crucial tool of universal masking is removed.⁶⁶

Quite simply, therefore, the AG’s arguments—and the motions panel’s reasoning—regarding the “other preventative measures available” (App. Br. at 11-13, 16, 27-28, 37, 46) were not supported by the scientific evidence in the record and are not based on available medical literature. At the very least, the District Court did not clearly err in finding that other measures were insufficient to make schools safe for the vulnerable children. Its order is thus “entitled to deference.” *BNSF*, 973 F.3d at 334.

V. GA-38 Increases the Risk of Serious Illness and Death to Plaintiffs-Appellees and Thereby Effectively Denies Them Access to Services

Finally, the AG’s argument that Plaintiffs-Appellees are merely “choosing to avoid in-person education” and “GA-38 does not prevent

⁶⁶ *See, e.g., Brooks, supra* note 45 (“An increasing number of ecological studies have also provided persuasive evidence that universal mandatory mask wearing policies have been associated with reductions in the number or rate of infections and deaths This association is strengthened because, in many cases, other mitigation strategies (eg, school and workplace closures, recommendations for social distancing, hand hygiene) had already been deployed before enactment of mask wearing policies, after which the reductions were observed.”).

any [of them] from meaningfully accessing their schools” (App. Br. at 16, 36) ignores the undisputed scientific evidence.

By barring schools from imposing universal mask policies, GA-38 forces upon parents an untenable choice. They can either send children, including especially medically vulnerable children such as Plaintiffs-Appellees, to school where they face grave risks of contracting COVID-19 or they can keep children home, where they will not have access to the in-person public services provided in schools. For medically vulnerable children who have an increased risk of severe complications and death from COVID-19, barring schools from imposing the precise kind of masking policy shown to reduce their risk of contracting COVID-19 *is* a denial of safe access to in-person school and a failure to provide these children reasonable accommodations under the ADA and the Rehabilitation Act. The ADA exists to prevent individuals with disabilities from being shunted into inferior, segregated services due to their disabilities, yet that is precisely GA-38’s practical effect for medically vulnerable children.

Indeed, masking is so effective that several courts have found it to be *required* in schools under ADA and Rehabilitation Act.⁶⁷ As one explained, “the evidence shows that the absence of a mask mandate is fueling infections . . . with frightening celerity.”⁶⁸ Every federal court that has reached the merits of the ADA and Rehabilitation Act has found that they preclude mask bans like GA-38. This Court should do the same.

CONCLUSION

For these reasons, *Amici* request that the Court vacate the stay the motions panel imposed, and affirm the District Court’s injunction, because the public interest—and in particular, the interest of medically vulnerable children—would be served by allowing schools to require Texas children to wear masks to prevent serious injury from COVID-19.

⁶⁷ *See, e.g., R.K. v. Lee*, No. 21-cv-725, 2021 WL 4942871 (M.D. Tenn. Oct. 22, 2021) (granting preliminary injunction); *S.B. v. Lee*, No. 21-cv-317, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021) (same); *Arc of Iowa v. Reynolds*, No. 21-cv-264, 2021 WL 4737902 (S.D. Iowa Oct. 8, 2021) (same); *Disability Rights S.C. v. McMaster*, No. 21-cv-2728, 2021 WL 4444841 (D.S.C. Sept. 28, 2021) (same); *G.S. v. Lee*, No. 21-cv-2552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021) (granting temporary restraining order).

⁶⁸ *S.B.*, 2021 WL 4755619, at *16.

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This filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word for Windows, version 2016 in Century Schoolbook 14-point font typeface, with 12-point font typeface for footnotes.

/s/ Jeffrey P. Justman
JEFFREY P. JUSTMAN

CERTIFICATE OF SERVICE

I, Jeffrey P. Justman, counsel for Proposed *Amici*, certify that on January 13, 2022, a copy of the foregoing brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

I further certify that 1) 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 for viruses and has been found to be free of viruses.

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Jan. 13, 2022