No. 21–3268

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE ARC OF IOWA et al.,

Plaintiffs–Appellees,

vs.

KIM 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.

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

APPELLANTS' BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

SAMUEL P. LANGHOLZ
Assistant Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov
jeffrey.thompson@ag.iowa.gov

ATTORNEYS FOR APPELLANTS

Appellate Case: 21-3268 Page: 1 Date Filed: 10/19/2021 Entry ID: 5088857

SUMMARY OF THE CASE

Iowa Governor Kim Reynolds and Department of Education Director Ann Lebo appeal a preliminary injunction prohibiting their enforcement of a statute of the State of Iowa. That statute—Iowa Code § 280.31—sets Iowa education and public health policy by allocating authority over universal mask mandates in schools to the State rather than its local school districts. And even though the statute permits schools to comply with federal law, the district court held that the statute likely violates title II of the Americans with Disabilities Acts and section 504 of the Rehabilitation Act by excluding disabled students from in-person education.

This mismatch between the granted injunction and Plaintiffs' novel claims is even worse because the injunction doesn't require any school to impose a mask mandate. And Plaintiffs can't succeed on the merits of their claims anyway because they failed to exhaust administrative remedies and federal disability law doesn't invalidate the State's neutral nondiscriminatory policy or require universal mask mandates as a reasonable modification.

The State appreciates this Court granting its motion to expedite the appeal. Because of the urgency in ending this intrusion into the State's education and public health domain, the State continues to respectfully request that the Court expedite its decision so that relief may be provided before even more of the school year passes.

Appellate Case: 21-3268 Page: 2 Date Filed: 10/19/2021 Entry ID: 5088857

TABLE OF CONTENTS

SUMMARY OF THE CASE 2

TABLE OF AUTHORITIES 5

JURISDICTIONAL STATEMENT 9

STATEMENT OF ISSUES 10

STATEMENT OF THE CASE 11

SUMMARY OF THE ARGUMENT 18

ARGUMENT 20

I. Plaintiffs lack standing to enjoin section 280.31—and an injunction is unnecessary—because the statute does not prevent schools from complying with federal law and enjoining its enforcement does not redress Plaintiffs' alleged harms because the relief does not guarantee a universal mask mandate in their children's schools. 22

A. Plaintiffs are not harmed by section 280.31 because it permits schools to mandate facial coverings when required by federal law. 23

B. Enjoining enforcement of section 280.31 does not redress Plaintiffs' alleged harms because the injunction doesn't require their children's schools to impose universal mask mandates. 26

II. Plaintiffs failed to exhaust their administrative remedies under the IDEA as required before suing. 31

III. Federal disability law does not require schools to impose—or to have the discretion to impose—universal mask mandates. 38

Appellate Case: 21-3268 Page: 3 Date Filed: 10/19/2021 Entry ID: 5088857

A. Section 280.31's prohibition on schools imposing universal mask mandates is a neutral and nondiscriminatory policy that does not violate federal law. 39

B. A universal mask mandate in a school is not a reasonable modification and other reasonable modifcations exist 42

C. A contrary interpretation of federal disability law would raise constitutional concerns. 48

CONCLUSION 49

CERTIFICATE OF COMPLIANCE 51

CERTIFICATE OF SERVICE 51

Appellate Case: 21-3268 Page: 4 Date Filed: 10/19/2021 Entry ID: 5088857

TABLE OF AUTHORITIES

Cases

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) 48

Alexander v. Sandoval, 532 U.S. 275, (2001) 42

Ballard v. Rubin, 284 F.3d 957 (8th Cir. 2002) 47

Brakebill v. Jaeger, 932 F.3d 671 (8th Cir. 2019) 21

Buckles v. First Data Resources, Inc., 176 F.3d 1098 (8th Cir. 1999) 44

CVS Pharmacy, Inc. v. Doe, No. 20-1374 (U.S. July 2, 2021) 42

Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998) 39, 40, 42, 43

DeBord v. Bd. of Educ., 126 F.3d 1102 (8th Cir. 1997) 40, 42

Dixon v. City of St. Louis, 950 F.3d 1052 (8th Cir. 2020) 21, 25

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc., 528 U.S. 167 (2000) 27

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017) 32, 33, 35, 36

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 49

J.M. v. Francis Howell Sch. Dist., 850 F.3d 944 (8th Cir. 2017) 33, 34, 36

L.E. v. Ragsdale, No. 1:21-CV-4076, 2021 WL 4841056 (N.D. Ga. Oct. 15, 2021) 31

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 27

Mason v. Frank, 32 F.3d 315 (8th Cir. 1994) 44

Appellate Case: 21-3268 Page: 5 Date Filed: 10/19/2021 Entry ID: 5088857

Nelson v. Charles City Cmty. Sch. Dist., 900 F.3d 587
(8th Cir. 2018) 36

New Motor Vehicle Bd. V. Orrin W. Fox Co., 434 U.S. 1345
(1977) (Rehnquist, J., in chambers) 48

Planned Parenthood Minn., N.D., S.D. v. Rounds,
530 F.3d 724 (8th Cir. 2008) (en banc) 21, 48

Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926
(8th Cir. 1994) 43

R.K. v. Lee, No. 3:21-CV-00725, 2021 WL 4391640 (M.D. Tenn.
Sept. 24, 2021) 31

R.R. Comm'n of Tex. V. Pullman Co., 312 U.S. 496 (1941) 25

Rizzo v. Goode, 423 U.S. 362 (1976) 25

S.B. v. Lee, No. 3:21-CV-00317, 2021 WL 4755619 (E.D. Tenn.
Oct. 12, 2021) 31

Sessler v. City of Davenport, 990 F.3d 1150 (8th Cir. 2021) 20

Timothy H. v. Cedar Rapids Cmty. Sch. Dist.,
178 F.3d 968 (8th Cir. 1999) 40, 43

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) 20

Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) 44

<u>Constitutional Provisions</u>

U.S. Const. amend. X 49

U.S. Const. art. III, § 2 27

Appellate Case: 21-3268 Page: 6 Date Filed: 10/19/2021 Entry ID: 5088857

Statutes

20 U.S.C. § 1415(*l*) 32

28 U.S.C. § 1292(a)(1) 9

28 U.S.C. § 1331 9

28 U.S.C. § 1343(a)(4) 9

29 U.S.C. § 794(a) 39

42 U.S.C. § 12132 39

Act of May 20, 2021 (H.F. 847), ch. 139, 2021 Iowa Acts § 28 (to be codified at Iowa Code § 280.31) ....passim

Act of May 20, 2021 (H.F. 847), ch. 139, 2021 Iowa Acts § 31 11

Iowa Code § 135.144(3) 41

Iowa Code § 256.11(10)–(12) 12

Iowa Code § 256B.2(2) 32

Iowa Code § 256B.4 32

Iowa Code § 256B.6 32

Iowa Code § 272.2(4) 12

Iowa Code § 29C.6 41

Regulations

Iowa Admin. Code r. 281-41.321–.328 30

Iowa Admin. Code r. 281-41.506 30

Iowa Admin. Code r. 281-41.507–.518 30

Iowa Admin. Code r. 282-25.3(6)(m) 13

Other Authorities

Federal Rule of Appellate Procedure 41(b) 20

House Video, Consideration of H.F. 847 (May 19, 2021), *available at* https://perma.cc/BD9B-2FZ6 12

Mask Mandate Fails to Pass at Special Sioux City School Board Meeting, Radio Iowa (Sept. 16, 2021) 28

Melody Mercado, *Ankeny School Board Approves a Mask Mandate, Following Federal Court Order*, Des Moines Reg. (Sept. 23, 2021) 30

Taj Simmons, *Waukee School Board Votes in Opposition of Mask Mandate Within the District,* WHO 13 (Sept. 16, 2021) 28

Teresa Kay Albertson, *Ankeny School Board Debates Mask Mandate as Crowd Voices Concerns about 'Body Autonomy', 'Freedom of Choice,'* Des Moines Reg. (Sept. 14, 2021) 17

Tim Johnson, *Shouting, Police Officers and Tears: Bluffs School Board Meeting Turns into an Anti-Mask Demonstration*, The Daily Nonpareil, (Sept. 14, 2021) 16

Trevor Oates, *Linn-Mar School Board Approves Mask Mandate for PK-6 Students*, KWWL (Sept. 16, 2021).......................... 28

U.S. Dep't of Educ., *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment*................ 46

World Health Organization, *Advice on the Use of Masks for Children in the Community in the Context of COVID-19*, Aug. 21, 2020.. 46

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case under 28 U.S.C. § 1331 because Plaintiffs' claims arise under laws of the United States—title II of the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the American Rescue Plan Act of 2021. The court also had jurisdiction over Plaintiffs' ADA and section 504 claims under 28 U.S.C. § 1343(a)(4) because they seek equitable relief under an Act of Congress providing for the protection of civil rights.

This court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because Governor Reynolds and Director Lebo filed a timely notice of appeal the same day the district court entered an order granting an injunction on October 8, 2021. Add 27; App. 681.

Appellate Case: 21-3268 Page: 9 Date Filed: 10/19/2021 Entry ID: 5088857

STATEMENT OF ISSUES

I. Do parents who want universal mask mandates in their children's schools have standing to enjoin enforcement of a statute prohibiting schools from adopting mask mandates when the statute contains an exception permitting compliance with federal law?

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc., 528 U.S. 167 (2000)
Dixon v. City of St. Louis, 950 F.3d 1052 (8th Cir. 2020)
U.S. Const. art. III, § 2

II. Are parents who allege that their children are being deprived appropriate in-person education because of the lack of a universal mask mandate in their schools "seeking relief that is also available under the IDEA" and thus required to exhaust IDEA administrative remedies?

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017)
J.M. v. Francis Howell Sch. Dist., 850 F.3d 944 (8th Cir. 2017)
Nelson v. Charles City Cmty. Sch. Dist. 900 F.3d 587 (8th Cir. 2018)
20 U.S.C. § 1415(*l*)

III. Does federal disability law require schools to impose—or to have the discretion to impose—universal mask mandates?

Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998)
Timothy H. v. Cedar Rapids Cmty. Sch. Dist., 178 F.3d 968 (8th Cir. 1999)
Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1100–02 (8th Cir. 1999)
U.S. Const. amend. X

Appellate Case: 21-3268 Page: 10 Date Filed: 10/19/2021 Entry ID: 5088857

STATEMENT OF THE CASE

Near the end of last school year, the Legislature passed, and Governor Reynolds signed, legislation enacting Iowa Code section 280.31 into law. *See* Act of May 20, 2021 (H.F. 847), ch. 139, 2021 Iowa Acts § 28 (to be codified at Iowa Code § 280.31), *available at* https://perma.cc/XM6Q-A3HX. The statute became effective immediately, *see id.* § 31, and provides:

> 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. It generally prohibits Iowa schools from mandating that anyone wear face masks on their property. *Id.* But schools may still mandate wearing a mask if it "is required by . . . any other provision of law." *Id.*

During legislative debate on the statute, the House Education Committee Chair who sponsored the provision explained that it came "from the citizens of Iowa" and that he had heard from more Iowans on this issue than on any other

Appellate Case: 21-3268 Page: 11 Date Filed: 10/19/2021 Entry ID: 5088857

issue since the pandemic began. House Video, Consideration of H.F. 847 (May 19, 2021, at 6:35:32, 7:11:50 PM), *available at* https://perma.cc/BD9B-2FZ6. In response to questioning from opponents about the possibility of new, more dangerous variants needing mask mandates, *see, e.g.*, *id.* at 6:15:35 PM, he repeatedly explained that the Governor has the authority to impose mandates if she decides they become necessary. *See id.* at 6:18:50, 6:26:30; 7:09:50 PM. And there was even discussion about the exception permitting schools to impose mask mandates when required by other law—with opponents criticizing the inclusion of such a broad exception. *See id.* at 6:15:50.

Section 280.31 contains no enforcement provisions. But a school that violates the statute—like any school law—could eventually be subject to loss of accreditation or other action by the State Board of Education if the violation is not remedied. *See* Iowa Code § 256.11(10)–(12). Similarly, a school administrator that disregards the statute could be subject to professional licensure discipline by the Iowa Board of Educational Examiners. *See* Iowa Code § 272.2(4); Iowa Admin. Code r. 282-25.3(6)(m).

Plaintiffs are eleven parents of children in Iowa public school districts and one nonprofit organization—The Arc of

Appellate Case: 21-3268 Page: 12 Date Filed: 10/19/2021 Entry ID: 5088857

Iowa.[1] All their children have intellectual or physical disabilities that increase their risk associated with contracting COVID-19. And they believe that "[i]f everyone were wearing a mask," these harms would be avoided and "their children would be safe." App. 155. They all have expressed their desire to "block" section 280.31 so that their schools could impose a universal mask mandate. *See* App. 90 ¶ 15; App. 93 ¶ 14; App. 96 ¶ 15; App. 98 ¶ 18; App 102 ¶ 22; App. 105 ¶ 14; App. 107 ¶ 15; App. 112 ¶ 17; App. 115 ¶ 24; App. 118 ¶ 12; App 120 ¶ 17.

As the current school year approached, some of Plaintiffs sought out modifications from their schools. For example, one parent sought an accommodation in advance of the school year that her son's teacher wear a mask when she was working one-on-one with him. App. 118 ¶ 9. But after a week of school, her son told her that his teacher wasn't wearing a mask when interacting with him one-on-one. App. 118. ¶ 10; *see also* App. 115 ¶ 18 (requesting that teacher mask and permit student to leave class early to avoid crowded halls); App. 95 ¶ 10 (requesting small groups working with

---

[1] The Arc of Iowa advocates for people with intellectual and developmental disabilities and their families. App. 11 ¶ 10. Several Plaintiffs are also members of the Arc of Iowa. App. 32 ¶ 66; App. 35 ¶¶ 68–69; App. 37 ¶ 71.

Appellate Case: 21-3268 Page: 13 Date Filed: 10/19/2021 Entry ID: 5088857

child to be voluntarily masked); App. 110 ¶ 10 (requesting voluntarily masking around child, a smaller classroom, and social distancing). Yet there's no evidence that any parent took any steps to try to enforce the agreed measures or seek additional help through any of the remedies available. *See* App. 95, 110, 115, 118.

Instead, more than three months after section 280.31 was enacted, Plaintiffs sued Governor Reynolds, Iowa Department of Education Director Ann Lebo, and ten school districts, alleging that section 280.31 violates title II of the Americans with Disabilities Act ("ADA"), section 504 of the Rehabilitation Act, and the American Rescue Plan Act of 2021 ("ARPA"). *See* App 38–44 ¶¶ 76–102. They sought a temporary restraining order and preliminary injunction enjoining enforcement of section 280.31 so that local schools could impose universal mask mandates. App. 44.

Governor Reynolds and Director Lebo (collectively, "the State") resisted the temporary restraining order and the preliminary injunction. But after conducting a hearing, the district court rejected the State's arguments. The court first entered an indefinite temporary restraining order on September 13, 2021, enjoining all Defendants "from enforcing Iowa Code section 280.31 banning local public school districts from utilizing their discretion to mandate masks for students, staff, teachers, and visitors." Add. 56. Fourteen

Appellate Case: 21-3268 Page: 14 Date Filed: 10/19/2021 Entry ID: 5088857

days later, the court formally extended the temporary restraining order another 14 days over the State's objection. Add. 63–64.

And then on October 8, 2021—twenty-five days after first enjoining the statute—the district court finally issued a preliminary injunction. Add. 27. The district court focused significant attention on the irreparable harm it concluded Plaintiffs could suffer without an injunction of section 280.31. Add. 1–7, 21—24, 29–13, 45–49. The district court explained:

> Again, the Court recognizes issuing a preliminary injunction is an extraordinary remedy, however, given the current trajectory of pediatric COVID-10 cases in Iowa since the start of the school year, the irreparable harm that could befall the children involved in this case, Plaintiffs' likelihood of success on the merits, the grave harm to Plaintiffs if Iowa Code section 280.31 is not enjoined, and the important public interests at stake, such an extreme remedy is necessary.

Add. 27.

The district court also held that Plaintiffs are likely to succeed on the merits of their claims under title II of ADA and section 504 of the Rehabilitation Act. Add. 20. The court reasoned that "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. 20. According to the district court, this was because the lack of universal mask

Appellate Case: 21-3268 Page: 15 Date Filed: 10/19/2021 Entry ID: 5088857

mandates made "in person learning at schools available only under conditions that are dangerous to children with disabilities." Add. 15, 26.

The court rejected the State's arguments that an injunction was neither necessary nor sufficient to remedy any alleged injuries because section 280.31 permits compliance with federal law and the injunction wouldn't provide Plaintiffs a mask mandate. Add. 10–12. It also rejected the State's argument that Plaintiffs were required to exhaust their administrative remedies under the Individuals with Disabilities Education Act. Add. 13–14.

The district court's preliminary injunction—like the temporary restraining order before it—upset the status quo rather than maintained it. Schools were providing education to their students with section 280.31 in effect, in many cases for several weeks before this Court's temporary restraining order ruling. Suddenly enjoining that law—as predicted, *see* App. 181—has reopened the debate in each school board and management team as to whether to adjust masking requirements in their school, creating significant unnecessary confusion and conflict that will continue until the injunction is vacated. *See* Tim Johnson, *Shouting, Police Officers and Tears: Bluffs School Board Meeting Turns into an Anti-Mask Demonstration*, The Daily Nonpareil, (Sept. 14, 2021), https://perma.cc/D9N3-HSS5; (Sept. 14, 2021), Teresa Kay Albertson, *Ankeny School Board*

Appellate Case: 21-3268 Page: 16 Date Filed: 10/19/2021 Entry ID: 5088857

Debates Mask Mandate as Crowd Voices Concerns about 'Body Autonomy', 'Freedom of Choice,' Des Moines Reg. (Sept. 14, 2021), https://perma.cc/SH6S-AMNP.

Thus, the same day it was issued, the State appealed the order granting a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) and moved to expedite the appeal. This Court granted the motion, setting an expedited briefing schedule and scheduling oral argument for November 18, 2021, in Omaha, Nebraska.

Appellate Case: 21-3268 Page: 17 Date Filed: 10/19/2021 Entry ID: 5088857

SUMMARY OF THE ARGUMENT

The district court preliminarily enjoined enforcement of Iowa Code section 280.31, which generally prohibits schools from mandating the wearing of masks on school property. The court agreed with Plaintiffs that they were likely to succeed on their novel claims that this statute violates title II of the ADA and section 504 of the Rehabilitation Act. But the district court abused its discretion in granting this extraordinary remedy because its conclusion was based on several errors of law.

First, the injunction is unnecessary. Section 280.31 permits schools to impose to mandate the wearing of masks if it "is required by . . . any other provision of law." The statute thus doesn't prevent schools from complying with the ADA and section 504. And Plaintiffs don't suffer any injury from section 280.31 that is protected those federal statutes.

Second, the injunction is insufficient. Even if failing to have a universal mask mandate in schools violates federal law, enjoining enforcement of section 280.31 doesn't provide Plaintiffs such a mandate. That remains an independent decision of the local schools. Plaintiffs thus lack standing.

Third, the district court improperly overlooked Plaintiffs' failure to exhaust their administrative remedies under the Individuals

Appellate Case: 21-3268 Page: 18 Date Filed: 10/19/2021 Entry ID: 5088857

with Disabilities Education Act ("IDEA"). Because Plaintiffs contend that the lack of a universal mask mandate is denying them a full in-person public education, they are seeking relief that is also available under the IDEA, and its exhaustion requirements apply. Their claims cannot succeed.

And fourth, the ADA and section 504 do not require schools to impose—or to have the discretion to impose—universal mask mandates. Following a neutral nondiscriminatory policy, like section 280.31, doesn't violate these statutes because any denial of benefits is because of the policy, not an individual's disability. It's unsettled whether the State must make a reasonable modification to such a policy. But even if it must, a universal mask mandate in schools is not a reasonable modification. It would be a fundamental alteration of the State's education program as set in section 280.31 and cause administrative burdens. It infringes on the rights of other students at school. And other alternative reasonable modifications are available. A contrary interpretation of the ADA and section 504—like the district court's preliminary injunction here—raises serious constitutional concerns about intrusion of the federal government into the public health and education domain of the States.

By the time of oral argument, enforcement of section 280.31 will have been improperly enjoined for 66 days. By upsetting the status quo and granting this extraordinary relief, the district court

Appellate Case: 21-3268 Page: 19 Date Filed: 10/19/2021 Entry ID: 5088857

has caused confusion and conflict through-out Iowa. Schools have been forced to wrestle with the implications of the court's order and how to exercise the authority the court granted them. Students, parents, teachers, schools, and the State need relief from the court's injunction.

The State respectfully requests that this Court vacate the preliminary injunction in an expedited decision. And this Court should direct the immediate issuance of the mandate pursuant to Federal Rule of Appellate Procedure 41(b) so that school can again be conducted in the manner decided by the State of Iowa's duly elected Legislature and Governor.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). When considering a preliminary injunction, a district court ordinarily must evaluate "the movant's likelihood of success on the merits, the threat of irreparable harm to the movant, the balance of the equities between the parties, and whether an injunction is in the public interest." *Sessler v. City of Davenport*, 990 F.3d 1150, 1154 (8th Cir. 2021).

But when a preliminary injunction seeks to "enjoin the implementation of a duly enacted state statute," a district court must

"make a threshold finding that a party is likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–33 (8th Cir. 2008) (en banc). Only if a plaintiff makes this threshold showing should the court "then proceed to weigh the other *Dataphase* factors." *Id.* at 732. Without this showing, "there is no reason at the preliminary injunction stage for the courts to disturb a duly elected legislature's attempt to balance" competing interests. *Id.* at 737 n.11. This "more rigorous standard" is intended "to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id.* at 733.

"The ultimate decision to grant a preliminary injunction is reviewed for abuse of discretion, with factual findings examined for clear error and legal conclusions considered *de novo*." *Brakebill v. Jaeger*, 932 F.3d 671, 676 (8th Cir. 2019); *Rounds*, 530 F.3d at 733 (vacating preliminary injunction and holding that district court abused its discretion when "district court rested its conclusion on an error of law"). "An abuse of discretion also occurs when a relevant factor that should have been given significant weight is not considered" or "when all proper factors, and no improper ones, are considered, but the court, in weighing those factors commits a clear error of judgment." *Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020) (cleaned up).

Appellate Case: 21-3268 Page: 21 Date Filed: 10/19/2021 Entry ID: 5088857

I. Plaintiffs lack standing to enjoin section 280.31—and an injunction is unnecessary—because the statute does not prevent schools from complying with federal law and enjoining its enforcement does not redress Plaintiffs' alleged harms because the relief does not guarantee a universal mask mandate in their children's schools.

Plaintiffs want their children's schools to impose universal mask mandates so that they may feel that their disabled children are safer from COVID-19. Section 280.31 stands in their way because it generally prohibits schools from imposing universal mask mandates unless the mask "is required by . . . any other provision of law." Act of May 20, 2021 (H.F. 847), ch. 139, 2021 Iowa Act § 28 (to be codified at Iowa Code § 280.31). They allege that the statute violates federal disability law and successfully sought to enjoin its enforcement entirely.

But the granted injunction is a mismatch with Plaintiffs' novel disability discrimination claims. A statute that carves out an exception to permit compliance with federal law can't violate federal law. Nor can enjoining the statute get Plaintiffs the mask mandates they desire—because that decision merely reverts to each independent school. This could be considered as matter of standing because of the lack of a fairly traceable injury that can be redressed by the injunction. Or it could be a matter of judgment because of the unnecessary injunction of a state statute without respecting state–federal comity. But in every way, the district court erred.

A. Plaintiffs are not harmed by section 280.31 because it permits schools to mandate facial coverings when required by federal law.

Section 280.31 doesn't prohibit any actions of a school where "the facial covering . . . is required by . . . any other provision of law." Act of May 20, 2021 (H.F. 847), ch. 139, 2021 Iowa Act § 28 (to be codified at Iowa Code § 280.31). So even if Plaintiffs are correct that federal law requires some masks in schools, section 280.31 doesn't prohibit it. No injunction of the statute's enforcement is required. A school already has it within its power to comply with any requirement of federal law.

To be sure, as discussed in Part III, the State disputes that the ADA or the Rehabilitation Act impose any federal requirement that a universal mask mandate be imposed in all Iowa schools—or that they require local school decisionmakers to have the discretion to impose such universal mandates rather than the Governor. And presumably Iowa schools and their lawyers have come to the same conclusion since none acted to impose a district-wide, or building-wide universal mask mandate based on some requirement of federal law before the district court enjoined section 280.31.

Yet the district court enjoined Governor Reynolds and Director Lebo "from enforcing Iowa Code section 280.31 banning local public school districts from utilizing their discretion to mandate masks for students, staff, teachers, and members of the public."

Appellate Case: 21-3268 Page: 23 Date Filed: 10/19/2021 Entry ID: 5088857

Add. 27. In rejecting the State's argument that the injunction was unnecessary, the district court reasoned that "schools in Iowa did not believe they were allowed to implement mask mandates." Add. 12. True enough. But lack of awareness of one provision in a statute is not a valid reason to unnecessarily enjoin that entire statute. And it cannot change the text of the statute which includes the exception—whether or not every school board member or administrator in Iowa was aware.[2]

The district court also reasoned that this argument "flies in the face in [sic] Governor Reynolds's public statements that she would 'hold strong' and vigorously enforce section 280.31." Add. 12 n.12. But the Governor's statements don't contradict this argument any more than the first paragraph of this Part contradicts the second. And while nuanced, the State's position is consistent. No question—the parties disagree over whether federal law requires universal mask mandates in schools. But that dispute—even if Plaintiffs are right in *their* interpretation of federal law's requirements—does not justify *this* preliminary injunction against *these parties*.

---

[2] If anything, the evidence of schools' beliefs supports the State's view set forth in Part III that federal law doesn't require universal mask mandates. A school would be *accurate* in believing that they couldn't implement a universal mask mandate if federal law doesn't require the mandates. And if true, there still could be no injunction because the merits of the federal claims fail.

Appellate Case: 21-3268 Page: 24 Date Filed: 10/19/2021 Entry ID: 5088857

If Plaintiffs are correct that universal mask mandates in schools are required by federal disability law, then section 280.31 doesn't stand in the way of their desired mandates. Their quarrel would be with their schools. Now, a school may well disagree that federal law requires a mask mandate. Or the school may fear that it will be subject to enforcement action by the State and not want to risk waiting until then to find out if the State is correct in its interpretation of federal disability law. Plaintiffs might be able to request some relief other than the granted injunction to seek resolution of these disputes. But enjoining section 280.31 is a mismatch.

An unnecessary injunction, relying primarily on evidence of possible confusion over the text of a statute, is particularly problematic when it is a federal injunction against a state statute. *See Dixon*, 950 F.3d at 1056 (vacating injunction for failure to properly consider "whether a preliminary injunction served the public interest in comity between the state and federal judiciaries"). "'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies.'" *Id.* (quoting *R.R. Comm'n of Tex. V. Pullman Co.*, 312 U.S. 496, 500 (1941)); *see also id.* ("'[F]ederal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976))).

Appellate Case: 21-3268 Page: 25 Date Filed: 10/19/2021 Entry ID: 5088857

B. Enjoining enforcement of section 280.31 does not redress Plaintiffs' alleged harms because the injunction doesn't require their children's schools to impose universal mask mandates.

The district court's preliminary injunction isn't just unnecessary—it's also insufficient to redress Plaintiffs' alleged irreparable harms. They asserted that their irreparable harms are "heightened risk of exposure" to COVID-19 if they attend in-person school or "loss of educational opportunities" if the students are removed from school. App. 156–57. And they believe that "[i]f everyone were wearing a mask," these harms would be avoided and "their children would be safe." App. 155. Indeed, every Plaintiff expressed their desire to "block" section 280.31 so that their schools could impose a universal mask mandate. *See* App. 90 ¶ 15; App. 93 ¶ 14; App. 96 ¶ 15; App. 98 ¶ 18; App 102 ¶ 22; App. 105 ¶ 14; App. 107 ¶ 15; App. 112 ¶ 17; App. 115 ¶ 24; App. 118 ¶ 12; App 120 ¶ 17.

But Plaintiffs did not ask for an injunction requiring everyone in their children's schools to wear a mask. They sought only to enjoin Governor Reynolds and Director Lebo from enforcing section 280.31. App. 44 ¶ 4. And that's all that the district court enjoined.[3] Add. 27. That won't remedy their claimed harm. It's dependent on

---

[3] The district court's language also enjoined "the school districts" from enforcing section 280.31. Add. 27. But since school districts have no authority to enforce section 280.31, it's unclear what actions, if any, they are prevented from taking.

Appellate Case: 21-3268 Page: 26 Date Filed: 10/19/2021 Entry ID: 5088857

the actions of independently elected school boards and leaders of private schools to decide whether they will in fact implement a universal mask mandate in their school districts like Plaintiffs hope. Because of this lack of redressability, Plaintiffs do not have Article III standing to seek this injunction and it should not have been issued. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (requiring showing that injury is "fairly . . . trace[able] to the challenged action of the defendant"); *see also* U.S. Const. art. III, § 2 ("The judicial power shall extend to all cases . . . .").

The district court initially speculated that redressability was not a concern since many districts had mask mandates in the last school year before the enactment of section 280.31, and at least one school district indicated it was prepared to impose a mandate again. Add. 43–44. Then, after the court improperly enjoined the statute with its temporary restraining order and some districts again implemented mandates, the court took those actions and evidence that Plaintiffs' alleged injuries were redressable by its injunction. Add. 11.

Appellate Case: 21-3268 Page: 27 Date Filed: 10/19/2021 Entry ID: 5088857

True, since the district court issued its temporary restraining order, some schools in Iowa have imposed a universal mask mandate. *See* App. 409–13. And this includes some of the school attended by Plaintiffs' children. *See id.*; *see also* App. 513–14. But the mask mandates might not be maintained—that depends on actions of third parties not being required by the injunction to provide such a mandate. And some schools, like Defendant Linn Mar Community School District, decided to impose a mandate only for students sixth grade and younger and set it to expire 60 days after vaccines are available for children under twelve. *See* Trevor Oates, *Linn-Mar School Board Approves Mask Mandate for PK-6 Students*, KWWL (Sept. 16, 2021), https://perma.cc/MG3B-VVRU; *see also* App. 410.

And other districts have decided not to impose mandates or are delaying any decision, even after the court's orders, showing that this injunction didn't remedy their harms. For example, one Plaintiff complains that even after the statute has been enjoined and the school board has met three times, her child's district still has not imposed a mandate. App. 504; *see also Mask Mandate Fails to Pass at Special Sioux City School Board Meeting*, Radio Iowa (Sept. 16, 2021), https://perma.cc/PR5H-VWXE; Taj Simmons, *Waukee School Board Votes in Opposition of Mask Mandate Within the District,* WHO 13 (Sept. 16, 2021), https://perma.cc/55XJ-YKH9.

Appellate Case: 21-3268 Page: 28 Date Filed: 10/19/2021 Entry ID: 5088857

Still other Plaintiffs remain uncomfortable with returning their children to in-person learning even after their schools have imposed universal mask mandates. One parent with a child enrolled at a school with a new mandate says that the child's doctor recommends "one-on-one or home learning" and that she is still "working with the school on a plan for my child to return to school, specifically additional accommodations that would make it safer for her to attend school." App. 495–96 ¶ 2–5. Another was dissatisfied that his children's school district mask mandate was not imposed for a longer period of time and kept his children enrolled online. App. 497–98 ¶ 2–5. And a third parent, with a child at a school with a mandate only for students through sixth grade, expressed her opinion that the school should have imposed a mandate for all grades and was also waiting "to finalize further accommodations under the ADA so that [her child] may return to school in person safely." App. 509.

These actual circumstances show that the remedy is dependent on the independent decisions of others, and in some cases changes nothing about the disabled students' access education to education. How can the district court's injunction be said to provide any redress in these circumstances?

Appellate Case: 21-3268 Page: 29 Date Filed: 10/19/2021 Entry ID: 5088857

There's one important way that the district court's injunction did spur schools to impose mask mandates. It forced schools to navigate perilous legal waters flooded by the questions raised by the implications of the district court's orders. *See, e.g.*, Melody Mercado, *Ankeny School Board Approves a Mask Mandate, Following Federal Court Order*, Des Moines Reg. (Sept. 23, 2021), https://perma.cc/29KW-YTU5 (quoting the superintendent of Defendant Ankeny Community School District as saying that his recommendations to impose a mask mandate were "based on my desire for the district school to avoid violating federal civil rights and disability laws" and summarizing that Ankeny's "plan was meant to avoid a lawsuit against the school district").

While the district court only enjoined enforcement of section 280.31, the necessary implications of its holding that Plaintiffs are likely to succeed on their federal disability claims are much broader. If a universal mask mandate is a reasonable modification required by federal law, is every school in Iowa in violation if it doesn't impose a universal mask mandate? Or is every government entity or recipient of federal funds required to do so in all its buildings? And every employer or public accommodation subject to the ADA? So long as the injunction remains in effect, these questions will persist.

Appellate Case: 21-3268 Page: 30 Date Filed: 10/19/2021 Entry ID: 5088857

These concerns are not merely hypothetical. In other similar cases, plaintiffs have sought to force schools to impose universal mask mandates based on these same statutory provisions and the same erroneous logic. And some courts have agreed. *See S.B. v. Lee*, No. 3:21-CV-00317, 2021 WL 4755619, at *29 (E.D. Tenn. Oct. 12, 2021) (ordering preliminary injunction based on ADA claim against school district to reinstate universal mask mandate that it's school board had voted down while also enjoining the governor's executive order); *R.K. v. Lee,* No. 3:21-CV-00725, 2021 WL 4391640, at *6, 8 (M.D. Tenn. Sept. 24, 2021) (granting temporary restraining order against school districts that did not resist and the governor in reliance on the district court's temporary restraining order in this case); *L.E. v. Ragsdale*, No. 1:21-CV-4076, 2021 WL 4841056, at *1–3 (N.D. Ga. Oct. 15, 2021) (denying preliminary injunction against school district seeking a mask mandate based on ADA and section 504 claim)

In sum, Plaintiffs' requested injunction is divorced from their alleged harm and any likely valid legal claim. Because of this mismatch and lack of standing, the injunction should be vacated.

II. Plaintiffs failed to exhaust their administrative remedies under the IDEA as required before suing.

Plaintiffs failed to exhaust their administrative remedies under the Individuals with Disabilities Education Act ("IDEA"). This

dooms their federal disability claims. And the district court thus erred in holding that Plaintiffs were likely to succeed on the merits of their claims. Add. 20, 27.

The IDEA ensures that children with certain physical or intellectual disabilities receive a "free appropriate public education," known as a FAPE. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748 (2017). And the IDEA sets up a comprehensive procedure to provide a FAPE. *See id.* at 748–49. The process starts with the development of an individualized education program ("an IEP"). And it includes administrative procedures to resolve disputes between a school and a family that could ultimately lead to a hearing before a neutral administrative law judge and then judicial review in state or federal court. *See id.* at 748–49; *see also* Iowa Code §§ 256B.2(2), 256B.4, 256B.6; Iowa Admin. Code r. 281-41.321–.328 (IEP process), 281-41.506 (mediations); 281-41.507–.518 (due-process hearings).

While Plaintiffs sue under title II of the ADA and section 504 of the Rehabilitation Act—rather than under IDEA—they must still exhaust the administrative remedies provided by the IDEA if they are "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*); *see also Fry*, 137 S. Ct. at 750 ("[A] plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances—that is, when 'seeking relief that is

Appellate Case: 21-3268 Page: 32 Date Filed: 10/19/2021 Entry ID: 5088857

also available under' the IDEA—first exhaust the IDEA's administrative procedures.").[4]

This "exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education." *Fry*, 137 S. Ct. at 754. If the suit claims discrimination in a way that does not result in denial of a FAPE, then exhaustion is not required "because, once again, the only 'relief' the IDEA makes 'available' is relief for the denial of a FAPE. *Id*. at 755. In conducting this analysis, "[w]hat matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Id.*

Thus, in *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 948–49 (8th Cir. 2017), this Court affirmed dismissal of several federal claims—including under the ADA and section 504—because exhaustion was required. The plaintiff was the parent of a disabled elementary student who alleged that her son had been physically restrained "'for half of the time he actually spent at Defendant's schools'" over several months. *Id.* (quoting the complaint). And she

---

[4] At the hearing on Plaintiffs' Motion for a Temporary Restraining Order, their counsel admitted that they considered bringing a claim directly under the IDEA. App. 304 ("We considered them, and we decided we don't need to do that to get our plaintiffs relief."). He didn't say that they concluded the relief wasn't "also available" under the IDEA—just that the IDEA claims were unnecessary.

Appellate Case: 21-3268 Page: 33 Date Filed: 10/19/2021 Entry ID: 5088857

alleged that he was "'denied . . . because of his disability, participation in and the benefits of a public education.'" The Court reasoned that "[t]hese allegations show that the complaint was based on the 'denial of a FAPE' under the IDEA." *Id.* at 949.

Plaintiffs allege throughout their Complaint that the lack of a universal mask mandate—or perhaps merely the lack of their schools' authority to be able to consider such a mandate—is excluding them from receiving their appropriate public education. *See* App. 26 ¶ 56 ("Students with disabilities who are unable to safely return to brick-and-mortar schools because of continued health concerns are being excluded from the public school system . . . ."); App. 27 ¶ 59 ("Iowa state officials have effectively excluded these students from participation in the public education system . . . ."); *id.* ¶ 58 ("Thus the Defendants' actions will have the perverse effect of either placing children with disabilities in imminent danger or unlawfully forcing those children out of the public school system."); *id.* ¶ 57 (complaining of lack of "virtual learning" and that "virtual learning, even if available, is not a viable or adequate substitute for in person learning"); App. 26 ¶ 54 (complaining that "Children with disabilities are entitled to learn and interact with all other children, to receive the same education as all other children"); App. 9 ¶ 1 (alleging schools cannot comply with section 280.31 and still provide "equal access to their education"); *id.* ¶ 2 (alleging student risk

Appellate Case: 21-3268 Page: 34 Date Filed: 10/19/2021 Entry ID: 5088857

harm to health or harm to "their education and development"); App. 19–20 ¶¶ 38–40 (alleging various educational harms to disabled students because of the pandemic).

Plaintiffs' claimed discrimination is thus an injury that is allegedly denying them a FAPE. That injury could be remedied by granting relief under the IDEA. Exhaustion was required.

The district court held otherwise, reasoning that while "Plaintiffs' claims relate to the children's education, Plaintiffs do not seek the type of special education services that the IDEA guarantees." Add. 14. The court relied on the Supreme Court's recognition in *Fry* that not every dispute between a disabled student and a school involves the denial of a FAPE. Add. 14 (citing *Fry*, 137 S.Ct. at 754). But the Court in *Fry* didn't hold that the question turns on whether a plaintiff seeks any particular "type of special education services." In fact, it rejected any requirement to use "magic words" or refer to "FAPE" or "IEP" or "IDEA." *See Fry*, 137 S. Ct. at 755.

The proper analysis is whether a plaintiff alleges the denial of a FAPE—the free appropriate public education required by the IDEA—rather than some other injury that doesn't deny appropriate education. *Id.* at 754. In *Fry*, a student with cerebral palsy sought to bring a service dog instead of the one-on-one human aide that the school district offered to meet her educational needs. *Id.* at

Appellate Case: 21-3268 Page: 35 Date Filed: 10/19/2021 Entry ID: 5088857

758. The plaintiff did not even implicitly allege a denial of her educational needs. *Id.* And thus the Court concluded it likely exhaustion was not required—though it ultimately remanded for reconsideration. *See id.* 758–59.

Unlike *Fry*, Plaintiffs' complaint is explicitly tied to a deprivation of their educational needs. They contend that they are being deprived their education because they're not able to safely attend in-person school without a mask mandate and the alternative of virtual school is inadequate. App. 26–27 ¶¶ 56–59. Their claims are thus like the student in *J.M.* who alleged discrimination for being kept in restraints for the half the time and deprived his full education. *See J.M.*, 850 F.3d at 948–49.

The district court developed its reasoning by considering two hypothetical questions: Could Plaintiffs have brought this claim against an entity other than a school? And could a teacher or visitor bring a similar claim? Add. 13–14. But this Court has explained that it's improper to approach this question at a "higher level of generality" *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 592 (8th Cir. 2018); *see also Fry*, 137 S. Ct. at 759 (Alito, J., concurring) (explaining that the hypotheticals are "false clues" that "are likely to confuse and lead courts astray" given the overlapping coverage of the statutes).

Appellate Case: 21-3268 Page: 36 Date Filed: 10/19/2021 Entry ID: 5088857

Because Plaintiffs' claims are driven by the focus on the importance of education for their children and their exclusion from receiving that education, the proper level of comparison 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—and they could not. Nor could the students bring that same claim against a different entity, like a county courthouse or public library. But at bottom, asking the true question demanded by the statute and *Fry*, students could get the relief they're asking for—accommodation to their disabilities so they can receive a FAPE through the IDEA administrative process.

This case shows the wisdom of the exhaustion requirement. Precisely what additional accommodations these disabled students need because of the pandemic are highly fact-specific, individualized determinations. They depend on the unique health and educational needs of each student, their classrooms and facilities, the current public health conditions, and the most recent and accurate public health guidance on appropriate mitigation measures. Those decisions should be made individually. And if disputes arise, they should be resolved through the proper processes in place—not through a one-size-fits-all injunction in this lawsuit.

Indeed, the record indicates that some of the Plaintiffs started to seek individualized solutions for their children. These included

teachers wearing a mask when working on-on-one with the child. App. 118 ¶ 9; App. 115 ¶ 18. And special arrangements for avoiding crowded hallways. App. 115 ¶ 18. Masking of only those small groups near the child. App. 95 ¶ 10. Or other social distancing measures. App. 110 ¶ 10. In some cases, however, the parents reported that their schools were not following the agreed upon measures. App. 115 ¶ 18; 118. ¶ 10. Yet there's no evidence that they took any steps to try to enforce the agreed measures or seek additional help through any of the remedies available. *See* App. 95, 110, 115, 118.

Because Plaintiffs have not exhausted their administrative remedies under the IDEA their claims under the ADA or the Rehabilitation Act are subject to dismissal as a matter of law and they are thus unlikely to succeed on these claims. Granting a preliminary injunction was an abuse of discretion.

III. Federal disability law does not require schools to impose—or to have the discretion to impose—universal mask mandates.

The district court held that Plaintiffs are likely to succeed on the merits of their claims under title II of the ADA and section 504

Appellate Case: 21-3268 Page: 38 Date Filed: 10/19/2021 Entry ID: 5088857

of the Rehabilitation Act. Add. 20.[5] The court reasoned that "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. 20. But neither the ADA nor the Rehabilitation Act require universal mask mandates in schools or requires schools to have the discretion to implement such mandates.

A. Section 280.31's prohibition on schools imposing universal mask mandates is a neutral and nondiscriminatory policy that does not violate federal law.

Courts typically analyze disability discrimination claims under title II of the ADA and section 504 of the Rehabilitation Act together. *See, e.g.*, *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 756 (8th Cir. 1998). Under both statutes, "a plaintiff must show that he was a qualified individual with a disability and that he was denied the benefits of a program, activity, or services by reason of that disability." *Id.* (citing 42 U.S.C. § 12132; 29 U.S.C. § 794(a)). And

[5] Plaintiffs also brought a claim that the American Rescue Plan Act of 2021 ("ARPA"), agency guidance, and a letter from the Secretary of Education conflict with and supersede Iowa Code section 280.31. App. 42–44 ¶¶ 95–102. The district court didn't rely on this claim in issuing its preliminary injunction. Add. 15 n.7.

under both, when the denial occurs because of a neutral nondiscriminatory policy rather than because of a plaintiff's disability, no violation arises. *See Davis*, 138 F.3d at 756–57. It matters not whether the plaintiffs "question the wisdom" of the policy. *Id.* at 756. The policy doesn't violate the federal statutes where it "applies to all students regardless of disability and rests on concerns unrelated to disabilities or misperceptions about them." *Id.* (cleaned up); *see also Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968, 971–72 (8th Cir. 1999); *DeBord v. Bd. of Educ.*, 126 F.3d 1102, 1105–06 (8th Cir. 1997).

This Court has thus held that following a policy that all students in an intra-district transfer program must provide their own transportation is not disability discrimination. *See Timothy H.*, 178 F.3d at 972. Nor is following a policy to administer medication in schools only consistent with the maximum dosage recommended by the Physician's Desk Reference. *See Davis*, 138 F.3d at 756; *DeBord*, 126 F.3d at 1105–06. And these were just *policies* of school districts—not a duly enacted statute setting statewide education policy that is entitled to even greater respect.

Section 280.31 establishes a uniform nondiscriminatory policy that—unless required by other law or a specific instructional or educational purpose—local schools cannot require students, em-

Appellate Case: 21-3268 Page: 40 Date Filed: 10/19/2021 Entry ID: 5088857

ployees, or visitors to wear face coverings. There's been no suggestion that the statute was adopted to single out individuals with disabilities. And it imposes no restriction on individuals—whether disabled or not—at all. To be clear, *all* students, employees, and visitors remain free to wear face coverings or take any other health precautions they (or their parents) choose. The statute is mainly an allocation of decision-making authority between the State and local government, disconnected from students with disabilities. After passage of section 280.31, a universal mask mandate as a public health precaution can only be imposed by the Governor as a part of her emergency powers during a public health disaster, rather than by a school district. *See* Iowa Code §§ 135.144(3), 29C.6.

The alleged denial of Plaintiffs' desired universal mask mandates in their children's schools, and their further alleged denial of education, is not caused because of their disability. If it's caused at all, it's because of this neutral, nondiscriminatory statute. And since title II of the ADA and the Rehabilitation Act do not override neutral local school district policies, they also do not provide a basis to override this statutory product of Iowa's democratic process.[6]

[6] This argument—like the alternative arguments in subsections B and C— defeats all of Plaintiffs' ADA and section 504 claims because they negate the required statutory element of being denied a benefit because of a disability. *See Davis*, 138 F.3d at 756. These

B. A universal mask mandate in a school is not a reasonable modification and other reasonable modifcations exist.

In granting the preliminary injunction, the Court held that schools are required to make "reasonable modifications" and that "universal masking policies are a reasonable modification, which public schools are required to provide." Add. 16, 20. But this Court has not decided "whether the failure to make reasonable modifications in a policy is itself discrimination even where the policy and its rationale cannot be shown to be discriminatory." *Davis*, 138 F.3d at 757; *see also DeBord*, 126 F.3d at 1106; *cf. CVS Pharmacy, Inc. v. Doe*, No. 20-1374 (U.S. July 2, 2021) (granting certiorari on question, which will be argued on December 7, 2021, whether a private cause of action exists for disparate-impact disability discrimination claim under section 504); *Alexander v. Sandoval*, 532 U.S. 275, 284-86 (2001) (holding that similar Title VI does not create private cause of action for disparate-impact discrimination claims). So Plaintiffs can hardly be likely to succeed on a claim where the law is unsettled.

---

same arguments were made in the district court. App. 318–24. While the State didn't dispute that Plaintiffs' children are qualified individuals with disabilities, the State thus disputed the rest of Plaintiffs' claims. Nothing in the State's briefing limited its argument to only a claim based on denying a reasonable modification. The district court erred in concluding otherwise. Add. 16 & n.8.

Appellate Case: 21-3268 Page: 42 Date Filed: 10/19/2021 Entry ID: 5088857

But even if reasonable modifications are required, a universal mask mandate is not a reasonable modification. A modification that imposes an undue administrative burden or a fundamental alternation in the nature of the State's education program is not reasonable. *See Davis*, 138 F.3d at 757 (holding that request to deviate from medication policy wasn't reasonable because it would "impose undue financial and administrative burdens on the district by requiring it to determine the safety of the dosage and the likelihood of future harm and liability in each individual case"); *Timothy H*, 178 F.3d at 972–73 (holding that request to establish a special free bus route would be "an undue financial burden and a fundamental alteration in the nature of the intra-district transfer program"); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929–30 (8th Cir. 1994) (holding that request to participate in high school baseball program as a nineteen year-old despite uniform age limit was not reasonable modification because it would "constitute a fundamental alteration in the nature of the baseball program" given its intent to protect younger athletes, have fair competition, and discouraging delays in education).

Modifying the uniform policy established by section 280.13 to impose a universal mask mandate in schools—or permitting schools to make those decisions—would be an undue burden and fundamentally alter the nature of the educational program established

Appellate Case: 21-3268 Page: 43 Date Filed: 10/19/2021 Entry ID: 5088857

by the State. Modifying the policy to give schools discretion would void the Legislature's policy decision to take the highly contentious and emotional issue of masks in schools from the responsibility of local schools so that local leadership could devote their time to other important concerns. This fundamentally alters Iowa's education program as set in section 280.31. And imposing a universal mask mandate would impose the administrative and potential financial and legal burdens of enforcing a mask mandate on all students, distracting teachers and school administrators from their educational duties.

A universal mask mandate is also not a reasonable modification because it infringes on the rights of third parties—other students, employees, and visitors. In the employment context, this Court has repeatedly recognized that ADA doesn't require "accommodations that would violate the rights of other employees" and doesn't impose "obligation to terminate other employees or violate a collective bargaining agreement." *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *see also Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1100–02 (8th Cir. 1999) (rejecting "irritant-free work environment" as a reasonable accommodation for employee with severe sensitivity to strong smells); *Mason v. Frank*, 32 F.3d 315, 319 (8th Cir. 1994) (holding that an accommodation isn't reasonable if it "would violate the rights of other employees

Appellate Case: 21-3268 Page: 44 Date Filed: 10/19/2021 Entry ID: 5088857

under a legitimate collective bargaining agreement”). Plaintiffs’ desired modification of a universal mask mandate is an imposition on the rights of all the other students and visitors to the school. And that is not reasonable.

That’s all the more so here, where there are disability interests on both sides of the debate. Imposing a universal mask mandate can harm disabled students with social communication issues, such as those with autism, because it prevents the students from advancing “social skills and understanding the express of those around [the student] due to [the] fellow students and teachers wearing masks.” App. 338 ¶ 6; App. 337 ¶¶ 9–10. It can also harm disabled students with anxiety. App. 336 ¶¶ 4–6. And those who struggle with speech and pronunciation. App. 337 ¶ 11. And those with asthma. App. 337 ¶¶ 7–8. And those with severe and painful sensory processing issues. App. 340–41 ¶¶ 4–6, 12 (describing how wearing a mask feels like skin is “on fire or poked with sharp needles” creating “a ‘traffic jam’ in her brain and she essentially becomes ‘paralyzed’ in that moment). And those who are deaf. App. 357–62.

The Legislature thus could have reasonably been concerned about balancing all these competing interests, includes the possible negative educational and social consequences. *See* World Health

Appellate Case: 21-3268 Page: 45 Date Filed: 10/19/2021 Entry ID: 5088857

Organization, *Advice on the Use of Masks for Children in the Community in the Context of COVID-19*, Aug. 21, 2020, *available at* https://perma.cc/TTQ8-PNHU (stating that "the benefits of wearing masks in children for COVID-19 control should be weighed against potential harm associated with wearing masks, including feasibility and discomfort, as well as social and communication concerns").

Even the U.S. Department of Education acknowledges that any universal mask mandates in schools must attempt to provide reasonable accommodations. *See* U.S. Dep't of Educ., *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment*, *available at* https://perma.cc/G88U-32SD, at 8–9. The Legislature could conclude that where there are interests such as these on both sides that it would remove the issue of universal mask mandates from the discretion of local schools. And modifying this decision to permit (or require) universal mandates is a fundamental alternation and undue burden of the State's policy choices. It's not reasonable.

Plaintiffs could seek other modifications that would be reasonable. And section 280.31 doesn't prevent schools from engaging with students to provide such modifications. Those could include, for example, greater personal protective equipment for the student (such as a higher quality N95 mask), greater social distancing, or

Appellate Case: 21-3268 Page: 46 Date Filed: 10/19/2021 Entry ID: 5088857

perhaps if justified by the particular facts even limited masking of teachers or students while interacting closely with the individual.

Some Plaintiffs assert that they have asked for such modifications, but the schools aren't providing or following through on the agreement.[7] For example, one parent sought an accommodation in advance of the school year that her son's teacher wear a mask when she was working one-on-one with him. App. 118 ¶ 9. But after a week of school, her son told her that his teacher wasn't wearing a mask when interacting with him one-on-one. App. 118. ¶ 10; *see also* App. 115 ¶ 18 (requesting that teacher mask and permit student to leave class early to avoid crowded halls); App. 95 ¶ 10 (requesting small groups working with child to be voluntarily masked); App. 110 ¶ 10 (requesting voluntarily masking around child, a smaller classroom, and social distancing). But if this is so, that's a harm being caused by the school, not enforcement of section 280.31 by the State. And such a failure doesn't support a claim against the State or the court's preliminary injunction.

---

[7] Failing to request a modification poses another reason some Plaintiffs claims are unlikely to succeed. *Cf. Ballard v. Rubin*, 284 F.3d 957, 960–61 (8th Cir. 2002).

Appellate Case: 21-3268 Page: 47 Date Filed: 10/19/2021 Entry ID: 5088857

C. A contrary interpretation of federal disability law would raise constitutional concerns.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Rounds*, 530 F.3d at 732–33.

But education and protection of the public health are at the core of the State's—rather than the federal government's—domain. And the Supreme Court requires "Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). Nothing in the text of either the ADA or section 504 suggests, let alone clearly states, that it authorizes these disability discrimination statutes authorize this injunction's intrusion into the State's authority to set education and public health policy. Plaintiffs' novel interpretation that a State engages in disability discrimination if it chooses to generally ban universal mask mandates should be rejected to avoid this constitutional concern.

To the extent that Plaintiffs can cabin their interpretation of the statutes to only require that schools have discretion to consider mask mandates, the constitutional concerns are even greater.

Appellate Case: 21-3268 Page: 48 Date Filed: 10/19/2021 Entry ID: 5088857

There is even less of a federal interest in merely dictating the allocation of authority between the State and local governments about masks. And under the Tenth Amendment, the federal government cannot intrude on the State's power to structure its internal division of governmental power to school districts. *See Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature, and duration of the powers conferred upon these [political subdivisions] and the territory over which they shall be exercised rests in the absolute discretion of the state."); *see also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Such a constitutional problem should also be avoided.

CONCLUSION

The district court abused its discretion in granting a preliminary injunction against enforcement of Iowa Code section 280.31. Governor Reynolds and Director Lebo respectfully request that this Court vacate the preliminary injunction in an expedited decision and order the issuance of the mandate forthwith.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

Appellate Case: 21-3268 Page: 49 Date Filed: 10/19/2021 Entry ID: 5088857

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ
Assistant Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov
jeffrey.thompson@ag.iowa.gov

ATTORNEYS FOR
APPELLANTS

Appellate Case: 21-3268 Page: 50 Date Filed: 10/19/2021 Entry ID: 5088857

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 10,390 words. It also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. And as required by 8th Cir. R. 28A(h), the brief and addendum have been scanned for viruses and are virus-free.

/s/ *Samuel P. Langholz*
Assistant Solicitor General

CERTIFICATE OF SERVICE

The undersigned certifies that on the 18th day of October, 2021, this brief was electronically filed with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

/s/ *Samuel P. Langholz*
Assistant Solicitor General

Appellate Case: 21-3268 Page: 51 Date Filed: 10/19/2021 Entry ID: 5088857