No. 21-2070

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

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

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLEES

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1, Plaintiff-Appellee Disability Rights South Carolina states that it has no parent corporation and no corporation or publicly held company owns 10% or more of its stock, and Plaintiff-Appellee Able South Carolina states that it has no parent corporation and no corporation or publicly held company owns 10% or more of its stock.

Plaintiffs-Appellees Amanda McDougald Scott, Michelle Finney, Lyudmyla Tsykalova, Emily Poetz, Samantha Boevers, Timicia Grant, Christine Copeland, Heather Price, and Cathy Littleton are individuals with minor children, and therefore do not have a parent corporation or any stock.

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INTRODUCTION

This case is about whether federal law allows South Carolina schools to be stripped of their ability to adopt masking policies when needed to protect the health and educational opportunities of students with disabilities who face increased risks of severe complications from COVID-19. State Superintendent of Education Spearman and Defendant-school districts, who are on the front lines of educating South Carolina's children, have not appealed the district court's decision restoring local authority. Only Governor McMaster and Attorney General Wilson ("Defendants") seek to forbid schools—including the school districts that reinstated masking policies after the district court enjoined enforcement of Proviso 1.108—from adopting masking policies on penalty of lawsuits and loss of funding. Defendants urge this course knowing that it is contrary to the overwhelming consensus of the medical and scientific community. And they do so knowing its discriminatory consequence: forcing South Carolina students with disabilities to choose between their health and their education.

The district court considered substantial record evidence proving that Proviso 1.108 increased risks to the health of Plaintiff-children, as well as loss of educational opportunities and other irreparable harms. Rather than dispute this evidence, Defendants urge the Court not to reach the merits based on an erroneous standing argument repeatedly rejected in similar mask litigation. On the merits, Defendants advance a radical legal theory that would gut federal anti-discrimination laws.

The district court did not abuse its discretion in joining the majority of other courts enjoining similar mask-mandate restrictions.[1] This Court should affirm.

STATEMENT OF THE CASE

A. Conditions in South Carolina Before Proviso 1.108

Before resuming in-person instruction for the 2020-21 school year, the South Carolina Department of Education enacted a policy "requiring face coverings to be worn on school buses and within public

[1] *E.g.*, *G.S. v. Lee*, No. 21-cv-02552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021); *Arc of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 WL 4737902 (S.D. Iowa Oct. 8, 2021); *S.B. v. Lee*, 3:21-cv-00317, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021); *R.K. v. Lee*, No. 3:21-cv-00725, 2021 WL 4942871 (M.D. Tenn. Oct. 22, 2021); *E.T. v. Morath*, No. 1:21-cv-717, 2021 WL 5236553 (W.D. Tex. Nov. 10, 2021).

school facilities."[2] ECF 76 at 8 & n.14. *See also id.* at n.8 & ECF 76-1 to 76-5 (2020-21 mask requirements for Defendant-school districts).

Universal masking—a basic public health preventive measure—was particularly important to protect the tens of thousands of South Carolina children with disabilities, because many disabilities increase the risk from COVID-19. JA127-42; JA70-3 ¶¶17-22. School-aged children with a range of underlying medical conditions can face a higher rate of severe illness from COVID-19 as compared to children without those underlying conditions. JA70 ¶17. As the CDC has recognized, "children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease," as well as "children with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression," can "be at increased risk for severe illness from COVID-19." JA70 ¶17. Individuals with intellectual disabilities are also at increased risk. JA71¶19. As a study in the *New England Journal of Medicine* found, individuals with intellectual disabilities

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[2] *South Carolina Department of Education Face Covering Guidelines for K-12 Public Schools*, S.C. DEP'T OF EDUC. (Aug. 4, 2020), https://ed.sc.gov/state-board/state-board-of-education/additional-resources/south-carolina-department-of-education-face-covering-guidelines-for-k-12-public-schools/

were more likely to contract COVID; if diagnosed with COVID, more likely to be admitted to the hospital; and more likely to die following admission. JA71 ¶19.

B. Conditions in South Carolina After Proviso 1.108

On June 21, 2021, in passing its general budget, the South Carolina legislature enacted Budget Proviso 1.108 entitled, "SDE: Mask Mandate Prohibition." JA144. Proviso 1.108 was not proposed, considered, or approved as a general law; it was added to the budget bill during the reconciliation process, was not fully debated, and was not separately approved by the South Carolina Senate. JA249.

The Proviso, which took effect on June 25, 2021, provides that "[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities." JA144.

On July 6, 2021, Superintendent Spearman directed each school board that, pursuant to Proviso 1.108, "school districts are *prohibited* from requiring students and employees to wear a facemask while in any

of its educational facilities for the 2021-22 school year." JA146 (emphasis added).

As schools started reopening in August 2021, with the emergence of the Delta variant, South Carolina experienced a dramatic increase in COVID-19 transmission. JA67-9 ¶¶10, 13. The number of reported new cases in August grew to over 20 times higher than when Proviso 1.108 was enacted, ranging from 2,000 to 4,000 new cases per day; hospital intensive care units filled; and COVID-related deaths climbed rapidly. JA148. This surge hit South Carolina children particularly hard: in August, South Carolina had the fourth highest cumulative case rate per 100,000 children in the United States, with over 9,500 recorded pediatric cases per 100,000 children, and the third highest proportion of pediatric COVID-19 cases in the country with children accounting for over 19% of all South Carolina COVID-19 cases. JA69 ¶13. During the first two weeks of August, South Carolina reported over 10,000 new COVID-19 cases among South Carolina children, with children's hospitals saying their facilities were "quickly filling with sick children." JA150-53, 155-86; JA41.

With the new school year approaching, public health and education officials called for universal masking in primary schools. In early August, the CDC reiterated its recommendation for "universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status," a recommendation supported by extensive studies that concluded that "community masking ... reduce[s] the spread" of COVID-19. JA73-74 ¶¶23-27 (discussing CDC and studies). Various studies have confirmed that wearing masks is one of the most powerful tools to thwart transmission of COVID-19 in indoor settings such as schools. JA74 ¶26 (discussing Duke University analysis of North Carolina's 1.2 million K-12 students that concluded "wearing masks is an effective strategy to prevent in-school COVID-19 transmission"); ECF 76-10 (summary of studies). And leading medical organizations, including the American Academy of Pediatrics and the American Medical Association, joined the call for universal masking as part of school openings. JA73 ¶24.

Nonetheless, Defendants warned school districts that continued or adopted universal masking would do so at their peril. Attorney General Wilson filed lawsuits against two school districts that had reintroduced

universal masking. JA250 & n.6; JA102-16, 199-203. The Governor stated: "for the government to mask children who have no choice … is the wrong thing to do. And we're not going to do it." JA196. As a result, school districts dropped their masking requirements, with some publicly blaming Proviso 1.108. ECF 76 at 6 & 76-6.

The impact in certain school districts was felt almost immediately upon schools reopening. Nine days after it reopened for the 2021-22 school year without any masking requirement, Pickens County School District reverted to all-virtual classes after 142 students and 26 staff tested positive for COVID-19. JA121-22. After one week of school (August 16-20), Dorchester County School District 2 reported 324 infected students and 42 infected staff. Three staff, including a coach at Plaintiff M.F.'s school, died from the virus. JA230 ¶8.

In the wake of these outbreaks, Superintendent Spearman publicly called for the legislature to rescind Proviso 1.108. JA43 ¶60. Shortly thereafter, the South Carolina Department of Health and Environmental Control (DHEC)—the State agency charged with promoting the health of the public in South Carolina—passed a unanimous resolution calling upon the legislature to rescind Proviso

1.108 and restore "local authority for mask mandates." JA73 ¶25; JA43 ¶61 & n.4; *see also* ECF 76-10 (DHEC background document noting "the scientific evidence clearly shows that wearing masks in schools reduces the rate of COVID-19 transmission").

C. Plaintiffs' Lawsuit to Enjoin Enforcement of Proviso 1.108

In the midst of these outbreaks, on August 24, 2021, nine parents (on behalf of themselves and their children) as well as Disability Rights South Carolina (DRSC) and Able South Carolina (Able) brought this action against Governor McMaster, Attorney General Wilson, Superintendent Spearman, Pickens County School District, Dorchester County School District 2, and five other school districts, seeking to enjoin enforcement of Proviso 1.108.

DRSC is South Carolina's designated Protection and Advocacy system and represents the interests of tens of thousands of children with disabilities. JA29 ¶8. Able is a Center for Independent Living and represents the interests of the people it serves who are adversely impacted by Proviso 1.108. JA30 ¶9. The individual Plaintiff-children have medical conditions that place them at a heightened risk of severe illness should they contract COVID-19. These conditions include

respiratory ailments including asthma (JA216 ¶3; JA220 ¶4) and a history of respiratory syncytial virus, autoimmune deficiencies such as congenital myopathy (JA218 ¶5) and Renpenning Syndrome (JA230 ¶3), cardiovascular issues such as Henoch-Schönlein purpura (JA216 ¶4), autism spectrum disorder (JA222 ¶4; JA224 ¶4; JA226 ¶3; JA227 ¶4; JA229 ¶3), and attention-deficit hyperactivity disorder (JA222 ¶4).

Proviso 1.108's restrictions on school districts exercising their authority to adopt masking where necessary to accommodate disabilities placed Plaintiff-parents in an untenable position: expose their medically vulnerable children to an unsafe educational environment or remove them from in-person schooling and thereby deprive them of an integrated public school education. Some Plaintiff-parents pulled their medically vulnerable children out of school. JA222 ¶11; JA224 ¶6; JA226 ¶8; JA227; JA230. Others had no choice but to send their children to school at a significant threat to their health, either because their schools did not offer virtual learning or because virtual learning was unsuited for children with disabilities who have developmental and educational delays. JA218 ¶¶11-12; JA220 ¶¶10-11; JA229 ¶8. And others paid for private school where Proviso 1.108 does

not apply and there is greater compliance with CDC guidance. JA216 ¶¶8-9.

Plaintiffs' Complaint accordingly alleged that Proviso 1.108 violated Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

D. Entry of the Preliminary Injunction

Plaintiffs moved to enjoin the enforcement of Proviso 1.108. In support, Plaintiffs submitted testimony from individual Plaintiffs as well as expert testimony from Dr. Robert Saul, Professor of Pediatrics at the University of South Carolina School of Medicine, former Medical Director for General Pediatrics at the Children's Hospital, Prisma-Health-Upstate, and President of the South Carolina Chapter of the American Academy of Pediatrics. JA64-232. While the proceedings were pending, the health situation deteriorated, and Plaintiffs supplemented the record with additional evidence concerning the spread of COVID-19 among South Carolina children. JA233-74; ECF 76, 76-7, 76-10.

In opposition, Defendants offered no evidence. They did not dispute that Plaintiff-children face added risks of severe illness should

they contract COVID-19. Nor did they dispute that Plaintiff-children were excluded from school (and thus segregated in education) or attended at risk to their health. Defendants offered no evidence of any administrative burden or other cost to complying with an injunction. ECF 58 at 34-35. Instead, they principally argued that the ADA and Rehabilitation Act permit claims for only intentional discrimination, and there is no private right of action for unintentional discrimination. ECF 55 at 6-9; ECF 58 at 8-21.

Attorney General Wilson did not contest that Plaintiffs would be irreparably harmed or address the public interest or other equities. ECF 55. Governor McMaster argued that Plaintiffs had not shown irreparable harm, though he acknowledged that between "about 54,000 and 115,000" pediatric cases of COVID-19 had been reported among South Carolina children as of September 10, 2021, that 578 children had been hospitalized, and eighteen had "died of COVID-19." ECF 58 at 32. The Governor also argued that the equities and public interest did not support an injunction.

On September 20, 2021, while the motion for preliminary injunction was pending, the Charleston County School District (a

Defendant) reinstated masking and pledged to use reserve funds. Shortly thereafter, the Attorney General issued a legal opinion responding to an inquiry on whether private parties "may bring an action if a school district is not carrying out the mandate of Proviso 1.108," and concluded that "anyone with legal standing may sue to enforce the statute …." S.C. Att'y Gen. Op. (Sep. 22, 2021). The next day, private litigants sued Charleston County. ECF 106 at 2-3.

On September 28, 2021, the district court entered a preliminary injunction barring Defendants from enforcing Proviso 1.108. JA275-96. In a lengthy opinion, the district court held that there is a private right of action to bring a reasonable accommodation claim, and that Title II and the Rehabilitation Act allow a plaintiff to "assert non-intentional discrimination claims." JA284. The district court made factual findings that Defendants "have denied the minor plaintiffs meaningful access to in-person education … because of Proviso 1.108," and noted that Defendants "fail to address this issue." JA285. The court additionally found that "allowing school districts, at their discretion, to require face coverings is a reasonable modification." JA285-87. The district court made further factual findings, citing epidemiological evidence from Dr.

Saul's report, that Plaintiffs faced a risk of "contracting COVID-19" and were "likely to suffer irreparable harm in the absence of injunctive relief"; that "there is little harm to enjoining Proviso 1.108 and permitting the public-school districts to satisfy their burden to make reasonable modifications"; and "the public interest does not lie with enforcement of a state law that violates the laws which Congress has passed to prevent discrimination based on disability." JA288-90.

E. Many School Districts Have Reimplemented Masking Under Continued Threats of Lawsuits and Divesting Their Funding

Nobody on the front lines of student safety chose to appeal the district court's decision. Superintendent Spearman did not appeal. Nor did Defendant-school districts. Only the Attorney General and Governor Wilson urge this Court to reverse the decision below.[3]

After the district court entered the preliminary injunction, the legislative sponsor of Proviso 1.108 publicly threatened that any school district that enacted a mask mandate would face "big time," "massive budget cuts." Doc. 38 at 25 n.4. And, of course, many districts saw

[3] Defendants also sought a stay of the injunction, which the district court (JA299-07), and this Court (Doc. 46), denied.

what happened to Charleston County when it had adopted masking: a lawsuit encouraged by the Attorney General.

Notwithstanding the threats of funding and litigation, a number of school districts beyond Charleston—Chester, Hampton, Jasper, Marlboro, Richland, Sumter, and certain districts in Florence County—reinstated universal masking. ECF 106 ¶¶3-5 & nn.1-10. Collectively, school districts that have masking requirements have at least 17,500 children with disabilities.[4] In addition to these districtwide mandates, the City of Clemson requires masks, which allows Plaintiff-children M.A. and L.P. to attend school in-person.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in enjoining the enforcement of Proviso 1.108, and this Court should affirm.

Defendants primarily seek to evade review of the merits, arguing that Plaintiffs lack Article III standing. Defendants made no standing argument below, and with good reason: the record plainly shows that

[4] *2020-2021 Child Count Data*, S.C. DEP'T OF EDUC. https://ed.sc.gov/districts-schools/special-education-services/data-and-technology-d-t/data-collection-and-reporting/sc-data-collection-history/idea-child-count-data/2020-2021-child-count-data/.

Plaintiffs suffered harm directly traceable to Proviso 1.108. Before the Proviso, Plaintiffs' schools had authority to adopt universal masking where needed for safe in-person instruction; after the Proviso, they did not.

Improperly relying on selective and misleading extra-record, post-injunction developments, Defendants argue that the harm here is not "redressable" because some schools have not reinstated systemwide masking. Defendants ignore that this Court has held that the removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to confer standing. Defendants also conveniently ignore that some districts reinstated universal masking, and others granted reasonable modifications to Plaintiffs based on more localized solutions. And Defendants further ignore that the injunction did not mandate masking, but instead, left it for schools to decide whether present conditions support masking. Schools that have yet to adopt masking may still do so; others may fear retribution given the threats to their funding and lawsuits against districts that adopted masking, something that can be redressed by the courts. Defendants emphasize that Proviso 1.108 theoretically permits schools to adopt masking with

non-public funds. But that ignores that schools attempting to do so have still been sued and advised that no school employee may be involved in a masking policy, even to announce the policy, rendering the exception illusory.

On the merits, the district court correctly found that Plaintiffs were likely to succeed on their claims under Title II of the ADA and Section 504 of the Rehabilitation Act. The court concluded that "because of Proviso 1.108," Defendants have "denied the minor plaintiffs meaningful access to in-person education, programs, services and activities," and that "allowing school districts, at their discretion, to require face coverings is a reasonable modification, as the benefits of masking significantly exceed the costs." JA285-86. As the district court noted, Defendants did not dispute that Proviso 1.108 in fact has the effect of preventing Plaintiff-children from safely attending school. JA285. And Defendants offered no evidence that allowing schools to require masking would create an "undue burden" or cause a "fundamental alteration" to South Carolina's educational program; nor could they, given that the Department of Education's policy before Proviso 1.108 adopted universal masking.

Instead, Defendants argue that federal law only prohibits "intentional discrimination" targeted at individuals with disabilities. That argument is irreconcilable with this Court's precedents, with decades of history, and with the text and purpose of the ADA and Rehabilitation Act. As the Supreme Court has repeatedly recognized, disability discrimination is more often the product of thoughtlessness than animus, and Defendants' view would gut federal disability law.

To be sure, newly-approved vaccines for children may help beat back the scourge that is COVID-19. But that underscores the need for school districts to have authority to adopt mask policies when needed: so that they can respond to requests for reasonable modifications as required by federal disability rights law and so that they can calibrate policies to best address ever-changing health conditions, including policies that set benchmarks for when universal masking is no longer required. This Court should affirm.

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Defendants' belated standing argument, which they concede was not presented in opposition to the motion for preliminary injunction, Doc. 40 at 8 n.1, fails for the same reasons multiple courts have rejected

similar standing arguments in mask-related litigation. *E.g.*, *Arc of Iowa*, 2021 WL 4737902, *5 (rejecting standing argument in suit challenging Iowa's mask-mandate ban); *R.K.*, 2021 WL 4942871, at *9 (similar for Tennessee law); *S.B.*, 2021 WL 4755619, at *8-9 (similar); *G.S.*, 2021 WL 4268285, at *8-9 (similar); *E.T.*, 2021 WL 5236553, at *7 (similar for Texas law). Put simply, Plaintiffs satisfied the requirements of a case or controversy under Article III: "injury in fact," "traceability," and "redressability." *Deal v. Mercer Cty Bd. of Educ.*, 911 F.3d 183, 187-88 (4th Cir. 2018).

A. Plaintiffs Have an "Injury in Fact"

To establish an injury-in-fact, a plaintiff must allege that they "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). The injury requirement "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs unquestionably have a personal stake in the outcome here.

First, it is settled law that parents who assert "an injury to their children's education interests and opportunities" satisfy Article III's injury-in-fact requirement. *Liddell v. Special Admin. Bd. of the Transitional Sch. Dist.*, 894 F.3d 959, 965 (8th Cir. 2018) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007)). "Parents have standing to sue when practices and policies of a school threaten their rights and interests and those of their children." *Id.* at 965-66. The district court made factual findings that Defendants "have denied the minor plaintiffs meaningful access to in-person education, programs, services, and activities because of Proviso 1.108." JA285. That was not clear error.[5] Defendants do not even challenge these findings. And the district court cited record evidence showing that some Plaintiff-parents made the difficult choice to pull their children out of in-person school, even knowing the educational, behavioral, and social consequences. JA285; *see E.T.*, 2021 WL

[5] Though the district court did not have an opportunity to consider Defendants' standing argument, the court's factual findings relevant to assessing standing are reviewed for clear error. *Piney Run Preservation Ass'n v. County Commrs. of Carroll Cty.*, 268 F.3d 255, 262 (4th Cir. 2001).

5236553, at *7 (standing to challenge Texas mask law where "the evidence shows that [Attorney General] Paxton's conduct has deprived Plaintiffs of reasonable access to in-person public school").

Second, the Supreme Court repeatedly has recognized that a substantial risk of harm satisfies Article III, an independent injury-in-fact supporting standing here. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Applying this standard, courts in other mask-restriction litigation have held that the injury-in-fact requirement is readily satisfied because "the imminent threat of COVID-19 is 'real, immediate, and direct' in Plaintiffs' schools." *R.K.*, 2021 WL 4942871, at *9. Again, the district court here did not err in likewise finding that "the risk of the minor plaintiffs just contracting COVID-19 constitutes irreparable harm." JA289; *id.*; JA304-05 ("[N]umerous other courts around the country have concluded irreparable harm is demonstrated by the threat of COVID-19 in schools …. Suffice it to say that the minor-children plaintiffs will be substantially harmed."). Defendants offered nothing to rebut this evidence below, and they offer nothing in this Court to show these findings are clearly erroneous. Nor could they.

The COVID-19 outbreaks in Dorchester County and Pickens County school districts alone establish the risk of harm. *See supra* at 7.

Third, this Court has recognized that "financial harm is a classic and paradigmatic form of injury in fact." *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 210 (4th Cir. 2020) (citation omitted). Here, some Plaintiffs incurred financial harm from Proviso 1.108. P.S.'s parents, for instance, removed him from public school and placed him in a learning environment that maintained greater compliance with CDC guidance, incurring thousands of dollars in financial harm. JA216. Defendants did not contradict this evidence below or dispute it in this Court. Thus, there are multiple, independent injuries-in-fact, any one of which is sufficient under Article III.

B. Plaintiffs' Injury is Traceable to Proviso 1.108 and Defendants' Threats of Enforcement

To satisfy the traceability requirement, a plaintiff must show that their injuries are "fairly traceable to the challenged conduct of the defendant …." *Episcopal Church in S.C. v. Church Ins. Co. of Vermont*, 997 F.3d 149, 155 (4th Cir. 2021) (citation omitted). "[T]he causation element of standing does not require the challenged action to be the sole

or even immediate cause of the injury." *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 284 (4th Cir. 2018).

Here, Plaintiffs' injuries are fairly traceable. Before Proviso 1.108, undisputed record evidence demonstrated that the Department of Education required face coverings and South Carolina school districts imposed and enforced masking requirements. ECF 76 at 6 n.8; *supra* n.2. Shortly after Proviso 1.108 took effect, Superintendent of Education Spearman directed that, pursuant to Proviso 1.108, "school districts are *prohibited* from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021-22 school year." JA146 (emphasis added). Indeed, school districts publicly blamed Proviso 1.108 for their inability to enforce masking for the 2021-22 school year. ECF 76 at 6 n.9. For instance, Greenville County schools' reopening plan directly attributed its no-mask requirement to Proviso 1.108. ECF 76-6 ("Per action of the General Assembly, masks will not be required for students or staff in buildings, but may be worn by choice [2021-22 State Budget Proviso 1.108]"). DHEC passed a resolution calling upon the legislature to rescind Proviso 1.108 and restore "local authority for mask mandates." JA73 ¶25. And in the face

of staggering COVID-19 infections, Defendant Superintendent Spearman called for the legislature to rescind Proviso 1.108. JA43 ¶60. It doesn't get more traceable than that. *See G.S.*, 2021 WL 4268285, at *9 (traceability satisfied where mask law "was the catalyst for [local schools] to be unable to provide this reasonable accommodation for students with disabilities"); *S.B.*, 2021 WL 4755619, at *9 ("The record … smacks of an injury traceable to Governor Lee's executive order because it shows that the executive order foreclosed the Knox County Board of Education from adopting a mask mandate"); *E.T.*, 2021 WL 5236553, at *7 ("If GA-38 were not enforced, school districts would have the discretion to implement a mandatory mask policy on school grounds without violating GA-38 and risking a lawsuit by Paxton.").[6]

C. Plaintiffs' Injuries are Likely to be Redressed

To satisfy redressability, a plaintiff need only show that it will "be likely, as opposed to merely speculative" that a favorable decision would redress the harm. *Lujan v. Defs. Wildlife,* 504 U.S. 555, 561 (1992).

[6] The situation here is thus far afield from *Allen v. Wright*, 468 U.S. 737 (1984), Br. 15, where the numerous "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole" to show anything but a speculative connection between the conduct and harm.

"The burden imposed by this requirement is not onerous." *Deal,* 911 F.3d at 189 (cleaned up). "Plaintiffs need not show that a favorable decision will relieve [their] every injury. Rather, plaintiffs need only show that they personally would benefit in a tangible way from the court's intervention." *Id.* Here, individual Plaintiffs benefited from the injunction in a tangible way: their school districts now have the authority to determine, based on a case-by-case assessment, whether, when, and how masking could be required.

Relying exclusively on contentions not in the record and not presented to the district court, Defendants assert that the harm is not redressable (or traceable) because, even if Proviso 1.108 is enjoined, each school district will still need to make the independent decision to impose mask requirements—be it universal or targeted—and that some have not adopted universal masking policies. Br. 13-14. But that misses the point of the district court's order. As the court found, schools "must undertake a fact-specific and case-by-case inquiry to determine whether reasonable accommodations are being made," which "may lead to a conclusion masks are required on certain parts of a school campus and during certain hours. Or it may not." JA306.

Defendants' presentation also ignores the inconvenient reality of the situation: schools in Jasper, Hampton, Sumpter and Richland 2 districts adopted universal masking after the injunction, benefiting thousands of children with disabilities whose interests are represented by DRSC. ECF 106 at 2-3 ¶¶3,4 nn.1-10.[7] In addition to these districtwide mandates, there is a citywide mandate in Clemson, which allows Plaintiff-children M.A. and L.P. to attend in-person. And as for those schools that have not yet adopted masking, with Provision 1.108 enjoined, they can in the future, and a "partial remedy satisfies the redressability requirement." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 794 (2021).

Critically, Defendants' focus on the districts that have not adopted universal masking policies overlooks an independent reason for inaction: the threat that doing so will result in a lawsuit or loss of

[7] Defendants do not contest that DRSC is the State's Protection and Advocacy system (P&A), *see* JA29 ¶8, which has associational standing to represent P&A system constituents—here, all South Carolina students with disabilities who face increased risks of serious health consequences from COVID-19, including students in non-party schools that adopted masking after the injunction took effect. *See, e.g.*, *Disability Rts. Pennsylvania v. Pennsylvania Dep't of Hum. Servs.*, No. 1:19-cv-737, 2020 WL 1491186, at *8 & n.6 (M.D. Pa. Mar. 27, 2020) (collecting cases concerning P&A standing).

funding. The Attorney General sued jurisdictions that adopted school mask requirements and issued an opinion encouraging others to do so. S.C. Att'y Gen. Op. (Sep. 22, 2021). Proviso 1.108's sponsor has threated that schools that adopted masking would face "massive budget cuts."[8] That some districts have chosen to avoid the risk of lawsuits, funding threats, or the ire of government officials is no basis to evade review here. *Cf. E.T.*, 2021 WL5236553, at *7 ("If GA-38 were not enforced, school districts would have the discretion to implement a mandatory mask policy on school grounds without violating GA-38 and risking a lawsuit by Paxton. Therefore, it is not merely speculative that enjoining enforcement of GA-38 will redress Plaintiffs' alleged injuries.").

Defendants alternatively assert that because school districts can theoretically impose mask policies if they fund the policies from non-state sources, the injunction does not redress Plaintiffs' injuries. Br. 13-

[8] *See* Jeffrey Collins, *Official: Ruling Means S. Carolina Schools Can Require Masks*, ASSOCIATED PRESS (Sept. 29, 2021) https://apnews.com/article/coronavirus-pandemic-business-health-education-covid-19-pandemic-f3099d4f35baa3d80afeb3f118121d9c?utm_source=Twitter&utm_campaign=SocialFlow&utm_medium=AP.

15. This supposed exception is illusory. When the City of Columbia tried an alternate funding approach, it was invalidated with the state Supreme Court ruling that if even one employee or "a penny of state funds" is used to announce, implement, or enforce a mask mandate, Proviso 1.108 will be violated. *Wilson v. City of Columbia*, 863 S.E.2d 456, 461 (S.C. 2021). In another case, the court refused to give guidance as to what would be sufficient. *Richland County Sch. Dist. v. Lucas*, 862 F.2d 920 (S.C. 2021). Thus, schools that try to avail themselves of this provision clearly risk suit. And nothing in the record shows that other schools even have access to outside funds.

In any case, Article III does not require that a plaintiff ultimately obtain all the relief sought. This Court has held that "[t]he removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Sierra Club*, 899 F.3d at 285. Here, the district court's decision removes a substantial barrier to schools imposing mask mandates where necessary to comply with

disability rights laws; the fact that some South Carolina schools have reintroduced masking confirms the injury is redressable.[9]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Have a Private Right of Action and Can Pursue Reasonable Modification Claims

The district court correctly concluded that "Title II and Section 504 provide for a private right of action … as well as allow Plaintiffs to assert non-intentional discrimination claims." JA284 (citing *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016)); *see also* JA302-03. That was not an abuse of discretion.[10]

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[9] *Doe v. Va. Dep't of State Police*, 713 F.3d 745 (4th Cir. 2013), Br. 14-15, is not to the contrary. In *Doe*, the plaintiff challenged a law barring sex offenders from entering schools and churches unless a circuit court or the facility granted express permission. Because the plaintiff had not sought permission, and could still do so and receive it, this Court found it "purely speculative whether action by this court would have any effect on her ability" to enter the property. 713 F.3d at 757. Here, by contrast, before Proviso 1.108 was enacted schools had universal masking, after Proviso 1.108 they did not, and after the injunction many schools returned to masking.

[10] This Court "review[s] the decision to grant or deny a preliminary injunction for an abuse of discretion." *Mountain Valley Pipeline LLC v. 6.56 Acres of Land,* 915 F.3d 197, 213 (4th Cir. 2019) (cleaned up). It is "a deferential standard, and so long as the district court's account of the evidence is plausible in light of the record viewed in its entirety, [the

Defendants do not cite a single decision of any court in the decades-long history of the ADA and Section 504 adopting their view that there is no private cause of action. Nor could they. The Supreme Court has squarely held that Title II and Section 504 "are enforceable through private causes of action." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

All that remains then is Defendants' sweeping argument that unless they "deliberately discriminate[] against students with disabilities" those students have no legal recourse, Br. 21. But that is contrary to decades of jurisprudence and the plain text of the statutes, which make clear that reasonable modification claims are available under Section 504 and Title II, and that intent to discriminate is not required.[11]

Court] may not reverse, even if [the Court is convinced that it] would have weighed the evidence differently." *Id.*

[11] The district court based its decision on only Plaintiffs' reasonable modification claim, finding it unnecessary to address Plaintiffs' disparate impact claims. JA288. As explained below, several of Defendants arguments are only about disparate impact claims, which this Court need not resolve.

1. *Courts have long held that intentional discrimination is not required for reasonable modifications claims*. The Supreme Court has repeatedly confirmed that Title II and Section 504 require public entities to provide reasonable modifications to qualified people with disabilities. Period. The Court has applied this rule in multiple cases where no intentional discrimination was alleged. For example, in *Tennessee v. Lane*, the Supreme Court explained that Title II imposes a "duty to accommodate," because Congress "[r]ecogniz[ed] that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion." 541 U.S. 509, 531-32 (2004). *Tennessee v. Lane* involved no allegations of intentional discrimination. *See also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017) (describing absence of wheelchair ramps as discrimination); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (finding discrimination under Title II on a reasonable modification theory brought by private plaintiffs, without any allegation of intentional discrimination). In *Alexander v. Choate*, the Court observed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe

only conduct fueled by a discriminatory intent." 469 U.S. 287, 296-97 (1985).

This Court has likewise has repeatedly emphasized that "the ADA and the Rehabilitation Act do more than simply provide a remedy for intentional discrimination." *Lamone*, 813 F.3d at 510. Rather, "[t]hey reflect broad legislative consensus that making the promises of the Constitution a reality for individuals with disabilities may require even well-intentioned public entities to make certain reasonable accommodations." *Id.* Thus, in *Lamone*, this Court affirmed the district court's permanent injunction requiring Maryland state election officials to make an online ballot marking tool available as a reasonable modification, where "the record [wa]s devoid of any evidence that the defendants acted with discriminatory animus." *Id.* at 498, 510.

Lamone is no outlier. *See, e.g., A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 362 (4th Cir. 2008) (Title II "allow[s] a plaintiff to pursue three distinct grounds for relief," including "failure to make reasonable accommodations"); *Bacon v. City of Richmond*, 475 F.3d 633, 639 (4th Cir. 2007) ("A statutory violation [under Title II] is not limited to a finding of discriminatory intent."); *Seremeth v. Bd. of Cty. Comm'rs*

Frederick Cty., 673 F.3d 333, 339 (4th Cir. 2012) ("public entity must 'make reasonable modifications ….'").[12]

Defendants ignore this binding precedent.[13] And it is hard to overstate how radical their argument is. Their position would mean that a public entity would have no obligation to make its public buildings accessible by adding ramps unless a plaintiff could prove the entity specifically built its stairs to discriminate against people with disabilities. That is as wrong as it sounds.

Defendants' reliance on *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235 (6th Cir. 2019), Br. 22, does not salvage their

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[12] This Court's cases are aligned with holdings from nine other circuits recognizing that the plain language and purpose of federal disability discrimination law reaches nonintentional discrimination. *Ruskai v. Pistole*, 775 F.3d 61, 78-79 (1st Cir. 2014); *Theriault v. Flynn*, 162 F.3d 46, 48 (1st Cir. 1998); *Disabled in Action v. Bd. of Elections in the City of N.Y.*, 752 F.3d 189, 196-97 (2d Cir. 2014); *Nathanson v. Medical Coll. of Pa.*, 926 F.2d 1368, 1384 (3d Cir. 1991); *Brennan v. Stewart*, 834 F.2d 1248, 1261-62 (5th Cir. 1988); *McWright v. Alexander*, 982 F.2d 222, 228-29 (7th Cir. 1992); *DeBord v. Bd. of Educ.*, 126 F.3d 1102, 1105 (8th Cir. 1997); *Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (9th Cir. 2008); *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1268-69 (D.C. Cir. 2008).

[13] Far from "pass[ing] sub silentio" on whether Section 504 and Title II prohibit only intentional discrimination, the issue has been "discussed in the opinion[s]" of the Supreme Court. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

argument. That case does not concern reasonable modification claims like the ones here; it concerns *disparate impact* claims under Section 504. The court specifically distinguished reasonable accommodation claims from disparate impact claims and indeed concluded that "denial of [a] requested accommodation may amount to unlawful discrimination." *Id.* In this regard, the Sixth Circuit is aligned with every other circuit in concluding that a failure to make a reasonable accommodation is a viable claim under Section 504 and Title II.

2. *Defendants' statutory interpretation is wrong*. Even if this Court's precedent did not foreclose Defendants' argument, Section 504 and Title II prohibit non-intentional discrimination, including failures to provide reasonable modifications.

Statutory text (Defendants' first point). That Section 504 and Title II encompass non-intentional discrimination follows from a straightforward application of the statutory text. The Supreme Court has explained that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Texas Dep't of*

Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 533 (2015). Neither 504 nor Title II even mention an actor, much less the "mindset" of an actor. The text of both provisions focuses exclusively on the prohibited consequences for a qualified person with a disability—they must not be "excluded from participation," or "denied the benefits of" a service or program, or "subjected to discrimination" "by reason of" disability, 42 U.S.C. §12132, or "solely by reason of" disability, 29 U.S.C. §794. The statutes' use of the passive voice—which "focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability"—reinforces the conclusion that the text is focused on consequences. *Dean v. United States*, 556 U.S. 568, 572 (2009). "Congress's use of the passive voice" indicates that the provision "does not require proof of intent." *Id.*

The text of two other subsections of Section 504 further confirms that its prohibition on discrimination is not limited to intentional discrimination. When reauthorizing Section 504 after the Supreme Court's decision in *Choate*, Congress added section 794(c), which explains that, in certain limited circumstances, "[s]mall providers are

not required by subsection (a)," i.e., the anti-discrimination provision, "to make significant structural alterations to their existing facilities." 29 U.S.C. §794(c). This provision would be unnecessary if the anti-discrimination provision only reached intentional discrimination. *See Inclusive Cmtys.*, 576 U.S. at 537-38 (interpreting Fair Housing Act to include disparate impact liability in part to avoid statutory surplusage).

Similarly, subsection (d) expressly provides that the "standards" for determining whether "this section"—that is, Section 504—has been violated in the employment context mirror the standards under Title I of the ADA, and Defendants concede that "disparate-impact claims exist under Title I." Br. 23. There is only one Section 504; its text cannot allow disparate impact claims in employment and prohibit them in all other settings.

Moreover, Congress has reenacted Section 504 on four separate occasions, first in 1978 and most recently in 1992, without changing the relevant statutory text. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citation omitted). The first reenactment

in 1978 came just ten months after the Department of Health, Education and Welfare issued regulations explained that Section 504 "prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating." 43 Fed. Reg. 2132, 2134 (Jan. 13, 1978). And the next three reenactments of Section 504 post-date Supreme Court decisions recognizing that a refusal to make reasonable modifications can amount to discrimination under the statute. *See Choate*, 469 U.S. at 301; *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979). The amendments made during the reenactments, including the additions of subsection (c) and subsection (d) discussed above, make sense only if Section 504 prohibits unintentional discrimination.

The consistent regulatory and judicial interpretation of Section 504 was in place when Congress enacted Title II in 1990 using the same key phrases as Section 504. "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and

judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Defendants contend that "by reason of" means "because of," and "because of" requires that "disability motivate … the discriminatory act." Br. 21. But the Supreme Court has rejected that supposition. *See Inclusive Cmtys.*, 576 U.S. at 535 (noting that Title VII and Age Discrimination in Employment Act (ADEA), like the Fair Housing Act (FHA), use "because of" phrasing and finding that those statutes do impose disparate impact liability).

"By reason of" does require a causal link between an individual's disability and the impermissible effects, but there is no textual reason to limit the causal link to the "motive" of an actor—especially here, where no actor is even mentioned by the statute. Thus, as a matter of ordinary language, one might say that "a student using a wheelchair could not enter the art room *because of* the narrow doorway" and not mean that the doorway, or the person who built it, had any particular motivation; the narrow doorway would still cause the student to be unable to enter. *Cf. Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.) (explaining

that a blind tenant who relies on a guide dog and is subject to a "no pets" policy, and a paraplegic individual precluded from living in a first-floor apartment, are unable "to live in those housing facilities … because of conditions created by their disabilities").

Comparison with Title VI (Defendants' second point). Defendants' comparison to Title VI is misplaced. Br. 21-24. As the Ninth Circuit has explained, the Supreme Court's interpretation of Title VI in *Alexander v. Sandoval*, 532 U.S. 275 (2001), is not relevant to interpreting the ADA or the Rehabilitation Act because its holding turned on purposive and historical considerations unique to Title VI—not its text. *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 735 (9th Cir. 2021). In *Sandoval*, the Supreme Court explained it "must be taken as given," "and no party disagrees—that [Section 601 of Title VI] prohibits only intentional discrimination," 532 U.S. at 279-80, based on the Court's precedents in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) and *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582 (1983). In *Bakke*, Justice Powell, in the principal opinion, described the text of Title VI as "majestic in its sweep," but—based on an "[e]xamination of the voluminous legislative history, 438 U.S. at 284,

and "[i]n view of the clear legislative intent"—concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287. *Guardians* simply rested on *Bakke*. *Sandoval*, 532 U.S. at 281.

In *Choate*, the Supreme Court recognized that "*Bakke* locked in a certain construction of Title VI," "in response to factors peculiar to Title VI [that] would not seem to have any obvious or direct applicability to §504." 469 U.S. at 294 n.11. In contrast to the legislative history of Title VI, the legislative history of Section 504 shows that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Id.* at 295. Therefore, the Court "counsel[ed] hesitation before reading Title VI and §504 in pari materia with respect to the effect/intent issue." *Id.*

Contrast with other statutes, internal differences in the ADA, and Remedies structure (Defendants' third, fourth, and fifth points). Defendants' next three arguments, Br. 22-25, involve only claims for disparate impact, which was not the basis for the district court's preliminary injunction, and which this Court accordingly need not

address. *See Lamone*, 813 F.3d at 503 n.5. Regardless, Defendants are wrong here too.

A civil rights statute need not use the phrase "otherwise adversely affect" or other magic words to prohibit discriminatory effects. The term "otherwise" is used in the FHA, Title VII, and the ADEA "to introduce the results-oriented phrase … signaling a shift in emphasis from an actor's intent to the consequences of his actions." *Inclusive Cmtys.*, 576 U.S. at 534-35. Because the text of both Title II and Section 504 are focused exclusively on the consequences of an action, language to signal a "shift in emphasis" is unnecessary.

While Defendants argue that the language of Title II is different than Title I (which they concede prohibits unintentional discrimination), Br. 23, Defendants ignore other statutory text of the ADA applicable to both Title I and Title II. This text makes clear that in enacting both titles, Congress intended "to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. §12101(b), which Congress explained include "discriminatory effects" and "failure to make modifications," *id.* §12101(a)(5). As the Supreme Court has held, when passing the ADA, Congress found that

"discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001) (quoting 42 U.S.C. §12101(a)(2)). And this Court has emphasized, "Congress explicitly found that discrimination was not limited to 'outright intentional exclusion,' but was also to be found in 'the failure to make modifications to existing facilities and practices.'" *Lamone*, 813 F.3d at 505 (quoting *PGA Tour, Inc.*, 532 U.S. at 675).

While "the remedies for violations of §202 of the ADA and §504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI," *Barnes*, 536 U.S. at 185, it does not follow that the limitation on Title VI's scope "dominoes" to the ADA or Rehabilitation Act. *See Choate*, 469 U.S. at 294 n.11; *Payan*, 11 F.4th at 737. Defendants' contrary argument rests exclusively on the opinion of the dissenting judge in *Payan*. Br. 24.

Regulations (Defendants' sixth point). Defendants' argument that Section 504 and Title II do not "provide relief for claims based on regulations that prohibit certain types of discrimination that are not

actually prohibited by statute," Br. 24-25, is beside the point. Plaintiffs claim that Defendants violated the statutes. JA50, 53.

In short, Defendants have failed to show that the district court abused its discretion in concluding that Title II and Section 504 permit claims for reasonable modifications, regardless of intent.

B. The District Court Properly Held that Local Schools Could Adopt Masking Requirements as a Reasonable Modification

"A modification is reasonable if it is 'reasonable on its face' or used 'ordinarily or in the run of cases' and will not cause 'undue hardship.'" *Lamone,* 813 F.3d. at 507 (quoting *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012)). As the district court found, Plaintiffs easily satisfied this requirement. The modification—to restore school districts' authority to permit masking—is ordinary in the sense that the South Carolina Department of Education required masks for most of the 2020-21 school year.[14] ECF 76 at 6-7; ECF 76-1 to 76-5. That Plaintiffs' proposed modification was already "voluntarily implemented by defendants … without any apparent incident speaks to the reasonableness." *Lamone*, 813 F.3d at 508 (internal citation

[14] *See supra* n.2.

omitted). Moreover, in finding that the modification was reasonable, the district court noted Plaintiffs' evidence that the CDC, the American Academy of Pediatrics, and numerous studies support masking in schools to limit the spread of COVID-19. JA286.

Defendants do not dispute that two separate state agencies—DHEC and Department of Education—called for restoration of local authority to adopt universal masking at the beginning of the school year. JA73 ¶25. And Defendants make no argument, let alone point to any evidence below, to meet their burden to show that the proposed modification requires a fundamental alteration or imposes an undue burden. *E.g., Lamone*, 813 F.3d at 508.

Defendants cannot avoid the district court's reasoned analysis with hand-waving that the order's logic "turn[s] Title II and section 504 into a federal mask mandate." Br. 16. Defendants' real objection is not that "the logic" of the district court's order leads to a federal mask mandate; it is that the order permits schools to adopt any mask order at all, even for one individual. Doc. 45 at 20 ("[A]ny federal intervention to require one or all students … to wear masks must be more explicit than a novel interpretation of decades' old statutes.").

In any event, neither the terms of the order nor its logic led to a "federal mask mandate." Br. 16. The district court expressly rejected this argument as meritless:

> [The] determination of whether a particular modification is reasonable involves a fact specific, case-by-case inquiry. South Carolina schools, and only South Carolina schools … must undertake a fact specific and case-by-case inquiry to determine whether reasonable accommodations are being made. A fact specific and case-by-case inquiry can lead to a conclusion masks are required on certain parts of a school's campus and during certain hours. Or it may not.

JA306. All the injunction does is lift the categorical ban on masking to allow school districts to adopt masking policies *as needed* to meet their federal obligations to children with disabilities. JA283-84, 293.[15]

Moreover, it is the September 28 order, and only that order, that is on appeal. Defendants' contention that the "logic" of the district court's order could, through a chain of speculative events, justify a

[15] Defendants similarly mischaracterize the orders of other states. *See, e.g.*, *Arc of Iowa*, 2021 WL 4737902 at *8 (enjoining ban on mask mandates, and "giv[ing] school districts back … discretion").

federal mask mandate is not a basis for holding that the district court abused its discretion *here*.[16]

Similarly, Defendants' assertion that education is "a traditional concern of the States," Br. 20, is not a basis for reversing the preliminary injunction, as federal law provides for federal intervention to address discrimination in schools. *E.g., Fry*, 137 S. Ct. 743. A case about the reach of the federal government's commerce power does not prove otherwise. Br. 30 (citing *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring)).

Finally, citing *South Bay* and *Andino*, Defendants argue that the injunction was improper because it required the court to resolve public health issues that cut "both ways" and the court should have deferred to elected officials. Br. 29. But that is wrong for multiple reasons.

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[16] Defendants emphasize that Plaintiff-parents stated their belief, at the time the lawsuit was filed, that their children would be safe if "everyone" were wearing a mask. Br. 11, 16. As the district court noted, the case was filed at a time when South Carolina had the third highest proportion of pediatric COVID-19 cases in the country. JA286. Defendants ignore that the relief Plaintiffs sought always was to enjoin Defendants "from violating the ADA [and] Section 504 of the Rehabilitation Act … by prohibiting school districts from requiring masks for their students and staff." JA57. That addresses Plaintiffs' needs by giving school districts the ability to tailor a reasonable modification during a rapidly changing pandemic.

Defendants ignore the deference that is due to the district court finding that "the benefits of masking significantly exceed the costs." JA286. The court made this finding relying on an expert declaration and recommendations from the CDC, the American Academy of Pediatrics, and other preeminent medical organizations that support masking in schools to limit the spread of COVID-19. *See, e.g.,* JA286 (citing Dr. Robert Saul); *id.* at 292 (stating that "several prominent health organizations, who have reported on school age children in desperate conditions, are calling on lawmakers to give school districts the option to implement universal masking in schools"); *id.* at 292-93 ("The fact that that health organizations such as the Centers for Disease Control and Prevention and the American Academy of Pediatrics recommend mask-wearing lends support to the notion that Plaintiffs' request is reasonable."). Defendants do not even argue these factual findings were clearly erroneous.

Defendants also ignore the conclusions of South Carolina's public health authority—DHEC—which unambiguously concluded "the scientific evidence clearly shows that wearing masks in schools reduces the rate of COVID-19 transmission" and there was "no peer-reviewed

scientific literature," "no evidence," and "no data" to support the various "false claims" about masks such as those advanced by Defendants. ECF 76-10. Indeed, the two articles Defendants claim establish a "debate" do no such thing. Br. 28. Both find masking curbs transmission of COVID-19. One supports universal masking *in schools*, noting that "findings in this report suggest universal and correct mask use is an important COVID-19 prevention strategy in schools" because "universal and correct use of masks can reduce SARS-CoV-2 transmission."[17] The other concludes, "Our review of the literature offers evidence in favor of widespread mask use as source control to reduce community transmission."[18] The third piece Defendants offer—an op-ed[19]—was

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[17] Jenna Gettings et al., *Mask Use and Ventilation Improvements to Reduce COVID19 Incidence in Elementary Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 28, 2021), https://tinyurl.com/4ftx4asx.

[18] Jeremy Howard et al., *An Evidence Review of Face Masks Against COVID-19*, 118 PNAS 1, 9 (2021), https://www.pnas.org/content/118/4/e2014564118. Defendants cite this piece to suggest masking is bad policy, noting risks from masks getting dirty. Br. 28. Defendants fail to note the piece goes on to say: "Further research is needed to clarify these issues. In the meantime, most health bodies recommend replacing dirty or wet masks with clean ones."

[19] Marty Makary & H. Cody Meissner, *The Case Against Masks for Children*, WALL ST. J. (Aug. 8, 2021), https://www.wsj.com/articles/masks-children-parenting-schools-

never presented to the district court, and this Court "will not analyze... evidence for the first time on appeal." *Alexander v. Modrak*, 2 F. App'x 298, 299 (4th Cir. 2001) (per curium). In any case, a non-peer-reviewed opinion piece cannot overcome the wealth of scientific evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

And Defendants are wrong in their suggestion that the State should automatically win when purported public policy "debates" involve factual debates as they invariably do. The Supreme Court addressed this argument in *School Bd. of Nassau Cty. v. Arline,* holding that federal anti-disability law requires district courts to make their own assessments about public health needs in the context of disability, and that in doing so they should generally defer to "the reasonable medical judgments of public health officials," not to defendants who oppose accommodations. 480 U.S. 273, 288 (1987). Here not only do the national public authorities support masking, but the State's own public health authority recommended suspension of Proviso 1.108 and allowing districts authority to adopt universal masking, JA73 ¶25.

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mandates-covid-19-coronavirus-pandemic-biden-administration-cdc-11628432716.

Moreover, Defendants' position is contrary to basic principles of judicial review. *See generally Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 74 (2021) (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of … discrimination … are raised").

In sum, "the district court's account of the evidence is plausible in light of the record viewed in its entirety," and therefore must be upheld. *Mountain Valley Pipeline, LLC*, 915 F.3d at 213.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE OTHER EQUITIES SUPPORTED PRELIMINARY INJUNCTIVE RELIEF

A. The District Court Properly Held That Plaintiffs Would Suffer Irreparable Harm

Defendants argue that "Appellees failed to show they are likely to suffer irreparable harm." Br. 30. Most of Defendants' contentions were not raised below—indeed, the Attorney General did not dispute that Plaintiffs would be irreparably harmed, *see* ECF 55; *see also* JA288 (noting waiver). In any event, these newfound arguments do not establish that the district court abused its discretion.

In the proceedings below, Plaintiffs asserted three independent bases for irreparable harm: (1) violations of civil rights protected under anti-discrimination laws, ECF 16-1 at 20; (2) loss of educational opportunities, ECF 16-1 at 21-22; JA267-69; and (3) the risk from heightened exposure to COVID-19, ECF 16-1 at 20-21; JA264-67. Plaintiffs submitted supporting evidence, including expert testimony from Dr. Saul, President of the South Carolina Chapter of the American Academy of Pediatrics. JA64-76; JA288-89.

In this Court, as below, Defendants do not address or otherwise contest that Plaintiffs have established irreparable harm because of loss of educational opportunities or that violations of civil rights—if established—constitute irreparable harms. Br. 30-31. They have accordingly waived these issues, each of which independently establishes irreparable harm. *See, e.g., Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) ("even a few months in an unsound program can make a world of difference in harm to a child's educational development") (citing *Nieves-Marquez v. Puerto Rico*, 53 F.3d 108, 121-22 (1st Cir. 2003)); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs,* 251 F.3d 814, 827 (9th Cir. 2001) (when "defendant has

violated a civil rights statute," courts "presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation") (citing cases).

With regard to exposure to COVID-19—which is the only irreparable harm Defendants contest—the district court made factual findings supported by expert medical evidence:

- "[P]ediatric COVID-19 cases comprise an increasing share of overall COVID-19 cases both in the United State and South Carolina," JA288.
- "South Carolina has the fourth highest cumulative case rate per 100,000 children in the United States, with over 9,500 recorded pediatric cases per 100,000 children." JA288-89.

And the court noted the Governor's concession that eighteen South Carolina children have died from COVID-19 and there had been between 54,000 and 115,000 COVID-19 cases reported for children in South Carolina. JA288. Defendants offered no expert evidence or anything to rebut this evidence. Nor do they address these findings on appeal, much less establish that they were clearly erroneous.

These findings were not clearly erroneous. Rather, they were well supported by the record:

First, Plaintiffs presented evidence that Plaintiff-children have disabilities that make them particularly vulnerable to serious health complications if they contract COVID-19. ECF 16-1 at 6-10; JA266-67; JA70-3 ¶¶17-20. *See supra* at 8-9. This was not disputed.

Second, Plaintiffs introduced evidence concerning the heightened risk of South Carolina children contracting COVID-19. In particular:

- at the time the preliminary injunction was entered, over 40,000 South Carolina children had contracted COVID-19 since the suit was filed in late August, ECF 76 at 1;
- in September, South Carolina was experiencing its highest rate ever for new infections and hospitalizations, JA244;
- in September, South Carolina was reporting the highest rate of new COVID-19 cases in the country, JA234-35;
- in September, the South Carolina Children's Hospital Collaborative reported 34 child hospitalizations, including 17 children in intensive care, and 8 on life support, JA236; ECF 76-7; and
- South Carolina's rates of childhood COVID-19 were among the highest reported in the United States. JA245.

Third, Plaintiffs introduced evidence regarding the risk from uncontrolled spread of COVID-19 in school districts: In Dorchester County School District 2, after one week of school, 324 students were reported infected. JA230 ¶8. *See also* JA235 & n.3 (noting that as of

Sept. 7, the district reported 1,032 students with COVID-19 and 5,177 students in quarantine); Pickens County School District reverted to virtual schooling nine days into the school year, when 142 students and 26 staff tested positive. JA121-22.

In other words, Defendants badly misrepresent the record below when they contend that "Appellees offered *nothing* in the district court to suggest these low rates for severe outcomes or death are substantially higher for *any* children with disabilities," Br. 31 (emphasis added).

Defendants cite no support for their extreme rewriting of *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), to suggest that Plaintiffs have to prove that it is either "very probable" that a specific Plaintiff will contract COVID-19 in the absence of the injunction, or that Plaintiffs must suffer a "severe outcome" if they do. Br. 31. Indeed, this Court has rejected Defendants' attempted reformulation of *Winter* that a Plaintiff must establish that it is "certain to suffer injury" as opposed to "a risk of irreparable injury," *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013); *see also Roe v. Dep't of Def.*, 947 F.3d 207, 230 (4th Cir. 2020) (noting Supreme Court has rejected "heightened

requirement of irreparable harm"); *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010) ("The standard for preliminary injunctive relief requires a *threat* of irreparable harm" (emphasis original)).

Defendants' analysis also ignores consistent findings from district courts, including within this Circuit, that increased risk of exposure to COVID-19 poses a tremendous risk of irreparable harm. *See, e.g., Coreas v. Bounds*, 451 F. Supp. 3d 407, 428-29 (D. Md. 2020) (finding COVID-19 exposure risks irreparable harm); *Banks v. Booth*, 459 F. Supp. 3d 143, 159 (D.D.C. 2020) (same); *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. 2020) (same); *Peregrino Guevara v. Witte*, No. 6:20-cv-01200, 2020 WL 6940814, at *8 (W.D. La. Nov. 17, 2020) ("It is difficult to dispute that an elevated risk of contracting COVID-19 poses a threat of irreparable harm").

Defendants' assertion that since the injunction issued the risk of contracting COVID-19 is "trending down," Br. 31 n.6, is neither here nor there: this Court is required to assess whether the district court acted within its discretion based on the record before the court when it issued the preliminary injunction on September 28. *See, e.g.*, *Roe*, 947 F.3d at 219 (4th Cir. 2020) ("[A]buse of discretion" means that the

appellate court will not reverse "so long as 'the district court's account of the evidence is plausible in light of *the record* viewed in its entirety.'" (emphasis added) (internal citations omitted)).[20] Similarly, Defendants' contention that children "have been remarkably resilient," Br. 31, ignores (i) Governor McMaster's concession below that 578 South Carolina children had been hospitalized and 18 children (6 under the age of 10) had died of COVID-19, ECF 58 at 32; and (ii) the number of South Carolina children (40,000) that contracted COVID-19 between the suit's filing in late August and the entry of the injunction, ECF 76 at 1.

Defendants also fail to address that exclusion from public school for a discriminatory reason constitutes irreparable harm. *See, e.g., Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993). "[T]he gravity of the harm is vast and far reaching" when a child is deprived of his or her

[20] *See also Ashcroft v. ACLU,* 542 U.S. 656, 671 (2004) (affirming preliminary injunction based on five year-old factfinding, including "certain facts about the Internet [that] are known to have changed" [because] "[f]or us to assume, without proof," facts not in the record "would usurp the District Court's factfinding role."). *Cf. Alexander*, 2 F. App'x at 299 (explaining Fourth Circuit will not analyze evidence not presented first to the district court).

education. *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 957-58 (11th Cir. 2005) (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)). And this injury flows from being the subject of illegal discrimination, which itself supports a finding of irreparable harm. *Cf. Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (noting that constitutional injury "unquestionably constitutes irreparable harm").

B. The District Court Properly Held That Other Equities Supported an Injunction

The district court found that the "public interest does not lie with enforcement of a state law that violates the law which Congress has passed to prevent discrimination based on disability" and there was "little harm to enjoining Proviso 1.108 and permitting the public-school districts to satisfy their burden to make reasonable modifications under Title II and Section 504." JA290.

There is a strong public interest in promoting the nation's anti-discrimination laws. *See, e.g., Olmstead v. L.C.*, 527 U.S. 581, 589 (1999) (the ADA "is intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities") (citing §12101(b)(1)); *Lamone*, 813 F.3d at

505 ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals."). The injunction here supports that public interest.

In opposing the injunction below, Defendants did not contend that there was any administrative burden or cost to having Proviso 1.108 enjoined. *See* ECF 55, 58; *see also* JA290 (noting AG Wilson did not contest other equities). Instead, Defendants emphasize abstract considerations. For example, Defendants contend the State suffers an "irreparable injury" whenever it is enjoined from implementing statutes that reflect a "policy choice." Br. 32. But that is contrary to a century of jurisprudence holding that federal courts can prospectively enjoin state officials from enforcing state laws to prevent violations of federal law. *E.g.*, *Ex Parte Young*, 209 U.S. 123 (1908). And the federal court "power" to "invalidate a statute … has been firmly established since *Marbury v. Madison*." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020).

Defendants also argue that "injecting the judiciary into the debate on mask mandates undermines public confidence in the courts," and "presents significant federalism and separation-of-powers concerns," Br.

33-34. Defendants' argument ignores that the South Carolina Department of Education and its public health authority publicly called for Proviso 1.108 to be rescinded, and for "local authority for mask mandates" be restored, JA43 ¶¶60-61 & n.4; JA73 ¶25, and that any deference paid by a federal court should be "to the reasonable medical judgments of public health officials." *Arline*, 480 U.S. at 288. Indeed, the Defendant-school district and Superintendent have chosen not to appeal.

Moreover, Defendants' invocation of the "democratic process" ignores that Proviso 1.108 was tacked on to the budget bill during the reconciliation process, was never the subject of hearings or full debate, and was not separately voted on or approved by the South Carolina Senate. JA249.

But even if the bill had been thoroughly debated by the South Carolina legislature, that is not a *carte blanche* to exclude children with disabilities from public schools: the "rights of children not to be discriminated against … can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes …." *Cooper v. Aaron*, 358

U.S. 1, 17 (1958). While the Governor invokes *Schuette v. BAMN*, 572 U.S. 291, 313 (2014), and Justice Scalia's concurrence in *Minnesota v. Carter*, 525 U.S. 83, 98 (1998), to urge that political decisions should be insulated from court review, "the people's will is not an independent compelling interest that warrants" permitting discrimination. *Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir. 2014) (discussing *Schuette*).

The district court's conclusions regarding the public interest and other equities are "plausible in light of the record viewed in its entirety," *Roe,* 947 F.3d at 219, and not clearly erroneous.

IV. THE ADDITIONAL ISSUES RAISED BY THE COURT DO NOT WARRANT MODIFICATION OF THE INJUNCTION

By Order dated November 10, 2021, the Court directed the parties to address issues concerning the Hyde Amendment that were not raised or briefed before the trial court. Doc. 46. Respectfully, any modification of the district court's injunction based on arguments not raised by the parties below would be improper under the party-presentation principle. *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (reversing court of appeals that based decision on issue not raised by parties).

In any event, with respect to the Court's questions on whether Proviso 1.108 is "a funding provision not unlike the Hyde Amendment" the answer is plainly *no*. And federal courts have the power—and the obligation—to invalidate state funding provisions that interfere with federally-protected rights.

1. The Supreme Court has concluded that the federal right to an abortion does not include an affirmative right to funding to obtain an abortion. Rather, the Fourteenth Amendment prevents the state from imposing an undue burden on a person's ability to get an abortion. *See Planned Parenthood v. Casey,* 505 U.S. 833, 837 (1992). But just as the State is not required to distribute megaphones under the First Amendment or furnish firearms under the Second Amendment, the Court has held that the federal constitution does not mandate that the state or federal government fund abortion care. *Maher v. Roe*, 432 U.S. 464, 474 (1977) ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."); *Harris v. McCrae*, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a

woman's exercise of her freedom of choice, it need not remove those not of its own creation.").

By contrast, Title II of the ADA and Section 504 of the Rehabilitation Act mandate that public entities—including States—take affirmative steps to ensure individuals with disabilities have equal access to public programs, services, and facilities. *See*, *e.g.*, 28 C.F.R. §35.130 ("A public entity *shall* make reasonable modifications…") (emphasis added); 28 C.F.R. §35.150 (requiring services, programs, and activities be "readily accessible" to individuals with disabilities); 34 C.F.R. §104.4(b)(1)(i)-(iii) ("A recipient … may not, … [d]eny a qualified handicapped person the opportunity to participate in or … an opportunity … that is not equal to [or] … as effective as that provided to others.").

In that way, the ADA and Rehabilitation Act share operation with other federal mandates, such as those to provide legal counsel to the indigent accused, *Gideon v. Wainwright*, 372 U.S. 335 (1963), to provide necessary healthcare to prisoners, *Estelle v. Gamble*, 429 U.S. 97 (1976), and to integrate public schools, *Brown v. Board of Educ.*, 349 U.S. 294 (1955). And just as the State of South Carolina cannot dodge the Sixth

or Eighth Amendments by making a policy choice to refuse to fund indigent defense services or pay for healthcare for prisoners, the legislature cannot gut the access and integration mandates of Title II and Section 504 by refusing to fund compliance. *See*, *e.g.*, *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.").

2. A holding that States may prohibit spending to enforce civil rights would upend civil rights enforcement in this country. As this Court affirmed in *Lamone*, the ADA "trumps state regulations that conflict with its requirements." 813 F.3d at 508-09 (citing *Jones v. City of Monroe*, 341 F.3d 474, 487 (6th Cir. 2003) (Cole, J., dissenting) ("Requiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does."). Upholding Proviso 1.108 would invert this approach. Imagine if the South Carolina legislature sought to bar schools from using state funds to desegregate. Would the federal government really be impotent to act? The Supreme Court has definitively answered this question "no." *See Cooper v. Aaron*, 358 U.S. at 17. The South Carolina legislature could no more pass such a

restriction than it could prohibit schools or municipalities from using state funds be spent on construction of wheelchair ramps or curb cuts to comply with the ADA.

3. Proviso 1.108 greatly impedes the fulfillment of federal law by forcing South Carolina school districts to risk defunding in order to offer a reasonable accommodation as required by federal law to ensure access to education for students with disabilities amidst a global health crisis.

Defendants argue that "the Proviso does not … ban all mask mandates in public schools." Supp. Br. at 13 (citing *Richland Cty Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920, 924 (S.C. 2021)). But they know otherwise. Just ask the schools. *See* ECF 76-6 (school reopening plan: "Per action of the General Assembly, masks will not be required ….").

Without the lower court's preliminary injunction, schools with masking requirements face imminent litigation and defunding. Defendant Wilson—the enforcement officer for the law—has sued the Richland 2 district arguing that Proviso 1.108 "overwhelmingly demonstrate[s] the legislature's intent that schools … must not impose or implement mask mandates." JA114. And in four separate legal actions, he has proven

eager to advance this view by suing political subdivisions that adopt masking requirements. Although *Richland Co. Sch. Dist. 2* observed the theoretical possibility that schools could impose mask mandates without violating the Proviso, 862 S.E.2d at 924, the state Supreme Court found in a related case against the City of Columbia that if even one school employee or "a penny of state funds" is used to announce, implement, or enforce a policy, Proviso 1.108 is violated. *Wilson v. City of Columbia*, 863 S.E.2d at 461. That is tantamount to an outright ban.

Moreover, even if school districts avoid getting sued, they still risk legislative defunding. Immediately after the preliminary injunction was entered, the legislative sponsor of Proviso 1.108 threatened that any school district that enacted a mask mandate would face "massive budget cuts." Doc. 38 at 25 n.4.

4. This Court's Hyde Amendment jurisprudence plainly recognizes that a State's decision to withhold Medicaid funding for abortion cannot prevail over contrary federal law. Although states may generally withhold such funding, they may not do so in the limited circumstances of rape, incest, or where the pregnancy is life-threatening. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 692

n.1 (4th Cir. 2019). That is because federal law requires Medicaid to cover abortion in such instances. *Id.* ("South Carolina does not provide Medicaid reimbursements for abortion services except in cases where it is required to do so by federal law. Such cases involve rape, incest, or the need to protect the mother's life."). The same rationale applies here. Defendants argue that Proviso 1.108 reflects the legislature's policy determination that parents, rather than schools, should be deciding whether students wear masks. But just as the State's decision not to provide Medicaid coverage of abortion must yield to federal law, the legislature's regulation of masking authority must cede to the demands of federal disability rights law. The ADA and Section 504 require schools to provide reasonable modifications in order to allow students with disabilities equal access to their education. Under the unique factual circumstances of a pandemic, these reasonable modifications must include the ability to require masking as one key reasonable modification.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,545 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 365 and is set in Century Schoolbook font in a size equivalent to 14-point or larger.

s/ *John A. Freedman*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed electronically on November 29, 2021 and will, therefore be served electronically upon all counsel.

s/ *John A. Freedman*
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