No. 21-2070

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISABILITY RIGHTS SOUTH CAROLINA, *et al*.,

Plaintiffs-Appellees

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of South Carolina, *et al.*,

Defendants-Appellants

and

MOLLY SPEARMAN, in her official capacity as State Superintendent of Education, *et al.*,

Defendants

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES ON THE ISSUES ADDRESSED HEREIN

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES ON THE ISSUES ADDRESSED HEREIN

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the proper interpretation and application of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* (Title II), Section 504 of

the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and their implementing regulations. Congress gave the Attorney General express authority to issue regulations under Title II, see 42 U.S.C. 12134(a), and directed all federal agencies to issue regulations implementing Section 504 with respect to programs or activities for which they provide federal financial assistance, 29 U.S.C. 794(a). The Attorney General has authority to bring civil actions to enforce both Title II and Section 504. See 42 U.S.C. 12133; 29 U.S.C. 794a.

The Department of Justice has designated the Department of Education as an agency responsible for investigating possible violations of Title II involving public schools. See 28 C.F.R. 35.190(b)(2); 28 C.F.R. 35.170-.173. On August 30, 2021, the Department of Education's Office for Civil Rights opened an investigation to determine whether, in light of the state law at issue here, the South Carolina Department of Education was discriminating against students with disabilities who are at heightened risk for severe illness from COVID-19 by preventing their safe return to in-person learning. That investigation is ongoing.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether South Carolina Budget Proviso 1.108 is preempted to the extent that it prevents school districts from using state funds to announce or enforce masking requirements even if those requirements are adopted to comply with Title II of the ADA and Section 504 of the Rehabilitation Act.

2. Whether plaintiffs have a private right of action for their reasonable-modification (failure-to-accommodate) claim under Title II of the ADA and Section 504 of the Rehabilitation Act.

3. Whether the fact that plaintiffs challenge a state funding statute deprived the district court of jurisdiction.[1]

STATEMENT OF THE CASE

1. Factual Background

This case arises against the backdrop of the ongoing and evolving public health crisis presented by COVID-19, a "highly communicable respiratory virus."

[1] The United States takes no position on any other issue presented in this case.

J.A.35.[2] In the midst of this pandemic, South Carolina school districts returned to five-day, in-person learning as of April 2021. See 2021 S.C. Acts No. 102 § 1.

To mitigate the risks posed by COVID-19 when returning to the classroom, the Centers for Disease Control and Prevention recommends "universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status." J.A.39-40. Following this guidance, the South Carolina Department of Health and Environmental Control likewise recommends "public indoor masking for everyone," including "teachers, students, parents, and visitors in K-12 schools." J.A.40.

Nevertheless, in June 2021, South Carolina added Budget Proviso 1.108, titled "SDE: Mask Mandate Prohibition," to its 2021-2022 Appropriations Act. 2021 S.C. Acts No. 94, Part 1B, § 1.108 (Proviso). According to the Proviso, "[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." *Ibid.* The Proviso specifies that "[t]his prohibition extends to the announcement or enforcement of any such policy." *Ibid.*

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[2] "J.A. __" refers to the Joint Appendix by page number. "Defs.' Br. __" and "Defs.' Supp. Br. __" refer to defendant-appellants' opening and supplemental briefs, respectively, by page number. "Doc. __, at __" refers to documents on the district court docket by page number.

Since the Proviso's enactment, the South Carolina Supreme Court has twice found the Proviso to be valid as a matter of state law without occasion to consider federal law. *Wilson* v. *City of Columbia*, 863 S.E.2d 456 (S.C. 2021); *Richland Cnty. Sch. Dist. 2* v. *Lucas*, 862 S.E.2d 920 (S.C. 2021) (per curiam). In neither decision did the court "outright reject the possibility that a local government could impose a mask mandate without contravening Proviso 1.108" by using funds other than those allocated by the State. *Wilson*, 863 S.E.2d at 461; see also *Lucas*, 862 S.E.2d at 924. Nevertheless, in *Wilson*, when South Carolina's Attorney General brought a declaratory judgment action against the City of Columbia for announcing a mask mandate in schools, the South Carolina Supreme Court rejected the City's claim that it could fund the mandate itself. See 863 S.E.2d at 461.

Meanwhile, the South Carolina Department of Education has provided conflicting advice to school districts. In a memorandum dated July 6, 2021, the Superintendent of Education explained that school districts "may not create or enforce any policy, which would require the wearing of face coverings." J.A.146. She warned that, "[s]hould a district decide to act contrary to this law, state funding may be withheld." J.A.146.

Then, on August 18, 2021, the Deputy General Counsel of the South Carolina Department of Education issued a memorandum "to reiterate the requirements" for local educational agencies under the Individuals with Disabilities

Education Act, as well as Title II and Section 504. Doc. 54-1, at 2. She recognized that "[t]here are instances where the consideration of mask mandates is necessary for specific individuals who provide instruction and related services to, or come into contact with, students who are medically fragile, have immunocompromised and immunodeficiency conditions, or are otherwise at significant risk for medical conditions that make them more likely to become seriously ill." Doc. 54-1, at 2. In such circumstances, "decisions must be made on a case-by case basis" depending on "that particular student's impairment and circumstances." Doc. 54-1, at 3.

2. Procedural Background

a. Plaintiffs are disability-rights groups, parents, and "students with disabilities, including certain underlying medical conditions, which increase their risk of contracting COVID-19 and/or increase their risk of serious complications or death from a COVID-19 infection." J.A.27-28; see also J.A.29-32. They filed suit in the District of South Carolina challenging the Proviso under Title II, Section 504, and the American Rescue Plan Act of 2021, and seeking declaratory and injunctive relief. J.A.50-57. They named South Carolina's Governor, Attorney General, and Superintendent of Education as defendants, and seven school board districts as indispensable but not adverse parties. J.A.32-35.

On August 26, 2021, plaintiffs moved for a temporary restraining order and a preliminary injunction "to stop enforcement of Budget Proviso 1.108 insofar as it bars schools and localities from requiring masking in the schools." J.A.61. As relevant here, plaintiffs argued that they were likely to succeed on the merits because "[d]efendants are failing to make reasonable modifications in violation of 28 C.F.R. § 35.130(b)(7) because they are prohibiting schools from requiring all students to wear masks at school so that students with disabilities can participate in in-person learning with their peers." Doc. 16-1, at 15-16. They stressed that they "have not asked the Court to order universal masking for all students." J.A.260. "Rather, Plaintiffs have merely insisted that the Court enjoin Proviso 1.108 *so that* Defendant Districts can satisfy their burden to make reasonable modifications under the ADA and Rehabilitation Act." J.A.260.

b. The district court granted plaintiffs' motion and enjoined the Governor and Attorney General from enforcing the Proviso, "which is violative of Title II and Section 504." J.A.296; see also J.A.291. As to the merits, the court concluded that plaintiffs were likely to succeed on their reasonable-modification claim. J.A.283-288. The court recognized that "allowing school districts, at their discretion, to require face coverings is a reasonable modification." J.A.286. "At bottom," the court explained, "Proviso 1.108 conflicts with Title II and Section 504 because it fails to accommodate disabled children and denies them the benefits of

public schools' programs, services, and activities to which they are entitled." J.A.288. Because the court determined that this issue was dispositive, it did not reach any of plaintiffs' other bases for relief. J.A.288, 291.

In a subsequent order denying defendants' motion for a stay, the district court emphasized that its prior order "enjoins only Proviso 1.108," and that, under this order, "South Carolina schools, and only South Carolina schools * * * must undertake a fact-specific and case-by-case inquiry to determine whether reasonable modifications are being made." J.A.306. This inquiry by the schools "may" or "may not," depending on particular facts, "lead to a conclusion [that] masks are required on certain parts of a school campus and during certain hours." J.A.306.

c. South Carolina's Governor and Attorney General appealed. J.A.297-298. On November 10, 2021, this Court denied their renewed emergency motion for a stay pending appeal but ordered the clerk to expedite briefing and schedule oral argument. In addition, the Court asked the parties to address two supplemental issues: (1) Is the statutory provision at issue a funding provision not unlike the Hyde Amendment? and (2) If it is, do U.S. courts have jurisdiction over funding decisions made by a state legislature?

ARGUMENT

In Part I, we explain that the Proviso is preempted to the extent that it poses an obstacle to school districts' ability to comply with their obligations under Title II and Section 504. In Part II, we refute defendants' arguments that plaintiffs do not have a private cause of action to bring a reasonable-modification claim under Title II and Section 504. In Part III, we explain that the fact that plaintiffs are challenging a state funding statute did not deprive the district court of jurisdiction, and also that defendants are not entitled to sovereign immunity in this case.

I

THE PROVISO IS PREEMPTED TO THE EXTENT IT OBSTRUCTS SCHOOL DISTRICTS' ABILITY TO IMPOSE MASKING REQUIREMENTS WHEN NEEDED TO COMPLY WITH THEIR OBLIGATIONS UNDER FEDERAL LAW

The Proviso is preempted to the extent it obstructs school districts' ability to satisfy their obligations under Title II and Section 504. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, "Congress may implicitly pre-empt a state law, rule, or other state action" through conflict preemption. *Oneok, Inc.* v. *Learjet, Inc.*, 575 U.S. 373, 376-377 (2015). "[C]onflict pre-emption exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress." *Id.* at 377 (citation and internal quotation marks omitted). "In either situation, federal law must prevail." *Ibid.*

A. Title II And Section 504 Require School Districts To Make Reasonable Modifications When Necessary To Ensure Meaningful Access To Students With Disabilities

Title II and Section 504 "aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs." *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756 (2017).

Section 504 prohibits discrimination on the basis of disability in federally funded programs or activities. It provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Title II, which extends Section 504's prohibition to public entities, similarly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

Title II's implementing regulations require "[a] public entity [to] make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7)(i). Courts likewise have interpreted Section 504's regulations "as demanding certain 'reasonable' modifications to existing practices in order to 'accommodate' persons with disabilities." *Fry*, 137 S. Ct. at 749 (quoting *Alexander* v. *Choate*, 469 U.S. 287, 299-300 (1985)); see generally 34 C.F.R. 104.4 (describing prohibited discriminatory actions).

Here, there is no dispute that South Carolina school districts are subject to the requirements of Title II and Section 504 as public entities that receive federal funding. See 42 U.S.C. 12131(1)(B) (defining public entities); 29 U.S.C. 794(b)(2)(B) (including operations of local educational agencies that receive federal funding). Accordingly, to comply with their federal obligations, school districts must make reasonable modifications when necessary to ensure meaningful access for their students with disabilities, absent a showing that the modifications would constitute a fundamental alteration.

Depending on the circumstances, for example, schools may need to make such changes as allowing a service animal to accompany a student with a seizure

disorder, see, *e.g.*, *Alboniga* v. *School Bd. of Broward Cnty.*, 87 F. Supp. 3d 1319, 1323, 1344-1345 (S.D. Fla. 2015); providing a one-to-one aide supported by a special education teacher to assist a student with autism, see, *e.g.*, *K.N.* v. *Gloucester City Bd. of Educ.*, 379 F. Supp. 3d 334, 352 (D.N.J. 2019); or requiring students to wash their hands before and after meals to protect a student in their classroom with severe food allergies, see, *e.g.*, *Ridley Sch. Dist.* v. *M.R.*, 680 F.3d 260, 281 (3d Cir. 2012) (noting provisions of "a § 504 Service Agreement"). And in this context, again depending on the circumstances, a school district could decide that some degree of requiring masks is necessary as a reasonable modification to ensure that students with disabilities have meaningful access to in-person schooling without risking hospitalization or death due to COVID-19.

B. The Proviso Conflicts With School Districts' Obligations Under Federal Law By Obstructing Their Ability To Make Reasonable Modifications

The Proviso is preempted to the extent it obstructs school districts' ability to meet their federal obligations under Title II and Section 504 by adopting masking requirements as a reasonable modification when needed to ensure that students with disabilities can learn alongside their peers.

1. The Proviso prohibits using state funds (or state-funded personnel) to announce or enforce any form of mask mandate in public schools. As a result, even if a school district makes a fact-specific determination that requiring masks to some extent is necessary to comply with Title II and Section 504, the Proviso

makes it much harder, if not impossible, for it to do so. The prohibition on using state funds applies not just to universal mask mandates, but also to more limited masking requirements. Based on the Proviso's plain language, a school district would not be able to use state funds to require masking in one wing of a school building, in one classroom, or for an individual aide working directly with a student with disabilities, even if necessary to comply with Title II and Section 504.

Defendants nevertheless claim that school districts can implement mask mandates so long as they use only federal or local funds. Defs.' Br. 1, 7. But this assertion is an about-face from their position in the district court. There, the Governor recognized that, "while it is theoretically possible that a local government could impose a mask mandate without running afoul of the Proviso, practically speaking, virtually any enforcement or announcement of a mask mandate in a public school would require some use of state-appropriated funds." Doc. 58, at 3 n.1 (citing *Wilson* v. *City of Columbia*, 863 S.E.2d 456 (S.C. 2021)).

Indeed, in *Wilson*, the South Carolina Supreme Court rejected the City of Columbia's argument that it would "itself fund and enforce [a mask] mandate in the City's public schools, rather than using any state-appropriated funds to do so." *Wilson*, 863 S.E.2d at 461. The court found that the City's mandate still would rely on state funds because the ordinance was enforced by school personnel, "all of whom have an obvious connection to state-appropriated funds." *Ibid.* And, in any

case, "[t]he notion that City employees would infiltrate the schools and, without any assistance from school personnel and without a penny of state funds, would be able to mandate masks and impose civil penalties strains credulity." *Ibid.*[3]

Thus, as a practical matter, the Proviso makes it much harder, if not impossible, for a school district itself to announce or enforce masking requirements, even if necessary to comply with its obligations under Title II and Section 504.

2. As the Supreme Court has noted, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct" federal law requirements, "it must fall." See *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) (addressing state statute, enacted in the midst of a school desegregation case, that prohibited involuntary busing and barred the use of public funds for the same despite a constitutional obligation to eliminate existing dual school systems). And specific to the federal statutes at issue here, the Second Circuit has recognized that "[t]he natural effect of Title II's reasonable

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[3] The City of Columbia and Richland County have since passed new ordinances, which try to work around the Proviso by requiring masks in schools while assigning enforcement to the Fire Marshals rather than school district staff, and specifying that no state funds shall be used in any way. See City of Columbia, Ordinance No. 2021-078 (Sept. 8, 2021); Richland Cnty., An Emergency Ordinance Requiring the Wearing of Face Masks to Help Alleviate the Spread of Covid 19, Specifically the Recent Surge in the Delta Variant (Sept. 15, 2021); see generally *Richland Cnty. Sch. Dist. 2* v. *Lucas*, 862 S.E.2d 920, 922 n.2 (S.C. 2021) (per curiam). The ordinances' validity has yet to be tested.

modification requirement * * * requires preemption of inconsistent state law when necessary to effectuate a required reasonable modification." *Mary Jo C.* v. *New York State & Loc. Ret. Sys.*, 707 F.3d 144, 163 (2d Cir.) (citation and internal quotation marks omitted), cert. dismissed, 569 U.S. 1040 (2013).

Applying these principles to a state law similar to the Proviso, a district court recently held that Title II and Section 504 preempted an Executive Order issued by Texas's Governor that prohibited governmental entities, including school districts, from imposing any form of mask requirements. *E.T.* v. *Morath*, No. 1:21-cv-717, 2021 WL 5236553, at *3, 9-10 (W.D. Tex. Nov. 10, 2021), appeal pending, No. 21-51083 (5th Cir. docketed Nov. 12, 2021). The court concluded, in part, that the Executive Order "conflicts with federal law to the extent that it interferes with local school districts' ability to satisfy their obligations under the ADA and Section 504 and their implementing regulations." *Id.* at *10. "The clear intent of Congress is to place the authority with local school districts to decide by what means to comply with their obligations under the ADA and Section 504," but, the court held, the Executive Order "ignore[d] that intent" and "remov[ed] that authority from local school districts and plac[ed] all authority state wide with the Governor." *Ibid.*

Here, too, the State cannot obstruct a school district's ability to adopt masking requirements when needed to comply with their federal-law obligations to

make reasonable modifications for their students with disabilities. The Proviso is preempted to the extent it has that effect. Simply put, state law cannot obstruct school districts' ability to comply with federal law.

3. To be clear, this analysis does not mean that students with disabilities are always unsafe in schools without masks or that universal masking will always be required to ensure them meaningful access. The Proviso is preempted only to the extent it obstructs school districts—the entities primarily responsible for complying with Title II and Section 504 in this context—from adopting masking requirements on a case-by-case basis in order to comply with their obligation to make reasonable modifications for their particular students under federal law. This is necessarily a fact-specific inquiry depending on each school's particular circumstances and the modifications sought by their students.

Thus, as the district court explained in its order denying a stay, South Carolina schools "must undertake a fact-specific and case-by-case inquiry to determine whether reasonable accommodations are being made." J.A.306. This analysis "may lead to a conclusion [that] masks are required on certain parts of a school campus and during certain hours." J.A.306. "Or it may not." J.A.306.

II

PLAINTIFFS NEED NOT ALLEGE INTENTIONAL DISCRIMINATION TO BRING A REASONABLE-MODIFICATION CLAIM

Defendants argue that plaintiffs do not have a private right of action for disparate-impact and failure-to-accommodate theories under Title II and Section 504. Defs.' Br. 20-27. Here, however, the district court relied only on plaintiffs' reasonable-modification (or failure-to-accommodate) theory to grant the preliminary injunction.[4] See J.A.288. Reasonable-modification claims have long been cognizable under Title II and Section 504, and for good reason. Defendants' contrary argument ignores well-established case law, including in this Court, and misunderstands the language of the statutes.

A. Reasonable-Modification Claims By Private Parties Are Cognizable Under Title II And Section 504

This Court's decision in *National Federation of the Blind* v. *Lamone*, 813 F.3d 494 (4th Cir. 2016), forecloses defendants' argument. There, the Court explicitly recognized that "Title II allows plaintiffs to pursue three distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate

[4] The terms "reasonable accommodation" and "reasonable modification" are "used interchangeably" in the case law for Title II and Section 504 "without apparent distinction." See *Berardelli* v. *Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 116-117 (3d Cir. 2018); *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807, 816 n.26 (9th Cir. 1999); see also *Halpern* v. *Wake Forest Univ. Health Sci.*, 669 F.3d 454, 462 n.5 (4th Cir. 2012) (same under Title III).

impact; and (3) failure to make reasonable accommodations." *Id.* at 503 n.5; see also *id.* at 502 n.4 (analyzing plaintiffs' Title II and Section 504 claims together). Plaintiffs in that case proceeded and won on a reasonable-accommodation theory. See *ibid.*; see also *id.* at 507-510. In addressing that theory, the Court specifically highlighted "that the record [was] devoid of any evidence that the defendants acted with discriminatory animus," but recognized that "the ADA and the Rehabilitation Act do more than simply provide a remedy for intentional discrimination." *Id.* at 510. The Court explained that these statutes "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." *Ibid.*

Other circuits agree that Title II and Section 504 authorize—and therefore provide a private right of action for—reasonable-modification claims. See, *e.g.*, *Frame* v. *City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc), cert. denied, 565 U.S. 1200 (2012); *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737, 751 (7th Cir. 2016) (en banc). Indeed, even the Sixth Circuit, the only court not to recognize Section 504 disparate-impact claims, explicitly distinguished reasonable-modification claims. See *Doe* v. *BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 243 (6th Cir. 2019). In addition, there is a wide consensus that reasonable-modification claims do not require plaintiffs to prove

discriminatory intent. See, *e.g.*, *Brooks* v. *Colorado Dep't of Corr.*, 12 F.4th 1160, 1167 (10th Cir. 2021); *Snell* v. *Neville*, 998 F.3d 474, 500 n.35 (1st Cir. 2021); *Brooklyn Ctr. for Psychotherapy, Inc.* v. *Philadelphia Indem. Ins. Co.*, 955 F.3d 305, 312 (2d Cir. 2020).

These decisions make sense given the statutes' purpose to provide "non-discriminatory access to public institutions" for individuals with disabilities. *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756 (2017). "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required [covered entities] to take reasonable measures to remove architectural and other barriers to accessibility." See *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) (citing 42 U.S.C. 12131(2)). For this reason, Title II and Section 504 have long been understood to eradicate barriers to access that keep individuals with disabilities from full participation in society, even if unintentionally so. See *Alexander* v. *Choate*, 469 U.S. 287, 297 (1985).

B. Defendants' Contrary Arguments Are Not Persuasive

Defendants nevertheless contend that this well-established body of law is wrong, based on their reading of the statutes' text and the Supreme Court's interpretation of Title VI of the Civil Rights Act of 1964. See Defs.' Br. 20-27. As relevant here, they argue that (1) the plain language of the statutes requires discrimination "by reason of" or "solely by reason of" a disability; (2) the statutes

are modeled on and incorporate the remedies of Title VI, which allows claims only for intentional discrimination; and (3) the regulations cannot themselves create a private right of action. Defs.' Br. 21-25.[5] None of these arguments is persuasive.

First, defendants misread the statutory text. Critically, the operative provisions of both Title II and Section 504 are written in the passive voice to focus on protecting a covered individual from "be[ing] excluded" from participation, "be[ing] denied" benefits, or "be[ing] subjected to discrimination" when the adverse effect occurs "by reason of" such disability. 42 U.S.C. 12132; 29 U.S.C. 794(a). The statutes thus "focus[] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean* v. *United States*, 556 U.S. 568, 572 (2009). As a result, the "by reason of" language signifies the required causal nexus between the individual's disability and an adverse outcome. It does not require proof of a discriminatory intent. For example, a student who uses a wheelchair and is unable to attend an assembly because the school's auditorium lacks a ramp is naturally described as being excluded from participation in the assembly "by reason of" her disability, even if the school did not intend to exclude her.

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[5] We do not address here defendants' two additional arguments specific to disparate-impact claims (see Defs.' Br. 22-23), given that the district court based its issuance of a preliminary injunction only on plaintiffs' reasonable-modification claim. J.A.288.

Second, defendants place too much reliance on Title VI. The Supreme Court noted in *Choate* that "Title VI itself directly reache[s] only instances of intentional discrimination." 469 U.S. at 293; see also *Alexander* v. *Sandoval*, 532 U.S. 275, 281 (2001) (quoting same). But the Court explained that this conclusion was based on legislative history and constitutional considerations "peculiar to Title VI," rather than on the statute's text. See *Choate*, 469 U.S. at 294 n.11. And, although the Court construed Title VI to reach only intentional discrimination, the 1973 Congress that enacted the Rehabilitation Act "was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination." *Ibid.* Thus, while Title VI is relevant to Title II and Section 504, the Court cautioned that "too facile an assimilation of Title VI law to § 504 must be resisted." *Id.* at 293 n.7.

Third, Title II's regulation requiring covered entities to make reasonable modifications, 28 C.F.R. 35.130(b)(7), is grounded in the statute's text. Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without *reasonable modifications* to rules, policies, or practices, * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." 42 U.S.C. 12131(2) (emphasis added). The Title II regulation elaborates on the standard governing when covered entities are required to make the reasonable modifications anticipated by the statutory

definition to avoid discrimination. See 28 C.F.R. 35.130(b)(7). That regulation "mirrors" and "was intended to implement" the statutory definition. *Hargrave* v. *Vermont*, 340 F.3d 27, 38 (2d Cir. 2003); *Mary Jo C.* v. *New York State & Loc. Ret. Sys.*, 707 F.3d 144, 157 n.3 (2d Cir.), cert. dismissed, 569 U.S. 1040 (2013); see also *Haberle* v. *Troxell*, 885 F.3d 170, 181 n.11 (3d Cir. 2018) (citing both the statutory definition and regulation).

In sum, contrary to defendants' arguments, reasonable-modification claims are cognizable under Title II and Section 504. Nothing in the statutes' text or the interpretation of Title VI suggests otherwise.

III

THE FACT THAT PLAINTIFFS CHALLENGE A STATE FUNDING STATUTE DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION

Federal courts may exercise jurisdiction over challenges to state funding statutes. Judicial review of such statutes is critical to ensuring that States comply with federal statutory and constitutional law when determining which activities to fund. Although defendants appear to argue that they are entitled to sovereign immunity with respect to the particular funding-statute challenges asserted here, those arguments are unpersuasive.

A. The Proviso Here Is Unlike The Hyde Amendment

This Court's November 10 Order asked the parties to address first whether South Carolina's Proviso is a funding provision not unlike the so-called "Hyde Amendment," a federal statutory restriction on using certain federal funds to pay for abortions. See *Harris* v. *McRae*, 448 U.S. 297, 302-303 (1980). In *Harris*, the Supreme Court rejected several constitutional challenges to the Hyde Amendment on the merits, explaining in relevant part that a woman's constitutional "freedom of choice [to obtain an abortion]" does not "carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316.

South Carolina's Proviso is similar to the Hyde Amendment only in that it too bars the use of government funds for specified activities. But it is different from the Hyde Amendment in numerous respects, one of which is particularly critical: as explained above, the Proviso bars the use of state funds for actions that federal law—the Rehabilitation Act and the ADA—sometimes requires the government to undertake. If the Hyde Amendment had barred funding for government actions mandated by the Constitution (for example, providing counsel to indigent criminal defendants), *Harris* would have been a very different case. Cf. *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (holding Congress's spending

power "may not be used to induce the States to engage in activities that would themselves be unconstitutional").

B. Federal Courts May Exercise Jurisdiction Over Challenges To State Funding Statutes, And There Is No Sovereign Immunity Bar To This Suit

In answer to this Court's second question in its November 10 Order concerning whether federal courts have jurisdiction over challenges to state funding statutes, there is no categorical jurisdictional bar to such challenges. To the contrary, federal courts routinely review state funding decisions on the merits and strike them down when they conflict with federal law. See, *e.g.*, *Dalton* v. *Little Rock Fam. Plan. Servs*., 516 U.S. 474, 475-478 (1996) (per curiam) (remanding for entry of order partially enjoining enforcement of state constitutional provision barring the use of state funds for certain abortions); *Williams* v. *Zbaraz*, 448 U.S. 358, 360, 368-369 (1980) (reviewing state abortion funding provision on the merits); *Maher* v. *Roe*, 432 U.S. 464, 466, 469-480 (1977) (same); see also, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017, 2019-2025 (2017) (holding state agency violated the First Amendment's Free Exercise Clause when the agency disqualified a church from receiving a particular grant pursuant to a state constitutional provision barring the use of state funds "in aid of any church, sect or denomination of religion") (citation omitted); *Chamber of Com. of U.S.* v. *Brown*, 554 U.S. 60, 62-63, 66-76 (2008)

(concluding that federal labor law preempted state statute barring certain employers from using state funds to assist, promote, or deter union organizing).

Similarly, when federal courts determine that States are violating federal law, they regularly order States to provide the funding necessary to bring their actions into compliance. See, *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977) (rejecting Tenth Amendment, Eleventh Amendment, and federalism challenges to the district court's requirement that the State fund a school desegregation remedy). In opinions reviewing state funding decisions, the Supreme Court has emphasized that preemption principles apply not just when a State exercises its "regulatory power" but also when it exercises its "spending power." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 & n.7 (2000) (citation omitted) (concluding that federal law preempted state statute barring state entities from buying goods or services from certain persons doing business with Burma).

To be sure, as explained in the case law upon which defendants rely in their supplemental brief, federal courts should generally avoid second-guessing state law, including state funding decisions. But, as that case law makes clear, that general rule has nothing to do with subject-matter jurisdiction or with the fact that funding (as opposed to some other decision) is involved, and the general rule is inapplicable where, as here, a plaintiff contends that a state funding decision

conflicts with federal law. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-837, 845-846 (1995) (explaining that States "must have substantial discretion in determining how to allocate scarce resources," but invalidating state university funding decision as violating the First Amendment).

Defendants are therefore quite wrong (Defs.' Supp. Br. 2, 10) that all state funding statutes—even those that conflict with federal statutes and the Constitution—are insulated from judicial review in federal courts. To the extent that defendants' supplemental brief raises any other jurisdictional issue, it concerns whether they are entitled to sovereign immunity in this particular case. They are not.

1. The Eleventh Amendment does not apply here because plaintiffs properly brought this action, which alleges an ongoing violation of federal law, against state officials under *Ex parte Young*, 209 U.S. 123 (1908). As defendants emphasize (Defs.' Supp. Br. 13), a plaintiff bringing such an action must sue an official with "some connection with the enforcement of the act." *South Carolina Wildlife Fed'n* v. *Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (citation omitted). But that requirement is plainly satisfied here with respect to at least one defendant, the South Carolina Attorney General. His "connection" to enforcement of the Proviso is clear, given that he has already enforced it by obtaining a declaratory judgment

that a local mask mandate was void. See *Wilson* v. *City of Columbia*, 863 S.E.2d 456, 457-458, 463 (S.C. 2021).

Defendants further suggest (Defs.' Supp. Br. 16) that plaintiffs' action cannot proceed under *Ex parte Young* because the relief they seek—an injunction against future enforcement of the Proviso—could affect how the State spends its money. That argument is foreclosed by binding precedent. Although plaintiffs suing state officials under *Ex parte Young* may not seek retrospective damages without implicating the Eleventh Amendment, such plaintiffs are free to seek prospective relief, even if "the implementation of such prospective relief would require the [State's] expenditure of substantial sums of money." *Antrican* v. *Odom*, 290 F.3d 178, 185 (4th Cir.), cert. denied, 537 U.S. 973 (2002); see also, *e.g.*, *Stanley* v. *Darlington Cnty. Sch. Dist*., 84 F.3d 707, 713 (4th Cir. 1996) (explaining courts in school desegregation cases can order States violating federal law to bear the "future costs of desegregation" under the "'prospective-compliance exception' to Eleventh Amendment") (quoting *Milliken*, 433 U.S. at 289).

Although the Supreme Court has also held that an *Ex parte Young* action is unavailable if it implicates "special sovereignty interests," that exception applies only in narrow circumstances, such as when a suit threatens a State's ownership of land and its regulatory authority over that land. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-288 (1997) (explaining that although "[a]n allegation of

an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction," that case was "unusual" in that the Tribe's suit was the "functional equivalent of a quiet title action which implicates special sovereignty interests"). As defendants do not dispute, that exception is inapplicable to the "garden variety" challenge at issue here. *CSX Transp., Inc.* v. *Board of Pub. Works of W. Va.*, 40 F. App'x 800, 803-805 (4th Cir. 2002) (per curiam) (holding State had no special sovereignty interest in avoiding suit alleging that it had "impos[ed] discriminatory taxes" in violation of federal law); *Antrican*, 290 F.3d at 189-190 (concluding State had no special sovereignty interest in deciding how to allocate Medicaid funds).

2. Even if this Court were to conclude that plaintiffs did not bring a proper *Ex parte Young* action, defendants still are not entitled to sovereign immunity. Plaintiffs have pursued, *inter alia*, a cause of action under Section 504 of the Rehabilitation Act and Title II of the ADA. Significantly, the State waived its sovereign immunity as to the Rehabilitation Act claim by accepting federal funding. That conclusion follows ineluctably from a decision of this Court defendants wholly ignore—*Constantine* v. *Rectors & Visitors of George Mason University*, which held that Congress properly and clearly conditioned receipt of federal funding on a State's waiver of sovereign immunity to Section 504 suits. 411 F.3d 474, 491-496 (4th Cir. 2005) (citing 42 U.S.C. 2000d-7).

Because plaintiffs do not claim, and the district court did not hold, that their Title II rights are broader than their Section 504 rights, there is no need for this Court to reach the question whether Congress validly abrogated the State's sovereign immunity to the Title II claims at issue here. If the Court were to reach that question, however, it should answer in the affirmative. Contrary to defendants' assertion (Defs.' Supp. Br. 16), *United States* v. *Georgia*, 546 U.S. 151 (2006), did not hold that Congress's abrogation under Title II is valid "only" for conduct that violates the Fourteenth Amendment. Instead, *Georgia* made clear that "insofar as [the] misconduct [at issue] violated Title II but did not violate the Fourteenth Amendment," a court must evaluate whether Congress's abrogation "is nevertheless valid." *Id.* at 159; accord *Allen* v. *Cooper*, 140 S. Ct. 994, 1004 (2020) (explaining that "Congress can permit suits against States for actual violations" of the Fourteenth Amendment and "a somewhat broader swath of conduct, including acts constitutional in themselves") (citation omitted). In *Constantine*, after conducting such an inquiry, this Court held that Congress properly abrogated States' sovereign immunity to Title II reasonable-accommodation claims in the higher-education context. See 411 F.3d at 484-490. *Constantine*'s analysis is equally applicable to the education-related reasonable-modification claims at issue here.

CONCLUSION

For the foregoing reasons, Title II and Section 504 preempt the Proviso to the extent that it obstructs school districts' ability to impose masking requirements when needed to comply with their federal obligation to provide a reasonable modification to students with disabilities. Contrary to defendants' arguments, plaintiffs' reasonable-modification claim is cognizable under Title II and Section 504. The fact that plaintiffs challenge a state funding statute did not deprive the district court of jurisdiction.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,414 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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