

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - - X
THE ARC OF IOWA, et al., :
:
Plaintiffs, :
:
vs. : Case No. 4:21-cv-264
:
KIM REYNOLDS, In her : TRANSCRIPT OF HEARING ON MOTION
Official Capacity as : FOR TEMPORARY RESTRAINING ORDER
Governor of Iowa, et al., :
:
Defendants. :
- - - - - X

Courtroom 455, Fourth Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Friday, September 10, 2021
9:59 a.m.

BEFORE: THE HONORABLE ROBERT W. PRATT, Senior Judge

TONYA R. GERKE, CSR, RDR, CRR
United States Courthouse
123 East Walnut Street, Room 197
Des Moines, Iowa 50309

APPEARANCES:

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For the School District
Defendants:
(Except Iowa City CSD)

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P R O C E E D I N G S

THE COURT: Please be seated.

MR. MESSINA: Your Honor, the case before the Court this morning is 4:21-cv-264, the Arc of Iowa, et al. versus Reynolds, et al.

Counsel, please enter your appearances for the record.

MR. DUFF: Tom Duff for the plaintiffs.

MR. FREEDMAN: John Freedman for the plaintiffs.

MS. PATTON: Leah Patton for the plaintiffs.

MS. JOHNSON: Catherine Johnson for the plaintiffs.

MS. MILLER: Cynthia Miller for the plaintiffs.

MR. LANGHOLZ: Sam Langholz for Governor Reynolds and Director Lebo.

MS. LATTA: Kristy Latta for all defendant school districts excepting the Iowa City School District.

THE COURT: Mr. Freedman, is it your burden?

MR. FREEDMAN: It is, Your Honor, if I may approach. Your Honor, I'm not sure what the local practice is removing the mask for argument or not.

THE COURT: That will be fine.

MR. FREEDMAN: Good morning, Your Honor. John Freedman for the plaintiffs. We're here on plaintiffs' motion for a temporary restraining order. The record we submitted we believe is clear, and we think that it shows why interim injunctive relief should be entered. Unless the Court would

1 prefer a different order, I plan to start with irreparable harm,
2 then turn to likelihood of success on the merits, then talk
3 about burden on other parties, and then, finally, the public
4 interest.

5 THE COURT: That's fine.

6 MR. FREEDMAN: So with regard to irreparable harm, I
7 think there are three key points. The first is that our
8 clients, these students and their families, face irreparable
9 harm because defendants' acts have caused them to face
10 heightened risk of danger to their health. Each of these
11 children -- each of our clients has a disability that makes them
12 particularly vulnerable to severe medical consequences if they
13 contract COVID-19: lung conditions, heart problems, Down
14 syndrome, cerebral palsy, immunocompromised conditions.
15 National and state officials, including the Centers for Disease
16 Control, American Academy of Pediatrics, the American Medical
17 Association, the Iowa Medical Association, and the Iowa chapter
18 of the Academy of Pediatrics, have all said unambiguously that
19 universal masking at schools makes children safer at schools,
20 and it makes schools safer for our plaintiffs and thousands of
21 other children in Iowa with disabilities.

22 THE COURT: Mr. Freedman, do you want to offer the
23 declarations so we have a record?

24 MR. FREEDMAN: I do. I offer the declarations of our
25 two medical experts as well as our individual plaintiffs.

1 THE COURT: Okay. Mr. Langholz, do the defendants
2 have objections?

3 MR. LANGHOLZ: The State defendants have no
4 objections, Your Honor.

5 THE COURT: Are the school districts defendants here
6 as well?

7 MS. LATTA: Yes, they are.

8 THE COURT: Is there any objection?

9 MS. LATTA: No, Your Honor.

10 THE COURT: Go ahead, Mr. Freedman. I'm sorry to have
11 interrupted you.

12 MR. FREEDMAN: Thank you, Your Honor. The guidance --
13 the unambiguous guidance from national and state authorities is
14 why school districts around the country have adopted universal
15 masking requirements. The impact of the State defendants taking
16 a different approach is clear. The numbers since Iowa schools
17 have reopened in the last few weeks speak for themselves. 22
18 percent of the new cases in the state last week were pediatric
19 cases. 22 percent. In the short time since schools have
20 reopened, school districts have reported increasing numbers of
21 cases. Cedar Rapids reports 66 students infected through
22 September 3rd. That's a week ago. Iowa City has reported 115
23 students infected and another 130 put in quarantine. Des Moines
24 has reported 215 students and 66 staff infected. That's as
25 of -- as of yesterday.

1 THE COURT: Mr. Freedman, are these -- are these the
2 same figures that were in your earlier brief?

3 MR. FREEDMAN: They're updated.

4 THE COURT: Updated?

5 MR. FREEDMAN: Yes, updated, Your Honor. And we can
6 submit record evidence if that would be --

7 THE COURT: Okay. Well, I have read your brief. I
8 suspect Mr. Langholz and Ms. Latta have as well. So I had some
9 specific questions that I was going to go to the standard that I
10 think I'm bound by. The -- I think the *Rounds versus Planned*
11 *Parenthood* from my circuit says that when you have a, quote,
12 democratically, small d, passed statute that the threshold
13 requirement -- I think the circuit uses the term, and I'm sure
14 Mr. Langholz will correct me if I'm wrong -- that the Court has
15 to be more deferential to the passing of a statute by another
16 branch of government as opposed to enjoining another kind of act
17 by non-governmental defendants, so I guess I'd like to know do
18 you accept that as the law of this circuit, *Rounds*, and what
19 deference all of these factors that you've set out for
20 irreparable harm, balance of the equities, et cetera -- what --
21 how should I handle *Rounds* in approaching the factual record
22 that you've made in the declarations?

23 MR. FREEDMAN: Your Honor, I think that it goes to
24 the -- the issue of *Rounds* and putting aside the question of
25 whether or not *Rounds* is the governing standard or not, we

1 believe that we meet that standard. I think the issue that goes
2 to his likelihood of success on the merits, we have identified
3 in our papers in our brief five separate violations of the
4 Americans with Disabilities Act, any one of which would override
5 any deference the Court owes to the State legislature. We've
6 separately identified as a preemption ground under the American
7 Relief Plan Act which under the Supremacy Clause would overrule
8 any deference the Court owes to State legislative
9 determinations.

10 THE COURT: Okay. Thank you.

11 MR. FREEDMAN: Just -- I want to -- just in terms of
12 the harm -- and this is -- because the numbers are evolving, I
13 just want to give the Court some sense of how serious these
14 numbers are, so the 215 cases that the Des Moines district had
15 reported as of yesterday, that's 215 cases in 11 school days.
16 That's more than 25 percent of the total number of cases that
17 the Des Moines district reported in a full year last year. So
18 we're on a -- on a fast-spreading trajectory. It's faster than
19 anything that any school district saw last year.

20 The Eighth Circuit has repeatedly held that danger to
21 a plaintiff's health is sufficient to establish irreparable
22 harm. We cite in our brief the *Kai versus Ross* case, the *Harris*
23 *versus Blue Cross* case, and courts across the country have found
24 that exposing somebody to elevated risk of contracting COVID-19
25 constitutes irreparable harm. That's the cases we cite at pages

1 13 and 14 of our brief.

2 The second -- and we have two other bases for
3 irreparable harm. The second is the loss of educational
4 opportunities. A number of our plaintiffs, the Craig family
5 and -- I'm going to mispronounce the name -- the Valencourt
6 [phonetic] family have removed their children from public
7 schools because of increased risk for attending schools where
8 masks were not required, and we cite in our brief various
9 circuit court decisions from around the country where the loss
10 of educational opportunities has been found to constitute
11 irreparable harm.

12 The third source of irreparable harm flows from
13 plaintiffs having their civil rights violated, being subject to
14 discrimination. Here being subject to the illegal choice of
15 exposing their clients -- my clients to risk -- risk to their
16 health or exclusion and loss of education also establishes
17 irreparable harm with the cases we cite in our brief.

18 Now, defendants filed a partial response to this late
19 last night. I want to address --

20 THE COURT: Right. Because I'm concerned about the
21 first thing I think they concede -- or maybe they don't. I'm
22 assuming they concede jurisdiction, but the next thing they
23 claim is that standing is doubtful because even if I do what you
24 want, i.e., enjoin 847, it doesn't give your plaintiffs what
25 they want.

1 MR. FREEDMAN: Right.

2 THE COURT: Is that essentially the argument they
3 make?

4 MR. FREEDMAN: That's on their papers, Your Honor.

5 THE COURT: Yeah.

6 MR. FREEDMAN: And I think our response to that is
7 it's wrong both, I think, in their articulation of the legal
8 standard as well as on the facts. So I think that with regard
9 to the question of ascertainability, if we look at the key
10 Supreme Court cases on this, *Friends of the Earth*, for example,
11 a plaintiff who faces threat of future injury due to illegal
12 conduct from the defendants, anything that will abate that
13 conduct and prevent -- and prevent a violation of the law in the
14 future is a form of redress. That's from the *Friends of --*
15 *Friends of the Earth* decision. Anything also that -- and also
16 from that decision, anything that encourages defendants to
17 discontinue current violations and deters them from future
18 violations is also sufficient to establish redress.

19 It's also important and the Supreme Court emphasizes
20 this last term in a case called *Uzeugbunam -- Uzeugbunam*. I'll
21 try my best to spell it for the court reporter; it's
22 U-z-u-e-g-b-u-n-a-m, versus *Preczewski*, P-r-e-c-z-e-w-s-k-i, 141
23 Supreme Court 792 at 801. The Supreme Court in that decision
24 emphasized citing prior holdings that the ability to effectuate
25 a partial remedy satisfies the redressability requirement, so

1 even if the relief that we're seeking only partially provides a
2 partial remedy, that's sufficient to meet the redressability
3 hurdle.

4 THE COURT: As I got your prayer for relief, you want
5 an injunction against the enforcement of 847 which if I
6 understand the mechanics here would restore to a school the
7 discretion whether to require a mask or not. Is that
8 essentially what would happen?

9 MR. FREEDMAN: That's correct, Your Honor. That's our
10 current request to the Court.

11 But I think on the -- on the factual basis why that's
12 sufficient -- so I think if you look at our complaint, three
13 important things to keep in mind. One is that plenty of school
14 districts, including my understanding is every school district
15 where we have a plaintiff -- individual plaintiff last year, had
16 a universal masking requirement. We cite some of those in
17 paragraph 4 of our complaint on page 3, but they all at some
18 point last year had masking mandates, and several of them
19 publicly said that they were suspending them in light of passage
20 of HF 847.

21 The second thing is that plaintiffs' school districts
22 have indicated that if the law is -- if enforcement of the law
23 is suspended or enjoined, they would reestablish universal
24 masking. We cite some of the school districts that have
25 publicly stated that in paragraph 53 of our complaint at pages

1 18 and 19.

2 And the third point that I think is important to
3 remember and not to lose sight of is that the defendants -- the
4 State defendants -- I should qualify -- the State defendants
5 have made clear that they intend to enforce HF 847. That's --
6 we cite the statements to that effect at paragraphs 48 and 49 of
7 our complaint, pages 16 and 17, and those statements along with
8 the other evidence we cite in our complaint establishes that but
9 for the defendants' -- State defendants' efforts to enforce the
10 law, they would reintroduce universal masking, so we think
11 that's sufficient to establish -- establish a likelihood that --
12 of redressability which is all we're required to do.

13 THE COURT: The partial relief case sounds like it's
14 very much in your favor then because what you're claiming is
15 that if I enjoin it, then it will revert to the school district
16 to give you the relief that you -- that they may or may not give
17 you. I guess the State's point is that there's no guarantee
18 that if you get what you want, it helps your clients at all.

19 MR. FREEDMAN: We think we've established facts that
20 it's likely that the defendant school districts would give us
21 the relief. They had similar measures in effect last year.

22 THE COURT: And that's the redressability element of
23 standing.

24 MR. FREEDMAN: That's correct, Your Honor.

25 One other point that they -- that they made in last

1 night's filing I also want to address is the timing. They say
2 we should have sued four months ago when the law was first
3 passed.

4 THE COURT: Right. And I want to know should that be
5 part of the analysis about your entitlement to this
6 extraordinary remedy, the fact that they claim that you've
7 delayed, and I guess they essentially argue what's the hurry?
8 That's the way I read their brief.

9 MR. FREEDMAN: So here's what I'd say. I don't think
10 it's relevant to -- considering the issue.

11 THE COURT: Okay.

12 MR. FREEDMAN: I think it's important to keep a couple
13 of things in mind.

14 THE COURT: Okay. Well, they contrasted what happened
15 in Western Tennessee -- they said that claim -- and it is
16 distinguishable. I get that. But the claim that -- claim that
17 Judge Lipman addressed had -- it was like 18 days after the
18 Governor's intervening by use of an executive way to get around
19 the Shelby County mandate, that that's the reason they were
20 entitled to the extraordinary remedy. You, on the other hand,
21 have waited four months. So how should I approach that?

22 MR. FREEDMAN: So I do think that the question of
23 timing may go to an affirmative defense like laches or anything
24 like that. I don't think it factors into the considerations the
25 Court is supposed to apply in considering a request for

1 emergency injunctive relief, and I think it's important to keep
2 in mind two important -- maybe three important things with
3 regard to timing.

4 First is that schools just started in Iowa. A lot of
5 school districts have been in session for two or three weeks at
6 this point. Relatedly, and I think the second point is, that
7 the injury and irreparable injury to our clients has only been
8 manifest since the schools reopened and are operating without
9 universal masking.

10 THE COURT: They cite to a New York Times article -- I
11 think it was July 7th -- in the brief that you knew the variant
12 was out of control two months ago; you didn't do anything. Your
13 point is we didn't know of the specific harms that were to visit
14 us until we all got together with unmasked individuals. I guess
15 that's your claim.

16 MR. FREEDMAN: I think that's right, Your Honor. I
17 think, like, we look at -- you don't have a claim before your
18 injury is manifest. It took reopening the schools and see how
19 spread impacts -- how spread is occurring for injury to be
20 manifest, and we look at that school district -- I cited
21 Des Moines earlier where we're already 11 days into the school
22 year at 25 percent of the total number of students that were
23 infected last year. And Des Moines is not alone. Cedar Rapids
24 is at 16 percent of their totals from last year. Linn-Mar is at
25 30 percent of their total from last year, and that -- that's at

1 the end -- as of the end of last week. We haven't gotten the
2 updated numbers. Waterloo as of two weeks ago -- again, they
3 haven't updated the numbers since end of August.

4 THE COURT: And you're going to supplement the record
5 this morning by a filing with that?

6 MR. FREEDMAN: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. FREEDMAN: Waterloo is at 55 percent of where --
9 the total numbers that they were at last year. I mean, we're
10 seeing spread unlike anything that we've seen previously, and
11 the data I think substantiates our clients' concern, fear,
12 threat that they're actually going to be irreparably harmed.

13 I think the other important point is that it's only
14 been in the last few weeks that the State defendants have made
15 clear their intent to vigorously defend the law and to punish
16 school districts that take basic steps to comply with federal
17 law and to follow public health guidance. We cite statements
18 from the Governor or statements from Director Lebo at paragraphs
19 48 and 49 of our complaint. And they've made those statements
20 after they were advised by the federal government that the
21 federal government put them on notice of potential violations of
22 federal law. Like, in response to that, they said we're going
23 to go ahead and stick with our --

24 THE COURT: You're referring to Director Cardona's
25 letter.

1 MR. FREEDMAN: That's correct, which is the
2 August 18th letter as well as the Office of Civil Rights letter
3 that came in on August 30th.

4 THE COURT: Is that in the record?

5 MR. FREEDMAN: It's in the complaint.

6 THE COURT: All right. Thank you.

7 MR. FREEDMAN: The -- on the likelihood -- just
8 turning to the likelihood of success on the merits, I alluded to
9 a lot of what I was planning to say. A lot of it is covered in
10 our brief. I just want to emphasize a couple points. With
11 regard to our claims under Title II of the Americans with
12 Disabilities Act and the Rehabilitation Act, we don't think
13 there's any dispute that our plaintiffs have disabilities, and
14 they're all being discriminated against because of their
15 disabilities.

16 The violations -- the violations -- we identify five
17 separate violations or particular elements of the statute or
18 regulations in our brief. They all flow from the legal
19 requirement that no person with a disability can be excluded
20 from participation in or be denied the benefits of the services,
21 programs, or activities of a public entity, or be subjected to
22 discrimination by any such entity. I can walk through the five
23 separate violations -- they're outlined in our brief -- if it
24 would be helpful for Your Honor to do that.

25 THE COURT: I don't think it's necessary unless you

1 do. I've read your brief.

2 MR. FREEDMAN: And I don't think that they respond or
3 engaged on that in last night's filing, so I think we can let
4 the brief speak for itself.

5 We've separately pointed to a second -- second set of
6 federal violations under our preemption claim. When Congress
7 passed the American Rescue Plan, it provided Iowa schools with
8 hundreds of millions of dollars in emergency relief so that they
9 could adopt and implement policies in line with guidance for the
10 Centers for Disease Control. CDC guidance -- I mentioned this
11 before -- specifically recommends that each school district
12 implement mask mandates. The defendants' threat to enforce
13 HF 847 to punish schools who adopt and implement CDC guidance is
14 directly contrary and frustrates Congress's purpose in providing
15 this money. That was the main message of Secretary Cardona's
16 August 18th letter. We don't think that the preemption case is
17 closed. It's clearly contrary and frustrates Congress's
18 purpose. Separate basis -- it's a separate basis for why we
19 think we will prevail on the merits.

20 And just turning quickly to the -- to the last two
21 factors, the interests of other parties and the public interest,
22 as we note in our brief, when the Government -- when a
23 Governmental entity is the defendant, those factors effectively
24 merge. There's no discernible cost or administrative burden to
25 the defendants from enjoining enforcement of HF 847. Defendants

1 certainly -- the State defendants certainly didn't cite any in
2 their brief last night.

3 And with regard to the public interest, it's always in
4 the public -- in the public's interest to enforce a nation's
5 anti-discrimination laws, and it's also in the public interest
6 to protect children with disabilities and indeed all children to
7 reduce their risk of contracting COVID-19. Again, they did not
8 engage on this last night, so I think we win on all four
9 factors. We think that interim injunctive relief is warranted
10 and should be entered, and I'm happy to entertain any other
11 questions Your Honor has.

12 THE COURT: Mr. Freedman, how do you respond to their
13 claim in their brief last evening that said that an order
14 enjoining -- well, let me put it this way. Two questions.
15 First of all, what exact relief are you requesting? I went --
16 when I read that part of their brief, I went to your prayer. It
17 looked to me -- you had three -- three clauses. You want an
18 injunction based upon each of the substantive claims -- ADA,
19 Rehabilitation Act of '73, and the American Rescue Plan of
20 2021 -- and it's a broad claim for enjoin 847. So when they
21 claim in their brief it will cause -- an order enjoining would
22 cause confusion, what's your response to that?

23 MR. FREEDMAN: Your Honor, I think we are seeking --
24 to be clear, we are seeking enjoining the State defendants from
25 attempting to enforce HF 847. I think that's relatively clear.

1 I think that that would permit the defendant school districts
2 and, frankly, school districts around the state to make their
3 own judgment as to whether they think universal masking should
4 be introduced. Many, many school districts including -- it's my
5 understanding all defendant school districts had universal
6 masking last year. It would essentially restore things to the
7 status quo before passage of the law. I don't think that's
8 confusing. The attorney for the school districts can speak to
9 whether they think that would be confusing, but people wore --
10 students wore masks all last year. Students all over the
11 country are wearing masks. School districts in Minnesota, in
12 Illinois, in Missouri, in Nebraska -- school districts in those
13 states have adopted universal masking. It's not rocket science,
14 Your Honor.

15 THE COURT: Mr. Freedman, the other argument they
16 make -- one of the other arguments they make is that there's
17 nothing that prevents school districts and, I guess, everybody
18 from complying with 847 by saying we're enforcing the Americans
19 with Disabilities Act, therefore, it takes a back seat -- I'm
20 paraphrasing, and I'm sure counsel will correct me but -- or
21 maybe you can put this in better context than I just did. But
22 the way I get their argument is that a school district can still
23 comply with federal law by permitting a mask mandate, and I
24 guess the school district would -- I'm trying to envision how
25 they'd do that. I assume they'd say you can mask because we

1 want to comply with the ADA, but you don't have to. I mean, I'm
2 confused by their argument.

3 MR. FREEDMAN: Yeah. I found that to be something of
4 a head scratcher when I read that this morning, Your Honor. As
5 I understand the argument -- as I read or interpret it, there's
6 savings language at the end of the statute that says the
7 universal masking -- there's a carve-out for any other provision
8 of the law, which the State is now taking the position that the
9 violations that we're talking about would be considered other
10 provisions of the law.

11 I think -- you know, I've got two sort of factual
12 questions about that for the State if that's their position.
13 The first is that the State defendants have taken the
14 position -- and this is the language we cite at paragraphs 48
15 and 49 of our complaint at pages 16 and 17 -- that they intend
16 to enforce HF 847 vigorously. That includes statements
17 attributed to a Department of Education spokesperson that risks
18 to school districts if they impose mask mandates include various
19 sanctions including loss of accreditation.

20 The second thing that I think it's important to keep
21 in mind is that those statements that we cited, including
22 statements from the Governor, are statements after the U.S.
23 Department of Education twice put the State on notice that
24 enforcement of HF 847 would violate the same federal laws that
25 we're citing in our complaint. That's the Secretary Cardona

1 letter on August 18th and the Office of Civil Rights letter on
2 August 30th. So I don't understand how they can be taking the
3 position publicly that they don't think there's any -- any
4 problem with federal law and the position that they articulate
5 in the brief that this is all much to do about nothing because
6 school districts can go ahead -- their position is school
7 districts can go ahead.

8 We think clearly for the Court on this and just making
9 clear that if HF 847 is enjoined would make it perfectly clear
10 to the school districts that they can go back to the way things
11 were before the statute was passed. That's usually what the
12 purpose of an injunction is.

13 THE COURT: Mr. Freedman, are you familiar with the
14 concept called judicial estoppel?

15 MR. FREEDMAN: I am, Your Honor.

16 THE COURT: So the defendant claims on the one hand
17 that we're going to vigorously enforce the law, and then they
18 come here and say, But wait a minute; we want -- we -- you can
19 have a mask mandate and say we're complying with federal law.
20 Is that essentially judicial estoppel?

21 MR. FREEDMAN: Your Honor, I'm not sure if it meets
22 the technical finding.

23 THE COURT: I'm not either.

24 MR. FREEDMAN: I'm not sure it's sufficiently binding
25 on the Governor. If the Governor comes out today and says,

1 Never mind; the school districts should do what they want; we
2 now see the light, that would be something I think the Court can
3 take notice of. Given the pattern and the recalcitrance that
4 we've seen in the public statements to date, I don't think it's
5 sufficient to overcome a paragraph in a brief.

6 THE COURT: Right. The savings language we talked
7 about says, quote, The facial covering is required by any other
8 provision of law. So I assume if a student came to school with
9 a mask, would the student be able to say, Well, never mind your
10 mandate; I'm relying on federal law?

11 MR. FREEDMAN: Well, I think it's not a question of
12 individual masking. I think the risk presented to our clients
13 and thousands of other children with disabilities here is the
14 risk that others are not masking. That's really the -- I mean,
15 the -- the CDC is clear that these are recommendations that are
16 designed to reduce risk, and for our clients it's important to
17 reduce risk to the minimum extent possible. Nothing is going to
18 eliminate risk. Getting vaccines wouldn't 100 percent eliminate
19 the risk. Masking -- masking reduces the risk. Vaccines reduce
20 risk. What we believe the ADA and the Rehabilitation Act
21 require is to allow our clients and students with disabilities
22 to be able to participate as full participants in school. The
23 school can take the very easy step -- districts can take the
24 very easy step of telling everybody to wear masks, universal
25 masking. They did it last year. They did it last year before

1 the law. States around the country, including every neighboring
2 state, have school districts that require this.

3 THE COURT: Mr. Freedman, I saw nothing in the brief
4 of the State about the Supremacy Clause, and obviously I don't
5 have those kinds of cases every day involving the Supremacy
6 Clause, but I -- I did -- you cited -- in your opening brief,
7 you cited two cases about the Supremacy Clause. One was *Pacific*
8 *Gas and Electric* from 1983 term and then *Hines versus*
9 *Davidowitz*, and I -- I'm going to ask Mr. Langholz this as well,
10 but in *Hines versus Davidowitz* that you cited, it says, This
11 Court, in considering the validity of state laws in the light of
12 treatises or federal laws touching on this same subject, has
13 made use of the following expressions: conflicting; contrary
14 to; occupying the field; repugnance; difference;
15 irreconcilability; inconsistency; violation; curtailment; and
16 interference. But none of these expressions provides an
17 infallible constitutional test or exclusive constitutional
18 yardstick. In the final analysis, there can be no one crystal
19 clear distinctly marked formula.

20 So when I look at Article VI, Clause 2, of the
21 Constitution, how should I -- if we let 847 go forward with no
22 injunctive relief, is that in opposition to the three acts of
23 Congress? Is that repugnant to the three acts of Congress?
24 What's my analysis?

25 MR. FREEDMAN: So, Your Honor, I think we're just

1 talking about one act of Congress which is the American Rescue
2 Plan Act.

3 THE COURT: All right.

4 MR. FREEDMAN: I think, though, the answer is it's all
5 of the above. It's everything you just cited. It's contrary
6 to, inconsistent with, repugnant to.

7 Congress was very clear when it gave this money that
8 schools were expected to address compliance with CDC
9 recommendations. HF 847 says, in effect, we don't care what the
10 CDC says -- in fact, the Governor has made statements to that
11 effect: No school can adopt this; we don't care what the CDC
12 has said. So that's -- given Congress's express invocation of
13 the CDC guidance, the conflict, the inconsistency is clear. We
14 think that that's -- that's -- you know, it's as clear a
15 violation of the Supremacy Clause as we can have other than
16 writing into the statute or making the statute language like we
17 are expressly directing you to disregard anything the CDC says.
18 That's the only thing I can think of that would be a clearer
19 violation.

20 THE COURT: I have the sense that you don't feel as
21 strongly about your third claim as you do about the first two.
22 Is my impression wrong?

23 MR. FREEDMAN: Well, I think that -- here's what I
24 would say. I think that our clients -- the first two claims are
25 really directed at our clients and protection of our clients,

1 and they directly intend to invoke our civil rights of our
2 clients as recognized in federal law. I think the third claim
3 is a broader claim that could be asserted on behalf of our
4 clients but also all children in this state. All children
5 deserve to be kept safe. I do -- I do feel strongly about -- I
6 think we all -- we feel strongly about all three claims. I
7 think the -- you know, the heart of our case for our clients, as
8 I think Your Honor correctly identifies, is probably more
9 focused on the first two claims.

10 THE COURT: Okay. Lastly, the State's brief says, in
11 essence, put this off; we want to file a motion to dismiss, and
12 the Court could benefit by more robust briefing. I know the
13 latter is true. I can always learn more. But I wanted to know,
14 I guess, in contrast to the State, your claim is you're entitled
15 to the extraordinary remedy of injunctive relief because this is
16 indeed an emergency; there is irreparable harm. Is that it?

17 MR. FREEDMAN: That's correct, Your Honor. I mean, we
18 look at the trends in the schools, you know, in the short time
19 that they've been open. I mean, the Des Moines numbers are --
20 are off the charts, and a number of other districts are off the
21 charts.

22 THE COURT: Okay. Thank you, Mr. Freedman.

23 MR. FREEDMAN: Thank you, Your Honor.

24 THE COURT: Good morning, Mr. Langholz.

25 MR. LANGHOLZ: Good morning, Your Honor. My name is

1 Sam Langholz, and it's my privilege to represent Governor
2 Reynolds and Director Lebo here today, and, first of all, Your
3 Honor, we appreciate the opportunity to have this hearing. We
4 recognize that in a temporary restraining order you could have
5 made the decision that it was appropriate to issue that
6 immediately.

7 THE COURT: Well, you know, I talked to Ms. Austen
8 last week -- I think the day after she filed it -- and, you
9 know, I always quote Judge Vietor, my predecessor, when I
10 started said only if there is a nuclear explosion should you
11 give injunctive relief without a hearing because you can always
12 learn more, and so I appreciate you saying that, but I have
13 learned something here in the time I've been here, and your
14 brief and Mr. Freedman and Ms. Austen's brief as well has been
15 very helpful to me because when you -- as you know from your
16 previous work, Mr. Langholz, when you guess, which is
17 essentially what you're doing at this early stage, you hope that
18 you -- just pray that you don't make a mistake because people's
19 rights are very valuable. So I appreciate you saying that.

20 So anyway, go ahead.

21 MR. LANGHOLZ: And given that and given the weighty
22 issues that plaintiffs present here, the State takes the
23 position that this is not appropriate for a temporary
24 restraining order, that the Court would benefit, as you noted,
25 from further briefing and development of a record and a

1 preliminary injunction and that really when you're looking at
2 whether a TRO should be granted, we're looking at the harm just
3 in this interim time period between when you would otherwise
4 have the opportunity to rule on a temporary injunction.

5 You know, stepping back just a bit, I think it's
6 helpful to remember that this is now the third year that Iowa's
7 students have been affected by the COVID-19 pandemic. The
8 federal government, the state government, school districts, and
9 parents have all been faced with challenging decisions trying to
10 navigate that, and we're here today now talking about one
11 provision of House File 847, you know, section 280.31, that is,
12 you know, the latest attempt to resolve some of those issues for
13 the benefit of Iowa students, and there's certainly, like all
14 the decisions through the last three years, strong opinions on
15 all of those sides, but it's not a basis for granting the
16 temporary restraining order.

17 I want to kind of address a preliminary issue that
18 struck me as I was listening to the discussion and the specific
19 request here, and there's -- there was talk of enjoining
20 enforcement of House File 847, and although that's the short
21 term that's sort of been used throughout the plaintiffs' briefs,
22 that's a large bill. So an injunction enjoining House File 847
23 would -- regardless of any other basis would be overly broad and
24 significant. My understanding from plaintiffs' briefing and
25 discussion is that they're concerned about one section of that

1 bill which is now, you know, Iowa Code section 280.31.

2 THE COURT: Right. And I noted that as well. Because
3 as you just pointed out, 65(d)(1)(C) says -- and it's entitled
4 Contents and Scope of Every Injunction and Restraining Order.
5 It says, (C), Describe in reasonable detail -- and not by
6 referring to the complaint or other document -- the act or acts
7 restrained or required. So your point is that as you understand
8 the request, they're requesting only that the ban of a local
9 school district's being able to impose a mask mandate be
10 enjoined.

11 MR. LANGHOLZ: Correct. That's correct.

12 THE COURT: And if that's not the case -- excuse me
13 for interrupting. And if that's not the case, Mr. Freedman is
14 going to tell me in rebuttal that I got it wrong.

15 MR. LANGHOLZ: That's correct. And the State cites,
16 you know, at the beginning of our introduction on page 2, you
17 know, what we believe is a proper citation, you know, of that
18 act and what section, you know, ultimately is codified at
19 section 280.31. And we understand -- you know, and it sounded
20 like there was no change in that position today that the request
21 is to enjoin Governor Reynolds and Director Lebo from enforcing
22 that provision, and this request, you know, whether at a TRO or
23 preliminary injunction, is neither necessary nor sufficient to
24 remedy the alleged harms of plaintiffs.

25 As Your Honor just discussed with counsel, section

1 280.31 contains an explicit exception that allows mandates of
2 face coverings when required by any other provision of law.
3 That includes federal law. There was, in fact, a discussion,
4 you know, about this provision during the debates on the House
5 floor. You know, the legislators expressed some confusion about
6 what -- you know, how broad that could be; it wasn't fully
7 acknowledged, you know, kind of an acknowledgment. In fact, one
8 of the opponents, Representative Bohannon, was raising
9 perhaps -- this was a concern perhaps because how do we know
10 what sort of exceptions could come in there, but nonetheless,
11 you know, that's the law that was passed.

12 THE COURT: Did that include a discussion of the State
13 prohibition against discrimination regarding the disabled, or
14 was that just -- was the discussion of the legislature just
15 limited to the federal law?

16 MR. LANGHOLZ: It was -- it was a discussion of this
17 provision --

18 THE COURT: Okay.

19 MR. LANGHOLZ: -- recognizing that there's an
20 exception for other provisions of law and raising questions.
21 You know, that could be, you know, any number of things, you
22 know, legislators that were complaining, you know, that they had
23 only had a short period of time to -- to consider and hadn't
24 fully thought through all of the provisions of law that might be
25 implicated in that regard.

1 THE COURT: So does the CDC order requiring masks on
2 school buses fall within that exception?

3 MR. LANGHOLZ: The State has given guidance, I
4 believe -- and I think that's outside the scope of any claim
5 here but has -- has given guidance that that is a -- a mandate
6 that's required that this statute does not prohibit --

7 THE COURT: Okay.

8 MR. LANGHOLZ: And as the Court points out as well, I
9 mean -- you know, as a matter of law, you know, leaving aside
10 this injunction, you know, with the Supremacy Clause, regardless
11 of whether or not there's a savings clause in the statute, I --
12 governmental entities, private citizens are required to follow
13 federal law as a matter of the Supremacy Clause regardless of
14 whether the statute acknowledged it. But when we're talking
15 about an injunction and whether it's necessary to take that
16 extraordinary relief or the even more extraordinary relief of a
17 temporary restraining order while we're sorting things out, the
18 fact that there's a savings clause and that that allows mask
19 requirements without an injunction, if it is required by -- by
20 federal law, you know, is significant for the question before
21 the Court here today.

22 And I want to -- the Court and plaintiffs expressed
23 some confusion about, you know, what the State's position is is
24 contradictory to some of the public statements, and I want to be
25 absolutely clear that the State defendants do not agree that

1 federal law -- the federal -- you know, any federal law that
2 we're aware of or the three federal claims that have been
3 brought here mandate as a matter of law that a universal mask
4 mandate in the entire school district that these 10
5 plaintiffs -- or perhaps if their argument is taken to its full
6 implications, you know, all Iowa schools -- that as a matter of
7 federal law, every school district must implement a universal
8 mask mandate for all students.

9 THE COURT: I don't think that's their claim. That's
10 not their claim. Isn't their claim that we want discretion
11 restored to local schools, and absent that, there's violations
12 of federal law? Isn't that their claim?

13 MR. LANGHOLZ: That may be -- you are correct that
14 they don't state what I just said.

15 THE COURT: Right.

16 MR. LANGHOLZ: And I'm unclear at this juncture from
17 the briefing exactly what they claim. I mean, all of the
18 declarations, you know, of these individuals are claiming they
19 will only feel safe with a universal mask mandate. That's the
20 harm they're asking about. You know, when outlined about the
21 harm, you know, it's the heightened risk to health or
22 alternatively being pulled out of school and having, you know,
23 harms from the education and the Hobson's choice, you know, that
24 they argue. That presents -- if that's the harm -- you know,
25 and it's more nuanced -- you know, and it's a more nuanced

1 federal position -- then I think we have the serious
2 redressability problems that --

3 THE COURT: Okay. Well, I want to talk about
4 redressability in a minute because on ECF 17, which is their
5 brief, they've got -- and I'm at page 24. Here's what the
6 plaintiffs tell me about this, because you just got into the
7 part about let me be clear; there was no contradictory position
8 of the State. Because here's what the defense -- in footnote 29
9 the plaintiffs write, The Defendants cannot avoid their
10 obligations under the ADA even if compliance may violate state
11 law. Under the Supremacy Clause, U.S. Constitution Article VI,
12 Clause 2, The laws of the United States, quote, shall be the
13 supreme Law of the Land, and Judges in every State shall be
14 bound thereby, any Thing in the Constitution or Laws of any
15 State or to the Contrary notwithstanding. State law must give
16 way to the extent it conflicts with federal law.

17 So they're telling me you don't have a choice. You,
18 the district court -- you don't have a choice; you have to
19 enjoin this because they can't enforce 847 because if they
20 enforce 847, it violates the Constitution.

21 MR. LANGHOLZ: That appears to be their argument, Your
22 Honor.

23 THE COURT: Yeah.

24 MR. LANGHOLZ: And I don't disagree with any of the
25 legal propositions cited there about the Supremacy Clause and

1 the nature of the federal law, but there's nothing to give way
2 here because this statute already allows schools to enforce a
3 mask mandate if it is required by federal law. Again, there's a
4 dispute about whether it's required by federal law or whether
5 discretion is required by federal law in some way, but the --
6 you know, the -- I think it may help, again, to kind of look
7 specifically -- you know, move a bit to the discrimination
8 claims because as we start to look at that -- as we start to
9 look at the discrimination --

10 THE COURT: Mr. Langholz, let me interrupt there. I
11 apologize. I have the advantage of a transcript. Because what
12 you just said was -- when you mentioned discretion: Again,
13 there's a dispute about whether it's required by federal law or
14 whether discretion is required by federal law, and so that's two
15 different claims, isn't it?

16 MR. LANGHOLZ: Yes.

17 THE COURT: I mean, I don't think one -- and
18 Mr. Freedman is going to correct me or Mr. Duff will. I don't
19 think they're claiming the first part of your statement is their
20 claim, but I do believe that the second part of your statement
21 is their claim. You say, Again, there's a dispute about whether
22 it's required by federal law or whether discretion is required
23 by federal law in some way. That's the way I get their claim.

24 MR. LANGHOLZ: And I will be interested as well in
25 plaintiffs' response to that.

1 THE COURT: Okay.

2 MR. LANGHOLZ: As we looked at their complaint, their
3 application, the requested relief, I'm unclear how expansive --

4 THE COURT: Okay. And does that get back to your
5 redressability where you were at when I interrupted you?

6 MR. LANGHOLZ: It does. You know, and I can address
7 that -- that point briefly here too. Again, it -- the request
8 they're asking for doesn't give them a mask mandate; it only
9 does the same thing that the statute already does, saying that
10 the school districts can comply with federal law.

11 Now, plaintiffs point to the school districts'
12 practices last year, to some statements of individual school
13 board members or superintendents about, you know, possible
14 intentions. To my knowledge, there's nothing in the record and
15 I'm not aware of any school boards that have taken a vote that
16 have put in, you know, a mask mandate that is conditioned on
17 this -- you know, this statute being struck down in some manner,
18 you know, which is what the situation was before the Court in
19 Tennessee and why the Court there was able to avoid, you know,
20 redressability problems.

21 But there's changed circumstances now. Certainly, you
22 know, plaintiffs have pointed out, you know, some of those, you
23 know, on the side of the Delta variant and such, but the subject
24 of masks in schools has been the topic of significant debate
25 throughout these school districts, you know, before you here

1 today. Across the whole state, there are school board elections
2 coming up. It's been the subject of, you know, campaigns and
3 discussions there. I think, you know, there's not a basis to
4 conclude certainly at the level of facts that might be
5 necessary, even if facts can get us there without an absolute
6 government action, that, you know, Article III standing has been
7 met for this, you know, requested relief when it's uncertain and
8 speculative.

9 It's also speculative, you know, at this juncture in
10 the record here whether there's going to be any actual harm --
11 irreparable harm between now and when a preliminary injunction
12 could be ruled, and there's other processes to address these
13 concerns. That's the normal IEP, IDEA special education
14 process, and, in fact, plaintiffs talk about that process in
15 their applications, and that demonstrates why this statute is
16 not what's causing their harm.

17 If you look at the declaration that's docket 3-11,
18 Ms. Preston's declaration, you know, paragraph 18, she talks
19 about how her child had a -- you know, new reasonable
20 precautions put into her plan to try to address the safety
21 issues and then complains after the first day of school at the
22 Des Moines Public School -- or the first week of school at the
23 Des Moines Public Schools that the plan they put in place was
24 not being followed. You know, the remedy to that problem is to
25 go through the complaint process with Des Moines Public Schools,

1 with the AEAs, with the state agency. There's nothing in the
2 declarations or the pleadings that are before you that this
3 remedy that is available in a way to go through the process --
4 the fact-specific process to decide for this individual student
5 what's necessary to keep them safe and comply with federal law,
6 you know, has been complied with.

7 THE COURT: So she -- he or she then has an
8 administrative remedy that -- and who would be the arbiter of
9 that? Who would be the decider of that?

10 MR. LANGHOLZ: Well, ultimately it would come back to
11 this court, Your Honor. It's, you know, a process -- or it
12 could come back to this court. It's a process that starts at
13 the school level that can go to the AEA. Eventually there's an
14 administrative law judge proceeding, and that can be appealed
15 either to the Iowa District Court or to the federal court. Most
16 often it comes to this court.

17 THE COURT: Right. And I think Judge Lipman addressed
18 that in the Western Tennessee case if I recall, and she said
19 exhaustion wasn't required.

20 MR. LANGHOLZ: That's correct. You know, and I would
21 point out as well, again, that was a temporary restraining order
22 and with limited briefing from the State of Tennessee. They
23 actually just in the last couple days, you know, have held a
24 preliminary injunction hearing that's still pending. There's
25 been additional briefing filed by the State of Tennessee that

1 more robustly outlines, you know, those exhaustion arguments.
2 You know, the State of Iowa will certainly intend to be more
3 robustly explaining, you know, those as well.

4 I'd also briefly direct the Court to docket 3-12,
5 another declaration, a similar issue, again, where Ms. Geest
6 talks about, you know, asking for an accommodation that -- and
7 this is paragraphs 9 through 12 -- asking for an accommodation
8 that the child's teacher whenever there would be one-on-one
9 interaction would mask, you know, as a part of their reasonable
10 accommodation and, again, after the first week of school
11 complained -- or was complaining in this declaration -- although
12 there's no suggestion she complained through the proper channels
13 and started those administrative processes -- that the teacher
14 wasn't following those reasonable accommodations. Those are the
15 processes.

16 And also, again, going back to the question about
17 what's the State's position and what do you mean when you say
18 you can comply with federal law, you know, although the question
19 is not before us right here, I would be hard-pressed to say
20 that, you know, it is -- that federal law might not require, you
21 know, one-on-one interaction between a teacher and, you know, a
22 medically fragile student to have to have a mask and that that
23 would be a situation where the school district could say, Yes,
24 teacher, you know, you need to do this when you're around them
25 because that's a reasonable accommodation required by federal

1 law, and, again, it would be possible right now with the
2 existing law because that's permitted under section 280.31
3 without an injunction, and it's unclear, again, why that isn't
4 happening or why the processes for -- for doing that --

5 One last also point to docket 3-5, paragraph 10, which
6 is another situation like this talking about a plan put
7 together, you know, for masking in close contact and small
8 groups, you know, a voluntary masking, try and have that done.
9 Again, the complaint there was that voluntary is not good
10 enough. Now, I can't tell you from the factual record here
11 whether there would be a basis to conclude that mandatory
12 masking for those small group contacts would be appropriate, but
13 it's possible through the normal process that that's the
14 determination that could be made, that for that student and the
15 situation of that classroom and the interactions they're going
16 to have that federal law requires it. And, again, it's not --
17 there's no injunction required to sort those problems out.

18 And that's really why this lawsuit's not appropriate.
19 These are fact-specific situations. There's a process set up to
20 resolve those without enjoining the statute, without -- without
21 even the more nuanced version of, you know, their claim that
22 Your Honor suggested that there needs to be discretion. There
23 is discretion where federal law authorizes and mandates that
24 discretion already under the statute. But the State's position
25 and what the public comments, you know, appear to be discussing,

1 you know, is the idea that, you know, one of these public
2 schools could say, Well, because I have one medically fragile
3 student, you know, in this building, I am now required by
4 federal law to -- to implement a districtwide universal mask
5 mandate. If a school were to do that, I suspect that the State
6 of Iowa would be very concerned that that's, you know, not
7 actually required by federal law and that they're violating Iowa
8 law by doing that.

9 You know, these are significant merits issues. You
10 know, there's disability issues on both sides. You know, the
11 federal Department of Education Q and A documents on their
12 website, you know, talk about how there have to be -- for
13 schools that do do mandatory mask mandates, there have to be
14 exceptions for disabled students on the other side, you know,
15 autistic students who may have issues with -- you know, with
16 wearing masks or those with sensory issues or deaf and, you
17 know, situations where masks are, you know, problematic. These
18 are tough choices for the schools. They're fact-specific
19 choices. The legislature made a decision to help remove some of
20 these challenges by making clear, you know, what -- that on a --
21 which side of that equation they should start from and start
22 making exceptions to accommodate disabled students and the
23 requirements of federal law with respect to them, but that's not
24 a basis to enjoin the lawsuit.

25 As we've talked about, you know, ultimately as we

1 start to go into the merits and the things I think we should be
2 talking about, when we think about the likelihood of success and
3 eventually a preliminary injunction -- I mean, as we go
4 fact-specific, the questions are, you know, what is the
5 accommodation that would be necessary for these students? You
6 know, are there accommodations short of universal mask mandates,
7 which repeatedly throughout the declarations and complaints
8 appear to be what plaintiffs are asserting are the only, you
9 know, possible solution? But are there PPE that -- you know,
10 whether it's masks or other things that can be done for the
11 students who need to protect themselves? You know, how has this
12 been handled, you know, with other sorts of significant --
13 protections from significant illnesses in the past? You know,
14 are there distancing options? You know, a host of fact-specific
15 things that through the normal process that can be followed, you
16 know, are an appropriate way to address these issues.

17 THE COURT: Mr. Langholz, can I interrupt for just a
18 minute?

19 MR. LANGHOLZ: Absolutely.

20 THE COURT: One of the things I asked Mr. Freedman
21 about -- and it's in your brief and I want to know -- you know,
22 the public interest is always one of the important factors in
23 equitable relief, particularly emergency equitable relief, so
24 you've said in your brief -- and I think you cite The New York
25 Times article of July 7th about the Delta variant is here. I

1 may have the dates of that wrong. And you tell me that they
2 delayed four months; this was passed and effective May 20th. So
3 I asked Mr. Freedman this as well. In considering the public
4 interest and the balance of the harms, should I take into
5 account the fact that there's been four months and nothing
6 happened until last Thursday when they filed the lawsuit?

7 And, secondly, Mr. Freedman's response to that is,
8 Hey, nobody was in school then; we didn't know -- you know,
9 while we knew there was a pandemic, we didn't know the extent of
10 it until school which has only been recently convened two or
11 three weeks ago, and then he recites for me the record cases
12 that have come. So that's a long question, but should I take it
13 into account, the four-month delay in their filing?

14 MR. LANGHOLZ: The short answer is yes. The U.S.
15 Supreme Court says that you should in the *Benisek* case that we
16 cite. That says that the timing in coming forward -- certainly
17 that was a case where the timing was significantly more delayed
18 than even four months, but timing is an appropriate
19 consideration as is -- you know, you asked about the *Rounds*
20 standard and an injunction of, you know, a statute. That's also
21 an appropriate consideration.

22 Although we did not cite it in our brief, I'd also
23 point the Court to *New Motor Vehicle Board v. Orrin Fox*, which
24 is 434 U.S. 1345, and there the U.S. Supreme Court talks about
25 the irreparable harm to a State anytime that a statute is

1 enjoined. And that's particularly heightened here when we're
2 talking about a TRO rather than a preliminary injunction and
3 we're talking about a statute that already says you can follow
4 federal law.

5 THE COURT: Right. Well, it bothers me when you've
6 got the numbers that both I think you agree on. I think
7 Mr. Freedman or Mr. Duff's brief tell me that there are 415,000
8 students in the Iowa public schools, 62,000 of which the
9 Department of Education says have some kind of disability, so
10 when you say -- I don't know. Mr. Freedman I think used the
11 term in his brief calamitous consequences and the idea of
12 calamitous consequences to the plaintiffs. I assume that your
13 request, as I get it, you want to put off a decision; you want
14 more time to file a motion and further briefing, that an order
15 now is going to create -- is going to impair the public
16 interest. Is that --

17 MR. LANGHOLZ: That's correct. Yes, especially -- I
18 mean, whether it's a TRO or a preliminary injunction, either of
19 those, the State would believe it would impair the public
20 interest and put this exceedingly controversial issue back on
21 the plates of all of the school boards around the state. That
22 could have been one of the conceivable rational bases for the
23 statute in the first place to, you know -- given everything
24 that's going on --

25 THE COURT: What do you see -- I mean, is there going

1 to be a substantial -- is this going to boil down to just a
2 straight-out legal question? Because it doesn't seem to me like
3 there's a great deal of difference about the affidavits of
4 Dr. Waddell and Dr. Srinivas. I apologize for not getting that
5 pronunciation correct. So if I did that going forward, do you
6 anticipate a lot of discovery? Have you talked to counsel about
7 the way they've framed their lawsuit and what's necessary to get
8 the thing at issue if you want it put off?

9 MR. LANGHOLZ: Unfortunately, Your Honor, we have not
10 really yet, given the short time frame from the filing and
11 preparing for this hearing --

12 THE COURT: Okay.

13 MR. LANGHOLZ: -- and other emergency matters --

14 THE COURT: That's fine.

15 MR. LANGHOLZ: -- but we stand ready to do that. You
16 know, I can't represent for certain, you know, that we wouldn't
17 have any evidence, you know, to present. We certainly may, but
18 I think your perception is accurate that this is largely a legal
19 question which also goes, you know, I think, as my answer to
20 your question about what do we say, you know, about the
21 statistics, the potential calamity, you know, coming -- and
22 those are certainly valid policy public concerns that are a
23 subject of debate, you know, right now throughout the state of
24 Iowa, throughout state government. They were a part of the
25 debate in the legislature when the statute was passed about what

1 would happen, but it does not appear that any of those
2 evidentiary issues connect up to the legal claims that are being
3 brought here certainly in such a sufficient way, you know, for
4 the narrow question here about likelihood of success on a TRO
5 but likely on the claim at all.

6 THE COURT: I have to tell you that your brief has
7 been helpful because it's brought to bear on many of the
8 *Dataphase* and *Rounds* factors. You know, the argument about, you
9 know, we can still comply without violating the statute, what
10 I'll call the savings clause, I hadn't realized before when you
11 argued that facial covering is required by any other provision
12 of law that perhaps that's a, I guess, defense is what you
13 argued, so I hadn't seen that before your brief.

14 So anything else, Mr. Langholz?

15 MR. LANGHOLZ: Just briefly, Your Honor. I want to
16 make sure that I responded to every, you know, question that had
17 been raised last time.

18 There was some discussion about, you know, the
19 accuracy of the standing and redressability and whether the
20 recent U.S. Supreme Court case that I'm also not going to
21 attempt to present -- to pronounce has a contrary assertion, and
22 I want to be clear. It's not contrary. In fact, you know, the
23 majority opinion cites the case that we, you know, cited for the
24 proposition that you need standing for every form of relief, and
25 it needs to be redressing. It was a critical part of their

1 analysis for why nominal damages, you know, was appropriate, and
2 so it's not contrary in any way; it was just recently reaffirmed
3 that that's an appropriate consideration.

4 So at bottom, this is upsetting the status quo. You
5 know, we will also be arguing that, you know, a preliminary
6 injunction isn't appropriate, but regardless if this Court
7 ultimately disagrees for the drastic extraordinary remedy of
8 enjoining a duly enacted statute of the State of Iowa, the Court
9 should decline to grant a temporary restraining order and wait
10 until after a preliminary injunction.

11 THE COURT: Mr. Langholz, unless I missed it, I didn't
12 see any response to the claim of the plaintiffs that 847 -- this
13 section of 847 violates the Supremacy Clause. Did you argue
14 that and I missed it or --

15 MR. LANGHOLZ: Well, we did not in the expedited
16 briefing here get into the significant merits of the substantive
17 claims. The Supremacy Clause kind of flows throughout all three
18 of these claims. I think specifically they highlighted
19 specifically with respect to the ARP Act, and it similarly --
20 you know, if that is, in fact, a federal requirement -- and the
21 State disputes that there is -- that the plaintiffs are correct
22 that there's anything in that statute that can -- is clear
23 enough to be a mandate that school districts either must have
24 universal mask mandates or must have discretion to implement
25 universal mask mandates, you know, again, an injunction wouldn't

1 be necessary because districts could comply with that as well.

2 But we've closely parsed from when we first received,
3 you know, the Secretary's letter, you know, explaining --
4 directing to the Act, the letter itself, as it's a hyperlink in
5 the complaint. It doesn't actually say that mask mandates are
6 required or that school districts are required to be able to
7 implement universal mask mandates. It's an interesting chain of
8 legal reasoning. You know, it appears to be very carefully
9 lawyered, but it's a novel claim both from that letter and
10 from -- you know, as asserted here that somehow a -- an
11 appropriation and language authorizing the use of that money
12 linked somehow now to a regulation that a school comes up with a
13 plan to come back to return to learning and guidance from the
14 CDC that, you know, masking is appropriate. That that chain of
15 links turns into a clear federal mandate that all schools either
16 must have discretion or must actually implement, you know, mask
17 mandates was a novel and unprecedented claim that the State of
18 Iowa would resist as well. But if it's correct and if schools
19 concluded that it was correct, they would have authority under
20 the statute already without an injunction from the Court.

21 THE COURT: When you're an older person like I am,
22 Mr. Langholz, *Cooper versus Aaron* was the Little Rock case that
23 all nine justices signed, and they talked about the supremacy of
24 federal law, and so I went and read *Cooper* yesterday. If the
25 design of the Constitution is that federal law is supreme, I

1 don't see a way that this statute can be enforced. Do you?

2 MR. LANGHOLZ: Well, it would be -- it presupposes
3 that there is a federal mask requirement, and if a federal mask
4 requirement exists, then, you know, a school district would be
5 allowed, you know, and, in fact, would be required to implement
6 it. It would -- perhaps in that situation if plaintiffs are
7 correct that there's not just a -- if it is correct -- and I
8 don't want to put words in plaintiffs' mouth that this is their
9 assertion, but if it's correct that federal law requires all
10 school districts to implement a mandatory mask mandate, school
11 districts could do so under the terms of this law. Effectively
12 it would be a nullity at that point, you know, if it didn't have
13 a savings clause, as we're calling it, you know, in it, correct,
14 the Supremacy Clause would supersede it and prevent enforcement,
15 but we do have a savings clause, so an injunction is not
16 necessary at least, again, on the -- I can conceive perhaps of a
17 way -- you know, different sorts of injunctions than what's
18 being requested by plaintiffs here that might be more
19 appropriate, you know, depending on the nuance of the claim, but
20 a strictly just don't enforce the statute is an unnecessary
21 injunction.

22 THE COURT: Thanks very much.

23 MR. LANGHOLZ: Thank you, Your Honor.

24 THE COURT: Ms. Latta, do the school boards have any
25 input that they -- that your clients want to make at this point

1 or -- no?

2 MS. LATTA: No, Your Honor. Yes. We're not taking a
3 position with respect to this portion of the proceedings at
4 least on behalf of the nine districts that I represent.

5 THE COURT: Right. But as to the chaos, confusion,
6 calamitous impact, nothing?

7 MS. LATTA: No position.

8 THE COURT: All right. All right. Okay.

9 Mr. Freedman, do you want any rebuttal?

10 MR. FREEDMAN: Yes, Your Honor, just briefly --

11 THE COURT: Yes.

12 MR. FREEDMAN: -- if I may. So I want to just address
13 a few points Mr. Langholz raised. The first is on the citation
14 to HF 847, that's a fair point. I think we're looking
15 specifically to enjoin enforcement of section 280.31. I
16 believe -- just so we're clear, I believe the specific language
17 we're talking about was a last-minute addition to the overall
18 education bill which is HF 847. I believe it was -- the bill
19 was HR 2147. We'll confirm that with Mr. Langholz, but it was
20 the -- the bill passed on -- the amendment to the overall House
21 File, it was passed on May 20th, 2021. But I -- the statutory
22 citation in defendants' brief is certainly correct and is what
23 we're seeking to enjoin enforcement of.

24 THE COURT: Okay.

25 MR. FREEDMAN: I think the second point I want to

1 address is you had a colloquy with Mr. Langholz about the
2 State's position -- State defendants' position regarding whether
3 we're seeking to impose a universal statewide mask mandate or
4 give school districts the discretion to implement them based on
5 their judgment, their application of public health guidance, and
6 in accordance with their local public health authorities
7 applying CDC guidance. Your Honor is correct. We're asserting
8 the latter in this litigation. We think that that's
9 consistent -- and to preview an argument we'll come back to, we
10 think that's consistent with what Congress intended in the
11 American Rescue Plan Act, that local school districts are
12 empowered to follow the CDC guidance in the language of the Plan
13 Act to the maximum extent practical. I believe that's the
14 statutory language.

15 We think that exercising that judgment last year in
16 the absence of this prohibition, many school districts --
17 probably even most school districts across the state -- made the
18 judgment that universal masking was appropriate as a public
19 health measure to protect their -- to protect the student
20 population. I don't know whether the disability community was
21 also advocating it at that time, but it certainly benefited and
22 protected the community of students with disabilities. But just
23 so we're clear, we are just saying the purpose of this
24 injunction is to restore back the status quo before this bill
25 passed, which is what the purpose of an injunction serves, to

1 empower school districts to be able to take -- impose or adopt
2 universal masking, if that's the decision that they make.

3 Mr. Langholz suggested that our record is unclear on
4 sort of what -- what -- whether that would be necessary to
5 provide relief to our clients. I don't want to revisit the
6 discussion of redressability. I think that we've provided
7 sufficient facts to show that we meet the redressability
8 standard. I do want to say -- I mean, it may be the case that
9 no school boards have taken a vote to implement this --
10 implement universal masking, but I think that's readily
11 explainable by a couple of things.

12 One is the defendants have stated that they consider
13 any such measures to be illegal under State law. They've
14 also -- Director Lebo's department has taken public positions
15 that school boards who engage in enacting universal masking will
16 be sanctioned including up to loss of accreditation. We look at
17 particular Iowa communities that have as public health measures
18 adopted universal masking and see that school districts in those
19 communities have said, We can't follow our local law because of
20 the State law. Iowa City has -- the mayor has adopted a
21 universal masking, and the superintendent of the school district
22 has said, We can't follow that because of the State law. So we
23 think that's sufficient to establish redressability along with
24 the fact that the school districts where all of our clients
25 reside had made that decision last year.

1 A lot of Mr. Langholz's -- turn to another point. A
2 lot of Mr. Langholz's argument was directed towards questions of
3 exhaustion of remedies. We are not bringing -- to be clear, we
4 are not bringing a claim in this lawsuit that requires us to
5 exhaust administrative remedies. Mr. Langholz is suggesting
6 that maybe if we brought a claim under IDEA and that our
7 students were seeking enforcement of their Individualized
8 Education Plans, IEPs, there are exhaustion requirements there.
9 We are not bringing those claims there. We considered them, and
10 we decided we don't need to do that to get our plaintiffs
11 relief. Our claims here are under the Americans with
12 Disabilities Act which has no exhaustion requirement and under
13 the Rehabilitation Act which has no exhaustion requirement, so a
14 lot of the argument and a lot of what we just heard is just
15 simply a red herring. It's not relevant to the claims we're
16 bringing.

17 On the -- on the question of timing, you know, I --
18 where I practice, one of our -- one of our D.C. judges, my
19 regular court -- he's a retired judge now, but he was very fond
20 of saying the federal government, the Department of Justice,
21 whenever they came in to defend a suit always claimed that the
22 plaintiff was both too early and too late, and I think that's
23 what we're hearing now: too early to know whether it's really
24 going to cause harm; too late because the law was passed months
25 ago. And you can't have it both ways. I mean, if we look at it

1 another way, we brought suit promptly when it was clear from the
2 defendants' statements that they intended to vigorously enforce
3 the law, including statements from Director Lebo's department
4 about the consequences for school districts if they passed -- if
5 they enacted or reintroduced universal masking. That's only
6 been clear since the school has resumed. It's a matter of days,
7 not months.

8 It's also, I think, clear that our students are -- or
9 our plaintiffs are in districts where we're seeing spread unlike
10 anything that we saw last year. So whether that would have been
11 apparent in May I think is not really relevant. It's apparent
12 now. We have injury now. That's sufficient to grant relief.

13 On the -- on the colloquy at the end of Mr. Langholz's
14 argument about the -- about the preemption plan, there was some
15 suggestion that this was a novel or creative or crazy preemption
16 theory. It's not. Appropriations bills have substantive riders
17 all the time that make policy changes, implement policy changes.
18 That's something Congress is very fond of doing because it's
19 frequently easier to get something enacted as part of an
20 appropriation or otherwise. It doesn't change things, the fact
21 that Congress directed that school districts in taking this
22 money were supposed to follow recommendations and guidance from
23 the CDC to the maximum extent practical.

24 HF 847 prevents, frustrates, directs Iowa school
25 districts that they can't follow that Congressional direction,

1 takes that discretion away from them, takes away any ability of
2 school districts to assess and make decisions for their
3 districts whether they want to -- whether they -- what they want
4 to do. We know that last year the school districts where our
5 plaintiffs reside and many other school districts across the
6 state in assessing and making -- in assessing that guidance
7 concluded that they wanted universal masking.

8 Just two other sort of short points. One is that I
9 think if the defendants' position -- if the defendants' position
10 is that the statute actually allows districts to comply with
11 federal law and adopt universal masking in order to comply with
12 federal law, there's really no harm -- no harm that they've
13 cited in granting the TRO. There's simply -- if that's their
14 position, that's really -- entering the TRO is preserving the
15 status quo. We have grave concerns based on the public
16 statements that the defendants -- State defendants have made
17 that they don't really -- that's not really their position in
18 which case we think a TRO would bring great clarity to the
19 situation and make it far easier for school districts to comply
20 with federal law, but if it's really the State's position and if
21 it's really Governor Reynolds' position that state [sic]
22 districts can adopt universal mask mandates if they conclude
23 that's what they're entitled to under federal law, there's no
24 harm to the State from entering the TRO.

25 And the final point I want to make, Your Honor, is

1 that we recognize that entry of a TRO and entry of emergency
2 injunctive relief is an extraordinary remedy, but we think these
3 circumstances warrant it. When you look at the harm that our
4 plaintiffs face, the harm that thousands of other children with
5 disabilities in the state of Iowa face, the harm that could be
6 reduced, mitigated, potentially prevented if school districts
7 are allowed to make and in their judgment adopt universal
8 masking clearly weighs in favor of an injunction. We think
9 similarly the violations of federal law here are clear and
10 warrant an injunction. We think the public interest
11 currently -- certainly warrants an injunction, and we don't
12 think we've heard any burden from the State defendants that
13 would offset any of those. So we recognize this is a big ask,
14 but we do think that circumstances warrant it, and we ask Your
15 Honor to enter an injunction.

16 THE COURT: Mr. Freedman, the last thing I asked
17 Mr. Langholz, if I get in Count 1 and Count 2 the analysis about
18 are they disabled, were they discriminated against, did they
19 accommodate their disability -- okay. If I get through that
20 analysis and the analysis on the Count 2 that the 280 -- 280.31
21 violates those two, then on a straightforward analysis, the last
22 question I ask you, am I being too simplistic to think that the
23 Supremacy Clause means that if Congress -- or if the State
24 passed a law saying you can discriminate -- I'm trying to think.
25 Is it -- what's the right analysis to look at the Supremacy

1 Clause here? This can't -- this -- 280.31 cannot stand because
2 of the ADA and the Vocational -- and the Vocational [sic] Act of
3 '73. Is that as simple as it is?

4 MR. FREEDMAN: So here's what I'd say. We have been
5 looking at the Supremacy Clause issue as related to the direct
6 language in the Congressional language in the American Rescue
7 Plan Act. I don't think -- the question of whether it's
8 preempted under the -- under the Americans with Disabilities Act
9 I will tell Your Honor is far more complicated than I was
10 hoping.

11 THE COURT: Okay.

12 MR. FREEDMAN: We looked at that. The issue, I think,
13 is that courts construing the question of preemption of the
14 Americans with Disabilities Act recognize that a lot of states
15 at the time the ADA was passed had State pronouncements and did
16 not intend to preempt -- Congress did not intend to preempt
17 those protections, so, you know, I can't cite -- I don't know
18 whether I can think of an Eighth Circuit case specifically
19 holding that, but in all candor, Your Honor, I think our
20 stronger claim on preemption is under the American Rescue Plan
21 Act.

22 THE COURT: Okay. Candor is always appreciated.

23 MR. FREEDMAN: Unless Your Honor has any other
24 questions --

25 THE COURT: No. We'll consider the matter submitted.

1 Thank you very much.

2 We'll be in recess.

3 MR. FREEDMAN: Thank you, Your Honor.

4 MR. LANGHOLZ: Thank you, Your Honor.

5 (Proceedings concluded at 11:24 a.m.)

6

7

8 C E R T I F I C A T E

9 I, Tonya R. Gerke, a Certified Shorthand Reporter of
10 the State of Iowa and Federal Official Realtime Court Reporter
11 in and for the United States District Court for the Southern
12 District of Iowa, do hereby certify, pursuant to Title 28 U.S.C.
13 Section 753, that the foregoing is a true and correct transcript
14 of the stenographically reported proceedings held in the
15 above-entitled matter and that the transcript page format is in
16 conformance with the regulations of the Judicial Conference of
17 the United States.

18 Dated at Des Moines, Iowa, September 16, 2021.

19

20

21 /s/ Tonya R. Gerke
22 Tonya R. Gerke CSR, RDR, CRR
23 Federal Official Court Reporter
24
25