UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT KNOXVILLE

UNMASK KNOX COUNTY KIDS, A TENNESSEE UNINCORPORATED NONPROFIT ASSOCIATION, *et al.*

Plaintiffs,

Docket No. 3:22-cv-00074-JRG-DCP

v.

KNOX COUNTY BOARD OF EDUCATION, *et al.*,,

Defendants,

MOTION FOR RELIEF FROM AN ORDER

Plaintiffs, Unmask Knox County Kids, and minors K.A., K.M., C.G., A.S., and M.A., by and through their parents, bring this Motion for Relief from the Court's September 24, 2021, order requiring the Knox County Board of Education to enforce a mask mandate in all Knox County Public Schools as a reasonable accommodation under the ADA. Plaintiffs make this request pursuant to F.R.C.P. 60(b) and submit this brief in support of a motion for relief from an order.

I. STATEMENT OF FACTS AND INTRODUCTION

The five named Plaintiffs are Knox County students who have suffered injuries and damages from the Court's Order requiring all Knox County Public Schools to forcibly mask students ("Mask Mandate"). They are joined by members of the Unmask Knox County Kids Association ("Members") who, on behalf of children who have suffered the same, represent a more than 1000-member association which has come together for the purpose of fighting against this Court's Mask Mandate. Countless students have been harmed by this Court's Order—Plaintiffs and named members making known to this Court just a fraction of the issues.

Masking detrimentally impacts two of the most vulnerable groups in our school systems—children with disabilities and those learning English as a second language. Declaration of Tracy Høeg, M.D., Ph.D. ("Hoeg Decl.") ¶¶ 47-48. The Mask Mandate has caused children extreme physical harm. Children with speech and language disorders have been particularly hit hard. Declaration of Jean Brandon ("Brandon Decl."), ¶¶ 7-17. The Mask Mandate exacerbated existing speech and language disorders, Declaration of Andrew S., ¶¶ 1-2, and created new ones, Declaration of Lynn M., ¶ 4. Masks muffle sound making it more difficult to understand speech. Brandon Decl., ¶7. Masks take away students' ability to read lips and see facial expressions, which help them better understand what they are hearing. *Id.* Masks have caused children to have headaches and nosebleeds. Declaration of Lynn M.,at ¶¶8-10. And the Mask Mandate undercut thriving students with hearing impairments and Auditory Processing Disorders, amplifying their disabilities to the point they couldn't learn. Declaration of Sara W., ¶¶ 1-4; Declaration of Angie G., ¶¶ 6, 9-10; Brandon Decl. ¶¶ 7-14.

Otherwise healthy children have developed crippling anxiety from masking, leading to concerning and debilitating physical responses. Forced masking led Member 3's daughter to

develop severe trichotillomania. In 6 months, Member 3's daughter went from having a full head of hair to nearly completely bald, her head covered in sores from her self-harm, and her spirit crushed by this horrific condition. Declaration of Elise I., ¶¶ 8-9. Forced masking has caused C.G. to suffer at least twenty-three debilitating, breath-shortening panic attacks during the school year because of wearing masks, Declaration of Angie G., ¶¶ 9-10. These episodes require C.G. to use a rescue inhaler, and are so overwhelming, C.G. cannot function and must go home. *Id.* Forced masking causes other plaintiffs to have what their parents describe as "complete meltdowns," consisting of crying, throwing fits, being visibly shaken and inconsolable. Declaration of Sarah W., ¶ 3. Masks have been diagnosed as a trigger for severe anxiety and debilitating panic attacks for multiple plaintiffs. Declaration of Elizabeth W., ¶ 7; Declaration of Angie G., ¶ 11; Declaration of Kim H., ¶ 29.

And beyond the physical and emotional damage to Knox County students, the negative educational impact has been staggering. The learning loss experienced by Plaintiffs here is a microcosm of a problem plaguing the entire district. K.M. went from a happy, thriving ADHD child who enjoyed school, to frustrated and joyless as he struggled with the added distraction of the mask. Declaration of L.M., ¶¶ 11-12. Plaintiff K.A., an autistic eighth grader with sensory issues triggered by masks, went from an A/B student to a D/C student due to the difficulties he faced from forced masking. After a year of trying and failing to learn while masked, Sarah W.'s son was told he would have to be moved back a grade because of how disruptive the mask mandates was to his second-grade education. Declaration of Sarah W., ¶ 6. And M.A.'s learning regressed, leading to a dramatic decline in her test scores. Declaration of M.A., ¶ 5.

Yet the learning loss in Knox County Schools goes well beyond children with disabilities. Teachers individually reported, and the state reported numbers confirmed, that the mask mandate

"has manifested in unprecedented learning loss and overall lower proficiency rates," leading education expert Michelle Hooper to conclude, the mask mandate was "negatively impacting the mental well-being of students and interfering with their educational development." Declaration of Michelle Hooper ¶¶14-15, 24.

Masks hurt kids. Masks hurt kids' physical development. Masks hurt kids' emotional development. And masks hurt kids' educational development. Yet adding insult to injury, masks don't work. Høeg Decl. ¶¶ 19-46. No study to date shows that school mask mandates reduce transmission or disease. *Id.* at 20. And that includes studies cited by the Center for Disease Control. Høeg Decl. ¶¶ 19-46.

As stated by Dr. Tracy Høeg, "forcing a medical intervention on anyone, especially a minor, without clear evidence that the benefits outweigh the harms is unethical." Høeg Decl. ¶ 54. The forced medical intervention of masking has harmed Knox County students for far too long. The Mask Mandate has severely and negatively affected Plaintiffs. Further, this accommodation was not reasonable as it fundamentally altered school policy and interfered with third party rights. This Court should act without delay to unshackle Knox County kids from the damaging effects of its Mask Mandate.

II. PROCEDURAL POSTURE

On August 16, 2021, Governor Bill Lee issued Executive Order 84, allowing parents/guardians to opt out of any masking requirement for students in kindergarten through twelfth grade. September 1, 2021, the Knox County School Board voted 5-4 to end the masking mandate. On September 2, real parties in interest S.B., M.S., and T.W. ("original plaintiffs") sued Governor Lee and Knox County for Declaratory and Injunctive Relief in this Court. On September 9, the original plaintiffs amended their complaint to remove Knox County as a

Defendant and add the Knox County Board of Education. On September 10, the original plaintiffs moved for a preliminary injunction, which this Court granted on September 24, 2021. The Court amended the order on October 12 and October 18. The Court's Order reimposed a mask mandate on all sixty-thousand students of the Knox County School System.

On February 28, the Plaintiffs in this action filed a complaint with the Court to initiate this action, naming the Knox County Board of Education as Defendant, and Governor Lee and the original plaintiffs as real parties in interest. Plaintiffs filed a First Amended Complaint on March 3, 2022. Plaintiffs bring this rule 60(b)(6) motion seeking relief from the Court's September 24, 2021, Order imposing forced masking with only limited exceptions.

III. THE PLAINTIFFS HAVE STANDING TO BRING A RULE 60(B)(6) MOTION AS NON-PARTIES WHOSE INTERESTS ARE SEVERELY AFFECTED BY THE MASK MANDATE

The order imposing forced masking upon students in Knox County public schools has harmed the physical, emotional, and mental wellbeing of the Plaintiffs, prevented them from attending school and receiving an education, and clashed with their right to receive reasonable accommodations in order to have access to education as required by the Americans with Disabilities Act. The Plaintiffs accordingly request relief from the Court's Order under Rule 60(b)(6).

The Supreme Court has recognized that "Rule 60(b) vests wide discretion in courts" and "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just.'" Though, the Sixth Circuit generally requires a party moving for a Rule 60(b) motion to have been a party to the original action in which the subject order or judgment was imposed, the Court has recognized limited exceptions for non-parties. *See Southerland v. Irons*, 628 F.2d

978, 980 (6th Cir. 1980). In *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932 (6th Cir. 2013) and *Salem Pointe Cap., LLC v. BEP Rarity Bay, LLC*, 854 F. App'x 688 (6th Cir. 2021), the Sixth Circuit analyzed the Second Circuit's exception allowing non-parties standing to bring Rule 60(b)(6) motions at length. In those cases, the Sixth Circuit declined to affirmatively adopt standing Rule 60(b) exceptions similar to the Second Circuit finding no need to reach the issue. *Southerland*. *Salem Pointe Cap., LLC v. BEP Rarity Bay, LLC*, 854 F. App'x 688, 701 (6th Cir. 2021) ("In *Bridgeport*, this Court did not definitively adopt those exceptions because even if they applied in that case, the movant's motion would still fail. *Id.* at 941. The same is true here because as described below for each subsection RBP raises, its arguments are without merit. As such, we need not definitively say whether this Court adopts any exception, other than that recognized in *Southerland*, to the general principles of Rule 60(b) standing.")

However, the Sixth Circuit utilized the Second Circuit's "sufficiently connected and identified with" standard for its analysis. Under that standard, a non-party may bring a Rule 60(b)(6) motion for relief of an order or judgment when the movant is "sufficiently connected and identified with" the previous action such that the movants' rights are affected enough that the "sufficiently flexible" principles governing standing "permit a finding of standing." *Grace v. Bank Leumi Tr. Co. of NY*, 443 F.3d 180, 188 (2d Cir. 2006) ("While we limited our holding in *Dunlop* to the facts of that case, which are clearly distinguishable from the facts here, we rested our decision on 'the principles governing standing,' which, given the facts of *Dunlop,* were 'sufficiently flexible to permit a finding of standing.' *Id.* at 1051."). In *Dunlop*, the movants were precluded from bringing a discrimination action because a prior judgment to which they were not a party restricted their litigation options. *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982). In *Grace*, the movants were directly affected by a settlement agreement

between prior plaintiffs and a judgment-proof defendant, and the intent of the prior plaintiffs was to use the settlement agreement to affect a fraud against the movants. *Grace*, 443 F.3d at 188. In both cases, the Second Circuit found that the movants had standing to bring a Rule 60(b)(6) motion to protect their rights because their interests were sufficiently connected and identified with the prior actions.

Here, the Court should apply the same principles of standing that the Sixth Circuit applied in *Southerland* to allow the Plaintiffs to bring a Rule 60(b)(6) motion related to the Court's masking order. Whether under a standard similar to the "sufficiently connected and identified with" standard, or under a general standing principle that allows parties whose rights have been significantly affected by an order in an action in which they were not a party to redress harms from the order, justice requires that the Plaintiffs have standing to seek relief from the Court's order that has significantly affected their interests.

The Plaintiffs are students from the same school system as the original plaintiffs. Many of them also suffer disabilities that severely restrict or destroy their ability to receive an education unless they receive accommodations. Their access to education has been severely impacted by the mask mandate, just like the original plaintiffs claimed as a basis for their initial action. Plaintiffs here have a right to reasonable accommodation in order to ensure their access to education under the ADA, the same as the Defendants. Yet not only are students with disabilities negatively impacted by the Mask Mandate, students without disabilities, or with disabilities that they had been able to overcome without intervention, have been detrimentally impacted by the Mask Mandate. The Court's Order seriously affected all students in the Knox County school system even though they were not a party to the original litigation. Accordingly, the Plaintiffs are sufficiently connected and identified with the prior action such that principles of justice require

that they be found to have standing to bring a Rule 60(b)(6) motion regarding the order that is drastically affecting their rights.

IV. A RULE 60(B)(6) MOTION SHOULD BE GRANTED BECAUSE THE HARM SUFFERED BY THE PLAINTIFF'S AND THOSE SIMILARLY SITUATED DUE TO THE COURT'S ORDER CONSTITUTES AN EXTRAORDINARY CIRCUMSTANCE

The Supreme Court has held that a movant seeking a Rule 60(b)(6) motion must demonstrate that A) the motion is made within a reasonable time, B) it is not premised on one of the grounds for relief enumerated in Rule 60(b)(1) – (5), and C) there are extraordinary circumstances justifying the 60(b)(6) motion, even though there are not particularized factors. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988). Plaintiffs meet all criteria.

A. Plaintiffs Filed Their Motion Within Reasonable Time

The Plaintiffs bring this motion within 6 months of entry of the Court's Order from which they are seeking relief. For Rule 60(b)(6) motions, there is not specific time required, only a reasonable time. What constitutes a reasonable time "ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) ("Parties seeking relief under Rule 60(b)(6), however, must file their motion within a 'reasonable' time, which ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief."); *see also Emergency Beacon Corp.,* 666 F.2d at 760 (holding that trustee's motion to vacate order

authorizing debtor in possession to issue certificates of indebtedness filed twenty-six months after entrance of order was filed within a reasonable time); *In re Pacific Far East Lines,* 889 F.2d 242 (9th Cir.1989) (eighteen months not untimely nor unreasonable under circumstances); *Menier v. United States,* 405 F.2d 245 (5th Cir.1968) (two years not unreasonable).").

Here, the Plaintiffs did not delay seeking this Court's intervention. After entry of the masking Order in September 2021, the Plaintiffs attempted to attend schools subject to the involuntary masking and subsequently suffered the harms for which they seek relief. After attempting to seek alternative resolutions through the school system for dealing with the harms imposed on them by the forced masking to no avail, they are now seeking relief from the Order directly from the Court. The harms to the masking mandate have only become known as they have been enforced over the last several months. The original plaintiffs do not suffer any prejudice from the period of time between the masking order and the current motion, and the health and educational access concerns of the Plaintiffs necessitate relief. Accordingly, the six-month period between the order and the current Rule 60(b)(6) motion is reasonable given the circumstances.

B. The Motion is Premised Upon Grounds Suitable for Rule 60(b)(6) Only

The requirement that a Rule 60(b)(6) motion must not be based upon any of the other grounds for relief enumerated in Rule 60(b)(1)— (5) is based on the courts contemplating the issue of a movant seeking to avoid the time limitations for motions brought under those other grounds. Both the Supreme Court and the Sixth Circuit have repeatedly rejected Rule 60(b)(6) motions for operating as motions based upon alternative grounds or appeals in disguise. *Montague v. Lee*, No. 2:03-CV-113-JRG-MCLC, 2018 WL 505906, at *5 (E.D. Tenn. Jan. 22, 2018); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

Such concerns do not apply to the Plaintiffs' motion because they were not parties to the action in which the masking Order was instituted. The present Rule 60(b)(6) motion is only for the sake of pursuing justice and relief of the drastic education, physical, emotional, and mental harm suffered by the Plaintiffs and can serve no other purpose for them because they were not parties to the original action.

C. The Massive Educational, Physical, Emotional, and Mental Suffering of the Plaintiffs Constitutes an Extraordinary Circumstance Justifying Relief from Forced Masking under Rule 60(b)(6)

The Supreme Court has held that movants seeking relief under Rule 60(b)(6) must show "extraordinary circumstances" to support such a motion. *Gonzalez v. Crosby*, 545 U.S. 524, 535, (2005). The Sixth Circuit has held that Rule 60(b)(6) applies in "exceptional or extraordinary circumstances where principles of equity mandate relief." *West v. Carpenter*, 790 F.3d 693, 696–97 (6th Cir. 2015)*; see also Doran v. Joy Glob., Inc.,* No. 2:15-CV-243, 2016 WL 7799598, at *4 (E.D. Tenn. Aug. 9, 2016).

Here the Plaintiffs' suffering and harm due to the forced masking policy represent extraordinary circumstances that were uncontemplated by the Court at the time of the masking order's entry. The Court's Order imposed mandatory masking on 60,000 students in Knox County with only two exclusions that do not provide accommodations for the majority of students with special needs and disabilities that are exacerbated and made a fundamental barrier to their ability to receive an education. Further, the mask mandate has led to a dramatic drop in test scores across the district, regardless of disability.

i. The Harms Suffered by the Plaintiff Students

The named-student Plaintiffs are five such students with disabilities who suffered grievous emotional, physical, mental, and education harm as a result of the forced masking order.

K.A.

K.A. is an eighth-grade student in the Knox County School System. He suffers from severe sensory issues. Declaration of Kim H. ¶ 3. His doctor has described his disability to his school as follows:

> K.A. has been seen by me at this office on an outpatient basis for Obsessive-Compulsive Disorder and perhaps Autistic Spectrum Disorder. This young man has very significant problems with sensory input from sense of touch and visual stimuli. He is very reactive and emotional when confronted with these triggers and as such, he is highly avoidant whenever possible. He has little control over his highly emotional responses. His most severe reactions occur with specific sensations on his skin, especially including the masks that are required for protection against the Covid-19 virus.

Id. K.A. is not provided an accommodation under the two exclusions in the Court's Order.

K.A.'s issues with masks are so severe that when he attempted to wear a mask to school on September 28, 2021, he suffered severe, escalating anxiety and panic, necessitating that his parents pick him up from school for the sake of his health and wellbeing. *Id.* at ¶¶ 5-8. K.A. attempted to use calming techniques so that he could wear a mask in order to attend school in person, but his severe reactions continued, nevertheless. *Id.* He was able to join other children in a separate room without masks from October 5 through October 8, but the Court changed its policy so that children not wearing masks were completely forbidden from attending school. *Id.*

As a result of the Court's policy, K.A. was unable to attend school due to the complications masking imposed on his disability between October 18 and November 29. *Id.*

K.A.'s mother sought an exemption during this time. *Id.* at ¶ 10. She worked with his school's principal, and K.A.'s mother and father followed all the steps they were told. *Id.* They had a meeting with an administrator on October 25 and were told that K.A. would be given an accommodation. *Id.* at ¶¶11-14. But the insufficient accommodation, which K.A.'s parents knew would not work, consisted merely of a five-minute break from mask-wearing, two to three times a day. *Id.* K.A.'s parents also suggested alternatives such as a face shield, or partial masking when going between classrooms. *Id.* at ¶¶ 15-16. The school denied both those requests. *Id.* K.A.'s mother and father appealed the process, and his doctor wrote a letter to the school explaining why K.A. medically required an exemption from mask-wearing, but the school waited another three weeks before responding, in which time K.A. was unable to attend school safely due to the mask mandate. *Id.* at ¶¶ 18-22.

As a result of K.A.'s suffering due to the Court's Order and the failure of reasonable accommodation for his disability through any of the means that his parents pursued, K.A.'s grades have declined drastically from A/B to C/D, he suffers anxiety about his coursework and the prospect of attending school at all, and he has been systematically denied basic educational instruction. *Id.* at ¶ 21.

K.M.

K.M. is a second-grade student in Knox County Public Schools and has been in the school system since kindergarten. Declaration of Lynn M. ¶ 2. In kindergarten, he did not suffer

any delays in speech, but was diagnosed with attention deficit disorder. *Id.* at ¶ 3. As a result of two years of forced masking, K.M. has regressed in his development and has difficulty with speech. *Id.* at ¶¶ 2-5. After his first-grade year, which was entirely masked, K.M.'s ability to speak declined. *Id.* After the forced masking in his second-grade year, he has been diagnosed with a reading disability and is now struggling with words that he had mastered in kindergarten, two years earlier. *Id.*

K.M. struggles to communicate with and understand his friends and others, he cannot understand teachers in the classroom because he cannot read their lips. *Id.* at ¶¶ 7-9. His progress in reading both in his regular classes and even his special education classes has stalled. *Id.* He now reports frequent headaches and nausea, stating he is going to be sick at school, which dissipates when his mask is removed – an unsubtle sign of the anxiety and aversion that K.M. has developed towards school due to the suffering that masking has inflicted on him. *Id.* at ¶¶ 10-12. He now suffers from chronic nosebleeds, which he has never suffered from before starting to wear masks. *Id.*

C.G.

C.G. is a junior high school student who is blind in one eye, partially deaf in one ear, suffers from asthma, testing anxiety, and general anxiety. Declaration of Angie G. ¶¶ 2-3. She has already exerted great effort to develop strategies for coping with her significant disabilities in order to pursue her education and enjoy the same social and scholastic activities as her peers. *Id.* at ¶¶ 4-6. Forced masking has destroyed the effectiveness of her coping strategies, exacerbated the issues presented by her disabilities, and caused her direct and extreme physical suffering. *Id.*

C.G. relies on being able to see the mouth movements and expressions of others to help her communicate due to her hearing loss. *Id.* Masks entirely prevent her from using either of these necessary methods for aiding her understanding of others' communication. *Id.* Her inability to communicate with and understand others has contributed to her pre-existing anxiety and caused her to feel helpless in dealing with her disabilities. *Id.*

This anxiety has had real effects upon C.G. that have manifested in terrifying panic attacks. *Id.* at ¶¶ 8-12. When she was a freshman and the school was not masked, C.G. suffered only two panic attacks. *Id.* Last year, when masking was required but there was some freedom to remove masks if students were distanced, she suffered eight panic attacks. *Id.* In the present 2021-2022 schoolyear, as of February 26, 2022, when the year is only half-over, she has suffered at least fifteen panic attacks directly due to the anxiety caused by forced masking. *Id.* Due to her pre-existing breathing difficulties from her asthma, the panic attacks are crippling. *Id.* C.G. feels that she cannot breathe, and her body shuts down such that she feels as if her brain does not work. *Id.* She requires a rescue inhaler to cope with the attacks and must go home after such an attack because they leave her unable to perform even basic functions at school afterwards. *Id.*

The brutality of C.G.'s asthma attacks are made extraordinarily worse by forced masking. *Id.* at ¶¶ 10-15. When she feels an asthma attack oncoming, she can often avoid it by lowering her mask to increase her oxygen flow to her lungs. *Id.* But the absolutely uncompromising refusal to offer any accommodations to students and zero-tolerance policy that imposes collective punishment on her peers if a student lowers their mask has left C.G. bereft of even that small solution to her debilitating asthma problem. *Id.* C.G. participates in the performing arts, choir, theater, and band. *Id.* Teachers have told students that if their masks are lowered for these activities or removed, the school will cancel them entirely. *Id.* Thus, C.G. is left either unable to

avoid her debilitating asthma attacks, unable to participate in extracurricular activities due to her disability, or at risk that she will be caught taking a moment to catch a breath and avoid a crippling asthma attack and thus become the reason why her favorite extracurricular activities have been canceled for all of her peers. *Id.* This, understandably, has increased her pre-existing anxiety to a cruel degree. *Id.*

A.S.

A.S. is a young student in the Knox County School System who was diagnosed with a speech and language disorder at three years old. Declaration of Andrew S. ¶¶ 2-5. Her family moved to Knox County from California, where A.S. had received speech therapy services that involved articulation therapy in order to correct her manipulation of her mouth to enable her to pronounce sounds and words correctly. *Id.* Such correction of her pronunciation and manipulation of her mouth is vital for treating A.S.'s disability. *Id.* When her family moved to Knoxville, the school system denied her this therapy saying it was not allowed under the mask mandate. *Id.* at ¶¶ 6-7. This was despite that her disability is recognized and provided accommodations under the ADA. *Id.* at ¶ 8. It was only after her father appealed directly to the school board that she was permitted to go without a mask, yet she still is unable to get the speech language services she desperately needs because her teachers remain masked. *Id.* at ¶¶ 8, 15.

M.A.

M.A. is a fifth-grade student with an IEP for math, reading, and language processing. Declaration of M.A. ¶ 2. Under forced masking for the last two years, her ability to communicate with and understand her teachers has drastically worsened because she cannot hear them correctly and her teachers cannot see her facial expressions. *Id.* at ¶ 3. This has caused her to

process words incorrectly and has harmed her language development; she has also "shut down" in class because her teachers cannot see her face, which she requires to communicate that she is thinking and processing information in her own way, at her own speed. *Id.* at ¶¶ 4-5. As a result of masking, M.A.'s scores in reading comprehension and math under the AIMS web protocol have dropped dramatically. *Id.*

M.A. was making significant progress in overcoming her disability and in her development prior to the pandemic. *Id.* at ¶¶ 6-7. Her mother, who is an educator, believes that M.A. would have been able to test out of special education but for the learning loss and development regression caused by forced masking exacerbating her pre-existing disability. *Id.* Now, M.A. has regressed due to her inability to hear or comprehend her teachers' speech due to forced masking. *Id.*

The pain, suffering, anxiety, learning loss and developmental regression experienced by K.A., K.M., C.G., A.S., and M.A. has directly resulted from the Court's Order. The harms they have endured are extraordinary circumstances that the Court did not have the opportunity to consider or contemplate in issuing its Order because the Plaintiffs were not parties to that action. And their individual harms are echoed by the 1000 plus members of the Unmask Knox County Kids Association. 763 of these parents said their children have been harmed by masking. Declaration of Andrew S. ¶ 19. This includes harms like severe trichotillomania, Declaration of Elise I., ¶¶ 8-9, and Anxiety, Declaration of Sarah W.¶¶ 2-4; Declaration of Elizabeth W. ¶¶5-8. 119 of those parents have children with disabilities, and 64 of them sought, and were denied, an exemption. Declaration of Andrew S. ¶ 19.

The learning loss of both disabled and able body students has been staggering. Teachers have reported, across grade levels and across subjects, they have never before seen such low

academic performance levels among students. Declaration of Michelle Cooper, ¶ 15. One teacher with over 20 years teaching experience has seen students' grades drop by 40% due to increased absences, lack of engagement due to distraction caused by their masks and not submitting assigned work. *Id.* Another teacher noted 61% of his class is below grade level in math, as opposed to the typical 38% range. *Id.* Students' communication skills and normal social interactions are being impaired due to mask wearing, and educators are seeing large numbers of students who are demonstrating negative socio-emotional behaviors, such as fear, anxiety and depression. *Id.* at ¶ 17. Students with speech and auditory processing difficulties, are being negatively impacted by the masks because they muffle speech - leading to auditory miscues. *Id.* at ¶ 18. And while middle school and high school teachers are experiencing problems as well, a particularly heavy burden seems to be falling on Knox County elementary teachers. *Id.* at ¶ 21.

For children suffering from speech disorders, mask requirement greatly limits their ability to learn since the masks hide mouths from their teachers, peers, other students, or supporting adults. Brandon Decl., ¶ 6. Masks interfere with information that makes communication successful: correct speech productions, clarity of speech sounds, tracking who is speaking to attend to the speaker, and facial expression to correctly interpret emotion, volume of speech, and ultimately interferes with the ethical delivery of services. *Id.* They create barriers for the hearing impaired, and complicate learning for children with auditory processing disorder. *Id.* at ¶¶ 8-11. Children benefit from being able to interpret adult emotions, and not being able to see these nonverbal cues due to masking can lead to negative consequences such as loss of confidence, poor behavior, and fear. *Id.* at ¶ 13. For young learners, masking inhibits phonological awareness. *Id.* at ¶ 15. A masked face limits the clarity of speech, hides the lip reading cues, and the articulation cues to differentiate between the sounds. *Id.* Speech-Language Pathologists are

put in an untenable position. Masks limit clear information and instruction to students thereby extending the time spent in therapy. *Id.* at ¶ 15. As stated by Expert Language Speech-Language Pathologist Jean Brandon, "enforcing a mask mandate for [speech-language pathologists] forces them to make a decision to violate our Code of Ethics, or walk away from the position." *Id.*

And this damage is undertaken, at great expense to the most vulnerable, when it has no appreciable effect on COVID-19 cases in schools. Høeg Decl. at ¶ 22. Epidemiological data make clear that COVID-19 poses an extremely low risk to children. *Id.* at ¶¶ 8-18. Yet even if it *did* pose a greater risk, no study to date shows that school mask mandates reduce transmission or disease. *Id.* at ¶ 20. Numerous studies and reports indicate that masking students has not had an appreciable effect on COVID-19 cases in schools. *Id.* at ¶¶ 20-48. As stated by Dr. Høeg, "given the absence of any clear benefit, the social and developmental harms that all students experience cannot justify this medical intervention." *Id.* at ¶¶ 47-54. Further, the medical intervention of masking healthy children without clear evidence that the benefits outweigh the harms is "unethical." *Id.* at ¶ 54.

Knox County children have suffered tremendous ongoing harm due to the mask mandate.

V. THE COURT'S ORDER IS NOT A REASONABLE ACCOMMODATION UNDER THE ADA

The Sixth Circuit has held that Title II of the ADA requires public entities to abstain from intentional discrimination against individuals with disabilities and to provide reasonable accommodations to them in order to enable them access to publicly provided benefits. *Marble v. Tennessee*, 767 F. App'x 647, 651 (6th Cir. 2019). Both the Sixth Circuit and the Supreme Court have looked to the Code of Federal Regulations for determining how a reasonable accommodation is defined:

> A public entity shall 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.

Id. (quoting *Fry v. Napoleon Cmty. Schs*., 137 S. Ct. 743, 749 (2017) (quoting 28 C.F.R. § 35.130(b)(7) (2016)).

The Sixth Circuit has rejected accommodations as unreasonable along two lines: 1) when the accommodation serves to fundamentally alter a policy, and 2) when the accommodation impairs the rights of third parties. *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 491–92 (6th Cir. 2019). Here, both are implicated.

A. The Forced Masking Policy Is An Impermissible Fundamental Alteration Of Policy

"[G]overnmental entities need not accommodate disabled individuals if doing so would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. *Hindel v. Husted*, 875 F.3d 344, 347 (6th Cir. 2017) (citing to 28 C.F.R. § 35.164). The defense that an accommodation is a fundamental alteration is "typically fact-based and not capable of resolution on the basis of pleadings alone." *Id*. In considering whether an accommodation is a fundamental alteration, the focus should be on "whether waiver of the rule in the particular case would be so at odds with the purpose behind the rule that it would be a fundamental and unreasonable change." *Jones v. City of Monroe, MI*, 341 F.3d 474, 480 (6th Cir. 2003) (quoting *Dadian v. Village of Wilmette*, 269 F.3d 831, 838–39 (7th Cir.2001).

In *Jones*, the Sixth Circuit found that a disabled plaintiff's request for an exemption from a one-hour parking limit as an accommodation for mobility disability was "'at odds' with the fundamental purpose of the rule" and thus unreasonable as a fundamental alteration. 341 F.3d 474, 480 (6th Cir. 2003). The Court found that an accommodation that would serve to provide disabled

individuals immunity from prosecution for violating the parking ordinance was "by its very nature" a "fundamental alteration of the rule itself" and therefore unreasonable. *Id*.

In the educational context, the Sixth Circuit has found that a request for accommodation that forces an educational institution into making highly individualized determinations of conflicting rights between students is unreasonable. In *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036–37 (6th Cir. 1995), the Sixth Circuit found that a student's request for lifting an age restriction that limited his ability to participate in athletics as an older student who was held back due to a learning disability was an unreasonable alteration of school policy because "[t]e daunting task of determining whether an older student possesses an unfair competitive advantage is not a 'reasonable modification[ ],' just as the task is not a 'reasonable accommodation.' We add only that the word "modification" "connotes moderate change, [] and nothing in the context or structure of [T]itle II suggests otherwise." Quoting *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218 (1994).

In *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 462–63 (6th Cir. 1997), the Sixth Circuit applied the same logic as in *Jones* to a plaintiff's requested accommodation of a general waiver of the age-restriction for disabled students. The Sixth Circuit rejected this proposal in strong terms:

> The plaintiff would have us require waivers for all learning-disabled students who remain in school more than eight semesters. That, of course, would have the potential of opening floodgates for waivers, while until now, there have been only a handful of cases deemed appropriate for waivers. Assessing one or two students pales in comparison to the task of assessing a large number of students; an increase in number will both increase the cost of making the assessments, as well as increase the importance of doing so correctly. Having one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high-school sports.

Id. Part of the Court's concern was the "immense administrative burden" that would be placed on schools from needing to "sort out legitimate requests from those based on a desire to gain an unfair advantage," which "necessarily mean[t] that the plaintiff's requested accommodation [was] not reasonable." *Id*.

Here, the mask mandate is inflexible and stringent. Exceptions were so narrow that named-Plaintiffs were kept from receiving and education, even when the court's policy went against the express opinions of their medical providers. The Court effectively put its thumb on the disability scale, counting some with disabilities as "more equal" than others. The one-size-fits all approach of the Court's masking order necessarily meant that administrators had the impossible task of determining how the disabilities of the Plaintiffs and their inability to wear masks compared to the disabilities of the original plaintiffs and their requested accommodation for all other students to wear masks.

As in *McPherson*, school administrators are put in the position not of assessing the needs of one or two students, but the needs of all disabled students as a class, each of whom has his and her own highly unique needs, in order to determine how each student's issue surrounding masks slotted into the regime created by the Court's Order. The task placed upon administrators is clearly too costly and difficult, as evidenced by the Kafka-esque bureaucratic nightmare experienced by the K.A., K.M., C.G., A.S., and M.A..

The move from the "freedom to -mask" policy to the mandatory-masking policy as an accommodation resembles the proposed smoking ban in *Davis* that the Sixth Circuit struck down as an impermissibly altering "rewrite" rather than a reasonable "adjustment." *Davis*, 945 F.3d at 483. Accordingly, the Court's Order does not constitute a reasonable accommodation because it has served a fundamental alteration of the school's normal function and policy and led to the denial

of the Plaintiffs' right to education due to the incapacity for schools to manage the policies required by the unreasonable accommodation.

B. The Court's Order Is An Impermissible Violation Of The Plaintiffs' Third Party Rights

The Sixth Circuit has also recognized that proposed accommodations for disabilities are not reasonable when they interfere with the rights of third parties. In *Davis*, the Sixth Circuit also considered that the plaintiff's proposed accommodation of a smoking ban in his condominium community would "intrude on the rights of third parties". *Id*. "Neighbors who smoke may well have bought their condos because of the Association's policy permitting smoking. So, unlike the blind applicant asking to keep a seeing eye dog in an apartment building that bans pets, Davis is like the person with allergies seeking to expel all dogs from a building that allows pets." *Id*.

In *Groner v. Golden Gate Gardens Apartments*, the Sixth Circuit declared that a third party's "rights did not have to be sacrificed on the altar of reasonable accommodation." 250 F.3d 1039, 1046 (6th Cir. 2001) (quoting *Temple v. Gunsalus*, No. 95–3175, 1996 WL 536710, at *2 (6th Cir. Sept.20, 1996)). The Court took "all of the circumstances into account" and determined that "the balance of equities" in the case did not weigh in favor of the plaintiff seeking accommodation. *Id*. The plaintiff suffered a mental illness that caused him to disturb a neighbor by screaming and slamming doors at all hours of the night. *Id*. The plaintiff made several proposals for how his landlords could accommodate his disability, including forcing his neighbor to move, finding him a neighbor who is hearing impaired and would be undisturbed by his noisemaking, and extensively soundproofing his apartment. *Id*. The Sixth Circuit rejected all of these proposed accommodations because "a reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person" and "because [the defendant] has a legitimate interest in ensuring the quiet enjoyment of *all* of its tenants, and

because there has been no showing of a reasonable accommodation that would have enabled [the plaintiff] to remain in his apartment without significantly disturbing another tenant." *Id*. at 1047.

Both the Supreme Court and the Sixth Circuit have found that proposed accommodations are unreasonable for interfering with third party rights in the employment context. *See Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 1251–52 (6th Cir. 1985); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *Adams v. Potter*, 193 F. App'x 440, 445 (6th Cir. 2006).

In the present case, the Plaintiffs' rights to receive an education, to be free of physical, emotional, mental, and developmental harm have been transgressed against by the accommodation afforded to the Defendants. The mask mandate is an impermissibly burdensome accommodation that interferes with the rights of third parties. If the interests of third parties in the cases referenced above—to smoking, to quiet-living, and to a bargained-for employment scheme—were significant enough to balance equities and find that proposed accommodations that threatened them were unreasonable, how much more so should it be with the Plaintiffs' interests here. The harms suffered by the Plaintiffs as third parties to the Defendants' accommodation outstrips any of the third-party harms that were sufficient for the Supreme Court and the Sixth Circuit find made a proposed accommodation unreasonable.

V. CONCLUSION

For the reasons discussed here, the Court should grant Plaintiffs Rule 60(b) motion and immediately free Knox County Students from forced masking.

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CERTIFICATE OF SERVICE

I certify that this document or pleading was served via the Court's ECF Filing System on all users authorized and directed to receive such service, this 3rd day of March, 2022.

s/Jesse D. Nelson