IN THE
SUPREME COURT OF VIRGINIA

Record No. 220033

MATTHEW CASTILLO, et al.,
Petitioners,

v.

GLENN A. YOUNGKIN, in his official capacity as Governor of Virginia, et al.,
Respondents.

RESPONSE TO VERIFIED PETITION FOR WRIT OF MANDAMUS

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January 20, 2022

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MOTION TO DISMISS

Pursuant to Rule 5:7(b)(6), respondents move to dismiss the Verified Petition for Writs of Mandamus and Prohibition because petitioners lack standing, mandamus and prohibition are improper remedies for the relief petitioners seek, and petitioners fail to state facts upon which relief should be granted.

BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF THE CASE

The COVID-19 pandemic has posed a significant public health challenge in our public schools. State and local officials have struggled to balance the critical importance of in-person education and the fundamental right of all parents to direct the upbringing, care, and education of their children, *see* Code § 1-240.1, against mitigating the transmission of the virus. Nowhere have these interests been in greater conflict than with regard to the decision of some school boards to require children to wear masks in school irrespective of their parents' wishes.

The General Assembly conferred on the Governor broad authority to address these challenges. *See* Code § 44-146.17. On January 15, 2022, Governor Glenn Youngkin exercised that authority to issue Executive

Order 2 (EO 2), which allowed parents to "elect for their children not to be subject to any mask mandate in effect at the child's school or educational program." In so doing, EO 2 restores to parents the authority to assess the risks and benefits COVID-19 poses to their children's specific circumstances and to make the best decision for their children based on current health information.

Petitioners are parents of students enrolled in Chesapeake City Public Schools who prefer that school boards, rather than parents, decide whether children should wear masks in public schools. On January 18, 2022, petitioners filed a petition for a writ of mandamus and prohibition contending that EO 2 violates Senate Bill 1303, 2021 Acts ch. 456 (Spec. Sess. I), and exceeds the Governor's executive authority. Pet. 6–7. Accordingly, petitioners ask this Court to declare EO 2 void and to "grant prohibition, mandamus and other appropriate relief."

LEGAL STANDARD

Petitioners seek writs of mandamus and prohibition. These are both extraordinary remedies and, for that reason, this Court has "carefully scrutinized and imposed limitations upon" their use. *Hertz v. Times-World Corp.*, 259 Va. 599, 607 (2000). They are not awarded as a

matter of right; instead, this Court issues them only "in the exercise of [its] sound judicial discretion." *Richmond-Greyhound Lines v. Davis*, 200 Va. 147, 151 (1958).

A. Mandamus

"Mandamus is an extraordinary remedy which may be used to compel a public official to perform a duty which is purely ministerial and which is imposed upon the official by law." *Gannon v. State Corp. Comm'n*, 243 Va. 480, 481–82 (1992). This Court does not issue a writ of mandamus unless (1) the petitioner has a "clear right . . . to the relief sought," (2) the respondent had a "legal duty . . . to perform the act which the petitioner seeks to compel," and (3) the petitioner has available "no adequate remedy at law." *Bd. of Cnty. Supr's v. Hylton Enters.*, 216 Va. 582, 584 (1976) (citing *Richmond-Greyhound Lines*, 200 Va. at 152). If the petitioner fails to establish any of these elements, the Court will not issue the writ. *Richmond-Greyhound Lines*, 200 Va. at 152. And even if the petitioner satisfies them all, the Court does not issue the writ as a matter of right; issuance remains a matter of the Court's discretion. *Id.* "In doubtful cases the writ will be denied." *Id.* at 151.

B. Prohibition

Similarly, "[a] writ of prohibition is an extraordinary remedy employed 'to redress the grievance growing out of an encroachment of jurisdiction.'" *In re Commonwealth's Att'y for City of Roanoke*, 265 Va. 313, 316 (2003) (quoting *Elliott v. Great Atl. Mgmt. Co.*, 236 Va. 334, 338 (1988)). The purpose of the writ of prohibition is to supervise courts and judicial proceedings, not executive officers. *See Howell v. McAuliffe*, 292 Va. 320, 353 n.19 (2016) (Writs of prohibition "are traditionally issued by 'superior courts to the inferior courts, to restrain the latter from excess of jurisdiction.'" (original alterations omitted) (quoting *Burch v. Hardwicke*, 64 Va. 51, 58 (1873))); *see also* 3 William Blackstone, Commentaries *111–12 (explaining that, at common law, the writ of prohibition was to restrain courts from asserting jurisdiction they did not have); James L. High, A Treatise on Extraordinary Legal Remedies § 762, at 705–06 (3d ed. 1896) (defining the writ of prohibition as "an extraordinary *judicial* writ" issued "for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested" (emphasis added)).

ARGUMENT

The Court should dismiss the petition for three independent reasons. First, petitioners lack standing because they have failed to identify any cognizable injury of any kind, or to explain how any such injury is particularized to them. Second, the petition seeks relief that is unavailable in this Court's original jurisdiction, as neither mandamus nor prohibition is a substitute for the injunctive relief petitioners seek from this Court. Finally, even if the petitioners had standing and their petition were procedurally proper, this Court should reject their claim on the merits because they have failed to identify a "clear right . . . to the relief sought." *Hylton Enters.*, 216 Va. at 584. Because petitioners' right to relief is far from "clear and certain," they are not entitled to the "drastic" and "extraordinary" remedy they seek and the petition for writs of mandamus and prohibition should be dismissed. *Gannon*, 243 Va. at 482 (quoting *Richmond-Greyhound Lines*, 200 Va. at 151–52).

I. Petitioners lack standing as they have neither alleged nor suffered any particularized injuries.

No party may invoke the original jurisdiction of this Court unless they have standing to do so. *Park v. Northam*, Record No. 200767, slip

op. at 5 (Aug. 24, 2020) (unpublished).[1] The petitioner "must allege facts indicating he or she has suffered a 'particularized' or 'personalized' injury due to [a governmental] action" to have standing to challenge that action via extraordinary writ. *Park*, slip op. at 5 (quoting *Wilkins v. West*, 264 Va. 447, 460 (2002)); *see also Howell*, 292 Va. at 330 ("It is incumbent on petitioners to allege facts sufficient to demonstrate standing."). Simply "taking a position and then challenging the government to dispute it" is insufficient to establish standing. *Lafferty v. Sch. Bd.*, 293 Va. 354, 365 (2017) (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 231 (1964)). Instead, a petitioner "must demonstrate a ripe justiciable controversy by alleging an 'actual or potential injury in fact based on present rather than future or speculative facts.'" *Park*, slip op. at 5 (quoting *Lafferty*, 293 Va. at 361).

This Court has recently addressed standing in petitions for extraordinary writs challenging executive actions responding to the COVID-19 pandemic. In *Marrs v. Northam*, this Court refused to issue a writ of mandamus to a voter who challenged the Governor's executive

[1] Unpublished opinions and orders are cited herein as information pursuant to Rule 5:1(f).

order halting all in-person instruction in all Virginia public schools. *Marrs v. Northam*, Record No. 200573, slip op. at 2, 8 (June 17, 2020) (unpublished). This Court explained that standing is "a preliminary jurisdictional issue unrelated to the merits of [the] case." *Id.* at 4. Where no evidence is taken, a party's factual allegations—if any—are "presumed to be true when considering whether he or she has standing to request the relief sought." *Id.* "'The concept of standing concerns itself with the characteristics of the [individuals] who file[] suit' and their interest in the outcome, and the requirements of standing apply to petitioners seeking writs of mandamus." *Park*, slip op. at 5 (quoting *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 120 (2007)).[2]

[2] The importance of a case is irrelevant to the standing inquiry. Regardless of how "interesting and important to the public [a case] may be," a court will not hear it unless petitioners show they are "aggrieved in some manner peculiar unto [themselves], aside and apart from that of other . . . residents." *Nicholas v. Lawrence*, 161 Va. 589, 592–93 (1933). This principle prevents courts from improvidently answering "abstract questions" that "lack any real 'errors injuriously affecting' the complaining litigants." *Howell*, 292 Va. at 335 (quoting *Nicholas*, 161 Va. at 593).

Petitioners claim to have standing to seek relief before this Court because they are parents and "have constitutionally recognized and protected rights and interests in caring for and protecting their children." Pet. 2. That is the sum total of petitioners' argument on standing. Although respondents agree that parents have a fundamental interest in the upbringing, education, and care of their children, *see infra* section III, this interest alone does not confer standing to sue for three reasons.

First, petitioners have failed entirely to allege any injury at all. They claim they are "likely to suffer irreparable harm and damage if this Court declines to grant immediate relief." *Id.* at 8. But that is a legal conclusion, not an allegation of fact. Petitioners must allege *facts* sufficient to demonstrate how the challenged conduct will invade their "immediate, pecuniary, and substantial interest," *Westlake Props.*, 273 Va. at 120 (quoting *Harbor Cruises, Inc. v. State Corp. Comm'n*, 219 Va. 675, 676 (1979)), which invasion could be redressed by their requested relief, *see Goldman v. Landsidle*, 262 Va. 364, 371 (2001). But petitioners do not allege how they will be injured; the nature and scope of those injuries; or how the injuries would arise in the absence of the requested

relief. The absence of any factual allegations demonstrating their injuries is fatal to their petition.[3]

Second, even assuming that the "harm and damage" claimed by petitioners is an increased risk of COVID-19 transmission caused by some parents choosing to have their children wear masks for less than the entire school day, petitioners have failed to allege how any of their putative injuries are particularized to them. They claim to suffer injury as "parents of children currently enrolled as students in Chesapeake City Public Schools." Pet. 2. But any such injury is shared by every other parent of public-school students in Chesapeake—and, indeed in the entire Commonwealth. That is not a "unique injury or potential injury that would provide a basis for standing." *Lafferty*, 293 Va. at 364;

[3] A petitioner may also establish standing by identifying a statute by which the General Assembly has created a "statutory right" to recovery. *Goldman*, 262 Va. at 373. Petitioners have identified no such statutory right in their petition. Although petitioners contend that EO 2 contravenes Senate Bill 1303, 2021 Acts ch. 456 (Spec. Sess. I), they do not assert that this enactment "gives them a legally enforceable right to have a court compel the [respondents] to perform [their] duties in the manner they request." *Goldman*, 262 Va. at 374; *see also Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 315 (2016) (discussing the requirements of statutory standing).

see also Goldman, 262 Va. at 373 (petitioners must allege "a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large"). Petitioners have "merely stated that they are parents of a child in the school district," which is insufficient to establish standing. *Lafferty*, 293 Va. at 364.

Third, even if this Court were to conclude that petitioners have alleged sufficient facts to establish a cognizable injury particularized to them, that injury is incapable of redress by a judicial order. Hours before respondents filed this response, the Chesapeake School Board voted 7-to-1 to make masking optional in Chesapeake City Public Schools beginning on January 24, 2022. Nathan Crawford, *Chesapeake School Board Votes to Remove Mask in Alignment with Youngkin's Executive Order*, WAVY (Jan. 20, 2022, 6:35 p.m.), https://tinyurl.com/2p8h4dkz. The Chesapeake School Board's independent decision to lift its mask mandate means that whatever injury petitioners believe they have suffered is not fairly traceable to EO2 and cannot be redressed by the relief they seek.

Petitioners' failure to allege any facts supporting their claim to standing defeats their entitlement to mandamus. Accordingly, considering the "total absence of any allegation of a particularized injury," this Court should hold that petitioners have "not established [their] standing to challenge any of the provisions [they] claim[] are unlawful" and dismiss the petition. *Marrs*, slip op. at 4.

II. Petitioners inappropriately invoke this Court's original jurisdiction to seek injunctive relief under the guise of mandamus and prohibition.

Although presented as a petition for writs of mandamus and prohibition, petitioner in fact seeks traditional injunctive relief. "[M]andamus is always granted to compel the performance of some duty which has not been done" rather than as "a preventive remedy"; "its purpose and object is to command performance, not desistance." *Bd. of Supr's v. Combs*, 160 Va. 487, 498 (1933). The "function of an injunction is 'to restrain motion and enforce inaction,'" whereas "the function of mandamus is 'to set in motion and compel action.'" *Adkins v. Va. Redistricting Comm'n*, Record No. 210770, slip op. at 6 (Sept. 22, 2021) (unpublished) (quoting James L. High, A Treatise on Extraordinary Legal Remedies § 6, at 10 (1874)). "An injunction preserves the status quo, while 'the

very object of [mandamus] is to change the status of affairs and to substitute action for inactivity.'" *Id.* (original alterations omitted) (quoting High, A Treatise on Extraordinary Legal Remedies § 6, at 10).

Petitioners' objective here is not to compel respondents to take any action. Petitioners readily acknowledge that they "are seeking to restrain, invalidate and prevent" respondents from "engag[ing] in certain actions that are opposed by petitioners." Pet. 3. As this Court held in *Adkins*, "asking the Court to prevent the respondents from taking certain actions" is an improper "attempt to use mandamus as a substitute for injunction," which this Court lacks original jurisdiction to issue. *Adkins*, slip op. at 6, 8. Accordingly, mandamus does not lie for the relief petitioners seek.

Petitioners also improperly invoke the writ of prohibition as a substitute for injunctive relief. The petition asks this Court to award "writs of prohibition to *prevent and restrain* the respondents from taking action based on" the directive portion of EO 2 or in violation of Senate Bill 1303, 2021 Acts ch. 456 (Spec. Sess. I). Pet. 9–10 (emphasis added). Prohibition, however, is not a synonym for injunction. It is instead a nar-

row extraordinary remedy available only to restrain a judicial act exceeding the tribunal's authority. *See In re Commonwealth's Att'y*, 265 Va. at 316–17. A writ of prohibition may issue to restrain courts and quasi-judicial bodies attempting to exceed their judicial powers, but it is unavailable outside the judicial context. *Bee Hive Mining Co. v. Indus. Comm'n of Va.*, 144 Va. 240, 242–43 (1926). Because "this matter does not involve the use of judicial powers . . . prohibition does not lie." *Adkins*, slip op. at 7.

III. Petitioners have not identified a clear right to relief.

Even if petitioners could establish that they have standing and that they are seeking an appropriate remedy, this Court should decline to issue the relief requested for several reasons. First, EO 2 does not conflict with Senate Bill 1303, 2021 Acts ch. 456 (Spec. Sess. I), as petitioners claim. Pet. 6. Senate Bill 1303 directs schools to follow the *guidelines* recommended by the federal Centers for Disease Control and Prevention (CDC), *see* Senate Bill 1303, § 2 (Spec. Sess. I); neither it nor those guidelines impose a "mask mandate[]," Pet. 6.[4]

[4] *E.g.*, CDC, *Omicron Variant: What You Need to Know* (Dec. 20, 2021), https://tinyurl.com/2kyzk62e; CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (Jan. 13, 2022), https://tinyurl.com/yutek7ne.

And even if the CDC issued something other than recommendations, Senate Bill 1303 would not require rigid adherence to every CDC promulgation; instead, the bill explicitly provides that in-person instruction should be provided in a manner which adheres "*to the maximum extent practicable*, to any currently applicable mitigation strategies" provided by the CDC for childcare and education programs. Senate Bill 1303, § 2 (Spec. Sess. I) (emphasis added). It does not (and could not) require schools unthinkingly to adopt *every* item on the vast menu of options that exist for warding off COVID-19 in schools, a list starting at social distancing and extending all the way to "replacement and upgrades of equipment to improve the indoor air quality in school facilities, including . . . ventilation, and air conditioning systems, filtering purification, fans, [and] control systems."[5] EO 2.

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[5] Indeed, a wide range of studies demonstrate that the benefits of compelling children to wear masks in school remain unclear. At least one study concluded that compulsory mask mandates for students had no statistically significant effect on the transmission of the virus. Jenna Gettings, et al., *Mask Use and Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools — Georgia, November 16–December 11, 2020*, CDC (May 28, 2021) https://tinyurl.com/nhbb8cud.

On the other hand, the masks most commonly used by school children have been shown to pose serious health risks rather than protection. *See* ScienceDaily, *Cloth Masks: Dangerous to Your Health?* (Apr.

Second, contrary to petitioners' contention that "primary responsibility for public school education" is shared by *only* the General Assembly and local school boards, Pet. 6–7, parents play a fundamental role in the education of their children. Indeed, the General Assembly has statutorily enshrined each parent's "fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." Code § 1-240.1. The Virginia Constitution directs the Governor to "take care that the laws," including Section 1-240.1, "be faithfully executed,"

22, 2015), https://tinyurl.com/mr3m7tuc. At least one study from members of Brown University has concluded that "masks worn in public settings and in school or daycare settings may impact a range of early developing skills, such as attachment, facial processing, and socioemotional processing." Sean CL Deoni, et al., *Impact of the COVID-19 Pandemic on Early Child Cognitive Development: Initial Findings in a Longitudinal Observational Study of Child Health* (Aug. 11, 2021), https://tinyurl.com/rn4zdf5n. A professor of psychology, despite concluding that the benefits of wearing masks for children outweigh the costs of the overall pandemic, even expressed concern that mask wearing especially negatively affects those "kids whose lingual or social development is atypical." Kristen Rogers, *Does Mask Wearing Harm Your Child's Development? Experts Weigh In*, CNN (Aug. 11, 2021), https://tinyurl.com/479f4y7k. And those costs are especially alarming given multiple observations regarding the "dubious findings" on which these mandates rest. *See* David Zweig, *The CDC's Flawed Case for Wearing Masks in School*, The Atlantic (Dec. 16, 2021), https://tinyurl.com/5n73wd8e.

Va. Const. art. V, § 7, and EO 2 does just that, *see* EO 2 ("Under Virginia law, parents, not the government, have the fundamental right to make decisions concerning the care of their children.").

Last, it is exactly because, as petitioners note, "COVID-19 has proved to be a deadly and highly destructive virus with high transmissibility and constantly evolving variants that have made it difficult to control and protect against," Pet. 7–8, that the General Assembly bestowed broad emergency powers on the Governor. Code § 44-146.17. Indeed, the previous Governor invoked this emergency authority to order sweeping measures ostensibly directed toward reducing transmission of COVID-19 by forbidding Virginians from leaving their homes for any other than a small number of enumerated reasons, Executive Order 55 (2020); halting all-in person education across the entire Commonwealth, Executive Order 53 (2020) (Amended); ordering all Virginians to wear masks in public, Executive Order 63 (2020); and ordering all schools to impose mandatory mask mandates, Executive Order 79 (2021). Governor Youngkin has invoked these same powers to remove requirements that have proven ineffective in combatting transmission of COVID-19 and instead focus on more practical methods for reducing the spread of

the disease, such as improving inspection, testing, maintenance, repair, replacement, and upgrades of equipment to improve the indoor air quality in school facilities. These actions are assuredly within powers the same emergency power previously invoked to compel the donning of masks and to forbid in-person education.

CONCLUSION

For the foregoing reasons, the petition for writs of mandamus and prohibition should be dismissed.

Respectfully submitted,

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January 20, 2022

CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on January 20, 2022, this document was filed electronically with the Court through VACES. This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages or 8,750 words. A copy was electronically mailed to:

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