

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

ALEXANDRIA CITY SCHOOL BOARD,)
ARLINGTON COUNTY SCHOOL BOARD,)
FAIRFAX COUNTY SCHOOL BOARD,)
FALLS CHURCH CITY SCHOOL BOARD,)
HAMPTON CITY SCHOOL BOARD,)
PRINCE WILLIAM COUNTY SCHOOL BOARD,)
RICHMOND CITY SCHOOL BOARD,)

Plaintiffs,)

v.)

Case No. _____

GLENN A. YOUNGKIN, Governor of Virginia,)

Serve: Honorable Glenn A. Youngkin)

Capitol Square)

1111 East Broad Street)

Richmond, VA 23219)

Defendant.)

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Alexandria City School Board, Arlington County School Board, Fairfax County School Board, Falls Church City School Board, Hampton City School Board, Prince William County School Board, and Richmond City School Board (collectively, “Plaintiffs” or the “School Boards”), by counsel, state as follows for their Complaint for Declaratory and Injunctive Relief against Defendant Glenn A. Youngkin, Governor of Virginia (the “Defendant” or the “Governor”).

Introductory Statement and Importance of the Issues

This case presents fundamental questions about the framework for public education in Virginia, as set out in the Constitution of Virginia and in the laws passed by the General

Assembly. At issue is whether locally-elected school boards will maintain the exclusive authority and responsibility conferred upon them by Article VIII, Section 7 of the Constitution of Virginia to supervise the public schools in their respective school divisions or whether the Governor can unilaterally infringe upon that authority through an executive order. Specifically, the School Boards have adopted, based upon authoritative medical guidance, and taking into consideration the current conditions and experience in their particular schools and communities, policies and practices calling for the continued wearing of masks by all students and staff while at school to best protect them and their families from transmission of the COVID-19 virus. The Governor recently issued an executive order¹ that effectively would render the School Boards' policies and practices meaningless. Also at issue is whether the Governor can, through executive order and without legislative action by the General Assembly, reverse Senate Bill 1303 ("S.B. 1303"), a lawfully-adopted statute passed with bipartisan support for the protection of students and staff, providing that Virginia's local school boards should, to the maximum extent practicable, adhere to the health and safety requirements of the federal Centers for Disease Control and Prevention ("CDC") in order to satisfy their requirement to provide in-person instruction.

The question for this Court is whether, by executive order, a governor can override both the Constitution of Virginia and a law enacted by the General Assembly. The School Boards respectfully submit that the answer to this question is no.

This action is brought by seven local School Boards from around the Commonwealth that are directly and immediately impacted by EO2, which was issued by the Governor last week and becomes effective January 24, 2022, and effectively would nullify the well-considered decisions

¹ Executive Order Number Two (2022), styled "Reaffirming the Rights of Parents in the Upbringing, Education, and Care of Their Children," dated January 15, 2022 ("EO2").

of the School Boards (and others) that health conditions unique to their respective schools and communities necessitate that all students wear masks in school. Pursuant to Article VIII, Section 7 of the Constitution of Virginia, local school boards are vested with the authority and the responsibility to make that determination as part of their constitutional role to supervise the schools in their respective communities. The Governor's Executive Order to the contrary is a clear violation of the School Boards' constitutional rights and responsibilities, as well as to the entire structure for the supervision of public education in Virginia, prescribed by the Constitution of Virginia.

Furthermore EO2, which allows parents and guardians to exempt their students from any mask requirements of the School Boards, for any undisclosed reason or for no reason at all, is in direct violation of existing Virginia law, S.B. 1303, which was adopted with bipartisan support through Virginia's legislative process just last spring. As a way of returning students to in-person learning, and ensuring that they can stay in school, S.B. 1303 requires that local school boards adhere insofar as practicable to the recommendations of the CDC. Currently, the CDC recommends universal indoor masking for students, staff, and visitors in schools, in recognition that masks protect not only the wearer, but also those who may be infected by virus particles emitted by the wearer. The School Boards' masking policies have been not only practicable, but essential, in allowing nearly all students, nearly all of the time, to continue in-person learning over the course of this school year, even as COVID-19 cases in the School Boards' communities (and in Virginia and across the country) have skyrocketed. Understandably, these masking policies are supported by a clear majority of parents and students in the communities represented by the School Boards.

The School Boards ask that this Court resolve the conflict presented by EO2, so as to preserve their exclusive constitutional authority to supervise the local schools of their division as conferred by Article VIII, Section 7 and other provisions of the Constitution of Virginia. The School Boards further ask this Court to uphold the provisions of S.B. 1303, as it applies to the School Boards.

Accordingly, the School Boards ask that the situation be returned to the status quo as it existed before the Governor issued EO2, that the Court issue a judgment declaring that the provisions of EO2 pertaining to local school boards are contrary to the Constitution of Virginia and a law enacted by the General Assembly, and that the Governor be enjoined from further enforcement of EO2.

Parties

1. Plaintiff Alexandria City School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of the City of Alexandria, Virginia, known as the “Alexandria City Public Schools.” In that role, the Alexandria City School Board serves over 15,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Alexandria City School Board also employs approximately 2,500 teachers and other school-based staff working directly with students in schools.

2. Plaintiff Arlington County School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of Arlington County, Virginia, known as the “Arlington Public Schools.” In that role, the Arlington County School Board serves over 27,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up

to the age of 22. The Arlington County School Board also employs over 5,500 teachers and other school-based staff working directly with students in schools.

3. Plaintiff Fairfax County School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of Fairfax County, Virginia, known as the “Fairfax County Public Schools.” In that role, the Fairfax County School Board serves over 178,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Fairfax County School Board also employs over 23,000 teachers and other school-based staff working directly with students in schools.

4. Plaintiff Falls Church City School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of the City of Falls Church, Virginia, known as the “Falls Church City Public Schools.” In that role, the Falls Church City School Board serves over 2,500 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Falls Church City School Board also employs close to 500 teachers and other school-based staff working directly with students in schools.

5. Plaintiff Hampton City School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of the City of Hampton, Virginia, known as the “Hampton City Schools.” In that role, the Hampton City School Board serves almost 19,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Hampton City School Board also employs over 2,800 teachers and other school-based staff working directly with students in schools.

6. Plaintiff Prince William County School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of Prince William County, Virginia, known as the “Prince William County Public Schools.” In that role, the Prince William County School Board serves over 89,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Prince William County School Board also employs over 12,000 teachers and other school-based staff working directly with students in schools.

7. Plaintiff Richmond City School Board is the body corporate vested with the authority and duty under the Constitution and statutes of the Commonwealth of Virginia to supervise and operate the public schools of the City of Richmond, Virginia, known as the “Richmond Public Schools.” In that role, the Richmond City School Board serves over 22,000 students from prekindergarten (age 2 or 3) through 12th grade, as well as students with special needs up to the age of 22. The Richmond City School Board also employs over 3,000 teachers and other school-based staff working directly with students in schools.

8. The Alexandria City Public Schools, Arlington Public Schools, Fairfax County Public Schools, Falls Church City Public Schools, Hampton City Schools, Prince William County Public Schools, and Richmond Public Schools, which are responsible for the education, health, and safety of over 350,000 students and almost 50,000 teachers and school-based staff, are collectively referred to herein as the “School Divisions.”

9. Defendant Glenn A. Youngkin is the Governor of Virginia. He is sued in his official capacity.

Jurisdiction and Venue

10. This Court has jurisdiction over this action on the grounds that all parties are governmental entities in Virginia or residents of Virginia.

11. This Court is a proper venue pursuant to Code of Virginia section 8.01-261(15)(c), on the grounds that it is located in a county in which acts at issue are to be done, and are being done; and, pursuant to Code of Virginia section 8.01-262(4), on the grounds that all or part of the cause of action arises in this jurisdiction, for at least two of the school boards at issue herein.

Factual Background

The COVID-19 Pandemic and Its Effect on In-Person Learning

12. Coronavirus disease 2019 (“COVID-19”) is a contagious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The first known case was identified in Wuhan, China, in December 2019 and, since then, COVID-19 has spread around the world, including within the United States of America and throughout Virginia.

13. The United States detected its first COVID-19 case on January 21, 2020.² As of January 21, 2022, there had been 340,543,962 confirmed cases of COVID-19 globally, including 5,570,163 deaths.³ The United States alone has had 70,206,220 confirmed cases of COVID-19, including 862,494 deaths.⁴

² See First Travel-related Case of 2019 Novel Coronavirus Detected in United States, Centers for Disease Control and Prevention (Jan. 23, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

³ See WHO Coronavirus Disease (COVID-19) Dashboard, World Health Organization, <https://covid19.who.int/> (last visited Jan. 23, 2022).

⁴ See CDC COVID Data Tracker, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 23, 2022).

14. Virginia has had 1,451,713 cases of COVID-19, including 15,852 deaths.⁵ In addition, 46,906 Virginians have been hospitalized as of January 21, 2022, because of COVID-19.⁶

15. Children aged 9 and under account for 112,577 of Virginia’s COVID-19 cases, while children aged 10 to 19 account for 184,638 cases.⁷

16. Children are a source of COVID-19 transmission, and children, therefore, present a risk of spreading COVID-19 to parents, teachers, school staff, the community, and other children.⁸ The evidence and data gathered to date indicates that children may be efficient transmitters of the virus, especially older children. The result of studies that took place in 2020 indicates that children over 10 can transmit COVID-19 as effectively as adults.⁹ In addition, children may carry higher viral loads, even though they can be less symptomatic than adults, which has significant implications for community transmission.¹⁰ Accordingly, it is a serious concern that if children attending school become infected, they may infect other children, school

⁵ See <https://www.vdh.virginia.gov/coronavirus/see-the-numbers/covid-19-in-virginia> (last visited Jan. 23, 2022).

⁶ *Id.*

⁷ See <https://www.vdh.virginia.gov/coronavirus/see-the-numbers/covid-19-in-virginia/covid-19-in-virginia-demographics> (last visited Jan. 23, 2022).

⁸ See Mubbasheer Ahmed *et al.*, Multisystem Inflammatory Syndrome In Children: A Systematic Review, *The Lancet* (Sept. 4, 2020), [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30271-fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30271-fulltext)).

⁹ See Contact Tracing during Coronavirus Disease Outbreak, South Korea, 2020, available at https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article.

¹⁰ See Paul LA, Daneman N, Schwartz KL, *et al.* Association of Age and Pediatric Household Transmission of SARS-CoV-2 Infection. *JAMA Pediatr.* 2021;175(11):1151–1158. doi:10.1001/jamapediatrics.2021.2770 (“Several studies of age-specific viral shedding of SARS-CoV-2 have reported that viral loads in children are similar or higher than viral loads in adults.”).

staff, and persons with whom they live, including children and adults with an increased risk for severe illness.

17. Children who recover from COVID-19 may also experience complications, including cardiac lesions and multisystem inflammatory disorder, after recovering from the disease.¹¹ The disease presents even greater risks for children with underlying health conditions.¹²

18. The widespread and devastating impact of the COVID-19 pandemic resulted in the statewide closure of all of Virginia’s public and private schools for in-person instruction from March 13, 2020, until the end of school year 2019-20.¹³

19. Since it was identified in December 2019 and through the present, COVID-19 has continued to spread throughout the world, the United States, and the Commonwealth of Virginia. At least twelve new variants of COVID-19 have emerged, including the Delta variant and, most recently, the Omicron variant, both of which the CDC has classified as “variants of concern.”¹⁴

20. Plaintiffs’ School Divisions, and many other school divisions in Virginia, began the 2020-21 school year exclusively with virtual learning. Over the course of that school year, Plaintiffs’ School Divisions gradually were able to return to some in-person instruction for most students who chose to return, utilizing “hybrid” models where students were in school part-time, and received the remainder of their instruction through a virtual, on-line platform. Even then,

¹¹ *Id.*

¹² *Id.*

¹³ See https://www.doe.virginia.gov/support/health_medical/office/covid-19-faq.shtml (last visited Jan. 23, 2022).

¹⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html> (last visited Jan. 23, 2022).

however, many schools were forced to return to all-virtual instruction during surges in COVID-19 infections in the community.

21. In all of Plaintiffs' School Divisions, numerous students are too young to receive any of the COVID-19 vaccines. In addition, all of Plaintiffs' School Divisions (as well as many others in Virginia) have numerous students and staff members with compromised immune systems or other medical conditions that do not allow them to receive vaccines or that render vaccines less effective or ineffective. Also, in all of Plaintiffs' School Divisions, some parents and guardians have chosen not to have their students immunized for other reasons.

22. All of the Plaintiffs' School Divisions have students and staff members who are particularly vulnerable to the effects of COVID-19, and for whom an infection with the virus could lead to serious illness or death, including many students with disabilities for whom the School Boards must provide a free and appropriate education as required by federal and state law and for whom in-person instruction best meets their needs. In addition to the students and the staff who attend and teach in the Plaintiffs' School Divisions, those students and staff have siblings, parents, guardians, and other family members – young and old – who cannot take or benefit from the COVID-19 vaccine due to age or medical condition, and who are particularly vulnerable to the effects of a COVID-19 infection, regardless of whether they have been vaccinated.

23. Children and young adults of school age in Virginia are required to attend school by virtue of the Commonwealth's compulsory attendance laws. In addition, students with special needs as young as age 2, and as old as age 22, attend public schools in order to receive the special education and related services they require to receive a beneficial education. Furthermore, at this point in time, teachers and other school-based staff members ordinarily are

required to be physically present at school. Particularly given that all of these students and staff members are required to be in school, it is vitally important that the School Boards act to protect them from the effects of a highly communicable disease such as COVID-19.

*Senate Bill 1303 Enacted to Help Return Students
to Full-Time In-Person Instruction*

24. It has been the experience of the School Boards and other school divisions generally – both in the Commonwealth and elsewhere – that in-person instruction is, to the greatest degree possible, important for the education of students. As such, the School Boards have made every effort to return to, and continue, in-person instruction for their students to the greatest degree possible, consistent with ensuring the health and safety of their students, their staff, and families.

25. In order to ensure that students in Virginia would return to, and continue, in-person education for the 2021-22 school year, the General Assembly adopted, and the governor signed on March 30, 2021, bipartisan-sponsored legislation, S.B. 1303, included in the 2021 Uncodified Acts of Assembly, Chapter 456. That legislation provides in relevant part:

§ 2. Each school board shall offer in-person instruction to each student enrolled in the local school division in a public elementary and secondary school for at least the minimum number of required instructional hours and to each student enrolled in the local school division in a public school-based early childhood care and education program for the entirety of the instructional time provided pursuant to such program. For the purposes of this act, each school board shall (i) adopt, implement, and, when appropriate, update specific parameters for the provision of in-person instruction and (ii) provide such in-person instruction in a manner ***in which it adheres, to the maximum extent practicable, to any currently applicable mitigation strategies for early childhood care and education programs and elementary and secondary schools to reduce the transmission of COVID-19 that have been provided by the federal Centers for Disease Control and Prevention.***

S.B. 1303 (emphasis added).

*Universal Masking Requirements as Part of Successful,
CDC-Recommended Mitigation Strategies Adopted by the School Boards*

26. For the 2021-22 school year, each of the School Boards, directly and/or through their respective division superintendents, have adopted a full range of mitigation strategies in order to reduce the transmission of COVID-19 among students, school staff, and visitors in the school environment. Those mitigation strategies include the requirement that, with the exception of a very small number of students with documented medical or religious exemptions, all students, school staff, and visitors who are present within the schools in the division – whether vaccinated or unvaccinated – must wear a face covering over the nose and mouth (commonly referred to as a “mask”) throughout the school day, with limited exceptions such as while actively eating or drinking (hereinafter “universal masking requirements”).

27. Throughout the 2021-22 school year, the CDC has recommended universal indoor masking by all students (ages 2 years and older), staff, teachers, and visitors to K-12, regardless of vaccination status.¹⁵ These requirements serve as an effective and important mitigation strategy for early childhood care and education programs and elementary and secondary schools to reduce the transmission of COVID-19. The CDC’s recommendation is consistent with its other, continuing recommendations for universal indoor masking in public buildings, including many of Virginia’s state and federal courthouses. The CDC’s guidance takes into consideration, among other things, that due to the number of students in a classroom and the space available, it is not always possible to distance students as far apart as would otherwise be preferable. The CDC’s guidance also recognizes that, regardless of whether a particular parent or guardian would prefer for their student to wear a mask, that student may serve as a source of transmission of the

¹⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last visited Jan. 23, 2022).

virus to other students or school staff. The CDC’s guidance also recognizes that even vaccinated individuals can nonetheless become infected with COVID-19, and/or can still infect others. The CDC’s guidance of universal indoor masking in K-12 schools was reiterated as recently as January 13, 2022. The continued use of universal indoor masking in K-12 schools also is supported by other authorities, including the American Academy of Pediatrics, which states that, “universal indoor mask use should continue in all K-12 schools for all students, teachers, staff and visitors.”¹⁶

28. By virtue of the mitigation strategies they have employed, including universal masking requirements for students, the School Boards have been able to keep their schools open and to provide in-person instruction for almost all students in almost all situations during the 2021-22 school year to date. The School Boards have been able to accomplish this even as the rates for community transmission of COVID-19, including those caused by the Delta variant and the Omicron variant, have increased substantially over the course of the 2021-22 school year. Indeed, as of the last update on January 15, 2022, all of Virginia was classified as having a “high” level of community transmission with a 43.8% test positivity rate.¹⁷

*EO2 and Its Direct Conflict with Locally-Adopted,
Widely-Supported, and CDC-Approved Universal Masking Requirements*

29. On January 15, 2022, immediately upon beginning his term as Governor of Virginia, the Governor issued a series of Executive Orders, including EO2, styled “Reaffirming the Rights of Parents in the Upbringing, Education, and Care of Their Children. EO2 was not

¹⁶ See *Face Masks for Children During COVID-19* (updated January 12, 2022) <https://tinyurl.com/47t2jbxh> (last visited January 23, 2022).

¹⁷ See <https://www.vdh.virginia.gov/coronavirus/see-the-numbers/covid-19-in-virginia/community-transmission/> (last visited Jan. 20, 2022).

adopted by any legislative process, nor was it adopted after consulting with any of the School Boards.

30. EO2 states, in part, that:

2. The parents of any child enrolled in a elementary or secondary school or a school based early childcare and educational program may elect for their children not to be subject to any mask mandate in effect at the child's school or educational program.

3. No parent electing that a mask mandate should not apply to his or her child shall be required to provide a reason or make any certification concerning their child's health or education.

4. A child whose parent has elected that he or she is not subject to a mask mandate should not be required to wear a mask under any policy implemented by a teacher, school, school district, the Department of Education, or any other state authority.

31. By stating that it confers an unfettered opportunity to opt out of the School Boards' universal masking requirements, for any undisclosed reason, or no reason at all, the foregoing portions of EO2 directly contradict the School Boards' universal masking requirements – and would render those requirements ineffective and meaningless – though the School Boards adopted that requirement to protect the health and safety of students, staff, and families, and to keep schools open to provide in-person education. Numerous parents of students who attend schools in Plaintiffs' School Divisions already have communicated to the School Boards their intent to have their children “opt out” of wearing a mask at school in reliance on their interpretation of EO2 as early as Monday, January 24, 2022.

32. The stated factual assumptions on which EO2 is based are inaccurate and inapplicable, at least in the School Divisions operated and supervised by the School Boards. For example, contrary to the recitation in EO2 that universal masking requirements have *not* “proven ineffective and impractical” in the Plaintiffs' School Divisions, such requirements *have* proven to be effective, and administration of them, materially and on the whole, has proven to be

practical and feasible. Indeed, recent CDC studies confirm that COVID-19 outbreaks are more likely in school districts without universal masking.¹⁸ As far as the Omicron variant allegedly resulting in “less severe illness” due in part to its greater transmissibility, that variant actually is resulting in more hospitalizations and some unique, upper-respiratory complications, as compared to earlier variants. And while school-age children may not be perfect when it comes to wearing masks correctly (nor are adults), it has been the School Boards’ experience that most children, most of the time, are able to wear masks properly.

33. Furthermore, contrary to what is stated in EO2, it has *not* been the experience of the School Boards that universal masking requirements have “inflicted notable harm and proven to be impracticable,” nor have they had a material negative effect on the students’ overall social, emotional, or communication skills. It has *not* been the case that *masks* for students in the school setting have increased feelings of isolation or mental health problems or been demoralizing to students. Instead, where these negative effects have occurred, they have often resulted from the lack of socialization with their peers that students would otherwise experience when attending school in-person. Feelings of isolation and related mental health issues increased for some students when they were unable to attend school in person due to the high transmission rates of COVID-19. Such harms are precisely what the School Boards are trying to prevent by keeping schools open through the use of CDC-recommended mitigation strategies, including universal masking requirements.

34. A majority of parents in Plaintiffs’ School Divisions support universal masking requirements as an important and essential strategy to protect the health, safety, and welfare of

¹⁸ <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html> (last visited Jan. 23, 2022).

their children and their families. In addition, a majority of school-based staff in the Plaintiffs' School Divisions support and rely upon these universal masking requirements as an important and essential strategy to protect their health, safety, and welfare, and that of their children and families, and to ensure their continuing availability and willingness to provide in person instruction.

35. In addition, a majority of students in each of the Plaintiffs' School Divisions travel to and from school on public school buses. CDC orders require all riders of public "conveyances," including those on school buses, to wear masks. Students in school buses frequently do not have the ability to distance themselves from other students, making universal masking requirements all the more important in this context.

36. In a public interview on or about January 16, 2022, Defendant threatened to use "every resource within the governor's authority" to force local Virginia school divisions, including the School Boards, to comply with the terms of EO2.¹⁹ The following day, the newly-elected Lt. Governor Winsome Earle-Sears was quoted as saying, "There are certain combinations of monies that we send to the local school boards and [the Governor] could withhold some of that."²⁰

37. In an effort to provide clarity for both students, parents, guardians, and staff, the School Boards (and dozens of other Virginia school boards) have, through votes taken since the issuance of EO2, reaffirmed the continuing need for, and application of, their universal masking requirements.

¹⁹ <https://tinyurl.com/2mzu2nt5> (last visited Jan. 23, 2022).

²⁰ <https://www.wric.com/news/local-news/richmond/richmond-mayor-stoney-holding-covid-19-response-update-tuesday-afternoon/> (last visited Jan. 23, 2022).

38. The provisions of EO2 that are applicable to local school boards have nonetheless created a situation in which the School Boards face the real and imminent threat of having COVID-19 outbreaks occur at multiple schools, endangering the health of students and staff, and causing those schools at least temporarily to be shut down.

39. The provisions of EO2 that are applicable to local school boards have further created a real and imminent threat that the School Boards will have insufficient staff to operate all schools with their School Divisions on an in-person basis, due to numerous staff members not being in a position to risk their own health, or the health of family members, by being exposed for seven or more hours per day to unmasked students and, in many cases, unvaccinated students.

40. The provisions of EO2 that are applicable to local school boards also have created significant uncertainty among students, parents, and guardians as to the status of universal masking requirements in their particular schools, inasmuch as the School Boards have determined – based upon CDC guidance and the particular circumstances in their schools and their jurisdictions – that those requirements should continue.

41. Federal ARP/ESSER funding provided to the School Boards to address the impact of COVID-19 on schools required those school divisions to develop and sustain plans for the safe return to in-person instruction and continuity of services, to include policies consistent with CDC guidance, including universal and correct wearing of masks.²¹

42. In addition, insurance carriers that provide coverage to school divisions in Virginia, including the School Boards, have issued written guidance warning that failure by school divisions to adhere to CDC guidelines, including universal indoor masking, would be

²¹ 34 CFR, Chapter 11, implementing the requirements of the American Rescue Plan Elementary and Secondary School Emergency Relief (“ARP ESSER”) Fund, under section 2001 of the American Rescue Plan (“ARP”) Act of 2021.

considered a willful failure that could void insurance coverage for a COVID-19-related claim.

43. Adherence to EO2, which conflicts with the CDC universal masking guidance, places the School Boards in imminent danger of losing such federal funding and/or insurance coverage.

44. For all these reasons, and pursuant to Code of Virginia section 8.01-184, a live, present, and actual controversy exists between the School Boards, on the one hand, and the Governor, on the other hand, concerning the application of EO2 to the students and schools within the Plaintiffs' School Divisions, and specifically whether the Governor has the legal authority, through the issuance of EO2, to overrule or invalidate the School Boards' decisions to continue their respective universal masking requirements.

45. Accordingly, the School Boards seek an adjudication of their rights under the Constitution of Virginia (including, without limitation, Art. VIII, Section 7), the laws of Virginia (including, without limitation, S.B. 1303), and other applicable provisions of law with respect to EO2. The School Boards cannot run the risk of endangering the health and welfare of their students and staff, and their families. The School Boards further cannot run the risk of unspecified, future financial or other detrimental consequences with respect to noncompliance with EO2 – including, but not limited to, attempts by the Governor or agencies controlled by the Governor to withdraw or withhold state funding for educational services or personnel – something that has occurred in other states where governors have attempted to ban school divisions from adopting mask mandates. In addition, there is a present, imminent need for an adjudication of the respective rights and responsibilities of the School Boards and the Governor with respect to EO2 and the legal provisions referenced herein.

46. The harms inflicted by EO2 are direct, immediate, and irremediable. They include, but are not limited to, the increased likelihood of severe illness or death by a student, school staff member, or member of either one's families (or visitor or other third party); the loss of in-person learning by students either for whom it is necessary to quarantine due to unmasked students later found to be COVID-19 positive, and/or due to insufficient staff available at the school; and loss of needed state funding for educational services for students. These harms are in no way speculative, and are instead directly contemplated by, *inter alia*, S.B. 1303, the CDC guidance to which it refers, and the experience of the School Boards.

47. With respect to the claims asserted herein, the School Boards have no adequate remedy at law.

Count I: Violation of the Constitution of Virginia

48. The allegations contained in paragraphs 1-47 are incorporated by reference.

49. Under Article VIII, Section 7 of the Constitution of Virginia, local school boards are vested with the ultimate and exclusive responsibility to supervise and operate the public schools of their respective school divisions.

50. In accordance with the Constitution of Virginia and the laws of Virginia, the citizens of Arlington, Fairfax, and Prince William Counties and the Cities of Alexandria, Hampton, Falls Church, and Richmond have elected the members of their respective local school boards – the School Boards here – to exercise that constitutional responsibility by supervising the operation of their public schools. That supervision necessarily encompasses, as relevant here, determining from time to time as the conditions for students and school facilities and programs may warrant, as local public health conditions may dictate, and as the citizens of their respective jurisdictions may express is in the best interests of the students and families of their school

division, what mitigating measures should be utilized in their public schools, including, where appropriate, universal masking requirements.

51. The portions of EO2 directed to local school boards, including the School Boards, violate Article VIII, Section 7 of the Constitution of Virginia by limiting the right and the responsibility of these local school boards to supervise and operate the public schools in their respective jurisdictions, specifically with respect to determining the existence, timing, extent, and duration of masking requirements.

Count II: Violation of S.B. 1303 (2021 Acts of Assembly, Ch. 456)

52. The allegations contained in paragraphs 1-47 are incorporated by reference.

53. The Virginia General Assembly and the governor serving at that time, through the constitutionally-prescribed legislative process, enacted into law S.B. 1303, effective as of March 30, 2021, and continuing in effect today. S.B. 1303 provides that local school boards should keep schools open for in-person instruction by, *inter alia*, utilizing the mitigation strategies recommended by the CDC. Those mitigation strategies including universal masking requirements.

54. The provisions of S.B. 1303 cannot, prior to their expiration on August 1, 2022, be rescinded or invalidated unilaterally by the Governor. Instead, altering or eliminating those requirements would require new legislative action, which has not occurred.

55. The portions of EO2 directly applicable to local school boards, including the School Boards, violate S.B. 1303, inasmuch as EO2 attempts to abolish and prohibit a COVID-19 mitigation strategy currently recommended by the CDC and successfully and practicably being utilized by the School Boards throughout this school year.

Count III: Lack of Authority for Issuance of Relevant Provisions of EO2

56. The allegations contained in paragraphs 1-47 are incorporated by reference.

57. Executive orders issued by the Governor of Virginia are valid only insofar as they are issued pursuant to some underlying legal authority.

58. EO2 was issued by the Governor, in part, under the stated authority of Code of Virginia section 44-146.17. That section of the Code, however, pertains to the powers and duties of the Governor in relation to declaring states of emergency or disaster; ordering evacuations; controlling distribution of food, clothing, or fuel; and similar activities. None of these enumerated powers extend to the provisions of EO2 pertaining directly to local school boards, including the School Boards. Indeed, Code of Virginia section 44-146.17(11) provides that, in times of communicable disease, the governor may establish programs to *purchase* personal protective equipment such as masks; nowhere does it provide that the Governor may instead *prohibit* local school boards from requiring use of them.

59. To the extent EO2 is predicated upon Code of Virginia sections 32.1-13 and/or 32.1-20, those legal provisions pertain to the powers of the State Board of Health, not the Governor, to suppress communicable diseases. The School Boards take no position on the validity of EO2 as it pertains to these other entities. Whatever else EO2 is intended to do, however, suppression of communicable diseases in public schools is not arguably part of its purpose.

60. EO2 is further predicated in part on the authority conferred by Code of Virginia section 35.1-10. That section of the Code pertains to the Commissioner of Health's ability to regulate summer camps, campgrounds, restaurants, and hotels, none of which are involved in or

related to EO2's attempt to prohibit the School Boards from continuing to implement universal masking requirements in the public schools.

61. EO2 is further predicated in part on Code of Virginia section 1-240.1. That 2013 statute, which appears in the general "Rules of Construction and Definitions" section of the Code of Virginia, does not authorize a governor to issue executive orders invalidating local school board decisions adopting universal mask requirements.

62. Inasmuch as EO2 lacks any underlying legal authority with respect to its provisions relating directly to local school boards including the School Boards, it is void and of no effect.

Request for Relief

WHEREFORE, the School Boards respectfully request that this Court enter an Order:

- a. Declaring that, insofar as it applies to Virginia local school boards, including the School Boards, the provisions of EO2 are invalid, inconsistent with the requirements of law, and void;
- b. Preliminarily and permanently enjoining the Governor from taking any action to enforce the foregoing provisions of EO2 against any or all of the School Boards, or from withholding any funding, service, or other resource from any or all of the School Boards, in reliance upon or as a result of any noncompliance by any or all of the School Boards or Plaintiffs' School Divisions with any provision of EO2;
- c. Awarding the School Boards their costs and fees expended in connection with this action;
- d. Granting the School Boards any and all such other and further relief as the Court deems necessary and appropriate.

Respectfully submitted,

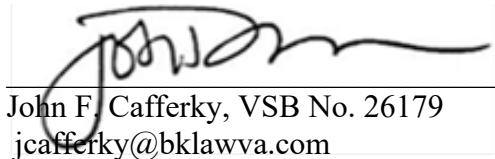
ALEXANDRIA CITY SCHOOL BOARD
ARLINGTON COUNTY SCHOOL BOARD
FAIRFAX COUNTY SCHOOL BOARD
FALLS CHURCH CITY SCHOOL BOARD
HAMPTON CITY SCHOOL BOARD
PRINCE WILLIAM COUNTY SCHOOL BOARD and
RICHMOND CITY SCHOOL BOARD

By Counsel

Date: January 24, 2022

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Fairfax, Virginia 22030
(703) 691-1235 (telephone)
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By:



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Michael K. Kim, VSB No. 82922
mkim@bklawva.com

Counsel for Plaintiffs

Verification

On behalf of the Alexandria City School Board, and pursuant to Va. Code 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'Meagan L. Alderton', is written over a horizontal line.


Name: Meagan L. Alderton

Title: Board Chair

Date: January 22, 2022

Verification

On behalf of the Arlington County School Board, and pursuant to Va. Code 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.



Dr. Barbara Kanninen

Chair, Arlington County School Board

January 23, 2022

Verification

On behalf of the Fairfax County School Board, and pursuant to Va. Code § 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'Stella Pekarsky', written in a cursive style.

Name: Stella Pekarsky

Title: Chair, Fairfax County School Board

Date: 01/23/2022

Verification

On behalf of the Falls Church City School Board, and pursuant to Va. Code 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.

A handwritten signature in cursive script, appearing to read "Laura Downs", written over a horizontal line.

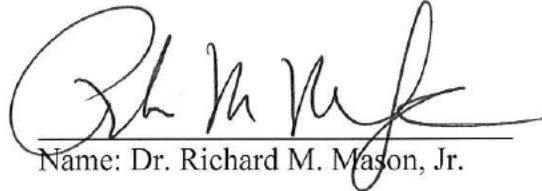
Name: Laura Downs

Title: Chair, Falls Church City School Board

Date: January 23, 2022

Verification

On behalf of the Hampton City School Board, and pursuant to Va. Code 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read "Dr. Mason", written over a horizontal line.

Name: Dr. Richard M. Mason, Jr.

Title: School Board Chair

Date: 1/23/22

Verification

On behalf of the Prince William County School Board, and pursuant to Va. Code § 8.01-4.3, I declare and verify under penalty of perjury that the allegations in the foregoing Verified Complaint are true to the best of my knowledge and belief.



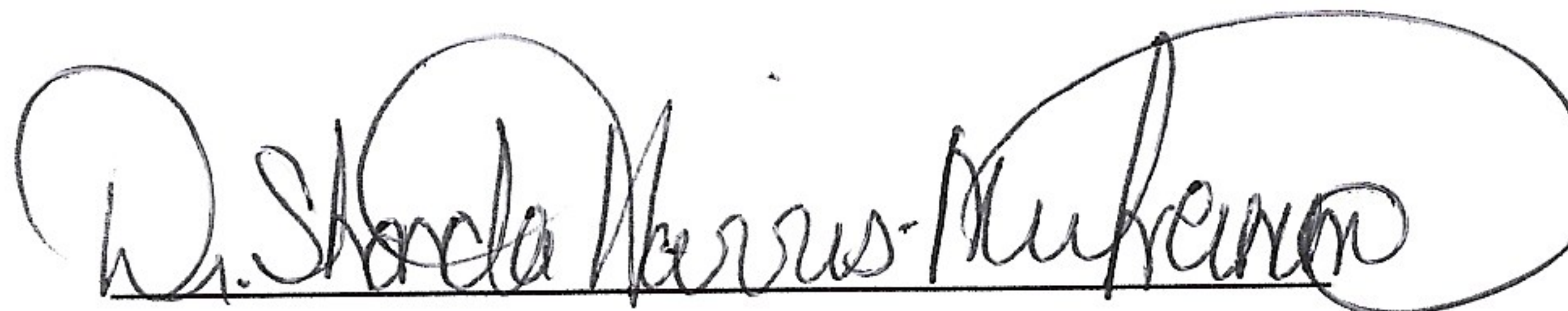
Name: LaTanya D. McDade, Ed.D.

Title: Superintendent of Schools

Date: January 23, 2022

Verification

On behalf of the Richmond City School Board, and pursuant to Va. Code § 8.01-4.3, I
declare and verify under penalty of perjury that the allegations in the foregoing Verified
Complaint are true to the best of my knowledge and belief.

A handwritten signature in dark ink, reading "Dr. Shonda Morris-Mukherjee". The signature is written in a cursive style with a large, looping initial "D".

Name:

Title: Chair

Date: January 23, 2022