

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.)

GLENN A. YOUNGKIN, Governor of Virginia,)

Serve: Honorable Glenn A. Youngkin)
Capitol Square)
1111 East Broad Street)
Richmond, VA 23219)

Defendant.)

Case No. 22-224

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MOTION FOR TEMPORARY INJUNCTION

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 and pursuant to Code of Virginia section 8.01-620, *et seq.*, state as follows for their Motion for Temporary Injunction against Defendant Glenn A. Youngkin, Governor of Virginia.

1. Pursuant to Article VIII, Section 7 of the Constitution of Virginia, the School Boards are vested with the ultimate and exclusive responsibility to supervise and operate the public schools in their respective school divisions.

2. 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 then-governor signed on March 30, 2021, bipartisan-sponsored legislation, Senate Bill 1303 (“S.B. 1303”), included in the 2021 Uncodified Acts of Assembly, Chapter 456.

3. S.B. 1303 provides, in relevant part, that “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.*” (Emphasis added.)

4. Consistent with its constitutional authority and following the requirements of S.B. 1303, in response to the COVID-19 pandemic, the School Boards adopted policies and practices calling for the continued wearing of masks by all students and staff at school in order to protect them and their families from transmission of the COVID-19 virus. These policies and practices followed authoritative medical guidance and took into consideration the current conditions and experience in their particular schools and communities. The School Boards’ policies and practices are consistent with the guidance provided by the federal Centers for Disease Control and Prevention (“CDC”), which has recommended universal indoor masking by all students (ages 2 years and older), staff, teachers, and visitors to K-12, regardless of vaccination status.

5. Immediately upon taking office on January 15, 2022, the Governor issued 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”), which

confers an unfettered opportunity of the parents and guardians of public school students to opt out of the School Boards' universal masking requirements for any undisclosed reason or for no reason at all.

6. EO2 not only limits the School Boards' constitutional authority to supervise their public schools and eliminates the policies and practices adopted by the School Boards to mitigate the transmission of COVID-19, but it also conflicts directly with S.B. 1303, a lawfully-adopted statute passed into law with bipartisan support in the General Assembly.

7. Numerous parents and guardians of students who attend the School Boards' schools 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.

8. In a public interview on or about January 16, 2022, the Governor 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 EO2.¹ The following day, the newly-elected Lt. Governor 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."²

9. 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.

¹ <https://tinyurl.com/2mzu2nt5>

² <https://www.wric.com/news/local-news/richmond/richmond-mayor-stoney-holding-covid-19-response-update-tuesday-afternoon/>

10. 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 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.

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

12. 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.³ 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, which includes universal indoor masking, would be considered a willful failure, which could void insurance coverage for a COVID-19-related claim. 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.

³ 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.

13. The School Boards seek a temporary injunction from this Court that restores the status quo for the 2021-22 school year, as it existed before EO2.

14. The School Boards seek a temporary injunction from this Court enjoining the Governor from taking any action to enforce 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 and of Plaintiffs' school divisions with any provision of EO2.

15. A temporary injunction is proper in this case because of the likelihood of irreparable harm to the School Boards, the likelihood that the School Boards will prevail on the merits, the lack of harm to the Governor if this Motion is granted, and the public interest in ensuring the health and safety and students and staff in the School Boards' respective school districts.

16. The School Boards will succeed on the merits of their claim based on the plain text of the Constitution of Virginia, which vests in the School Boards the authority to govern and manage their respective school districts, as well as based on S.B. 1303, which requires the School Boards to adhere to guidelines set forth by the CDC. The Governor's issuance of EO2 is a unilateral and unconstitutional attempt to override the authority of the School Boards to govern their respective school districts and violates the principles of separation of powers that are enshrined in the Constitution of Virginia.

17. The School Boards will suffer irreparable harm by the Governor's unilateral conduct. By issuing EO2, the Governor is attempting to limit the authority vested in the School Boards to govern their respective school districts in violation of the Constitution of Virginia and S.B. 1303. The Governor's actions also place the School Boards in an impossible situation of

either complying with EO2, and thereby losing Federal ARP/ESSER funding and/or insurance coverage, or defying EO2 and facing punitive action from the Governor, including but not limited to the Governor deciding to withhold government funds upon which the School Boards rely to operate their respective school districts.

18. For the reasons above and others that will be addressed in a memorandum of law, the School Boards' Motion for Temporary Injunction must be granted, as soon as the Court's calendar allows.

19. Pursuant to Local Rule 3(A)(iii), Counsel for the School Boards intends to request an emergency hearing and a briefing schedule for submission of their Motion for Temporary Injunction to the Court, including a request to file a memorandum in support of their Motion for Temporary Injunction that is in excess of five pages.

WHEREFORE, the School Boards, respectfully request that this Court:

- a. enter an order that restores the status quo for the 2021-22 school year, as it existed before EO2;
- b. enter a temporary injunction declaring that the provisions of EO2, insofar as it applies to Virginia local school boards, including the School Boards, are invalid, inconsistent with the requirements of the law, and void;
- c. enter a temporary injunction enjoining the Governor from taking any action to enforce the 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 the Plaintiffs' school divisions with any provision of EO2;

d. award the School Boards their costs and fees expended in connection with this action; and

e. grant 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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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2022, a true copy of the foregoing was delivered by facsimile and first-class mail to:

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