

**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.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN
SUPPORT OF PETITIONERS

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1. Pursuant to Rule 5:30(c), the National Education Association (“NEA”) and Virginia Education Association (“VEA”) respectfully request leave to file an amicus brief in support of Petitioners in this matter. *Amici* certify that Petitioners and all Respondents have consented to this motion. A copy of *amici*’s proposed brief is attached as Exhibit A.

2. *Amici* are membership organizations made up of educators who serve our nation’s students in public school districts, colleges, and universities. The NEA represents three million educators across the nation, and the VEA, a local affiliate of the NEA, represents educators throughout Virginia. *Amici* work to improve the quality of education that students across the country receive, advocating on behalf of teachers and students at the national, state, and school district level. As part of these efforts, *amici* work to improve conditions in schools so that educators can teach and students can learn safely and effectively.

3. This is an exceptionally important case, arising in the midst of an unprecedented pandemic that continues to spread throughout Virginia. As *amici*’s members have seen firsthand, this pandemic does not stop at the schoolhouse door. Indeed, COVID-19 poses particular challenges in the context of education, forcing complicated decisions about how to balance the need for in-person education with the need to protect students and educators from the spread of the coronavirus. This case raises important constitutional and statutory questions about who gets to

decide what that balance will be. Because this case will directly impact the conditions in which their members work and teach, *amici* have a strong interest in this litigation.

4. In their brief, *amici* reiterate their commitment to in-person education and describe the risks their members face from the increased spread of COVID-19, both to the health and safety of students and educators and to the continuation of in-person education. They also describe the evidence supporting the use of mask mandates as an effective, safe method to mitigate these risks while maintaining in-person education. Educators are tasked on a daily basis with providing in-person support to their students in conditions that place them at increased risk for harm. *Amici* therefore can provide this Court a unique and valuable perspective separate from the Parties on the impact of Executive Order 2 and the need for schools to continue to adhere to the guidance of the scientific and medical community to mitigate the spread of COVID-19 in schools.

5. *Amici* are aware that Petitioners have filed a motion for leave to amend their petition. If this Motion is granted, *amici* respectfully request that their amicus brief be deemed in support of Petitioners' amended petition for relief.

Respectfully submitted,

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Dated, January 24, 2022

CERTIFICATE OF SERVICE

I certify under Rule 5:26(h) that on January 24, 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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Exhibit A

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MATTHEW CASTILLO, et al.,
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Respondents.

BRIEF OF *AMICI CURIAE* NATIONAL EDUCATION ASSOCIATION AND
VIRGINIA EDUCATION ASSOCIATION IN SUPPORT OF PETITIONERS'
REQUEST FOR WRITS OF MANDAMUS AND PROHIBITION

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INTEREST OF *AMICI CURIAE*

Amici believe that children learn best in an in-person environment and are committed to ensuring that all students receive the benefits of an in-person education in a manner that protects the health and safety of students and teachers alike.

The National Education Association (NEA) is a national membership organization of three million educators who serve our nation's students in public school districts, colleges, and universities. Since its founding over a century and a half ago, NEA and its affiliates have worked to create, expand and strengthen the quality of public education available to all children.

The Virginia Education Association, a local affiliate of NEA, represents educators across Virginia and is dedicated to advancing quality instruction and curriculum, adequate funding, and excellent working conditions for Virginia public employees.

INTRODUCTION

This case comes to the Court at an extraordinary time when Virginia remains in the midst of an unprecedented public health emergency caused by the spread of the COVID-19 virus. At every stage of this rapidly changing pandemic, a return to “normal” has had to be carefully balanced with the recognition that steps must be taken to protect communities from the serious health risks the virus presents.

Nowhere is this careful balance more needed than in the public schools. Children learn best in the classroom. No one disputes that—least of all the educators who form the membership of *amici* and who themselves teach best in the classroom. But equally indisputable is that in-person education requires students and teachers to be indoors in close quarters for extended periods of time—exactly the set of conditions that increases the risk of spreading COVID-19.

That is why *amicus* Virginia Education Association supported the passage of Senate Bill 1303 (“SB 1303”). That law, which passed by an overwhelming majority in the General Assembly, recognized that the best way to get students back into classrooms and keep them there was to reopen schools safely, following the best available medical and scientific guidance to mitigate the spread of COVID-19. SB 1303 achieved the goal of safely re-opening the public schools for in-person instruction in a very specific manner: it required school districts to follow “to the *maximum* extent practicable” the currently applicable mitigation

strategies provided by the Centers for Disease Control and Prevention (“CDC”). SB 1303, § 2 (emphasis added). And that guidance is clear: Everyone who is able—not just those who choose to—should wear a mask in school.

Executive Order 2 (“EO 2”) disregards the careful balance crafted by the General Assembly for safe operation of the public schools. Not only does it directly contravene the Virginia Constitution, which prevents the Governor from suspending a duly enacted statute on his own whim, Va. Const. art. V, § 7, but it also purports to override the express parameters set by the General Assembly to safely provide in-person instruction during this public health emergency. In doing so, EO 2 puts at risk the health of children and educators as well as children’s education—the very two things SB 1303 sought to protect.

ARGUMENT

I. The Increased Spread of COVID in Schools is Harmful to the Health of Students and Educators.

Two years into this pandemic, the serious health risks posed by COVID are well known. Over 850,000 Americans have died,¹ including 15,852 Virginians.² Nearly 47,000 Virginians have been hospitalized due to COVID.³ And while EO 2

¹ *COVID-19 Mortality Overview*, CDC (data as of week ending Jan. 15, 2022), <https://tinyurl.com/2p89f6ya>.

² *COVID-19 Data in Virginia*, Va. Dep’t Health (data as of Jan. 21, 2022), <https://tinyurl.com/3tddkh25>.

³ *Id.*

asserts that the now-dominant Omicron variant “results in less severe illness,” EO 2 at 1, there are 3,836 Virginians currently hospitalized with COVID.⁴ Placing anybody in conditions that increase the risk of contracting COVID thus puts them at serious risk of illness.

It is also now well-established that the risk of COVID spread is higher in enclosed spaces with inadequate ventilation and where exposure to the virus lasts longer than 15 minutes.⁵ These conditions are, of course, standard in schools, where students and educators spend hours upon hours in close contact in buildings that often lack adequate ventilation. And, as one would expect in these conditions, there is substantial evidence of COVID spread in schools.

On a national level, the number of children with COVID increased dramatically in August and September 2021, when schools returned from summer break.⁶ Local case studies also bear this out. In Florida, for example, where students returned to in-person instruction for the 2020 fall semester, there were nearly 700 outbreaks of COVID in schools from August 10 to December 21, 2020,

⁴ *VHHA Hospitalizations*, Va. Dep’t Health (data as of Jan. 21, 2022), <https://tinyurl.com/4hfxjpkz>.

⁵ *See Scientific Brief: SARS-CoV-2 Transmission*, CDC (updated May 7, 2021), <https://tinyurl.com/48zvy4x8>.

⁶ *Children and COVID-19: State Data Report* at Appx. Tab. 2A, Am. Acad. of Pediatrics & Children’s Hosp. Ass’n (Dec. 30, 2021), <https://tinyurl.com/4j7a8wf2>.

with an average of 6.3 cases per outbreak.⁷ The outbreaks resulted in hundreds of hospitalizations of children and educators and the deaths of 13 educators.⁸

In addition, 42% of educators meet the CDC's criteria for increased risk for severe COVID-19,⁹ which means they are at higher risk of severe illness, hospitalization, and death.¹⁰ Failing to mitigate the spread of COVID in schools thus puts both students and educators at increased risk of harm.

II. COVID Spread Further Harms Children by Disrupting In-Person Education.

When COVID begins spreading in a school, it disrupts in-person education in a variety of ways, thereby undermining the goal of in-person education that the General Assembly sought to achieve through SB 1303. At the broadest level, COVID outbreaks in schools often necessitate the closure of individual classrooms, schools, or even entire districts. According to the CDC, between August 2 and September 17, 2021, there were 248 district-wide closures and 384 school

⁷ Timothy Doyle, *et al.*, *COVID-19 in Primary and Secondary School Settings During the First Semester of School Reopening—Florida, August–December 2020*, 70 *Morbidity & Mortality Weekly Report* 437, 438 (March 26, 2021), <https://tinyurl.com/3wwj5yz4>.

⁸ *Id.*

⁹ Thomas M. Selden, *et al.*, *The Risk of Severe COVID-19 Within Households of School Employees and School-Age Children*, 29 *Health Affairs* 2003, 2003 (Sept. 17, 2020), <https://tinyurl.com/mwa8pff3>.

¹⁰ *COVID-19 Information for Specific Groups of People*, CDC (updated Apr. 20, 2021), <https://tinyurl.com/4wd2b224>.

closures.¹¹ These closures left 933,913 students at home for at least one day and, often, much longer.¹² Earlier this month, six schools in the Chesapeake school district were forced to shut down for a week due to COVID outbreaks.¹³

Even when districts and schools are open, the spread of COVID in schools can wreak havoc on in-class instruction. The CDC recommends that people with COVID symptoms or positive COVID tests stay home for at least five full days.¹⁴ Each time a teacher contracts COVID, their students are left without their teacher and are instead provided remote instruction, combined into another classroom, or taught by a substitute teacher for at least a week. Moreover, as noted above, 42% of educators meet the CDC's criteria for increased risk for severe COVID-19, making longer absences more likely as teachers recover. By the same token, students with COVID symptoms or a positive test also lose at least a week of in-person education. And many students will not recover quickly enough to return in

¹¹ Sharyn E. Parks, *et al.*, *COVID-19–Related School Closures and Learning Modality Changes—United States, August 1–September 17, 2021*, 70 *Morbidity & Mortality Weekly Report* 1374, 1374 (Oct. 1, 2021), <https://tinyurl.com/5n8aczfr>.

¹² *Id.*

¹³ Sierra Jenkins, *6 Chesapeake schools switching to virtual learning next week because of COVID-19 outbreaks*, *Virginian-Pilot* (Jan. 7, 2022), <https://tinyurl.com/2p9vdmds>.

¹⁴ *Guidance for COVID-19 Prevention in K-12 Schools*, CDC (updated Jan. 13, 2022), <https://tinyurl.com/2p8s3sz6>. Chesapeake Public Schools similarly require at least five days of quarantine in accordance with the CDC's guidance. <https://tinyurl.com/bnbz9ukm>.

just one week. In the last week, an average of over 800 children with COVID were admitted to the hospital each day.¹⁵ Even if their symptoms are initially mild, children who have COVID may develop longer-term symptoms that disrupt their ability to learn, like fatigue and difficulty concentrating.¹⁶

Finally, even the threat of increased COVID spread can significantly disrupt in-person education. Nearly two-thirds of educators and 58.7% of school-age children live in households in which at least one adult meets the CDC's definition of increased risk of severe COVID.¹⁷ Without adequate safeguards in place in schools, including the universal masking provided by the CDC, a substantial number of these students and educators will be put in the difficult position of endangering a vulnerable household member or forgoing in-person education. As a result, many students and educators will opt for virtual education, meaning even more students learning remotely, in combined classrooms, or with substitutes.

III. School Mask Mandates are a Vital Tool in Mitigating the Spread of COVID-19 and Keeping Schools Open.

The science is clear: Mask mandates safely reduce the spread of COVID. Study after study has found that masking is an effective means of limiting the

¹⁵ *COVID Tracker—New Hospital Admissions*, CDC (accessed Jan. 23, 2022), <https://tinyurl.com/4t9zawkx>.

¹⁶ Peter Rowe, *Long-Haul COVID-19 in Children and Teens*, Am. Acad. Pediatrics (updated Nov. 2, 2021), <https://tinyurl.com/2p8ahapn>.

¹⁷ *Id.* at 2003-04.

spread of COVID.¹⁸ These studies also show that mask-wearing is most effective when “compliance is high.”¹⁹ This makes sense, as masks are more effective as a form of “source control”—a way of keeping a contagious person from spreading the virus—than as a form of protection for an uninfected person.²⁰ Indeed, this is why the CDC, based on its review of numerous scientific studies, “recommends community use of masks.”²¹

The data also shows that mask mandates work in decreasing the spread of COVID in schools in particular. The study conducted after Florida schools reopened in Fall 2020 found that those school districts that did not require masking had higher rates of COVID among students than those that did.²² Another study in

¹⁸ See, e.g., John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325(10) J. of Am. Med. Ass’n 998 (2021), <https://tinyurl.com/yck6xb3h>; Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, 118(4) Proc. of the Nat’l Acad. of Servs. of the United States of America e2014564118 (2021), <https://tinyurl.com/2p8vhz52>; Hiroshi Ueki, et al., *Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2*, mSphere (Am. Soc’y for Microbiology), Vol, 5, Issue 5, at e00637 (Oct. 21, 2020), <https://tinyurl.com/36v9z2tv> (“[C]otton masks, surgical masks, and N95 masks had a protective effect with respect to the transmission of infective droplets/aerosols and . . . the protective efficiency was higher when masks were worn by the virus spreader.”).

¹⁹ Howard, *supra* n.18.

²⁰ *Respiratory Protection vs. Source Control—What’s the Difference?*, CDC (Sept. 8, 2020), <https://tinyurl.com/3wzn27he>.

²¹ *Science Brief: Community Use of Masks to Control the Spread of SARS-CoV-2*, CDC (updated Dec. 6, 2021), <https://tinyurl.com/2p8pfpc4>.

²² Doyle, *supra* n.7, at 439.

Arizona found that “the odds of a school-associated COVID-19 outbreak in schools without a mask requirement were 3.5 times higher” than in schools with a mask requirement in place when schools opened.²³ This is true across the country: A study examining cases across the United States found that counties without school mask mandates had larger increases in pediatric COVID rates after the start of school than did counties with school mask mandates. Counties with mask mandates each had about 18 fewer pediatric cases *per day* for every 100,000 children.²⁴ This relationship between masks in schools and less COVID-19 spread has been consistently confirmed.²⁵

²³ Megan Jehn, *et al.*, *Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July–August 2021*, 70 *Morbidity & Mortality Weekly Report* 1372, 1372 (Oct. 1, 2021), <https://tinyurl.com/2zvx3ums>.

²⁴ Samantha E. Budzyn, *et al.*, *Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1–September 4, 2021*, 70 *Morbidity & Mortality Weekly Report* 1377, 1377 (Oct. 1, 2021), <https://tinyurl.com/4ywswhr3>.

²⁵ *See, e.g.*, Angelique Boutzoukas, *et al.*, *School safety, masking, and the Delta variant*, 149 *Pediatrics* 1, 2 (Jan. 2022), <https://tinyurl.com/2p9bcsw6> (“[E]ven with exponentially rising community cases at the start of the Delta variant surge, schools that implemented universal masking retained low within-school transmission”); Rebecca Hershov *et al.*, *Low SARS-CoV-2 Transmission in Elementary Schools—Salt Lake County, Utah, December 3, 2020–January 31, 2021*, 70 *Morbidity & Mortality Weekly Report* 442, 446 (March 26, 2021), <https://tinyurl.com/mw6e3u6s>; Patrick Dawson, *et al.*, *Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies—St. Louis County and City of Springfield, Missouri, December 2020*, 70 *Morbidity & Mortality Weekly Report* 449, 451, 453 (March 26, 2021), <https://tinyurl.com/ttdnh95j>; Amy Falk, *et al.*, *COVID-19 Cases*

While the State Respondents assert the benefits of school mask mandates are “unclear,” citing a single study conducted in Georgia schools, Mot. to Dismiss at 14 n.5, they neglect to mention that this study found that student mask mandates decreased the incidence of COVID by 21% and concluded that the “findings in this report suggest universal and correct mask use is an important COVID-19 prevention strategy in schools.”²⁶ But there is no need for the Court or the parties to compare various studies. The General Assembly has already determined which scientific guidance schools are required to adhere to: “any currently applicable mitigation strategies...to reduce the transmission of COVID-19 that have been provided by the [CDC].” SB 1303, § 2. It is clear that one of the mitigation strategies currently provided by the CDC to reduce the spread of COVID-19 in schools is “universal indoor masking for all students (ages 2 years and older), teachers, staff, and visitors to K-12 schools, regardless of vaccination status.”²⁷

Whether the CDC calls this a “mask mandate,” Mot. to Dismiss at 13, misses the mark. As this Court has explained, in interpreting statutory language,

and Transmission in 17 K–12 Schools—Wood County, Wisconsin, August 31–November 29, 2020, 70 Morbidity & Mortality Weekly Report 136, 137 (Jan. 29, 2021), <https://tinyurl.com/7a2ajfsj>.

²⁶ Jenna Gettings, *et al.*, *Mask Use and Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools—Georgia, November 16–December 11, 2020*, 70 Morbidity & Mortality Weekly Report 779, 783 (May 28, 2021), <https://tinyurl.com/59d8hr9h>.

²⁷ *Supra* n.14, *Guidance for COVID-19 Prevention in K-12 Schools*.

courts are bound by the plain language of the statute and must “assume that the legislature chose, with care, the words it used when it enacted the relevant statute.” *Barr v. Town & Cnty. Props., Inc.*, 240 Va. 292, 295 (1990). Here, SB 1303 expressly references the mitigation strategies that are “provided” by the CDC. Universal indoor masking is unquestionably a mitigation strategy “provided” by the CDC to reduce the transmission of COVID-19 in schools. Throughout this pandemic, including at the point in time when SB 1303 was adopted, the CDC has “provided” guidance, not mandates, to schools. To read SB 1303 to apply only to mitigation strategies “mandated” by the CDC is thus both contrary to the statutory language chosen by the General Assembly and would render the statute’s express directive that schools “adhere” to the mitigation strategies provided by the CDC meaningless and encompassing a null set. As this Court has noted, it is a “settled principle of statutory construction that every part of a statute is presumed to have some effect.” *Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 340 (1998).

Under the plain language of SB 1303, Virginia school boards must adopt the mitigation strategies provided by the CDC to the *maximum* extent practicable. There is no doubt that implementing a mask mandate is practicable. As the State Respondents acknowledge, Chesapeake School District had such a requirement in place prior to the issuance of EO 2. Mot. to Dismiss at 10. In barring school boards from implementing one of the express mitigation strategies provided by the CDC,

EO 2 undermines both the directive of the General Assembly and the ability of school boards to protect their students and educators.

CONCLUSION

The extraordinary circumstances present here warrant the extraordinary relief Petitioners seek. The request for writs of mandamus and prohibition should be granted.

Respectfully submitted,

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Education Association*

CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on January 24, 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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