

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 7th day of February, 2022.

Present: All the Justices

Matthew Castillo, et al., Petitioners,

against Record No. 220033

Glenn A. Youngkin, in His Official Respondents.
Capacity as Governor of Virginia, et al.,

Upon a Petition for Writs of Mandamus and Prohibition

Petitioners, parents of children enrolled in the City of Chesapeake Public Schools, seek writs of mandamus and prohibition. They challenge the provisions of Governor Glenn A. Youngkin’s Executive Order Two and Order of Public Health Emergency One (collectively, “EO 2”) that permit parents to exempt their children from school masking requirements. As respondents, petitioners name Governor Youngkin, Acting Virginia State Health Commissioner Colin Greene, Acting Virginia Superintendent of Public Instruction Jillian Balow, the School Board of the City of Chesapeake (“the School Board”), and Superintendent of Chesapeake Public Schools Jared Cotton.¹ For the following reasons, we deny petitioners’ motion to amend, and we dismiss the petition because the relief requested does not lie against any of the respondents.

Prohibition does not lie against any of the respondents under the circumstances of this case. Prohibition is “traditionally issued by superior courts to the inferior courts, to restrain the latter from excess of jurisdiction,” and neither the initial petition nor the proposed amended petition contends respondents are acting in a judicial or quasi-judicial capacity such that we could limit their conduct by prohibition. *Howell v. McAuliffe*, 292 Va. 320, 353 n.19 (2016) (internal quotation marks and ellipses omitted); *see also Bee Hive Min. Co. v. Indus. Comm’n of*

¹ Although neither the School Board nor Superintendent Cotton have responded to the petition, we may resolve it without their response. *See* Rule 5:7(c) (“This Court may act on any petition for a writ of habeas corpus, mandamus, or prohibition before a responsive pleading or reply of the petitioner is filed.”).

Va., 144 Va. 240, 242-43 (1926); *Burch v. Hardwicke*, 64 Va. 51, 58-61 (1873).

Petitioners also fail to demonstrate mandamus lies. Mandamus is “an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law.” *Howell*, 292 Va. at 351 (internal quotation marks and citation omitted). “A ministerial act is an act that one performs in obedience to a legal mandate and in a prescribed manner, without regard to his own judgment as to the propriety of the act to be done.” *Id.* (internal quotation marks and citation omitted). A petitioner must identify “a clear and unequivocal duty of a public official to perform the act in question.” *Smith v. Richmond Newspapers, Inc.*, 261 Va. 113, 118 (2001).

Save for Governor Youngkin and the School Board, the initial petition and the proposed amended petition do not allege a source of any relevant duty incumbent on any of the other respondents. Further, the sole potential duty either petition suggests places an affirmative obligation on Governor Youngkin is his constitutional responsibility to “take care that the laws be faithfully executed.” Va. Const. Art. V, § 7. However, executing the laws is “an executive function, requiring in its performance the exercise of . . . discretion,” that cannot be directed by mandamus. *Allen v. Byrd*, 151 Va. 21, 25 (1928). Absent an explicit command that Governor Youngkin take definite positive action in conformity with a mandatory and ministerial duty, mandamus cannot control or restrict his effort to influence school masking requirements, even if such effort is unlawful. See James L. High, *A Treatise on Extraordinary Legal Remedies*, § 6, at 10 (1874) (while the function of an injunction is “to restrain motion and enforce inaction,” the function of mandamus is “to set in motion and compel action”).

Additionally, the only authority the petitions assert as imposing a duty on the School Board is Senate Bill 1303, 2021 Acts Ch. 456 (Spec. Sess. I) (“SB 1303”). In relevant part, SB 1303 provides that 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.

By allowing school boards to follow the Centers for Disease Control and Prevention’s recommended COVID-19 mitigation strategies “to the maximum extent practicable,” SB 1303

necessarily gives the boards a degree of discretion to modify or even forgo those strategies as they deem appropriate for their individual circumstances. With respect to implementing policies on student masking, that discretion persists even if EO 2's masking exemption provisions are unlawful. *See Dovel v. Bertram*, 184 Va. 19, 21-23 (1945) (constitutional direction that representation on a three-member board "shall" be given "as far as practicable" to the two political parties receiving the highest and next highest number of votes in a preceding election did not create a ministerial duty to appoint two members from the party receiving the most votes). Accordingly, because the School Board has license to decide "whether or when [its] power [under SB 1303] should be exercised," mandamus does not lie to compel the School Board's action under the statute. *Allen*, 151 Va. at 26.

Accordingly, petitioners' motion to amend is denied; Governor Youngkin's, Commissioner Greene's, and Superintendent Balow's "Motion to File Contingent Response" is denied as moot; and the petition is dismissed.²

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. [unclear] [unclear]".

Clerk

² By this dismissal, we offer no opinion on the legality of EO 2 or any other issue pertaining to petitioners' claims.