VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 17th day of June, 2020.

Before: All the Justices

Bradley P. Marrs, Petitioner,

against Record No. 200573

Ralph S. Northam, in His Official Capacity
as Governor of the Commonwealth of Virginia, et al., Respondents.

Upon a Petition for a Writ of Mandamus

Bradley P. Marrs, a resident of the City of Richmond, petitions for a writ of mandamus and seeks relief from provisions of several orders Governor Ralph Northam and the Commonwealth's Commissioner of Health, Norman Oliver, have issued in response to the COVID-19 pandemic. In addition to Governor Northam and Commissioner Oliver, Marrs names the Superintendent of Richmond City Public Schools, Jason Kamras, and the Chief of the Richmond City Police, William Smith, as respondents. Because we agree with the respondents' contentions that Marrs has not demonstrated his standing to seek mandamus relief, we dismiss the petition.

Over the last several months, Governor Northam, at times in conjunction with Commissioner Oliver, has issued orders declaring a state of emergency due to COVID-19 and implementing measures to control the disease's spread. Marrs argues several of the orders' provisions are *ultra vires* because they are beyond Governor Northam's and Commissioner Oliver's statutory powers to respond to an emergency or a threat to public health. Marrs claims also that, even if Governor Northam's and Commissioner Oliver's actions are statutorily authorized, they are nonetheless unlawful because they unconstitutionally suspend the fundamental rights of Marrs and all Virginians and constitute an improper exercise of powers

reserved to the legislature or other public officials.[1]

Specifically, Marrs challenges the provision of Executive Order 53 that ceases in-person instruction at all public schools for the remainder of the 2019-2020 school year ("school closure provision"). Relying on *Howell v. McAuliffe*, 292 Va. 320 (2016), Marrs asserts his status as a voter in the City of Richmond provides him standing to contest the school closure provision because the provision "nullified" his rights to vote for members of the Richmond City school board and to petition them to consider his opinions on matters affecting local schools.

Further, Marrs contests the provisions of Executive Order 53 that (1) close "all public access" to numerous types of "recreational and entertainment businesses;" (2) close "all dining and congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets;" and (3) require any non-essential retail business "to limit all in-person shopping to no more than 10 patrons per establishment" or close. Executive Order 53 makes it a Class 1 misdemeanor to violate these restrictions (collectively, "business restriction provisions"). Marrs alleges the *ultra vires* business restriction provisions "nullified [his] rights of association and his general right to freedom of movement and freedom of contract" because

1. he "has been deprived of his ability to patronize restaurants, breweries, wineries, distilleries, movie theaters, live theaters, fitness centers, recreation or sports facilities (whether as a participant or as a spectator), barbershops or salons, or 'other places of indoor public amusement,' or otherwise to conduct himself as a free citizen of the Commonwealth should rightly be able to expect to be allowed;" and

2. "[e]ven where permitted to enter certain establishments, [he] frequently may not enter if his entry would result in more than 10 persons being inside."

[1] We note that the executive orders Marrs contests, Executive Orders 53 and 55, have been amended and superseded by more recent executive orders. Because Marrs' failure to allege facts establishing his standing to challenge any provision of Executive Order 53 or 55 leaves us without jurisdiction to consider his petition, we do not reach the question of whether his petition has been rendered moot in whole or in part. *See Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 226 (1988) (standing to maintain an action is a preliminary jurisdictional issue).

Marrs also challenges the provisions of Executive Orders 53 and 55 that, with limited exceptions, make it a Class 1 misdemeanor to gather in person with ten or more people ("gathering provisions"). Marrs alleges the gathering provisions infringe on his constitutional right to peaceably assemble and on his "freedoms" because they "prohibit [him] from participating in any public or private gatherings of 10 or more persons (even when such gatherings might involve religious or political activities)."

As to the threat of criminal prosecution for violating the gathering and business restriction provisions, Marrs alleges Richmond City Mayor, Levar Stoney, ordered Chief Smith to enforce the provisions. On "information and belief," Marrs asserts Smith ordered his subordinates to arrest or criminally charge those who violate the provisions. Marrs claims that, "[i]nasmuch as [he] resides in the City of Richmond, he is subject to arrest and/or criminal charges in this manner." Accordingly, Marrs argues he has only two choices: comply with the unlawful executive orders and forfeit his constitutional rights or face potential criminal prosecution and imprisonment. Therefore, Marrs contends, he "has suffered, and will (absent the intervention of this Court) continue to suffer irreparable harm from the *ultra vires* Orders."

Finally, Marrs contests the provision of Executive Order 55 that directs "[a]ll individuals in Virginia [to] remain at their place of residence" unless leaving for one of numerous enumerated purposes ("stay-at-home provision"). Marrs alleges he "is among those adversely affected by" the stay-at-home provision and that it violates his "freedoms" and right to peaceably assemble because Governor Northam and Commissioner Oliver have "claim[ed] for [themselves] the power to order [Marrs] to remain in his place of residence, . . . permitting [him] to leave his residence only as and when expressly permitted."

In his culminating prayer for relief, Marrs requests a writ of mandamus holding that the Orders referenced above are *ultra vires* and otherwise in violation of the Virginia Constitution, and are and therefore void and of no effect; directing respondent Oliver to inform all of his subordinates within the Commonwealth's Department of Health to cease all actions designed to enforce the Orders; directing respondent Kamras to ignore the Orders and therefore, to reopen the public schools of the City of Richmond unless and until he is otherwise directed by vote of the City of Richmond's School Board; directing respondent Smith to ignore the Orders and

therefore, to instruct all of his subordinate officers and other personnel to cease any, and all efforts to enforce them, whether by arrest or any other means.

Considering the sparse factual allegations in Marrs' petition and the total absence of any allegation of a particularized injury, we conclude he has not established his standing to challenge any of the provisions he claims are unlawful. Standing is a preliminary jurisdictional issue unrelated to the merits of a case, and, when no evidence is taken on the issue, a party's factual allegations are presumed to be true when considering whether he or she has standing to request the relief sought. *See Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012); *Andrews*, 236 Va. at 226; *see also Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686-87 (2011) (whether a party's factual allegations establish standing is a legal question). "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. *Westlake Props. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 120 (2007) (internal quotation marks and citations omitted); *see Moreau v. Fuller*, 276 Va. 127, 134 (2008).

To have standing to challenge governmental action, a party must allege facts indicating he or she has suffered a "particularized" or "personalized" injury due to the action. *Wilkins v. West*, 264 Va. 447, 460 (2002); *Howell*, 292 Va. at 330-33 (stating "[i]t is incumbent on petitioners to allege facts sufficient to demonstrate standing" and discussing *Wilkins*). It is not enough to simply "tak[e] a position and then challeng[e] the government to dispute it," a party must demonstrate a ripe justiciable controversy by alleging an "actual or potential injury in fact based on present rather than future or speculative facts." *Lafferty v. School Bd. of Fairfax Cnty.*, 293 Va. 354, 361, 364-65 (2017) (internal quotation marks omitted). In other words, to establish his standing to seek mandamus relief, Marrs must identify a direct — special or pecuniary — interest in the outcome of this controversy that is separate from the interest of the general public. *Goldman v. Landsidle*, 262 Va. 364, 372-73 (2001). The purpose of this personalized injury requirement is to prevent courts from improvidently answering "abstract questions that may be interesting and important to the public but lack any real errors injuriously affecting the complaining litigants." *Howell*, 292 Va. at 335 (internal quotation marks omitted).

With these principles in mind, we turn to Marrs' contention that he has suffered a sufficiently particularized injury due to the school closure provision because the provision

"nullified" his rights to vote for his school board members and to petition them to consider his opinions on matters of school governance. Marrs suggests these supposed detriments to his ability to participate in the governance of Richmond City schools are on par with the vote dilution injury that *Howell* held could provide citizens with standing to challenge an executive order that significantly expanded the number of potential voters. For several reasons, we disagree.[2]

First, the school closure provision does not directly or materially diminish the power of Marrs' vote. Unlike the executive order at issue in *Howell*, the provision in no way manipulates the size or composition of the electorate. *See Howell*, 292 Va. at 331-34 (discussing another case, *Wilkins*, in which vote dilution supplied an injury sufficient to confer standing). Nor does the provision alter the membership of Richmond City's current school board or portend to impact the results of any future school board election. Accordingly, any conceivable impact the school closure provision has on Marrs' right to participate in electing a school board is, at best, merely tangential, nominal, and general to every Virginia voter.

Marrs' contention that the school closure provision reduces his ability to petition the school board is similarly misplaced. The provision does not prevent Marrs from communicating any of his opinions to the school board, including his concern that the provision is invalid and that schools should remain open until a local authority decides otherwise. Further, the hypothetical possibility that Marrs might express his concerns to the school board and that the board's response thereto might be in some way constrained or influenced by the school closure provision is too speculative and indefinite a scenario to afford Marrs standing. *See Lafferty*, 292 Va. at 361 (standing must be premised on "present rather than future or speculative facts")

[2] At various points, Marrs speaks of how Governor Northam's and Commissioner Oliver's actions violate his rights and, by extension, the rights of all Virginians. To the extent Marrs attempts to rely on, assert, or vindicate the rights of unnamed persons, he has not alleged any circumstances under which he might do so. *See, e.g.*, *W.S. Carnes, Inc. v. Bd. of Sup'rs of Chesterfield Cnty.*, 252 Va. 377, 383 (1996) ("An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so."); *see also Casey v. Merck & Co., Inc.*, 283 Va. 411, 418 (2012) ("Virginia jurisprudence does not recognize class actions[,] . . . . [and] a class representative who files a putative class action is not recognized as having standing to sue in a representative capacity on behalf of the unnamed members of the putative class.").

(internal quotation marks omitted). Accordingly, unlike a victim of actual vote dilution, Marrs has not established that the school closure provision injures his democratic rights in a manner that is adequately direct, substantial, or unique. *See Livingston v. Va. Dept. of Transp.*, 284 Va. 140, 154 (2012) ("A party has standing if it can show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest.").

Marrs has likewise failed to establish standing to seek mandamus relief from the business restriction provisions. The only factual allegations Marrs asserts with regard to how those provisions have injured him personally are his broad statements that he "has been deprived of his ability to patronize" various classes of businesses and he "frequently may not enter" "certain establishments" where ten or more people are present. In essence, Marrs reiterates the terms of the business restriction provisions without describing any specific instance in which they have impacted him.[3] *See Avery v. Beale*, 195 Va. 690, 706 (1954) ("[T]he person questioning the constitutionality of a legislative enactment must clearly show that in its operation he has been injured thereby. The fact that it may contravene the constitution in its application to him or others under supposed or different circumstances avails him nothing."). Although it is certainly conceivable that the business restriction provisions have in some manner impacted Marrs' ability to engage in commercial activity, standing cannot be premised on inference or assumption, no matter how plausible. *See Lafferty*, 293 Va. at 363 (noting that a party cannot rely on inference or speculation to establish standing). Nor can standing be sustained by Marrs' "bare position" as a citizen or taxpayer of the Commonwealth paired with his assertion that the business restriction provisions are invalid. *Id*. at 364 (internal quotation marks omitted).

[3] In Marrs' reply to the respondents' contention that he lacks standing to challenge the business restriction provisions, Marrs asserts that, "[f]or the past two months, and for the indefinite future, [he] has had removed from him the ability to access any number of Virginia-based businesses, including his fitness center, barber shop, local restaurants, and any number of other businesses. And if he were to attempt access, [he] would be subject to arrest." This is the first instance in which Marrs has suggested that there may exist a specific business, *i.e.*, "his fitness center" or "barbershop," that he has been unable to patronize. To the extent this reference is more particularized than the allegations in Marrs' original pleading, it does not bear on our determination that Marrs lacks standing to challenge the business restriction provisions because Marrs has not sought or been granted leave to amend his original petition. *See* Rule 1:8 ("No amendments shall be made to any pleading after it is filed save by leave of court.").

Moreover, Marrs seeks the prospective remedy of mandamus but has not attempted to describe how the business restriction provisions might affect him in the foreseeable future other than to claim they will continue to be criminally enforced in the geographic area where he lives. *Cf. Morrissette v. McGinniss*, 246 Va. 378, 382 (1993) ("Mandamus is applied prospectively only and will not be used to undo an act already done; it lies to compel, not to revise or correct action, however erroneous the action may have been."). Marrs has not alleged any facts indicating he has recently engaged in, might engage in, or even desires to engage in conduct that may hazard criminal charges, and Marrs' general fear of prosecution based merely on the potential enforcement of the business restriction provisions under a nondescript or theoretical set of circumstances is not sufficient to establish standing. *See Lafferty*, 293 Va. at 361-62 (explaining that, standing alone, a student's "bald," factually unsupported assertion of fear of discipline for violating his school's revised anti-discrimination policy did not establish an "injury sufficient for standing" to challenge the policy's legality).

Marrs' assertion of standing to challenge the gathering provisions fails for much the same reasons. Specifically, Marrs does not identify any instance in which he has been or might be prevented from gathering with ten or more people due to the provisions. Instead, the only factual allegations in Marrs' petition regarding the gathering provisions are that he is subject to them and could be criminally prosecuted for violating them. Every Virginia citizen, regardless of personal circumstance, could claim precisely the same, non-specific injury with respect to the gathering provisions.[4] Thus, with regard to the gathering provisions, Marrs does not assert an interest "in the outcome of the controversy that is separate and distinct from the interest of the public at large." *Goldman*, 262 Va. at 373.

Finally, Marrs lacks standing to challenge the stay-at-home provision because he again alleges nothing more than that he is subject to the provision without stating how it impacts him

[4] For the first time in his reply to the motions to dismiss, Marrs asserts the gathering provisions have a "chilling" effect on his "freedom of association" and notes one instance in which individuals were purportedly threatened with arrest for violating the gathering provisions. Because Marrs did not include these allegations in his original pleading, they do not bear on our assessment of his standing. Rule 1:8.

materially or uniquely.[5] Like the business restriction provisions, the stay-at-home provision permits citizens to freely engage in a wide variety of conduct, and Marrs has not attempted to describe how he has been or might be particularly affected by the admonishment that he not leave his home for reasons other than the provision allows. Considering also that the stay-at-home provision does not carry the threat of criminal prosecution, Marrs' mere disagreement with the advisability of the provision or its legality does not give him standing to seek its abolition. *See Lafferty*, 293 Va. at 362 ("[G]eneral distress over a general policy does not alone allege injury sufficient for standing").

Upon further consideration whereof, Marrs' motion to expedite is denied as moot.

Accordingly, the petition is dismissed.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

Deputy Clerk

[5] Contrary to Marrs' assertion in his reply to the respondents' motions to dismiss, at no point do Governor Northam and Commissioner Oliver concede Marrs could have standing to challenge the stay-at-home provision.