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8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
9 IN AND FOR THE COUNTY OF MARICOPA

10 DOUGLAS HESTER, a teacher in the  
Phoenix Union High School District,

11 Plaintiff,

12 vs.

13 PHOENIX UNION HIGH SCHOOL  
14 DISTRICT; LELA ALSTON, STANFORD  
PRESCOTT, NAKETA ROSS,  
15 STEPHANIE PARRA, LAURA PASTOR,  
STEVE GALLARDO, and AARON  
16 MARQUEZ, in their official capacities as  
members of the Phoenix Union High School  
17 District Governing Board; CHAD  
GESTSON, in his official capacity as  
18 Superintendent of the Phoenix Union High  
School District; DOES I-X,

19 Defendants.  
20

No. CV2021-012160

**MOTION TO DISMISS**

**(Assigned to Honorable Randall  
Warner)**

**Oral Argument: August 13, 2021,  
9:00 a.m.**

21 Defendants move to dismiss<sup>1</sup> Plaintiff Douglas Hester's First Amended Verified  
22 Complaint for a Special Action pursuant to Ariz. R. Civ. P. 12(b)(6) and Ariz. Special  
23 Action Rule 3. Hester's lawsuit is groundless, relying on a purported violation of a law  
24 – A.R.S. § 15-342.05 – that is not yet effective or binding on Defendants, or anyone  
25 else. Because there can be no violation of a law that is not yet in effect, this lawsuit  
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27 <sup>1</sup> Undersigned counsel certifies that they have met and conferred with Plaintiff's  
28 counsel and the parties' counsel did not identify any amendments that would resolve the  
issues in this Motion.

1 must be dismissed. Defendants cannot be enjoined to follow an ineffective law, and any  
2 lawsuit aimed at some future actions the Defendants may or may not take is not yet ripe.  
3 For similar reasons, the lawsuit fails to state a proper claim under Special Action Rule  
4 3.

### 5 **Background**

6 Phoenix Union High School District (“PXU”) is a public school district in  
7 Arizona charged with, among other things, prescribing and enforcing policies for the  
8 governance of several schools. (First Amended Complaint (“Am. Compl.”) ¶¶ 2, 34.)  
9 In this capacity, PXU decided during the 2020-21 school year to adopt a mask  
10 requirement (the “Mask Policy”) for “universal indoor masking only, regardless of  
11 vaccination status.” (*Id.* ¶ 18.) This policy is binding on “all staff, students, and  
12 visitors.” (*Id.*) After receiving feedback from “staff, students, and families that they  
13 want [PXU] to realign [its] mitigation practices with the guidelines and  
14 recommendations of national and local health agencies,” PXU decided to “begin the  
15 school year on August 2 enforcing [its] existing Board-adopted mask requirement.”  
16 (*Id.*).

17 Plaintiff, a PXU teacher (*id.* ¶ 1), sued PXU, its governing board, and its  
18 superintendent (collectively, “Defendants”), seeking a declaration that PXU’s Mask  
19 Policy is contrary to the law and to require PXU to impose different policies that do not  
20 include a masking requirement. (*Id.* Prayer for Relief ¶¶ B & C.) To support his view  
21 that the Mask Policy is contrary to the law, Plaintiff cites a recently passed omnibus  
22 budget bill, HB 2898. (*Id.* ¶¶ 14, 16.) In particular, he relies on a new statute, A.R.S.  
23 § 15-342.05, which provides that a “school district governing board . . . may not require  
24 the use of face coverings by students or staff during school hours and on school  
25 property.” (*Id.* ¶ 15.) He also relies on Section 118(A)<sup>2</sup> of HB 2898 which purports to  
26 make this new statute apply retroactively to, from, and after June 30, 2021. (*Id.* ¶ 17.)

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28 <sup>2</sup> Plaintiff misidentifies Section 118 as Section 119. (Am. Compl. ¶ 17.)

1 Based on this new statute, Plaintiff alleges that “[t]he policies and procedures put in  
2 place by Defendants include an illegal mandate requiring students and staff to wear  
3 masks.” (*Id.* ¶ 35.)

#### 4 **Argument**

#### 5 **I. The First Amended Complaint fails to state a viable claim for relief.**

#### 6 **A. A.R.S. § 15-342.05 is not currently the law.**

7 Plaintiff’s lawsuit is based on the incorrect premise that A.R.S. § 15-342.05 is  
8 *presently* the law of Arizona. This is not accurate. The Arizona Constitution provides  
9 that any legislation passed by the legislature does not become effective and is not the  
10 law until 90 days after the close of the legislative session. Ariz. Const. art. IV, pt. 1  
11 §1(3). The effective date for legislation passed this legislative session is September 29,  
12 2021.<sup>3</sup> While there is a narrow exception for laws with emergency clauses passed by a  
13 super majority of the legislature, there is no doubt that HB 2898 is not such a law – it  
14 was passed by a bare majority in each house and included no emergency clause.<sup>4</sup> The  
15 Mask Policy therefore does not violate any currently operative Arizona law.

16 The retroactivity clause in HB 2898 does not impact this analysis. That clause,  
17 like the rest of the law, takes effect on September 29, 2021. A retroactivity clause does  
18 not alter the constitutionally established effective date of legislation. To avoid requiring  
19 the Court to read the same analysis twice, Defendants incorporate by reference their  
20 arguments made in their opposition to Plaintiff’s Application for a TRO regarding why  
21 Plaintiff’s claim fails, and do not further restate them here.

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24 <sup>3</sup> See Arizona State Legislature, “General Effective Dates,” available online at  
25 <https://www.azleg.gov/general-effective-dates/>. A printout of this webpage can be  
26 found at the Declaration of Josh Bendor, ¶ 3 & Ex. 2, attached as Exhibit B to  
27 Defendants’ Opposition to the Application for a Temporary Restraining Order (“Bendor  
28 Decl.”).

<sup>4</sup> See Bill History for HB2898, available online at  
<https://apps.azleg.gov/BillStatus/BillOverview/76131?SessionId=123>. A copy of the  
bill summary can be found at Bendor Decl. ¶ 2 & Ex. 1.

1 Defendants request that the Court dismiss Plaintiff's First Amended Complaint  
2 because it fails to state a claim for which relief can be granted. Plaintiff cannot enforce  
3 A.R.S. § 15-342.05 before it is effective.

4 **B. Plaintiff's alternative request for relief does not salvage the**  
5 **complaint.**

6 To attempt to overcome the effective date problem, Plaintiff's First Amended  
7 Complaint added alternative requests for relief based on the law's effective date,  
8 seeking to enjoin Defendants from enforcing the Mask Policy on September 29, 2021.  
9 This does not salvage Plaintiff's claim. The complaint's allegations do not support a  
10 claim for relief on September 29, 2021.<sup>5</sup> None of the facts alleged provide a basis for  
11 finding a violation of Section 15-342.05 on September 29, 2021 because there are no  
12 allegations about what PXU's policy will be on September 29. As the complaint  
13 alleges, PXU has set the mask policy that would apply to "begin the school year on  
14 August 2." (Am. Compl. ¶ 18.) PXU has done nothing more.

15 Plaintiff has added to the First Amended Complaint a quote from the PXU  
16 Superintendent that indicates that PXU does not "want a mask requirement forever  
17 either, and we'll make a decision to change that when it's safe to do so." (*Id.* ¶ 41.)  
18 That seemingly sensible statement does not state a claim for a violation of A.R.S. § 15-  
19 342.05 after it takes effect September 29.

20 Therefore, the First Amended Complaint fails to state a claim for relief and must  
21 be dismissed.

22 **II. The First Amended Complaint does not state a claim for special action**  
23 **relief.**

24 The First Amended Complaint includes a single count alleging a violation of  
25 Special Action Rule 3. Under Rule 3, the only permissible questions in a special action  
26 are:

27 \_\_\_\_\_  
28 <sup>5</sup> Plaintiff made almost no changes to the factual allegations in the First Amended  
Complaint.

- 1 (1) “Whether the defendant has failed to exercise discretion which he has a duty
- 2 to exercise; or to perform a duty required by law as to which he has no
- 3 discretion;”
- 4 (2) “Whether the defendant has proceeded or is threatening to proceed without
- 5 or in excess of jurisdiction or legal authority;” or
- 6 (3) “Whether a determination was arbitrary and capricious or an abuse of
- 7 discretion.”

8 Ariz. Special Action Rule 3. The First Amended Complaint’s allegations do not  
9 implicate any of these issues. As previously explained, Plaintiff’s entire case focuses on  
10 a law that is not yet in effect. As a result, requiring masks now does not implicate *any*  
11 obligations or duty within the scope of Special Action Rule 3.

12 Plaintiff suggests that “threatening” not to change PXU’s masking policies until  
13 “it is . . . safe to do so” (Am. Compl. ¶¶ 40, 41) amounts to a “threat[] to proceed  
14 without or in excess of their jurisdiction or legal authority,” (*id.* ¶ 42). This is an absurd  
15 and somewhat frightening acknowledgement that, in plaintiff’s view, once Section 15-  
16 342.05 takes effect, public schools in Arizona would be required to engage in conduct  
17 that is not safe.<sup>6</sup> Moreover, that suggestion is merely Plaintiff’s speculation about what  
18 may occur in the future. For now, because Section 15-342.05 is not in effect, school  
19 districts unquestionably have the authority to require masks, as PXU is doing to begin  
20 the new school year.

21 In sum, none of the factual allegations implicate a question under Special Action  
22 Rule 3. This is another reason the complaint fails to state a claim and should be  
23 dismissed.

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26 <sup>6</sup> All laws must, at a minimum, have a rational basis, and it is hard to imagine  
27 something less rational than requiring schools to engage in conduct that they know is  
28 not safe, as plaintiff suggests the new law he seeks to enforce requires. This absurdity  
raises an issue about the constitutionality of the new law, but that is beyond the scope of  
this motion.

1 **III. Plaintiff's claim is not ripe.**

2 For similar reasons, any potential claim is not ripe for adjudication. "Ripeness is  
3 a prudential doctrine that prevents a court from rendering a premature decision on an  
4 issue that may never arise." *Brush & Nib Studio, LC v. City of Phx.*, 247 Ariz. 269, 280  
5 ¶ 36 (2019). Courts should not render decision when doing so would "implicate[] a  
6 multitude of possible factual scenarios too 'imaginary' or 'speculative' to be ripe." *Id.*  
7 at 280 ¶¶ 37-41 (wedding vendor's challenge to city ordinance was unripe as it related  
8 to certain products for which the factual record was not developed, and the court would  
9 therefore have to speculate about how the ordinance would be applied).

10 As explained previously, Plaintiff's First Amended Complaint includes no  
11 allegations about PXU's conduct on or after September 29, 2021. It relies only on  
12 PXU's July 30, 2021 statement that it "will begin the school year on August 2"  
13 enforcing its existing Mask Policy (Am. Compl. ¶ 18) and subsequent comments that  
14 the district will change that requirement "when it's safe to do so," (*id.* ¶ 41). Nothing in  
15 the factual allegations provides any basis for relief based on a law that does not take  
16 effect until September 29, 2021, almost two months away.

17 Because the coronavirus presents a rapidly evolving landscape, there is no way to  
18 know if there will be a dispute between the parties when A.R.S. § 15-342.05 goes into  
19 effect on September 29, 2021. Any decision concerning A.R.S. § 15-342.05 would  
20 therefore be "a premature decision on an issue that may never arise." *Brush & Nib*, 247  
21 Ariz. at 280 ¶ 36. Relief "should be based on an existing state of facts, not facts that  
22 may or may not arise in the future." *Thomas v. City of Phx.*, 171 Ariz. 69, 74 (App.  
23 1991). The Court is not required to speculate what the facts will be when the law takes  
24 effect.

25 Thus, there is no "actual controversy between the parties," as is necessary for a  
26 case to be ripe, and there can be no actual controversy until after A.R.S. § 15-342.05  
27 takes effect. *Brush & Nib*, 247 Ariz. at 280 ¶ 36. Until then, any claim is purely  
28 speculative.

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**Conclusion**

Plaintiff’s lawsuit is based on the faulty premise that A.R.S. § 15-342.05 is presently Arizona law. It is not. In addition, there are no allegations that PXU will violate the law after it takes effect. Plaintiff has no valid claim now, and this lawsuit should be dismissed.

Because A.R.S. § 15-342.05 is plainly not the law in Arizona, Plaintiff’s suit is without any substantial basis. PXU therefore seeks its fees and costs, pursuant to A.R.S. § 12-349.

DATED this 6<sup>th</sup> day of August, 2021.

OSBORN MALEDON, P.A.

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This document was electronically filed and copy served via eFiling system this 6<sup>th</sup> day of August, 2021 on:

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