

1 Mary R. O'Grady, 011434  
2 Joshua D. Bendor, 031908  
3 Emma J. Cone-Roddy, 034285  
4 OSBORN MALEDON, P.A.  
5 2929 North Central Avenue, Suite 2100  
6 Phoenix, Arizona 85012-2793  
7 (602) 640-9000  
8 [mogrady@omlaw.com](mailto:mogrady@omlaw.com)  
9 [jbendor@omlaw.com](mailto:jbendor@omlaw.com)  
10 [econe-rodgy@omlaw.com](mailto:econe-rodgy@omlaw.com)

11 Attorneys for Defendants

12  
13 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

14 IN AND FOR THE COUNTY OF MARICOPA

15 DOUGLAS HESTER, a teacher in the  
16 Phoenix Union High School District;

17 Plaintiff,

18 v.

19 PHOENIX UNION HIGH SCHOOL  
20 DISTRICT; LELA ALSTON,  
21 STANFORD PRESCOTT, NAKETA  
22 ROSS, STEPHANIE PARRA, LAURA  
23 PASTOR, STEVE GALLARDO, and  
24 AARON MARQUEZ, in their official  
25 capacities as members of the Phoenix  
26 Union High School District Governing  
27 Board; CHAD GESTSON, in his official  
28 capacity as superintendent of the Phoenix  
Union High School District; DOES I-X,

Defendants.

No. CV2021-012160

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S APPLICATION FOR A  
TEMPORARY RESTRAINING  
ORDER WITHOUT NOTICE**

**(Assigned to Honorable Randall H.  
Warner)**

Defendants Phoenix Union High School District, its governing board members in their official capacities, and its Superintendent in his official capacity (collectively, "PXU") urge this Court to deny Plaintiff's Application for a Temporary Restraining Order. Plaintiff's claim fails on the merits because the statute on which he relies does not take effect until September 29, 2021. He is not entitled to a TRO or any other relief from this Court.

1 **Factual Background**

2 PXU is a public school district in Phoenix, which operates twenty-two high schools  
3 that serve more than 28,000 students. *See* Declaration of Dr. Chad Gestson (“Gestson  
4 Decl.”), attached as Ex. A, ¶ 2.

5 When the COVID-19 pandemic first struck Arizona in March 2020, PXU, like  
6 many districts, shifted to remote education. *Id.* ¶ 3. In fall 2020, to address the serious  
7 health and safety challenges presented by the COVID-19 pandemic, PXU began requiring  
8 all people on campus to wear masks. *Id.* This requirement extended to students, staff,  
9 and visitors, among others, and was contained in PXU’s Student Handbook (approved by  
10 its board) and several district policies. *Id.*

11 The mask requirement was also contained in PXU’s Health and Safety Mitigation  
12 Plan, which PXU initially adopted during the 2020-21 school year to address the serious  
13 health and safety challenges presented by the COVID-19 pandemic. *Id.* ¶ 4. The  
14 Mitigation Plan provides comprehensive guidance regarding PXU’s approach to  
15 supporting “healthy and safe learning and working environments for students and staff”  
16 using health data and recommendations from experts. *Id.*

17 As PXU prepared for academic year 2021-22, the COVID-19 pandemic continued,  
18 and cases began to rise again, particularly a Delta variant, which is more deadly and more  
19 contagious than prior variants. *Id.* ¶ 5. PXU monitors information available through the  
20 Maricopa County Public Health Department to get specific information about conditions  
21 in the PXU community. *Id.* ¶ 6. As PXU was planning to begin the 2021-22 school year,  
22 all of the locations that PXU serves were designated as having “High” community  
23 transmission levels by the Maricopa County Public Health Department based on new cases  
24 and positivity rates. *Id.*

25 At the same time, the CDC announced a new recommendation that all persons wear  
26 masks in high traffic indoor spaces, whether vaccinated or not. *Id.* ¶ 7. In addition, the  
27 CDC recently revised its guidance for K-12 schools, recommending that masks should be  
28 worn indoors by all individuals, regardless of vaccination status, because of “new

1 evidence” about the spread of the Delta variant of COVID-19. *Id.* The Arizona  
2 Department of Health Services similarly lists “[u]niversal and correct use of masks” as  
3 one of five “key mitigation strategies” that schools should use. *Id.*

4 After careful consideration, PXU determined that it would be safest to begin the  
5 school year by maintaining a requirement that all students, staff, and visitors continue to  
6 wear masks while on school grounds at its schools (the “Mask Policy”). *Id.* ¶ 8. According  
7 to the guidance from health experts, discussed above, masking is a proven technique for  
8 suppressing the spread of COVID-19. *See also id.* The policy allows PXU to effectively  
9 balance the benefits of in-person education with protecting the health and safety of its  
10 students, staff, and their families. *Id.*

11 Indeed, requiring masks in K-12 classrooms provides a potential quarantine  
12 exception for students who are exposed to COVID. *Id.* ¶ 9. Thus, consistent masking by  
13 students both decreases the chance of a COVID-19 outbreak in a school setting and  
14 increases the chance that students who have been exposed to a student with COVID-19  
15 can stay in school. *Id.*

16 Plaintiff’s challenge to PXU’s decision to implement the Mask Policy is based  
17 solely on a new state law, A.R.S. §15-342.05, which the Legislature enacted during its  
18 2021 regular session as part of HB 2898, the K-12 education budget reconciliation bill.  
19 Section 15-342.05 purports to prohibit school districts from creating policies like the Mask  
20 Policy that require the use of facial masks by students and staff when they are on school  
21 grounds during school hours. Although PXU believes that A.R.S. § 15-342.05 is legally  
22 and constitutionally infirm, the ultimate validity of A.R.S. § 15-342.05 need not be  
23 addressed to resolve the pending TRO application because, as explained below, A.R.S.  
24 § 15-342.05 is not currently the law.

### 25 **Legal Argument**

26 To receive injunctive relief, including a TRO, Plaintiff must establish that (1) he is  
27 likely to succeed on the merits, (2) there is a possibility of irreparable injury if the  
28 requested relief is not granted, (3) the balance of hardships favors him, and (4) public

1 policy favors an injunction. *Schoen v. Schoen*, 167 Ariz. 58, 63 (App. 1990). Plaintiff  
2 ignores three of these four requirements, instead relying solely on the argument that he  
3 will prevail on the merits and arguing that “the requirement of irreparable injury is  
4 satisfied when the official acts . . . are unlawful.” (TRO Appl. at 4-5.) Because Plaintiff  
5 is wrong on the merits, and because he has posited no other potential harm, he is not  
6 entitled to a TRO.

7 **I. Plaintiff is not likely to succeed on the merits.**

8 Plaintiff’s application for a TRO is based on the incorrect premise that A.R.S.  
9 § 15-342.05 is *presently* the law of Arizona. But that is simply not the case. The  
10 Arizona Constitution provides that any legislation passed by the legislature does not  
11 become effective and is not the law until 90 days after the close of the legislative  
12 session. The effective date for legislation passed this legislative session is September  
13 29, 2021. While there is a narrow exception for certain laws passed by a super majority  
14 of the legislature with an emergency clause, there is no doubt that HB 2898 is not such  
15 a law – it was passed by a bare majority in each house and includes no emergency  
16 clause. The Mask Policy therefore does not violate any currently operative Arizona  
17 law.

18 **A. The Arizona Constitution governs the effective date of the statute.**

19 The Arizona Constitution establishes when legislation takes effect. The general  
20 rule is that “no act passed by the legislature shall be operative for ninety days after the  
21 close of the session of the legislature enacting such measure.” Ariz. Const. art. IV, pt. 1  
22 §1(3). The only exception is for measures that

23 require earlier operation to preserve the public peace, health, or safety, or  
24 to provide appropriations for the support and maintenance of the  
25 departments of the state and of state institutions; provided, that no such  
26 emergency measure shall be considered passed by the legislature unless  
27 it shall state in a separate section why it is necessary that it shall become  
28 immediately operative, and shall be approved by the affirmative vote of  
two-thirds of the members elected to each house of the legislature.

1 *Id.* There are no unstated exceptions to the Effective Date Clause. Substantive  
2 legislation does “not go into effect at once” and an emergency law does so only “when  
3 passed according to the forms prescribed by the Constitution,” i.e., when it has an  
4 emergency clause and is supported by two-thirds of the House of Representatives and  
5 two-thirds of the Senate. *Clark v. Boyce*, 20 Ariz. 544, 547 (1919).

6 The Effective Date Clause serves an “obvious” purpose: “to allow the people to  
7 have the right to review the action of the Legislature on any act which is passed by the  
8 usual simple majority of both houses.” *State ex. rel. La Prade v. Cox*, 43 Ariz. 174,  
9 178 (1934); *see also* Ariz. Const. art. IV, pt. 1 § (3) (stating that the purpose is “to allow  
10 opportunity for referendum petitions”). And when some reason exists that “require[s]  
11 a law to take effect immediately,” the Constitution “provide[s] a special manner in  
12 which this need can be met.” *Cox*, 43 Ariz. at 178. Indeed, the Supreme Court has  
13 stated that attempts by the Legislature to create effective dates other than those  
14 permitted by the Constitution are a “nullity. . . without force and effect and should be  
15 disregarded.” *Indus. Comm’n v. Frohmiller*, 60 Ariz. 464, 475 (1943) (holding that  
16 when the Legislature passed a law in compliance with the emergency clause, a  
17 provision providing a different effective date had no legal effect); *see also* Ariz. Atty.  
18 Gen. Op. I89-102 (Dec. 1, 1989) (confirming *Frohmiller* and noting that legislation  
19 passed without necessary two-thirds vote was not effective until general effective date,  
20 despite language indicating that the legislature intended it to be immediately operative);  
21 Ariz. Atty. Gen. Op. 70-26 (Oct. 30, 1970) (finding that although statute specified an  
22 effective date of July 1, 1970, because it was enacted without an emergency clause, the  
23 Arizona Constitution required it to be deemed effective as of August 11, 1970).

24 Here, A.R.S. § 15-342.05 was passed as part of HB 2898, a budget reconciliation  
25 bill (“BRB”). *See* HB 2989, Ch. 404, 55<sup>th</sup> Leg, 1<sup>st</sup> Reg. Sess., *available at*  
26 <https://www.azleg.gov/legtext/55Leg/1R/laws/0404.pdf> and attached as Ex. A to  
27 Plaintiff’s First Am. Compl. The Senate’s fact sheet for HB 2898 acknowledges that  
28 “[b]ecause BRBs contain substantive law changes, the Arizona Constitution provides

1 that they become effective on the general effective date, unless an emergency clause is  
2 enacted.”<sup>1</sup> Newly enacted A.R.S. § 15-342.05 is Section 12 of the bill. The bill was  
3 passed during the First Regular Session of the Fifty-fifth Legislature, and therefore has  
4 a general effective date of September 29, 2021.<sup>2</sup>

5 HB 2898 has none of the requirements for an effective date *other than* September  
6 29. It does not have an emergency clause that explains that A.R.S. § 15-342.05 must  
7 be effective immediately, and it passed the House of Representative and the Senate with  
8 far less than the constitutionally required two-thirds majority vote.<sup>3</sup> As such, A.R.S.  
9 § 15-342.05 is not yet operative and presently has no legal effect. It does not restrict  
10 PXU’s actions and does not prevent PXU from taking any action it could before the  
11 Legislature passed HB 2898.

12 Indeed, as the First Amended Complaint acknowledges (at ¶ 34), PXU may  
13 “[p]rescribe and enforce policies and procedures for the governance of the schools that  
14 are not inconsistent with law.” A.R.S. § 15-341(A)(1). This is precisely what PXU has  
15 done here. Its governing board has prescribed a policy that is consistent with *current*  
16 Arizona law. The policy could change by September 29, 2021, and there could be  
17 further legal disputes concerning the constitutionality and enforceable of A.R.S. §15-

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21  
22 <sup>1</sup> Arizona State Senate, Fact Sheet for HB 2898, attached as Ex. 1 to the Declaration  
23 of Joshua Bendor (“Bendor Decl.”) (Ex. B hereto) and available online at  
24 [https://www.azleg.gov/legtext/55leg/1R/summary/S.2898APPROP ASPASSEDCO  
W.pdf](https://www.azleg.gov/legtext/55leg/1R/summary/S.2898APPROP ASPASSEDCO W.pdf).

25 <sup>2</sup> See Arizona State Legislature, “General Effective Dates,” attached as Bendor Decl.  
26 Ex. 2 and available online at <https://www.azleg.gov/general-effective-dates/>.

27 <sup>3</sup> See Bill History for HB 2898, attached as Bendor Decl. Ex. 3 and available online at  
28 <https://apps.azleg.gov/BillStatus/BillOverview/76131?SessionId=123>. HB 2898  
passed the House on a bare majority vote of 31-29, and passed the Senate with a vote  
of 16-12 and two abstentions.

1 342.05 when it takes effect. But those are issues for another day. There is no question  
2 that PXU is complying with current law.<sup>4</sup>

3 The two Declarations filed by Plaintiff do not change the outcome. Those  
4 Declarations, submitted by Representatives Jacqueline Parker and Jake Hoffman, set  
5 forth the declarants' beliefs that A.R.S. § 15-342.05 "merely clarifies existing law" and  
6 can apparently thus take effect immediately. (Parker Decl. ¶ 11; Hoffman Decl. ¶ 6.)  
7 An individual legislator's opinion about the law has little bearing on the decision before  
8 this Court. See *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204 ¶ 13 (App. 2007) (holding  
9 that comments of individual legislators are "not necessarily determinative of legislative  
10 intent") (citing *Coal. For Clean Air. v. S. Cal. Edison Co.*, 971 F.2d 219, 227 (9th Cir.  
11 1992) ("statements of individual legislator[s] 'entitled to little, if any, weight'")). But  
12 even assuming that two Representatives can speak for and represent the view of the  
13 entire legislative body, this argument plainly fails – the Constitution provides no  
14 exception to the Effective Date Clause for laws that merely "clarify" an existing law,  
15 nor can Plaintiff identify any such existing law that A.R.S. § 15-342.05 purportedly  
16 "clarifies." Indeed, PXU is empowered to "[p]rescribe and enforce policies and  
17 procedures for the governance of the schools that are not inconsistent with law or rules  
18 prescribed by the state board of education." A.R.S. § 15-341(A)(1). This broad power  
19 is limited only by conflicting law, and no law exists that prevents PXU from requiring  
20 students and employees to wear face masks when on school property. The Declarations  
21 cannot override the Arizona Constitution, change the facts surrounding the number of  
22 votes obtained to adopt HB 2898, or create law that does not exist.

23 **B. The retroactivity provision cannot override the Constitution.**

24 Plaintiff appears to argue that A.R.S. § 15-342.05 is currently the law because HB  
25 2898 contains a clause purporting to make it retroactive to June 30, 2021. (TRO Appl. at

26 \_\_\_\_\_  
27 <sup>4</sup> PXU has serious doubts about the constitutionality and enforceability of A.R.S.  
28 § 15-342.05, but the Court need not reach those issues in connection with Plaintiff's  
request for a TRO.

1 2; *see also* HB 2898, § 118 (retroactivity clause)). But that retroactivity clause does not  
2 change HB 2898’s effective date. It cannot trump the Arizona Constitution and cause  
3 section 15-342.05 to go into effect earlier than the Constitution allows. The Constitution  
4 states that “no act passed by the legislature shall be operative for ninety days after the  
5 close of the session” unless it is an emergency measure “approved by the affirmative vote  
6 of two-thirds of the members elected to each house of the legislature.” Ariz. Const. art.  
7 IV, pt.1 § 1(3). There is no exception for situations in which the Legislature, without the  
8 requisite two-thirds vote, inserts a retroactivity clause. And while no Arizona Court has  
9 specifically ruled on whether a retroactivity clause can override the two-thirds requirement  
10 and the separate statement provisions of the Effective Date Clause, the Constitution  
11 plainly cannot be overridden: “[t]he legislature may not enact a statute which is in conflict  
12 with a provision of the Arizona Constitution.” *Harris v. Maehling*, 112 Ariz. 590, 591  
13 (1976).

14 On September 29, 2021, HB 2898 will take effect (assuming no referendum  
15 petitions are filed that prevent HB 2898 from taking effect until the voters consider the  
16 measure and the bill is not enjoined). The Court should reject Plaintiff’s argument that  
17 the bill somehow takes effect earlier, which simply cannot be reconciled with the  
18 Constitution’s requirements. Indeed, in a telling omission, Plaintiff does not even mention  
19 the governing constitutional provision. Because A.R.S. § 15-342.05 is not the law now,  
20 Plaintiff’s claim fails as a matter of law and the Court should not issue a TRO.

21 **II. Plaintiff has failed to show an irreparable injury.**

22 Plaintiff makes no argument that the Mask Policy causes him any harm at all –  
23 much less irreparable harm – other than the harm he asserts arises because of PXU’s  
24 alleged failure to comply with A.R.S. §15-342.05. (TRO Appl. at 5.) Because he is wrong  
25 on the merits, he is also wrong about his alleged harm.

26 **III. The balance of hardships and public interest favor PXU.**

27 While Plaintiff alleges no harm other than his interest in enforcing a state law that  
28 is not yet in effect, there are significant interests served by PXU’s Mask Policy. Most



1 importantly, the current CDC guidance, PXU’s obligation to keep as many students in the  
2 classroom for in-person instruction as possible, and the specific COVID transmission rates  
3 currently within PXU boundaries all support PXU’s ability to implement the Mask Policy.  
4 Gestson Decl. ¶¶ 5-15.

5 In addition, an injunction would harm PXU by depriving its elected governing  
6 board of the ability to make local decisions about the educational needs of its students.  
7 The board has broad authority to establish policies and procedures for the district. *E.g.*,  
8 A.R.S. §§ 15-341, -342. This necessarily includes taking steps that it deems appropriate  
9 to ensure that its schools are safe for students, teachers and other staff, so that students  
10 may access their education in a safe, consistent manner. *See, e.g.*, A.R.S. § 15-806  
11 (allowing district boards to excuse students from attendance during periods of widespread  
12 illness); § 15-873 (requiring schools to bar unimmunized students from attendance during  
13 an outbreak of “communicable immunization-preventable diseases” as determined by the  
14 Department of Health Services of local health departments). Some people may disagree  
15 with PXU’s decision, but it is PXU’s decision to make.

16 Moreover, the public interest is served by PXU taking active steps to avoid  
17 potential COVID outbreaks that would risk in-person education or require a quarantine to  
18 suppress one.

19 **IV. Request for a bond.**

20 Plaintiff asks this Court to enter an order prohibiting PXU from protecting its  
21 students and staff with the universal mask requirements recommended by the CDC,  
22 Arizona Department of Health Services, and other experts. Such an order would endanger  
23 the students and staff of PXU, their families, and the communities in which they live. That  
24 makes it difficult to specify, in dollars, the security that Plaintiff would have to provide to  
25 pay the costs and damages that PXU would sustain if it were wrongfully enjoined.

26 In addition to the lives and health at issue, there are financial costs that a TRO  
27 would likely impose on PXU. If PXU cannot require masks, it is much more likely to  
28 have to close one or more schools due to COVID outbreaks; for students to have to

1 quarantine, and therefore to need virtual education or additional instruction at a later date;  
2 and for teachers and other staff to have to miss work, and to be replaced by substitutes.  
3 As context, last school year PXU spent an estimated \$10 million dollar in COVID-related  
4 expenses. See Gestson Decl. ¶ 15.

5 PXU also recognizes that Plaintiff is a teacher, not a large corporation.  
6 Nonetheless, Plaintiff's requested relief (which is unsupported by the law in the first  
7 instance) would impose great costs on PXU and those it is duty-bound to teach and protect.  
8 PXU therefore requests that, if the Court were to issue a TRO, Plaintiff be required to post  
9 a bond of at least \$1 million dollars.

10 **V. Request for fees and costs.**

11 PXU further requests its attorneys' fees and costs pursuant to A.R.S. § 12-349  
12 because this action is without substantial justification.

13 **CONCLUSION**

14 For the reasons set forth above, this Court should deny Plaintiff's TRO request.

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

16 OSBORN MALEDON, P.A.

17  
18 By /s/ Mary R. O'Grady  
19 Mary R. O'Grady  
20 Joshua D. Bendor  
21 Emma J. Cone-Roddy  
22 2929 North Central Avenue, 21st Floor  
23 Phoenix, Arizona 85012-2793  
24  
25 Attorneys for Defendants  
26  
27  
28

1 This document was electronically filed  
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3 The Honorable Randall Warner  
4 Maricopa County Superior Court

5 Alexander Kolodin  
6 Christopher Viskovic  
7 Kolodin Law Group PLLC  
8 [Alexander.Kolodin@KolodinLaw.com](mailto:Alexander.Kolodin@KolodinLaw.com)  
9 [CViskovic@KolodinLaw.com](mailto:CViskovic@KolodinLaw.com)  
3443 N. Central Avenue, Suite 1009  
Phoenix, AZ 85012

*Attorneys for Plaintiff*

10 /s/ Karen Willoughby \_\_\_\_\_

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