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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

Plaintiff,

vs.

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

Defendants.

No. CV2021-012160

REPLY IN SUPPORT OF MOTION TO DISMISS

(Assigned to the Honorable Randall H. Warner)

Oral argument at 9:00 August 13, 2021

Plaintiff asserts that he is entitled to immediate and permanent injunctive relief prohibiting Defendants ("PXU") from requiring masks to be worn at school because PXU's Mask Policy purportedly conflicts with a "new statute," A.R.S. § 15-342.05 (First Am. Compl. ¶ 14). The problem with this argument is obvious: the Arizona Constitution prevents new, substantive legislation from coming into effect until 90 days after the end of a legislative session, absent a two-thirds vote from the Legislature and the inclusion of an emergency clause in the bill. Ariz. Const. art. IV, pt. 1 § 1(3). HB 2898, the bill that included A.R.S. § 15-342.05, had neither. Plaintiff's response fails to save this lawsuit

from dismissal. The law that is the basis for this lawsuit does not take effect until September 29, and PXU's decision to begin the school year requiring masks in light of the pandemic is well within its discretion. This lawsuit should be dismissed.

I. A.R.S. § 15-342.05 does not merely clarify current law.

Plaintiff first argues that PXU lacked the authority to impose the Mask Policy even before A.R.S. § 15-342.05 was passed.[1] Plaintiff's argument appears to be that because Arizona statutes do not expressly authorize school boards to impose a mask policy, school districts lack the power to do so, relying on *Oracle School Dist. No. 2 v. Mammoth High School Dist. No. 88*, 130 Ariz. 41, 43 (App. 1981).

This restrictive reading of a school district's authority is plainly inconsistent with Arizona law. The school district governing board is defined as "a body organized for the government and management of the school within a school district." A.R.S. § 15-101(14). A.R.S. § 15-341(A)(1) further provides that school district governing boards have broad authority to "[p]rescribe and enforce policies and procedures for the governance of the schools that are not inconsistent with law or rules prescribed by the state board of education." A.R.S. § 15-341(A)(17) further obligates governing boards to "[p]rovide for adequate supervision over pupils."

Reflecting these principles, the Court of Appeals has "consistently recognized that the legislature has delegated to the governing board of a high school district the control of the affairs of the district, subject to certain statutory controls." *Kelly v. Martin*, 16 Ariz. App. 7, 9 (1971). "That power has been characterized as 'plenary ..., subject only to various statutory limitations.'" *Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 20 (App. 1981) (citation omitted). Similarly, in interpreting A.R.S. § 15-341(A)(1)'s identical predecessor statute, the Arizona Supreme Court concluded the statute authorized a student dress code, noting that "[t]here must, of course, be some authority to operate a school on a day-to-day basis and this statute amply supports the authority of the school

[1] In addition to lacking merit, this theory is not in Plaintiff's First Amended Complaint and therefore cannot be the basis for granting Plaintiff any relief.

board to pass reasonable rules and regulations for the orderly operation of the school." *Pendley v. Mingus Union High Sch. Dist. No. 4*, 109 Ariz. 18, 22 (1972). In light of that, the Supreme Court admonished courts to "keep in mind that when they are asked to determine whether the regulation of a school board is reasonable or unreasonable, they should do just that and nothing more. Courts should not intrude upon the 'lawfully vested discretion' of the school board." *Id.* at 23.

Just last week, the Arizona Supreme Court unanimously affirmed that "the school-student relationship imposes an affirmative duty on schools to protect students from unreasonable risks of harm," including risks arising from "school policy." *Dinsmoor v. City of Phoenix*, — P.3d —, 2021 WL 3440670, at *3, ¶ 15 (Ariz. Aug. 6, 2021). "The duty imposed recognizes that the school 'is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents.'" *Id.* (citation omitted). This duty "appl[ies] when the school supervises and controls students and their environment, enabling it to identify and eliminate risks." *Id.* at *4, ¶ 20.

Plaintiff's narrow reading of school district authority appears based primarily on a misreading of *Oracle*. That case addressed whether one school district could contract with another to allow students to attend schools outside their district without paying tuition. *Oracle School Dist. No. 2*, 130 Ariz. at 42-43. When the districts entered into an agreement, however, a statute mandated that all out-of-district students "pay[] a reasonable fee," which served as a "requirement for the collection of tuition and that it be paid in the form of money." *Id.* at 43. Thus, the *Oracle* court held that a school district could not enter into a contract "waiving tuition or permitting it to be paid in any manner other than the payment of monies," as such agreements were prohibited by statute. *Id.*

Here, Plaintiff offers no law that would prohibit PXU from imposing a mask mandate. In his reply in support of his application for a TRO (at 5), he lists four provisions related to student health and safety and argues that school districts can *only* adopt policies related to health and safety in those four categories: sports, anaphylaxis, bullying, and

inhalers.[2] Under this narrow interpretation, PXU would lack the authority to prevent a student from bringing a dangerous animal, such as a rattlesnake, onto school grounds, as the authority to adopt policies related to protecting students from rattlesnakes is not expressly listed in statute. Districts could also not require students to stay home when they are sick, offer vaccinations on school grounds, or protect students who are harmed for reasons other than bullying. But the statutes do not create a comprehensive list of policies a school may adopt. As long as a policy reasonably relates to school governance and does not violate a rule of the State Board of Education or a specific statutory directive, it is within the governing board's broad authority under A.R.S. § 15-341(A)(1). *See Pendley*, 109 Ariz. at 22.

In any case, the Mask Policy is justified under express grants of authority to school districts. For example, A.R.S. § 15-342(22) authorizes school districts to impose a school uniform requirement, and nothing precludes a mask from being part of a uniform requirement. And despite no statute providing that school districts can issue a dress code rather than requiring uniforms, the Supreme Court has expressly held they may do so. *See Pendley*, 109 Ariz. at 22. A dress code plainly encompasses requiring students and staff to wear a mask on the face, and is clearly a source for PXU's authority to impose a mask requirement, as are other statutes. *See also* A.R.S. § 15-341(42) (authorizing school districts to proscribe duties for teachers); *id.* § 15-341(12) (authorizing school districts to hold students to "strict account" for "disorderly conduct").

Plaintiff also makes much of Governor Ducey's July 2020 executive order mandating that school districts adopt a mask policy. *See* State of Arizona, Executive Order 2020-51(5) (July 23, 2020) ("All school districts and charter schools shall develop and implement a policy to require face coverings."). Plaintiff argues that the Governor's mandate that school districts adopt a mask requirement last July shows that mask requirements were otherwise illegal, but it is unclear why this would be the case. Instead,

[2] Plaintiff has failed to mention other statutes that are related to health and safety policies. *See* A.R.S. §§ 15-344 (administration of prescription drugs), -344.01 (diabetes management); -345 (chemical abuse prevention), -346 (chronic health problems).

the better analysis is that although districts had the authority to require masks, the Governor's executive order purported to mandate that schools adopt mask requirements.

Plaintiff's argument that A.R.S. § 15-341.05 merely clarifies existing law is baseless. Rather, the statute purports to impose a new restriction on school districts' authority.

II. A.R.S. § 15-342.05 is not an act for the support and maintenance of the State and State institutions.

Plaintiff next argues that A.R.S. § 15-342.05 is in effect now because HB 2898 provides "appropriations for the support and maintenance of the departments of the State and of State institutions." Resp. at 5 (quoting Ariz. Const., art. IV, pt. 1, § 3). But HB 2898 is not an appropriations bill under *Garvey v. Trew,* 674 Ariz. 342, 354 (1946). Nor is it a tax bill within this constitutional provision based on *Wade v. Greenlee Cty.,* 173 Ariz. 462 (1992). Rather, it is a "budget reconciliation bill" that makes a number of statutory changes. The "synopsis" of the copy of the bill that is Exhibit 1 to Plaintiff's complaint lists at least 100 statutes that HB 2898 added, amended or repealed. Like A.R.S. § 15-342.05, the other provisions in HB 2898 are not appropriations.

Among many other things, HB 2898:

- Creates the Division of School Facilities within the Arizona Department of Administration and creates a new Oversight Board, replacing most of the functions of the former School Facilities Board (§§ 2, 10, 11);
- Prohibits certain forms of instruction (§ 21);
- Grants the attorney general new powers to sue political subdivisions and school employees (§ 50);
- Moves the authority to investigate certified persons and others from the Department of Education to the State Board of Education (§ 56);
- Requires school districts to adopt open enrollment policies with certain criteria (§ 25, 56);
- Requires the Department of Administration to create a new School Financial Transparency Portal (§ 23).

An appropriation requires a "legislative intent to set aside a certain sum for a specified object in such a manner that the executive officers are authorized to spend that money." *Rios v. Symington,* 172 Ariz. 3, 8 (1992); *see also Fogliano v. Brain ex rel. Cty. of Maricopa,* 229 Ariz. 12, 18 ¶ 14 (App. 2011) (applying three-part *Rios v. Symington* test). None of the provisions in HB 2898 qualify as an appropriation. Out of the 115 sections of HB 2898, Plaintiff cites 6 that he claims are appropriations (Resp. at 10), but even those are not. Most of the sections Plaintiff asserts are appropriations amend statutes that affect the allocation of state aid to public schools. *E.g.,* HB 2898, § 27 (amending definition of "base level"); § 33 (amending transportation support level); § 55 (amending qualifying tax rates). Those are not appropriations because they do not authorize the expenditure of a sum certain. The actual appropriation for state aid to public schools is found in Section 30 of the general appropriations bill, SB 1823 (Amending Laws 2020, Ch. 408, 55th Leg. 1st Reg. Sess.).

Similarly, Plaintiff identifies the increases in cost per square foot for new school facilities in HB 2898 as an appropriation. But that statutory change provides no authorization to spend a sum certain, as required for an appropriation under *Rios.* Again, the relevant appropriation is in the general appropriations bill, SB 1823, where there is an appropriation to the School Facilities Board. SB 1823, § 83. "[T]he sums or sources of revenue set forth in [the general appropriation bill] are appropriated for the fiscal years indicated and . . . from the funding sources listed for the purposes and objects specified." SB 1823, § 2. The statutory amendment to increase in Charter Additional Assistance is also not an appropriation. Again, there is no sum certain or an authorization to spend any money.

Plaintiff finally cites (at 10) the $50 annual increase in the cap on unclaimed lottery prize distributions to the tribal college dual enrollment program fund as another appropriation, but it is not. The amendment to A.R.S. § 5-568(3) in HB 2898 increases the allocation to the fund established in A.R.S. § 15-244.01, but the monies in that fund cannot be spent without a legislative appropriation. The related appropriation, again, is

in the general appropriations bill, where $325,000 was appropriated from the fund to the tribal college dual enrollment program. SB 1823, § 30. In sum, none of the provisions in HB 2898 cited by Plaintiff are appropriations.

There should be no appropriations in HB 2898 in any event. The general appropriations bill is supposed to include "nothing but appropriations for the different departments of the state, for state institutions, for public schools, and for interest on the public debt." Ariz. Const., art. IV, pt. 2, § 20. That is why any *substantive* legislation related to the budget is in a separate bill, such as HB 2898. The general appropriations bill is a measure "to provide appropriations for the support and maintenance of the departments of the state and of state institutions" under Article IV, part 1, §1(3). HB 2898, which includes substantive statutory changes, is not.

Finally, even if there were an appropriation included somewhere in HB 2898, that would not change the analysis of the bill's effective date. As *Garvey* recognized, appropriations that are "incidental to a measure" are still subject to a referendum (and therefore not effective until 90 days after the Legislature adjourns) unless passed with an emergency clause and the requisite two-thirds vote. *Garvey,* 64 Ariz. at 355. Moreover, if a substantive change in the law also qualifies as an appropriation under *Rios,* it is still subject to a referendum and effective 90 days after the Legislature adjourns. Ariz. Att'y Gen. Op. I97-007, 1997 WL 566650 (legislation altering the use of monies in the tobacco tax fund is subject to referendum). The Constitution cannot possibly be read to allow the Legislature to insulate new laws, such as A.R.S. § 15-342.05, from a referendum, by putting them in larger omnibus bills that might contain some appropriations. *See Carr v. Frohmiller*, 47 Ariz. 430, 443 (1936) (agreeing with the Nevada Supreme Court that "appropriation bills . . . are not legislative acts changing the substantive or general laws of the state") (citation omitted); *see also* Ariz. Att'y Gen. Op. I97-007, 1997 WL 566650 at *3 ("If this were the case, the Legislature could insert a substantive law change into an appropriation bill to exclude the substantive law from referendum and thus circumvent the people's referendum power.").

1 For these reasons, under the Arizona Constitution, HB 2898 takes effect 90 days after the legislative session adjourned, which is September 29.[3]

III. Plaintiff has no claim based on gubernatorial action.

Plaintiff next argues (at 2, 10-11) that the Governor "could" use his emergency powers to prohibit school districts from imposing mask mandates. Setting aside Plaintiff's misreading of A.R.S. § 26-303(E), this claim is not properly before the Court. It is not contained anywhere in the Plaintiff's First Amended Complaint. Moreover, Plaintiff has not identified any official action the Governor has taken pursuant to his emergency powers purporting to prohibit mask mandates in schools now. Plaintiff therefore has no claim in this case based on a supposed conflict between the Governor's emergency powers and PXU's mask policy.

IV. Plaintiff's claim is not ripe.

As explained in the Motion to Dismiss, Plaintiff's claim is not yet ripe. No law currently prohibits the Mask Policy, and PXU has not made any decision about its future masking policy, given the rapidly evolving cycle of the coronavirus pandemic. Therefore, it is simply unknown whether PXU will have a mask policy that conflicts with any operative law on September 29, 2021, and Plaintiff's claim is not yet ripe. Proceeding with this case would result in a "premature decision on an issue that may never arise." *Brush & Nib Studio, LLC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 36 (2019).

Plaintiff first attempts to save his claim by arguing that there is never a ripeness problem when a law is not yet in effect, relying on *Blanchette v. Conn. Gen. Ins. Corp.* (cited as *Regional Rail Reorganization Act Cases*), 419 U.S. 102, 143 (1974). But that case held only that when there is an "inevitability of the operation of a statue against certain individuals," a statute may be challenged before the statute becomes effective. *Id.*

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[3] Plaintiff relies heavily on cases involving doctrines of deference and constitutional avoidance, such as *Chevron Chemical Co. v. Superrior Court*, 131 Ariz. 431, 438 (1982) and *State v. Kaiser*, 204 Ariz. 514, 517 (App. 2003). Nothing in the motion to dismiss asks the Court to declare A.R.S. § 15-342.05 or HB 2898 unconstitutional. Applying the effective date provision of the Constitution does not render any part of the statute unconstitutional; it just indicates that it is not yet effective.

In this case, however, nothing is inevitable – A.R.S. § 15-342.05 could be subject to a referendum and never take effect, or PXU could withdraw the Mask Policy prior to September 29, 2021. Indeed, the Supreme Court itself acknowledged that "there are situations where, even though an allegedly injurious event is certain to occur, the Court may delay resolution of constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available." *Id.* There is no need for this Court to speculate whether PXU will retain a Mask Policy, or whether A.R.S. § 15-342.05 will actually take effect, or any other facts the Court may need to consider in resolving other defenses PXU could raise, given that Plaintiff (or anyone else) can return to court after September 29, 2021 if there is a legal dispute to resolve at that time.

Plaintiff next argues that his Rule 3(b) claim is ripe because PXU is purportedly "threatening" to violate the law. It is not clear where Plaintiff found this threat. He claims that at a recent board meeting, PXU voted "unanimously to continue such mandate until the CDC withdraws its indoor masking guidance."[4] (Resp. at 13.) PXU did no such thing; rather, it made minor modifications to the Mask Policy to note that it only applied indoors and that PXU would consider recommendations from trusted health agencies besides the CDC that were more familiar with the circumstances in PXU's geographic location when making any future policy revisions. Indeed, Superintendent Gestson expressly noted that "we don't know what masking will look like in a month from now because we don't know what the virus is going to like in a month from now."[5]

Plaintiff further argues that PXU's forthright acknowledgement that it has constitutional concerns with A.R.S. § 15-342.05 constitutes a threat. If anything, the presence of these constitutional concerns suggests the Court should dismiss the case as

[4] Plaintiff cites a time stamp where this purportedly occurred, 3:04:10-3:06:34, that does not exist, as the video Plaintiff links to ends at 2:28:15. The board discussion of the mask policy begins at 2:02:33 and ends at 2:23:50.

[5] *See* August 5, PXU Governing Board Meeting, YouTube, Aug. 5, 2021 https://www.youtube.com/watch?v=PwpQvmvD1tk at 2:04:30-2:04:39 (last visited Aug. 12, 2021).

not ripe so it does not have to wade into constitutional issues that may never be necessary to resolve. *Cf. Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.3d 1282, 1290 (D.C. Cir. 1982) ("To avoid ill-considered judgments, the constitutionality of statues ought not to be decided except in an actual factual setting that makes such a decision necessary.") (citation omitted).[6]

Plaintiff also attempts to use an offer of judgment to argue the case is ripe. This is plainly impermissible. An unaccepted offer of judgment can only be considered by a Court in one instance: as evidence "in a proceeding to determine sanctions under this rule." Ariz. R. Civ. P. 68(d)(1). And an offer of judgment made "within 60 days after service of the summons and complaint must remain effective for 60 days after the offer is served." Ariz. R. Civ. P. 68(h)(1)(A). In other words, Plaintiff's offer of judgment has not been rejected – as a matter of law, it remains open for PXU to consider, and even if it had been rejected, that rejection can have no bearing on the Court's decision. Plaintiff is making improper use of a Rule 68 offer of judgment to attempt to gain a litigation advantage, and not as a genuine attempt to compromise and avoid further litigation.

V. The Court should not allow this case to continue in order to issue an expansive opinion about the interplay between state authority and the CDC's authority.

Finally, Plaintiff argues (at 16-17) that it makes sense to allow this case to continue even if not ripe because it is a matter of great public importance that goes "to the very heart of federalism." Plaintiff asks this Court to "make[] a clear and unequivocal statement that state law is supreme in matters of health, and not CDC guidance." Plaintiff's apparent desire to circumscribe the authority of the CDC appears nowhere in his First Amended Complaint and provides no reason for this Court to issue an advisory opinion on the issue of preemption.

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[6] Plaintiff also argues that the Court should ignore ripeness problems under the exception to mootness for cases that are capable of repetition yet avoid review. This is not such a case. The issue here is not that a challenged policy has been withdrawn, but that the factual predicates for the supposed illegality of the Mask Policy do not yet exist. Any conflict between the Mask Policy and A.R.S. § 15-342.05 can be reviewed once the statute takes effect.

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Conclusion

Plaintiff's First Amended Complaint states no valid claim for relief and must be dismissed.

DATED this 12th day of August, 2021.

OSBORN MALEDON, P.A.

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This document was electronically filed and copy served via eFiling system this 12th day of August, 2021 on:

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