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SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF MARICOPA

DOUGLAS HESTER; *Plaintiff,* v. PHOENIX UNION HIGH SCHOOL DISTRICT; et al.; *Defendants.*	Case no. CV2021-012160 **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER** (Hon. Randall Warner)

Defendants' Response is predicated on Ariz. Const. art. IV, pt. 1 §1(3), which provides that, subject to enumerated exceptions, legislation may not take effect until ninety-days after the close of the Legislative session (the "ninety-day rule[.]"). Defendants assert that ARS 15-342.05 therefore does not presently govern their conduct despite the fact that the Legislature intended it to take effect on June 30th. They also contend that injury, the balance of hardships, and public policy weigh in their favor. These arguments fail to defeat Plaintiff's Motion for several reasons. As an initial matter, a constitutional challenge to the enforceability of a statute may not be decided on a TRO. In addition, by seeking to have this Court consider injury, the balance of hardships, and public policy, Defendants ignore the applicable standard, the sole question for which is the lawfulness of their present conduct. Thus, Defendants fail, as a matter of law, to present any legally adequate defense.

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Even if this Court were inclined to reach Defendants' constitutional timing argument, that argument must still fail because Defendants have not met their burden of demonstrating the likelihood that their mask mandate is presently lawful. Indeed, Defendants' mask mandate would be unlawful under preexisting law, a point which ARS 15-342.05 merely clarifies. But even if Defendants' mask mandate were not already unlawful, HB 2898 is an act for the support and maintenance of Arizona's schools. As such its provisions, including ARS 15-342.05, are exempted from the ninety-day rule.

These points are addressed below, as well as in Plaintiff's Response in Opposition to Motion to Dismiss, which addresses, and expands on, many of the same topics and is fully incorporated herein by reference. Plaintiff's Response also sets forth the additional argument that the Governor, even acting without the Legislature's assent, was empowered under preexisting law to immediately prohibit school districts from imposing mask mandates and argues that the fact that, in this instance, he acted with such consent in no way diminishes his power. This argument, which provides an independent basis for finding an exception from the ninety-day rule, is not repeated here in the interest of space.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Defendants misstate the applicable standard for Plaintiff's Motion.

Perplexingly, Defendants ignore the Arizona Supreme Court's clear holding that a plaintiff who seeks to enjoin government officials from engaging in unlawful activity need not satisfy the standard for preliminary injunctive relief. *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 309 (Ariz. 2020). Instead, they invite the Court to engage in a balancing of the equities and an analysis of public policy. However, the right place to weigh competing interests and determine the public policy of the state was in the Legislature. The right time to consider those factors was during the lawmaking process. "The judiciary cannot sit as a super-legislature to determine the wisdom, the necessity, or the inconvenience of a legislative enactment[.]" *Shaw v. State*, 447 P.2d 262, 267 (App. 1968). Hence, our Supreme Court has said: "public policy and the public interest are served by enjoining [a government official's] unlawful action[.]" *Fontes* at 309. Similarly, in actions to enjoin

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statutory violations by public officials, "once a movant establishes the likelihood of prevailing on the merits, irreparable harm to the public is presumed[.]" *Id*. (citing *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427 (E.D. Mo. 1985)). Were it otherwise, every action to enjoin violations of the law would require a single judge to revisit the work of the entire legislative process and would invite that judge to substitute his or her own policy considerations for that of the ninety members of the Legislature as well as the Governor. In such a situation, the policy arguments of a single set of litigants would be put on equal footing with all those who provided input during the legislative process. Hence, the proper role of the courts is to say "what the law is[,]" not what it should be. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803).

To that end, Defendants do not dispute that ARS 15-342.05, on its face, renders their conduct unlawful. The sole legal defense they raise at this stage is a constitutional one concerning timing. However, on a motion for TRO, questions of constitutionality must be deferred to a final ruling on the merits. *See Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 281, 860 P.2d 1328, 1334 (App. 1993) (*citing Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 221 F.2d 815, 820 (7th Cir.), *cert. denied*, 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955)). The only issue that needs to be decided at this stage is whether Defendants' conduct is unlawful on its face. *See Fontes, supra*.

If the Court nonetheless decides to reach the timing argument, it should be guided by "a strong presumption that [a statute] is constitutional." *State v. Kaiser*, 204 Ariz. 514, P8, 65 P.3d 463, P8 (App. 2003). An "act of the legislature[,] such as HB 2898, should not be found "in conflict with the federal or state constitutions" unless "**the challenging party** . . . establish[es] beyond a reasonable doubt" that it "violates some provision of the constitution." *State v. Brown*, 207 Ariz. 231, 236, 85 P.3d 109, 114 (App. 2004) (emphasis supplied) (cleaned up).

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II. School boards lacked the power to impose mask mandates under existing law.

a. ARS 15-342.05 merely clarified existing law.

If a new statute "merely clarifies what [a] prior statute was originally intended to mean . . . it has no retroactive effect that might be called into constitutional question." *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (cleaned up). Rather, a law that "in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act." *Mesa v. Killingsworth*, 96 Ariz. 290, 297, 394 P.2d 410, 414 (1964). "While subsequent legislation clarifying a statute is not necessarily controlling on a court, it is strongly indicative of the legislature's original intent." *Police Pension Bd. v. Warren*, 97 Ariz. 180, 187, 398 P.2d 892, 896 (1965); *see further State v. Fell*, 210 Ariz. 554, 560, 115 P.3d 594, 600 (2005) (laws clarifying prior legislative acts may be applied retroactively to conduct occurring before their effective date). Because Defendants had no authority under the law as it existed prior to ARS 15-342.05 to impose a mask mandate, the Legislature was entitled to clarify this point at any time. Alternatively, Defendants' mask mandate is unlawful irrespective of ARS 15-342.05.

Defendants point to ARS 15-341(A)(1) as authorizing them to impose a mask mandate. Opposition 6:12-16. However, ARS 15-341(A)(1) is not a general grant of authority to prescribe policies and procedures unless **expressly prohibited** by law. Rather, the policies and procedures promulgated pursuant to ARS 15-341(A)(1) must be ones **expressly authorized** by existing law. *See Batty v. Glendale Union High Sch. Dist. No. 205*, 221 Ariz. 592, 596, 212 P.3d 930, 934 (App. 2009) ("School boards have only the authority granted by statute, and such authority must be exercised in a manner permitted by statute."); *Oracle Sch. Dist. v. Mammoth High Sch. Dist.*, 130 Ariz. 41, 43, 633 P.2d 450, 452 (App. 1981) ("School districts are a legislative creation having only such power as is granted to them by the legislature . . . [they] can exercise no powers which are not expressly or impliedly granted."). Most "especially[,]" such legislative creations may not exercise "powers expressly or **impliedly** forbidden." *Olmsted & Gillelen v. Hesla*, 24 Ariz. 546, 551, 211 P. 589, 590 (1922) (emphasis supplied).

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Defendants' general powers and duties are set by ARS 15-341 (Title: General powers and duties; immunity; delegation) and the powers they may permissively exercise are outlined by ARS 15-342 (Title: Discretionary powers). Via ARS 15-341 and 15-342 the Legislature specified exactly what health-related policies and procedures school boards are authorized to enact. In particular, school boards are authorized to: ***(A)*** *"Prescribe and enforce policies and procedures relating to the health and safety of all pupils participating in district-sponsored practice sessions or games or other interscholastic athletic activities[.]" ARS 15-341(24).* ***(B)*** *"Prescribe and enforce policies and procedures: (a) Allowing pupils who have been diagnosed with anaphylaxis by a health care provider licensed pursuant to title 32, chapter 13, 14, 17 or 25 or by a registered nurse practitioner licensed and certified pursuant to title 32, chapter 15 to carry and self-administer emergency medications, including epinephrine auto-injectors, while at school and at school-sponsored activities . . . [and] (b) For the emergency administration of epinephrine auto-injectors by a trained employee of a school district pursuant to section 15-157." ARS 15-341(34).* ***(C)*** *"Prescribe and enforce . . . (i) Procedures designed to protect the health and safety of pupils who are physically harmed as the result of incidents of harassment, intimidation and bullying[.]" ARS 15-341(36).* ***(D)*** *"Prescribe and enforce policies and procedures for the emergency administration of inhalers by trained employees of the school district and nurses who are under contract with the school district pursuant to section 15-158." ARS 15-342(37).*

Elsewhere, Title 15 expressly authorizes the state superintendent, in conjunction with the director of the department of health services, to develop school immunization requirements. *See* ARS§ 15-871, 15-872, 15-873. Yet, even here there is no provision for a mask mandate.

It is a fundamental canon of statutory construction that the Legislature's creation of a list setting forth express rights, duties, or powers "implies the legislative intent to exclude those items not so included." *Sw. Iron & Steel Indus. v. State*, 123 Ariz. 78, 79, 597 P.2d 981, 982 (1979). Had the Legislature intended ARS 15-341(A)(1) as a general grant of

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authority to prescribe and enforce health-related policies and procedures except where **expressly prohibited** by existing law, the specifically enumerated authorizations above would be mere surplusage.

In *Bd. of Educ. v. Scottsdale Educ. Ass'n*, the Court of Appeals took a more expansive view of the power of school boards than is currently the law, holding that "the power to manage and control the affairs of the school district lies exclusively with the board of trustees, except where that power has been by specific legislation granted to someone else[.]" *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972) (*overruled by Bd. of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 509 P.2d 612 (1973)). Even applying this unlawfully expansive standard does not avail defendants because the power to "define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases" has, by "specific legislation[,]" been delegated to the director of the Department of Health Services. ARS 36-136(H).

Thus, ARS 15-342.05 did not change existing law, but rather clarified it, just as Representatives Hoffman and Parker assert. **Exhibit A** ¶ 6-7,[1] **Exhibit B** ¶ 8-11. This conclusion finds support in two recent events: First, the Governor found it necessary to invoke his emergency powers under Titles 26 and 36 to authorize school districts to impose mask mandates during the 2020 school year, then later rescinded that authority. *See* State of Arizona Executive Order ("Executive Order") 2020-51 ¶ 5 (authorizing and requiring "All school districts and charter schools [to] develop and implement a policy to require face coverings, such as face masks or face shields, for all staff and students over the age of five"), Executive Order 2020-51 ¶ 1 (rescinding Executive Order 2020-51 ¶ 5). Subsequently, members of the Legislature attempted to amend Title 15 to expressly grant school boards the authority to impose mask mandates. **Exhibit A** ¶ 5, **Exhibit B** ¶ 7. At the very least, because it is possible for this Court to construe ARS 15-342.05 as a clarification of existing law and, thus, not violative of the Arizona Constitution's 90-day

[1] All citations to exhibits are to those exhibits attached to Plaintiff's Response.

requirement, it should do so. *See State v. Kaiser*, 204 Ariz. 514, 517, 65 P.3d 463, 466 (App. 2003) ("[W]e will, if possible, interpret the regulation in such a way as to render it constitutional.").

b. Even if A.R.S. § 15-341(A)(1) vested Defendants with broad authority to promulgate policies and procedures related to health and safety, which it does not, that statute would still not authorize Defendants' mask mandate.

ARS 15-341(A)(1) states that the policies and procedures prescribed and enforced by a school board must be "not inconsistent with law[.]" Ordinarily, "the legal effect of conduct" is to be "assessed under the law that existed when the conduct took place." *Bahr v. Regan*, No. 20-70092, 2021 U.S. App. LEXIS 22333, at *27 (9th Cir. July 28, 2021).[2] However, "retroactivity of legislation and regulations is not per se unlawful[.]" *Id*. Rather, this general presumption against retroactivity only applies where application of a new law to prior conduct would "impair[] prior-existing rights **and**[] affect[] reliance interests." *Id.* at *21-22 (9th Cir. July 28, 2021) (emphasis supplied).[3] In this case, as set forth above, ARS 15-342.05 does not impair prior-existing rights because pre-existing law did not authorize Defendants to promulgate their mask mandate. But even if this were not so and even if ARS 15-341(A)(1) otherwise authorized Defendants to impose the mask mandate, ARS 15-342.05 still renders such a mandate inconsistent with law and thus unauthorized by ARS 15-341(A)(1) because it does not affect Defendants' reliance interests.

ARS 15-342.05 was signed into law on June 30th, 2021 and the bill enacting it contained a clause that the statute "applies retroactively to from and after June 30, 2021." HB 2898 § 118(A). Defendants' own official statement demonstrates that, when they enacted their mask mandate a month later, they understood that their actions were illegal:

> *[T]his past month, we did align our masking practices district-wide with the **current prohibition** of mask mandates. Recently, we have heard from our staff, students, and families that they want us to realign our mitigation practices with the guidelines and recommendations of national and local health agencies.*

[2] Quoting *CFPB v. Gordon*, 819 F.3d 1179, 1196-97 (9th Cir. 2016) (itself quoting *Landgraf*, 511 U.S. at 265).
[3] Citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

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Exhibit C (emphasis supplied). Only after litigation commenced did Defendants come up with their constitutional argument that ARS 15-342.05 was not yet in effect. Accordingly, Defendants cannot demonstrate that they actually relied on their perceived authority under existing law in imposing their mask mandate. Indeed, even had Defendants' believed that ARS 15-342.05 was not yet in effect at the time they imposed their mask mandate and even had such a belief been correct, they would still not be able to demonstrate the reliance necessary to render ARS 15-342.05 applicable only to their future conduct. *Enter. Leasing Co. v. Ariz. Dep't of Revenue* is instructive on this point. There, our Court of Appeals held that, where a taxpayer waited "until after clarifying legislation was introduced and one month before the amendment was signed" to apply a tax credit, the taxpayer could not "demonstrate actual detrimental reliance" sufficient to defeat the retroactive application of the clarifying law on his prior conduct. *Enter. Leasing Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 123, 127, 211 P.3d 1, 5 (App. 2008) (analyzing some of the same caselaw discussed in *Bahr*). How much less can Defendants in the instant case demonstrate such reliance when they waited until after the clarifying law was actually signed to impose their mask mandate?

Accordingly, even assuming for the purposes of argument that ARS 15-342.05 is not currently effective, when it becomes effective it will apply in a backwards-looking fashion to render Defendants' current conduct unlawful. Under such circumstances it simply cannot be the case that Defendants' mask mandate is consistent with the law as ARS 15-341(A)(1) requires.

III. Alternatively, the Legislature was entitled to give ARS 15-342.05 immediate effect because the statute is not subject to referendum.

HB 2898 contains a clear statement that "Section 15-342.05, Arizona Revised Statutes, as added by this act, applies retroactively to from and after June 30, 2021." HB 2898 § 118(A). Where there is a "plain indication of an intent" that a statute "operate retroactively" it not to be "given prospective effect only[.]". *See Stuart v. Ins. Co. of N. Am.*, 152 Ariz. 78, 80, 730 P.2d 255, 257 (App. 1986). Defendants ask this Court to find

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that this plain manifestation of the Legislature's intent to prohibit mask mandates as of June 30th conflicts with the ninety-day rule contained within Article IV, part 1, §1(3) of the Arizona Constitution. As set forth above, because ARS 15-342.05 merely clarifies existing law, Article IV, part 1, §1(3) is simply inapplicable. However, even if ARS 15-342.05 does more than simply provide clarity, it falls within an exception to the ninety-day rule of Article IV, part 1, §1(3). Although Defendants discuss the first exception (laws containing an emergency clause), they only obliquely acknowledge the second - **"[a]ct[s] . . . provid[ing] appropriations for the support and maintenance of the departments of the State and of State institutions. . . ."** are also exempt. Art. IV, part 1, §1(3); *Wade v. Greenlee Cty.*, 173 Ariz. 462, 463, 844 P.2d 629, 630 (App. 1992).

When considering whether an act falls within the "support and maintenance" exception to the ninety-day rule, a court must "construe strictly" IV, part 1, §1(3)'s requirements in favor of finding an exception. *Wade*, 173 Ariz. at 464, 844 P.2d at 631. Thus, our courts give "support and maintenance" a broad construction. 173 Ariz. at 463-64, 844 P.2d at 630-31. "Support and maintenance" extends to cover acts that raise revenue, direct the use of state funds, or both. *Garvey v. Trew*, 64 Ariz. 342, 347, 170 P.2d 845, 848 (1946). The concept of "support and maintenance" thus squarely encompasses appropriations bills but applies to a much broader range of legislation. *Wade*, 173 Ariz. at 463-64, 844 P.2d at 630-31.

In this case, HB 2898 falls within both the narrow and broad definitions of "support and maintenance." By its title, it is expressly an appropriations bill. *See* 2021 Ariz. HB 2898 "Synopsis" ("AN ACT . . . appropriating moneys" for K-12 education). In addition, as comprehensively discussed in Plaintiff's Response to the Motion to Dismiss, HB 2898 both raises revenue and directs the use of funds. As Defendants helpfully note, COVID mitigation measures cost money to impliment and enforce. Defs.' Opposition to Plaintiff's Application for a TRO 10:3-4 ("last school year PXU spent an estimated $10 million dollar in COVID-related expenses.").[4] An examination of ARS 15-342.05's parent statute, ARS

[4] Arizona's auditor general concurs. Lindsey A. Perry, *Arizona School District Spending: Fiscal Year 2020,* March 1, 2021, https://www.azauditor.gov/sites/default/files/21-201_Report_No_Pages.pdf p. 3.

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15-342, illuminates why such a measure might be included in "AN ACT . . . appropriating moneys" for Arizona's schools. 2021 Ariz. HB 2898 "Synopsis". ARS 15-342 authorizes school boards to "[d]evelop policies and procedures to allow principals to budget for or assist with budgeting federal, state and local monies.". Arizona's fiscal year 2021-22 began on July 1st.[5] The overall intent of HB 2898 was to allow "school districts [to] increase the total percentage of classroom spending over the previous year's percentages in the combined categories of instruction, student support and instructional support as prescribed by the auditor general." 2021 Ariz. HB 2898 Sec. 117. "Intent". Arizona's Auditor General has noted that COVID related spending can impact "instructional spending percentage[.]"[6] When taken as whole, these sources evidence a clear legislative intent that HB 2898's provisions for the support and maintenance of Arizona's schools for fiscal year 2021-2022 were to be utilized by districts for purposes other than defraying costs associated with implementing or enforcing a mask mandate.

Defendants point to a Senate "Fact Sheet," which they attach as Exhibit 1 to the Declaration of Joshua Bendor, for the proposition that, because budget reconciliation bills "contain substantive law changes, the Arizona Constitution provides that they become effective on the general effective date, unless an emergency clause is enacted." Defs.' Opp'n 5:24-6:4. This anonymously-drafted opinion in the Senate "Fact Sheet" constitutes nothing more than a legal conclusion and is wholly insufficient to demonstrate that Defendants can create reasonable doubt as to the constitutionality of the June 30th effective date. The author fails to cite any provision of the Arizona Constitution, or any court decision interpreting it, that would support his or her conclusion that a budget reconciliation bill can only "become effective on the general effective date, unless an emergency clause is enacted." Defendants, for their part, decline the opportunity to assist the Court with any analysis of their own that might support the author's conclusion. They merely present the opinion that appropriations bills passed as part of the budget

[5] *See* Lindsey A. Perry, *Arizona School District Spending: Fiscal Year 2020*, March 1, 2021, https://www.azauditor.gov/sites/default/files/21-201_Report_with_Pages.pdf pg. 3.

[6] Lindsey A. Perry, *Arizona School District Spending: Fiscal Year 2020*, March 1, 2021, https://www.azauditor.gov/sites/default/files/21-201_Report_No_Pages.pdf p. 3.

reconciliation process fall within the ambit of the ninety-day rule as presumptively correct. Binding precedent from the Arizona Supreme Court, however, indicates otherwise. *See e.g.*, *Garvey*, 64 Ariz. at 352, 170 P.2d at 851 ("The constitutional exemption . . . makes no distinction" between types of appropriations bills but rather looks to whether the bill provides for "the support and maintenance of a department or institution[.]").

IV. Any bond amount should be nominal.

"Despite the mandatory language of Rule 65(c), district courts retain "discretion as to the amount of security required, *if any*." *Language Line Servs. v. Language Servs. Assocs.*, 500 F. App'x 678, 681 (9th Cir. 2012) (emphasis in original)(cleaned up),[7] *accord Magnotta v. Serra*, No. 1 CA-CV 16-0712, 2018 Ariz. App. Unpub. LEXIS 300, at *10 (Ct. App. Feb. 22, 2018).[8] "[W]here public policy favors an injunction and the plaintiffs lack the means to pay a bond, the bond requirement should be nominal." *Castillo v. Johnson*, No. CV-17-04688-PHX-DLR, 2021 U.S. Dist. LEXIS 3622, at *15 (D. Ariz. Jan. 8, 2021). "[P]ublic policy and the public interest are served by enjoining [a government official's] unlawful action[,]" *Fontes* at 309, and, as Defendants acknowledge, Plaintiff is of modest means. Defs.' Opposition 10:5-9.

Further, Defendants' harm is speculative. The sole argument Defendants raise in opposition to Plaintiff's Motion is that ARS 15-342.05 does not go into effect until September 29th. They articulate no argument as to why any "harm" that they would suffer now if the TRO is granted would not simply be suffered then if the TRO is not granted. Indeed, Defendants cite no sources for the proposition that voluntary masking, instead of a mandate, will result in the increase of such costs either now, or in the future.

Therefore, Plaintiff requests that this Court set a bond of $0 or, alternatively, $1.

[7] *See Jaynes v. McConnell*, 238 Ariz. 211, 214, 358 P.3d 632, 635 (App. 2015) ("Because Arizona's rules are substantially similar to the Federal Rules of Civil Procedure, we give significant weight to federal interpretations of those rules.").

[8] Cited pursuant to Ariz. R. Sup. Ct. 111(c)(1)(C). Copy available at: https://casetext.com/case/magnotta-v-serra

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Respectfully submitted this 10th day of August, 2021

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I CERTIFY that a copy of the forgoing will be served on defendants electronically as required by this Court's Order.

By /s/Chris Viskovic

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