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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.

Consolidation Sought With

ARIZONA SCHOOL BOARDS ASSOCIATION, INC.; et al.,

Plaintiffs,

v.

STATE OF ARIZONA, a body politic,

Defendant.

Case no. CV2021-012160

REPLY TO DEFENDANTS' AND ARIZONA SCHOOL BOARDS ASS'N, INC., ET ALS' RESPONSE TO PLAINTIFF'S MOTION TO CONSOLIDATE

Expedited Consideration Requested
(Hon. Randall Warner)

Copy filed in CV2021-012741
(Hon. Katherine Cooper)

On August 23rd, 2021, various persons, ("AZ School Boards") some parties, some not yet parties, filed a Response to Hester's Motion for Consolidation ("AZ School Boards Resp."). Typically, where the persons filing such a response are yet parties to this action, such a response would need to be stricken because motions to consolidate are heard within

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the context of the earlier, and not later, filed case. Maricopa Co. Local Rule 2.1(c). However, since several of the plaintiffs in the New Case are Defendants in the Instant Case, Plaintiff Hester will forgo making a motion to strike. Later the same day, Defendants joined in AZ School Boards' Resp. and asserted limited additional argument on the consolidation issue ("Defs.' Opp'n."). Defs.' Opp'n. 1:26-28 ("PXU joins in the arguments made by [AZ School Boards][.]"). Plaintiff replies as follows:

I. Argument

Plaintiff and AZ School Boards agree on much. They agree that the purpose of consolidation is to avoid "inefficiency, inconvenience, or unfair prejudice to a party[.]" AZ School Boards Resp. 3:19-21. They also agree that the resolution of the New Case "could moot Hester's claims[,] but AZ School Boards suggests that the parties in the Instant Case "can make arguments about that issue in their separate case[.]" AZ School Boards Resp. 5:8-10. Yet AZ School Boards' and Defendants' responses further illuminate how a failure to consolidate would be inefficient, inconvenient, and unfair.

a. AZ School Boards' Response highlights the inefficiency and inconvenience of failing to consolidate.

Failure to consolidate would be inefficient and inconvenient because, as AZ School Boards acknowledges, such failure would require the issue of A.R.S. § 15-342.05's constitutionality to be resolved in two separate cases by two separate judges. Even more inefficiently and inconveniently, this raises the prospect of two inconsistent rulings on the statute's constitutionality, leaving Arizona's parents, students, and schools bereft of needed clarity. Further, where Plaintiff and the State of Arizona agree, it is inefficient and inconvenient for our courts to require that Plaintiff duplicate the State's arguments in separate litigation. AZ School Boards argues that consolidation would be prohibitively inefficient because it will allow Plaintiff to make arguments to which AZ School Boards would then have to respond. AZ School Boards Resp. 5:15-22. If that was a bar to consolidation, then consolidation would never be permissible. Similarly, they argue that consolidation "would cause discordant overlapping schedules[.]" *Id*. 3:17-19. To the

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contrary, consolidation would result in one case subject to one schedule. One certainly **hopes** that if the constitutionality of A.R.S. § 15-342.05 is upheld in the consolidated case, Plaintiff will not be required to take additional steps to see to it that Defendants promulgate policies and procedures consistent with that law. Thus consolidation has the added benefit of allowing Plaintiff's claims to be resolved at the same time as the claims in the New Case.

AZ School Boards argue that they are challenging the constitutionality of bills besides HB 2898.[1] AZ School Boards Resp. 4:17-5:5. They acknowledge that that they are challenging all bills on the same two constitutional bases - equal protection and title. *Id*. Only with respect to one bill do they raise a third constitutional cause of action not applicable to HB 2898. *Id*. Plaintiff, to state the obvious, does not intend to present arguments unrelated to HB 2898 and A.R.S. § 15-342.05's specific prohibitions once the action is consolidated.

b. AZ School Boards' Response and Defendants' Opposition highlight how a failure to consolidate would unfairly prejudice Plaintiff.

Failure to consolidate would also be unfair. Hester should not have to argue about whether a ruling in a case that was filed after his own, and in which he did not participate, moots his claims in the Instant Case. That would be true even as a general proposition. It is especially true where, as here, Defendants Gallardo and Alston seek to deprive Plaintiff of the opportunity to respond to their Constitutional arguments by the simple expedient of filing a separate case. It is even truer where Alston and Gallardo employ the procedural trick of filing that separate case in their individual capacities while premising their standing in the New Case on their positions as president and member, respectively, of the Phoenix Union High School District's ("PUHSD's") governing board and on the fact that PUHSD has implemented the very mask mandate that Plaintiff is challenging in the Instant Case. Mot. to Consolidate 9:12-28, Compl. [New Case] ¶¶ 18, 20.

AZ School Boards argues that because they are seeking emergency injunctive relief

[1] It should be noted that Rule 42 does not require that consolidated cases share more than a single common question of either law or fact, certainly complete identity is not required.

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in their lawsuit, they would "be unduly prejudiced by sudden consolidation[.]" AZ School Boards Resp. 5:12-15. AZ School Boards cannot claim to have been unaware of the Instant Case at the time it was served given that Phoenix Union is a member and two of the plaintiffs in the New Case are defendants in the instant case. They could have raised their constitutional claims in the Instant Case: Defendants Phoenix Union, Alston, and Gallardo directly, and the other plaintiffs in the New Case as intervenors. They could even have brought in the State of Arizona if necessary pursuant to ARCP 14. As Plaintiff alleged in his Motion to Consolidate, they instead chose to file a separate action, on the eve of oral arguments in the Instant Case, to avoid mooting Defendants' ripeness defense. Mot. to Consolidate 12:19-21. Neither counsel for AZ School Boards nor Defendants rebut this in their responses. As ethical attorneys, they cannot – because it is true. Thus, even if consolidation were to delay resolution, that would be a problem of AZ School Boards own making.

However, there is no reason to believe that consolidation would actually delay resolution of the claims in the New Case. As AZ School Boards acknowledges, the return hearing in the New Case has not even been held but is rather set for the August 25th. AZ School Boards Resp. 2:21-23. AZ School Boards notes that it intends to request an expedited briefing schedule. *Id*. Plaintiff also desires an expedited resolution of the constitutional questions and is ready, willing, and able to participate in briefing on an expedited schedule. Finally, Plaintiff's Motion to Consolidate noted that he would not object to consolidation before either judge,[2] allowing the action to be resolved by the judge most able to provide an expedited resolution.

Defendants argue that "Hester is not entitled to use consolidation as a vehicle to reopen his challenge to the Mask Policy before [his claim] becomes ripe." Defs.' Opp'n. 2:25-26. This Court, while acknowledging that "Plaintiff is not required to wait until the day the statute becomes effective to seek relief" concluded that "[t]his far from the effective date, it cannot be said that a justiciable issue is inevitable[.]"

[2] The Court has discretion to consolidate the action before either judge pursuant to Local Rule 2.1(c).

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What was not and could not have been before the Court at the time it issued that ruling was the allegations made in the New Case. At the time that briefing closed on the Motion to Dismiss and Temporary Restraining Order, the New Case had not been filed. At the time of oral arguments on those motions, the New Case had just been filed the prior evening and, as acknowledged by all present, neither the Court nor parties had had a chance to thoroughly review it. Thus, this Court, while acknowledging that "Plaintiff is not required to wait until the day the statute becomes effective to seek relief" concluded that "[t]his far from the effective date, it cannot be said that a justiciable issue is inevitable[.]" August 16th, 2021 Order p. 2.

The remaining allegations in Plaintiff's Amended Complaint are that Defendants are "threatening" to violate the law when it becomes effective. The allegations made by Alston and Gallardo in the New Case regarding why that case is presently ripe are the mirror image of that claim:

> *"The Phoenix Union High School Governing Board has implemented a policy requiring masks. The unconstitutionally adopted statutes that are the subject of this case* ***threaten*** *[Gallardo's] ability to work to protect his district's students and staff when the budget reconciliation bills go into effect on September 29, 2021."*

> *"The Phoenix Union High School Governing Board has implemented a policy requiring masks. The unconstitutionally adopted statutes that are the subject of this case* ***threaten*** *[Alston's] ability to work to protect her district's students and staff when the budget reconciliation bills go into effect on September 29, 2021."*

Complaint [New Case] ¶¶ 18, 20, *see also* Mot. to Consolidate 9:12-28. Plaintiff is at a loss to understand how his claim that Defendants are "threating" to continue their mask

mandate past September 29th could be unripe and yet Alston and Gallardo's claim that A.R.S. § 15-342.05 "threatens" to take away their ability to continue their mask mandate past September 29th could at the same time be ripe. Certainly, the interests of fairness dictate that the ripeness issue be resolved in a consistent fashion. At the very least, argument over the issue should go a long way towards illuminating exactly when Plaintiff's claims might sufficiently ripen (since, as this court has stated, he is not required to wait until the 29th).

II. Conclusion.

The parties agree that consolidation is appropriate to avoid inefficiency, inconvenience, or unfair prejudice to a party. Their briefs unintentionally highlight the inefficiency, inconvenience, and unfair prejudice that a failure to consolidate would cause and thus why the motion should be granted.

Respectfully submitted this 23rd day of August, 2021

By /s/Alexander Kolodin
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Chris Viskovic

Attorneys for Plaintiff

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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