Alexander Kolodin (SBN 030826)
Christopher Viskovic (SBN 035860)
KOLODIN LAW GROUP PLLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012
Telephone: (602) 730-2985
Facsimile: (602) 801-2539
Email:
Alexander.Kolodin@KolodinLaw.com
CViskovic@KolodinLaw.com
Admin@KolodinLaw.com (file copies)
Attorneys for Plaintiff

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 RESPONSE IN OPPOSITION TO MOTION TO DISMISS** (Hon. Randall Warner)

Defendants' Motion to Dismiss is entirely based on the contention that Plaintiff has failed to state a claim on which relief may be granted because his case is not yet ripe. This, Defendants allege, is because A.R.S. § 15-342.05 is not yet the law and therefore they are not breaking the law. This ripeness argument fails for five, independent, reasons.

First, A.R.S. § 15-342.05 merely clarified that school boards already lacked the power to promulgate mask mandates under pre-existing law. A statute that clarifies existing law may be applied immediately. Therefore, Ariz. Const. art. IV, pt. 1 §1(3) did not prevent the Legislature from giving the law immediate effect or, alternatively, Defendants' acts are unlawful whether or not A.R.S. § 15-342.05 is in effect.

Second, because HB 2898 provides for the "support and maintenance" of schools, its provisions are not subject to Ariz. Const. art. IV, pt. 1 §1(3)'s prohibition on legislation being given effect before ninety-days have passed since the end of the legislative session (the "ninety-day rule").

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

Third, Arizona is still under a declared public health emergency and the Governor, by statute, may direct the exercise of all police powers related to such an emergency by any government body. Therefore, the Governor, acting alone, could immediately prohibit school districts from imposing mask mandates and the fact that he acted jointly with the Legislature in the instant case in no way diminishes his power.

Fourth, the doctrine of ripeness does not bar claims concerning laws that are soon to take effect from being adjudicated. And even if, as a general matter, the doctrine did bar litigation of such claims, the specific language of RPSA 3(b) expressly provides otherwise. Claims under RPSA 3(b) do not require a present legal violation to be ripe. Rather, such claims are ripe both when a defendant is presently exceeding their legal authority as well as when a defendant is merely threatening to proceed in excess of their legal authority but has not yet done so. Defendants have argued that A.R.S. § 15-342.05 becomes effective on September 29th, 2021, but their behavior clearly demonstrates that, even then, they will not acknowledge the law's binding effect and will continue to flout the law unless the CDC changes its masking guidance prior to that date.

Fifth, even if none of Plaintiff's claims are yet ripe, this Court may still adjudicate the case and should do so. Cases which raise questions of great public importance **or** which are likely to reoccur fall into an exception to the ripeness doctrine. This case does both.

Plaintiff expands on these points in the Memorandum of Points and Authorities below, as well as in his Reply in Support of Motion for Temporary Restraining Order, which addresses many of the same arguments and is fully incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Standard on a Motion to Dismiss.

In reviewing a motion to dismiss, courts "assume the facts alleged in the complaint to be true and give plaintiffs the benefit of all inferences arising from those facts." *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, 590 (App. 2002). A "trial court should not grant a motion to dismiss unless it is certain that plaintiffs can prove no set of facts which will

entitle them to relief upon their stated claim." *Tucson Airport Auth. v. Certain Underwriters at Lloyd's*, 186 Ariz. 45, 46 (App. 1996) (cleaned up).

II. Argument.

a. Plaintiff's claims are ripe because Defendant is presently breaking the law.

As further explained in Plaintiff's Reply in Support of Motion for Temporary Restraining Order, Defendants' mask mandate is presently unlawful. This is so for three independent reasons. First, A.R.S. § 15-342.05 merely clarified that school boards had no power to promulgate mask mandates under pre-existing law. Second, the ninety-day rule does not apply to A.R.S. § 15-342.05 because HB 2898 was an act for the "support and maintenance" of schools. Third, the governor was empowered to give the prohibition on mask mandates immediate effect.

i. A.R.S. § 15-342.05 merely clarified that existing law already prohibited school boards from imposing mask mandates.

Defendants lacked the authority to impose their mask mandate even prior to the enactment of A.R.S. § 15-342.05.

Defendants point to but a single statute, A.R.S. § 15-341(A)(1), in support of their contention that they possessed the power to impose the mask mandate under prior law. Opposition 6:12-16. However, A.R.S. § 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 A.R.S. § 15-341(A)(1) must be ones expressly authorized by existing law. *See Oracle Sch. Dist. v. Mammoth High Sch. Dist.*, 130 Ariz. 41, 43 (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."). The remainder of A.R.S. § 15-341 and A.R.S. § 15-342 spell out with particularity the health-related policies and procedures a school board is required or allowed to issue. Nothing within the text of those statutes or in the balance of Title 15 could reasonably be construed as authorizing a school board to implement a mask

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

mandate. *See Sw. Iron & Steel Indus. v. State*, 123 Ariz. 78, 79 (1979) (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."). Indeed, the Legislature has, by "specific legislation[,]" delegated the power to "define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases" to the director of the Department of Health Services, A.R.S. § 36-136(H), or, as discussed below, during a declared public health emergency, to the Governor.

A.R.S. § 15-342.05's clarification of law passed during prior legislative sessions is effective immediately or, alternatively, provides immediate guidance as to the meaning of that prior law. *See Police Pension Bd. v. Warren*, 97 Ariz. 180, 187 (1965) ("While subsequent legislation clarifying a statute is not necessarily controlling on a court, it is strongly indicative of the legislature's original intent."), *Mesa v. Killingsworth*, 96 Ariz. 290, 297 (1964) (A law that "in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act.").

Even absent this clarification, however, pre-existing law simply did not authorize Defendants' mask mandate. This is why, when the Governor wanted to authorize school districts to impose such a mandate, he felt it necessary to exercise his emergency powers under Titles 26 and 36 to confer such authority upon them. *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). Similarly, members of the Legislature who thought it desirable for school districts to possess such power recognized the necessity of additional statutory authorization and so tried (and failed) to amend Title 15 to grant school boards the authority to impose mask mandates. **Exhibit A** ¶ 5-7, **Exhibit B** ¶ 7-9.

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

ii. Alternatively, the ninety-day rule does not apply to A.R.S. § 15-342.05 because it was integral to a budget bill.

Defendants urge the Court to disregard HB 2898's clear statement that "Section 15-342.05, Arizona Revised Statutes, as added by this act, applies retroactively to from and after June 30, 2021." Amended Compl. ¶ 17. Instead, they ask this Court to find, on the basis of the ninety-day rule contained within Article IV, part 1, §1(3) of the Arizona Constitution, that it does not actually come into effect until September 29, 2021. Defs.' Opp. to Pl.'s Application for a T.R.O. at 4:9-13. As set forth above, because A.R.S. § 15-342.05 merely clarifies existing law, Article IV, part 1, §1(3) is simply inapplicable. However, even if A.R.S. § 15-342.05 did more than simply provide clarity, the ninety-day rule contained in Article IV, part 1, §1(3) still would not apply. The ninety-day rule provides that, as a general matter, new laws may not be given effect until ninety days after the end of the legislative session "to allow the opportunity for referendum petitions[.]. Article IV, part 1, §1(3). There are two exceptions to this rule. However, though Defendants discuss the first (laws containing an emergency clause), they only obliquely acknowledge the second: **The contents of "Act[s] . . . provid[ing] appropriations for the support and maintenance of the departments of the State and of State institutions" are also exempt from ninety-day rule**. Article IV, part 1, §1(3), Defs.' Opp. to Pl.'s Application for a T.R.O. at 4:22-27. It is this exception that allowed the Legislature to make A.R.S. § 15-342.05 effective as of June 30th.

As Defendants concede, A.R.S. § 15-342.05 was included in HB 2898, "a recently passed omnibus budget bill[.]". Defs.' Opp. to Pl.'s Application for a T.R.O. at 2:21-22. More to the point, the title of HB 2898 clearly indicates that it is "AN ACT . . . appropriating moneys" for K-12 education. 2021 Ariz. HB 2898 "Synopsis". Therefore, on the very face of the bill, its contents are exempt from the ninety-day rule and the Legislature could give its provisions effect whenever it wished. This alone is sufficient to create "reasonable doubt" as to whether the act's provision that A.R.S. § 15-342.05 was to be effective as of June 30th conflicted with the Arizona Constitution, and thus prevent

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

dismissal. *See Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 438 (1982) ("We will not declare an act of the legislature unconstitutional unless we are satisfied beyond a reasonable doubt that the act is in conflict with the federal or state constitutions.").

As Defendants also helpfully note, COVID mitigation measures cost money to implement and enforce, and a lot of it. Defs.' Opp. to Pl.'s Application for a T.R.O. at 10:3-4 ("last school year PXU spent an estimated $10 million dollar in COVID-related expenses.").[1] An examination of A.R.S. § 15-342.05's parent statute, A.R.S. § 15-342, illuminates why such a measure might be included in "AN ACT . . . appropriating moneys" for Arizona's schools. 2021 Ariz. HB 2898 "Synopsis". A.R.S. § 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.[2] HB 2898 made several provisions for the support and maintenance of Arizona's schools for fiscal year 2021-22. These are discussed at greater length below. The overall intent of HB 2898 was to allow "school districts 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[.]"[3] 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. As discussed below, legislation that, like HB 2898, both raises revenue and directs its use is subject to the "support and maintenance" exception to the ninety-day rule and thus may be made effective at any time. Indeed, even legislation that merely directs

[1] Arizona's auditor general concurs. *See e.g.*, 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 (last visited Aug. 10, 2021).
[2] *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 p. 3 (last visited Aug. 10, 2021).
[3] 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 (last visited Aug. 10, 2021).

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

the use of revenue is exempt.

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. 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 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 v. Trew*, 64 Ariz. 342, 352 (1946) ("The constitutional exemption . . . makes no distinction" between types of appropriation bills but rather looks to whether the bill provides for "the support and maintenance of a department or institution[.]").

In *Wade v. Greenlee County*, 173 Ariz. 462 (App. 1992), a decision that Defendants omit from their papers, the Court of Appeals considered the scope of the "support and maintenance" exception. 173 Ariz. at 463. The *Wade* court began by noting that the text of Article IV, pt. 1, §1(3) "is internally inconsistent," in that the terms "support" and "appropriations" are "distinct concepts." 173 Ariz. at 463. "Appropriations are customarily thought of as bills allocating money to state departments and institutions for their operating expenses. Support is a broader term embracing **both the acquisition and the allocation of funds**." *Id*. (emphasis). The *Wade* Court thus chose to interpret the exception broadly as applying with the same force to both "appropriations" and "support" legislation. 173 Ariz. at 464. As a consequence, the *Wade* court held that legislation which had the dual

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

function of both raising revenue and directing its use was exempt from the referendum in its entirety. *Id.* ("[E]ven in some states where referenda are excluded only for laws appropriating for the support of state institutions, a law imposing both a tax and directing its use may not be the subject of referendum . . . We see no distinction on the facts of this case where the Greenlee County Board of Supervisors at the same time created the sales tax and directed its use[.]").

The *Wade* court relied on part on the Arizona Supreme Court's prior decision in *Garvey*, 64 Ariz. 342 (cited in *Wade*, 173 Ariz. at 464, 844 P.2d at 631), which Defendants also fail to address. In *Garvey*, a law was enacted directing the Arizona Corporation Commission:

> *[T]o ascertain the fair value of the property of all public service corporations in the state furnishing gas or electricity "for the purpose of establishing a basis for rate-making purposes." The commission is directed and authorized to arrange with and secure the co-operation of the Federal Power Commission to assist it in the investigation. Affected public service corporations are required, upon notice by the commission, to file inventories and other data. Upon the completion of the property valuation investigation, the commission is directed to enter appropriate decrees, etc., "which shall thereupon become binding and effective and shall be enforced as to all persons concerned." The sum of $ 50,000 is appropriated to the commission for the payment of the expenses of the Federal Power Commission "in making the property investigation authorized by this act."*

64 Ariz. at 345. The requisite number of electors timely filed referendum petitions, but the secretary declined to accept the petitions, on grounds that the act was "for the support and maintenance of the corporation commission. . . ." *Id*. at 345-46. The trial court granted a writ of mandamus requiring that the referendum petition be filed. *Id*. at 346. The Supreme Court reversed, finding that the act was an appropriation for "the support and maintenance of the departments of the state government" within the meaning of the Effective Date Clause. *Id*. at 347-48. The Court held that the fact that a bill appropriating funds also dictated how those funds were to be spent in no way subjected it to referendum, lest the constitutional exemption for such acts "be almost wholly nullified." *Id*. at 347. Thus, the fact that HB 2898, in appropriating funds, also prohibits funds from being spent

implementing or enforcing mask mandates in no way subjects it to the referendum or brings its provisions within the ambit of the ninety-day rule.

The *Garvey* court also noted that "the test of whether the appropriation is for the support and maintenance is not the earmarking for a specific purpose" (i.e., directing that the commission take advantage of the services of the Federal Power Commission to ascertain a fair valuation of all property), but whether the funds were "appropriated for use in carrying out the objects and functions of the department." *Id*. at 347-48. The *Garvey* court went on to distinguish and limit its prior decision in *Warner v. White*, 39 Ariz. 203 (1931), which had provided a much narrower construction of the support and maintenance provision of Article IV, and required that an appropriation must satisfy the emergency clause in order to have immediate effect. *Garvey*, 64 Ariz. at 348-55. The court first noted that the act at issue in *Warner* "created a new department to conduct a state tax survey, and made an appropriation therefor." *Id*. at 348. As such, the appropriation was incidental to the creation of this new department, and thus did not to provide for the support and maintenance of an existing department of the state. *Id*. at 348-49. The *Warner* court need not have gone any further.

The *Garvey* court rejected the suggestion in *Warner* that an appropriation for the support and maintenance of existing departments must comply with the emergency clause in order to avoid a referendum. *Id*. at 352. As later echoed by *Wade*, the contrary conclusion would force one to accept that "the framers of the constitution, or the voters who adopted it, intended to make it possible for a small percentage of the voters to stop the functions" of government by operation of the referendum. *Id*. "This," the court noted, "does not make sense." *Id*. The court thus concluded "that support and maintenance appropriations for *existing* state departments and institutions are not subject to the referendum." *Id*. at 355 (emphasis added).

Like the acts considered in *Wade* and *Garvey*, HB 2898 provides for the support and maintenance of Arizona's public school system for fiscal year 2022 ("FY 2022). For example, HB 2898:

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

- Increases the base level of state aid per student count (*see* HB 2898 at § 27.B);
- Increases the Charter Additional Assistance amount per student (*id.* at § 4.B.4);
- Increases the transportation support level per route mile formula amount (*id.* at § 33.A);
- Raises the cap on distributions of lottery prize money to the tribal college dual enrollment program (*id*. at § 1.3);
- Adjusts the qualifying tax rates for certain school districts (*id*. at § 55.I); and
- Increases the cost per square footage rates for funding new school facilities (*id*. at § 70.D.3(c)).

Because it is possible to interpret HB 2898 as raising revenue for schools and, via measures like A.R.S. § 15-342.05, directing the use of revenue, the ninety-day rule does not apply. *See State v. Kaiser*, 204 Ariz. 514, 517 (App. 2003) ("[W]e will, if possible, interpret the regulation in such a way as to render it constitutional."). The Legislature was thus privileged to give A.R.S. § 15-342.05 binding effect as of June 30th. At the very least, questions of fact concerning whether it is possible to interpret A.R.S. § 15-342.05 as directing the use of revenue prevent dismissal.

iii. Alternatively, existing law empowered the Governor to give the prohibition on mask mandates immediate effect.

A.R.S. Title 26 specifically addresses epidemics and states of emergency. A.R.S. § 26-301(15) defines "state of emergency" as "the duly proclaimed existence of conditions of disaster or extreme peril" caused by numerous events, including an epidemic. A.R.S. § 26-303(D) allows the Governor to proclaim a state of emergency, and § 26-303(E) sets forth specific powers the Governor may exercise during a state of emergency.

Here, the Governor declared a statewide public health emergency and that declaration is still in effect. Amended Complaint ¶¶ 25, 27. Under A.R.S. § 26-303(E)(l), the governor may exercise "all police power vested in the state by the constitution and laws." School boards are political subdivisions of the state, A.R.S. § 15-101(23), and mask mandates constitute exercises of the state's police powers. *See Stewart v. Justice*, No. 3:20-0611, 2021 U.S. Dist. LEXIS 24664 (S.D.W. Va. Feb. 9, 2021) ("The Mask Mandate . . . is a justifiable exercise of the state's police power under the United States Constitution[.]").

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

Emergency functions, as defined in A.R.S. § 26-301(5) include "welfare" and therefore include orders aimed at addressing the existing emergency. Therefore, a comprehensive reading of Title 26 makes clear that the Governor possesses the power to control the response of all political bodies to statewide emergencies.

The Governor has exercised this power on a variety of occasions. For example, when Pima County wished to impose a COVID related curfew, Governor Ducey issued Executive Order 2020-36, which he made effective three days hence, prohibiting local governments from imposing such curfews. This police power exercise was upheld by the Pima County Superior Court, which entered a preliminary injunction against the curfew. *Next Level Arcade v. Pima County*, 2021 Ariz. Super. LEXIS 20, *22. ("Because the Court finds the Resolution is not statutorily authorized and violates the Governor's Executive Order, and that the Plaintiffs have demonstrated the possibility of harm, the Court finds the Plaintiffs are entitled to relief.").[4]

Thus, even when he acts alone, the Governor is fully empowered, under existing law, to immediately require government bodies to impose mask mandates or, conversely, to immediately prohibit any such body from imposing a mask mandate.[5] During the present public health emergency, the Governor has typically exercised his plenary police powers via formal executive order. However, A.R.S. § 26-303(E)(l) does not require the Governor to exercise his police powers in any particular fashion.[6] Thus, since the Governor, acting alone, would have the power to immediately prohibit school districts from imposing mask mandates, it is difficult to see how the fact that, in this case, the Legislature also assented, detracts from his powers.

b. In the alternative, Plaintiff's claims are ripe even if Defendants have not yet broken the law.

[4] A Superior Court decision, of course, is not binding authority on this Court but may nonetheless be considered. *See Regan v. First Nat'l Bank*, 55 Ariz. 320, 327 (1940) ("[C]ourts take judicial notice of other actions involving similar parties and issues and of the pleadings therein, and that in passing upon the pleadings in one action they may and should consider the record in the other.").

[5] Unless there is an applicable statutory prohibition.

[6] In addition, executive orders are not required to take any particular form. *See* Todd Garvey and Vivians S. Chu, *Executive Orders: Issuance, Modification, and Revocation*, April 16, 2014, https://fas.org/sgp/crs/misc/RS20846.pdf (last visited Aug. 10, 2021).

i. All of Plaintiff's claims are ripe even if Defendants have not yet broken the law.

A case is not "hypothetical or speculative[,]" and therefore unripe, simply because a claim is made with respect to a law that is soon to take effect:

> *Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.*

Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). Here, even if A.R.S. § 15-342.05 is not already in effect, it is an "inevitability" that it will come into effect against Defendants no later than September 29th, 2021. Thus, a justiciable controversy as to all of Plaintiff's claims presently exists whether or not the statute is yet in effect.

ii. In the alternative, Plaintiff's RPSA 3(b) claims are ripe even if Defendants have not yet broken the law because Defendants are "threatening" to do so.

The plain language of RPSA 3(b) belies Defendants' mootness argument. This rule provides that a claim for special action relief is ripe where a defendant "has proceeded or **is threatening to proceed** without or in excess of jurisdiction or legal authority[.]" The State Bar Committee Notes on RPSA 3(b) [1970] explain that the rule "inherit[s] the tradition of writs of certiorari and prohibition[,]" that "[t]raditionally, prohibition could be utilized to control legal abuses in connection with threatened acts . . . while certiorari could be used to control legal abuses already accomplished[,]" and that RPSA 3(b) consolidates these two concepts into a single proceeding, "obliterat[ing] these distinctions of tense[.]"

As our Court of Appeals has noted, "prohibition is a preventive rather than a corrective measure[.]" Not only is it available to "prevent the commission of a future act[,]" but, indeed, that is the "sole" purpose for which it is available. *Jacobson v. Superior Court*, 402 P.2d 1018, 1019-20 (App. 1965). Accordingly, special action review may properly be invoked to determine whether a defendant intends to break the law in the future as well as whether a statute may be applied retroactively. *In re Levine*, 174 Ariz. 146, 158 (1993) ("Special action jurisdiction could properly be invoked to review . . . 'intention.'").

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

The question of whether Defendants are currently breaking the law bears only on the question of whether they have **proceeded** in excess of their authority and not on the question of whether Defendants are **threatening** to so proceed. As to this later issue, Defendants assert "[Phoenix Union] has set the mask policy that would apply to begin the school year on August 2. [Defendant] has done nothing more." Mot. to Dismiss 4:12-14 (internal quotations and citation omitted). Plaintiff disagrees that Defendant has "done nothing more." Specifically, Plaintiff believes that Defendant has: (a) manifested an intent to keep their mask mandate in effect, for as long as CDC guidance calls for indoor masking, even if such guidance continues past September 29th and (b) asserted, either directly or indirectly, the authority to disregard A.R.S. § 15-342.05 even as of that date. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209-10 (2019) ("indirect assertion of regulatory authority" is "sufficient injury" to defeat a ripeness challenge to a special action even if further injury has not yet occurred). As to these points, the following facts, among others, make dismissal inappropriate.

Plaintiff's Amended Complaint asserts that "Defendants are threatening not to promulgate lawful policies until the CDC changes its masking guidance or they feel it is otherwise safe to do so." Amended Compl. ¶ 40. Plaintiff's Amended Complaint further asserts that at the (then) upcoming August 5th board meeting, Defendants would consider whether to continue their mask mandate until the CDC changes its masking guidelines. *Id.* ¶ 18. Subsequent to the filing of the Amended Complaint, Defendants indeed met and voted unanimously to continue such mandate until the CDC withdraws its indoor masking guidance.[7] Defendants also voted to continue their mask mandate even past that point if "other trusted health agencies" continue to recommend indoor masking.[8] It goes without saying that there is no relationship between future changes to CDC recommendations and any possible effective date for A.R.S. § 15-342.05. Further, though Defendants have raised a pretextual constitutional argument during the course of this litigation, at the time they

[7] *See August 5, PXU Governing Board Meeting*, YouTube, Aug. 5, 2021 https://www.youtube.com/watch?v=PwpQvmvD1tk at 3:04:10 – 3:06:34 (last visited Aug. 10, 2021).
[8] *Id.*

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

first imposed their mask mandate, even they believed that A.R.S. § 15-342.05 was on the books and that their mandate violated current law. Amended Compl. ¶ 18 ("[T]his past month, we did align our masking practices district-wide with the **current** prohibition of mask mandates.") (emphasis supplied). Since the filing of the Amended Complaint, Defendants have replaced the word "current" with the words "recently enacted[,]" demonstrating that they are aware of the implications of the prior wording.[9] Plaintiff has preserved a copy of the original statement as **Exhibit C**.

It is reasonable to infer from these facts that Defendants have thus manifested an intent to keep their mask mandate in effect until both the CDC and other trusted health agencies cease to recommend indoor masking, even if such guidance continues past September 29th. It is also reasonable to infer that Defendants have asserted, either directly or indirectly, the authority to disregard A.R.S. § 15-342.05 even as of that date if they see fit to do so. Defendants' claim of authority to disregard A.R.S. § 15-342.05, even after the date they assert it becomes effective, leads to the additional inference that, even if masking guidance is withdrawn prior to September 29th, Defendants reserve the right to re-implement a mask mandate at their discretion if the guidance again changes. Plaintiff is entitled to the benefit of such inferences.

The procedural history of this case provides further support for these inferences. At the recent return hearing, Defense counsel reiterated that Defendants' masking policy on September 29th, 2021 will be based on the "factual situation" regarding the state of the pandemic as of that date:

> *I don't know what the factual situation will be September 29th, when the law takes effect, and so, you know, because this is based on what's going on with the pandemic, and as we all know those things change quickly.*

Exhibit D 8:21-25. However, the only "fact" that will matter as of September 29th, 2021 is that A.R.S. § 15-342.05 will undoubtably be the law. A threat to consider other facts is a threat to proceed in excess of Defendants' legal authority. That threat alone is enough to create a present controversy under the plain language of RPSA 3(b).

[9] *PXU Announces Mask Requirement, Reiterates Commitment to Public Health, Public Education, and the Safe Return to In-Person Learning*, July 30, 2021, https://www.pxu.org/Page/28142 (last visited Aug. 10, 2021).

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

Perhaps the clearest evidence that Defendants are threatening to proceed in excess of their legal authority comes from the fact that they have declined to accept Plaintiff's Offer of Judgment, which would require them to withdraw their mask mandate only on the date Defendants themselves claim A.R.S. § 15-342.05 becomes effective. There is no conceivable reason for Defendants to reject this offer unless they wish to preserve the option to unlawfully maintain their mask mandate past September 29th, 2021. Further, Defendants, both at the return hearing, **Exhibit D** at 9:1-7, and in subsequent briefing, Defs.' Opp. to Pl.'s Application for a T.R.O. at 3:21-24, have complained that A.R.S. § 15-342.05 has constitutional infirmities that prevent it from being enforced, even after September 29th, 2021, and which Defendants will raise at a later date if necessary.

In other words, Defendants do not feel bound to follow A.R.S. § 15-342.05, now or ever, and reserve the right to continue substituting the CDC's judgment for that of the State Legislature as long as, and whenever, they see fit.[10] They are therefore, at the very least, threatening to proceed in excess of their legal authority.

No doubt, the state of the COVD pandemic is highly variable. However, unfortunately for the people of Arizona, but fortunately for the efficient resolution of this case, this is not the first pandemic known to our state's common law. In 1987, our Court of Appeals had this to say about a case concerning an epidemic:

> *Because of the relatively short duration of measles contagion, we conclude that the issues in the instant case are likewise "capable of repetition, yet evading review." We accordingly address the merits.*

Maricopa Cty. Health Dep't v. Harmon, 156 Ariz. 161, 164 (App. 1987), *acc'd KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 250 (1984) ("It is firmly established that jurisdiction is not necessarily defeated simply because the order has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'").

[10] In the case of the COVID pandemic, the CDC has already gone through several cycles of relaxing and tightening its masking guidance. Deborah Netburn, *A timeline of the CDC's advice on face masks*, LA Times Science (July 27, 2021), https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic. In an August 8th, 2021 interview with USA Today, Dr. Anthony Fauci, Chief Medical Advisor to the President, predicted another COVID spike in the spring of 2022 unless "the overwhelming majority of the population" is vaccinated by then. *Dr. Anthony Fauci: Get vaccinated to stop risk of an even deadlier COVID variant*, USA Today (Aug. 8, 2021), https://www.usatoday.com/story/opinion/2021/08/08/anthony-fauci-covid-vaccinate-mandate/5507400001/

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

In other words, despite the fact that public health emergencies ebb and flow, the law does not require plaintiffs to play whack-a-mole in order to obtain resolution on the merits. Even if Defendants' conduct is presently lawful, which it is not, the fact that they might withdraw their mask mandate prior to September 29th, 2021 is meaningless. As long as COVID and other respiratory illnesses exist and Defendants refuse to acknowledge state law, this situation is capable of repetition.

c. In the alternative, this case should still be adjudicated because it concerns a question of great public importance that is likely to reoccur.

Unlike the US Constitution, the Arizona Constitution contains no "case or controversy" requirement. *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 (2019). Though our courts generally "exercise restraint" and refrain from issuing advisory opinions, *id*., they "will make an exception . . . to consider a question of great public importance **or** one which is likely to recur[.]" *Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd.*, 133 Ariz. 126, 127 (1982) (emphasis supplied). Though either requirement alone is enough to provide an exception, in this case, both requirements for an exception are present.

Clearly, the issue is one of great public importance. The Governor has stated that "coordination of all matters pertaining to COVID-19 are of statewide concern rather than local concern[.]" Amended Complaint ¶ 26. Further, since Defendants announced their mask mandate, many other school districts have followed suit. The Arizona Republic has reported that, as of Friday August 6th, 2021, seven other school districts in metropolitan Phoenix had followed Defendants' lead and implemented mask mandates as well.[11] This case will accordingly have ramifications far beyond the Phoenix Union High School District. Its outcome will surely be considered by many other districts in determining whether they maintain their own mask mandates and, if so, for how long such mandates may be maintained. Yet this case has implications that reach far beyond the issue of school

[11] *These metro Phoenix school districts require masks, despite Arizona ban on mask mandates*, AZ Central Education (Aug. 5, 2021), https://www.azcentral.com/story/news/local/phoenix-education/2021/08/05/metro-phoenix-districts-require-masks/5500123001/

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

mask mandates and go to the very heart of federalism. Earlier today, White House Press Secretary Jen Psaki used her official platform to openly encourage school districts to defy state laws prohibiting mask mandates and follow CDC guidance instead:

> *Q. . . . Are you encouraging school districts in Florida and Texas specifically to resist the governors in those states and impose mask mandates?*
> *MS. PSAKI: Well, we're certainly encouraging any officials and local leaders to follow public health guidelines to save lives.*[12]

The issue is not only likely to reoccur, but, as set forth above, it already has reoccurred in various other districts. Clearly, the legal questions presented by this case require an "immediate and final resolution" making resolution on the merits especially appropriate. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 (2019). In addition, as discussed above at greater length, the issue is likely to reoccur because contagions ebb and flow, respiratory illnesses will always be with us, and CDC masking guidance has constantly changed throughout the course of the pandemic. Finally, unless this Court makes a clear and unequivocal statement that state law is supreme in matters of health, and not CDC guidance, officials will feel emboldened to ignore the law in any number of future health-related matters. Therefore, even if there is presently no live case or controversy, this Court should still reach the merits.

III. Conclusion.

Defendants originally imposed their mask mandate in open defiance of the law, betting that no parent or teacher would be brave enough to challenge them. Since being sued, they have raised a pretextual constitutional argument, hoping to force this action to be dismissed and refiled late next month, and this process to be repeated. By such maneuvering they seek to set themselves above the law for as long as possible and thereby maintain their mandate well into the school year in opposition to the will of the legislative and executive branches of government. These tactics must fail. This case is ripe for adjudication. Defendants' Motion to Dismiss must be denied.

[12] *Press Briefing by Press Secretary Jen Psaki, August 10, 2021*, White House Press Briefings, Aug. 10, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/10/press-briefing-by-press-secretary-jen-psaki-august-10-2021/ (praising the "courage" and "boldness" of defying state law.) (Last visited Aug. 10, 2021).

Respectfully submitted this 10th day of August, 2021

By /s/Alexander Kolodin

Alexander Kolodin
Kolodin Law Group PLLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012

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

KOLODIN LAW GROUP PLLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539