

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Alexander Kolodin (030826)
Christopher Viskovic (035860)
Davillier Law Group, LLC
3443 N. Central Ave. Ste 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985
Facsimile: (602) 801-2539
Email:
AKolodin@davillierlawgroup.com
Cviskovic@davillierlawgroup.com
Phxadim@davillierlawgroup.com (file copies).

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DOUGLAS HESTER;

Plaintiff,

v.

PHOENIX UNION HIGH SCHOOL
DISTRICT; et al.;

Defendants.

Case No. CV2021-012160

**SECOND AMENDED VERIFIED
COMPLAINT**

For his Second Amended Verified Complaint against the Phoenix Union High School District, the members of its governing board, and its superintendent (“Defendants”), Plaintiff Douglas Hester alleges as follows. Incorporated by reference into this Second Amended Verified Complaint are Plaintiff’s prior pleadings, briefing, and oral arguments in this matter.

Davillier Law Group, LLC

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

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Douglas Hester is a teacher in the Phoenix Union High School District.
2. The Phoenix Union High School District (“PUHSD”) is a public body.
3. Defendants Alston, Prescott, Ross, Parra, Pastor, Gallardo, and Marquez are the members of PUHSD’s governing board. They are being sued in their official capacity only.
4. Defendant Gestson is PUHSD’s superintendent. He is being sued in his official capacity only.
5. Does I-X are other persons who may be responsible, in whole or in part, for the acts and omissions complained of herein.
6. All or substantially all of the acts and occurrences giving rise to this Verified Complaint occurred in Maricopa County, Arizona.
7. Pursuant to A.R.S. § 12-401(16) an action against public officers shall be brought in the county in which the officer, or one of several officers holds office.
8. Plaintiffs may proceed by special action where there is no equally “plain, speedy and adequate remedy” available. A.R.S. §§ 12-2001, 12-2021, Rules of Procedure for Special Actions (“RPSA”) 1. For the reasons set forth below, there is no equally plain, speedy, and adequate remedy available.
9. A special action may be brought in the superior court for the county that is the principal place of business for the public officer or body being sued. RPSA 4(b).
10. This Court has jurisdiction to hear this matter and venue is proper pursuant to A.R.S. §§ 12-2001, 12-2021,¹ the Uniform Declaratory Judgments Act and other statutes governing the issuance of declaratory judgments, the Arizona Rules of Procedure for Special Actions (“ARPSA”) 1-4, and other applicable law.

GENERAL ALLEGATIONS

11. Plaintiff incorporates by reference the preceding allegations.

¹ To the extent, if any, that Plaintiff is expressly required to so state, included in this action is a prayer for a writ of mandamus or its equivalent under the RPSA. The special action now encompasses applications for writs of mandamus. RPSA 1(a-b).

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

- 1 12. On June 30th, 2021, Governor Doug Ducey signed HB 2898 into law. **Exhibit A.**
- 2 13. Included within HB 2898 was a new statute, A.R.S. § 15-342.05.
- 3 14. A.R.S. § 15-342.05 provides as follows:
- 4 a. *“Notwithstanding any other law or order, a county, city, town, school*
- 5 *district governing board or charter school governing body may not require*
- 6 *the use of face coverings by students or staff during school hours and on*
- 7 *school property.”*
- 8 b. *“A school district or charter school may not require a student or teacher to*
- 9 *receive a vaccine for COVID-19 or to wear a face covering to participate*
- 10 *in in-person instruction.”*
- 11 15. HB 2898 was an omnibus bill, the various portions of which have different effective
- 12 dates.
- 13 16. Section 119(A) of the bill provides as follows: “Section 15-342.05, Arizona
- 14 Revised Statutes, as added by this act, applies retroactively to from and after June
- 15 30, 2021. **Exhibit A** p 160.
- 16 17. On July 30, 2021, the PUHSD posted the following announcement on its website:
- 17 *“Our current Board-adopted policies still require masks when indoors in the*
- 18 *presence of others. However, this past month, we did align our masking practices*
- 19 *district-wide with the current prohibition of mask mandates. Recently, we have heard*
- 20 *from our staff, students, and families that they want us to realign our mitigation*
- 21 *practices with the guidelines and recommendations of national and local health*
- 22 *agencies.*
- 23 *In an effort to protect our staff, students, and community, PXU has a good faith belief*
- 24 *that following guidance from the CDC and other health agencies regarding*
- 25 *mitigation strategies is imperative. Therefore, Phoenix Union will begin the school*
- 26 *year on August 2 enforcing our existing Board-adopted mask requirement of*
- 27 *universal indoor masking only, regardless of vaccination status. This masking*
- 28 *requirement is for all staff, students, and visitors. At the August 5 Board meeting,*

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

1 *District leadership and Governing Board will discuss mitigation plans, including*
2 *masking policies, and consider the temporary continuation of the mask requirement*
3 *until the CDC (and/or other federal, state, and local health agencies) changes their*
4 *masking guidelines.”*

5 18. The same day, the Arizona Republic reported as follows:

6 *“Phoenix Union High School District will require masks to be worn indoors when*
7 *students head back to school next week — despite an Arizona law that bans mask*
8 *mandates.*

9 ...

10 *In a statement, Gov. Doug Ducey's office said Phoenix Union's policy is not*
11 *allowed under Arizona law, calling the district's move ‘unenforceable.’*

12 ...

13 *At a news conference on Friday, Phoenix Union Superintendent Chad Gestson*
14 *repeatedly declined to comment on whether the district was following state law.*
15 *He said he has been in talks with his legal team about the mandate but reiterated*
16 *that his job was about the health and safety of schools.”²*

17 19. Twelve News reported more fully on Governor Ducey’s July 30th statement:

18 *“A spokesman for Gov. Doug Ducey, a fierce opponent of any COVID-related*
19 *mandates, issued a statement that declared the district was breaking the law:*

21 *‘Gov. Ducey believes the decision by Phoenix Union requiring masks has no teeth.*
22 *It's not allowed under Arizona law. It's unenforceable.*

23 *Arizona is not anti-mask, we’re anti-mask mandate. As the governor has often*
24 *said, mask usage is up to parents.*

25 *School administrators should be doing everything they can to encourage eligible*
26 *students and staff to get vaccinated, not break state law.’*

27 _____
28 ² <https://www.azcentral.com/story/news/local/phoenix-education/2021/07/30/phoenix-union-high-school-district-require-masks-indoors/5431886001/>

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

1 *But Ducey didn't indicate that he would try to block the district's mandate.”³*

2 20. Just three days prior, Governor Ducey had released a statement reading, in pertinent
3 part:

4 *“Arizona does not allow mask mandates, vaccine mandates, vaccine passports or*
5 *discrimination in schools based on who is or isn't vaccinated. We've passed all of this*
6 *into law, and it will not change.”⁴*

7 21. The mask mandate applies to students, faculty, and staff.⁵

8 22. PUHSD's first day of school was August 2nd, 2021.⁶

9 23. On August 16, 2021, this Court ruled that A.R.S. § 15-342.05 takes effect September
10 29th, 2021.⁷

11 24. This Court further ruled that Plaintiff could file a second amended complaint when a
12 justiciable issue became inevitable. Today is the effective date of the statute and
13 Phoenix Union's mask mandate remains in effect. Therefore, a justiciable issue is now
14 inevitable. Accordingly, Plaintiff has no equally plain, speedy, and adequate remedy
15 at law.

16 25. On March 11, 2020, Governor Doug Ducey issued a Declaration of Public Health State
17 of Emergency pursuant to A.R.S. §§ 26-303 and 36-787.

18 26. Accordingly, “coordination of all matters pertaining to COVID-19 are of statewide
19 concern rather than local concern unless otherwise determined by the director of the
20 Arizona Department of Health Services.”⁸

21 27. The Public Health Emergency remains in effect.

22 28. One of Defendants' purposes in imposing their mask mandate is that they believe
23 masks will help prevent the spread of COVID-19.

24
25 ³ <https://www.12news.com/article/news/health/coronavirus/phoenix-union-high-school-district-to-requires-masks-indoors-regardless-of-vaccination-status/75-442922ca-3e41-465a-9971-021d4158cffd>

26 ⁴ <https://azgovernor.gov/governor/news/2021/07/governor-ducey-statement-updated-cdc-guidance>

27 ⁵ https://www.azfamily.com/news/continuing_coverage/coronavirus_coverage/facemask-mandate-phoenix-union-high-school/article_df19f11e-f154-11eb-ad7a-bbadde56d83d.html

28 ⁶ <https://www.pxu.org/calendar#calendar1/20210830/month>

⁷ By noting this, Plaintiff does not intend to waive this issue for purposes of appeal.

⁸ https://azgovernor.gov/sites/default/files/eo_2021-09.pdf

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

1 29. “The FDA regulates face masks, including cloth face coverings, barrier face coverings,
2 and surgical masks as medical devices **when they are intended for a medical**
3 **purpose**. Medical purposes include uses related to helping prevent the spread of
4 COVID-19.”⁹

5 30. Further, masks are covered by an FDA Emergency Use Authorization (“EUA”):
6 “Face masks are authorized under this EUA when they are intended for use as
7 source control, by members of the general public as well as HCPs in healthcare
8 settings, to cover their noses and mouths, in accordance with CDC
9 recommendations, to help prevent the spread of SARS-CoV-2 during the
10 COVID-19 pandemic.

11 . . .
12 *Manufacturers of face masks that are used as described above and meet the*
13 *above requirements (i.e., are within this section (the Scope of Authorization,*
14 *Section II)) do not need to take any action, other than complying with the*
15 *Conditions of Authorization (Section IV) to be authorized under this EUA.”¹⁰*

16 31. Arizona’s Attorney General recently issued a formal opinion stating:
17 “Under federal law, a person carrying out an Emergency Use Authorization
18 (“EUA”) activity, like administering an EUA vaccine, is required to inform a
19 potential recipient of the option of rejecting the EUA vaccine. Therefore, a
20 person carrying out an EUA activity, including the military, federal government,
21 or a private employer, cannot misinform a potential recipient of an EUA vaccine
22 by, on the one hand, telling the recipient she has an option to reject the vaccine,
23 and, on the other hand, mandating that she receive the vaccine or sanctioning
24 her for failure to do so.”¹¹

25 Plaintiff, however, will be sanctioned if he fails to wear a mask.

27 ⁹ <https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/face-masks-barrier-face-coverings-surgical-masks-and-respirators-covid-19> (emphasis in original).

28 ¹⁰ <https://www.fda.gov/media/137121/download>

¹¹ <https://www.azag.gov/sites/default/files/docs/press-releases/2021/briefs/2021-08-20%20AG%20Opinion.pdf>

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

CAUSE OF ACTION

(RPSA 3)

32. Plaintiff incorporates by reference the preceding allegations.

33. Special action relief is available where a Plaintiff seeks relief against a public body, officer, or person. RPSA 1(a).

34. Special actions are especially appropriate when they are brought regarding subject matter of statewide concern.

35. Applications for writs of mandamus pursuant to A.R.S. § 12-2021 are appropriately brought as special actions. RPSA 1(a-b).

36. RPSA 3(a) provides that the question of “**[w]hether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion**” may be raised by special action.

37. A.R.S. Title 15, Chapter 3, Article 3 is entitled “Powers and Duties of School District Governing Boards[.]”

38. Pursuant to that article, a school district’s governing board has the duty to “Prescribe and enforce policies and procedures for the governance of the schools **that are not inconsistent with law[.]**” A.R.S. § 15-341(A)(1).

39. The policies and procedures put in place by Defendants include an illegal mandate requiring students and staff to wear masks.

40. This mandate is unlawful under both A.R.S. § 15-342.05 **and** existing state and federal law.¹²

41. Therefore, Defendants have failed to perform their duty to prescribe policies and procedures that are not inconsistent with law.

42. RPSA 3(b) provides that the question of “**[w]hether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority**” may be raised by special action.

¹² This Court has already considered and partially rejected this argument. Plaintiff nonetheless makes it here to further ensure the issue is preserved for appeal, among other reasons.

Davillier Law Group, LLC

3443 North Central Avenue Suite 1009

Phoenix, Arizona 85012

Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

1 43. Defendants lack the legal authority to mandate that students and staff wear masks
2 under both A.R.S. § 15-342.05 **and** existing state and federal law.

3 44. Nonetheless, Defendants have imposed such a mandate.

4 45. Further, Defendants are threatening not to promulgate lawful policies until the CDC
5 changes its masking guidance or they feel it is otherwise safe to do so.

6 46. For example, in an August 4th, 2021 interview with the Wall Street Journal,
7 defendant Gestson said “We don’t want a mask requirement forever either, and we’ll
8 make a decision to change that when it’s safe to do so[.]”¹³

9 47. Therefore, Defendants are proceeding or threatening to proceed without or in excess
10 of their jurisdiction or legal authority.

11 48. Furthermore, CDC guidance as well as that of other authorities are highly variable, as
12 is the state of the COVID pandemic generally. Thus, in the alternative, this case
13 should be adjudicated as one that is capable of repetition but evading review.

14
15 WHEREFORE Plaintiff prays:

- 16 A. For a declaration that Defendants’ mask mandate is contrary to law.
- 17 B. For preliminary and permanent injunctive relief requiring Defendants to fulfill their
18 legal duty to “Prescribe and enforce policies and procedures for the governance of
19 the schools **that are not inconsistent with law**” by promulgating policies and
20 procedures for the new school year, and for subsequent school years, that do not
21 include the mask mandate.

22 C. For attorneys’ fees and costs pursuant to A.R.S. §§ 12-2030, 12-348, 12-349,
23 common law doctrine, and other applicable law.

24 D. For such other relief as this Court deems just and proper.

25
26
27
28

¹³ <https://www.wsj.com/articles/some-arizona-schools-require-masks-flouting-covid-19-state-law-11628082000>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 29th day of September, 2021.

By: /s/Alexander Kolodin

Alexander Kolodin
Christopher Viskovic
Davillier Law Group, LLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012

Attorney for Plaintiffs

I CERTIFY that a copy of the forgoing will be served on the other party/parties to this matter in accordance with the applicable rule of procedure.

By: /s/Yuka Bacchus

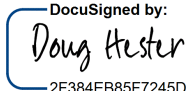
Yuka Bacchus
Davillier Law Group, LLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012

Davillier Law Group, LLC
3443 North Central Avenue Suite 1009
Phoenix, Arizona 85012
Telephone: (602) 730-2985 / Facsimile: (602) 801-2539

VERIFICATION

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

I declare under penalty of perjury that, to the best of my knowledge, the facts set forth above are true and accurate.

Signature: 
Printed Name: 2F384EB85F7245D... Doug Hester

Date: 9/29/2021

Davillier Law Group, LLC

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