ARIZONA COURT OF APPEALS
DIVISION ONE

RACHEL WALDEN, et al.,, Plaintiffs/Appellants, v. MESA UNIFIED SCHOOL DISTRICT #4, et al.,, Defendants/Appellees,	Court of Appeals Division One No. 1 CA-CV 24-0776 Maricopa County Superior Court No. CV2023-018263

Plaintiffs'/Appellants' Reply Brief

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Argument

I. The Trans Policy is a policy of Mesa Public Schools that was unilaterally imposed by Superintendent Fourlis.

The First Amended Complaint ("FAC") plausibly alleges that MPS maintained a policy of facilitating the in-school social gender transition of students and hid it from parents. Pl.Appx-008-19 ¶¶ 24-140. Indeed, the FAC provides documentary proof of the policy and that employees of Defendant Mesa Unified School District #4 ("Mesa Public Schools" or "MPS") implemented the policy and unlawfully hid the in-school gender transitions of multiple students. Pl.Appx-012-14, 18-22, 79-81, ¶¶ 55-73, 102-40. The FAC also makes factual allegations about the involvement of Defendant Andi Fourlis in the creation and implementation of the Trans Policy. Pl.Appx-006-7, 16-17, 24 ¶¶ 17-18, 87-96, 152.

At the motion to dismiss stage, courts "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012). Notwithstanding this well-known blackletter law principle, the Defendants attempt to argue that the Trans Policy does not exist and that the Superintendent did not implement it. Answering Brief ("AB") at 6, 13. Such

arguments can only be made following discovery. For now, for purposes of this appeal, this Court must assume that the Trans Policy exists and that MPS and the Superintendent (collectively, the "Defendants") implemented it without a required vote of the MPS Governing Board.

II. Governing Board Member Walden has suffered injury, and she has standing.

The Governing Board was required to vote on the Trans Policy yet refuses to conduct that vote. Pl.Appx-004, 018, 023 ¶¶ 3, 100-1, 150. Governing Board Member Walden was injured by the Board's failure to conduct this legally required vote because, as a Board member, she is entitled to vote on all policies of the school district. Additionally, she is injured because the school district's continued implementation of an unconstitutional and unlawful policy causes her to violate her oath of office.

The Defendants' attempt to distinguish *Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128 (2011) and *Brewer v. Burns*, 222 Ariz. 234 (2009) is unavailing. *See* AB at 11-12. While those decisions did not involve a school board, they both stand for the obvious proposition that a public official is harmed when she is denied the ability to exercise the lawful authority of her office. Indeed, this Court just held last year that nullification of

the votes of public officials *does* confer standing. *Toma v. Fontes*, --- Ariz. ---, 553 P.3d 881, 891 ¶ 39 (App. 2024), review granted (Jan. 7, 2025) ("Vote nullification plays a leading role in legislative standing based on institutional injury.")

Indeed, Courts from around the country have held the same thing: that a public officer entitled to vote on a matter who is denied that vote has suffered injury sufficient to confer standing. *E.g.*, *Cohen v. Rendell*, 684 A.2d 1102, 1105 (Pa. Commw. Ct. 1996) (city "council members individually possess a legal interest in enforcing the voting procedures established by the [city] Charter, and have standing to seek declaratory relief when such procedures are violated"); *Clarke v. United States*, 705 F. Supp. 605, 608 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated on other grounds, 915 F.2d 699 (D.C. Cir. 1990) ("City council members who challenged constitutionality of congressional act depriving District of Columbia of funds if council did not adopt specified legislation had alleged specific injury and deprivation by Congress of council members' First Amendment right to vote in accordance with their own views"); *Morris v. Goode*, 107 Pa. Cmwlth. 529, 535, 529 A.2d 50, 53 (1987) ("plaintiff-council members, as council members,

have a legal interest, granted by the home rule charter, in having a quorum present to vote on council resolutions").

Courts have also held that school board members have standing to challenge actions by their school board because it would violate their oath of office or otherwise violate their duty to uphold the Constitution. *E.g.*, *Anderson v. Orleans Par. Sch. Bd.*, 340 F. Supp. 2d 716, 718 (E.D. La. 2004) (members of school board had standing to challenge board's proposed action that was allegedly unconstitutional because it would interfere with the rights of its individual members to uphold the constitution); *Clarke*, 705 F. Supp. at 608 (holding that city council members had "oath of office standing" because "the Council members must either vote in a way which they believe violates their oaths, or face almost certain loss of their salaries and staffs as well as water, police and fire protection"); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968) (school board members had standing based on injury caused by prospect of being forced to violate their oath of office); *Brewer v. Hoxie Sch. Dist. No. 46 of Lawrence Cnty., Ark.*, 238 F.2d 91, 98–100 (8th Cir. 1956) (because directors and superintendent of consolidated school district were bound by constitutionally imposed duty as well as their oaths of office to support the Fourteenth Amendment, they had a

federal right to be free from direct interference in the performance of that duty).

The Defendants also claim that Governing Board Member Walden has failed to sufficiently plead deprivation of her vote and of her obligation to fulfill her oath of office. AB at 10. However, under Arizona's notice pleading standard, the Plaintiffs' claims are more than enough to satisfy the requirements of Rule 8 of the Rules of Civil Procedure to show standing. "Because Arizona is a notice pleading state, extensive factual recitations are not required." *Anserv Ins. Servs., Inc. v. Albrecht In & For Cnty. of Maricopa*, 192 Ariz. 48, 49 ¶ 5 (1998) (quotation omitted). Rule 8's "purpose ... is to avoid technicalities and give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *E.g.*, *Mackey v. Spangler*, 81 Ariz. 113, 115 (1956). The Defendants can hardly claim a lack of understanding about the type of litigation involved or that they have not been put on notice of the basis of Governing Board Member Walden's claims. Indeed, their appellate brief admits that they understand *exactly* what her claimed harm is. *See* Answering Brief ("AB") at 9-12 (describing and analyzing Governing Board Member Walden's claimed harm of deprivation of the right to vote on the Trans Policy).

The purpose of notice pleading has thus been fulfilled.

And even if Governing Board Member Walden's allegations in the complaint were somehow insufficient to demonstrate her claimed harm, dismissal would hardly be the appropriate disposition. If this Court believes that the FAC does not contain sufficient detail, then the proper remedy is remand with instructions to the superior court to permit amendment so that Governing Board Member Walden may add more specific allegations about the deprivation of her right to vote on the Trans Policy.

The Defendants argue that, under A.R.S. § 15-323(A), Governing Board Member Walden only has the right to vote on policies that are presented to the board. AB at 11-2. The Defendants' interpretation of that statute, however, is so constrained as to make the role of a Governing Board Member potentially meaningless. Under their interpretation, a school superintendent would have the ability to impose unilaterally any unlawful policy she chose, and so long the board chair was her confederate, she could keep the issue from ever being added to a meeting agenda and thus from ever coming up for a board vote. A Governing Board member has a right to be more than just a rubber stamp.

The Defendants also claim that Governing Board Member Walden's claims fail because they believe she did not sue in her official capacity, but rather in her individual capacity. The Defendants never argued this below, nor did the superior court dismiss on this ground. Furthermore, the FAC makes clear that Walden *was* suing in her official capacity: "Plaintiff Rachel Walden is currently a member of the Governing Board of MPS.... As a member of the Governing Board, she has standing to bring this suit." FAC ¶ 6. And once again, if the Court believes this to be some kind of real deficiency, the proper remedy is not dismissal, but reversal and remand with instructions that Governing Board Member Walden be granted leave to amend.

Interestingly, after cataloging these alleged pleading deficiencies (some of which were never brought up below), the very next section of the Defendants Opening Brief claims that "[t]he superior court did not abuse its discretion by denying Walden leave to further amend the complaint" because "amendment would be futile." OB at 12. If amendment would be futile, then why did the Defendants spend multiple pages of their brief claiming that the FAC was rightfully dismissed because of pleading deficiencies? Apparently, even the Defendants believe that amendment might not be futile after all.

Finally, the Defendants claim that Governing Board Member Walden lacks standing because "the [Trans] Guidelines are not a 'policy' and are instead in furtherance of the MPS anti-discrimination policy that was adopted by a Board vote." (AB at 13.) Apparently, the Defendants' argument is that Governing Board Member Walden was not injured by the lack of a vote on the Trans Policy because it is not a real "policy," but is rather merely the implementation of MPS's generic anti-discrimination policy. AB at 10-11, 13 (citing Pl.Appx-135-36).

However, that anti-discrimination policy merely contains standard boilerplate language about anti-discrimination and equal opportunity. Indeed, the words "gender" and "transgender" are not used in the anti-discrimination policy even *a single time*. Pl.Appx-135-36. The Defendants' argument could only be right if this *pro forma* policy contains within it the extraordinary power to ignore the U.S. Constitution, Arizona's Parents Bill of Rights (Ariz. Rev. Stat. Ann. § 1-601 and -602), Arizona's parental notification laws, and a number of other statutes. The Defendants essentially imbue this unremarkable policy with the power of some sort of super-constitution that empowers Superintendent Fourlis with the power to suspend any constitutional provision or statute that she wishes.

But it gets even worse. On its face, the Trans Policy *never* specifically claims to be authorized by the anti-discrimination policy. This absence is all the more notable because Superintedent Fourlis *does* cite other Governing Board policies in the Trans Guidelines documents—specifically, about dress and grooming (Pl.Appx-039 and -045) and about handling "[c]omplaints alleging harassment, bullying, or discrimination based on an individual's gender." Pl.Appx-038 and -044. It is a well-established principle in State and federal law that courts evaluating the decisions of administrative bodies can only consider the justifications that the body offered at the time they took action and may not consider *post hoc* rationalizations offered in litigation.[1]

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[1] *See, e.g.*, *Shelby Sch. v. Arizona State Bd. of Educ.*, 192 Ariz. 156, 163 ¶¶ 21-22 (App. 1998) (findings made by the State Board of Education "must be explicit enough to allow the court to intelligently review the agency's decision and to decide whether there is a reasonable basis for the decision" and reversing Board decision because it had "failed to make basic findings of fact or conclusions of law"); *Arizona Corp. Comm'n v. Citizens Utilities Co.*, 120 Ariz. 184, 189 (App. 1978) ("judicial inquiry" into Corporation Commission order "must of necessity be exercised based upon the conditions as they existed at the time of the promulgation of the order under review" (citation omitted)); *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 369 ¶ 12 (2013) ("judicial review of [board of adjustment] decisions is limited to the record before the board at the time of its decision"); *see also*, *DHS v. Regents of the Univ. of Calif.*, 140 S.Ct. 1891, 1907 (2020) (it is a "'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'") (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); *Texas v. United States*,

The Defendants may not offer *post hoc* justifications for the Trans Policy. The Trans Policy must stand (or fall) based on the justification that Superintendent Fourlis offered at the time. And because she failed to cite the anti-discrimination policy when she implemented the Trans Policy, she cannot now make that claim. And even if she could, that would not be dispositive as to standing. Rather, it would be a disputed issue of fact subject to further discovery and to be finally decided at trial. In other words, it would be a *merits* argument. "Standing does not turn on the merits of a party's arguments. [Courts] instead accept a plaintiff's allegations and then analyze whether there is standing. In other words, Defendants cannot defeat standing merely by assuming victory. *Toma*, 553 P.3d at 890 ¶ 35.

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40 F.4th 205, 226–27 (5th Cir. 2022) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself, not reasons developed post hoc." (cleaned up); *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (in assessing whether good cause exists, courts "must rely only on the 'basis articulated by the agency itself' at the time of the rulemaking. 'Post hoc explanations'" do not suffice (cleaned up)); *cf. Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 373–74 (App. 1987) (holding that action by a school board should be reviewed the same way that of an administrative agency).

III. Both Plaintiffs have standing to seek relief under the Uniform Declaratory Judgment Act.

Governing Board Member Walden and Jane Doe both have standing to seek relief under the Uniform Declaratory Judgment Act ("UDJA").

As an initial matter, the Defendants do not specifically contest Governing Board Member Walden's standing under the UDJA. Therefore, if this Court accepts the Plaintiffs' general arguments above about Governing Board Member Walden's standing, then it must conclude that she also has standing under the UDJA. And indeed, this Court has specifically held that a claim of "[v]ote nullification" can confer standing under the UDJA. *Toma*, 553 P.3d at 891 ¶ 39.

The Defendants only specifically argue against Jane Doe's standing because, in their telling, her claims are moot. However, this is not so. Rather, school officials *to this day* refuse to disclose to Jane the content of any of their discussions with her daughter about her sexuality and gender identity. Pl.Appx-019-20 ¶¶ 114-16; *see also* Opening Brief at 11. Jane Doe thus continues to suffer harm from the Trans Policy and the violation of her rights under the U.S. and State Constitutions and the Parents' Bill of Rights.

Furthermore, a plaintiff does not need to show harm to have standing under the UDJA: "actual injury is not required for standing under the UDJA.... If actual injury is lacking, standing still exists if there is an actual controversy between interested parties." *Toma*, 553 P.3d at 889 ¶ 23. Thus, a plaintiff "need not demonstrate past injury or prejudice so long as the relief sought is not advisory." *Arizona Sch. Boards Ass'n, Inc. v. State*, 252 Ariz. 219, 224 ¶ 16 (2022). Here, Jane Doe's daughter is still a student in an MPS school. The relief sought here, therefore, is not advisory because Megan Doe is still subject to the Trans Policy and Jane Doe faces the ongoing risk of a repeat incident. There is still a real controversy between the parties.

IV. Superintendent Fourlis is a proper party to this case.

Superintendent Fourlis is a proper party to this case. The Defendants argue that "Appellants' argument that Superintendent Fourlis 'was properly named as a defendant because she unilaterally instituted the [Guidelines]' (OB at 25) does not square with the allegations of the amended complaint. Indeed, the complaint makes no such allegation as to the Superintendent." AB at 17.

This is incorrect. Rather, the FAC *does* allege that the Superintendent helped create and implement the Trans Policy. Pl.Appx-006-7, 16-17, 24 ¶¶ 17-18, 87-96, 152. However, setting aside these specific paragraphs of the FAC, the FAC still makes the allegation by implication as well: the FAC alleges that the MPS Policy exists and that it was never adopted by the MPS Governing Board. The only official at MPS with apparent authority to promulgate such a policy would be the Superintendent. Therefore, any reasonable person reading the complaint would conclude that it alleges the Superintendent promulgated the policy without Board approval. The contents of the FAC, therefore, are sufficient under notice pleading standards.

And even if the FAC were not clear on this point, it became abundantly clear in the course of the briefing on the Motion to Dismiss, where the Plaintiffs clearly explained their theory of the case as to the Superintendent:

> Superintendent Fourlis was properly named as a Defendant. As Superintendent, she is the originator and main champion of the Trans Policy. Quite simply, it would not exist if she had not promulgated it. And because she issued and implemented it without Governing Board authorization, an order against only MPS would be insufficient to end the Trans Policy. Superintendent Fourlis is thus a necessary party to this case so that this Court may offer effectual relief and order the Superintendent to cease her unlawful usurpation of board authority. Thus, if nothing else, she is necessarily named as a relief defendant.

Pl.Appx-170-71. Thus, the proper course of action for the superior court in response to any perceived pleading deficiency as to the Superintendent was not to dismiss the complaint but to grant leave to amend to clarify the Plaintiffs' allegations about the Superintendent's specific role in the promulgating the Trans Policy.

V. The Plaintiffs have properly sought mandamus relief.

The Plaintiffs have properly sought mandamus relief. The Defendants' argument on this point delves into unnecessary arcane details about the proper characteristics of a genuine mandamus claim, as if there is some kind of Platonic ideal form of mandamus and that any plaintiff who deviates in the slightest from this perfect ideal is forever barred from relief. Thus, in the Defendants' world, a mandamus action may not seek relief that prohibits an official from taking action. Thankfully, this kind of 19th Century-style argument no longer has any place in Arizona courts because, decades ago, the Arizona Rules of Procedure for Special Action unified all the writs into one single action—a Special Action. The Plaintiffs sought "[f]or such other relief as the Court deems just and proper," Pl.Appx-034, and the superior court could have just as easily issued relief in the form of a writ of prohibition. In Arizona, both forms of relief are available in a single action. The

Plaintiffs made these arguments in great detail in their opening brief (at 29-37), but the Defendants have failed to meaningfully engage with those arguments. This Court should, therefore, disregard their inapposite arguments on mandamus relief.

VI. Jane Doe's claims were timely.

Jane Doe's claims were timely. The Plaintiffs provided six independent bases for finding that her claims were timely, and the Defendants have failed to refute any of them. Opening Brief at 40-49. Rather, the Defendants in their Answering Brief mount a factual attack on the question of when Jane Doe's claim accrued. However, the moment when Jane Doe had sufficient knowledge of her harm such that her claims accrued is *factual* question that cannot be determined at the Motion to Dismiss stage. *See* Opening Brief at 40-43. It was, therefore, inappropriate for the superior court to summarily dismiss the case before any discovery and before a trial on the facts.

Furthermore, the Defendants fail in their attempt to refute Jane Doe's fraudulent concealment argument for tolling the statute. AB at 26-27. In spite of their protestations to the contrary, the mere printing of a school program with the name "Michael" in it, and the Principal's partial admission of wrongdoing does not dispense with Jane Doe's claim of fraudulent

concealment. There are two reasons for this.

First, even though Jane Doe confronted Megan's school principal in December 2022, he refused "to disclose to Jane the content of Megan's discussions with the principal or other school personnel about gender and sexuality issues," and that concealment *continues to this day*. Pl.Appx-019-020 ¶¶ 114-16.

Second, at that December 2022 meeting, Jane Doe also demanded that "the principal ... ensure that all school personnel stopped using the name 'Michael' and instead referred to Megan by her given name." Pl.Appx-021 ¶ 123. However, unbeknownst to Jane, "the school ignored Jane's demand." *Id.* ¶ 124. It was only *at the end of the school year*, "[a]t Megan's final orchestra concert at the end of the year—a full semester after Jane's meeting with the principal" that Jane learned the school had completely ignored her demand and had continued to facilitate Megan's gender transition. *Id.* ¶ 125. Jane only discovered this when "Megan's orchestra teacher introduced Megan as 'Michael' to a packed auditorium at the end of the school year. *Id.* Thus, at the very least, the court should have tolled the statute of limitations until the date of the concert in May of 2023.

Additionally, this Court should hold that the statute of limitations

under A.R.S. § 12-821 did not start to run until May of 2023 under a theory of continuing misconduct. *See* Opening Brief at 46-47. The Defendants only argument against adopting a doctrine of continuing misconduct is by trying to distinguish one of the cases that the Plaintiffs cited because it involved a trespass, and thus would not be applicable here. AB at 27-28.[2] However, the Plaintiffs cited two other reported cases that acknowledge the possible viability of a continuing misconduct theory in relation to A.R.S. § 12-821, and neither of those cases involved trespass. *See Cruz v. City of Tucson*, 243 Ariz. 69, 74 ¶ 20 (App. 2017) (abuse of process and unlawful denial of access to public records); *Watkins v. Arpaio*, 239 Ariz. 168, 172 ¶ 15 (App. 2016) (intentional infliction of emotional distress and false-light invasion of privacy claims). If this Court does not grant relief based on the Plaintiffs' other

[2] The Defendants also take issue with the Plaintiffs' citation of a pre-2015 memorandum opinion of this court. AB at 27-28. However, the Plaintiffs' citation of the case was proper under Arizona Supreme Court Rule 111(c)(1)(B) because the Plaintiffs identified that the doctrine of "continuing misconduct" under A.R.S. § 12-821 is an unresolved issue of law in Arizona that no published opinion has addressed, and the Plaintiffs cited the unpublished opinion "to assist the appellate court in deciding whether to issue a published opinion" on this issue. Opening Brief at 46-47. *See also Torres v. Jai Dining Servs. (Phoenix) Inc.*, 250 Ariz. 147, 152 ¶ 22 n.5 (App. 2020), vacated on other grounds, 252 Ariz. 28 (2021) (explaining propriety under Rule 111(c)(1)(B) of citing a pre-2015 memorandum opinion for the purpose of requesting that a court clarify the law and publish the resulting opinion).

statute of limitations arguments, then this case would be the perfect vehicle to clarify that the doctrine of continuing misconduct applies to A.R.S. § 12-821.

The Defendants do not dispute that the one-year statute of limitations would not apply to the Superintendent's ultra vires actions. They merely take issue with how the Plaintiffs named her in their complaint, arguing that she should have been named in her private capacity. AB at 28. Accordingly, if this Court believe that the Superintendent was improperly named in her official capacity, the Plaintiffs ask that this Court remand with instructions that they be given leave to amend their complaint accordingly.

Similarly, this Court should hold that A.R.S. § 12-821 does not apply to "a purely declaratory judgment claim ... seeking purely prospective relief." Opening Brief at 49 (quoting *Home Builders Ass'n of Cent. Arizona v. City of Surprise*, No. 1 CA-CV 14-0466, 2015 WL 7454104, at *2 n.4 (Ariz. Ct. App. Nov. 24, 2015). The Defendants claim that this Court has already held the opposite. AB at 28-29. However the cases they cite hold no such thing. Rather, in both cases, the disputes were not purely declaratory judgment actions, but involved contract or fee disputes also sought retrospective relief or monetary damages. *See City of Chandler v. Roosevelt Water*

Conservation Dist., --- Ariz. ---, 559 P.3d 184, 187 ¶ 8 (App. 2024) (claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment seeking order of specific performance of contract); *Rogers v. Bd. of Regents of Univ. of Arizona*, 233 Ariz. 262 (App. 2013) (lawsuit against Arizona Board of Regents ("ABOR") to establish easement by implication over road on ABOR's land, and seeking quiet title relief). Thus, whether the one-year statute of limitations should apply to a purely declaratory judgment claim seeking purely prospective relief is still an open question that this Court should answer in the negative.

Conclusion

Therefore, for the preceding reasons, this Court should reverse the superior court's dismissal of this case and remand for adjudication on the merits.

RESPECTFULLY SUBMITTED this 19th day of March 2025.

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