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' Opening Brief

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Introduction

This case involves shocking facts. Arizona's largest school district, Defendant/Appellee Mesa Unified School District #4 ("Mesa Public Schools" or "MPS"), maintains a policy to help students socially transition their gender in school and conceal this from parents. This policy was created and imposed by Defendant/Appellee Andi Fourlis ("Superintendent Fourlis"), the Superintendent of MPS.

This is a case of critical importance to the State. It deserves to be heard on its merits. The Defendants/Appellees (the "Defendants") should have to account for their lawless actions. Yet, the superior court improperly dismissed the case on procedural grounds. However, the superior court's grounds for denial were incorrect. The Plaintiffs/Appellants (the Plaintiffs"), Rachel Warden ("Governing Board Member Walden") and Jane Doe have standing. This case is a proper special action; declaratory relief is available here, and the statute of limitations does not bar Jane Doe's claims. Therefore, the superior court's dismissal of this case should be reversed, and this case should remanded so that it can be adjudicated on the merits.

Statement of the Case

This case alleges that MPS maintains a district policy (the "Trans Policy") targeted at students who want to represent themselves as having a gender different from their biological sex, that the policy facilitates and encourages such students to socially transition their gender in school, and that the policy forbids the notification of parents and encourages students to lie to parents about their transition.

These allegations are supported by the following: 1) the experience of Plaintiff/Appellant Jane Doe, whose daughter was subjected to the policy when school employees encouraged and helped her to hide from her parents her in-school gender transition, *see* Pl.Appx-005 ¶¶ 7-10, Pl.Appx-018-22 ¶¶ 102-140; 2) MPS's own policy documents, *see* Pl.Appx-008-12 ¶¶ 24-54, Pl.Appx-015-18 ¶¶ 74-101, Pl.Appx-036-71; and 3) a secret internal document from an MPS junior high that was produced in response to a public records request in which a school counselor maintained a spreadsheet listing 17 students at the school who identified as transgender and, for ten of the students, instructing school employees how to lie to the students' parents to hide the students' gender transition (such as by listing a pronoun

and name that a student uses in school versus the pronoun and name to use when contacting parents), *see* Pl.Appx-012-14 ¶¶ 55-73, Pl.Appx-072-81.

Based on these factual allegations, the operative complaint (the First Amended Complaint or "FAC") asserted the following four claims:

- Count I sought injunctive and mandamus relief as to Plaintiff Rachel Walden because the Trans Policy was unlawfully adopted without MPS Governing Board approval, in violation of A.R.S. §§ 15-341, and 15-711.
- Count II sought injunctive and mandamus relief because the Trans Policy is substantively unlawful under A.R.S. §§ 1-601, 1-602, 13-1214, 13-1402, 13-3620, 15-102, 15-113, 15-341, 15-711, and 36-2272.
- Count III sought a declaratory judgment that the Trans Policy is unlawful under A.R.S. §§ 1-601, 1-602, 13-1214, 13-1402, 13-3620, 15-102, 15-113, 15-341, 15-711, and 36-2272.
- Count IV sought injunctive and mandamus relief as to Plaintiff/Appellant Jane Doe under the Parents' Bill of Rights, A.R.S. §§ 1-601, 1-602, 12-1801, and 12-2021.

The superior court dismissed the complaint, finding that Governing Board Member Walden lacked standing, that Jane Doe lacked standing under the Parent's Bill of Rights, that Superintendent Fourlis was not a proper defendant, that the case was not a proper special action because mandamus relief was not available, that declaratory relief was not available here, and that Jane Doe's claims were barred by the statute of limitations.

Statement of Facts

This is a case challenging MPS's policy of hiding students' in-school gender transitions from parents, helping students to transition their gender at school, and encouraging students to hide their transition from their parents.

Governing Board Member Walden filed a special action complaint on November 20, 2023, alleging that the Trans Policy was unlawful. Governing Board Member Walden is a member of the Governing Board of MPS. She was elected on November 8, 2023 and assumed office on January 1, 2023. Pl.Appx-005 ¶ 6.

On February 9, 2024, the First Amended Complaint (FAC) was filed. Pl.Appx-003-116. It added a new plaintiff, pseudonymously identified as "Jane Doe," who sued because she is the mother of Megan Doe.[1] Megan is a

[1] Early in the case, the Plaintiffs asked the Defendants to stipulate to a protective order agreeing that Jane Doe could proceed pseudonymously and which would allow the Plaintiffs to disclose Jane and Megan's real names to the Defendants while shielding their identities from public disclosure. However, the Defendants refused to this stipulation, instead preferring to wait until after the motion to dismiss had been briefed and decided. Accordingly, the case has not progressed sufficiently to formally seek leave of the superior court for Jane Doe to proceed pseudonymously. However, the Plaintiffs have such a motion drafted and would be ready to file it immediately upon remand, if the superior court's dismissal is reversed. *See* Pl.Appx-209.

biological female. While Megan was a student at an MPS junior high, she was a victim of the Trans Policy. MPS employees actively encouraged Megan to transition gender in school and to hide it from her parents. These MPS employees colluded to hide this from Megan's parents. *Id.* ¶¶ 7-10.

The FAC alleged that MPS and Superintendent Andi Fourlis had been maintaining their unlawful Trans Policy to help students transition gender at school and to hide these transitions from their parents and that this policy was substantively unlawful. Pl.Appx-007-118 ¶¶ 22-101. Additionally, it alleged that the policy is unlawful for two procedural reasons. *First*, because the Governing Board never authorized it. *Second*, because it required Governing Board Approval to go into effect, yet the Board never approved it.

The FAC alleged that the Trans Policy was substantively unlawful under the plain language of multiple statutes, for example, because it:

- requires school officials to talk to children about matters of human sexuality without parents' knowledge or consent;
- requires school officials to conceal from parents that they are having conversations with children about human sexuality;
- requires school officials to encourage children to lie to their parents about these conversations; Pl.Appx-004-5 ¶¶ 1, 4, 8; Pl.Appx-008 ¶ 26; Pl.Appx-

010-14 ¶¶ 44-73; Pl.Appx-019-22 ¶¶ 112-120, 125, 130, 132, 134; Pl.Appx-024-31 ¶¶ 157-193;

- requires school officials to provide unlicensed and unauthorized mental health screening and therapy; Pl.Appx-012-14 ¶¶ 55-73; Pl.Appx-025 ¶¶ 158-61.

The FAC alleged that Trans Policy violated a number of statutes, such as the following: the absolute prohibition on public employees making "[a]ny attempt to encourage or coerce a minor child to withhold information from the child's." A.R.S. § 1-602(C); the requirement that schools get advance parental consent before students participate in sex education curriculum. A.R.S. § 15-102(A)(5); the requirement that schools ensure that parents "will be notified in advance of and given the opportunity to opt their children in to *any* instruction, learning materials or presentations *regarding sexuality*, in courses other than formal sex education curricula." A.R.S. § 15-102(A)(6) (emphasis added); the prohibition on mental health screening of minors without parental permission. A.R.S. § 36-2272(A).

The FAC also alleged that the Trans Policy was an MPS school district policy and was, therefore, procedurally unlawful because it was never

authorized by the Governing Board but had been unilaterally imposed by Superintendent Fourlis.

As proof of the reality of the Trans Policy, the FAC attached documents obtained from a public records request in which Emily Wulff, an MPS school counselor at Kino Junior High, sent an email on March 3, 2023, to all staff members at the school, attaching a memo summarizing the Trans Policy and stating that "[s]chool staff shall not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others except as set forth on [the Support Plan]." Pl.Appx-012 ¶ 55. Also on March 3, 2023, Ms. Wulff sent a follow-up email to a teacher at the school who had asked for clarification on the non-disclosure policy. Ms. Wulff explained that the purpose of the nondisclosure policy was "mainly to protect outing students who are not ready to come out to peers or family members." Pl.Appx-013 ¶ 60.

Ms. Wulff further explained that one of the main purposes of having students complete a Support Plan is to help students hide an in-school gender transition from their parents: "Within the plan, there are boxes to be checked if a student is not ready to come out to peers or family. If you see that that box is checked within the plan, then you do not have to worry about

making corrections for others. The main takeaways would be to make sure when contacting home to be using their preferred name home. For example, if I have a student that goes by Emily and she/her pronouns that I need to call home for, and in their plan it says to use their birth name and biological pronouns home, being sure you do not out the student by using their preferred name and pronouns they use at school." Pl.Appx-013 ¶ 61.

Also on March 3, 2023, Ms. Wulff emailed other school employees about updating a spreadsheet to track information about students at the school who identified as being a gender different from their biological sex. That spreadsheet was titled "PRONOUN PREFERENCE." The spreadsheet contained columns listing the names of seventeen students, preferred pronouns, preferred names, and notes. The content of the spreadsheet's notes column focused almost entirely on whether a student's parents and family were aware of the student's in-school gender transition. Of the seventeen students on the spreadsheet, three were listed as having both parents who are "unaware." The spreadsheet had instructions for two of these three students that appeared to require school employees to actively deceive the parents by hiding the students' in-school names and/or pronouns. The spreadsheet also listed one student whose mom was aware but whose dad was

"unaware," with instructions that appeared to require school employees to use a name and/or pronoun to deceive the father. The spreadsheet listed a student whose mother was aware but stated that "other people at home are not aware." The spreadsheet also listed seven students whose parents were at least somewhat "aware" but were either unsupportive or only partially supportive. For all seven of these students, the notes appeared to instruct school employees to use the students' birth names and gender to deceive the parents about the extent of the students' in-school gender transition. Thus, out of seventeen students, Kino Junior High had been engaging in active deception for ten of them, or 59%, of transgender-identifying students at the school. The FAC also alleged, based on information and belief, that similar efforts at parental deception were taking place at many or most MPS schools. Pl.Appx-013-14 ¶¶ 63-72 and Pl.Appx-079-81.

The FAC also plausibly alleged a number of facts about how Jane Doe's daughter, Megan Doe, had been victimized by the Trans Policy. During the 2022 to 2023 academic year, Megan Doe was an Eighth-Grade student at an MPS junior high. In mid-October, a friend of Jane's told her that Jane's daughter was using a different name at school, going by "Michael" instead of Megan. Jane was confused by this statement, but because Megan had told

her nothing about using another name at school, and also because the school had not notified Jane about the name change, Jane assumed this information was some kind of mistake and took no action. On October 31, while Megan was trick-or-treating, the mother of one of Megan's friends asked Jane if she was "Michael's mom." Pl.Appx-018 ¶¶102-105.

Jane checked through Megan's school materials and discovered that the playbill for a recent school musical had listed Megan as a cast member under the name of "Michael." Jane discovered that school orchestra programs also listed Megan as "Michael." In early November, Jane contacted Megan's drama teacher and asked if Megan was using the name Michael. Astoundingly, the teacher refused to answer the question and told Jane that the teacher would need to check with the principal to verify whether the teacher could disclose any information to Jane. Notwithstanding this restriction, the teacher eventually relented and confirmed that Megan had been going by the name Michael and was known as Michael to all teachers and students at the school. Pl.Appx-018-19 ¶¶ 107-111.

Jane requested a meeting with the school principal, which was scheduled for December 5, 2022. At that meeting, the principal confirmed that the school knew that Megan used "Michael" as her chosen name and that the

school allowed and encouraged this. The principal further informed Jane that the reason for the name change was Megan's uncertainty about her sexual and gender identity, that Megan had asked that she go by the name of "Michael" at school, and that this request had been conveyed to all of Megan's teachers. Pl.Appx-019 ¶¶ 112-13.

The principal did not further disclose to Jane the content of Megan's discussions with the principal or other school personnel about gender and sexuality issues. Until the present, Jane has been unable to obtain any records or information from the school that disclose the specific content of the discussions school personnel had with Megan about gender and sexuality. The principal and other school personnel appear to consider information about their discussions with Megan on gender and sexuality to be confidential, even as to Megan's parents. They have treated Jane as if they believe she does not have the right to know this information. Pl.Appx-019-20 ¶¶ 114-16.

The principal told Jane that when a student went by a nickname or other name different from her given name, MPS's student information system allowed the school to input the student's preferred name into the system. The principal also informed Jane that any such change made to the

student information system would trigger an automatic alert to the student's parents and that if the school had changed Megan's preferred name to Michael in their electronic system, Jane would have been made aware of the name change. The principal admitted that school personnel intentionally had not changed Megan's name in the system to avoid any notification being sent to Jane and that there were no plans to change Megan's name in the system. Pl.Appx-020 ¶¶ 118-19.

The principal told Jane that even if Jane had asked to be notified about any name changes, pronoun changes, or other choices related to a transgender identity by her child, it was official MPS policy not to tell parents and that school personnel would not notify Jane about any further developments related to these issues. Jane asked whether biologically male students who claim a transgender identity were using the girls' bathroom at school, and the principal stated that Jane had no right to know this information and that it was MPS's policy not to notify parents whether this was happening. Jane asked the principal whether MPS's dress policy, which prohibits distracting clothing, would prohibit a biological male from dressing in traditionally female clothing, such as skirts and dresses. The principal claimed that, while such clothing might be distracting to some adults, it

would not be distracting to other students and was, therefore, allowed. Pl.Appx-020 ¶¶ 120-22.

Jane asked the principal to ensure that all school personnel stopped using the name "Michael" and instead referred to Megan by her given name. However, the school ignored Jane's demand. Jane only discovered that her demand had been ignored at Megan's final orchestra concert at the end of the year—a full semester after Jane's meeting with the principal—Megan's orchestra teacher introduced Megan as "Michael" to a packed auditorium. Pl.Appx-021 ¶¶ 123-25.

The Defendants filed a Motion to Dismiss on March 4, 2024. Pl.Appx-117-58. The Plaintiffs filed their Opposition on March 19, 2024 ("MTD Opposition"). Pl.Appx-159-77. The Defendants filed their reply on April 2, 2024. Pl.Appx-178-88. The court heard oral argument on June 11, 2024. Pl.Appx-189-235. The court issued an under advisement ruling on July 22, 2024 granting the Defendants' motion because, in the court's view, the Plaintiffs lacked standing, Superintendent Fourlis was not a proper defendant, the complaint was not a proper special action because the relief it sought was not properly characterized as mandamus relief, a declaratory judgment was not appropriate in the case, and Jane Doe's claims were

barred by the statute of limitations. Pl.Appx-236-42. The superior court issued a Rule 54(c) final judgment on August 27, 2024. Pl.Appx-243-44. The Plaintiffs filed their notice of appeal on September 25, 2024. Pl.Appx-246-47.

Statement of the Issues

This appeal presents six issues for review:

1. Did the superior court err in its determination that Governing Board Member Walden did not have standing as an individual member of the MPS Governing Board?

2. Did the superior court err in its determination that Jane Doe did not have standing under Arizona's Parents Bill of Rights. A.R.S. §§ 1-601 and -602?

3. Did the superior court err in summarily denying, without reasoned explanation, the Plaintiffs' request to amend their complaint to add additional proffered facts that demonstrate standing?

4. Did the superior court err in its determination that MPS Superintendent Fourlis was not a proper defendant?

5. Did the superior court err in its determination that mandamus relief was not available in this case and that the case was, therefore, not a proper special action?

6. Did the superior court err in its determination that declaratory relief was not available in this case?

7. Did the superior court err in its determination that Jane Doe's claims were barred by the statute of limitations?

Argument

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7 (2012).

"Motions to dismiss for failure to state a claim are not favored in Arizona law." *Luchanski v. Congrove*, 193 Ariz. 176, 179 ¶ 17 (App. 1998) (citing *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983).

Because "Arizona follows a notice pleading standard," when courts are "determining if a complaint states a claim on which relief can be granted," they "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman*, 230 Ariz. 352, 356 ¶ 9 (2012) (cleaned up). "[D]ismissal is appropriate under Rule 12(b)(6) only if as a matter of law plaintiffs would not be entitled to relief under any

interpretation of the facts susceptible of proof." *Id.* ¶ 8 (cleaned up). Thus, when a court is adjudicating a 12(b)(6) motion to dismiss, it must "deny the motion unless certain that plaintiffs can prove *no set of facts* which will entitle them to relief upon their stated claims." *Luchansk*, 193 Ariz. at 179 ¶ 17 (App. 1998) (quoting *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508 (App. 1987) (emphasis added).

Additionally, the Defendants faced an even heavier burden than normal because some of the claims in this case arise under the Parents' Bill of Rights ("PBRA"), which imposes on the Defendants "the burden of proof to demonstrate" both "a compelling government interest of the highest order" that is narrowly tailored "and is not otherwise served by a less restrictive means." Ariz. Rev. Stat. Ann. § 1-602(F).

The superior court failed to apply these forgiving standards. It did not assume the truth of the Plaintiffs' allegations. It did not make all reasonable inferences therefrom. It did not consider whether any set of facts might have entitled the Plaintiffs to relief. And it did not impose the burden of proof on the Defendants under the Plaintiffs' PBRA claim. Applying those standards would have required that the motion to dismiss be denied. This Court should therefore reverse.

I. The Plaintiffs have standing.

"The constitutional minimum for standing requires that the plaintiff has suffered an invasion of a legally protected right which is concrete, particularized, actual and imminent; there must be a causal connection between the injury and the conduct complained of, and it must be likely that the injury will be redressed by a favorable decision." *McComb v. Superior Ct. In & For Cnty. of Maricopa*, 189 Ariz. 518, 522 (App. 1997) (citation omitted). Because "[t]he Arizona Constitution omits a 'case or controversy,'"[2] Arizona courts "are not constitutionally constrained to decline jurisdiction based on lack of standing. Still, Arizona courts do exercise restraint to ensure they refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true

[2] Because standing is not a constitutional requirement in Arizona, courts have authority to waive it. *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 25 (1998) ("Although, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur."); *State v. Reed*, 246 Ariz. 138, 142 ¶ 12 (App. 2019), vacated on other grounds, 248 Ariz. 72 (2020) ("In 'exceptional circumstances,' this prudential standing requirement has been waived, 'generally in cases involving issues of great public importance that are likely to recur.'" (quoting *Sears*, 192 Ariz. at 71 ¶ 25)). If this Court affirms the superior court's decision on standing, it should remand this case for the superior court with an order that standing should be waived here because this is an exceptional case involving issues of great public importance that are likely to recur.

adversaries." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523 ¶ 12 (2021).

The Plaintiffs easily satisfied these requirements. They suffered invasions of their rights, and the Defendants caused those injuries.

A. Governing Board Member Walden has standing.

Governing Board Member Walden asserted her claim as a Board Member deprived of her power to vote on school board policies and who had been prevented from carrying out her oath of office to "faithfully and impartially discharge the duties of [her] office" to "support the Constitution of the United States and the Constitution and laws of the State of Arizona" and "bear true faith and allegiance to the same." A.R.S. § 38-231(E).

Arizona courts have upheld standing in analogous situations. For example, in *Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128, 131 ¶ 9 (2011), the Arizona Speaker of the House and President of the Senate sued the Commission on Appellate Court Appointments because three of the twenty-five nominees it had selected to serve on the Independent Redistricting Commission were not qualified. The Supreme Court held that they had standing because "[w]e agree that Petitioners, as the persons entitled to make the first and third appointments to the IRC, have standing to

challenge the legality of the Appointment Commission's list of nominees." *Id.* (citing *Brewer v. Burns*, 222 Ariz. 234, 237–38 ¶¶ 11–14 (2009). Just as those who were entitled to make appointments in *Adams* had standing to challenge the legality of the nominees, school board members have standing to challenge unlawful decisions or actions taken by their respective boards because board members are entitled to participate in the board's decision-making processes. Indeed, Arizona courts have allowed board members to sue their boards. In *Shirley v. Superior Ct. In & For Apache Cnty.*, 109 Ariz. 510 (1973), a person elected as county supervisor successfully sued the board of supervisors for trying to keep him from taking office.

The superior court attempted to distinguish *Adams* because, in its view, "[i]n *Adams*, the petitioners both had the statutory right to individually make appointments to the Independent Redistricting Commission." Pl.Appx-238. However, the superior court never explained why it was relevant that the right to appoint Adams was an individual right or how that could distinguish *Adams*.

In any event, the superior court's attempt to distinguish is irrelevant because the right asserted here, and the harm caused by its denial, is *also* an individual right. MPS Governing Board members have the *individual*

right to vote on all board policies. MPS may not lawfully adopt the Trans Policy without a Governing Board vote. Governing Board Member Walden thus suffered concrete, particularized, actual, and imminent harm because she was denied her right to vote on whether to adopt the Trans Policy. Being deprived of the right to vote is an injury sufficient to confer standing—this type of "injury is obvious, and accordingly [such plaintiffs] have standing to sue." *McComb*, 189 Ariz. at 522.

Arizona law grants only to a school governing board the authority to "[p]rescribe and enforce policies and procedures to govern the schools" in the school district. A.R.S. § 15-341(A). A school district superintendent only has the authority to implement policies adopted by the governing board. "A governing board may delegate in writing to a superintendent, principal or head teacher the authority to prescribe procedures that are consistent with the governing board's policies." A.R.S. § 15-341(F). Thus, only a school district governing board may adopt policies for a school district, including policies such as the Trans Policy.

And, most importantly, Arizona law confers on Governing Board members an *individual* right to vote on all board actions: "Notwithstanding any other provision of law, *a governing board member* is eligible to vote on any

budgetary, personnel or other question which comes before the board, except" in specific limited circumstances not applicable here.[3] A.R.S. § 15-323(A)(1) (emphasis added). Arizona law also explicitly confers on board members an *individual* right to approve school policies: "If action has been taken and documents approved at a meeting, they may be signed subsequently by *individual* board members." A.R.S. § 15-321(D) (emphasis added).

The superior court thus erred when it quoted a non-precedential 43-year-old Arizona Attorney General opinion for the proposition that "[a] single board member has "no power or right different from any other citizen." Pl.Appx-239 (quoting Ariz. Atty. Gen. Op. I81-054). This is incorrect because binding Arizona statutes say exactly the opposite. Moreover, that opinion is wholly inapposite because it was *not* about whether a school board member has standing to sue a board but about the requirements of Arizona's open meetings law and the power of individual school board members to independently sue *on behalf of* the board. The Attorney General Opinion thus

[3] Those exceptions apply when the vote concerns the "appointment, employment or remuneration" of a board member's spouse or dependent or when the vote is concerning the employment of board members or their spouses. A.R.S. § 15-323(A)(1)-(2).

has no bearing here anyway, because this is not a case in which a governing board member is attempting to bring a lawsuit on behalf of the entire board.

It is unlawful for MPS to adopt or implement policies without board approval. Governing Board Member Walden was injured because, as a member of the board, she is entitled to vote on all MPS policies.

Furthermore, in their MTD Opposition, the Plaintiffs stated that "discovery will show that [Walden] has asked the Board President to place this issue on the Governing Board agenda, but her requests have been consistently ignored. It will also show that opposition by the public has been frequently expressed at MPS board meetings, but has also been ignored." Pl.Appx-168. Accordingly, in their MTD Opposition, the Plaintiffs requested that if the superior court "is inclined to deny based on Governing Board Member Walden's standing, the Plaintiffs request leave to amend their complaint to add allegations related to these facts." *Id.* The superior court ignored this request without explanation. Accordingly, at the very least, the superior court should have dismissed the case with leave to amend the complaint so that Governing Board Member Walden could allege more specific facts showing her injury.

B. Jane Doe has standing under Arizona's Parents Bill of Rights, A.R.S. §§ 1-601 and -602.

The PBRA confers standing on Jane Doe. "Standing may be conferred by a statute," *Welch*, 251 Ariz. at 523 ¶ 12, and that is exactly what the PBRA does. Specifically, it establishes that "[a] parent may bring suit against a governmental entity or official ... based on any violation of the statutory rights" established in the PBRA "or any other action that interferes with or usurps the fundamental right of parents to direct the upbringing, education, health care and mental health of their children." A.R.S. § 1-602(F).

Notwithstanding all of this, the superior court found that Jane Doe lacked standing because, in the court's view, "Plaintiff Doe does not allege a current case or controversy" because "Plaintiff Jane Doe alleges a concern at her child's prior school that has been completely resolved." Pl.Appx-239. The superior court erred for two reasons.

First, the superior court's finding was factually incorrect because the FAC alleged that MPS concealed from Jane Doe "the content of Megan's discussions with the principal or other school personnel about gender and sexuality issues" and that "[u]ntil the present, Jane has been unable to

obtain any records or information from the school that disclose the specific content of the discussions school personnel had with Megan about gender and sexuality." FAC ¶¶ 114-15. This ongoing concealment violates the PBRA and constitutes a continuing harm to Jane Doe. Thus, Jane Doe's injury continues unabated and unresolved. The superior court thus erred when it found that Jane Doe did not have standing under the PBRA.

Second, this case represents a matter of public importance and a situation that is capable of repetition yet evading review, under which the doctrine of mootness should not apply. The Plaintiffs made this argument in their motion, Pl.Appx-170, and at oral argument, Pl.Appx-218-20, yet the superior court failed even to consider it. The MPS Trans Policy is a paradigmatic example of when the capable-of-repetition-yet-evading-review exception to mootness should apply. This Court has held that it "generally declines to address moot issues as a policy of judicial restraint, although this Court is not bound by the case or controversy requirements of the United States Constitution. We will make an exception, however, for matters of public importance or those capable of repetition yet evading review." *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 10 (App. 2013).

Both exceptions apply here: this is a situation capable of repetition yet evading review because the Trans Policy requires MPS to actively hide from parents their children's gender transition. Thus, parents have no way to know that they have even suffered a harm. And if they ever *do* find out, the natural reaction of any parent would be to quickly deal with the harm caused by the Trans Policy and seek to reverse it. The question thus arises: when would a parent ever have standing to challenge the Trans Policy? In the superior court's view, apparently almost never.

Furthermore, this is a matter of significant public importance and controversy that should be definitively adjudicated on the merits.

II. MPS Superintendent Andi Fourlis is a proper defendant.

Superintendent Andi Fourlis was properly named as a Defendant, and the superior court erred in dismissing her from the case. She was properly named as a defendant because she unilaterally instituted the Trans Policy. Therefore, her presence as a Defendant in the case was necessary for the Plaintiffs to obtain full relief.

Indeed, if the Plaintiffs had not named her as a Defendant, the Rules of Civil Procedure would have required her subsequent joinder to the case. A person "*must* be joined as a party if ... in that person's absence, the court

cannot accord complete relief among existing parties." Ariz. R. Civ. P. 19(a)(1); *see also Gerow v. Covill*, 192 Ariz. 9, 14 ¶ 21 (App. 1998) (citing Rule 19 and explaining that "[a] necessary party is ... one in whose absence complete relief is not possible among those already parties ... or ... one whose absence would leave those already parties subject to multiple or inconsistent obligations. The court also considers possible resulting prejudice and adequacy of remedy before determining indispensability.").

The FAC specifically alleged that "the Superintendent 'has the ability to control implementation of the statute[s] or regulation[s]' at issue in this case" and that she was therefore "properly named as a relief defendant." Pl.Appx-007 ¶ 18 (quoting *Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Servs.*, No. 1 CA-CV 13-0133, 2015 WL 1395271, at *8 (Ariz. Ct. App. Mar. 24, 2015)). The Plaintiffs' allegation that Superintendent Fourlis "has the ability to control implementation of the" Trans Policy went entirely uncontested. *Id.* At this motion to dismiss phase, the superior court was required to presume that it was true. Superintendent Fourlis was, therefore, a necessary Defendant and the superior court improperly dismissed her.

Indeed, the superior court failed to provide a reasoned explanation for the dismissal. The following was the entirety of the court's reasoning: "'A suit against a school board member in his or her official capacity is equivalent to a suit against the school district.' Similarly, Plaintiffs' claims against Dr. Fourlis are duplicative of their claims against MPS and dismissal of Dr. Fourlis is appropriate." Pl.Appx-239 (quoting *Williams v. Alhambra School District No. 68*, 234 F.Supp.3d 971, 978 (D. Ariz. 2017)).

The superior court cited to no authority for the proposition that a plaintiff's claims against one defendant should be dismissed if those claims are "duplicative" of claims against another defendant. Indeed, Rule 19 says the opposite. Furthermore, as explained above, the Plaintiffs' claims against Superintendent Fourlis were not duplicative because she was the instigator of the Trans Policy and was the person within MPS with the authority to implement it. She was also the person at MPS who would be required to implement any court-ordered relief in this case. Quite simply, the Trans Policy cannot be undone unless Fourlis chooses to reverse it. She is, therefore, a necessary party so that the superior court could have jurisdiction over her in the event she chose to ignore court-ordered relief.

The court's reliance on *Williams* is particularly puzzling, as that case is entirely inapposite, thrice over: first, *Williams* was based on federal law and thus has no relevance here; second, *Williams* was about whether individual school board members could be sued as co-defendants with their school district, not about whether superintendents could be named as co-defendants; and third, *Williams* ultimately held that the school board members *were* proper parties to the case and denied the board members' motion to dismiss.

Williams relied on a Ninth Circuit case that held that "[a]n official capacity suit against a municipal officer is equivalent to a suit against the entity." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008). To the extent that the superior court intended to rely on that federal law principle, it is not controlling in Arizona courts. Furthermore, in any event, it could not be applicable here because Superintendent Fourlis is not an officer of the school district, but an employee. *See* A.R.S. § 15-503(A)(1) (stating that a "governing board may ... *[e]mploy* a superintendent" (emphasis added)).

III. This case is a proper special action, and mandamus relief is available.

The Plaintiffs properly sought mandamus relief, and this is, therefore, a proper special action. The superior court improperly found the opposite, stating that "for purposes of a special action, 'the requested relief in a mandamus action must be the performance of an act and such act must be non-discretionary.'" Pl.Appx-240 (quoting *Sears v. Hull*, 192 Ariz. 65, 68 ¶ 11 (1998). The superior court reasoned that mandamus relief would be inappropriate because "[h]ere, Plaintiffs ask the Court to order MPS to stop taking certain action. In addition, Plaintiffs are requesting the Court order MPS to take different action." *Id*. The superior court's reasoning is incorrect, and its decision should be reversed.

A "writ of mandamus may be issued . . . to any person . . . on the verified complaint of the party beneficially interested, to compel . . . performance of an act which the law specially imposes as a duty resulting from an office." A.R.S. § 12-2021. Thus, in *Arizona Public Integrity Alliance v. Fontes ("AZ-PIA")*, the Supreme Court held that mandamus relief was appropriate where Arizona citizens and voters sought an order to halt Maricopa County's then-recorder from issuing an unlawful voter instruction. 250 Ariz.

58, 65 ¶ 31 (2020). The superior court was thus incorrect when it determined that mandamus relief is not available when a plaintiff seeks an order requiring the cessation of activity by a defendant.

The superior court also rejected the Plaintiffs' request for mandamus relief because, in the court's view, the "Plaintiffs are requesting that the Court order Defendants to take action that is discretionary (i.e., adopt a different policy)." Pl.Appx-240. The court's statement that discretionary duties cannot be compelled through mandamus is true but irrelevant. Its characterization of the requested relief as being discretionary mischaracterizes the Plaintiffs' claims, none of which are based on the Plaintiffs' preferred policies, but instead on mandatory requirements in Arizona's statutes, such as the Defendants' duty to only adopt district policies through a board vote; their duty to adopt sex education curriculum only through a board vote; their duty to not provide sex education to students without parental consent; their duty to notify parents ahead of time before students are exposed to "any instruction, learning materials or presentations regarding sexuality"; their duty to not provide mental health screenings without parental consent; their duty to not "encourage or coerce" minors "to withhold information from the child's parent"; and their duty not to "interfere with or

usurp the fundamental right of parents to direct the upbringing, education, health care and mental health of their children."[4] The FAC makes it

[4] *See, e.g.*, Pl.Appx-023-32 ¶¶ 141-202 (FAC, asserting claims for relief under the following statutes: A.R.S. § 15-341(A)(1) (stating that only school boards have the authority to "[p]rescribe and enforce policies and procedures to govern the schools"); A.R.S. § 15-711(E) (requiring that sex education instruction must be pre-approved by the Governing Board); A.R.S. §§ 1-601 and -602 (Parents' Bill of Rights, establishing that "[t]he liberty of parents to direct the upbringing, education, health care and mental health of their children is a fundamental right," that is "exclusively reserved to a parent of a minor child without obstruction or interference from this state, any political subdivision of this state, any other governmental entity or any other institution" and prohibiting all public employees, including school employees, from "encourage[ing] or coerc[ing]" minors "to withhold information from the child's parent," and making it unlawful for governmental entities to "interfere with or usurp the fundamental right of parents to direct the upbringing, education, health care and mental health of their children"); A.R.S. § 36-2272(A) (prohibiting mental health screening of a minor without parental permission); A.R.S. § 15-102(A)(5), -113(D), and -711(B) (making it unlawful for "[a] public educational institution" to "[p]rovid[e] sex education instruction to [a] student" unless it has first "obtain[ed] signed, written consent from a student's parent or guardian" and "prohibit[ing] the school district from providing sex education instruction to a pupil unless the pupil's parent provides written permission for the child to participate in the sex education curricula" and requiring two weeks' notice to parents before sex education provided to their children); A.R.S. § 15-711(A) (prohibiting "sex education instruction before grade five"); A.R.S. § 15-711(E)(1) (requiring that school governing boards "[s]hall provide parents with a meaningful opportunity to participate in, review and provide input on any proposed sex education course of study before it is adopted"); A.R.S. § 15-102(A)(6) (requiring that "parents will be notified in advance of and given the opportunity to opt their children in to any instruction, learning materials or presentations regarding sexuality, in courses other than formal sex education curricula"); A.R.S. § 13-1402(A) (making indecent exposure a crime);

abundantly clear that the Trans Policy violates all these duties. The Defendants do not have the discretion to violate the law, and the FAC merely sought a court order confirming this unremarkable principle.

Indeed, it is puzzling that the superior court concluded that the duties at issue here are only discretionary, as the only way the court could conclude this would be for it to determine the merits of this action. This was improper because the Plaintiffs plausibly alleged that the Defendants were violating mandatory duties. The superior court was required to presume the truth of these allegations, yet it improperly presumed precisely the opposite.

Additionally, the superior court erred in the first place when it concluded that mandamus relief is not available to restrain a public official from acting. The Arizona Supreme Court in *AZPIA* held precisely the opposite in the mandamus action there: "We reverse the trial court and grant relief. The County is enjoined from including the New Instruction with mail-in ballots for the November 3, 2020 General Election." *AZPIA*, 250 Ariz.at 65 ¶ 31. In fact, the Supreme Court issued a prohibitory injunction halting noncompliance with Arizona law, as opposed to a mandatory injunction

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A.R.S. § 13-1214 (making school officials mandatory reporters regarding the non-consensual or consensual mutilation of a female's genitals).

requiring compliance (*Id.* at 61), which is similar to some of the relief that the Plaintiffs request here. *See also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 835 (1994) ("[I]njunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms."); 11A Fed. Prac. & Proc. Civ. § 2948.2 (3d ed.) (observing that "with a little ingenuity practically any mandatory injunction may be phrased in prohibitory form").

Most surprisingly, the superior court failed even to acknowledge the precedential weight of *AZPIA*, even though the Plaintiffs specifically argued that, under *AZPIA*, this case is a proper special action. Pl.Appx-216-18. Rather, the superior court relies on a case that is 22 years older: *Sears v. Hull*, 192 Ariz. 65 (1998). However, *Sears* does not apply here. In *Sears*, Arizona citizens sued the Governor and requested the court to enjoin him from entering a gaming compact with an Indian Tribe. *Id.* at 67 ¶ 4. However, the Supreme Court had already held that Arizona law "required the Governor to enter a [gaming] compact" with the Tribe. *Id.* at 67 ¶5. The *Sears* plaintiffs, therefore, had requested relief that did not involve "the performance of a non-discretionary act" since they were seeking an order compelling the Governor *not* to perform his lawful duty. *Id.* at 69 ¶ 13. The Court thus held

that the *Sears* plaintiffs' action was "not in the nature of mandamus," and they, therefore, did not have standing as beneficially interested parties. *Id*. ¶ 14. Instead, to have standing, they had to assert standing "apart from mandamus principles," which were more forgiving, and instead under the standard "distinct and palpable injury" standard for regular non-mandamus actions. *Id*. ¶¶ 15-16.

The Plaintiffs' claims here, however, align conceptually and doctrinally with those of the plaintiffs in *AZPIA* and not with those in *Sears*. In *AZPIA,* as well as here, the question presented was whether an official failed to discharge non-discretionary duties in conformance with controlling law. Further, the relief sought in *AZPIA* was, in fact, at least partly proscriptive in nature; the plaintiffs had requested mandamus and injunctive remedies prohibiting the Recorder from enclosing the disputed instruction in early ballot packets. 250 Ariz. at 61, ¶ 5.

Indeed, the Supreme Court in *AZPIA* specifically recognized that *Sears* does not control in cases such as this one, where the plaintiffs allege that an official has failed to perform his non-discretionary duty to comply with Arizona's laws. In *AZPIA*, the court cited *Sears* and then immediately distinguished it, stating, "we apply a more relaxed standard for standing in

mandamus actions" such that the plaintiffs had standing for a mandamus action "compel[ling] the [Defendant] to perform his non-discretionary duty to ... comply with Arizona law." 250 Ariz. at 62 ¶¶ 10-12.

Unlike *Sears*, this case falls squarely within the parameters of a mandamus action because the requested relief would merely require the Defendants to perform their non-discretionary duties under Arizona's statutes. *See supra* at 31 n.4. For *Sears* to be analogous, the court would have had to make absurd findings, such as that the Defendants are *required* to perform actions such as providing instruction to students about sexuality without their parents' knowledge or consent; adopting sexual education curriculum without notification to parents; encouraging students to withhold information from their parents; interfering with and usurping the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children; and performing mental health screenings on minors without parental consent. However, the superior court could not go this far and made only the vague, unsupported (and false) argument that the Plaintiffs sought to compel the Defendants to engage in discretionary activities.

This is a proper mandamus action seeking to compel the Defendants to perform a non-discretionary duty to comply with Arizona law.

Furthermore, the court's analysis relied on a formalistic and anachronistic conception of mandamus that Arizona courts have long since discarded. The common law recognized distinct writs for compelling the performance of ministerial duties (i.e., mandamus) and for prohibiting or remedying actions in excess of a public officer or body's lawful authority (i.e., prohibition and certiorari). But these writs have since been "combine[d]," Ariz. R. Proc. for Spec. Actions 1, State Bar Committee Note (a), into the unitary rubric of a special action. *See id.* Rule 3, State Bar Committee Note (a) ("The practical consequence of the creation of a single special action will be to eliminate any problem of label if the conduct sought to be controlled is within the proper scope of either mandamus or prohibition."). The Plaintiffs accordingly have pled claims for all appropriate special action remedies.

At the same time, the Supreme Court's conception of general statutory mandamus claims, see A.R.S. § 12-2021, has likewise evolved in a more functionalist direction. Recent cases have recognized mandamus as an appropriate mechanism for cases like this one that seek to denote and effectuate the proper scope of public officials' statutory authority. *See AZPIA*, 250 Ariz. at 63, ¶ 17; *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶ 19 (2020) (argument that the Secretary of State

was required to adapt electronic signature platform to accommodate initiative petitions was correctly brought as a mandamus claim, explaining that "one purpose of a mandamus action is to determine the extent of a state official's legal duties"); *see also Ariz. Dept. of Water Res. v. McClennen*, 238 Ariz. 371, 377, ¶ 32 (2015) ("The mandamus statute reflects the Legislature's desire to broadly afford standing on members of the public to bring lawsuits to compel officials to perform their 'public duties.'" (citation omitted)); *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209, ¶ 6 (2019) ("Special action jurisdiction is ... particularly appropriate when a defendant 'has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority.'" (citation omitted)).

Mandamus relief, therefore, is entirely appropriate here. This is, therefore, a proper special action.

IV. Declaratory relief is available in this case.

The Plaintiffs validly sought declaratory relief. The Uniform Declaratory Judgments Act states that "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. §

12-1832. The Act "is ... remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; *and is to be liberally construed and administered*." A.R.S. § 12-1842 (emphasis added). Contrary to the explicit command of the Act, the superior court construed the Act narrowly to constrain its applicability. Thus, in the superior court's view, the Plaintiffs did not have standing to seek a declaratory judgment because there was not "a justiciable controversy between parties." Pl.Appx-241.

However, a "'justiciable controversy' arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972). More recent cases make this principle even more apparent. In 2007, this Court explained that, in a declaratory judgment action, "[a] controversy is not justiciable when a defendant has no power to deny the plaintiff's asserted interests." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 468 ¶ 29 (App. 2007). Applying the contrapositive, a controversy *is* justiciable when a defendant *does* have the power to deny the plaintiff's asserted interests. *Cf. State v. Hyde*, 186 Ariz. 252, 275 (1996) (noting with approval

U.S. Supreme Court's application of contrapositive to legal rule). Just so here.

The Plaintiffs have asserted present existing facts, ripe for judicial determination, that allege that the Defendants have the power to deny the Plaintiffs' asserted interests. The Plaintiffs have asserted adverse claims that the Defendants' Trans Policy violates Arizona law and harms the Plaintiffs' beneficial interest in faithfully carrying out the duties of her office (in the case of Governing Board Member Walden) and in her statutorily and constitutionally protected role as a mother in defending her daughter from the duplicity and harm caused by the Defendants (in the case of Jane Doe). The Plaintiffs also presented existing facts, including the Defendants' active violation of multiple statutes.

Importantly, a plaintiff need not be directly constrained or compelled by a disputed law or regulation to seek a declaration of its (in)validity; it need only affect his legal rights or interests. *See Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 225, ¶ 20 (2022) (holding that a "trade association with members living and working in Pima County ... were affected by the [challenged] bill's alleged impediments to the county's 'ability to exercise local control to protect its residents'" from COVID-related risks, and hence

had standing under the Declaratory Judgment Act); *Pena v. Fullinwider*, 124 Ariz. 42, 44 (1979) ("Appellants as consumers are 'affected' by the amendment [which related to labeling standards] because cost-per-unit pricing information is designed to allow them to compare the costs of different commodities. They have an actual or real interest in the matter for determination."). The Plaintiffs easily meet that standard.

The Plaintiffs' beneficial interests, together with their allegations in the Complaint, crystallize a concrete controversy that a judicial declaration can resolve.

V. Jane Doe's claims were timely; alternatively, factual findings were required to determine when her claims accrued.

Plaintiff Jane Doe's claims are timely and are not barred by the statute of limitations. The superior court improperly found that Jane Doe's claims had accrued more than a year before she joined this case when the FAC was filed on February 9, 2024.

However, Jane Doe provided *six* independent reasons that establish why the statute of limitations does not apply here. Astoundingly, the superior court ignored all of them.

First, the court erred in determining that the cause of action accrued in December 2023 or earlier. Pl.Appx-241-42. The Plaintiffs plausibly argued that Jane Doe's cause of action did not accrue until the end of the 2022-2023 school year, in approximately May 2023, which is less than one year before the action was filed. The court incorrectly found that the cause of action accrued by the date of Jane's meeting with the principal to discuss Megan's use of a different name in school, on December 5, 2023. Pl.Appx-241. At that meeting, Jane "asked the principal to ensure that all school personnel stopped using the name 'Michael' and instead referred to Megan by her given name," Pl.Appx-021 ¶ 123, but it was not until "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] ignored Jane's demand." *Id.* ¶¶ 123-124. Jane only learned this at the concert because it was then that "Megan's orchestra teacher introduced Megan as 'Michael' to a packed auditorium." *Id.* ¶ 125. The last day of MPS's 2022-23 school year was May 25, 2023.[5] Therefore, making "all inferences which the complaint

[5] MPS, 2022-2023 School Calendar, (accessed Dec. 23. 2024), https://tinyurl.com/356nfdm8; *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012) ("public records regarding matters referenced in a complaint, are not outside the pleading ... courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion" (cleaned up))

can reasonably support," *Luchanski*, 193 Ariz. at 179 ¶ 17 (cleaned up), the statute of limitations for Jane Doe's claims did not expire until May 2024, which is well after the FAC was filed.

Even if an earlier accrual date could plausibly be considered, that date would be February 9, 2023, when Megan's parents attended an Individualized Education Program (IEP) meeting with all of Megan's teachers, at which time they learned that all but one of Megan's had facilitated her in-school gender transition and at which Megan's art teacher "apologized and stated that the teacher did not know that Megan's parents were unaware of the name change." (First Amended Complaint ¶¶ 128-132.) It was at this meeting that Jane Doe got her first inkling of the sweeping extent of the school's deceptive perfidy. The First Amended Complaint was filed on February 9, 2024— exactly one year to the day after that meeting. Even under this more aggressive and less reasonable interpretation of when Jane Doe's claims accrued, her claims are still timely.[6] The Plaintiffs made this argument to the superior court, Pl.Appx-172-73, but not only did the court fail to

[6] *See, e.g. Hughes Air Corp. v. Maricopa Cnty. Superior Ct.*, 114 Ariz. 412, 412–13 (1977) (two-year statute of limitations for claim that accrued on March 4, 1974 ran out on March 4, 1976); *Pina v. Watson*, 115 Ariz. 227, 228 (App. 1977) (two-year statute of limitations for claim that accrued on December 7, 1973 "normally would have run on December 7, 1975").

do what was required of it and make all possible inferences in the Plaintiffs' favor on this point, it ignored the argument entirely.

Second, the accrual date for Jane Doe's claim is a question of fact that must await trial. For purposes of Section 12-821, "a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B).[7] This requirement is even more forgiving for plaintiffs who had a "professional or fiduciary relationship" with the defendant, where "something more is required than the mere knowledge that one has suffered an adverse result." *Walk v. Ring*, 202 Ariz. 310, 317 ¶ 26 (2002). This type of special relationship exists between parents and schools, which have significant obligations to parents under the PBRA, A.R.S. § 1-601 and -602, and which are required by statute to "promote the involvement of parents and guardians" and adopt plans to "improve parent and teacher cooperation." A.R.S. § 15-102(A) and (A)(1).

[7] *See also State v. Arizona Bd. of Regents*, 253 Ariz. 6, 13 ¶ 26 (2022) (definition of accrual in A.R.S. § 12-821.01(B) controls when "a cause of action accrues ... under § 12-821")

"When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Doe v. Roe*, 191 Ariz. 313, 323 ¶ 32 (1998) (citation omitted). "Thus, the 'jury must determine at what point Plaintiff's knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action.'... [D]eterminations of the time when discovery occurs and a cause of action accrues 'are usually and necessarily questions of fact for the jury.'" *Walk*, 202 Ariz. at 316 ¶ 23 (citation omitted). The superior court improperly credited the Defendants' evaluation of the claim accrual date without any factfinding on point. Rather, the resolution of this dispute was a question of fact that had to await trial. When Jane Doe's "knowledge, understanding, and acceptance in the aggregate" occurred could not be determined solely from the pleadings, and dismissal on the statute of limitations would be premature. The Plaintiffs made this argument to the superior court, but the court ignored it entirely. Pl.Appx-173-74.

Third, even if the cause of action could be said to have accrued on December 5, 2022, the superior court should have tolled the statute of limitations because of the Defendants' fraudulent conduct. "[A] defendant may not use the statute of limitations as a shield for inequity." *Nolde v. Frankie*, 192

Ariz. 276, 279 ¶ 13 (1998). Here, the Defendants have unclean hands. School employees actively concealed from Jane Doe—and still conceal to this day—their efforts, and the extent of those efforts, to assist Megan Doe's in-school gender transition. Because of this fraudulent concealment, the statute of limitations should have been tolled.

The principle of "fraudulent concealment" is "well-rooted in Arizona law" and holds that when there is a "fiduciary relationship 'calling for frank and truthful information,'" then "[i]f the fiduciary nature of the relationship charges the fiduciary with a duty to disclose his wrong to the plaintiff and he fails to disclose, the statute of limitations will be tolled." *Walk*, 202 Ariz. at 319 ¶ 34 and 320 ¶ 40 (citation omitted). Just so here. The PBRA and A.R.S. § 15-102 imposed on MPS and its employees the absolute duty to disclose to Jane Doe that they had been surreptitiously helping Megan Doe to transition her gender. Because they hid this fact from her and continued to hide the extent of their efforts even after Jane Doe affirmatively told them to stop, and *still to this day* continue to hide their efforts from her, then any applicable statute of limitations should have been equitably tolled. At the very least, "there are factual issues on the question" of the extent of the Defendants' fraudulent concealment from Jane Doe. *Walk*, 202 Ariz. 310,

321 ¶ 42. "If those issues are resolved in Plaintiff's favor, the statute of limitations would have been tolled...." *Id.* The Plaintiffs argued this below, but the superior court ignored this argument entirely. Pl.Appx-174-75.

Fourth, because the harm to Jane Doe that is alleged in the complaint was "continuing misconduct," the superior court should have determined that the statute of limitations only began to run once the misconduct had ceased. *Augusta Ranch Ltd. P'ship v. City of Mesa*, No. 1 CA-CV 08-0162, 2009 WL 1482219, at *4 ¶ 17 (Ariz. Ct. App. May 26, 2009). Each action by the Defendants to assist Megan Doe in her gender transition and each action by the Defendants to conceal Megan's transition from her parents gave rise to a new cause of action. It is analogous to a trespass, where "each day a trespass continues, a new cause of action arises." *Id.* at *3 ¶ 14 (citation omitted). Thus, this Court has held that Section 12-821 did not bar an action against a city even though more than one year had passed since the commencement of the wrongful conduct because "where a trespass is continuing in its nature damages may be recovered for all of the statutory period prior to the commencement of the action." *Id.* (cleaned up). No published decision of this Court has applied a continuing or ongoing harm theory to Section 12-821, but several decisions have acknowledged the possible viability of such

a theory. *Cruz v. City of Tucson*, 243 Ariz. 69, 74 ¶ 20 (App. 2017) (discussing continuing tort doctrine in context of notice of claims statute and declining to apply it because the plaintiff had "not pointed to any wrongful acts by the City that occurred within 180 days before she filed her notice of claim" and that thus, "even if the continuing tort doctrine applied, [the plaintiff's] notice of claim would be untimely"); *Watkins v. Arpaio*, 239 Ariz. 168, 172 ¶ 15 (App. 2016) (declining to apply theory of continuing wrong to Section 12-821 because the allegedly wrongful conduct was not ongoing had "all occurred at or shortly after the commencement"). The Plaintiffs argued that the doctrine applied here, but the superior court entirely ignored this argument. Pl.Appx-175-76. The Plaintiffs ask that this Court make a definitive determination on this point and clarify that the continuing or ongoing harm theory applies to Section 12-821.

Fifth, the dismissal of Superintendent Fourlis was not appropriate because she was not acting within the scope of her employment and thus lost the protection of Section 12-821's one-year statute of limitation. Section 12-821 "can only be reasonably interpreted to solely encompass" "acts within an employee's scope of employment." *McCloud v. State, Ariz. Dep't of Pub. Safety*, 217 Ariz. 82, 91 ¶ 27 (App. 2007). "[T]o interpret § 12–821 to apply

to claims against a public employee who was not acting in the scope of his or her employment at the time of the actionable event would be contrary to the legislature's intent and inconsistent with the interpretation of related statutes." *Id.* at 90 ¶ 22 (citations omitted). "An employee's conduct falls within the scope of employment if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it." *Id.*at 91 ¶ 29 (cleaned up). The superior court was required to make all inferences in the Plaintiffs' favor. For purposes of the statute of limitations analysis, it should have assumed that the Trans Policy was unlawfully adopted and, thus, that Superintendent Fourlis was not acting within the scope of her employment when she promulgated the policy. Thus, the general four-year statute of limitation should have applied, and Jane Doe's claims against Superintendent Fourlis were timely. *See* A.R.S. § 12-550. The plaintiffs made this argument below, but the superior court ignored it. Pl.Appx-176.

This argument also further illustrates why the superior court improperly found that the Plaintiffs' claims against Superintendent Fourlis were improperly duplicative. *See supra* at 27. If the superior court were correct

in applying the statute of limitations as to MPS, then the claims against Superintendent Fourlis would *not* have been duplicative, as Jane Doe's claims against Fourlis would still have been viable under the four-year statute of limitations. This provides an independent reason for this Court to reverse the superior court's dismissal of Superintendent Fourlis from this case.

Sixth, this Court has explained that it is an open question "[w]hether [A.R.S. § 12–821] would apply to a party pressing a purely declaratory judgment claim, not based on specific assessments, and seeking purely prospective relief." *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). This is just such a case. The plaintiffs asked the superior court to accept this Court's implicit invitation to resolve this unresolved question by determining that A.R.S. § 12-821 does not apply to actions for declaratory judgments or actions that otherwise seek only prospective relief. Pl.Appx-176. However, the superior court entirely ignored this argument as well. The Plaintiffs, therefore, ask that this Court resolve this open question and hold that Section 12-821 does not apply to actions for declaratory judgments or actions that otherwise seek prospective relief.

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 23rd day of December 2024.

America First Legal Foundation

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