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ARIZONA SUPREME COURT

8 Arizona School Boards Association et al,
9 Plaintiff,
10 v.
11 State of Arizona,
12 Defendant.

Case No.: CV-21-0234-T/AP

**Court of Appeals, Division One
No. 1 CA-CV 21-0555**

**Maricopa County Superior Court
No. CV2021-012741**

**AMICUS CURIAE BRIEF OF
TUCSON UNIFIED SCHOOL
DISTRICT NO. 1 IN SUPPORT OF
THE POSITION OF THE
PLAINTIFFS**

16 **I. INTEREST OF TUCSON UNIFIED SCHOOL DISTRICT NO.1
AS AMICUS CURIAE**

17 Amicus Tucson Unified School District No.1 (“Tucson Unified”) concurs with
18 the position of the Plaintiffs and the arguments presented in the briefs filed on behalf
19 of amicus National School Boards Association. It desires, however, to raise an
20 additional argument to emphasize the need for adherence to the subject and title
21 requirements contained in Article IV, Part 2, Section 13 of the Arizona Constitution.
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23 Tucson Unified has an interest in the health and safety of its approximately
24 44,000 students, their families visiting campuses, and its approximately 8,000
25 employees. As the largest school district in Southern Arizona, Tucson Unified
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1 knows that its actions have the potential to impact the entire region in numbers far
2 exceeding its students and employees. Therefore, throughout the COVID-19
3 pandemic, Tucson Unified has taken great pains to comply as best it can with every
4 measure recommended by national, state and, especially, local public health officials
5 to mitigate the spread of the virus. This has included universal masking for all
6 students, staff and visitors to its campuses and offices. Furthermore, as an institution
7 of education, Tucson Unified endeavors to remain current on proposed legislation
8 that may impact its funding, operations, students and their families, and its
9 employees. To this end, TUSD, through its superintendent and board members and
10 key staff members, engages its legislative contingent, the Plaintiff ASBA, and its
11 own lobbyist when it is made aware of legislation that affect its mission. This was
12 certainly the case during the 55th Legislature convened in the spring of 2021, as
13 Tucson Unified anticipated there would be some legislative action related to the
14 State’s pandemic response affecting schools.
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18 **II. STATEMENT OF THE CASE**

19 HB 2898, introduced under the title, “Appropriating Monies; Relating to
20 Kindergarten through Grade Twelve Budget Reconciliation” when passed on June
21 30, 2021, contained a number of new laws and statutory revisions unrelated to the
22 budget. These extra-budgetary provisions are listed in the Plaintiffs COMPLAINT
23 FOR DECLARATORY AND INJUNCTIVE RELIEF and will not be restated here.
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1 Tucson Unified is concerned about a number of the non-budget items passed under
2 the title of HB 2898, but for purposes of this brief, we focus on the ban on school
3 mask mandates to illustrate the following argument.

4 The amendment to the budget reconciliation bill banning mask mandates in
5 schools was introduced and passed on June 25, 2021, and the entire bill finally
6 passed and was signed by the governor late on the afternoon of June 30. It included
7 an attempted retroactivity provision that purported to make the ban on mask
8 mandates in schools effective on that date.

10 III. ARGUMENT

11 There are few provisions in Article IV, Part 2 of the state constitution that could
12 be said to guarantee advance public notice as to what actions the legislature is
13 proposing to take.¹ Of these few constitutional sections, the subject and title
14 restrictions in Part 2, Section 13 provide a reasonable measure of notice to the public
15 on what topics are being considered for legislative action.

16 By comparison, a school district governing board is bound by Arizona’s Open
17 Meeting Law , A.R.S. §§ 38-431 to -431.09. (“OML”) The legislature made a strong
18 statement about transparency in the processes of government: “It is the public policy
19 of this state that meetings of public bodies be conducted openly and that notices and
20 agendas be provided for such meetings which contain such information as is
21 reasonably necessary to inform the public of the matters to be discussed or decided.”
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25 ¹ See Ariz. Const. art. IV, pt. 2, § 3, § 12 & §13.

1 A.R.S. § 38-431.09(A). Notably, the legislature is included in the definition of
2 “public body.” A.R.S. § 38-431(6).

3 As far as amicus Tucson Unified can determine, application of OML has not
4 been made an issue in this litigation with the focus being on Article IV of the
5 Arizona Constitution. However, the concepts of notice and transparency of the
6 process are entirely consistent.

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8 The OML requires that the board’s agenda “shall list the specific matters to be
9 discussed, considered or decided at the meeting and other matters related thereto.”
10 A.R.S. § 38-431.02(H).

11 While the State argues that there is a sufficient relationship between the extra-
12 budgetary policy matters contained in HB2898 and the K-12 budget, it would not
13 very likely pass muster under the interpretation applied to the “other matters” clause
14 in A.R.S. § 38-431.02(H) for other public bodies. See *Thurston v. City of Phoenix*,
15 157 Ariz. 343, 344 (App. 1988). If a governing board passed *or even discussed* a
16 district-wide mask mandate under a posted agenda item titled “Approval of School
17 District Fiscal Year Budget” is there any doubt about the outcome of a complaint
18 made under the OML?
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21 Read together with the public policy statement in A.R.S. § 38-431.09(A), the
22 prescribed agenda requirements in A.R.S. § 38-431.02(H) are the equivalent of the
23 single subject and title clauses of Article IV, Part 2, Section 13 of the Arizona
24 Constitution. Their respective effects are certainly the same: to give notice to the
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1 public, and, indeed, the legislators themselves, of what will be addressed in a
2 proposed bill listed on the legislature’s calendars.

3 If adherence to the Constitution’s single subject and title requirements are not
4 truly required, then there is very little chance for the people to know what the
5 legislature is doing until after the act when it is too late to make their opinions known
6 to their representatives. The addition of the ban on face covering mandates to the bill
7 titled K-12 Budget Reconciliation is illustrative.
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9 The text of that last-minute amendment to the K-12 titled budget bill contains
10 no language regarding the purpose that a school district (or city or county) might
11 mandate a face covering in a school. It is apparent that the intent was to eliminate
12 mask mandates as a COVID-19 mitigation strategy, but the law as written does not
13 state that. There are no definitions as to what kind of mandated face coverings are
14 intended to be banned. Even setting aside the arguments others in this case have
15 made regarding the public health evidence on the efficacy of universal masking, the
16 statute contains no common-sense exceptions to the ban on face-covering mandates
17 for such activities as chemistry labs, welding classes, or health assistant classes, all of
18 which are offered at Tucson Unified. The plain language of the law would remove a
19 school district governing board’s authority to mandate a face covering in those
20 classes.
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1 There are no exceptions in the statute as chaptered for staff members who
2 should wear a face covering to protect students who may have medical conditions
3 that make it difficult or impossible for them to wear a face covering, but nevertheless
4 render them at significant risk of severe illness from COVID-19, or other any other
5 foreign pathogen that could harm an immunocompromised student. Indeed, failure
6 to take such precautions for such students with disabilities could very well lead to
7 civil liability and federal actions for a school district’s failure to provide free
8 appropriate public education to the disabled student.
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10 The title of the K-12 budget bill provides no reasonable notice that a ban on
11 face covering mandates in schools would be included. Had Tucson Unified known
12 this was going to be considered as part of the K-12 budget bill, it would have had the
13 opportunity to reach legislators before a vote to, if not argue for removal of the
14 provision for reasons of public health, at least advocate for amendments that would
15 include exceptions to allow it to comply with its obligations under federal disability
16 laws to serve certain student populations without risking state enforcement action. It
17 would have also argued for reasonable carve-outs for extracurricular or instructional
18 purposes as the Iowa legislature did in May, 2021 with its otherwise similar ban on
19 mandated facial coverings in schools. *See: Iowa Code § 280.31.*
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22 **IV. CONCLUSION**

23 In the interest of supporting the public’s ability to have a reasonable opportunity
24 to know the workings of the legislature - just as all other public bodies must provide
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under the OML - the trial court's ruling that gives meaning to the transparency-rela
subject and title provisions of the Arizona Constitution should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

TUCSON UNIFIED SCHOOL DISTRICT.



By: _____
Robert S. Ross, Jr., Esq.