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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GLENDALE ELEMENTARY SCHOOL DISTRICT; CHINO VALLEY UNIFIED SCHOOL DISTRICT; ELFRIDA ELEMENTARY SCHOOL DISTRICT; CRANE ELEMENTARY SCHOOL DISTRICT; JILL BARRAGAN, an individual; KATHY KNECHT, an individual; ARIZONA SCHOOL BOARDS ASSOCIATION; ARIZONA EDUCATION ASSOCIATION; ARIZONA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS; ARIZONA SCHOOL ADMINISTRATORS, INC.,

Plaintiffs,

vs.

STATE OF ARIZONA; SEAN MCCARTHY, in his official capacity as chairman of the School Facilities Board; VERN CROW, in his official capacity as vice-chairman of the School Facilities Board; EDWARD E. BOOT, in his official capacity as a member of the School Facilities Board; BRYAN E. PELTZER, in his official capacity as a member of the School Facilities Board; THOMAS D. RUSHIN, in his official capacity as a member of the School Facilities Board; TRACI L. SAWYER-SINKBEIL, in her official capacity as a member of the

Case No. CV2017-006975

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

(Assigned to the Honorable Connie Contes)

Oral Argument Requested

School Facilities Board; WARD SIMPSON, in his official capacity as a member of the School Facilities Board; JEFFREY J. SMITH, in his official capacity as a member of the School Facilities Board; SANDY WILLIAMS, in her official capacity as a member of the School Facilities Board,

Defendants.

And,

STEVEN YARBROUGH, PRESIDENT OF THE ARIZONA STATE SENATE; J.D. MESNARD, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES,

Special Intervenors.

Plaintiffs hereby respond to Defendants' Motion to Dismiss First Amended Complaint (and related joinder by Special Intervenors).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this lawsuit, Plaintiffs challenge the constitutionality of the State's school capital funding system. The Arizona Supreme Court declared that system unconstitutional in *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233 (1994), and subsequently explained that the State must, *inter alia*, "establish minimum adequate facility standards and provide funding to ensure that no district falls below them." *Hull v. Albrecht*, 192 Ariz. 34, 37 ¶ 8 (1998) (*Albrecht II*).

The Legislature eventually enacted a law which met these requirements. *See* Am. Compl. ¶¶ 24-30. That law, entitled Students FIRST, provided extensive funds for school districts to build new schools, bring existing schools up to State standards, repair schools, and purchase "soft capital" items such as textbooks, computers, school buses, furniture, and equipment. It also established the School Facilities Board (SFB) to set minimum standards for school facilities. *See id.* ¶¶ 31-39.

However, the State has since ignored *Roosevelt* and *Albrecht II* and dismantled Students FIRST. As a result, today's capital funding system is similar to, and perhaps

worse than, the system declared unconstitutional in *Roosevelt*. Am. Compl. ¶¶ 40-49. Accordingly, Plaintiffs seek a declaration that this system is unconstitutional. Plaintiffs also seek an injunction directing the State to revise the facility standards, which have become obsolete. These claims are justiciable and properly pled. The motion to dismiss should therefore be denied.

II. ARGUMENT

A. Plaintiffs' Claims are Viable and Justiciable.

1. The doctrine of exhaustion of administrative remedies does not apply to Plaintiffs' claim of inadequate funding.

The exhaustion of administrative remedies doctrine does not apply to Plaintiffs' claims because this litigation involves a challenge to the constitutionality of the State's funding system, not a challenge to individual disbursement decisions made by the SFB. Plaintiffs seek a declaratory judgment that the State's current school capital finance system violates the Arizona Constitution. The SFB is not responsible for ensuring that the school capital finance system satisfies constitutional requirements, and there is no administrative remedy through the SFB that can remedy Plaintiffs' claim.

The exhaustion of remedies doctrine applies when there is an "express statutory mandate" requiring issues to be resolved through a specific administrative process before seeking judicial review. *See Medina v. Ariz. Dep't of Transp.*, 185 Ariz. 414, 417 (App. 1995). No such administrative remedy or express statutory mandate exists here, so the exhaustion doctrine simply does not apply.

Moreover, the SFB could not possibly remedy the inadequate funding at issue in this litigation. That is not even the SFB's statutory directive. The SFB's statutes do not require the agency to provide funding to ensure that school districts have the funds necessary to meet the State's minimum adequacy guidelines for capital facilities and equipment. But that is what the Constitution requires.

The Constitution requires the Legislature to appropriate sufficient funds to ensure that school districts can meet the State's minimum standards for capital facilities and

equipment. *Albrecht II*, 192 Ariz. at 37 ¶ 8. The SFB does not have the authority to make appropriations; it simply distributes the funds the Legislature has given it. In recent years, total funding from the State for building renewal grants fell far below the amounts needed to maintain minimally adequate facilities in all of Arizona's schools. Am. Compl. ¶¶ 47-48. No matter how the SFB divides up the limited amount of funds it receives from the State, the SFB cannot ensure that all of Arizona's schools receive constitutionally adequate capital funding.

Furthermore, the SFB distributes no funding at all for "soft capital" needs, such as school buses, technology, and textbooks. Defendants claim (Mot. at 3) that the SFB is authorized to address soft capital funding issues, but the statute they cite merely authorizes the SFB to "assess[] . . . equipment deficiencies," A.R.S. § 15-2002(A)(1), and does not provide the SFB with funding or other authority to *remedy* equipment deficiencies or provide funding to prevent deficiencies. The SFB also does not fund essential support facilities such as administrative offices, transportation facilities, and central kitchens. *See* Am. Compl. ¶ 47. Thus, districts have unmet capital needs—which the State is constitutionally obligated to fund—with no recourse whatsoever through the SFB.

The SFB is also not authorized to provide timely funding to districts that need new schools because the State amended Students FIRST to fund the construction of new schools only when additional space is necessary in the current year. *Id.* ¶¶ 49-50. Thus, schools necessarily must be overcrowded—in violation of the minimally adequate standards—for years while school districts await approval and construction of the new buildings. The SFB has no power to remedy this problem.

Defendants cite to language in the SFB's policy-book stating that "[a] school district may appeal the Board's denial of that school district's request for funding" (Mot. at 3), but this litigation does not challenge individual SFB denials. It would be futile in the first place for districts to request relief the SFB lacks the authority to give, as is detailed above. Moreover, the possibility of administrative appeal does not trigger the

exhaustion requirement because (1) an agency cannot cut off judicial review through a mere policy, but only through a "statute or regulation," *see Medina*, 185 Ariz. at 417, and (2) the language of the policy is permissive, not mandatory. *Bentivegna v. Powers Steel & Wire Prod., Inc.*, 206 Ariz. 581, 585 ¶¶ 13-14 (App. 2003), *as amended* (Jan. 6, 2004) (statute using word "may" is permissive and exhaustion of remedies doctrine does not apply). More fundamentally, however, this case is not about a specific SFB decision regarding whether to fund a project. It is about the constitutional failures of the State's capital funding system. There is no need to exhaust administrative remedies before seeking judicial review of this issue.

2. The exhaustion doctrine does not apply to Plaintiffs' claim that the school facility standards are obsolete.

Defendants also argue that Plaintiffs were required to exhaust their claim that the school facility standards are obsolete. Defendants rely on A.R.S. § 41-1033(A), which allows a person to petition an agency to create a new rule or to convert a policy or practice into a formal rule. This procedure is not applicable to substantive challenges to rules, *see Samaritan Health Sys. v. Ariz. Health Care Cost Containment Sys. Admin.*, 198 Ariz. 533, 536 ¶¶ 11-12 (App. 2000),[1] and in any case the Legislature has, since *Samaritan*, expressly provided that the procedures described in § 41-1033(A) are not mandatory. *See* A.R.S. § 41-1033(H) ("[I]n lieu of the procedure prescribed in this section, a person may seek declaratory relief pursuant to § 41-1034."). Where an administrative process is permissive, rather than mandatory, the exhaustion doctrine should not be applied. *Coconino Cty. v. Antco, Inc.*, 214 Ariz. 82, 86 (App. 2006).

Defendants also rely on A.R.S. § 41-1047, which establishes an Administrative Rules Oversight Committee that can review the rules made by any agency for conformity with statute and legislative intent. However, the statute unambiguously

[1] In another section of *Samaritan Health*, the court of appeals held that plaintiffs were required to exhaust an administrative remedy *provided by an express statutory mandate*, A.R.S. § 36-2903.01(B)(4). 198 Ariz. at 536 ¶ 13. Here, in contrast, there is no such statute.

states that seeking review from this committee is a permissive remedy, not a mandatory one: "A party contesting the legality of a rule, agency practice or substantive policy statement is not required to file a complaint with the committee to exhaust its administrative remedies." A.R.S. § 41-1046(F).

As there is no mandatory administrative review process applicable to Plaintiffs' claims, the doctrine of exhaustion of administrative remedies does not bar this suit.

3. The Court has primary jurisdiction.

For decades, litigation challenging the constitutionality of various iterations of the State's school funding legislation has proceeded in Arizona's state courts. *E.g.*, *Roosevelt*, 179 Ariz. 233; *Hull v. Albrecht*, 190 Ariz. 520 (1997) (*Albrecht I*); *Albrecht II*, 192 Ariz. 34. Now, however, Defendants argue that the SFB, not the courts, should have primary jurisdiction over Plaintiffs' claims. For various reasons, this argument has no merit.

Plaintiffs ask the Court to determine whether the present school funding system and the present minimum school facility adequacy guidelines are constitutional. Constitutional claims are "the type of traditional claims with which our trial courts of general jurisdiction are most familiar and capable of dealing." *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 432 (App. 1978) (holding that claims based on matters within the expertise of an agency are nonetheless within the primary jurisdiction of the court where the most important aspects involve traditional legal claims); *see also Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 14 (App. 2009) ("The only proper method for testing the legality or constitutionality of a legislative enactment, be it municipal, county or state, is by judicial review."). The SFB has no jurisdiction to determine whether the school capital funding system is constitutional. That is a matter for the Court to resolve.

Likewise, Plaintiffs' request for injunctive relief is based on the allegation that the guidelines have become unconstitutionally obsolete. The minimum school facility adequacy guidelines exist because of the Arizona Supreme Court's decision in *Albrecht I*, *see* 190 Ariz. at 524, and determining whether those guidelines conform to the

constitutional mandate is a matter for the courts. Indeed, the statutory scheme that the Arizona Supreme Court reviewed in *Albrecht II*, 192 Ariz. at 37, contemplated minimum adequacy guidelines. When *Albrecht II* was litigated, the parties agreed that it was too early to determine whether the rules as promulgated would lead to "appropriate and adequate" standards, and the court noted the appropriateness of the standards could not "yet" be determined. *Id.* at 37 n.2. The constitutionality of the State's school funding system, including the guidelines approved by the SFB, remains squarely within the primary jurisdiction of the courts.

4. Plaintiffs have standing.

a. The school districts have standing.

The First Amended Complaint alleges that the Plaintiff school districts "have substantial capital needs on an ongoing basis, including new schools, additions to existing schools, renovations, and repairs, for which they have little to no funds after covering M&O expenses." Am. Compl. ¶ 18. The school districts "also have ongoing needs for school buses, technology, and school books for which they have little to no funds after covering their M&O expenses." *Id.* Plaintiffs Glendale Elementary School District and Crane Elementary School District have been able to issue bonds to partially fill the void of State funding, but not in an amount sufficient to meet the minimum facility guidelines or adequately address other capital needs. *Id.* ¶ 23. Plaintiffs Chino Valley Unified School District and Elfrida Elementary School District have been unable to issue bonds or capital overrides and have no access to the capital funds necessary to comply with the State's minimum facility standards or address other capital needs. *Id.* ¶ 22. The Plaintiff school districts lack minimally adequate facilities, buses, technology, or textbooks due to the State's failure to fund the school finance system at a constitutional level. This is an injury in fact.

Defendants rehash their exhaustion argument in the context of standing, arguing that Plaintiffs have not been injured unless they allege specific instances when the SFB denied funding applications. However, the SFB cannot provide funding for routine

maintenance, transportation, soft capital, or essential support facilities such as administrative offices, transportation facilities, and central kitchens. *See* A.R.S. §§ 15-2022, 15-2032, 15-2041; Am. Compl. ¶¶ 40-58. Accordingly, Plaintiffs have adequately alleged that the State injured them by constructing a constitutionally inadequate school finance system. For example, Plaintiff Chino Valley Unified School District cannot replace aging school buses or purchase new textbooks, and Plaintiff Crane Elementary School District has had to rely on its local taxpayers through bonds to fund the purchase of new buses. Am. Compl. ¶ 54.

Moreover, Plaintiffs allege that the approximately $17 million to $32 million per year that the State has provided for capital improvements *for all school districts in the entire state* in recent years is less than the cost of capital improvements needed by Plaintiff Glendale Elementary School District *alone*, which are estimated at $50.4 million. *Id.* ¶¶ 47-48. The amount of funding allocated to the SFB is so paltry relative to the capital needs of Arizona's schools that it is obvious that the SFB *cannot* ensure minimally adequate facilities throughout the state. School districts in the state have an obvious injury when the pot of funding for capital needs that they *all* must share is so small that it cannot even cover the capital needs of *one* district.

Also, Plaintiffs challenge the substance of the minimum school facility adequacy guidelines, which are outdated and not aligned with academic standards. *Id.* ¶ 61. Plaintiff school districts are injured because the State does not provide funding for equipment and facilities that are not included in the SFB's minimum school facility adequacy guidelines—even where that equipment and those facilities are in fact necessary to provide a minimally adequate education pursuant to the State's own academic standards.

b. The taxpayers have standing.

The First Amended Complaint alleges that the individual Plaintiffs are taxpayers in school districts that have issued bonds and established overrides for capital purposes that include items necessary for the school districts to maintain their buildings and

facilities in compliance with the State's minimum school facility adequacy guidelines. Am. Compl. ¶ 21. Defendants once again argue that standing should hinge on pleading denials of requests to the SFB. For the reasons detailed above, standing does not hinge on pleading SFB denials. Taxpayers of these (and other) school districts are shouldering the burden of maintaining minimally adequate schools because the State has shirked its responsibility to do so, contravening the Supreme Court's decision in *Roosevelt*. 179 Ariz. at 240; Am. Compl. ¶ 52. Therefore, the taxpayer Plaintiffs have sufficient injury to bring this lawsuit.

c. The organizations have standing.

An organization can assert two types of standing: (1) representational standing, based on an injury to its members, and (2) direct standing, based on an injury to the organization itself. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004).

To establish representational standing in federal court, an organization must establish that "(a) its members would have standing to sue in their own right; (b) the interests which the association seeks to protect are relevant to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6, (1985) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). In Arizona, however, representational standing "need not be determined by rigid adherence to the three-prong test of *Warth*, although those factors may be considered." *Id.* "The issue in Arizona is whether, given all the circumstances in the case, the association has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted by allowing representational appearance." *Id.*

Each of the four organizational Plaintiffs can assert representational standing, because their members have a "legitimate interest" in this controversy over school funding. In addition, two of the organizational Plaintiffs can assert direct standing, because they have had to divert resources in response to the lack of capital funding. *Valle*

del Sol Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013).

i. Arizona Education Association

The Arizona Education Association ("AEA") has standing because some of its members (teachers and other school employees) have been subjected to hazardous working conditions as a result of inadequate capital funding. *See* Am. Compl. ¶ 7; *Mendoza v. Perez*, 754 F.3d 1002, 1012 (D.C. Cir. 2014) (working conditions are a cognizable injury for purposes of standing). In addition, AEA members' salaries have been reduced because school districts have had to divert funds to meet capital needs. Am. Compl. ¶ 7. AEA members have also spent money out of their pockets as a result of unmet capital needs, including for furniture needed in special education classrooms. *See id*. Accordingly, AEA members have been injured by the State's dereliction of its constitutional duty, and that injury can be redressed by this Court. Moreover, AEA members have a legitimate interest in the resolution of this controversy—their salaries and working conditions depend on it—and allowing them to participate in this litigation will ensure that teachers throughout the state have a voice in the resolution of this critical issue. *See Armory Park*, 148 Ariz. at 6.

Defendants respond that because the First Amended Complaint did not allege a particular funding denial, the AEA has not alleged that its members' injuries are traceable to Defendants. But as explained above, the SFB lacks the ability to provide the vast majority of the funding at issue. Accordingly, the AEA's injuries are not dependent on particular denials by the SFB.

Defendants also argue (Mot. at 9) that it is not enough for the AEA to allege that funding cuts have made its members' jobs more difficult. They cite *Home Builders Ass'n of Central Arizona v. Kard*, 219 Ariz. 374, 378, ¶ 19 (App. 2008), in which the Court of Appeals held that a home builders' association did not have standing to challenge air quality regulations merely because those regulations might, in some unspecified future case, increase the costs of building a home. Defendants also cite *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (1992), which rejected Plaintiffs' theory of standing under

which "anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." But those cases are a far cry from this one, in which Plaintiffs allege that Defendants' conduct has *already* caused AEA members to suffer hazardous working conditions, reduced salaries, and required out-of-pocket expenditures. Thus, *Kard* and *Lujan* do not cast doubt on the AEA's injury.

ii. Arizona School Board Association

The Arizona School Board Association ("ASBA") also has standing. ASBA's members are nearly all of the school districts of this state, represented through their governing boards. Am. Compl. ¶ 8. Tellingly, Defendants do not deny that these governing boards stand in the shoes of their respective districts. *See id.* Instead, Defendants repeat the incorrect argument that Plaintiffs must allege specific funding denials. Defendants also insist that ASBA's members have disparate interests and must participate individually. But this rule only applies to claims for damages. *See Ariz. Ass'n*, 223 Ariz. at 13, ¶ 19 ("No such 'mini-adjudications' are required in this case, in which Plaintiffs seek injunctive relief."). This Court can declare the State's capital funding system unconstitutional without a mini-adjudication as to how that declaration will affect each district in the state.

iii. Arizona Association of School Business Officials ("AASBO") and Arizona School Administrators, Inc. ("ASA")

AASBO and ASA also have a legitimate interest in this dispute. Their members are school district employees, and consequently the lack of adequate capital funding subjects them to the same hazardous working conditions and inadequate salary as teachers. Am. Compl. ¶¶ 10-11; *see also id.* ¶ 7.

In addition, AASBO and ASA's members are responsible for district budgets and administration, and their jobs are impeded by the State's lack of capital funding. *Id.* ¶¶ 10-11. Defendants cite *Kard* and *Lujan* for the proposition that an employee does not have standing to challenge a law that makes his job more difficult, but again, *Kard*

involved a claim that regulations might raise the costs of unspecified future projects, 219 Ariz. at 378, ¶ 19, and *Lujan* involved nothing more than an elephant trainer's interest in elephants half a world away. 504 U.S. at 566. By contrast, AASBO and ASA have alleged that their members' work has already been impeded by Defendants' conduct.

AASBO and ASA also have direct standing because they have had to divert resources to train their members to deal with the State's inadequate capital funding. Am. Compl. ¶¶ 10-11; *Valle del Sol*, 732 F.3d at 1018 (diversion of resources for training in response to a challenged law constitutes a cognizable injury for standing purposes). Defendants' only response is to repeat the incorrect assertion that Plaintiffs must allege specific funding denials.

Thus, all of the Plaintiffs to this litigation have standing. Nevertheless, if the Court finds that any Plaintiff lacks standing, this litigation is of such great public importance that the Court could exercise its discretion to waive the standing requirement. *Sears v. Hull*, 192 Ariz. 65, 71 (1998) (collecting cases where the Court waived standing, all of which involved constitutional challenges).

5. Plaintiffs' claims are justiciable.

Defendants' political question argument is foreclosed by *Roosevelt*, which held that Arizona's capital finance system violated the general and uniform requirement of Article XI, Section 1 of the Arizona Constitution. 179 Ariz. at 235; *id.* at 243 (Feldman, C.J., concurring). *Roosevelt* therefore stands for the proposition that challenges to school finance systems under Article XI, Section 1 are justiciable. *See also Albrecht I*, 190 Ariz. at 523 (holding the ABC legislation unconstitutional); *Albrecht II*, 192 Ariz. at 37, ¶ 13 (holding the first iteration of Students FIRST unconstitutional). This case, like *Roosevelt*, challenges Arizona's capital finance system under Article XI, Section 1. Am. Compl. ¶ 64. Because that claim was justiciable in *Roosevelt*, it is justiciable here.

Albrecht I held that compliance with Article XI, Section 1 requires adequate standards and adequate funding to meet those standards. 190 Ariz. at 524. Defendants' argument appears to be that the application of this judicially-created test presents a

nonjusticiable political question. But they cite no case for this puzzling proposition. And indeed, the Supreme Court has itself applied the test, holding in *Albrecht II* that the funding system before the court did not "assure[] compliance with adequate standards." 192 Ariz. at 39, ¶ 20.

Defendants also argue (Mot. at 12-13) that the Constitution expressly delegates to the Legislature the authority to appropriate funds and set school facility standards. That is irrelevant because "it is well settled that when one with standing challenges a duly enacted law on constitutional grounds, the judiciary is the department to resolve the issue even though promulgation and approval of statutes are constitutionally committed to the other two political branches." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355, ¶ 34 (2012).

In support of this latter argument, Defendants cite *Fogliano v. Brain*, 229 Ariz. 12 (App. 2011), which held that Proposition 204's directive that the Legislature supplement a certain fund with "any other available source" was nonjusticiable, because there were no standards by which the Court could determine whether a source was available. *Id.* at 20, ¶ 25. Defendants also cite *Kromko v. Ariz. Board of Regents*, 216 Ariz. 190, 195, ¶ 24 (2007), which held that there were no standards by which a court could determine whether public university tuition was "as nearly free as possible" pursuant to Article XI, Section 6 of the Arizona Constitution. But these authorities simply prove that *some* constitutional provisions regarding funding are nonjusticiable, depending on their terms. Neither *Fogliano* nor *Kromko* contradicts *Roosevelt's* holding as to Article XI, Section 1. Indeed, *Kromko* offered *Roosevelt* as an example of a case in which there was "a judicially discoverable and manageable standard for measuring the constitutionality of a funding decision." *Id.* at 195, ¶ 24. And Defendants have admitted (Mot. at 13 n.9) that under *Roosevelt*, "manageable standards exist for courts to decide whether a school financing system is general and uniform." Accordingly, this case does not present a political question.

6. The notice of claim statute does not apply to Plaintiffs' claims.

Arizona's notice of claim statute applies only to claims seeking damages. *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 244-45 ¶¶ 47-53 (App. 2007). The statute does not apply to any of Plaintiffs' claims, which seek only declaratory or injunctive relief. *Id.* Plaintiffs seek no relief in the form of damages. This lawsuit does not seek monetary sums to compensate Plaintiffs for losses, as would a claim for damages. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (claims for damages are "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation"). Actions seeking declaratory and injunctive relief are "certainly not actions for money damages." *Id.* It is true that if the Court declares that the present school finance system is unconstitutionally underfunded, the State will be required to allocate more money to meet its constitutional obligation to fund education. Some of the Plaintiffs are school districts with less-than-constitutionally-adequate facilities, and thus the declaratory and injunctive relief sought in this lawsuit could indirectly result in those districts (along with many other school districts in Arizona) receiving money from the State to bring subpar facilities up to a constitutionally adequate level. This result does not transform this lawsuit into a claim for "damages." *Id.*

Moreover, the plain language of the notice of claim statute indicates that it does not apply to this lawsuit. The statute mandates that the notice of claim "contain a specific amount for which the claim can be settled." A.R.S. § 12-821.01(A). As such, the statute does not apply where it would be "nonsensical" to require Plaintiffs to include a monetary sum for which the claim could be settled, as is the case where declaratory or injunctive relief is sought. *Mabery*, 216 Ariz. at 245 ¶ 52. Plaintiffs seek only a declaration that the current capital funding system is unconstitutional and an injunction requiring the SFB to retool the minimum school facility adequacy guidelines.

Defendants argue that the claims in the First Amended Complaint seek "the equivalent" of monetary damages, relying on *Arpaio v. Maricopa County Board of Supervisors*, 225 Ariz. 358 (App. 2010). But in *Arpaio*, the Sheriff sought the return of

a specific dollar amount—$24 million—alleging that the sum had been "unlawfully seized." *Id.* at 361. Although the Sheriff sought declaratory relief, the court reasoned that "to the extent the Sheriff then would seek recovery of some or all of the $24 million from the State," the relief was declaratory in form but was in truth an avenue for pursuing damages. *Id.* at 362. Here, Plaintiffs do not seek recovery of a seized sum of money. Plaintiffs seek a determination that the funding system is constitutionally defective.

Because Plaintiffs seek only declaratory and injunctive relief, Arizona's notice of claim statute is inapplicable to Plaintiffs' claims.

7. The injunctive relief Plaintiffs seek should not be dismissed.

The First Amended Complaint includes a request that the Court direct Defendants to revise the school facility guidelines, which are woefully out of date. Defendants raise a number of challenges to this request for relief, all of which are unavailing.

a. The request is not moot.

Defendants argue that the request is moot because on July 5, 2017, after this litigation was filed, the SFB sent the Governor a letter requesting permission to initiate rulemaking proceedings to revise the standards, and the Governor gave his permission via an email from a staff member on August 24, 2017.

To begin with, the communications between the SFB and the Governor's office cannot be considered on a motion to dismiss because they are "outside the pleadings." Ariz. R. Civ. P. 12(d). Defendants contend that the communications can be considered because they are public records, but that exception is for "official public records" such as judicial filings and liens, *see Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 13 (App. 2010), not self-serving letters or emails written by a party in response to litigation. And if the letter and email were public records, "[t]he court could judicially notice only the procedural fact that the [they] had been [sent], not the truth of [their] assertions." *In re Marriage of Kells*, 182 Ariz. 480, 483 (App. 1995). After all, the communications have not been authenticated and their

assertions have not been tested in discovery.

Even if the Court could consider the communications, they would not moot Plaintiffs' claim for injunctive relief. Defendants offer the communications as evidence that they intend to voluntarily change the challenged regulations. But "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). A party asserting mootness based on voluntary cessation has the "formidable burden" to show that its conduct makes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The communications between the SFB and the Governor do not meet this standard. Indeed, they are not even evidence of voluntary cessation. At most, they are evidence that Defendants are *considering* changing *some* regulations. And the changes proposed in the letter and accompanying report are primarily technical or grammatical, and not responsive to the deficiencies alleged in the First Amended Complaint, which relate to technology, transportation, and security issues. *See* Am. Compl. ¶ 61. Thus, the communications do not show that the controversy over the regulations has been eliminated and will not recur. *See Laidlaw*, 528 U.S. at 189. Accordingly, Plaintiffs' claim is not moot.

b. Rule 65 does not apply to pleadings.

Defendants claim that the First Amended Complaint fails to comply with Arizona Rule of Civil Procedure 65(d)(1), which requires that "[e]very order granting an injunction . . . must . . . describe in reasonable detail . . . the act or acts restrained or required." But by its terms, Rule 65 applies only to an "order granting an injunction," and Defendants cite no case applying Rule 65 to a complaint. To the contrary, Arizona law does not require a plaintiff to specify the precise terms of his requested relief in the complaint. *See* Ariz. R. Civ. P. 54(d) (except in cases of default judgment, a final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in

its pleadings"). It would be highly unrealistic to require Plaintiffs to determine the precise wording of an injunction before the facts have been developed through discovery.

c. Obsolete standards do not comply with Article XI, Section 1.

Finally, Defendants argue that they have no continuing obligation to ensure that the standards remain adequate, because *Albrecht II* merely requires the State to "*establish* minimum adequate facility standards." 192 Ariz. at 37 (emphasis added). But this attempt to find a loophole in *Albrecht II* is contradicted by the text of Article XI, Section 1, which requires the Legislature to "provide for the establishment *and maintenance* of a general and uniform public school system." (emphasis added). The State fails to "maintain" an adequate school system if it allows its standards (and the associated funding) to become obsolete—for example, by pretending that buses manufactured in 1978 are constitutionally adequate nearly 40 years later, or that students can be educated for jobs in a modern economy with one computer for every eight students. *See* Am. Compl. ¶ 61. Indeed, the supreme courts of other states have recognized that "[t]he legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve." *McCleary v. Washington*, 269 P.3d 227, 251 (Wash. 2012); *accord Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 255 (Conn. 2010); *DeRolph v. Ohio*, 728 N.E.2d 993, 1001 (Ohio 2000); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Campbell Cty. Sch. Dist. v. Wyoming*, 907 P.2d 1238, 1274 (Wyo. 1995). The text of Article XI, Section 1 compels a similar conclusion in Arizona.

B. <u>The First Amended Complaint gives Defendants fair notice of the nature and basis of the claim</u>.

Arizona has a "lenient" notice pleading standard under Arizona Rule of Civil Procedure 8. *Kline v. Kline*, 221 Ariz. 564, 571–72 (App. 2009). The purpose of the notice pleading standard is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6 (2008). Arizona courts "assume the truth of the well-

pled factual allegations and indulge all reasonable inferences therefrom." *Id.* "All that is required is that the complaint contain a pla[i]n and concise statement of the cause of action and that the defendant is given fair notice of the allegations as a whole." *Tarnoff v. Jones*, 17 Ariz. App. 240, 245 (1972). Because cases "should be tried on the proofs rather than the pleadings," courts should construe complaints liberally. *Long v. Ariz. Portland Cement Co.*, 89 Ariz. 366, 369 (1961).

Plaintiffs' eighteen-page First Amended Complaint gives fair notice of the nature of the claims. Nevertheless, Defendants claim confusion over the meaning of such terms as "capital funding" and "capital needs." But a complaint is not required to define its terms with laser-like precision, and it is clear from the face of the First Amended Complaint that "capital funding" for "capital needs" refers to "funding for school buildings, facilities, and equipment." Am. Compl. ¶¶ 2-3. This corresponds with the lengthy discussions of such funding found in *Roosevelt*, *Albrecht I*, and *Albrecht II*.

Defendants attempt to recast this litigation as being about specific denials of funding by the SFB, and then they complain that Plaintiffs have not pleaded these specifics. In fact, the First Amended Complaint asserts that the current school funding system ***in its entirety*** fails to adequately provide for the capital needs of Arizona's schools ***as a whole***, such that the system is unconstitutional. As such, all capital funding sources from the State are at issue, as they fail to provide enough funding to maintain all of Arizona's schools at the minimally adequate level. Rule 8's "fair notice" requirement does not require Plaintiffs to plead a comprehensive list of all of the unmet capital needs of all of the school districts in Arizona.

III. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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RESPECTFULLY SUBMITTED this 28th day of August, 2017.

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Response: Plaintiffs' Response to Defendants' Motion to Dismiss First Amended Complaint