SUPREME COURT OF ARIZONA

TOM HORNE, in his Official Capacity as Arizona Superintendent of Public Instruction, Plaintiff /Appellant, v. KATIE HOBBS, in her Official Capacity as Governor of the State of Arizona; KRIS MAYES, in her Official Capacity as Attorney General of the State of Arizona; CREIGHTON ELEMENTARY SCHOOL DISTRICT; AVONDALE ELEMENTARY SCHOOL DISTRICT; CARTWRIGHT ELEMENTARY SCHOOL DISTRICT; CHANDLER UNIFIED SCHOOL DISTRICT #80; FLAGSTAFF UNIFIED SCHOOL DISTRICT; GLENDALE ELEMENTARY SCHOOL DISTRICT; KYRENE ELEMENTARY SCHOOL DISTRICT; LAVEEN ELEMENTARY SCHOOL DISTRICT; MESA UNIFIED SCHOOL DISTRICT; OSBORN ELEMENTARY SCHOOL DISTRICT; ABC ENTITIES 1-10; DOE INDIVIDUALS 1-10, Defendants/Appellees.	Arizona Supreme Court No. CV-25-0222-PR Court of Appeals Division One No. 1 CA-CV 24-0615 Maricopa County Superior Court No. CV2023-013656

DEFENDANTS/APPELLEES' RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Superintendent Horne tries to make this case seem review-worthy by accusing the School District Defendants of "openly and blatantly violat[ing] the will of the people" and boldly claiming that Governor Hobbs and Attorney General Mayes "[a]ided and abetted" them. Pet. at 1. The Court should not take the bait. The operative Complaint was dismissed based on a straightforward application of well-established precedent. No novel issues merit this Court's review.

The Complaint is laden with legal conclusions and argument about the Superintendent's disagreement with a statute and an act of the State Board of Education ("Board"). APP-17-52. The Superintendent disagrees with A.R.S. § 15-756.01 and a structured English immersion ("SEI") model that the Board approved because he believes both conflict with Proposition 203. The Superintendent wants a declaratory judgment validating this belief, so he sued Defendants. The superior court dismissed the Complaint, and the court of appeals affirmed.

The court of appeals rightly recognized that the Legislature hasn't expressly or impliedly authorized the Superintendent to sue these Defendants about the implementation of Arizona's English language learner

laws. Op. ¶¶ 9-16. Even if it had, the court also correctly held that the Superintendent failed to satisfy Arizona's rigorous standing requirement. *Id.* ¶¶ 17-26.

The Superintendent offers no good reason to revisit the precedents supporting the Opinion. The Court should ignore his hyperbole and decline to "become the referee" of what amounts to a difference of opinion among the parties. *See Bennett v. Napolitano*, 206 Ariz. 520, 527, ¶ 32 (2003). The Court should deny the Petition.

ISSUES PRESENTED FOR REVIEW[1]

1. Did the court of appeals correctly hold that Superintendent Horne lacks authority to bring this lawsuit when no law authorizes him to sue under the English language learners (ELL) Statutes?

2. Did the court of appeals correctly hold that the Superintendent lacks standing in the absence of (1) a particularized, traceable, and

[1] The Superintendent asks this Court (at 12-13, 16) to find that the Dual Language Immersion (DLI) Model is unlawful. Defendants do not address this argument, which was not addressed below, Op. n.4, and is not properly before the Court on an appeal from the grant of motions to dismiss. However, Defendants do not waive any arguments.

redressable injury; or (2) an actual controversy between the Superintendent and any Defendant?

3. Were the superior court's fee awards to the Attorney General and School Districts appropriate?

BACKGROUND

I. Proposition 203 and the DLI Model.

This case concerns Arizona statutes governing the education of English language learners. *See* A.R.S. §§ 15-751-757 (collectively, the "ELL Statutes"). Arizona voters enacted the first ELL Statutes in 2000 by passing Proposition 203. Prop. 203 provided that "children in Arizona public schools shall be taught English by being taught in English," A.R.S. § 15-752, and directed that English learners be educated through SEI, *id.*; A.R.S. § 15-751(5).

The Legislature later added to the ELL Statutes by adopting A.R.S. § 15-756.01, requiring the Board to adopt and approve "research-based models of [SEI]" for Arizona school districts to use in teaching English learners. A.R.S. § 15-756.01(A). And the Legislature authorized the Board alone to "delete from, add to or modify the existing models." A.R.S. § 15-

756.01(G). It also required school districts to select and implement one or more Board-approved SEI models. A.R.S. § 15-756.02(A).

In 2020, pursuant to section 15-756.01(A), the Board unanimously adopted the 50-50 DLI Model as an SEI model. *See* Op. ¶ 3; APP-45. School districts may now choose the DLI Model to provide SEI to English learners. A.R.S. § 15-756.02(A).

II. The Superintendent's limited ELL statutory duties.

The ELL Statutes give the Superintendent and the Arizona Department of Education ("ADE") a specific, limited set of duties. ADE is required to monitor schools and determine whether they are complying with laws applicable to English language learners. A.R.S. § 15-756.08(A)-(C). If ADE determines that a school is not in compliance, it must issue a report and the school must prepare and follow a corrective action plan. *Id.* (D), (E), (H), (I).

If, after a follow-up evaluation, ADE finds that the school remains out of compliance, then ADE must refer the school to the Board. *Id.* (J). If the Board finds that a school is not compliant, the school may not receive monies from the Arizona English language learner fund in A.R.S. § 15-756.04. A.R.S. § 15-756.08(J). Outside of this role overseeing ADE's monitoring process, the

Superintendent has no independent statutory authority under the ELL Statutes. *See* Op. ¶¶ 11-12.

III. The Superintendent oversteps, then sues, and his suit is dismissed.

In June 2023, ADE issued a letter purporting to eliminate the DLI Model as an SEI model. APP-45-46. In response to a request from state legislators, the Attorney General issued an opinion advising that neither the Superintendent nor ADE had authority to unilaterally eliminate a Board-approved SEI model. APP-42-43.

The Superintendent sued Governor Hobbs, Attorney General Mayes, and ten school districts implementing the DLI Model, seeking a declaratory judgment that A.R.S. § 15-756.01 is unconstitutional, the DLI Model is unlawful, and the Attorney General's Opinion was legally erroneous. APP-18-20; APP-25-26, ¶¶ A-D. The superior court dismissed the Complaint, holding that the Superintendent lacked authority to sue and lacked standing to sue Defendants. *See* Op. ¶ 5. The court of appeals affirmed. *Id.* ¶¶ 16-17.

The superior court awarded fees to all Defendants under A.R.S. § 12-348.01. *Id.* ¶ 29. The court of appeals affirmed the fee awards on a different basis than the superior court (see Part III). *Id.* ¶¶ 32-33.

REASONS TO DENY REVIEW

I. The Superintendent lacks authority to sue.

The Superintendent has only those powers "prescribed by law." Ariz. Const. art. XI, § 4. Thus, in order to sue, the Superintendent must have express or implied statutory authority to do so. Here, the Superintendent claims an implied power to file this lawsuit. The lower courts properly rejected this argument under this Court's precedent.

Implied powers are those "necessary for, the complete exercise of … express powers." *City of Phoenix v. Phx. Civ. Serv. Bd.*, 169 Ariz. 256, 259 (App. 1991). "[T]he only function of an implied power is to aid in carrying into effect a power expressly granted." *McMichael-Gombar v. Phx. Civ. Serv. Bd.*, 256 Ariz. 343, 347, ¶ 12 (2023) (quoting *City of Flagstaff v. Associated Dairy Prods. Co.*, 75 Ariz. 254, 257 (1953)).

The Superintendent argues (at 5) that the court of appeals "erroneously interpreted the word 'necessary' as 'strictly necessary.'" It did not. Instead, after outlining the Superintendent's express duties under the ELL Statutes, the court examined whether it was necessary for him to file this lawsuit to carry out any of those duties. Op. ¶¶ 13-14. It determined that "[n]one of the Superintendent's statutory duties require that he obtain

a judicial determination on an SEI model's constitutionality" and thus correctly reasoned that the Legislature had not impliedly authorized him to sue for one. *Id.* ¶ 14.

The Superintendent does not argue that fulfilling his statutory duties *requires* that he be able to sue. Instead, he argues (at 5) that the court of appeals should have interpreted "necessary" to mean "convenient, or useful, or essential to another," based on federal cases regarding Congress's authority under the Necessary and Proper Clause. But this Court has already defined "necessary" in the implied powers context to mean "require[d]" "to carry [the express power] into effect." *Associated Dairy Prods. Co.*, 75 Ariz. at 259. The Opinion correctly applied this precedent, and the Superintendent offers no good reason to revisit it.

The Superintendent suggests (at 6) that the Opinion creates a situation in which school districts can openly flout the law without consequence, but he is mistaken. If a school district fails to comply with the ELL Statutes, A.R.S. § 15-756.08(A)-(J) sets out a detailed, Legislatively prescribed process. Ultimately the Board, not the Superintendent, determines whether a school

district is in compliance with the law and if not, withholds funding.[2] A.R.S. § 15-756.08(J). The Superintendent's suggestion that no mechanism to enforce the ELL Statutes exists absent this lawsuit is just plain wrong. *See id.* The Legislature authorized others, not the Superintendent, to bring lawsuits to enforce the ELL Statutes. A.R.S. § 15-754 (authorizing parents and legal guardians of Arizona public school children to sue to enforce their child's right under the ELL Statutes). The Superintendent's dissatisfaction with that fact (at 5-6) neither renders the Opinion incorrect nor warrants this Court's review.

The Superintendent references other cases (at 7-8) in which officials sued based on an implied power, arguing that "the law should be consistent regarding implied authority to sue." But the law *is* consistent: implied powers must be necessary to effectuate express powers. *Associated Dairy Prods. Co.*, 75 Ariz. at 259. That standard's application varies because

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[2] The Superintendent suggests (at 8) that the court of appeals' observance of this statute implies that it believed the Board was a necessary party, an argument that the Governor and School Districts raised below. However, the court expressly did "not determine whether dismissal was warranted under Rule 12(b)(7)" for failure to join the Board. Op. ¶ 8. Because the lower court did not reach this issue, this response does not address it. The Governor and School Districts do not waive this argument.

different officials have different express powers—some of which do and some of which do not imply the authority to sue.

Moreover, the Opinion did not "erroneously disregard" those cases. Pet. at 7-8. The Court found them unpersuasive. Op. ¶ 15. None of the examples that the Superintendent offered involved the express powers at issue here (the ELL Statutes) or even held that the Superintendent had an implied authority to sue in other contexts.

There is no reason to review the Opinion as to implied powers.

II. The Superintendent lacks standing.

To sue in an Arizona court, the Superintendent was required to establish standing.[3] *See Bennett*, 206 Ariz. at 525, ¶ 19. Standing requires an "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* ¶ 18 (citation omitted). The standing requirement is "particularly acute" in cases like this one involving political disputes over executive branch actions. *See id.* ¶ 20.

[3] Although not necessary to decide this case, the Attorney General maintains that standing is constitutionally mandated and jurisdictional.

A. The Superintendent failed to allege an injury.

Superintendent Horne failed to allege any injury at all, let alone one that is fairly traceable to any Defendant or redressable by his requested relief. He claims (at 9) that he has standing because the Opinion "leaves [him] unable to perform duties required of him by the legislature." But the Superintendent was required to make his allegations in his Complaint, and it contains no allegations regarding his purported inability to perform any of his statutorily required duties. APP-17-26.

Nor are there any allegations regarding the Superintendent's other asserted basis for standing (at 9-10)—potential liability under A.R.S. § 15-754. APP-17-26. Personal liability is possible under section 15-754 only upon a finding that an official "willfully and repeatedly" refused to implement the ELL Statutes, but there are no facts alleged in the Complaint suggesting that the Superintendent "willfully and repeatedly" refused to implement these statutes. The Opinion properly rejected this argument as speculative. Op. ¶ 23.

B. The Superintendent does not have standing under the DJA.

The Declaratory Judgments Act ("DJA") permits "[a]ny person … whose rights, status or other legal relations are affected by a statute" to

"obtain a declaration of rights, status or other legal relations." A.R.S. § 12-1832. "While broad, that language does not permit courts to act as legislators by setting policy or issuing advisory opinions—standing is still required." *Ariz. Creditors Bar Ass'n v. State,* 257 Ariz. 406, 410, ¶ 12 (App. 2024). This Court has held that "in the absence of an actual injury" a plaintiff may satisfy the standing requirement by alleging that "an actual controversy exists between the parties." *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 424, ¶ 29 (2022).

The court of appeals found that the Superintendent did not establish standing under the DJA, explaining that the Act requires that the plaintiff have an underlying cause of action, the requested judgment not be advisory, and the defendant be able to control the challenged action. Op. ¶ 25. The Superintendent has no underlying cause of action under the ELL Statutes. *See* Part I. And because Defendants do not control the DLI Model's approval or parameters (*see* Part II.C), relief is not available through them and any opinion on this issue would therefore be an improper advisory one. The court of appeals correctly concluded that the Superintendent did not have standing under the DJA. Op. ¶ 25.

C. No actual controversy as to any Defendant.

The Superintendent argues (at 11-14) that he sued the proper defendants. But the court of appeals correctly concluded that no justiciable controversy exists as to any Defendant. Op. ¶¶ 20-23, ¶ 26.

1. The Attorney General is not a proper defendant.

The Attorney General issued an opinion as to whether the Superintendent could unilaterally eliminate a Board-approved SEI model. APP-42-52. But she is not a proper defendant because she has no "ability to control the [DLI Model's] implementation" and no role whatsoever in the ELL Statutes. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 470, ¶ 36 (App. 2007). And courts cannot direct the Attorney General to withdraw her opinion. Op. ¶ 20 (citing *Yes on Prop 200*, 215 Ariz. at 465, ¶¶ 14-16). Even if her opinion caused some alleged harm (it did not), that harm would not be redressable by the courts and there is no justiciable controversy.

The Superintendent also suggests (at 13-14) that the Attorney General is a proper defendant because he is challenging a statute's constitutionality. *See* A.R.S. § 12-1841(A). But section 12-1841 makes clear that it ***does not*** "permit [the attorney general] to be named as [a] defendant[] in a proceeding," A.R.S. § 12-1841(D), and so this argument fails too.

2. The Governor is not a proper defendant.

The Complaint's *only* allegation regarding the Governor is that she made a statement publicly supporting the DLI Model. APP-18, ¶ 2. That's it. The court of appeals correctly reasoned that public support for the DLI Model did not equate to a traceable injury. Op. ¶ 21. Nor is there an actual controversy between the Superintendent and the Governor. The Governor has no role in the ELL Statutes, and the Complaint seeks "no relief against [the Governor] at all." IR-67 at 12. The Superintendent's allegation does not establish standing against the Governor, and this type of blatantly political dispute does not warrant this Court's time. *See Bennett*, 206 Ariz. at 525, ¶ 20.

3. The School Districts are not proper defendants.

The Superintendent argues that the School Districts are proper defendants because they chose to implement the DLI Model instead of another SEI model. Pet. at 13 (citing *Ariz. Republican Party v. Richer*, 257 Ariz. 237 (2024)). But the School Districts have no control over the DLI Model's approval, and A.R.S. § 15-756.02(A) requires them to implement one or more Board-approved SEI models. Op. ¶ 23. Contrary to the Superintendent's suggestion (at 13), *Richer* "did not hold that all entities with implementation roles would be proper defendants." *Id.* ¶ 24. *Richer* considered a sanctions

order and reasoned that a county officer was *arguably* and *debatably* a proper defendant for purposes of assessing whether sanctions were warranted. *See Richer*, 257 Ariz. at 244, ¶¶ 19-20. The Court did not actually address whether those officers were, in fact, proper defendants. *Id.*

The Opinion's analysis on this point is sound. *Richer* does not make the Schools Districts proper defendants when the Superintendent failed to allege "presently existing facts" establishing an actual controversy. *See Mills*, 253 Ariz. at 425, ¶ 30. Indeed, he did not allege that ADE has engaged in any of the steps outlined in section 15-756.08 as to any School District. *See id.* ¶ 31 (no controversy where defendant had "not initiated formal proceedings"). And, of course, the School Districts cannot provide his requested relief. *Yes on Prop 200*, 215 Ariz. at 470, ¶ 36.

There is no basis to review the Opinion as to standing.

III. This Court should not grant review of the attorneys' fee awards.

The superior court awarded fees to all Defendants. Op. ¶ 29. On appeal, the Superintendent did not challenge Defendants' entitlement to fees as successful parties under section 12-348.01 or the reasonableness of any fees awarded. Rather, he argued that the Attorney General and School Districts failed to comply with Civil Procedure Rule 54(g). *Id.* ¶ 27.

At the superior court, each Defendant filed a separate motion to dismiss. IR-41-43. The Governor's motion included a fee request under section 12-348.01. Op. ¶ 28. Neither the Attorney General nor School Districts requested fees in their respective motions, but each filed a joinder in the Governor's fee request. *Id.* ¶ 29. Both joinders were filed well before the Superintendent's deadline to respond to the motions to dismiss. The Superintendent did not object to the joinders until the School Districts and Attorney General sought leave to file fee applications. IR-68. After briefing, the superior court found that the Attorney General and School Districts had timely requested fees and directed them to submit fee applications. IR-75. The superior court awarded fees to all Defendants. IR-86.

Although the court of appeals found that the Attorney General and School Districts did not comply with Rule 54(g)(1), it affirmed the fee awards because section 12-348.01 "makes the award mandatory." Op. ¶ 32. The court reasoned that the "language of the statute, which the Superintendent triggered by petitioning, does not give a court the discretion to refuse a reasonable fee request." *Id.* (citing *City of Tempe v. State*, 237 Ariz. 360, 367, ¶¶ 26-27 (App. 2015)).

The Superintendent does not dispute that section 12-348.01's plain language makes a fee award mandatory. Nor could he, having successfully argued that section 12-348.01 "directs that [fees] 'shall' be awarded, indicating that the award is mandatory and that the Legislature did not intend to provide any exceptions to recovery." *See* Appellees' Answering Brief at 30, *City of Tempe v. State*, 237 Ariz. 360 (App. 2015), No. 1 CA-CV 14-0282, 2014 WL 4650328, at *30; *see also* *City of Tempe*, 237 Ariz. at 367, ¶¶ 26-27 ("[A]n award of fees to the prevailing party was mandatory" under section 12-348.01).

Instead, the Superintendent argues (at 15) that section 12-348.01 "created a substantive right," and that Rule 54(g)(1) "prescribes the manner in which the right … must be enforced." That argument was neither raised nor briefed below, but as the court of appeals held, section 12-348.01 does not just create a substantive right—it mandates a fee award. Op. ¶ 32.

In any event, there is no reason to grant review as to the fee awards because the court of appeals could have affirmed them on any basis that the record supported, and there are many. First, although the court concluded that the Attorney General and School Districts did not make clear "that [they] were seeking their fees rather than supporting the Governor's request

for her fees," Op. ¶ 31, this Court has cautioned that "care must be taken not to elevate form over substance" when construing procedural rules, *Bryan v. Riddel*, 178 Ariz. 472, 477 (1994); *see also* Ariz. R. Civ. P. 1 (rules should be construed to secure the just determination of actions).

Of course the Attorney General and School Districts were seeking their own fees. Otherwise, their joinders would have served no purpose—nothing would have been gained by "supporting the Governor's request" for *her* fees. The superior court understood this and did not abuse its discretion by deeming the joinders adequate compliance with Rule 54.[4]

Second, the Superintendent was not prejudiced. Rule 54(g) is "intended to give parties notice of the risk that they may bear the burden of their opponent's legal fees, encouraging out-of-court settlement to avoid that risk." *In re Restated Tr. of Crystal H. West*, 249 Ariz. 355, 358, ¶ 8 (App. 2020). The Superintendent is a sophisticated litigant, and he knew or should have known that he would be ordered to pay Defendants' fees if he lost. And he

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[4] The Attorney General maintains that she cured any noncompliance with Rule 54(g) by filing her joinder by the deadline to file a responsive pleading, effectively supplementing or amending her pending Rule 12 motion. *See* Attorney General and School Districts' Answering Br. at 64 n.9.

had ample notice that Defendants were seeking fees. The Superintendent could have dismissed his case to avoid incurring further fees or objected to the Defendants' fee requests in his response to their motions to dismiss. He did nothing until after his Complaint was dismissed.

NOTICE UNDER RULE 21(A)

Defendants request an award of costs and reasonable attorneys' fees under A.R.S. §§ 12-341, 12-342, and 12-348.01.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

RESPECTFULLY SUBMITTED this 17th day of September, 2025.

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