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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

**Jane Doe, by her next friends and parents
Helen Doe and James Doe; and Megan Roe,
by her next friends and parents, Kate Roe
and Robert Roe,**

Plaintiffs,

v.

**Thomas C. Horne, in his official capacity as
State Superintendent of Public Instruction;
Laura Toenjes, in her official capacity as
Superintendent of the Kyrene School
District; Kyrene school District; the Gregory
School; and Arizona Interscholastic
Association, Inc.,**

Defendants.

Case No. 4:23-cv-00185-JGZ

**DEFENDANT HORNE'S RESPONSE TO
PLAINTIFFS' MOTION TO STRIKE
DEMAND FOR JURY TRIAL**

AND

**RULE 39(C) CROSS-MOTION FOR
ADVISORY JURY**

1 Defendant Thomas C. Horne, in his capacity as State Superintendent of Public Instruction
 2 (“Defendant Horne”) hereby responds to Plaintiffs’ Motion to Strike Defendant Horne’s Demand
 3 for Jury Trial (the “Motion to Strike”) and cross-moves in the alternative for an advisory jury in
 4 this matter under Fed. R. Civ. P. 39(c).

5 **I. DEFENDANT HORNE IS ENTITLED TO A JURY TRIAL ON PLAINTIFFS’**
 6 **CLAIM FOR DECLARATORY RELIEF.**

7 Plaintiffs argue that Defendant Horne has no right to a jury trial in this matter because they
 8 seek only equitable relief. *See* Motion to Strike at 2:19-4:2. But in addition to their equitable
 9 claim for an injunction, Plaintiffs also seek a declaratory judgment for which Defendant Horne is
 10 entitled to a jury. The Supreme Court has held that, in and of themselves, actions for declaratory
 11 judgments are “neither legal nor equitable.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,
 12 485 U.S. 271, 284 (1988). Moreover, Fed. R. Civ. P. 57, which governs declaratory judgments,
 13 expressly notes that declaratory-judgment claims are subject to the right to jury trial as laid out in
 14 Rules 38 and 39: “Rules 38 and 39 govern a demand for a jury trial.” The Rules thus clearly
 15 contemplate juries in declaratory-judgment cases.

16 And the Ninth Circuit has held that “**in a declaratory relief action**, as in other civil actions,
 17 a party has ‘an absolute right to a jury trial *unless a jury has been waived.*” *Kam-Ko Bio-Pharm*
 18 *Trading Co. Ltd-Australasia v. Mayne*, 560 F.3d 935, 942 (9th Cir. 2009) (italics in original, bold
 19 added) (quoting *Pac. Indem. Co. v. McDonald*, 107 F.2d 446, 448 (9th Cir. 1939). Defendant
 20 Horne has not waived his right to a jury.¹

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 25 ¹ *See also Illinois Union Ins. Co. v. Pacifica of the Valley Corp.*, 2016 WL 1742981, n.10 (C.D.
 26 Cal.) (quoting the above language from *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia* and
 27 recognizing a right to jury trial although “this case only involves requests for declaratory relief . .
 28 .”). *Mills v. Bank of America, N.A.*, 2016 WL 3636920, *2 (D. Nev.) (quoting the above language
 from *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia* and holding plaintiffs were entitled to jury
 trial although only equitable relief was being sought (specific performance and declaratory
 judgment)).

1 **II. IN THE ALTERNATIVE, DEFENDANT HORNE MOVES FOR AN ADVISORY**
2 **JURY UNDER RULE 39(C).**

3 In the alternative, if the Court determines Defendant Horne does not have a right to trial by
4 jury in this matter, Defendant Horne respectfully moves for an advisory jury under Fed. Rs. Civ.
5 P. 57 and 39(c):

6 “In an action not triable of right by a jury, the court, on motion or on its own: (1)
7 may try any issue with an advisory jury . . . ”

8 Fed R. Civ. P. 39(c).

9 “A trial court, sitting in equity, may nevertheless employ an advisory jury.” *Traxler v.*
10 *Multnomah County*, 596 F.3d 1007, 1013 (9th Cir. 2010)). “If the issues are purely equitable the
11 court has the right to call a jury in an advisory capacity and to submit such issues of fact as he
12 may elect.” *Firemen’s Ins. Co. of Newark, N.J. v. Smith*, 180 F.2d 371, 374 (8th Cir. 1950)
13 (holding trial court did not err in calling advisory jury to make factual determinations in
14 declaratory judgment case).

15 Indeed, the use of advisory juries in cases seeking declaratory relief (and other equitable
16 relief) is common. *See, e.g., Sterling v. Environmental Control Bd. Of City of New York*, 793 F.2d
17 52, 54-55 (2nd Cir. 1986) (submitting case to jury as advisory jury on claim for declaratory relief);
18 *American Automobile Ins. Co. v. Valentine*, 131 Fed.Appx. 406, 407 (4th Cir. 2005) (advisory jury
19 on claim for declaratory judgment); *Penn. Nat. Mut. Cas. Ins. Co. v. Lewis*, 105 F.Supp.3d 573,
20 575 (D.S.C. 2015) (same); *Penthouse Intern., Ltd. v. McAuliffe*, 702 F.2d 925, 926 (11th Cir.
21 1983) (advisory jury on claims for injunctive and declaratory relief); *Marcus v. Iowa Public*
22 *Television*, 97 f.3d 1137, 1138 (8th Cir. 1996) (same); *American Future Systems Inc. v. Penn. State*
23 *Univ.*, 618 F.2d 525, 255 (3rd Cir. 1980) (same); *Ferrari S.p.A Esercizio Fabbriche Automobili*
24 *Corse*, 1989 WL 298658 (S.D. Cal) (trying injunction case to advisory jury); *United States v.*
25 *Town of Colorado City, Arizona*, 2017 WL 1384353, * 12 (D. Ariz.) (same); *Starns v. Humphries*,
26 189 F.2d 357 (9th Cir. 1951) (advisory jury used where “[t]he Court recognized that the proceeding
27 was equitable.”); *Houtan Petroleum, Inc. v. ConocoPhillips Co.*, 2008 WL 4369975, * 4 (N.D.
28 Cal) (advisory jury on other equitable claims); *Hobro v. United Airlines, Inc.*, 2023 WL 2814694,
* 5 (D. Hawaii) (same).

1 This case involves questions of great societal concern. Defendant Horne strongly believes
 2 the citizenry should be involved in its determination. Even if the Court declines to seat a standard
 3 jury, an advisory jury will be crucial to provide the Court with a sense of how the effected
 4 community of Arizonans would determine the hotly-contested factual issues that will determine
 5 the outcome. *Kane v. PaCap Aviation Finance, LLC*, 2023 WL 5499994, * 3 (D. Hawaii)
 6 (“Advisory juries are also useful to ‘allow[] the judge to get some appreciation for the common
 7 sense or standard of the community[.]’”) (quoting 9 Wright & Miller, Federal Practice and
 8 Procedure: Civil 3d § 2335 (4th ed.) (collecting cases)). Specifically, the advisory jury should hear
 9 the evidence and provide its factual findings on questions including (1) whether prepubertal
 10 biological males have competitive performance advantages over prepubertal biological females
 11 in sports competition, (2) whether puberty-blocking medications and cross-hormone therapies
 12 fully reverse those prepubertal male competitive performance advantages, (3) whether biological
 13 males who block their puberty nevertheless develop further, additional competitive advantages
 14 over biological females (such as height and muscle mass).² The precise scope of the advisory
 15 jury’s fact-finding can be determined at a later time closer to the time of trial when discovery has
 16 further developed the fact disputes to be decided at trial.

17 **RESPECTFULLY SUBMITTED** on October 16, 2023.

18 **WILENCHIK & BARTNESS, P.C.**

19 /s/ Dennis I. Wilenchik

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27 ² Superintendent Horne has appealed this Court’s grant of a preliminary injunction on the basis
 28 that the ruling relies on clearly-erroneous findings of fact regarding these fact issues (among other
 arguments).

