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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**
13 **TUCSON DIVISION**

14 Jane Doe, by her next friend and parents
15 Helen Doe and James Doe; and Megan Roe,
16 by her next friend and parents, Kate Roe and
17 Robert Roe,

18 Plaintiffs,

19 v.

20 Thomas C. Horne in his official capacity as
21 State Superintendent of Public Instruction;
22 Laura Toenjes, in her official capacity as
23 Superintendent of the Kyrene School
24 District; Kyrene School District; The
25 Gregory School; and Arizona Interscholastic
26 Association Inc.,

27 Defendants,

28 Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION TO STRIKE
DEFENDANT HORNE'S DEMAND FOR A
JURY TRIAL AND OPPOSITION TO
DEFENDANT HORNE'S CROSS-MOTION
FOR AN ADVISORY JURY**

1 Plaintiffs hereby reply in support of their motion to strike Defendant Horne’s
2 demand for a jury trial and respond to Defendant Horne’s cross-motion for an advisory
3 jury under Federal Rule of Civil Procedure 39(c). Defendant Horne has no right to a jury
4 trial based on Plaintiffs’ claim for declaratory relief, and the Court should deny Defendant
5 Horne’s alternative request for an advisory jury.

6 **I. Defendant Horne Is Not Entitled To a Jury Trial Based on Plaintiffs’**
7 **Claim for Declaratory Relief.**

8 Defendant Horne has no right to a jury trial in this case. The fact that Plaintiffs seek
9 declaratory relief in addition to preliminary and permanent injunctive relief does not affect
10 that position.

11 *First*, a request for declaratory relief does not, by itself, create an entitlement to a
12 jury because, as recognized by Defendant Horne, actions for declaratory judgments are on
13 their own “neither legal nor equitable.” (*See* Dkt. No. 159 at 2 (quoting *Gulfstream*
14 *Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988)).) Rather, a jury trial
15 right exists only “[i]f the issue would have been tried to a jury had it arisen outside of the
16 declaratory judgment action[.]” *Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp.
17 2d 1084, 1103 (N.D. Cal. 2007). Thus, “[w]hether a declaratory judgment action[] entitles
18 a party to a jury trial depends on the nature of the claim from which it arises.” *Id.* (citing
19 *Pacific Indem. Co. v. McDonald*, 107 F.2d 446, 448 (9th Cir. 1939)). Where, as here, the
20 nature of the claim is equitable, the declaratory judgment should be determined by the
21 court, not a jury. *See id.*

22 *Second*, the Federal Rules of Civil Procedure do not “clearly contemplate”—much
23 less provide a right to—a jury trial in every case where a declaratory judgment is sought.
24 (*See* Dkt. No. 159 at 2.) On the contrary, the Federal Rules of Civil Procedure simply
25 preserve the right to a jury where one is provided for by the Seventh Amendment or federal
26 statute. *See* Fed. R. Civ. P. 38(a). As discussed in Plaintiffs’ motion to strike, neither
27 avenue provides a basis for a jury trial here. (*See* Dkt. No. 156.)

1 *Third*, the cases cited by Defendant Horne are inapposite and do not stand for an
2 “absolute right” to a jury in all cases where parties seek declaratory relief. *Pacific*
3 *Indemnity* stands for the rule that a right to a jury trial cannot be displaced by a statute
4 providing for declaratory relief if “the issues are ones which in the absence of the statute
5 for declaratory relief would be tried at law by a court and jury.” 107 F.2d at 448. The
6 relevant question is, and remains, whether the applicable issues in the action are equitable
7 or legal. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719
8 (1999) (citing *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830)). Here,
9 the issues are equitable. Plaintiffs seek injunctive relief, not monetary damages, and
10 accordingly no right to a jury trial exists.

11 *Kam-Ko* does not expand *Pacific Indemnity*. In *Kam-Ko*, the Ninth Circuit merely
12 affirmed that the trial court was correct to deny a motion for jury trial when the plaintiff
13 expressly waived its right to one. *Kam-Ko Bio-Pharm Trading Co., Ltd. v. Mayne Pharma*
14 *Inc.*, 560 F.3d 935, 942–943 (9th Cir. 2009). The court did not consider whether a jury
15 trial right existed for declaratory judgment actions on purely equitable claims, and the case
16 did not present that question because both legal and equitable claims were advanced,
17 including damages for breach of contract. *Id.* at 939.¹

18 Accordingly, Defendant Horne is not entitled to a jury trial simply because Plaintiffs
19 seek declaratory relief, and the Court should strike his jury demand.

20 **II. The Court Should Deny Defendant Horne’s Request for an Advisory** 21 **Jury.**

22 Similarly, Defendant Horne’s cross-motion for an advisory jury pursuant to Federal
23 Rule of Civil Procedure 39(c) is meritless and should be denied.

24 ¹ Defendant Horne’s other cited cases fare no better. *Illinois Union Ins. Co. v. Pacifica*
25 *of the Valley Corp.*, 2016 WL 1742981, at *6 (C.D. Cal. Apr. 28, 2016), involved
26 determining whether the issue of an agency relationship could be resolved through
27 summary judgment. The district court was not analyzing the validity of plaintiff’s
28 demand for a jury trial. And the district court in *Mills* was considering the entitlement
to a jury trial in a case alleging, *inter alia*, breach of contract and breach of good faith
and fair dealing claims—questions of common law to be determined by jury. *Mills v.*
Bank of Am., N.A., 2016 WL 3636920, at *2 (D. Nev. July 7, 2016).

1 *First*, the Court is best positioned to make findings of fact in this case. The three
2 questions Defendant Horne identifies as purportedly suitable for an advisory jury are
3 questions to be objectively determined by the Court when it weighs expert opinions and
4 evidence. (*See* Dkt. No. 159 at 4.) The Court already did this when ruling on Plaintiffs’
5 motion for a preliminary injunction. Specifically, Plaintiffs and Defendants submitted
6 twelve expert opinions addressing those three questions on Plaintiffs’ motion for a
7 preliminary injunction. The Court then made the factual findings necessary to resolve the
8 motion. Accordingly, an advisory jury would provide “no attendant benefit” here. *F.T.C.*
9 *v. ELH Consulting, LLC*, 2013 WL 593885, at *2 (D. Ariz. Feb. 7, 2013); *see also Van*
10 *Asdale v. Int’l Game Tech.*, 2010 WL 1490349, at *7 (D. Nev. Apr. 13, 2010) (declining
11 to empanel an advisory jury where, among other reasons, “the court [was] well positioned
12 to be the most informed trier-of-fact”), *aff’d sub nom. Asdale v. Int’l Game Tech.*, 549 F.
13 App’x 611 (9th Cir. 2013).

14 *Second*, community opinions will not assist the Court when deciding whether two
15 transgender girls should be able to play on girls’ sports teams. Rather, introducing personal
16 views into the calculus is liable to cause prejudice to Plaintiffs, two transgender girls that
17 this Court has already found reasonably fear discrimination because of their transgender
18 status. (Dkt. No. 44 at 1); *see Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 338,
19 339 (S.D. Cal. 2010) (“[D]efendants’ subtle suggestion that the legal issues presented in
20 this case should be influenced by community beliefs about the funding of sports programs
21 in the local schools or gender equality is inconsistent with the intent of Title IX
22 enforcement. An advisory jury would not assist the Court in fact finding in this case.”);
23 *see also Moss v. Lane Co., Inc.*, 471 F.2d 853, 855 (4th Cir. 1973) (“the use of advisory
24 juries in discrimination cases is not favored, however broad the language of Rule 39(c)
25 may be deemed, and should be restricted in any event to the exceptional case where there
26 are peculiar and unique circumstances supporting its use.”).

27 *Third*, an advisory jury would “increase the burden on the parties and the court by
28 needlessly complicati[ng] the trial of this case[, and] ... impose[] a burden on jurors whose

1 ultimate decision may not matter[.]” *See Van Asdale*, 2010 WL 1490349, at *7 (declining
2 to exercise its discretion to empanel an advisory jury); *see also Ollier*, 267 F.R.D. at 339
3 (stating an advisory jury would add unnecessary expense, time, and complexity to a Title
4 IX case). Coupled with the lack of any benefit and the risk of prejudice, the undue cost
5 and burden weigh heavily against an advisory jury in this case.

6 **CONCLUSION**

7 For the foregoing reasons, the Court should strike Defendant Horne’s demand for
8 a jury trial and deny Defendant Horne’s cross-motion to empanel an advisory jury.

9
10 Respectfully submitted this 23rd day of
11 October, 2023.

12 *s/ Colin M. Proksel*

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**Admitted pro hac vice.*

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

I hereby certify that on October 23, 2023, I transmitted the attached document via electronic mail to the following CM/ECF non-registrant:

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