1	STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
2	NEW HANOVER COUNTY FILE NO. 21 CVS 003915
3	2021 DEC 21 P 2: 26
4	DAVID A. PERRY, NEW HANOVER CO. REPLY TO THE DEFENDANT'S ANSWER
5	PLAINTIFF, BY TO COMPLAINT
6	VS.
7	
8	NEW HANOVER COUNTY BOARD OF EDUCATION;
9	NEW HANOVER COUNTY SHERIFF'S
10	OFFICE;
11	DEFENDANTS;
12	HERE COMES THE PLAINTIFF, David A. Perry, Pro Se, who, pursuant to NC
13	Rules of Civil Procedure, G.S. 1A-1, Rule 7(a), hereby requests that this Court accept this reply
15	to the Defendant, New Hanover County Board of Education's Answer to Complaint, which was
16	filed with this Court on December 15, 2021.
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18	FIRST DEFENSE (Mootness)
19	The Defense's claim that this case should be dismissed on the basis of mootness is
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21	wholly without merit. The Plaintiff agrees that on December 7, 2021 the New Hanover County
22	Board of Education voted 4-3 to lift its mask mandate in most situations, and that this likely will
23	mean that the Plaintiff will be able to attend the December 21, 2021 interim meeting of the board
24	without a mask. However, this fact alone does not make the Plaintiff's claims moot.
25	It is generally true that a claim that is moot then it should be dismissed. However,
26 27	there are five well-known exceptions where courts should NOT dismiss a mootivation court clerk of what handle courts are five well-known exceptions where courts should NOT dismiss a mootivation court of the handle courts are five well-known exceptions where courts should NOT dismiss a mootivation court of the handle courts are five well-known exceptions where courts should NOT dismiss a mootivation court of the handle courts are five well-known exceptions where courts should NOT dismiss a mootivation court of the handle courts are five well-known exceptions where courts should NOT dismiss a mootivation court of the handle courts are five well-known exceptions.
28	1) The defendant has voluntarily ceased an illegal practice REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 1 NEW HANOVER COOK NEW HANDVER COO

- 2) The action is capable of repetition yet evading review
- 3) The claim contains an issue of public interest
- 4) The class action claims are not moot
- 5) The action contains collateral legal consequences.

The first three exceptions to mootness are clearly evident in this case.

All federal and state courts agree that "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a ... court of its power to determine the legality of that practice." Thomas v N.C. Dept of Human Resources. 124 N.C. App 698, 706, 478 S.E.2d 816, 821 (1996) Id (quoting City of Mesquite v. Alladin's Castle Inc., 455 U.S. 283, 289, 71 L.Ed.2d 152, 159 (1982)). If this exception to mootness did not exist then there would be nothing to stop an unscrupulous defendant from voluntarily ceasing a challenged practice once being sued, getting the case dismissed, and then reinstituting the same challenged practice. In this case, there have been no changes to state or federal law that would prohibit the Defendant from almost immediately reinstituting their mask mandate and requiring the Plaintiff to wear a mask in order to attend future meetings of the school board.

North Carolina Courts have recognized that actions that are "capable of repetition yet evading review" should not be dismissed on the grounds of mootness (See Matter of Jackson, 352 S.E.2d 449 (1987) – "However, the case is similar to that category of cases which federal courts, in determining the existence of federal jurisdiction in otherwise moot cases, term 'capable of repetition yet evading review.' See, e.g., Moore v. Ogilvie, 394 U.S. 814, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969)). There are two requirements for this exception to apply:

(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 2

complaining party would be subjected to the same action again. (See <u>Crumpler v.</u> Thornburg, 375 S.E.2d 708 (1989))

In this case the Defendant, the New Hanover County Board of Education meets at least twice per month (once for their regular meeting, and once for their interim meeting) and they could also call additional "special meetings" if they so desire. Nothing in state or federal law would prohibit them from reinstituting their mask mandate at a moment's notice. In addition, state law (Senate Bill 654) currently requires them to reevaluate their mask policy once per month. There is simply not enough time to fully litigate the challenged action of this case. Finally, the situation with COVID-19 is extremely fluid. The primary reason the school board decided to lift the mask mandate at its December 7, 2021 meeting was that COVID-19 infection and hospitalizations rates were down. It is a reasonable expectation that any uptick in those rates would cause the Defendant to reinstitute their mask mandate and apply it to school board meetings.

North Carolina Courts have recognized that claims that contain "an issue of public interest" should not be dismissed on the basis of mootness (See Leak v. High Point Council, 25 N.C App 394, 397, 213 S.E.2d 386, 388 (1975) – "where the question involved is a matter of public interest the court has the duty to make a determination."). This lawsuit meets that definition. The lawsuit is based on the NC Open Meetings law (N.C.G.S. 143) and the very existence of that legislation is because the General Assembly recognized that "the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly" is in the public interest. Furthermore, this lawsuit is also based on all of our First Amendment rights of assembly and petition. This case has also attracted a great deal of local press coverage. There are simply thousands of local citizens who agree with the Plaintiff and might wish to attend a local government meeting without being forced to wear a mask. It is REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 3

important for this Court to determine the legality and constitutionality of these types of restrictions on our freedom.

Finally, this case not only seeks prospective injunctive relief, but also seeks retrospective relief, pursuant to G.S. 143-318.16A(a), by having this Court declare all actions of the New Hanover County School Board (from 45 days prior to the initiation of this lawsuit => the date the violations of the NC Open Meetings permanently cease). As the General Assembly contemplated when they crafted this law, the "public at large" (and not just the Plaintiff) suffers damage when government bodies disobey North Carolina law and exclude members of the public from fully participating in meetings of government bodies. Such punitive relief provides a deterrent to government bodies from ignoring the NC Open Meetings law. Dismissing this case now would deny the punitive retrospective relief that is necessary in this case.

SECOND DEFENSE (Objection to Form of Plaintiff's Complaint)

The Defense argument that the Plaintiff's claims should be dismissed for failing to number every single paragraph in its <u>Petition for Declaratory Judgement & Relief</u> is without merit. NC Rules of Civil Procedure, G.S. 1A-1, Rule 10(b) does indeed state that "Averments of claim or defense shall be made in numbered paragraphs." However, the Plaintiff did indeed number all of its claims in the "Allegations" section of the complaint. This section of the Complaint contains the heart of the Plaintiff's individualized claims. The other sections of the Complaint only provide context, state facts that are in the public record, or provide legal argument. It should be noted that if the Defendant truly found it "difficult and confusing" to respond the Plaintiff's Complaint then they should have filed a motion for more definite statement, pursuant to NC Rules of Civil Procedure, G.S. 1A-1, Rule 12(e) a long time ago.

REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 4

1 2 10(13 note 4 para 6 and 7 Cou 8 app 9 Ker 10 If an 11 be f 13 Cor 13 Cor 14 para 15 para 16 para 16 para 16 para 16 para 17 para 17 para 18 para 1

On its face, there is nothing in NC Rules of Civil Procedure, G.S. 1A-1, Rule 10(b) that requires that ALL paragraphs of a Complaint or an Answer be numbered. It should be noted that while defense counsel provided section headers in its Answer to Complaint, each paragraph in that submission were not numbered either. However, the Plaintiff is not an attorney, and admits that it is a possibility that the Complaint is technically deficient. But even if this Court does rule that the Plaintiff's Complaint is technically deficient, dismissal is not the appropriate remedy. It has been almost 50 years since the US Supreme Court held in Haines v. Kerner, 404 U.S. 519 (1972), that Pro Se complaints should be held to a less stringent standard. If any technical deficiency exists in the Plaintiff's Complaint, then the appropriate remedy would be for this Court to craft an Order for the Plaintiff to swiftly (within 10 days) amend the Complaint to add numbered paragraphs to the entire Complaint.

THIRD DEFENSE (Answer)

Defense counsel spends most of its efforts in this section regurgitating its objections to inappropriate paragraph numbering, ignoring most of the factual allegations made, and issuing blanket denials. The fact is that the relevant facts in this case are either part of the public record, or ones that should be stipulated to by all parties.

An Introduction is simply akin to an opening statement in a trial. No specific allegations are made within and no answer is required. The Plaintiff freely admits that its request for preliminary injunctive relief was denied by this Court on November 2, 2021.

In the Jurisdiction section of this Answer, the Defense again complains about unnumbered paragraphs, admits that the Defendants both are located in New Hanover County,

NC, but then denies all else. The residency of the Plaintiff is a matter of public record and any attempt to deny that fact is simply a stalling tactic.

In the Standing section of this Answer, the Defense again complains about unnumbered paragraphs, labels the entire paragraph as legal conclusions, and issues a blanket denial of any remaining allegations contained within in it. Again, the Plaintiff's residency is a matter of public record. The Plaintiff agrees that the rest of this section is legal conclusions. There was no need for the Defendant to provide an answer to it.

In the Parties section of this Answer, the Defense admits to the makeup of the New Hanover County Board of Education at the time this lawsuit was initiated. The Defense also says that it lacks sufficient knowledge to ascertain the "facts" asserted for the other parties in this case, and therefore denies them. Again, the makeup of the other parties is a matter of public record. There is no reason to deny anything in this section unless the Defense is motivated to employ stall tactics.

In the Facts section of this Answer, the Defense again complains about unnumbered paragraphs, feigns ignorance of the facts presented in that section of the Plaintiff's complaint, and issues a blanket denial of everything contained within it. All of the facts presented in this section the Plaintiff's Complaint are public record. Furthermore, many (but not all) of the items presented in this part of the Complaint refer to the specific conduct of the defendants in this case. The Defendant should have detailed specific knowledge of what happened at the New Hanover County Board of Education to specifically affirm or deny the individual facts presented. Offering up blanket denials is simply a stall tactic.

In the Allegations section of this Answer, the Defense spends most of its time either saying that the allegations in the Plaintiff's Complaint were a legal conclusion or offering blanket denials.

- 1) The Defendant admits that a mask mandate was in effect at the school board meetings, and that members of the public were only allowed to take off their face masks when speaking during the public comment section of the meetings. The Defendant also correctly states that the meetings were broadcast live on You Tube but denies all other allegations. What is there to deny? The heart of the Plaintiff's first allegation is that the school board made no exceptions for members of the public who wanted to physically attend the meeting but could not or would not wear a mask.
- 2) The Defendant admits that they enlisted the aid of the New Hanover County Sheriff's Office in enforcing their mask policy by asking them to remove individuals from the meeting who were not obeying that policy. The Defendant then issues a blanket denial for all else. The Plaintiff contends that the Defendant, the New Hanover County Board of Education, instructed members of the Sheriff's Office to deny entry to members of the public who were not wearing masks. The Defense has failed to specifically plead to that allegation.
- 3) The Plaintiff concurs that the third allegation is legal conclusion.
- 4) The Plaintiff concurs that the fourth allegation is mostly legal conclusion. However, the Defendant has not specifically answered to the allegation as to whether they have provided a physical location for the public to meet when electronic meetings are conducted by the school board.

- 5) The Plaintiff concurs that the fifth allegation forms a legal conclusion. However, the Defendant has failed to specifically answer the allegation that non-physical attendees who wish to provide comment during the public comments section of the meeting, are required to leave their comment on voicemail, and that this voicemail is not played back live during the course of the meeting.
- 6) The Plaintiff concurs that the sixth allegation is legal conclusion
- 7) The Plaintiff concurs that the seventh allegation is legal conclusion
- 8) The Plaintiff concurs that the eight allegation is legal conclusion
- 9) The Defendant says it lacks sufficient knowledge of whether the ninth allegation is true or not. The Plaintiff concurs that the 2nd part of this allegation makes a legal conclusion but wonders why any denial of the allegation by the Defendant is necessary.
- 10) The Plaintiff concurs that the tenth allegation forms a legal conclusion. However, the Defendant has failed to specifically answer the allegation that they have failed to provide an exemption to their mask mandate for members of the public who have been vaccinated against COVID-19.
- 11) The Plaintiff concurs that the eleventh allegation forms a legal conclusion. However, the Defendant has failed to specifically answer whether it has even considered, never mind implemented, any of the alternate measures suggested by the Plaintiff.
- 12) The Plaintiff concurs that the twelfth allegation forms a legal conclusion. However, the Defendant has failed to specifically answer the allegation that have not provided any exemptions for their mask mandate policy at school board meetings.

It is the firm belief of the Plaintiff that there are little to no facts to be disputed in this case, and that the case should be decided on its legal merits. Unnecessarily drawing this REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 8

REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 9

process out with blanket denials of basic facts, or an unneeded and lengthy discovery process, is not in the interests of justice and a waste of this Court's time.

FOURTH DEFENSE (Standing)

The Defendant, the New Hanover County Board of Education, filed a Motion to Dismiss in this case on October 27, 2021. In addition to seeking this Court to dismiss the case on the basis of "failure to state a claim upon which relief can be granted" (under Rule 12(b)(6)), Defense counsel also sought to have the case dismissed on the basis of a lack of subject matter jurisdiction. As explained in Page 6 of the Defendant's Brief in Opposition to Preliminary Junction and in Support of Motion to Dismiss (which was filed on October 29, 2021) the basis for this subject matter jurisdiction argument was a lack of standing by the Plaintiff. On November 2, 2021, this Court conducted a hearing on the Defendant's Motion to Dismiss and it was denied by Order of Judge Harrell. It would not be proper for this Court to relitigate any defense based on standing. If Defense Counsel is aggrieved with the Order of Judge Harrell, then the proper course is for them to bring the matter to the NC appellate court system.

The Plaintiff concedes that it may only be the intent of the Defendant to preserve this defense for appeal. If that's the case, then the Plaintiff has no issue with it. However, it should be noted that the Plaintiff has submitted a Motion for Supplemental Pleadings. Assuming this motion is granted, it is clear that the Defendant tried to physically enter the school board meeting of November 9, 2021 and was denied entry by the defendants for not wearing a mask. So even if the appeals court ruled that the Plaintiff did not have standing unless he physically was denied entry to school board meeting, such personal standing certainly exists now.

FIFTH DEFENSE (Statute of Limitations)

As the Defendant has not briefed the Court on this defense, the Plaintiff will reserve the bulk of any reply until it has been. However, it should be noted that the Plaintiff does not seek any retrospective relief for the alleged conduct of the Defendant earlier than 45 days before the commencement of this lawsuit (pursuant to G.S. 143-318-16A).

ADDITIONAL DEFENSES

The Plaintiff has no objection to the Defendant presenting non-affirmative defenses that are not named in their Answer at a future date, based on the unfolding evidence. However, pursuant to NC Rules of Civil Procedure, G.S. 1A-1, Rule 8(c) all affirmative defenses must be stated in their responsive pleading. Specifically, the Plaintiff requests that this Court bar any future affirmative defense that their mask mandate survives heightened or strict judicial scrutiny. Both these levels of judicial scrutiny are affirmative defenses, as the burden is on the government (and not the Plaintiff) to prove that the government action is constitutionally permissible.

THEREFORE, the Plaintiff beseeches this honorable Court to:

- Accept this Reply to the Defendant's <u>Answer to Complaint</u> and enter it into the record.
- 2. Deny the Defendant's first defense
- 3. Deny the Defendant's second defense. Or in the alternative, grant the Plaintiff a 10 day leave to revise the Complaint and add numbered paragraphs throughout.
- 4. Grant the Plaintiff's separately filed <u>Motion for Expedited Discovery</u>
- 5. Deny the Defendant's fourth defense

REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 10

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6. Order that the Defendant's fifth defense be briefed within 10 days' time, offer the Plaintiff adequate time to reply, and set a schedule so that this defense can be adjudicated at the earliest possible time.

- 7. Order that the Defendant be barred from making any affirmative defenses not listed in their Answer, and specifically deny the Defendant the right to present a defense that attempts to prove that their actions survive any form of heightened or strict judicial scrutiny.
- 8. Grant whatever other relief this Court finds just and equitable.

Dated this 21st day of December 2021.

David A. Perry, Pro Se

CERTIFICATE OF SERVICE

I certify that a copy of the attached **REPLY TO THE DEFENDANT'S**

ANSWER TO COMPLAINT was served upon all Defendants in this case on this date, via

USPS Priority Mail and electronic mail addressed to:

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Dated this 21st day of December 2021.

David A. Perry, Pro Se

REPLY TO THE DEFENDANT'S ANSWER TO COMPLAINT - 12