No.

In the
Supreme Court of the United States

IN RE WARREN PETERSEN, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

(1) Whether, in a private civil action challenging the constitutionality of a state law, the leaders of a state legislature waive the legislative privilege's protections, including for legislative motives, when they exercise their statutory right to intervene to defend the law.

(2) Whether, in a private civil action challenging the constitutionality of a state law, the leaders of a state legislature waive the *Morgan* doctrine's protections for high-ranking officials when they exercise their statutory right to intervene to defend the law.

PARTIES TO THE PROCEEDING

Petitioners (intervenor-defendants in the district court, and mandamus petitioners in the court of appeals) are Warren Petersen, President of the Arizona State Senate; and Ben Toma, Speaker of the Arizona House of Representatives.

Respondent in this Court is the United States District Court for the District of Arizona. Respondents also include 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 (collectively plaintiffs in district court, and real parties in interest in the court of appeals). Respondents also include 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 the Arizona Interscholastic Association, Inc. (collectively defendants in district court, and real parties in interest in the court of appeals).

RELATED PROCEEDINGS

United States District Court (D. Arizona):

- *Doe* v. *Horne*, No. CV-23-00185 (June 20, 2024)

United States Court of Appeals (9th Cir.):

- *In re Petersen*, No. 24-4335 (order issued Aug. 8, 2024)
- *Doe* v. *Horne*, No. 23-16026 c/w No. 23-16030 (9th Cir.) (argued Mar. 14, 2024)

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ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION FOR A WRIT OF MANDAMUS

President of the Arizona State Senate Warren Petersen (the "President") and Speaker of the Arizona House of Representatives Ben Toma (the "Speaker") respectfully petition for a writ of mandamus to the United States District Court for the District of Arizona. In the alternative, the President and Speaker respectfully request that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals is unreported and reprinted at Pet. App. 1A-2A. The order of the district court is available at 2024 WL 3083467 and reprinted at Pet. App. 3A-20A.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651 or, in the alternative, 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant texts for the following are found in the Addendum:

U.S. CONST. art. I, § 6

ARIZ. CONST. art. IV, pt. 2 § 7

ARIZ. CONST. art. IV, pt. 2 § 8

ARIZ. REV. STAT. § 12-1841

ARIZ. REV. STAT. § 15-120.02

INTRODUCTION

For more than 300 years, the legislative privilege has been indispensable to legislative independence. *United States* v. *Johnson*, 383 U.S. 169, 178 (1966). The legislative privilege "reinforc[es] the separation of powers," *id.*, and "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal," *Tenney* v. *Brandhove*, 341 U.S. 367, 373-74 (1951) (quoting *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808)). As applied to discovery, the legislative privilege creates an "absolute bar" to compelled disclosure from legislators. *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975).

In addition, from the Founding to the present, the legislative privilege and respect for an equal branch of government have prevented inquiry into legislative motives. *See, e.g.*, *Lake Country Ests., Inc.* v. *Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 405 (1979); *Fletcher* v. *Peck*, 10 U.S. 87, 131 (1810). "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress." *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*,

251 U.S. 146, 161 (1919) (collecting cases). State legislators receive the same absolute protection: "[N]o inquiry may be made concerning the motives or wisdom of a state Legislature acting within its proper powers." *Arizona* v. *California*, 283 U.S. 423, 455 n.7 (1931) (collecting cases). That is so even in Equal Protection cases. *See Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).

Despite this clear, unbroken line of authority, the district court ordered depositions and document production to probe the motives of the President of the Arizona State Senate and the Speaker of the Arizona House of Representatives. The district court's decision stems from two erroneous premises: (1) that legislative motive evidence is discoverable, and (2) that "[a] waiver of legislative privilege need not be explicit or unequivocal." Pet. App. 8A, 10A. The court then held the President and Speaker waived their privilege by intervening to defend state law. That is, the district court found waiver absent an "explicit and unequivocal renunciation of the protection," *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979), because the President and Speaker exercised a statutory right to defend state law in their capacities as President and Speaker, ARIZ. REV. STAT. § 12-1841(A), (D). The court disregarded the fact that the President and Speaker intervened after the state Attorney General disqualified her office from defending the law. Pet. App. 11A. The district court then applied its *per se* waiver rule to the *Morgan* doctrine. *Id.* at 14A-15A.

The rule that the district court created, which the Ninth Circuit sanctioned via its denial of the President's and Speaker's writ, applies to no other intervening litigants. In practical effect, it punishes,

and thus discourages, state legislators from intervening as authorized by state law to defend state statutes in federal court. The district court's *per se* waiver rule effectively denies only legislators the ability to intervene, and so "evince[s] disrespect for a State's chosen means of diffusing its sovereign powers" and "turn[s] a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests" and whose participation "also serves important national interests." *Berger* v. *N.C. State Conference of the NAACP*, 597 U.S. 179, 191–92 (2022).

There is no reason for this rule. The discovery sought here would not be discoverable in the First, Fifth, Eighth, Eleventh, and D.C. Circuits, because those circuits categorically shield legislative motive from discovery. Indeed, in almost every case *except* legislator intervention, the Ninth Circuit does as well. By contrast, the only circuit authority on the other side is a single Third Circuit case that is distinguishable as to procedural context and reasoning. To the extent that it is relevant here, the Third Circuit's opinion contradicts the vast weight of authority. There is no justification for a *per se* exemption from the rule against probing legislative motives for cases of intervention. "[A] State's chosen representatives should be greeted in federal court with respect, not adverse presumptions." *Id.* at 197. Similarly, the district court's rejection of the *Morgan* doctrine's application was erroneous and in conflict with decisions from the Fifth and D.C. Circuits.

This Court's review is necessary to reaffirm the vitality of the legislative privilege and the ability of States to determine who may speak and defend their laws in federal court, without suffering penalties

which other litigants do not face. The Court should grant the petition for a writ of mandamus, or, in the alternative, grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. "Within wide constitutional bounds, States are free to structure themselves as they wish." *Berger*, 597 U.S. at 183. That structuring includes authorizing "multiple officials to defend their practical interests" in federal court. *Id.* at 184.

Arizona has designated three state officials to defend the constitutionality of a state law: (1) the state's Attorney General; (2) the Speaker of the Arizona House of Representatives; and (3) the President of the Arizona State Senate. ARIZ. REV. STAT. § 12-1841(A), (D). Parties alleging a statute's unconstitutionality must serve the Attorney General, the Speaker, and the President with the relevant legal filing. *Id.* at § 12-1841(A), (B). Those officials "shall be entitled to be heard." *Id.* at § 12-1841(A). At their discretion, any of these three officials "may intervene as a party, may file briefs in the matter or may choose not to participate … ." *Id.* at § 12-1841(D). Any of these three officials who is not timely served with the required notice may move to vacate any judicial finding of unconstitutionality. *Id.* at § 12-1841(C). Thus, the people of Arizona "have authorized the leaders of their legislature to defend duly enacted state statutes against constitutional challenge." *Berger*, 597 U.S. at 200.

2. The Arizona State Legislature has independently empowered its leaders to defend legislative interests. "The Arizona Legislature … is an institutional plaintiff" and it may "assert[] an institutional injury … after authorizing votes in both of its chambers … ." *Arizona State Legislature* v.

Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 802 (2015).

The State Senate and House of Representatives shall each "choose its own officers" and "determine its own rules of procedure." ARIZ. CONST. art. IV, pt. 2 § 8. Pursuant to this constitutional authority, each chamber has adopted virtually identical rules that "authorize" the President and the Speaker "to bring or assert in any forum on behalf of the [Senate/House] any claim or right arising out of any injury to the [Senate's/House's] powers or duties under the constitution or laws of this state." Ariz. State Senate Rule 2(N); Ariz. House of Representatives Rule 4(K). When claims "fall within that authorization—that is the end of the matter so far as the judiciary is concerned." *Toma* v. *Fontes*, 2024 WL 3198827, at *5 (Ariz. Ct. App. June 27, 2024).

3. In March 2022, Arizona enacted the Save Women's Sports Act (the "Act"). *See* ARIZ. REV. STAT. § 15-120.02. The Act requires public schools—and private schools that compete against public schools—to designate sports teams as "males," "men," or "boys"; "females," "women," or "girls"; or "coed" or mixed"; "based on the biological sex of the students who participate on the team or in the sport." *Id.* at § 15-120.02(A). "Athletic teams or sports designated for "females", "women" or "girls" may not be open to students of the male sex." *Id.* at § 15-120.02(B).

The Senate passed the Act by a 16-13 margin. S. Journal, 55th Ariz. Leg., 2d Sess., at 91 (2022). The House passed the Act by a 31-24 margin. H.R. Journal, 55th Ariz. Leg., 2d Sess., at 299 (2022). The

Act took effect in September 2022. D. Ct. Doc. 127, ¶ 73.[1]

In January 2023, Warren Petersen and Ben Toma became the President of the Senate and Speaker of the House of Representatives, respectively. S. Journal, 56th Ariz. Leg., 1st Sess., at 3 (2023); H.R. Journal, 56th Ariz. Leg., 1st Sess. at 4 (2023). Both served as legislators, but not as President or Speaker, when the Act passed.

4. In April 2023, Plaintiffs Jane Doe and Megan Roe ("Plaintiffs") filed suit in the District of Arizona seeking a declaration that enforcement of the Act violated their rights under the Equal Protection Clause, Title IX, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. D. Ct. Doc. 1. The merits of Plaintiffs' challenge are not presented here; the preliminary injunction issued by the district court remains pending in the court of appeals. *See Doe* v. *Horne*, No. 23-16026 c/w No. 23-16030 (9th Cir.) (argued Mar. 14, 2024).

Plaintiffs sued four school-related defendants but only one state official, the State Superintendent of Public Instruction. D. Ct. Doc. 1, at ¶ 9. Just four days after Plaintiffs filed their complaint—and just one day after Plaintiffs served the State Superintendent, D. Ct. Doc. 17—the Attorney General of Arizona notified the State Superintendent that her office was disqualified from representing the State Superintendent in the lawsuit, D. Ct. Doc. 19-1. Despite authority to do so, the Attorney General refused to pay for the State Superintendent's counsel to defend the lawsuit. D. Ct. Doc. 40, at 3.

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[1] D. Ct. Doc. citations are to documents filed in *Doe v. Horne*, 4:23-cv-00185-JGZ (D. Ariz.).

After the Attorney General declined to defend the Act, the President and Speaker sought intervention in their official capacities pursuant to Ariz. Rev. Stat. § 12-1841 and chamber rules to defend the constitutionality of the Act. D. Ct. Doc. 19. At the time of intervention, the State Superintendent had not appeared in the litigation, and Plaintiffs had not alleged discriminatory motives by the Arizona State Legislature or any of its members. *See* D. Ct. Docs. 1, 3. The district court initially granted "permissive intervention on a limited basis to allow the Legislators to present argument and evidence in opposition to Plaintiffs' pending Motion for Preliminary Injunction." D. Ct. Doc. 79, at 1. The court later "allow[ed] [the President and Speaker] to represent their interests in the entirety of this action" and granted them party status. D. Ct. Doc. 142, at 1; *see also* D. Ct. Doc. 111, at 2.

5. The President and Speaker have defended the Act along with the State Superintendent, but their strategies have sometimes diverged. The President and Speaker moved to dismiss Plaintiffs' claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, D. Ct. Doc. 146; the State Superintendent filed an answer instead, D. Ct. Doc. 39. The President and Speaker attached three expert declarations to their opposition to the preliminary injunction, D. Ct. Docs. 38-3, 38-4, 38-5; the State Superintendent adopted the President's and Speaker's experts while he retained and prepared his own two experts, D. Ct. Doc. 73. The President and Speaker sought a stay of the preliminary injunction from the district court before they pursued appellate relief, D. Ct. Doc. 132; the State Superintendent did not. The President and Speaker served discovery on

Plaintiffs, D. Ct. Doc. 191-2, Ex. 7, D. Ct. Doc. 198-1, Ex. 1; the State Superintendent did not.

6. Discovery commenced with Rule 26(a)(1) initial disclosures. No party's initial disclosures identified the President or Speaker as a witness. D. Ct. Doc. 198-1, ¶ 13; D. Ct. Doc. 198-1, Ex. E (Plaintiffs' initial disclosures).

Six months into discovery, Plaintiffs informed the parties that they did not "plan to take any depositions of any fact witnesses from any of the Defendants in this litigation." D. Ct. Doc. 191-2, Ex. 9, at 3. Though no fact witness or party they sued merited a deposition, Plaintiffs demanded to depose the President and Speaker. D. Ct. Doc. 191-2, Ex. 9, at 3-4. Plaintiffs have admitted that the only purpose for these depositions is to explore the President's and Speaker's legislative motives relating to the challenged law. D. Ct. Doc. 191, at 9; Pet. App. 7A.

Plaintiffs also propounded written discovery on the President and Speaker. D. Ct. Doc. 191-2, Exs. 1, 2. The President and Speaker answered requests not protected by the legislative privilege or another privilege. D. Ct. Doc. 198-1, Exs. B, C. Since the legislative record already was public, D. Ct. Doc. 191-2, Ex. 7, at 16, the President and Speaker produced hundreds of emails from constituents concerning the Act. D. Ct. Doc. 191-2, Ex. 7, at 16. In all, the President and Speaker produced roughly 99 percent of the responsive documents, withholding only five documents out of more than 400, totaling just 14 pages. D. Ct. Doc. 198-1, at ¶ 7. All five withheld documents are communications sent by legislators or legislative staff. D. Ct. Doc. 191-2, Ex. 5 (documents 3, 6, 14, 15, and 18).

7. The President and Speaker objected to depositions and production of the remaining five documents on legislative privilege and *Morgan* doctrine grounds. D. Ct. Doc. 191-2, Ex. 7. Plaintiffs eventually moved for an order compelling the President and Speaker to provide this discovery, D. Ct. Doc. 191, which the district court granted on June 20, 2024, Pet. App. 3A-20A.

In ordering this discovery, the district court concluded that legislative motive evidence is relevant in Equal Protection cases. *Id.* at 7A-9A. As to legislative privilege, the district court started by saying the legislative privilege is qualified and waivable, and that such "[a] waiver ... *need not be explicit or unequivocal*." *Id.* at 9A-10A (emphasis added). The court then concluded the President and Speaker "waived their legislative privilege by voluntarily participating in this lawsuit and putting their intent at issue" by defending the law against Plaintiffs' Equal Protection challenge. *Id.* at 10A-13A. Likewise, the district held the *Morgan* doctrine inapplicable because the President and Speaker "voluntarily joined this lawsuit." *Id.* at 14A-15A.

The President and Speaker asked the district court to stay its decision pending appellate review, or in the alternative, to grant an administrative stay to allow the President and Speaker to seek relief from the court of appeals. D. Ct. Doc. 212. The district court denied the motion. Pet. App. 21A-24A.

8. On July 16, 2024, the President and Speaker filed their mandamus petition in the court of appeals, together with a motion for stay. Ct. App. Docs. 1, 4.[2]

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[2] Ct. App. Doc. citations are to documents filed in *In re Petersen*, 24-4335 (9th Cir.).

The President and Speaker asked the court of appeals for a writ to "prevent their depositions and production of five documents protected by the legislative privilege." Ct. App. Doc. 1, at 1.

On August 8, 2024, the court of appeals denied the petition and stay. Pet. App. 2A. In a single-sentence explanation, the court of appeals concluded that "Petitioners have not demonstrated a clear and indisputable right to the extraordinary remedy of mandamus." *Id.*

REASONS FOR GRANTING THE PETITION

The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable,"' and (3) 'the writ is appropriate under the circumstances.'" *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-81 (2004)) (brackets in original). The district court's decision meets all three criteria by compelling intrusive discovery into legislative motives—in defiance of centuries of clear and consistent precedent by this Court—merely because legislative branch leaders exercised their statutory right to defend a law's constitutionality. This Court should issue a writ of mandamus directly to the district court correcting these errors. *See id.* (stating that this Court may "issue the writ of mandamus directly to a federal district court.").

In the alternative, the Court should treat this application as a petition for certiorari and grant it to review the Ninth Circuit's denial of the President's and Speaker's mandamus petition. In rejecting the writ, the Ninth Circuit affirmed the district court's

reasoning, which is inconsistent with the precedents of this Court, and in conflict with decisions of the First, Fifth, Eighth, Eleventh, and District of Columbia Circuits on important, recurring issues of legislative privilege, as well as in conflict with decisions of the Fifth and District of Columbia Circuits on the *Morgan* doctrine. This Court can—and if it does not issue mandamus itself, should—construe this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' refusal to grant mandamus relief. This Court has granted such relief to block discovery of privileged documents, *In re United States*, 583 U.S. 29, 31 (2017) (granting petition for writ of certiorari), and to prevent a high-ranking official's deposition, *Dep't of Com.* v. *New York*, 139 S. Ct. 953 (2019) (granting petition for writ of certiorari before judgment).

I. The President and Speaker Have No Other Adequate Means to Attain Relief

Without relief from this Court, the district court's order is effectively unreviewable on appeal from final judgment. Since the Glorious Revolution, it has been recognized that for legislators to "enjoy the fullest liberty of speech," it is "indispensably necessary" that they "should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense." *Tenney*, 341 U.S. at 373 (quoting 2 WORKS OF JAMES WILSON 38 (James De Witt Andrews ed. 1896)). That includes "a possibly hostile judiciary." *Johnson*, 383 U.S. at 181.

Yet if the district court's order compelling the President and Speaker to sit for depositions and produce documents protected by the legislative privilege is allowed to take effect, the President and Speaker will be required to sit for depositions probing

their motives and thought processes, internal legislative discussions and documents will be revealed to adverse parties, the legislative privilege will be pierced, and the judiciary will have the opportunity to pass judgment on the legislators' motives and deliberations. "It would be difficult—if not impossible—to reverse the harm" from these disclosures. *Hollingsworth*, 558 U.S. at 195. "[T]he possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity," and "[t]his chill runs counter to the … purpose of" the privilege. *United States* v. *Rayburn House Off. Bldg.,* 497 F.3d 654, 661 (D.C. Cir. 2007).

In the same vein, there is no reversing violations of the *Morgan* doctrine—as *Morgan* itself shows. There, because the deposition had already occurred, this Court was left to disapprove that it had happened instead of provide relief. *See United States* v. *Morgan*, 313 U.S. 409, 422 (1941). An officer who "should never have been subjected to" a deposition, *id.*, can receive effectual relief only if he or she is never made subject to a deposition.

These circumstances "remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable … ." *Cheney*, 542 U.S. at 381.

II. The District Court Clearly and Indisputably Erred by Ordering Discovery of Legislative Motives from High-Ranking Legislators

The President's and Speaker's right to their privileges is "clear and indisputable." *Hollingsworth*, 558 U.S. at 190 (citation omitted). Based on its conclusion that legislative motive "is at issue due to the very nature of the claim," the district court ordered the President and Speaker to sit for

depositions and produce documents protected by the legislative privilege because "[t]his discovery may shed light on whether the Arizona legislature acted with a constitutionally permissible purpose in enacting [the Act]." Pet. App. 8A, 12A. The district court specifically approved Plaintiffs' request "to question the Intervenor-Defendants regarding their motives for passing [the Act]." *Id.* at 8A. This order contradicts centuries of settled authority zealously guarding the legislative privilege and rests on reasoning incompatible with that of numerous other circuits.

A. The district court clearly and indisputably erred by disregarding the legislative privilege and ordering discovery of legislative motives.

1. Respect for the legislative privilege and the bar against inquiry into legislative motives go hand-in-hand. The district court clearly erred by authorizing discovery of legislative motives.

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress." *Hamilton*, 251 U.S. at 161 (collecting cases). Since Chief Justice Marshall's opinion in *Fletcher* v. *Peck*, 10 U.S. at 131, it has "remained unquestioned" "that it was not consonant with our scheme of government for a court to inquire into the motives of legislators." *Lake Country Ests., Inc.*, 440 U.S. at 405 (quoting *Tenney*, 341 U.S. at 377); *see also McCray* v. *United States*, 195 U.S. 27, 59 (1904) ("It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into … ."); *Ex parte McCardle*, 74

U.S. 506, 514 (1868) ("We are not at liberty to inquire into the motives of the legislature.").

Inquiry into state legislators' motives is likewise prohibited. The Court has been clear: "[N]o inquiry may be made concerning the motives or wisdom of a state Legislature acting within its proper powers." *Arizona*, 283 U.S. at 455 n.7 (citing cases). The Court has "never allowed" inquiry into state legislator motives. *United States* v. *Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544–45 (1892) (rejecting challenge to Iowa law based on alleged improper legislative motives). So long as the legislature followed regular processes, inquiry into state legislators' "knowledge, negligence, methods, or motives" for legislation is forbidden. *Calder* v. *Michigan*, 218 U.S. 591, 598 (1910) (rejecting challenge to Michigan law based on alleged improper legislative motives).

"No inquiry," *Arizona*, 283 U.S. at 455 n.7, means no discovery. *See Gravel* v. *United States*, 408 U.S. 606, 628–29 (1972) (forbidding questioning of any witness "concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting"). The district court thus clearly erred by compelling discovery of legislative motives. Pet. App. 12A-13A. Contrary to the district court's conclusion that legislative motive is subject to discovery, *id.* at 8A, this Court has repeatedly and explicitly held that the legislative privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States* v. *Brewster*, 408 U.S. 501, 525 (1972).

It does not matter that this case involves an Equal Protection challenge. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an

alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). In fact, "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971). The pitfalls of using such evidence are well-established. "What motivates one legislator … is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 383-84. The legislative privilege "is insurmountable in private civil actions under section 1983" and does not hinge on "a subjective judgment of the case's importance." *Pernell* v. *Florida Bd. of Governors of State Univ.*, 84 F.4th 1339, 1344 (11th Cir. 2023) (citing decisions by four circuits rejecting arguments that the legislative privilege can be overcome).

Though the district court attempted to excuse its decision by distinguishing between probative value and discoverability, Pet. App. 8A-9A, *O'Brien* and *Palmer* demonstrate that legislative motive evidence has no probative value and thus is not discoverable. "The claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the [Speech or Debate] Clause, then the Clause simply would not provide the protection historically undergirding it." *Eastland*, 421 U.S. at 508–09.

2. The legislative privilege is a rare privilege with constitutional status at the federal, *see* U.S. CONST. art. I, § 6, and state levels, ARIZ. CONST. art. IV, pt. 2 § 7. Indeed, it has a deep-rooted history in Western legal tradition. "Since the Glorious Revolution in Britain, and throughout United States history, the [legislative] privilege has been recognized as an

important protection of the independence and integrity of the legislature." *Johnson*, 383 U.S. at 178 (citing Story, COMMENTARIES ON THE CONSTITUTION § 866 and 2 WORKS OF JAMES WILSON 37—38 (Andrews ed. 1896)). Demonstrating its importance, the Framers approved the legislative privilege in the Speech or Debate Clause "without discussion and without opposition,"[3] *id.* at 177 (citations omitted), and this Court extended it to state legislators litigating in federal court as a matter of federal common law, *Tenney*, 341 U.S. at 373-74. In civil actions, the legislative privilege for state legislators is coterminous with the protections provided by the Speech or Debate Clause. *Supreme Ct. of Virginia* v. *Consumers Union of U. S., Inc.*, 446 U.S. 719, 733 (1980) (citations omitted).

The legislative privilege creates an "absolute bar" to compelled disclosure from legislators. *Eastland*, 421 U.S. at 503; *Rayburn House Off. Bldg.*, 497 F.3d at 660. It is "incontrovertible" that the legislative privilege protects a legislator "from questioning elsewhere than in the [legislature]," and he or she "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred" in the legislature. *Gravel*, 408 U.S. at 615-16.

It is indisputable that Plaintiffs seek material protected by the legislative privilege. They "seek to question the [President and Speaker] regarding their motives for passing [the Act]" and "seek to discover information pertaining to the legislative history of

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[3] Almost all states, including Arizona, have adopted comparable provisions. *See Tenney*, 341 U.S. at 375 n.5 (citing state constitutions); ARIZ. CONST. art. IV, pt. 2 § 7.

[the Act] and the governmental purpose served by the law." Pet. App. 8A. These topics are clearly within the legislative privilege's protection for "acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525; *see also Gravel*, 408 U.S. at 624 ("anything 'generally done in a session of the House by one of its members in relation to the business before it'") (citation omitted).

3. In the First, Fifth, Eighth, Eleventh, and District of Columbia Circuits, the material sought by Plaintiffs would be privileged from discovery. The Ninth Circuit's refusal to do the same here is erroneous and splits with at least five other circuits.

The First Circuit issued mandamus to block depositions and documents sought from the speaker of the Rhode Island House of Representatives and another state representative relating to "legislative acts and underlying motives." *Am. Trucking Ass'ns, Inc.* v. *Alviti*, 14 F.4th 76, 87 (1st Cir. 2021). While agreeing that "interrogating the State Officials could shed light on and provide context concerning their subjective motivations and public comments," *id.* at 89, the court held that "the need for the discovery ... is simply too little to justify such a breach of comity." *Id.* at 90.

The Fifth Circuit applied legislative privilege to block discovery of more than 200 documents from Texas state legislators relating to challenged legislation. *La Union Del Pueblo Entero* v. *Abbott (LUPE I)*, 68 F.4th 228, 232, 239–40 (5th Cir. 2023). "[C]ourts are not to facilitate an expedition seeking to uncover a legislator's subjective intent in drafting, supporting, or opposing proposed or enacted legislation," the court reasoned. *Id.* at 238. Later in

the same case, the Fifth Circuit rejected discovery into "documents shared, and communications made," between Texas state legislators and a third party about challenged legislation. *La Union del Pueblo Entero* v. *Abbott (LUPE II)*, 93 F.4th 310, 323 (5th Cir. 2024).

LUPE II cited an Eighth Circuit decision: *In re North Dakota Legislative Assembly*, 70 F.4th 460 (8th Cir. 2023), *vacated as moot sub nom. Turtle Mountain Band v. North Dakota Legislative Assembly*, 2024 WL 3259672 (U.S. July 2, 2024). There, the Eighth Circuit issued mandamus prohibiting discovery seeking "documents and testimony from legislators and an aide concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota" that were protected by the legislative privilege. *Id.* at 463–64. The Eighth Circuit rejected the district court's use of a balancing test to determine whether to require deposition testimony "in lieu of the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege." *Id.* at 465. "Even where 'intent' is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole." *Id.*

Likewise, the Eleventh Circuit held that subpoenas seeking documents from the president of the Alabama Senate and the speaker of the Alabama House of Representatives should be quashed because the subpoenas' "sole reason for existing was to probe the subjective motivations of the legislators who supported" the challenged legislation. *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015). The legislative privilege, the court found, "applies with full force against requests for information about the motives for

legislative votes and legislative enactments." *Id.* The Eleventh Circuit reaffirmed that principle in *Pernell*, 84 F.4th at 1344. Chief Judge Pryor, pointing to cases from this Court, *Alviti*, *LUPE I*, *North Dakota*, and *Hubbard*, aptly summarized the law: The privilege "is insurmountable in private civil actions under section 1983." *Id.* at 1344–45.

The District of Columbia Circuit, likewise, has blocked discovery sought from federal legislators or legislative committees on at least seven occasions in analogous contexts. *See Musgrave* v. *Warner*, 104 F.4th 355, 365 (D.C. Cir. 2024); *In re Sealed Case*, 80 F.4th 355, 373 (D.C. Cir. 2023); *Jud. Watch, Inc.* v. *Schiff*, 998 F.3d 989, 993 (D.C. Cir. 2021); *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1203 (D.C. Cir. 2009); *Rayburn House Off. Bldg.*, 497 F.3d at 663; *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995); *MINPECO, S.A.* v. *Conticommodity Servs., Inc.*, 844 F.2d 856, 863 (D.C. Cir. 1988). Finding the "bar on compelled disclosure is absolute," the court emphasized that "a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." *Rayburn House Off. Bldg.*, 497 F.3d at 660. The judiciary "may not compel verbal testimony concerning legislative acts, [and] they may not force Members to hand over documentary evidence of those acts." *In re Sealed Case*, 80 F.4th at 365. The court also held that a private party "is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen." *Brown & Williamson Tobacco Corp.*, 62 F.3d at 421. Indeed, the legislative privilege "protects any document that

'comes into the hands of congress[members]' by way of 'legislative acts or the legitimate legislative sphere.'" *Musgrave*, 104 F.4th at 364 (citation omitted) (second quotation marks omitted).

To be sure, the D.C. Circuit's cases involve the U.S. Congress and thus "the separation of powers doctrine," while this case involves state legislators. *United States* v. *Gillock*, 445 U.S. 360, 370 (1980). But that does not matter in the civil context. Where, as here, state legislators invoke the privilege in a civil case, the scope of the privilege is equal "to that accorded Members of Congress under the Constitution." *In re N.D. Legislative Assembly*, 70 F.4th at 463.

Indeed, the Ninth Circuit's order even conflicts with its own circuit precedent. In other contexts, that court has blocked depositions and discovery sought from legislators to probe their motives. *See Lee* v. *City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018); *City of Las Vegas* v. *Foley*, 747 F.2d 1294, 1296, 1299 (9th Cir. 1984).

The district court's decision allowing discovery of legislative motives is thus "a major departure from the precedent rejecting the use of legislative motives." *Foley*, 747 F.2d at 1298. The district court clearly erred by granting discovery of legislative motives, and the Ninth Circuit clearly erred in refusing to issue mandamus—and, indeed, split with better-reasoned decisions of five other circuits that would have barred this discovery.

4. To avoid the overwhelming authority from multiple circuits applying the legislative privilege to Plaintiffs' discovery requests, the district court fashioned, and the Ninth Circuit approved, a rule that intervention automatically waives the privilege. This

is an unprincipled distinction out of step with this Court's precedents. It in no way distinguishes this case from numerous others, including those discussed above, applying the privilege in this context. It is clear error.

When it comes to the legislative privilege, "[t]he ordinary rules for determining the appropriate standard of waiver do not apply in this setting." *Helstoski*, 442 U.S. at 491. Indeed, the privilege may well be unwaivable. *See id.* At a minimum, any waiver must be an "explicit and unequivocal renunciation of the protection." *Id.*

"Explicit and unequivocal renunciation" is a high bar. In *Helstoski*, this Court ruled that a legislator had not waived his privilege even though he voluntarily testified eight times to a grand jury and produced documents. *Id.* at 482. Following *Helstoski*, circuit courts in both civil and criminal cases have rejected legislative privilege waiver arguments. *See, e.g.*, *Senate Permanent Subcomm. on Investigations* v. *Ferrer*, 856 F.3d 1080, 1086-87 (D.C. Cir. 2017) (filing lawsuit not waiver); *Brown & Williamson Tobacco Corp.*, 62 F.3d at 421 n.11 (radio interview not waiver); *United States* v. *Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (trial testimony not waiver).

The district court simply ignored *Helstoski*, saying "[a] waiver of legislative privilege need not be explicit or unequivocal." Pet. App. 10A. That determination infected the court's subsequent analysis, as it did not identify any "explicit or unequivocal renunciation" of the legislative privilege by the President or Speaker. *Id.* at 10A-13A. Rather, the district court's analysis centered on the President's and Speaker's act of intervention. *See id.*

Voluntarily participating in a judicial action, such as by intervention, is not an "explicit and unequivocal renunciation" of legislative immunity. *See Senate Permanent Subcomm. on Investigations*, 856 F.3d at 1086-87. In an action initiated by a legislative subcommittee, for example, a private party pointed to the lawsuit's filing to argue that "the Subcommittee necessarily accepted an implicit restriction on the Speech or Debate Clause by seeking to enlist the judiciary's assistance in enforcing its subpoena." *Id.* at 1087. This "argument lacks merit," ruled the D.C. Circuit. *Id.* The court reasoned that the subcommittee had not "invite[d] the courts' interference with constitutionally protected legislative activity." *Id.* Similarly, a legislator's voluntary participation before a grand jury on multiple occasions did not waive his legislative privilege. *See Helstoski*, 442 U.S. at 482. And the Fifth Circuit upheld the legislative privilege for documents possessed by an intervenor-defendant, *LUPE II*, 93 F.4th at 314, 325—a conflict with the lower courts' reasoning here.

Indeed, the district court's rule makes no sense on its own terms. Because privileges are always asserted in litigation, the mere fact of engaging in litigation cannot be sufficient to find waiver. A plaintiff does not, for example, waive attorney-client privilege by filing a lawsuit. It follows that legislators do not waive legislative privilege by intervening in a lawsuit.

Furthermore, finding waiver simply because of the fact of intervention vitiates this Court's recent holding in *Berger*, that federal courts should respect and permit state legislators to intervene in their official capacity to defend their State's interests when authorized to do so. A blanket rule that the legislative

privilege is automatically waived when the President and Speaker exercise their statutory right to defend the constitutionality of state law "risk[s] turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *Berger*, 597 U.S. at 191. Arizona has chosen the President and Speaker to defend the constitutionality of state law. ARIZ. REV. STAT. § 12-1841(A), (D).[4] Thus, Arizona's interests "will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." *Berger*, 597 U.S. at 191. Yet foisting upon the President and Speaker the Hobson's choice of surrendering their legislative privilege to defend state law, or deserting state law to preserve their legislative privilege, does just that; it provides powerful incentive discouraging intervention that no other litigant faces.

Moreover, this waiver rule will "tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably and quickly." *Id.* at 191-92. This case presents the perfect example. Just four days into this litigation, the Attorney General disqualified her entire office, D. Ct. Doc. 19-1; turned over the law's defense to the only state official named in the lawsuit (the State Superintendent), *id.*; and refused to pay for the State Superintendent's counsel to defend the lawsuit, despite authority to do so. D. Ct. Doc. 40, at 3. At the time the President and

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[4] Nothing in Ariz. Rev. Stat. § 12-1841 "provides that the [President or Speaker] forfeits its constitutional protections by seeking" intervention. *Senate Permanent Subcomm. on Investigations*, 856 F.3d at 1087.

Speaker exercised their statutory intervention right, the State Superintendent had not appeared, and no state official was defending the Act. Once he had appeared, the different litigation strategies between him and the President and Speaker "illustrate[] how divided state governments sometimes warrant participation by multiple state officials in federal court." *Berger*, 597 U.S. at 198.

In short, the President's and Speaker's intervention avoided the "risk [of] a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Berger*, 597 U.S. at 192. The district court's *per se* waiver rule penalizes that decision, and so increases the risk federal courts decide the constitutionality of state laws in litigation between "friendlies," or between plaintiffs and under-resourced State officials, thus undermining vital state sovereign interests.

In addition to state interests, the district court's rule disregards national concerns. "Respecting the States' 'plans for the distribution of governmental powers' also serves important national interests." *Id.* (alterations omitted) (quoting *Mayor of Phila.* v. *Educational Equality League*, 415 U.S. 605, 615 n.13 (1974)). For example, far from balancing federal authority, *see id.*, a *per se* waiver rule as applied to intervention would let the federal government engage in the same defendant-shopping as a private plaintiff. Thus, the federal government could use the courts to chip away at state sovereignty, denying States the ability "to accommodate government to local conditions and circumstances" and to function as "laboratories of 'innovation and experimentation' from which the federal government itself may learn and from which a 'mobile citizenry' benefits." *Id.* (quoting

Gregory v. *Ashcroft*, 501 U.S. 452, 458 (1991)). Finally, penalizing intervention by authorized State agents—no less than denying intervention—increases "the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests." *Id.*

Furthermore, lower courts' reasoning is uniquely applied to the legislative branch. No court decision has been found in which an executive branch actor—for example, the United States Department of Justice, a state attorney general, a governor, or a government agency—waived the executive privilege or deliberative process privilege by intervening. No court decision has been found in which intervention or appellate participation by a judge waived judicial immunity or privilege. The lower courts' rulings uniquely disfavor legislative bodies. The legislative privilege "preserve[s] the constitutional structure of separate, coequal, and independent branches of government" that is the foundation of the American political experience, at both the federal and state level. *Helstoski*, 442 U.S. at 491. "The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *Id.* By weakening the privilege, the Ninth Circuit and the district court disregarded the lessons learned in the Glorious Revolution and affirmed throughout centuries.

In the face of that precedent, the district court offered only one circuit-level case: *Powell* v. *Ridge*, 247 F.3d 520 (3d Cir. 2001). But *Powell* was not a waiver case; it held that the denial of legislative immunity does not give rise to immediate appeal under the collateral-order doctrine. *See id.* at 522. *Powell*

reasoned that "the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order." *Id.* at 525. That "privilege ... does not exist," according to the Third Circuit. *Id.*

The Third Circuit's decision can thus be understood as rejecting a claim of testimonial privilege plus immediate appellate review. Moreover, while the legislators in *Powell* intervened to provide their "unique perspective[s]" to the court, 247 F.3d at 522 (quotations omitted), the Third Circuit's opinion did not say that State law authorized the intervention—an important distinction given *Berger*.

Powell is thus, at best, only tangential support for the Ninth Circuit's affirmation of the automatic waiver rule the district court created. But in all events, it highlights the need for this Court's review. Reading *Powell* broadly brings it in square conflict with the precedents described above, resulting in a 5-2 circuit split on the ability of plaintiffs to receive discovery into legislative motives in situations like this case. Certiorari review is therefore appropriate even if mandamus does not issue—as it should. *See* Sup. Ct. R. 10(a).

* * *

The President and Speaker retain their legislative privilege when they intervene in federal court to defend state law. The district court clearly erred by ruling otherwise.

B. The district court clearly and indisputably erred by disregarding the *Morgan* doctrine and ordering depositions of high-ranking legislators.

1. The district court also clearly erred by not applying the *Morgan* doctrine to deny Plaintiffs' deposition requests. The *Morgan* doctrine stems from this Court's decision in *United States* v. *Morgan*, 313 U.S. 409 (1941). There, a district court authorized the Secretary of Agriculture's deposition over the government's objection; the Court ruled that the Secretary of Agriculture "should never have been subjected to this examination." *Id.* at 422. Separation-of-powers considerations motivated the conclusion that "it was not the function of the court to probe the mental processes of the Secretary." *Id.* (citation omitted). "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *Id.* (internal citation omitted).

The same respect is afforded to the legislative process. "Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Eastland*, 421 U.S. at 508 (citations omitted). Judicial review "should not go beyond the narrow confines of determining" whether the legislature "exceeded the bounds of legislative power" by an "obvious … usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney*, 341 U.S. at 378.

The *Morgan* doctrine applies to high-ranking legislators, as the district court conceded. Pet. App. 14A (citing *League of United Latin Am. Citizens* v. *Abbott* (*LULAC*), 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022)). In *LULAC*, the court applied the

Morgan doctrine to block the deposition of the speaker of the Texas House of Representatives. *Id.* at *2-3. As *LULAC* noted, every known federal court decision "applied the *Morgan* framework to deposition subpoenas targeted at legislative officials." *Id.* at *2 (citing *Blankenship* v. *Fox News Network, LLC*, 2020 WL 7234270, at *6-8 (S.D. W. Va. Dec. 8, 2020) (U.S. Senators); *Moriah* v. *Bank of China Ltd.*, 72 F. Supp. 3d 437, 438 (S.D.N.Y. 2014) (former U.S. House Majority Leader); *McNamee* v. *Massachusetts*, 2012 WL 1665873, at *1–2 (D. Mass. May 10, 2012) (U.S. Representative and his former Chief of Staff); *Feldman* v. *Bd. of Educ.*, 2010 WL 383154, at *1–2 (D. Colo. Jan. 28, 2010) (U.S. Senator)). "The United States has not directed the Court to any cases reaching the contrary conclusion; nor has the Court's independent research uncovered any such authority." *Id.* at *2.

Thus, every federal court to address the issue concluded the *Morgan* doctrine applied to high-ranking legislators and blocked depositions. It is undisputed that the President and Speaker are high-ranking legislators. Neither Plaintiffs nor the courts below identified any "extraordinary instances" that might demand testimony from the President or Speaker, and "even then such testimony frequently will be barred by privilege." *Vill. of Arlington Heights*, 429 U.S. at 268. The district court clearly erred by not blocking the depositions of the President and Speaker under the *Morgan* doctrine.

2. In three unsupported sentences, the district court concluded the *Morgan* doctrine did not apply solely because the President and Speaker "voluntarily joined this lawsuit." Pet. App. 14A-15A. According to the district court, "[t]he purposes underpinning the

Morgan doctrine simply do not apply when state legislators intentionally insert themselves as a party to the litigation." *Id.*

The district court cited no authority to support its conclusions, *see id.*, and no case has been found in which intervention waived the *Morgan* doctrine. The Ninth Circuit's order upholding the district court's decision conflicts with a decision by the D.C. Circuit, in which a high-ranking official successfully blocked a deposition ordered after she intervened in the case. *In re Clinton*, 973 F.3d 106, 109 (D.C. Cir. 2020) (writ of mandamus granted to intervenor former Secretary of State). The Ninth Circuit's order that joining the litigation subjects the President and Speaker to a deposition also runs counter to a Fifth Circuit decision that "reject[ed] the proposition that an administrative agency subjects its high-level officials to discovery when it brings a declaratory judgment action intended to give effect to an agency decision." *In re F.D.I.C.*, 58 F.3d 1055, 1062 (5th Cir. 1995). And by ordering depositions of the President and Speaker because they are now parties, the Ninth Circuit's order is at odds with decisions of the Fifth and Tenth Circuits, and even itself, applying the *Morgan* doctrine to block depositions of high-ranking officials. *See In re Paxton*, 60 F.4th 252, 259 (5th Cir. 2023) (Texas Attorney General); *In re Off. of the Utah Att'y Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022) (Utah Attorney General); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 706 (9th Cir. 2022) (former Secretary of Education).

III. The Writ Is Appropriate Under the Circumstances.

A writ of mandamus is "appropriate under the circumstances" because of the "importance of the issues at stake" and the district court's clear errors.

Hollingsworth, 558 U.S. at 190. The district court's order authorizes inquiry into legislative motives and adopts a rule that the President and Speaker waive their legislative privilege whenever they exercise their statutory right to intervene in defense of state law. Pet. App. 8A, 10A. Because loss of the privilege will impact future decisions by legislators to intervene in defense of state laws, the district court's ruling "evince[s] disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials." *Berger*, 597 U.S. at 191.

A writ is appropriate to address these extraordinary rulings. "Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382 (citation omitted). Writs also are warranted when the issue would "threaten the separation of powers." *Id.* at 381. While the district court's ruling applies to a state legislative branch, its reasoning is equally applicable to intervention by Congress, and thus threatens both principles of federalism and the separation of powers. In addition, Arizona's "interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." *Berger*, 597 U.S. at 191. "Respecting the States' 'plans for the distribution of governmental powers' also serves important national interests." *Id.* at 192 (alterations omitted) (quoting *Mayor of Phila.*, 415 U.S. at 615 n.13).

These issues raise "question[s] of public importance," *Hollingsworth*, 558 U.S. at 190, and make the writ appropriate under these circumstances.

CONCLUSION

The Court should issue a writ of mandamus to the district court, ordering it to halt depositions and document productions from the President and Speaker. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decision denying the petition for a writ of mandamus below.

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APPENDIX

APPENDIX

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Mandamus and Motion for Stay Pending Appeal, Ct. App. Doc. 9.1 (August 8, 2024) 1A

Order of the United States District Court for the District of Arizona Granting Plaintiffs' Motion to Compel, D. Ct. Doc. 211 (June 20, 2024) 3A

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-4335
D.C. No. 4:23-cv-185
District of Arizona, Tucson

In re: WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representative.

WARREN PETERSEN, Senator, President of the Arizona State Senate and BEN TOMA, Representative, Speaker of the Arizona House of Representative,

Petitioners.

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON,

Respondent.

HELEN DOE, parent and next friend of Jane Doe; et al.,

Real Parties in Interest.

ORDER

Before: SCHROEDER, M. SMITH, and HURWITZ, Circuit Judges.

Petitioners have not demonstrated a clear and indisputable right to the extraordinary remedy of mandamus. *See In re Mersho*, 6 F.4th 891, 897 (9th Cir. 2021) ("To determine whether a writ of mandamus should be granted, we weigh the five factors outlined in *Bauman v. United States District Court*."); *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). The petition is denied.

The motion (Docket Entry No. 4) to stay is denied as moot.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-23-00185-TUC-JGZ

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

ORDER

Pending before the Court are Plaintiffs' Motion to Compel Discovery as to Intervenor-Defendants (Doc. 191) and Motion for a Protective Order (Doc. 196).[1] Both motions are fully briefed. (Doc. 191, 198, 200, 196, 199, 201.) For the following reasons, the Court will grant the Motion to Compel and grant in part and deny in part the Motion for Protective Order.

I. BACKGROUND

The Plaintiffs filed suit on April 17, 2023, alleging that A.R.S. § 15-120.02, a law that prohibits transgender girls from competing on girls' school

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[1] The Plaintiffs also filed a Second Motion for Extension of Time to Complete Discovery. (Doc. 205.) The Court granted this request during oral argument on May 7, 2024. (Doc. 207.)

sports teams, violates their rights under the Equal Protection Clause, Title IX, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (RA). (Doc. 1.) Plaintiffs named five defendants in their Complaint: (1) Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction; (2) Laura Toenjes, in her official capacity as Superintendent of the Kyrene School District; (3) the Kyrene School District; (4) the Gregory School; and (5) the Arizona Interscholastic Association (AIA).[2] (*Id.*)

Before any defendant made an appearance, Senator Warren Peterson, President of the Arizona State Senate, and Representative Ben Toma, Speaker of the Arizona House of Representatives, filed a Motion to Intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. (Doc. 19.) The Court initially granted President Peterson and Speaker Toma limited intervention and allowed them to present arguments and evidence in opposition to the Plaintiffs' Motion for Preliminary Injunction. (Doc. 79.) Later, the Court amended its decision and allowed President Peterson and Speaker Toma to participate fully as a party in the litigation. (Doc. 111, 142.)

The Intervenor-Defendants have fully participated in this action. On September 12, 2023, in lieu of an answer, Intervenor-Defendants filed a motion to dismiss the complaint for failure to state a claim. (Doc. 146 at 10.) Since October 2023, the Intervenor-Defendants have actively participated in discovery.

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[2] Laura Toenjes and the Kyrene School District filed a Stipulation in lieu of Answer, informing the Court that they will not be active participants in this case. (Doc. 59 at 2.)

On October 30, 2023, the Plaintiffs served nine Interrogatories and nine Requests for Production on the Intervenor-Defendants. (Doc. 191 at 8.) On November 13, 2023, the Intervenor-Defendants served twenty-one Requests for Admissions, ten Interrogatories, and five Requests for Production on each Plaintiff. (*Id.*) The Intervenor-Defendants also served three Requests for Production and twelve Interrogatories on AIA. (*Id.*)

The pending motions center on the Intervenor-Defendants' objections to Plaintiffs' discovery requests. In their November 29, 2023 responses, the Intervenor-Defendants objected to several Requests for Production on the basis of legislative privilege and deliberative process privilege. (*Id.*) On February 8, 2024, the Intervenor-Defendants objected to Plaintiffs' requests to depose them on the basis of legislative privilege, the *Morgan* doctrine, and relevance. (Doc. 191-2 at 95-97.)

After the parties conferred, the Plaintiffs filed the instant Motion to Compel requesting that the Court order the Intervenor-Defendants to produce the documents at issue and to submit to depositions. (Doc. 191.) In their opposition, the Intervenor-Defendants stated that if this Court grants the Plaintiffs' Motion to Compel, they will seek to depose minor Plaintiffs Jane Doe and Megan Roe. (Doc. 199 at 1.) In response, the Plaintiffs filed their Motion for Protective Order requesting that the Court preclude the Intervenor-Defendants from deposing the minor Plaintiffs, or, in the alternative, set reasonable limits on any depositions. (Doc. 196.)

Oral argument on the Motions was held on May 7, 2024. (Doc. 207.) At the hearing, the parties informed the Court that many disputes had been resolved and

issues remain only with respect to the production of five documents,[3] the proposed depositions of the Intervenor-Defendants, and the proposed depositions of the minor Plaintiffs. (*Id.*) The parties requested that the Court conduct an in-camera review of the five contested documents. The Court granted the parties' request and has reviewed the documents in camera.

II. DISCUSSION

A. Motion to Compel

The Intervenor-Defendants oppose the Plaintiffs' discovery requests, arguing that (1) neither the five documents at issue nor their potential testimony are relevant to the Plaintiffs' claims; (2) the documents are protected from disclosure under legislative privilege; (3) Document 15 is also protected by the deliberative process privilege; and (4) the Intervenor-Defendants cannot be deposed due to legislative privilege and the *Morgan* doctrine. (*See* Doc. 198.)

1. Legal Standards

Federal Rule of Civil Procedure 26(b)(1) permits a party to discover information about "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The party seeking to compel discovery has the initial burden of establishing that the discovery sought is relevant. *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 81 (D. Ariz. 2022). This "is a relatively low bar." *Id.* A party asserting an evidentiary privilege "has the burden to

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[3] The five documents (3, 6, 14, 15, and 18) are described in the Intervenor-Defendants' Privilege Log and consist of emails to Arizona legislators about the enactment of A.R.S. § 15-120.02, one with "talking points" about the Save Women's Sports Act. (Doc. 191-2 at 55-60.)

demonstrate that the privilege applies to the information in question." *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 667 (D. Ariz. 2016).

2. Relevance

The Plaintiffs argue that the contested documents and the information sought through depositions are highly relevant in determining the Intervenor-Defendants' intent in drafting and supporting A.R.S. § 15-120.02. (Doc. 191 at 14.) The Plaintiffs state that "the 'heart' of this case is determining the [law's] constitutionality, which may involve a determination of what the legislators' motives were in passing [A.R.S. § 15-120.02]." (*Id*. at 12.) The Plaintiffs assert the discovery requests are "reasonably calculated to uncover '[w]hat motivated the Arizona legislature to act.'" (*Id*. at 14 (quoting *Mi Familia Vota v. Hobbs*, 682 F. Supp. 3d 769, 784-85 (D. Ariz. 2023).)

"Legislative motive is relevant in Equal Protection claims." *Vision Church v. Vill. of Long Grove*, 226 F.R.D. 323, 326 (N.D. Ill. 2005); see also *Mi Familia Vota v. Hobbs*, 682 F. Supp. 3d at 784–85 (explaining that the legislature's purpose in enacting state voting laws was "at the heart" of plaintiffs' Equal Protection challenge); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1292 (7th Cir. 1996) ("In an Equal Protection Clause analysis . . . courts often inquire into the motives of legislators or other government actors."); *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (proof of legislative intent is "relevant and extremely important as direct evidence."). Courts have recognized the relevance of discovering legislative materials in Equal Protection cases. *See Bethune-Hill*, 114 F. Supp. 3d at 339 ("[A]ny documents containing the opinions and subjective

beliefs of legislators or their key advisors would be relevant to the broader inquiry into legislative intent."); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1071 (D. Ariz. 2014) ("Motive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of discriminatory intent."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) ("[C]ontemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" may be relevant to determining legislative intent).

The Court concludes that the discovery Plaintiffs seek is relevant to their Equal Protection claim. Plaintiffs seek to discover information pertaining to the legislative history of A.R.S. § 15-120.02 and the governmental purpose served by the law. (Doc. 191 at 14.) The email correspondence between legislators directly relates to the adoption of A.R.S. § 15-120.02. *Id*. The Plaintiffs seek to question the Intervenor-Defendants regarding their motives for passing A.R.S. § 15-120.02. *Id*. This discovery may shed light on whether the Arizona legislature acted with a constitutionally permissible purpose in enacting A.R.S. § 15-120.02.

The Intervenor-Defendants argue that the discovery sought is not relevant because the motivation of one legislator cannot be attributed to the whole. (Doc. 198 at 5 ("The statements of a handful of lawmakers" are generally insufficient to show discriminatory intent because they "may not be probative of the intent of the legislature as a whole.") (quoting *United States v. Carillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023).) However, whether a

document is discoverable and whether it constitutes probative evidence are two different inquiries guided by different principles. *Carillo-Lopez* considers the probative value of particular types of evidence of legislative intent; it does not address whether evidence of legislative intent is discoverable. *See Carillo-Lopez*, 68 F.4th at 1140-41. Of course "courts must use caution when seeking to glean a legislature's motivations from the statements of a handful of lawmakers," but "that does not mean evidence of an individual legislator's motive is irrelevant to the question of the legislature's motive." *Mi Familia Vota*, 343 F.R.D. at 88; *see also Mi Familia Vota*, 682 F. Supp. 3d at 785 (the fact that statements by individual lawmakers may alone be insufficient to establish the motivation of the legislature does not eliminate the relevance of such statements); *Bethune-Hill*, 114 F. Supp. 3d at 339–40 ("[I]t may be true that 'the individual motivations' of particular legislators may be neither necessary nor sufficient for Plaintiffs to prevail," but "that does not mean that the 'evidence cannot constitute an important part' of the case presented.).

3. Legislative Privilege

Legislative privilege is a qualified privilege that shields legislators from the compulsory evidentiary process. *Mi Familia Vota*, 682 F. Supp. 3d at 782; *see also Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (holding that depositions of local legislators are barred by legislative privilege even in "extraordinary circumstances."); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984) (holding that a corporation's effort to depose city officials to determine their individual motives for enacting a zoning ordinance was precluded under legislative

privilege). Legislative privilege is a personal one and may be asserted or waived by each individual state legislator. *Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012). A waiver of legislative privilege need not be explicit or unequivocal, rather, waiver can occur when a party testifies as to otherwise privileged matters, shares privileged communications with outsiders, or through a party's litigation conduct in a civil case. *See Favors*, 285 F.R.D. at 212; *Singleton v. Merrill*, 576 F. Supp. 3d 931, 942 (N.D. Ala. 2021).

The Court concludes that the Intervenor-Defendants waived their legislative privilege by voluntarily participating in this lawsuit and putting their intent at issue. The Court finds *Mi Familia Vota v. Fontes*, 2023 WL 8183557 (D. Ariz. Sept. 14, 2023) persuasive. There, two legislators voluntarily intervened in a lawsuit to defend the state voting laws. *Id.* at *2. In rejecting the legislators' objections to producing documents and sitting for depositions, the court concluded that the legislators could not "actively participate in this litigation yet avoid the burden of discovery regarding their legislative activities." *Id.* The court explained that "the only reasonable inference from the Legislators' litigation conduct is that they have decided to forego [legislative privilege] in pursuit of an opportunity to defend in court their decisions as legislators." *Id.* at *3 (quoting *Singleton*, 576 F. Supp. 3d at 941).

As was the case in *Mi Familia Vota v. Fontes*, the Intervenor-Defendants "are not seeking immunity from this suit," but rather seek to "actively participate in this litigation while avoiding the burden of discovery regarding their legislative activities." *See* 2023 WL 8183557 at *2 (quoting *Powell v. Ridge*, 247 F.3d 520, 525 (3rd Cir. 2001). As in *Mi Familia Vota*,

the Plaintiffs did not seek discovery from the Intervenor-Defendants until they intervened in this action. In moving to intervene, the Intervenor-Defendants emphasized their "unique interest in defending the constitutionality of laws duly enacted by the Arizona legislature." (Doc. 19 at 1.) Finally, like *Mi Familia Vota*, the Intervenor-Defendants put their legislative intent at issue in their assertions that (1) the law does not discriminate on the basis of transgender status, (Doc. 82 at 13), and (2) the purpose of the law is to "redress past discrimination against women in athletics" and "promote equality of athletic opportunity between the sexes" in school sports. (Doc. 19 at 12).

The Intervenor-Defendants argue that *Mi Familia Vota* is distinguishable. They claim they had a heightened interest in intervening in this case because the Arizona Attorney General disqualified herself from defending A.R.S. § 15-120.02. The Intervenor-Defendants also argue that they did not put their motives at issue and that the Plaintiffs have not alleged discriminatory intent in this suit. (Doc. 198 at 6, 8.) These arguments are unpersuasive.

Whether the Intervenor-Defendants had an interest or a heightened interest in intervention is of no moment. They intervened in this litigation voluntarily. Under Arizona law, the Speaker and President are "entitled to be heard" "[i]n any proceeding in which a state statute … is alleged to be unconstitutional." A.R.S. § 12-1841(A). The Speaker and President may, in their discretion, (1) intervene as a party, (2) file briefs in the lawsuit, or (3) "*choose not to participate*" in the lawsuit. A.R.S. § 12-1841(D) (emphasis added). The Intervenor-Defendants chose

to intervene.[4] Furthermore, although Attorney General Mayes disqualified herself from defending the law, she authorized Defendant Horne, a named defendant in the Plaintiffs' Complaint, to defend the law.[5] At the time intervention was granted, Defendant Horne had already retained counsel, filed several motions, answered the complaint, and confirmed his intention to vigorously defend this lawsuit. (*See* Doc. 20, 21, 24, 31, 39, 42, 57, 58, 66, 67, 71, 72, 73.)

Whether the Plaintiffs alleged in their Complaint that the legislature acted with discriminatory intent is similarly irrelevant. Legislative purpose and motive is at issue due to the very nature of the claim. In this Equal Protection challenge, the government must establish that its sex-based classification is substantially related to an important government objective. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019). The Intervenor-Defendants assert that the law is substantially related to "redress[ing] past discrimination against women in athletics" and "promot[ing] equality of athletic opportunity between the sexes" in school sports. (Doc. 82 at 12.) Plaintiffs

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[4] While the Intervenor-Defendants have not yet filed an answer in this case, as was the case in *Mi Familia Vota*, they did file a Motion to Intervene (Doc. 19), Response to the Plaintiffs' Motion for Preliminary Injunction (Doc. 82), and a Motion to Dismiss Plaintiffs' claims (Doc. 146).

[5] Under A.R.S. § 41-192(E), in the event that the attorney general is disqualified, "the state agency is authorized to make expenditures and incur indebtedness to employ attorneys to provide the representation or services."

properly seek evidence in discovery to evaluate the support for the Intervenor-Defendants' assertions.

4. Deliberative Process Privilege

The Intervenor-Defendants argue that deliberative process privilege provides an additional basis for precluding the disclosure of Document 15. (Doc. 198 at 15-17.)

Deliberative process privilege is a form of executive privilege that shields from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 150 (1975)) (emphasis added). The purpose of deliberative process privilege is to protect government agencies from being "forced to operate in a fishbowl." *Id*. (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). Deliberative process privilege does not apply here because it is an executive privilege rendering executive agencies immune from normal disclosure or discovery in civil litigation.

5. The *Morgan* Doctrine

The Intervenor-Defendants argue that the *Morgan* doctrine provides an independent basis for denying the Plaintiffs' deposition requests. (Doc. 198 at 12-15.)

The *Morgan* doctrine specifies that a party may not involuntarily depose "a high-ranking government official" absent "exceptional circumstances." *United States v. Morgan*, 313 U.S. 409 (1941). Judges "generally only consider subjecting a high-ranking government official to a deposition if the official has first-hand knowledge related to the claims being

litigated and other persons cannot provide the necessary information." *Freedom from Religion Found., Inc. v. Abbott*, 2017 WL 4582804, at *11 (W.D. Tex. Oct. 13, 2017). The purpose of the *Morgan* doctrine is to allow high ranking government officials to serve in their official capacities without being "unduly entangled in civil litigation." *In re Gold King Mine Release in San Juan Cnty.*, 2021 WL 3207351, at *2 (D.N.M. Mar. 20, 2021).

The Intervenor-Defendants cite *League of United Latin Am. Citizens v. Abbott*, 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022), to support their assertion that the *Morgan* doctrine protects them from being deposed. In *Abbott*, the plaintiffs alleged that the redistricting plans adopted by the Texas Legislature violated the Equal Protection Clause and sought to depose the Speaker, General Counsel, and Parliamentarian of the Texas House of Representatives about their motives. *Id.* at *2. The court held that the *Morgan* doctrine prevented plaintiffs from deposing the state legislators because "[c]ourts are supposed to insulate high-ranking government officials 'from the constant distraction of testifying in lawsuits' in part because we need the government to function.'" *Id.* (quoting *Jackson Mun. Airport Auth. v. Reeves*, 2020 WL 5648329, at *3 (S.D. Miss. Sept. 22, 2020).

The *Morgan* doctrine does not apply here because the Intervenor-Defendants voluntarily joined this lawsuit. There is no need to insulate the Intervenor-Defendants from the distraction of this lawsuit because they requested to participate in the action. The purposes underpinning the *Morgan* doctrine simply do not apply when state legislators

intentionally insert themselves as a party to the litigation.

In conclusion, the Court holds that (1) the discovery sought by the Plaintiffs is relevant to their Equal Protection claim; (2) the Intervenor-Defendants waived their legislative privilege; (3) deliberative process privilege does not apply to Document 15; and (4) the *Morgan* doctrine does not protect Intervenor-Defendants from being deposed. Accordingly, the Intervenor-Defendants must produce documents 3, 6, 14, 15 and 18 and submit to deposition.

B. Motion for Protective Order

Plaintiffs move for a protective order to prevent Intervenor-Defendants from deposing minor Plaintiffs.[6] (Doc. 196 at 2.) In the alternative, Plaintiffs request that the Court set reasonable limits on such depositions. (*Id.*) The Court will allow Intervenor-Defendants to depose minor Plaintiffs but impose limitations.

1. Intervenor-Defendants may depose minor Plaintiffs.

Plaintiffs' counsel argues that allowing Intervenor-Defendants to depose minor Plaintiffs would subject them to "embarrassment, oppression, or undue burden." (Doc. 196 at 5.) Plaintiffs' counsel also argues that Intervenor-Defendants can obtain

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[6] Intervenor-Defendants asserted that if Plaintiffs are permitted to depose them, then they will seek to depose the minor Plaintiffs. (Doc. 199 at 1.) At hearing on the motions, Intervenor-Defendants stated that they had refrained from deposing Plaintiffs believing it would subject the legislators to being deposed. Intervenor-Defendants explain that if the Court orders their depositions, they wish to proceed with deposing the minor Plaintiffs.

relevant information by deposing the minor Plaintiffs' mothers. (*Id.*) Intervenor-Defendants respond that "it is well settled that a defendant has the right to depose the plaintiff." (Doc. 199 at 3.) Intervenor-Defendants argue that depositions of the minor Plaintiffs are permissible under Rule 26 because the information sought is relevant and non-privileged. (*Id.*)

Federal Rule of Civil Procedure 26(b)(1) permits a party to discover information about "any matter, not privileged, which is relevant to the subject matter involved in the pending action" regardless of its admissibility at trial. Fed. R. Civ. P. 26. Additionally, Rule 30(a)(1) provides that "[a] party may, by oral questions, depose any person, including a party, without leave of court" subject to the restrictions set forth therein. Fed. R. Civ. P. 30. Depositions are ordinarily allowed unless it is clear the information sought has no possible bearing on the matter at hand. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1031 (E.D. Cal. 2010).

The court may proscribe or limit discovery to prevent abuse. *See* Fed. R. Civ. P. 26(c). Under Rule 26(c), upon a showing of good cause, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The court has broad discretion to decide when a protective order is appropriate and what degree of protection is required. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The court considers all factors to determine whether the totality of the circumstances justifies the entry of a protective order. *Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016).

The Court concludes that Intervenor-Defendants may depose the minor Plaintiffs. See *Edgin on behalf*

of I.E. v. Blue Valley USD 220, 2021 WL 1750861, at *2 (D. Kan. May 4, 2021) (permitting the deposition of a minor stating "it's highly unusual to entirely preclude a deposition, particularly of a named party in the case."); *Hamilton v. Southland Christian Sch., Inc.*, 2011 WL 13143561, at *3 (M.D. Fla. Apr. 18, 2011) ("The great weight of the decisions permit a deposition when children are parties or witnesses to the claims in dispute, with reasonable restrictions."); *Kuyper v. Board of County Com'rs of Weld County*, 2010 WL 4038831, *1–2 (D. Colo. Oct. 14, 2010) (allowing deposition of seven year old victim of assault four years earlier by violent foster child placed in victim's home, in suit against county); *Graham v. City of New York*, 2010 WL 3034618, *4–5 (E.D. N.Y. Aug. 3, 2010) (allowing deposition to proceed "cautiously and sensitively" of seven year old child who three years earlier had witnessed police forcibly remove his father from the car, handcuff him, and place him in a police vehicle, leaving child alone, in civil rights suit against police); *Gray v. Howlett Lumber Co.*, 2007 WL 2705748 (Mass. Super. Aug. 9, 2007) (allowing deposition of ten-year-old child, who was principal witness to death of sibling which was the basis for the suit, while imposing reasonable restrictions); *In re Transit Management of Southeast Louisiana, Inc.*, 761 So.2d 1270 (La. 2000) (allowing deposition despite seven-year-old child's physician's opinion that deposition would cause considerable mental stress, in personal injury action). While the Court agrees that Intervenor-Defendants' depositions of minor Plaintiffs may go forward, the Court will impose reasonable limitations.

2. Intervenor-Defendants shall comply with the court-imposed limitations.

If the minor Plaintiffs are to be deposed, Plaintiffs' counsel proposes three limitations:

1. Intervenor-Defendants cannot pursue questioning concerning either the legitimacy or the appropriateness of the minor Plaintiffs' medical and/or mental health treatment;
2. Intervenor-Defendants cannot refer to the minor Plaintiffs' medical records and letters from mental health providers or ask questions about the contents of those records/letters; and
3. Intervenor-Defendants cannot ask questions referencing sexual abuse, assault, or misconduct.

(Doc. 196 at 7-8.)

Intervenor-Defendants oppose Plaintiffs' proposed limitations stating that the limitations would preclude Intervenor-Defendants from obtaining relevant and non-privileged information. (Doc. 199 at 3.) However, at hearing, Intervenor-Defendants could not identify any relevant information that that would be precluded by Plaintiffs' first and third limitations.[7]

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[7] When asked at oral argument to provide examples of some questions that the first limitation would prevent, Intervenor-Defendants responded: (1) You (minor Plaintiff) mentioned that you had difficulty concentrating and thinking, can you just tell us about that? (2) You say gender dysphoria interferes with your neurological functioning, can you explain what that means? (May 7, 2024, Hearing, Unofficial Transcript at 50 ¶¶ 3-6.) Intervenor-Defendants' proffered questions would not be precluded by the first limitation because the questions do not relate to the *legitimacy* or the *appropriateness* of the minor Plaintiffs' medical and/or mental health treatment. As Intervenor-Defendants have not identified any relevant information that would be precluded by the first condition, Intervenor-Defendants are precluded from questioning Plaintiffs about the legitimacy and/or the appropriateness of their medical and/or mental health

Thus, the Court will impose proposed limitations 1 and 3.

With respect to limitation 2, Intervenor-Defendants and Defendant AAIA did identify relevant information that they might seek in follow up questions to the minor Plaintiffs.[8] Consequently, the Court will allow Intervenor-Defendants to reference the minor Plaintiffs' medical records and letters from mental health providers to the extent that it is necessary to confirm or clarify the record.

III. CONCLUSION

For the foregoing reasons,

IT IS ORDERED Plaintiffs' Motion to Compel (Doc. 191) is **granted**.

IT IS FURTHER ORDERED Plaintiffs' Motion for Protective Order (Doc. 196) is **granted in part**

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treatment. As the Court previously noted, the "appropriateness of medical treatment for gender dysphoria is not at issue in this case." (Doc. 127 at 17.)

[8] Intervenor-Defendants stated that while they do not intend to reference Plaintiffs' medical records, it may become necessary if "somebody denies something and we have to bring it up just to get everyone on the same page." (May 7, 2024, Hearing, Unofficial Transcript at 51 ¶¶ 11-13.) When asked for examples of the types of questions that this limitation might interfere with, Intervenor-Defendants proffered: (1) How tall are you (minor Plaintiff) compared to other people in your grade? (2) What percentile is that vis-à-vis your peers? (3) Do you think being tall gives you an advantage when you are running or playing basketball? (May 7, 2024, Hearing, Unofficial Transcript at 51 ¶25; 52 ¶¶ 1-4.) The Court finds that this line of questioning may be relevant to Intervenor-Defendants' defenses, specifically, whether A.R.S. § 15-120.02 is substantially related to an important government interest. *See Karnoski*, 926 F.3d at 1200–01; *Craig*, 429 U.S. at 197.

and denied in part. Intervenor-Defendants may depose minor Plaintiffs, subject to the following limitations:

1. Intervenor-Defendants shall not question minor Plaintiffs about the legitimacy or the appropriateness of the Plaintiffs' medical and/or mental health treatment.
2. Intervenor-Defendants may reference the minor Plaintiffs' medical records and/or letters from mental health providers only to the extent that it is necessary to confirm or clarify the record.
3. Intervenor-Defendants shall not ask the minor Plaintiffs any questions regarding sexual abuse, assault, or misconduct.

IT IS FURTHER ORDERED re-setting the remaining case deadlines as follows:

1. Plaintiffs' Disclosure of Rule 26(a)(2) Expert Witnesses Material: August 12, 2024;
2. Close of Fact Discovery: August 20, 2024
3. Disclosure of Lay Witnesses: August 20, 2024
4. Defendants' Disclosure of Rule 26(a)(2) Expert Witnesses Material: September 11, 2024
5. Rebuttal Expert Opinions: October 25, 2024
6. Close of Expert Discovery: December 30, 2024
7. Dispositive Motions: January 28, 2025.

Dated this 20th day of June, 2024.

/s/ Jennifer Zipps
Jennifer G. Zipps
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-23-00185-TUC-JGZ

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

ORDER

On June 20, 2024, this Court granted Plaintiffs' Motion to Compel Discovery and ordered Intervenor-Defendants to produce certain documents and sit for depositions. (Doc. 211.) On June 21, 2024, Intervenor-Defendants filed a Motion for Stay Pending Appeal stating their intention to seek a Writ of Mandamus from the Ninth Circuit Court of Appeals. (Doc. 212.) If their Motion for Stay is denied, Intervenor-Defendants request this Court grant a 21-day administrative stay to allow time for the Ninth Circuit to consider a motion for stay and request for administrative stay. (*Id.*) Plaintiffs oppose the Motion. (Doc. 214.) For the following reasons, the Court will deny Intervenor-Defendants' Motion for

Stay Pending Appeal and Request for Administrative Stay.

Mandamus is a "drastic" remedy reserved for "extraordinary situations." *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654 (9th Cir. 1977). A petitioner must demonstrate that the "right to issuance of the writ is clear and indisputable." *Bozic v. U.S. Dist. Ct. (In re Bozic)*, 888 F.3d 1048, 1052 (9th Cir. 2018). The Ninth Circuit considers five factors when examining a petition for issuance of a writ of mandamus: whether (1) Petitioners have "no other adequate means, such as a direct appeal, to attain the relief ... desire[d]"; (2) Petitioners "will be damaged or prejudiced in a way not correctable on appeal"; (3) the "district court's order is clearly erroneous as a matter of law"; (4) the "order is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and (5) the "order raises new and important problems, or issues of law of first impression." *Bauman*, 557 F.2d at 654-55. The absence of factor three will always defeat a petition for mandamus. *Sussex v. U.S. Dist. Ct. (In re Sussex),* 781 F.3d 1065, 1071 (9th Cir. 2015).

When considering whether to grant a stay pending appeal, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation omitted). "[A] movant's failure to satisfy the stringent standard for demonstrating a substantial likelihood of success on the merits is an arguably fatal flaw for a stay

application." *M.M.V. v. Barr*, 459 F. Supp. 3d 1, 4 (D.D.C. 2020).

The Intervenor-Defendants have not made a substantial showing that they are likely to succeed on a request for the extraordinary relief of mandamus. In granting Plaintiffs' Motion to Compel, the Court concluded that: (1) the Intervenor-Defendants waived their legislative privilege by intervening in this litigation and putting their motives at issue, and (2) the *Morgan* Doctrine, which protects high ranking government officials from being unduly entangled in civil litigation, does not apply to prevent Intervenor-Defendants from being deposed where they voluntarily intervened. (*See* Doc. 211.) The Intervenor-Defendants disagree, re-urging the arguments presented in their Objection to Plaintiffs' Motion to Compel. (*See* Docs. 198, 212.) These arguments have been addressed by the Court and found to be without merit.

Intervenor-Defendants are unlikely to succeed on their claim that Legislative Privilege shields Intervenor-Defendants from producing certain documents and being deposed. As Intervenor-Defendants acknowledge, (Doc. 212 at 3 nt. 1), in a similar case brought by the same Intervenor-Defendants, the Ninth Circuit ultimately concluded that the district court did not clearly err in determining that the legislators waived their legislative privilege by intervening in the action. *See In re Toma*, 2023 WL 8167206, at *1 (9th Cir. Nov. 24, 2023) (unpublished) (reasoning that the district court could not clearly err where no Ninth Circuit authority prohibited the course taken by the district court).

Intervenor-Defendants are unlikely to succeed on their claim that the *Morgan Doctrine* shields

Intervenor-Defendants from being deposed. The *Morgan* doctrine serves to protect high ranking officials from being "unduly entangled" in civil litigation. *In re Gold King Mine Release in San Juan Cnty.*, 2021 WL 3207351, at *2 (D.N.M. Mar. 20, 2021). The underlying rationale of protecting high ranking officials from being forced to participate in litigation is not applicable where the high ranking officials request to and voluntarily insert themselves as a party to a litigation and actively request discovery from other parties. Though Intervenor-Defendants argue that intervention does not affect the *Morgan* doctrine's application, they cite no relevant caselaw that would suggest this Court clearly erred in reaching its conclusion. *See In re U.S. Dep't of Educ.,* 25 F.4th 692, 698 (9th Cir. 2022) ("[T]he district court has erred when [the Ninth Circuit] has already directly addressed the question at issue or when similar cases from [the Ninth Circuit], cases from the Supreme Court, cases from other circuits, the Constitution, or statutory language definitively show us that a mistake has been committed."). Accordingly,

IT IS ORDERED that Intervenor-Defendant's Motion for Stay Pending Appeal and Request for Administrative Stay (Doc. 212) is **denied**.

Dated this 12th day of July, 2024.

/s/ Jennifer Zipps
Jennifer G. Zipps
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

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

Jane Doe, by her next friend and parents Helen Doe and James Doe; and Megan Roe, by her next friend 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,

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.

ORDER GRANTING PLAINTIFFS' MOTION TO EXTEND FACT DISCOVERY (THIRD REQUEST)

Pending before the Court is the Plaintiffs' Third Motion for an Extension of Time to Complete Fact Discovery. (Doc. 223.) No Party objects to the extension. Having considered the Motion, and good cause appearing,

IT IS ORDERED that Plaintiffs' Third Motion for an Extension of Time to Complete Fact Discovery (Doc. 223) is **granted**. The new case deadlines are as follows:

Plaintiffs' Disclosure of Rule 26(a)(2) Expert Witnesses Material: **September 11, 2024**

Close of Fact Discovery: **September 19, 2024**

Disclosure of Lay Witnesses: **September 19, 2024**

Defendants' Disclosure of Rule 26(a)(2) Expert Witnesses Material: **October 11, 2024**

Rebuttal Expert Opinions: **November 22, 2024**

Close of Expert Discovery: **January 29, 2025**

Dispositive Motions: **February 27, 2025**

Dated this 29th day of July, 2024.

/s/ Jennifer Zipps
Jennifer G. Zipps
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. Art. I, § 6, cl. 1

> The Senators and Representatives … shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

ARIZ. CONST. Art. IV, pt. 2, § 7

> No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate.

ARIZ. CONST. Art. IV, pt. 2, § 8

> Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and determine its own rules of procedure.

ARIZ. REV. STAT. § 12-1841

> Parties; notice of claim of unconstitutionality
>
> **A.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. … In any proceeding in which a state statute, ordinance, franchise or rule is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the

allegation at the same time the other parties in the action are served and shall be entitled to be heard.

B. If a pleading, motion or document containing the allegation is served on the attorney general and the speaker of the house of representatives and the president of the senate pursuant to subsection A, a notice of claim of unconstitutionality shall be attached to the pleading, motion or document …

C. If the attorney general or the speaker of the house of representatives and the president of the senate are not served in a timely manner with notice pursuant to subsection A, on motion by the attorney general, the speaker of the house of representatives or the president of the senate the court shall vacate any finding of unconstitutionality and shall give the attorney general, the speaker of the house of representatives or the president of the senate a reasonable opportunity to prepare and be heard.

D. This section shall not be construed to compel the attorney general, the speaker of the house of representatives or the president of the senate to intervene as a party in any proceeding or to permit them to be named as defendants in a proceeding. The attorney general, the speaker of the house of representatives or the president of the senate, in the party's discretion, may intervene as a party, may file briefs in the matter or may choose not to participate in a proceeding that is subject to the notice requirements of this section.

ARIZ. REV. STAT. § 15-120.02

Interscholastic and intramural athletics; designation of teams; biological sex; cause of action; definition

A. Each interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school shall be expressly designated as one of the following based on the biological sex of the students who participate on the team or in the sport:

1. "Males", "men" or "boys".

2. "Females", "women" or "girls".

3. "Coed" or "mixed".

B. Athletic teams or sports designated for "females", "women" or "girls" may not be open to students of the male sex.

C. This section does not restrict the eligibility of any student to participate in any interscholastic or intramural athletic team or sport designated as being for "males", "men" or "boys" or designated as "coed" or "mixed".

D. A government entity, any licensing or accrediting organization or any athletic association or organization may not entertain a complaint, open an investigation or take any other adverse action against a school for maintaining separate interscholastic or intramural athletic teams or sports for students of the female sex.

E. Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a school knowingly violating this section has a private cause of action for injunctive

relief, damages and any other relief available under law against the school.

F. Any student who is subject to retaliation or another adverse action by a school or an athletic association or organization as a result of reporting a violation of this section to an employee or representative of the school or the athletic association or organization, or to any state or federal agency with oversight of schools in this state, has a private cause of action for injunctive relief, damages and any other relief available under law against the school or the athletic association or organization.

G. Any school that suffers any direct or indirect harm as a result of a violation of this section has a private cause of action for injunctive relief, damages and any other relief available under law against the government entity, the licensing or accrediting organization or the athletic association or organization.

H. All civil actions must be initiated within two years after the alleged violation of this section occurred. A person or organization that prevails on a claim brought pursuant to this section is entitled to monetary damages, including damages for any psychological, emotional or physical harm suffered, reasonable attorney fees and costs and any other appropriate relief.

I. For the purposes of this section, "school" means either:

1. A school that provides instruction in any combination of kindergarten programs or grades one through twelve.

2. An institution of higher education.