No. _____

In the Supreme Court of the United States

BEN TOMA, Speaker of the Arizona House of Representatives,
in his official Capacity; and
WARREN PETERSEN, President of the Arizona Senate, in his official capacity,

Applicants,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

Respondent,

MI FAMILIA VOTA, ET AL.,

Real Parties in Interest.

On Application for a Stay to the Hon. Elena Kagan,
Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR STAY OF DISCOVERY ORDER PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS

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November 20, 2023

PARTIES TO THE PROCEEDING

Applicants and Intervenor-Defendants-Petitioners below

Applicant petitioners (intervenor-defendants in the district court, and mandamus petitioners in the court of appeals) are Speaker of the Arizona House of Representatives Ben Toma and Arizona Senate President Warren Petersen, who are the presiding officers of their respective chambers and members of the Arizona Legislature.

Respondent to Petition for Writ of Mandamus Filed in the Ninth Circuit

Respondent in this Court is the United States District Court, District of Arizona-Phoenix.

Plaintiffs and Real Parties in Interest in Mandamus Proceedings

The following are Plaintiffs in the consolidated district court actions: Mi Familia Vota, Voto Latino, Living United For Change In Arizona, League Of United Latin American Citizens Arizona, Arizona Students' Association, ADRC Action, Inter Tribal Council Of Arizona Incorporated, San Carlos Apache Tribe, Arizona Coalition For Change, Poder Latinx, Chicanos Por La Causa, Chicanos Por La Causa Action Fund, Democratic National Committee, Arizona Democratic Party, Arizona Asian American Native Hawaiian And Pacific Islander For Equity Coalition, Promise Arizona, Southwest Voter Registration Education Project, Tohono O'odham Nation, Gila River Indian Community, Keanu Stevens, Alanna Siquieros, and Ladonna Jacket. These groups are referred to as "Plaintiffs."

The United States of America, through the United States Department of Justice, is also a Plaintiff in the action, although it did not take a position on the discovery order at issue.

Defendants and Real Parties in Interest in Mandamus Proceedings

The Defendants in the consolidated district court proceedings below include the State of Arizona, the Arizona Attorney General, Arizona Secretary of State Adrian Fontes, the Director of the Arizona Department of Transportation, and Intervenor-Defendant Republican National Committee.

The county recorders for the 15 counties in Arizona are also named as Defendants, although they have not taken a position on the merits on Plaintiffs' claims: Larry Noble, Apache County Recorder; David W. Stevens, Cochise County Recorder; Patty Hansen, Coconino County Recorder; Sadie Jo Bingham, Gila County Recorder; Sharie Milheiro, Greenlee County Recorder; Richard Garcia, La Paz County Recorder; Stephen Richer, Maricopa County Recorder; Kristi Blair, Mohave County Recorder; Michael Sample, Navajo County Recorder; Gabriella Cazares-Kelly, Pima County Recorder; Suzanna Sainz, Santa Cruz County Recorder; Richard Colwell, Yuma County Recorder; Michelle Burchill, Yavapai County Recorder; Polly Merriman, Graham County Recorder

PROCEEDINGS BELOW

1. *Mi Familia Vota, et al. v. Fontes, et al.*, Case No. 2:22-CV-00509-SRB (D. Ariz.) (consolidated).

2. *In re: Ben Toma et al.*, No. 23-70179 (9th Cir.). Order lifting stay of discovery order entered November 16, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

On September 14, 2023, an Arizona district court judge issued a discovery order, Doc. 535, that requires the Speaker of the Arizona House of Representatives, Ben Toma, and the President of the Arizona Senate, Warren Petersen, (collectively, the "Legislative Leaders") to be deposed about their personal motives for voting to enact two Arizona statutes, H.B. 2243 and H.B. 2492 (the "Voting Laws") and their personal involvement in the legislative process, and to produce documents related to the passage of those laws. *See* App. 1-9.[1] Furthermore, the district court judge has recently clarified that her order allows the plaintiffs to inquire into the Legislative Leaders' conversations with other legislative members in connection with the consideration and passage of the Voting Laws.

This order plainly violates the legislative privilege, which applies where legislators or their aides are "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Moreover, federal courts have long held that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators. . . ." *Tenney*, 341 U.S. at 377. Nor can a legislator waive another legislator's legislative privilege, which is personal to each legislator. *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 671 (D. Ariz. 2016).

[1] All references to "Doc. ___" refer to docket entries in the underlying district court case, *Mi Familia Vota v. Fontes,* No. 22-00509-PHX-SRB.

The district court held that Speaker Toma and President Petersen had waived their legislative privilege simply by intervening in the underlying case (after the Arizona Attorney General took the position that portions of the Voting Laws are preempted by federal law) and denying Plaintiffs' claims—even though an Arizona statute expressly allows them to intervene and be heard in cases involving constitutional challenges to state law. *See* A.R.S. § 12-1841(D); *see also Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022) (observing that some states have enacted state laws "authoriz[ing] multiple state officials to defend their practical interests in cases like these").

Although the Legislative Leaders moved the district court to stay the discovery order while they sought a Writ of Mandamus, the district court, in an order issued on September 26, 2023, denied that motion (Doc. 548). *See* App. 10-11. The Legislative Leaders then filed an emergency motion to stay and petition for writ of mandamus with the Ninth Circuit on September 29, 2023. The Ninth Circuit ordered further briefing on the motion to stay. On October 12, 2023, the Ninth Circuit granted the motion to stay pending the merits panel's decision on the Legislative Leaders' petition for writ of mandamus. The Ninth Circuit directed the real parties in interest to file an answer "address[ing] the scope and application of legislative privilege, the conditions under which a legislator waives the privilege, particularly under A.R.S. § 12-1841, and the relevance of the requested information to the constitutionality of the challenged Voting Laws." App. 13. Oral argument on the petition was held on November 16, 2023. On November 16, the Ninth Circuit issued an order lifting its

previous stay order, stating that a written disposition on the petition for writ of mandamus would follow. A copy of the order lifting the stay is reproduced at App. 15-16.

Given that the district court denied the request for a stay, and the Ninth Circuit lifted its previous stay order, Petitioners thus ask this Court to issue an emergency stay of the district court's order pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. § 1651, pending decision on the Legislative Leaders' petition for writ of mandamus which will be shortly filed with this Court.

Unless this Court issues an emergency stay of the discovery order, the Legislative Leaders will either have to refuse to be deposed—and thereby open themselves to potential sanctions or a finding of contempt—or allow themselves to be deposed and divulge their privileged testimony to the world. Once that occurs, further appellate review of the errant order will be largely moot: the Legislative Leaders' privileged testimony will be public knowledge.

A stay from this Court is surely warranted. The district court clearly erred in finding a waiver of the legislative privilege, and—other than as readily shown in the already-publicly available legislative records—Toma and Petersen's personal involvement in the legislative process leading to the Voting Laws, and their motives for voting in favor of those laws, are not relevant to any issue in the case. Allowing discovery of these irrelevant topics implicates the separation of powers at the highest level of government, embodying a federal court's significant intrusion into legislative affairs without legal justification. The district court's unprecedented ruling will chill

both the atmosphere for all legislators to freely express their views during the legislative process and the ability and willingness of present and future legislative leaders to participate in litigation to defend the constitutionality of state laws. The district court's order also disrupts Arizona's distribution of sovereign authority articulated in A.R.S. § 12-1841, subjecting Arizona's Legislative Leaders to depositions on irrelevant topics merely because they have chosen to intervene, in their official capacities, to defend state interests in this litigation. *See Berger*, 142 S. Ct. at 2201 (cautioning that federal courts must allow "duly authorized representatives" to participate "in federal litigation challenging state law" out of respect for "a State's chosen means of diffusing its sovereign powers among various branches and officials").

The bench trial in this case began on November 6, 2023, and concluded on November 17, 2023. The parties have until December 12, 2023 to submit proposed findings of fact and conclusions of law and closing argument will take place on December 19. The district court has held the record open with respect to the discovery sought from the Legislative Leaders. Plaintiffs have asked for deposition dates the week of November 27, and it appears that November 28 would be the first available date. Thus, we respectfully ask the Court for an emergency stay of the discovery order as soon as practicable, and if possible before 9:00 a.m. on November 28, 2023.

DECISIONS BELOW

The district court's September 14, 2023 order is reproduced at App. 1-9. The district court's order denying a stay pending appeal is reproduced at App. 10-11. The

Ninth Circuit's order granting a stay is reproduced at App.12-14 and the order lifting that stay is reproduced at App. 15-16.

JURISDICTION

This Court has mandamus jurisdiction with respect to the district court's September 14, 2023 discovery order. *See* 28 U.S.C. § 1651(a); *Mohawk Industries Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) (noting that in "extraordinary circumstances — *i.e.,* when a disclosure order amount[s] to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice — a party may petition the court of appeals for a writ of mandamus") (internal quotations omitted).

On November 16, 2023, the Ninth Circuit issued an order lifting the stay it previously granted and explaining that a further order would follow on the Legislative Leaders' petition for writ of mandamus.

Because the district court denied the Legislative Leaders' stay request and the Ninth Circuit has lifted its previous stay order, the relief sought here is not available in any other court. *See* Sup. Ct. R. 23(3).

STATUTORY PROVISION INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an appendix to this brief. App. 17-18.

STATEMENT OF THE CASE

Plaintiffs claim that the recently enacted Voting Laws, H.B. 2243 and H.B. 2492, violate the United States Constitution. The Voting Laws enabled government

officials to require documentary proof of citizenship from Arizona registrants and mandate certain consequences if a registrant does not provide such proof.

When the Voting Laws were enacted in 2022, Toma and Petersen were only one of the votes on each bill from their respective legislative bodies (and it was not until late 2022 when they were each elected to their current positions of House Speaker and Senate President). The Arizona Senate passed the final version of H.B. 2243 on June 23, 2022 by a vote of 16-12; Petersen was one of the 16 ayes. The Arizona House also passed the final version on June 23, 2022, by a vote of 31-27; Toma was one of the 31 ayes. Then-Governor Doug Ducey signed the bill into law on July 6, 2022.

The Arizona Senate passed the final version of H.B. 2492 on March 23, 2022 by a vote of 16-12; again, Petersen was one of those voting in favor. The Arizona House passed the final version on February 28, 2022 by a vote of 31-26, with Toma voting in favor. Then-Governor Doug Ducey signed the bill into law on March 30, 2022.

Various Plaintiffs filed eight separate complaints attacking the Voting Laws, and the district court consolidated those complaints. Doc. 164. The complaints attacked specific requirements of the Voting Laws, and also generally attacked the two laws as violative of equal protection under the Fourteenth Amendment, asserting among other things that a discriminatory purpose was a motivating factor in the legislature's adoption of the laws. *See* Doc. 304 at 14 (describing Plaintiffs' claims).

The complaints named the Arizona Secretary of State and Arizona Attorney General as defendants (as well as county recorders). No complaint named any

member of the Arizona Legislature as a party. Indeed, none of the complaints even mention Toma, and only one complaint mentions Petersen in passing. Nor did any Plaintiff seek to depose any legislators or seek discovery from any of the legislators. This approach was consistent with this Court's teaching that "[i]nquiries into congressional motives or purposes are a hazardous matter," and the Court will not void a statute based on what "fewer than a handful of Congressmen said about it." *United States v. O'Brien,* 391 U.S. 367, 383-84 (1968).

For nearly two decades, A.R.S. § 12-1841 has provided the Speaker of the House and the President of the Senate the express authority to intervene in lawsuits to defend the constitutionality of a statute, or to file briefs in such a case. Prior legislative leaders have invoked this statute on numerous occasions in state and federal courts. *See, e.g., Horne v. Flores*, 557 U.S. 433, 443 (2009) (noting that when the Speaker and President successfully moved to intervene "as representatives of their respective legislative bodies," they stated that "although the Arizona Attorney General had a legal duty to defend" the state law at issue, he had "shown 'little enthusiasm' for advancing the legislature's interests").

Speaker Toma and President Petersen likewise invoked their statutory authority under A.R.S. § 12-1841 to intervene in this case, and have done so in other pending federal court cases, when the defense of state laws proffered by the Arizona Attorney General has proven to be inadequate. *See, e.g., Isaacson v. Mayes*, 84 F.4th 1089, 1094 (9th Cir. 2023). As this Court recently emphasized, "where a State chooses to divide its sovereign authority among different officials and authorize their

participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Berger*, 142 S. Ct. at 2201. "Permitting the participation of lawfully authorized state agents promotes informed federal-court decisionmaking and avoids the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests." *Id.* at 2202.

In January 2023, a new governor, attorney general and secretary of state took office, all Democrats. Two months later, after the district court denied the State's motion to dismiss, the Legislative Leaders learned that the newly-elected attorney general did not intend to defend some aspects of the Voting Laws and had offered to stay enforcement of the Voting Laws pending trial on the merits. *See* Doc. 348 at 6. In April 2023, the Legislative Leaders thus intervened as of right under A.R.S. § 12-1841—in their official capacities—so they could defend the validity and constitutionality of the Voting Laws, including taking positions contrary to the newly announced position of the Attorney General. *See* Doc. 348 (motion to intervene); Doc. 355-1 (attaching letter from Attorney General's office regarding position in this case, in which Attorney General refused to defend certain portions of the law as preempted by federal law); Doc. 363 (order granting motion to intervene). In doing so, the Legislative Leaders understood that, unless they were actual parties to the suit, they would not be able to ensure that the existing parties would appeal an adverse decision.

After the Legislative Leaders intervened, Plaintiffs served requests for production of documents ("RFPs") and non-uniform interrogatories ("NUIs") on them, relating to the adoption of the Voting Laws. *See* Doc. 500-1 at Ex. A. Plaintiffs also said they intended to depose the two Legislative Leaders as well. Plaintiffs also sought to notice a Fed. R. Civ. P 30(b)(6) deposition of the Arizona House of Representatives and the Arizona Senate, arguing that, by intervening, the Legislative Leaders had "necessitated deposition testimony with respect to the legislature as an entity." Doc. 500 at 12-13.

The Legislative Leaders responded by producing more than 90,000 pages of documents along with written answers to the NUIs. *See* Doc. 499 at 1. However, citing legislative privilege, they declined to produce a number of documents (for which they produced a privilege log), and also declined to answer various NUIs to the extent they infringed on the privilege. *See id.*; Doc. 500-1, Ex. A. The Legislative Leaders further took the position that a member's personal motives are not relevant to the case. *See* Doc. 500-1, Ex. D. The Legislative Leaders also argued that the Rules of Civil Procedure did not allow a 30(b)(6) deposition of the "House of Representatives" or the "Senate," and that in any event such a deposition would invade the legislative privilege. *See id*.

Plaintiffs moved to compel the requested discovery, arguing that, by exercising their statutory right to intervene in the lawsuit and by denying that the legislature passed the Voting Laws with discriminatory intent, the Legislative Leaders had waived the legislative privilege. Doc. 500.

In its September 14, 2023 Order (Doc. 535), the district court granted Plaintiffs' motion to compel in part, holding that the Legislative Leaders "have waived their legislative privilege as to information about their motives for the Voting Laws." *See* App. 009. The district court ordered the Legislative Leaders to produce the withheld "communications that they have sent or received relating to the Voting Laws' legislative process" and allowed Plaintiffs to depose the Legislative Leaders about the Voting Laws' legislative process. *Id.* The court denied Plaintiffs' request to depose the Arizona Legislature as an entity under Rule 30(b)(6). *Id.* In its order, the district court further held that the Legislative Leaders "could not waive the privilege for their fellow legislators." App. 006 ("To the extent Plaintiffs seek information held by other members of the Arizona Legislature, it remains protected by the legislative privilege.").

The Legislative Leaders then moved for a stay of the district court's September 14, 2023 discovery order pending a writ of mandamus. Doc. 543. On September 26, 2023, the district court denied that motion (Doc. 548) but allowed the requested documents to be produced under a Protective Order to "protect the status quo and allow the parties to continue their trial preparations." App. 010-11. In accordance with that order, the Legislative Leaders provisionally produced the documents to Plaintiffs, for attorneys' eyes only, with the understanding that the relief sought in their petition for writ of mandamus would remedy this provisional disclosure.

The Legislative Leaders filed a petition for writ of mandamus with the Ninth Circuit on September 29, 2023 and an emergency motion to stay the challenged

portions of the district court's September 14, 2023 discovery order. After briefing on the motion to stay, the Ninth Circuit entered an order staying the district court's order and barring the use of the provisionally produced privileged materials pending the merits panel's decision on the Legislative Leaders' petition for writ of mandamus. Notably, the Ninth Circuit directed the real parties in interest to file an answer to the petition "address[ing] the scope and application of legislative privilege, the conditions under which a legislator waives the privilege, particularly under A.R.S. § 12-1841, and the relevance of the requested information to the constitutionality of the challenged Voting Laws." App. 13

Oral argument on the petition was held on November 16, 2023. During the argument, Plaintiffs' counsel avowed that they would not seek testimony regarding the Legislative Leaders' personal motives – the very information that the district court's order found was waived. Plaintiffs' counsel then took the position that they could ask the Legislative Leaders about the topics listed for the 30(b)(6) depositions, which the district court denied. Later that day, the Ninth Circuit issued an order lifting its previous stay order, effective immediately. App. 15-16.

On November 17, 2023, the district court heard argument from the parties and provided further guidance to the parties with respect to her previous discovery order. Over the Legislative Leaders' objection, the court held that under its waiver analysis, Plaintiffs could depose the Legislative Leaders with respect to not only their participation in the legislative process, but also private conversations with other legislators or third parties about the Voting Laws.

The bench trial in the case concluded on November 17, 2023, but the district court is holding the record open for the discovery Plaintiffs seek from the Legislative Leaders. The deadline for submission of proposed findings of fact and conclusions of law is December 12, 2023 and closing argument is scheduled for December 19, 2023. The parties are currently working to schedule depositions of the Legislative Leaders (barring a stay from this Court), and it appears that the earliest available date would be November 28, 2023. Thus, we respectfully ask the Court for an emergency stay of the discovery order as soon as practicable, and if possible before 9:00 a.m. on November 28, 2023.

Once the Ninth Circuit issues its written decision on the Legislative Leaders' pending petition for writ of mandamus, the Legislative Leaders will file a petition for writ of mandamus to this Court.

LEGAL STANDARD

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). These elements are satisfied here.

REASONS FOR GRANTING THE STAY

I. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO GRANT MANDAMUS.

The Legislative Leaders will shortly be submitting a petition for a writ of mandamus reversing that part of the district court's September 14, 2023 order, Doc.

535 (reproduced at App. 001-9), which holds that the Legislative Leaders waived their legislative privilege as to their personal motives for voting in favor of two statutes, and requiring them to produce documents and submit to depositions about their involvement in the legislative process that led to the statutes in question.

There is no dispute that the discovery the district court ordered falls within the scope of the legislative privilege, which applies where legislators or their aides were "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). The district court, however, wrongly held that the Legislative Leaders had ipso facto *waived* that privilege merely by exercising their statutory right to intervene in this case to defend the constitutionality of the challenged laws, and by denying that the Arizona Legislature passed the laws with discriminatory intent.

The district court's discovery order was wrong on multiple levels. First, it found a waiver of the legislative privilege even though the Legislative Leaders had taken no action to use or disclose privileged documents or communications in the case and in fact explicitly said they would *not* do so and would not offer their testimony in the case (or the testimony of any other individual legislator). The Legislative Leaders affirmed to the parties and the district court that they would rely on the evidence in the public record to demonstrate the Legislature's collective intent with respect to the Voting Laws. That action does not show the "voluntary relinquishment of a known right," the standard for proving a waiver. *Cornell, Howland, Hayes & Merryfield, Inc. v. Cont'l Cas. Col,* 465 F.2d 22, 24 (9th Cir. 1972). Nor does that action deprive

Plaintiffs of information vital to their claims, a critical component of the implied waiver analysis. *See, e.g.*, *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (in determining an implied waiver of attorney-client privilege, court must consider whether "allowing the privilege would deny the opposing party access to information vital to its defense" (quoting *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D.Wash.1975)); *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (citing *Amlani* in implied waiver analysis regarding the attorney-client privilege).

Second, the district court cited no precedent—and we are not aware of any—finding that a party could waive a privilege merely by intervening in a case in an official capacity pursuant to statutory authority, denying the opposing party's claims, and using the existing evidence to make legal arguments in support of their views. The most analogous circuit court decision (upon which the Legislative Leaders relied below) is *In re North Dakota Legislative Assembly*, 70 F.4th 460 (8th Cir. 2023), where the Eighth Circuit granted a mandamus petition filed by current and former state legislators who sought relief from a district court's discovery order that compelled compliance with a subpoena because the order infringed on their legislative privilege. There, the plaintiffs sought to develop evidence of the legislators' "alleged 'illicit motive'" in furtherance of plaintiffs' claims alleging violations of Section 2 of the Voting Rights Act. *Id.* at 462. The Eighth Circuit reasoned that the district court's conclusion "was based on a mistaken conception of the legislative privilege," granted the petition for writ of mandamus, and directed the district court to quash the subpoenas. *Id.* at 464.

The only fact that makes this case different from *In re North Dakota* supports the Legislative Leaders' petition for mandamus relief and confirms that the district court's order is wrong as a matter of law. While the legislators in *In re North Dakota* were not parties to the underlying case, Speaker Toma and President Petersen are empowered by state law to intervene and be heard in cases that involve constitutional challenges to state statutes. They invoked that authority in their official capacities here to articulate the state's interests and ensure that any adverse ruling would be appealed; they did not inject any factual assertions into the case or otherwise engage in conduct that could be construed as a waiver of the legislative privilege. Like other parties to the lawsuit, the Legislative Leaders invoked applicable privileges in response to discovery requests. The Legislative Leaders' status as presiding officers and authority vested in them under A.R.S. § 12-1841 supports upholding the legislative privilege, not destroying the privilege as punishment for their statutory intervention. *See In re North Dakota*, 70 F.4th at 465 (emphasizing that depositions of legislators, even to invoke legislative privilege, is a "compulsory process" that "constitutes a 'substantial intrusion' into the workings of a legislature that must usually be avoided") (quoting *Arlington Heights*, 429 U.S. at 268 n.18)).

The sole case the district court relied on for its "waiver" finding—*Powell v. Ridge,* 247 F.3d 520 (3d Cir. 2001), involved legislators (not presiding legislative officers) who sought to use the legislative privilege as a shield and a sword, wanting to offer their own testimony at trial but refusing to answer questions put to them. While that may well be action inconsistent with a privilege claim, it's nothing like the

facts here. The *Powell* court didn't find a waiver of privilege; it held that the "privilege" the legislators were attempting to invoke was not a recognized privilege at all. *Powell* also did not involve a legislative leader's exercise of a statutory right to intervene, such as the authority granted to the Legislative Leaders pursuant to A.R.S. § 12-1841. The *Powell* court ultimately held that it lacked jurisdiction over the legislators' interlocutory appeal, expressly noting that neither the district court nor the Third Circuit had even been presented with the question whether "the very act of intervening has waived the privilege." *Powell*, 247 F.3d at 526-27 & n.4. Simply put, *Powell* is not instructive at all and, as in *In re North Dakota*, the district court's order "was based on a mistaken conception of the legislative privilege." *In re North Dakota*, 70 F.4th at 464.

Third, this Court has repeatedly underscored the impropriety of trying to discern a legislature's intent based on statements of individual legislators, i.e. the discovery that the district court allowed. Federal courts have held since the 1810 case of *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators . . . ." *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951). That principle has "remained unquestioned." *Id.* The Eighth Circuit correctly recognized that "'judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government,' and are 'usually to be avoided.'" *In re North Dakota*, 70 F.4th at 465 (quoting *Village of Arlington Heights v. Metropolitan Housing Authority,* 429 U.S. 252, 268 n. 18 (1977).

And 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. *See United States v. O'Brien,* 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *see also In re North Dakota,* 70 F.4th at 465 (citing *O'Brien,* 391 U.S. at 383-84); *Am. Trucking Ass'ns, Inc. v. Alviti,* 14 F.4th 76, 80-81 (1st Cir. 2021) (granting advisory writ of mandamus to bar depositions of former governor, former speaker, and former legislator) ("the probative value of the discovery sought by American Trucking is further reduced by the inherent challenges of using evidence of individual lawmakers' motives to establish that the legislature as a whole enacted RhodeWorks with any particular purpose"). Obviously, individual legislators may vote for a particular statute for a variety of reasons, and those reasons may have little to do with the substance of the legislation. *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 470, (1981) (noting that "the individual legislators may have voted for the statute for a variety of reasons").

The exceptional circumstances present in this case warrant jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). A writ of mandamus is warranted where "(1) no other adequate means exist to attain the relief [the party] 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) (internal citations omitted).

"This Court will issue the writ of mandamus directly to a federal district court only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Hollingsworth*, 558 U.S. at 190 (internal citations omitted). As an example, the Court "has issued the writ to restrain a lower court when its actions would threaten the separation of powers by embarrassing the executive arm of the Government, or result in the intrusion by the federal judiciary on a delicate area of federal-state relations." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal citations and quotation marks omitted). Those circumstances exist here and require this Court's intervention.

A. **Petitioners Have No Other Adequate Means Of Relief And, Absent Mandamus, Will Be Prejudiced In A Way Not Correctable By Appeal**.

The Legislative Leaders seek review of a discovery order allowing the deposition of the Legislative Leaders on subjects protected by the legislative privilege and wholly irrelevant to the issues in the case. This Court's ruling in *Mohawk Industries Inc. v. Carpenter*, 558 U.S. 100 (2009), supports a writ of mandamus under the circumstances in this case.

In *Mohawk,* this Court denied jurisdiction over a ruling on the attorney-client privilege under the collateral order doctrine, finding that an ordinary appeal was typically adequate protection to correct the disclosure of information protected by the

attorney-client privilege, noting that the "class of collaterally appealable orders must remain 'narrow and selective in its membership.'" 558 U.S at 112-113.[2]

Even where no appeal is allowed under the collateral order doctrine, *Mohawk* supports the use of a writ of mandamus in appropriate circumstances, particularly when a disclosure order amounts to a "judicial usurpation of power," or a "clear abuse of discretion," or "otherwise works a manifest injustice…." *Id.* at 111.

Indeed, after the issuance of *Mohawk*, courts have continued to recognize the irreparable harm that arises from disclosure of privileged material. *See In re North Dakota Legislative Assembly*, 70 F.4th 460, 462 (8th Cir. 2023) ("Mandamus is an appropriate remedy where a claim of privilege is erroneously rejected during discovery, because the party claiming privilege has no other adequate means to attain relief, and the enforcement of the discovery order would destroy the privilege.") (granting mandamus relief and quashing subpoenas on legislative privilege grounds); *Perry v. Schwarzenegger,* 591 F.3d 1147, 1158 (9th Cir. 2010); *Hernandez v. Tanninen,* 604 F.3d 1095, 1101 (9th Cir. 2010); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (noting that "*Mohawk* explicitly preserved mandamus review in some cases" involving the attorney-client privilege and holding that "the

[2] The kernel of the matter at issue here also involves a privilege—not an attorney-client privilege as in *Mohawk,* but a legislative privilege. *Mohawk* expressly declined to express any view regarding governmental privileges. 558 U.S. at 113 n. 4. However, since the availability of appeal under the collateral order doctrine is unclear and given the exigent circumstances present in this case, the Legislative Leaders seek review under mandamus.

first condition for mandamus—no other adequate means to obtain relief—will often be satisfied in attorney-client privilege cases").

Moreover, the legislative privilege raises concerns about legislative independence and federalism not applicable to the attorney-client privilege. *See, e.g., Alviti,* 14 F.4th at 85 (granting advisory writ of mandamus to bar legislator depositions, noting that the discovery order "raises important questions about the appropriate balance of power between the states and the federal government"). This case also presents similar issues to those in *City of Las Vegas v. Foley,* 747 F.2d 1294, 1297 (9th Cir. 1984), where the Ninth Circuit found mandamus relief appropriate to deal with an improper discovery order that sought to allow the depositions of legislators to discover their "motives" in order to prove an "alleged illicit legislative motive."

Unless the Court grants a stay and mandamus relief, Plaintiffs will be able to use the documents provisionally produced as attorneys' eyes-only and the Legislative Leaders will be required to submit to depositions asking about their personal involvement in the legislative process for the Voting Laws, including private conversations with other legislators and with third parties. And once the documents are used or disclosed beyond the provisional attorneys' eyes-only designation and the testimony is given, there is no way to undo the disclosure.

Before the Ninth Circuit, Plaintiffs argued that the Legislative Leaders need only refuse to comply with the district court's order and then the Legislative Leaders can appeal when the district court sanctions them or finds them in contempt. But if—

contrary to common sense—refusing to comply and allowing oneself to get sanctioned or found in contempt were considered an "adequate" means of relief from a discovery order, then mandamus would *never* be appropriate. As discussed above, *Mohawk* itself recognizes otherwise.

B. The District Court's Order Was Clearly Wrong as a Matter of Law.

The basis for the district court's discovery order was a finding that the Legislative Leaders had waived the legislative privilege by voluntarily intervening in the lawsuit and putting their personal motives at issue. App. 009. As discussed below, that finding was plainly wrong. Furthermore, the district court clearly erred by allowing Plaintiffs to depose the Legislative Leaders about their individual, subjective motives for approving the Voting Laws. This Court has never allowed such an invasive and far-reaching inquiry of legislative matters; indeed, this Court has repeatedly found that a legislator's individual motives are not relevant to the issue of collective intent. The court was also wrong to allow the Plaintiffs to depose the Legislative Leaders about their conversations with other legislators, thus effectively waiving the personal privilege belonging to the other legislators.

1. The Legislative Leaders Didn't Waive The Legislative Privilege By Intervening In The Lawsuit To Defend The Constitutionality of Arizona's Voting Laws.

To begin with, there is no dispute that the discovery Plaintiffs seek falls within the scope of the legislative privilege.

Legislative privilege applies where legislators or their aides were "acting in the sphere of legitimate legislative activity." *Tenney,* 341 U.S. at 376. That's the case

here as to Toma and Petersen's involvement in the legislative process that led to enactment of the Voting Laws.

The "privilege 'protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.'" *In re North Dakota Legislative Assembly,* 70 F.4th 460 (8th Cir. 2023) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). Yet, the district court found that the Legislative Leaders had waived the privilege regarding their personal motives for supporting the challenged bills by "voluntarily intervening in this lawsuit and putting their intent at issue." *See* App. 002, 009:4-5 ("The Speaker and the President have waived their legislative privilege as to information *about their motives for the Voting Laws*." (emphasis added)).

Surely, though, merely intervening *as of right* under A.R.S. § 12-1841 to defend the constitutionality of a state statute can't be punished by finding an ipso facto waiver of the privilege, and we're not aware of any case that so states.

Moreover, the district court's statement that Toma and Petersen put "*their* intent at issue" simply by "denying [in their answers to the complaints] Plaintiffs' allegations that the *Arizona Legislature* enacted the Voting Laws with discriminatory intent" (App. 003:24-27 (emphasis added)) is logically invalid and misapprehends the very nature of legislation.

For example, as noted above, Petersen provided only one of the 16 votes by which the Arizona Senate passed H.B. 2243, and Toma provided only one of the 31 votes by which the Arizona House passed the same statute. And the Legislative

Leaders' defense of the Voting Laws' constitutionality with respect to legislative intent relies entirely upon public information, not anything covered by the legislative privilege.

Furthermore, neither Toma nor Petersen are competent to testify about another legislator's motives, and Fed. R. Evid. 602 limits their testimony to their "personal knowledge of the matter." Indeed, any attempt by them to testify about other legislators' motives would run afoul of *those* legislators' privileges, which the district court held Toma and Petersen could not waive. *See* App. 006:3-4. And the Plaintiffs have not subpoenaed information from any of the other legislative members who voted in favor of the Voting Laws.

Not only do no cases *support* the district court's ruling, courts have repeatedly rejected the faulty premise on which the district court's ruling rests: the premise that one can prove the intent of a legislature in adopting a law by showing the personal motives of individual legislators who voted for it.

As this Court has more than once warned, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Palmer v. Thompson,* 403 U.S. 217, 224 (1971). *See also Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."). And in the words of the Ninth Circuit, the court "prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task," since "[i]ndividual legislators

may vote for a particular statute for a variety of reasons." *Foley,* 747 F.2d at 1297 (exercising mandamus and directing that a private party was not entitled to depose city officials to determine their subjective motives for enacting a zoning ordinance). Simply put, it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney,* 341 U.S. at 377.

As discussed above, in the *North Dakota* case, the Eighth Circuit held that the legislative privilege protected documents and testimony from state legislators and their aides, and thus granted mandamus relief. Although the district court, relying on dicta from this Court's decision in *Arlington Heights*, reasoned that redistricting legislation presented a "particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent" was "specifically contemplated" as part of the "core issue," the Eighth Circuit disagreed, noting that it would work a substantial intrusion into the legislative branch. 70 F. 4th at 464. Moreover, the Eighth Circuit said, 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." 70 F.4th at 465 (citing *United States v. O'Brien,* 391 U.S. 367, 383-84 (1968)).[3] Here, too, legislative privilege bars the

[3] The Eighth Circuit declined to grant mandamus relief for one legislator because he "waived his legislative privilege by testifying at a preliminary injunction hearing in another case concerning redistricting legislation" and he did not "discuss or dispute the district court's conclusion of waiver" in his petition. 247 F.3d at 465. In contrast, the Legislative Leaders have not testified about the Voting Laws, and they don't intend to do so.

testimony Plaintiffs seek, which in any event cannot be attributed to any other member or speak to collective legislative intent.

The district court's discovery order relied on *Powell v. Ridge,* 247 F.3d 520 (3d Cir. 2001), to find a waiver, but that case didn't find an implied waiver of privilege at all; the *Powell* court simply found that the "purported privilege" those legislators were claiming was not a recognized privilege at all and concluded it lacked jurisdiction over the legislators' appeal. 247 F.3d at 526. The legislators there had tried to "build from scratch a privilege" which would allow them "to seek discovery but not to respond to it; take depositions but not be deposed; and *testify at trial, but not be cross-examined*." *Id.* at 525 (emphasis added). In other words, the legislators apparently sought to offer testimony regarding the laws at issue yet prevent discovery of their anticipated trial testimony, improperly using the privilege as both a sword and a shield. In light of those facts, the *Powell* court said, "they assert a privilege that does not exist." *Id.*

By contrast, the Legislative Leaders assert only the traditional legislative privilege, have not sought discovery or noticed depositions, and they *have* responded to discovery, producing more than 90,000 pages of documents and responding to interrogatories. *See* Doc. 499. They have withheld some documents based on privilege, as itemized on their privilege log. And they have declined to be deposed to preserve the legislative privilege. And unlike *Powell,* the Legislative Leaders have not sought to offer testimony at trial but not be cross-examined. They will offer no testimony at trial, have not used the legislative privilege as a sword and shield, and have not used any privileged materials at all.

Further, *Powell* did not involve legislative leaders' intervention in an official capacity pursuant to state statute. The legislators in *Powell* intervened in their *personal* capacities and had no statutory authority to intervene. Thus, unlike this case, they were not acting as representatives of the State or defending the constitutionality of state laws pursuant to state statute in light of a less than full defense by another authorized state official.

Here, the Legislative Leaders only intervened in their official capacities—pursuant to A.R.S. § 12-1841(D)—to present their perspective of the State's interests in defending the constitutionality of the Voting Laws. They did so only when they learned that the Arizona Attorney General did not intend to continue to defend some aspects of the Voting Laws and offered to enter into a stipulation to a stay of the enforcement of the Voting laws pending trial on the merits. *See* Doc. 348.

Given the nature of the Legislative Leaders' intervention, the district court's discovery order raises significant separation of powers and federalism concerns. Undoubtedly, "when a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge." *Berger*, 142 S. Ct. at 2201. Given that "[s]ome States may judge that important public perspectives would be lost without a mechanism allowing multiple officials to respond," "a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Id.* at 2197, 2201. Accordingly, courts should "respect" a State's "sovereign choice" to authorize legislative leaders to "defend duly enacted

state statutes against constitutional challenge." *Id.* at 2206; *cf. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 142 S. Ct. 1002, 1004 (2022) ("Respect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court.").

Notably, the Arizona Attorney General has the same legal authority under A.R.S. § 12-1841. Yet no one suggests that the Arizona Attorney General would waive her executive deliberative process privilege by intervening to defend the constitutionality of a state statute.

An implied waiver is based on what courts sometimes call "the fairness principle," or the notion that a privilege—meant as a shield—can't also be used as a sword. *E.g. Bittaker*, 331 F.3d at 719 (dealing with waiver of the attorney-client privilege). In "practical terms," this means that parties in litigation may not "abuse the privilege" by asserting claims the opposing party "can't adequately dispute unless it has access to the privileged materials." *Id.* "In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proc.*, 219 F.3d 175, 182–83 (2d Cir. 2000); *cf. United States v. Salerno,* 505 U.S. 317, 323 (1992) ("Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict."). The Legislative Leaders have not done either – they have not partially disclosed privileged

communications nor have they relied on privileged communications to support their defenses.

The "overarching consideration" in an implied waiver analysis "is whether allowing the privilege to protect against disclosure of the information would be *manifestly unfair* to the opposing party." *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995) (emphasis added) (quotation omitted). Accordingly, a court assessing implied waiver "must evaluate 'whether allowing the privilege would deny the opposing party access to information vital to its defense.'" *Bittaker,* 331 F.3d at 720 (quoting *Amlani,* 169 F.3d at 1195); *see also Home Indem. Co.* 43 F.3d at 1326 (affirming decision that no implied waiver of attorney-client privilege existed where party proved reasonableness of the settlement amount "on objective terms apart from the advice of counsel").

On this point, as discussed further below, the case law shows that the Legislative Leaders' personal motives for supporting the Voting Laws are *not even relevant* to proving discriminatory intent of the legislature itself—let alone "vital" to such proof. But the district court's order is premised upon a waiver of the Legislative Leaders' personal motives. *See* App. 002:27-28 ("Plaintiffs argue that the Legislators have waived their legislative privilege by voluntarily intervening in this lawsuit and putting their intent at issue."); App. 003:25-27 ("The Legislators also specifically put their own motives for passing the Voting Laws at issue when denying Plaintiffs' allegations that the Arizona Legislature enacted the Voting Laws with discriminatory intent."); App. 004:26-28 ("[The court] finds that the Speaker and

President each waived their privilege by intervening to 'fully defend' the Voting Laws and putting their motives at issue."); App. 009:4-5 ("The Speaker and the President have waived their legislative privilege as to information about their motives for the Voting Laws.").

And, it is undisputed that, in presenting their case regarding legislative intent, the Legislative Leaders have not, and will not, offer any testimony of their own. Nor will the Legislative Leaders rely upon any materials protected by the legislative privilege. Because the Legislative Leaders are not relying upon privileged materials to support their defense, and will be relying on the same public record evidence available to all parties to demonstrate legislative intent, there is no unfairness to Plaintiffs.

2. Speaker Toma And President Petersen's Personal Motives In Approving The Voting Laws Are Completely Irrelevant To This Case.

The district court further erred in allowing the Legislative Leaders' depositions based upon a conclusion that they put their personal motives at issue. The Legislative Leaders' personal motives for approving the Voting Laws are simply irrelevant, as this Court and many other courts have often held. While there may be times when the *legislature's* motive is pertinent in a case, "it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant." *S.C. Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1262 (4th Cir. 1989). Plainly, a court cannot infer collective legislative intent from the individual motivations of Toma and Petersen, nor would it be legally appropriate to impute their motives to the whole legislature.

Individual legislators vote to adopt a bill for many reasons. Few of the legislators will have been involved in the drafting of the bill, and they may not even be well-acquainted with all of its provisions.[4] Legislators may vote for a bill in deference to their party leaders, or as an accommodation for getting other legislators to support a bill in which they have a particular interest. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256, 213 L. Ed. 2d 545 (2022) ("Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole.").

Only a few years ago this Court had occasion to reiterate this well-established principle. In *Va. Uranium, Inc. v. Warren*, ___ U.S. ___, 139 S. Ct. 1894, 1907-08 (2019) (plurality opinion), the Court said:

> Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are *fully realized in the final product*.

(Emphasis added.)

And indeed, this Court has recently rejected use of a "cat's paw" theory of imputing a legislator's allegedly improper motives onto other members:

> The "cat's paw" theory has no application to legislative bodies. . . . [T]he legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.

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[4] Here, for example, 1,613 bills were introduced during the 55th Legislature, Second Regular Session. And 392 bills were approved and transmitted to the governor.

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021).

It is thus unsurprising that federal courts have held since the 1810 case of *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney,* 341 U.S. at 377. That principle has "remained unquestioned." *Id.* Justice Black, writing for a divided court in 1971 in *Palmer v. Thompson,* 403 U.S. 217, 224 (1971), stated that "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."

In *Arlington Heights,* for example, the Court held that "[p]roof of racially discriminatory intent or purpose" was needed to show a violation of the Equal Protection Clause. 429 U.S. at 265. But such discriminatory intent was to be found through a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the "legislative or administrative history," "contemporary statements by members of the decisionmaking body," "minutes of its meetings," or reports." *Id.* at 266, 268. Only in some undefined "extraordinary instances"—*which were not present in that case*—might testimony of individual legislative members about the "purpose" of the "official action" be considered, and even in such "extraordinary instances" such testimony "frequently will be barred by privilege." 429 U.S. at 268. As the *Arlington Heights* court underscored, this Court "has recognized ever since *Fletcher v. Peck*" in 1810 that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," so that testimony of an individual

legislator was "usually to be avoided." *Id.* at 268, n. 18; *see also Lee v. City of Los Angeles,* 908 F.3d 1175, 1187-88 (9th Cir. 2018) ("plaintiffs are generally barred from deposing local legislators, *even in* 'extraordinary circumstances'" (emphasis added) (citation omitted).

Putting aside that individual members' communications are rarely relevant to determining legislative intent, Plaintiffs have not shown that Toma and Petersen individually have more relevant information than the other 88 members of the 55th Arizona Legislature had in the Second Regular Session. It appears that the only reason Plaintiffs seek to depose Toma and Petersen is because they intervened in the case to defend the constitutionality of the Voting Laws.

When the Voting Laws were adopted, Toma and Petersen were not the Speaker and President of their respective chambers. And as already pointed out, across the 8 different complaints filed by Plaintiffs, there is only one mention of Petersen in one complaint, and zero mention of Toma. The Promise Arizona Complaint alleges only that Petersen stated during a floor session "that H.B. 2243 is an amended version of H.B. 2617 with additional notice, but that it was 'otherwise identical' to H.B. 2617." [Case 2:22-cv-01602-SRB, Doc. 1 ¶ 40.] That's it.

Even though the district court's order was based upon waiver of the privilege as to the Legislative Leaders' personal motives, in the face of the overwhelming authority that such motives are irrelevant, Plaintiffs shifted positions, recasting their discovery as seeking testimony as to the 9 topics identified in their draft 30(b)(6) deposition notice. But the district court barred the 30(b)(6) deposition, recognizing

that it would effectively force a waiver of other legislator's individual legislative privilege. App. 06. Petersen and Toma are not competent to testify as to the legislature's collective intent; that is to be determined by the court using the factors discussed in *Arlington Heights*.

That leaves Petersen and Toma's private communications with other legislators or third parties such as interest groups or constituents. But those private communications were not presented to the legislative body as a whole, and therefore cannot show collective intent, just as any after-the-fact statement by a legislator cannot show legislative intent. *See Barber v. Thomas*, 560 U.S. 474, 486 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law."); *cf. Campbell,* 883 F.2d at 1261 ("It is manifestly impossible to determine with certainty the motivation of a legislative body by resorting to the utterances of individual members thereof-even statements made by sponsors and authors of the act-since there is no way of knowing why those, who did not speak, may have supported or opposed the legislation.").

Furthermore, allowing the Legislative Leaders to testify as to their conversations with other legislators forces a waiver of that legislator's personal privilege, which the district court's order specifically forbade. App. 006. Yet, from the comments made in court on November 17, the district court appears to now allow Plaintiffs to discover information subject to another member's privilege. A stay is thus

necessary not only to protect the Legislative Leaders' legislative privilege, but also the privilege belonging to other legislators who are not parties to this case.

C. Mandamus Is Appropriate Because The District Court's Order Holding That The Legislative Leaders Waived The Legislative Privilege Through Their Intervention Implicates Separation of Powers and Harms Arizona's Sovereign Interests.

Mandamus is also appropriate because the district court's order raises important questions regarding waiver of privilege by legislative leaders who intervened in their official capacity after the state attorney general indicated an unwillingness to defend certain provisions of the laws and affirmatively argued that they were preempted by federal law. To our knowledge, this Court has never found waiver of the legislative privilege in similar circumstances or based a finding on discriminatory intent upon testimony from individual legislators regarding their personal motives or statements that are not part of the legislative record.

In *Foley,* the Ninth Circuit found mandamus jurisdiction appropriate to prevent "inquiry into the motives of legislators," calling such inquiries a "hazardous task" since "[i]ndividual legislators may vote for a particular statute for a variety of reasons." 747 F.2d at 1297. The Ninth Circuit also stated, quoting this Court, that the "diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertain the truth, *precludes all such inquiries* as impracticable and futile.'" *Id.* (quoting *Soon Hing v. Crowley,* 13 U.S. 703, 71-11 (1885) (emphasis added)).

This Court has held that even where a legislature's intent as to discrimination is relevant, a member might only be called to testify in "some extraordinary

circumstances," "although even then such testimony frequently will be barred by privilege." *Arlington Heights,* 429 U.S. at 268. The Court did not find such "extraordinary circumstances" in *Arlington Heights* or offer guidance as to what such circumstances might be. We are not aware of any case where this Court or any circuit court has ever found such extraordinary circumstances.

Although Plaintiffs have cited below to a five-factor balancing test used by some district courts to determine whether the legislative privilege should apply, that test has never been approved by this Court or any circuit court.[5] Recent circuit decisions have not applied Plaintiffs' proposed five-factor balancing test. *See In re North Dakota Legislative Assembly*, 70 F.4th at 464-65; *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 238-39 (5th Cir. 2023) (holding case did not present "extraordinary circumstances").

Mandamus is also appropriate given the federalism concerns presented by this issue. The district court's ruling would effectively find that an exercise of statutory authority to intervene to defend the constitutionality of state law would waive any governmental privilege held by those state officials. This ruling is contrary to the policy behind A.R.S. § 12-1841, which is to allow full intervention to ensure that the legislature's point of view is permitted to be heard throughout the case. Speaker

[5] The district court declined to reach Plaintiffs' argument regarding the five-factor balancing test or address whether it was timely raised when it was raised for the first time in Plaintiffs' motion filed an hour after the Legislative Leaders' brief on the issue. *See* App. 005 n. 1; *see also* Doc. 506 (asking for leave to respond to Plaintiffs' simultaneous brief "to the extent that the Court will consider" the newly-raised argument); Doc. 517 (denying motion for leave to respond).

Toma and President Petersen, as well as other legislative leaders, will understandably hesitate to participate in cases attacking the constitutionality of state laws if doing so will result in an automatic waiver of the legislative privilege.

In *Berger*, this Court instructed federal courts to respect states' division of sovereign authority when applying the federal rules of procedure governing intervention. 142 S. Ct. at 2201. To give meaning and effect to *Berger* and those state interests, it is imperative that legislative leaders who are empowered by state law to intervene and be heard in cases like this one are not unfairly forced to waive their legislative privilege when they choose to exercise the authority granted to them.

Furthermore, the legislative privilege helps preserve "[o]pen dialogue between lawmakers and their staff," and the failure to preserve that privilege will thus chill legislative debate. *See, e.g. Citizens Union of City of NY. V. Att'y Gen. of N.Y.,* 269 F. Supp. 3d 124, 170 (S.D.N.Y. 2017). Such chilling would, in turn, impede the Legislative Leaders' ability to discharge their duties with "firmness and success," without "concern of adverse consequences outside the ballot box." *Lee,* 908 F.3d at 1186-87 (citation omitted). Judicial scrutiny into private conversations between legislators will undoubtedly chill such communications and therefore interfere with the legislative process.

To hold that the Legislative Leaders, who are the only legislative officers authorized to intervene pursuant to Arizona law, have now waived their legislative privilege—even though they do not rely upon their individual motives to defend the questioned laws and have not offered and will not offer any nonpublic documents or

their own testimony in evidence—is contrary to the doctrine of implied waiver and will have serious consequences for future cases.

II. THE LEGISLATIVE LEADERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

As to the second factor, irreparable harm, unless the Court issues an immediate stay the Legislative Leaders will quickly find themselves between the mythical Scylla and Charybdis: they'll either need to submit to improper depositions or refuse to do so and expose themselves to potential sanctions and contempt charges.[6] Either choice brings serious consequences that can't be corrected.

A stay would not injure the other parties, because the discovery sought is improper in the first place and cannot be used to determine collective legislative intent. Plaintiffs cannot be harmed by the deprivation of such irrelevant information, especially given that the Legislative Leaders' position on collective intent is based on existing, publicly available facts and documents. Unlike the legislators involved in *Powell v. Ridge*, Toma and Petersen have responded to appropriate document discovery and will not offer either their own testimony or the testimony of any other legislators to prove proper motive or any other issue.

And the public interest also heavily favors the Legislative Leaders, given that judicial scrutiny of their personal motives and conversations as part of the legislative

[6] Pursuant to the district court's order denying the motion for stay, App. 011, the Legislative Leaders have provisionally produced the withheld privileged documents to opposing counsel with an attorneys' eyes only designation, but the relief sought in the Legislative Leaders' petition for writ of mandamus would include the return of those provisionally produced materials.

process would substantially intrude into the legislature's workings. *See Arlington Heights,* 429 U.S. at 268 n.18. The failure to preserve legislative privilege, both that belonging to the Legislative Leaders and other members who are not parties to this case, will also chill legislative debate and impede the legislative process. *See Lee,* 908 F.3d at 1186-87 (citation omitted).

A short stay would preserve the status quo pending resolution of the writ of mandamus. Although trial concluded on November 17, 2023, the district court has asked for the parties to submit proposed findings of fact and conclusions of law on December 12, and is holding the record open until that date with respect to the discovery sought by Plaintiffs. Plaintiffs' counsel has asked for deposition availability the week of November 27, but the earliest date the Legislative Leaders would be available that week is November 28.

CONCLUSION

For all the reasons discussed above, the Legislative Leaders ask the Court to issue an immediate emergency stay of the district court's discovery order pending the disposition of the Legislative Leaders' forthcoming petition for writ of mandamus. Given the upcoming depositions, we respectfully ask the Court to consider and act upon this motion **as soon as possible and ideally by 9:00 a.m. November 28, 2023**.

Dated: November 20, 2023

GALLAGHER & KENNEDY, P.A.

By: */s/Kevin E. O'Malley*

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