No. _____

In the Supreme Court of the United States

IN RE WARREN PETERSEN, ET AL.

On Application for a Stay of the Order of the
United States District Court for the District of Arizona

APPLICATION FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS

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PARTIES TO THE PROCEEDING

Applicants (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.

The 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).

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INTRODUCTION

President of the Arizona State Senate Warren Petersen (the "President") and Speaker of the Arizona House of Representatives Ben Toma (the "Speaker") respectfully apply for a stay of the order entered by the United States District Court for the District of Arizona on June 20, 2024 (Pet. Add. 3A-16A), pending the disposition of Applicants' petition for a writ of mandamus, filed concurrently with this application, and any further proceedings in this Court. Applicants request a stay of the order's requirements that (1) the President and Speaker sit for depositions to probe their legislative motives; and (2) the President and Speaker produce documents protected by the legislative privilege. This Court has granted such relief to block production of documents protected by a governmental privilege, *In re United States*, 583 U.S. 1029 (2017) (granting stay); *In re United States*, 583 U.S. 29, 31 (2017) (granting petition for writ of certiorari), and to prevent a high-ranking government official's deposition, *In re Dep't of Com.*, 139 S. Ct. 16 (2018) (granting stay of cabinet secretary's deposition); *Dep't of Com.* v. *New York*, 139 S. Ct. 953 (2019) (granting petition for writ of certiorari before judgment). This Court should do so here as well.

An unbroken string of authority from the Founding to the present prohibits 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," *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919), and this Court has been clear that "no 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). Discovery sought from legislators implicates the legislative privilege, which creates an "absolute bar" to compelled disclosure. *Eastland* v. *U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The district court's order violated these well-settled principles.

Stripping the legislative privilege from Arizona's legislative leaders for exercising their statutory right to intervene to defend state law deprives the people of Arizona of their chosen representatives to defend state law. ARIZ. REV. STAT. § 12-1841(A), (D). This case "illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court." *Berger* v. *N. Carolina State Conf. of the NAACP*, 597 U.S. 179, 198 (2022). Just four days after Respondents filed their lawsuit challenging the validity of an Arizona statute, the Attorney General disqualified her entire office, D. Ct. Doc. 19-1;[1] turned over the law's defense to the only state official named in the lawsuit, *id.*; and refused to pay for that official's counsel, despite authority to do so, D. Ct. Doc. 40, at 3. 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. Yet the district court's order penalizes the President and Speaker for stepping up to defend state law after the state Attorney General stepped aside.

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

The reasons to grant a stay are compelling. Ordering the discovery of legislative motives and documents shielded by legislative privilege is a clear and indisputable error that contradicts more than 200 years of this Court's precedent and splits with decisions from five federal courts of appeals. The district court also clearly erred by rejecting this Court's holding that, at a minimum, "waiver can be found only after explicit and unequivocal renunciation of the protection." *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979). Because of these clear and indisputable errors, there is a "fair prospect" that a majority of the Court will vote to grant mandamus, or in the alternative, a "reasonable probability" that four Justices will vote to grant certiorari, and a "fair prospect" that at least five Justices will vote to reverse the judgment below. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam).

No other adequate means exist to attain the requested relief, and the threat of irreparable injury is clear. Absent a stay, the President and Speaker will be forced to provide testimony and produce documents normally protected by the legislative privilege, including regarding legislative motives. The disclosure will irreparably harm the President and Speaker by forcing them to choose between declining to defend state law or disclosing privileged materials and communications. *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 175 (4th Cir. 2019); *In re Lott*, 139 F. App'x 658, 662 (6th Cir. 2005); *Admiral Ins. Co.* v. *U.S. Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989). The President and Speaker also will be irreparably harmed by "the intrusion of the deposition itself." *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022); *see also In re Kirkland*, 75 F.4th 1030, 1051

(9th Cir. 2023). And the Arizona Legislature will be harmed by the "chill" that inevitably will result, *United States* v. *Rayburn House Off. Bldg*, 497 F.3d 654, 661 (D.C. Cir. 2007), and the effective denial of their right of intervention. *See Berger*, 597 U.S. at 191. "It would be difficult—if not impossible—to reverse the harm" from these disclosures. *Hollingsworth*, 558 U.S. at 195. And there is no reversing violations of the *Morgan* doctrine—as *Morgan* itself shows. *See United States* v. *Morgan*, 313 U.S. 409, 422 (1941). The "importance of the issues at stake," *Hollingsworth*, 558 U.S. at 190, makes a stay appropriate under these circumstances.

In contrast, Respondents will not suffer any irreparable harm. No defendant sought documents or depositions from the President or Speaker. No defendant opposed the stay before the district court or the court of appeals. Thus, no defendant will be injured by a stay. Only Plaintiffs have sought the contested discovery, and a stay will not substantially injure them. Since July 2023, Plaintiffs have enjoyed the relief they sought from the lawsuit: a preliminary injunction enjoining enforcement of the Act against them. D. Ct. Doc. 127, at 35. Plaintiffs thus do not face any harm from a stay pending the disposition of Applicants' petition and any further proceedings in this Court.

The public interest also supports a stay. The public has a strong interest in upholding the legislative privilege, which protects state legislators from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). Protecting legislative privilege "allow[s] duly elected legislators to discharge their public duties

without concern of adverse consequences outside the ballot box." *Lee* v. *City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). The public also has a strong interest in upholding state laws and state choices about representation. *See* ARIZ. REV. STAT. § 12-1841(A), (D). 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.

This Court should stay the depositions and document production while it considers the significant constitutional questions raised by the President's and Speaker's petition.

STATEMENT

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.

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.

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. Add. 6A.

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. Add. 3A-16A.

In ordering this discovery, the district court concluded that legislative motive evidence is relevant in Equal Protection cases. *Id.* at 6A-7A. 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 8A-9A (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 8A-10A. Likewise, the district held the *Morgan* doctrine inapplicable because the President and Speaker "voluntarily joined this lawsuit." *Id.* at 11A-12A.

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. Add. 17A-19A.

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] 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. Add. 1A-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.*

ARGUMENT

The President and Speaker respectfully request that this Court grant a stay of the district court's order pending this Court's review of their petition for a writ of mandamus, or, in the alternative, a petition for a writ of certiorari. This Court has issued stays to block production of documents protected by a governmental privilege, *In re United States*, 583 U.S. 1029 (2017) (granting stay), and to prevent a high-ranking government official's deposition, *In re Dep't of Com.*, 139 S. Ct. 16 (2018) (granting stay). The same relief is justified here.

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*, 558 U.S. at 190 (quoting *Cheney* v. *United States Dist. Court*,

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

542 U.S. 367, 380-81 (2004)). A stay pending the disposition of a petition for a writ of certiorari, the alternative relief requested by the President and Speaker, is appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Id.* All these requirements are satisfied here.

I. There Is a Fair Prospect That a Majority of the Court Will Vote to Grant Mandamus.

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*, 558 U.S. at 190 (quoting *Cheney*, 542 U.S. at 380-81) (brackets in original).

A. No other adequate means exist to attain the requested relief.

Without relief from this Court, the district court's order will be effectively unreviewable on appeal from final judgment. 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. *Id.* at 195. The President and Speaker have "no other adequate means" of protecting their interests aside from this petition. *Id.* at 190 (citation omitted).

For legislators to "enjoy the fullest liberty of speech," it is "indispensably necessary" that legislators "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." *United States* v. *Johnson*, 383 U.S. 169, 181 (1966).

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 Morgan*, 313 U.S. at 422. 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.

The important issues at stake here—whether legislative motives can be probed and the legislative privilege and *Morgan* doctrine pierced—"remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable . . . ." *Cheney*, 542 U.S. at 381.

B. The right to issuance of the writ is clear and indisputable.

The President's and Speaker's right to a writ of mandamus is "clear and indisputable." *Hollingsworth*, 558 U.S. at 190 (citation omitted). As explained in more detail in the petition (at 14-18), the district court's order violates well-settled

precedent from this Court prohibiting discovery of legislative motives and protecting the legislative privilege.

1. Contrary to the district court's order expressly allowing discovery of legislative motives, Pet. Add. 6A, this Court has clearly and repeatedly held that federal courts may not inquire into 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).

Inquiry into state legislators' motives is likewise prohibited. "[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). 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).

"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 and indisputably erred by compelling discovery of legislative motives. Pet. Add. 10A.

2. Contrary to the district court's order compelling discovery despite the legislative privilege, *id.*, this Court has clearly and repeatedly held that the legislative privilege protects legislators from "questioning in any other place," including through depositions and document productions. 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.

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).

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 [the Act] and the governmental purpose served by the law." Pet. Add. 7A. These topics are clearly within the legislative privilege's protection for "acts that occur in the regular course of the legislative process and … the motivation for those acts." *United States* v. *Brewster*, 408 U.S. 501, 525 (1972); *see also Gravel*, 408 U.S. at 624 (holding that the protection extends to "anything 'generally done in a session of the House by one of its members in relation to the business before it'") (citation omitted). This Court's unbroken precedent prohibits Plaintiffs from obtaining this discovery from the President and Speaker, and the district court clearly and indisputably erred by ruling otherwise.

3. Contrary to the district court's order that the President and Speaker waived their legislative privilege by intervening to defend state law, Pet. Add. 8A, "[t]he

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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.

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 before he asserted the legislative privilege. *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*. v. *Williams*, 62 F.3d 408, 421 n.11 (D.C. Cir. 1995) (radio interview not waiver); *United States* v. *Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (trial testimony not waiver).

The district court ignored *Helstoski*, holding instead that "[a] waiver of legislative privilege need not be explicit or unequivocal." Pet. Add. 8A. 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 8A-10A. 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, *La Union del Pueblo Entero* v. *Abbott (LUPE II)*, 93 F.4th 310, 314, 325 (5th Cir. 2024)—a conflict with the reasoning in this case.

The President and Speaker retain their legislative privilege when they defend state law. The district court clearly and indisputably erred by ruling the President and Speaker waived the legislative privilege by intervening.

C. 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. Add. 7A-8A. Because loss of the privilege will impact future decisions by legislators on whether 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 it 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.* v. *Educational Equality League*, 415 U.S. 605, 615 n.13 (1974)).

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

II. There is a Reasonable Probability that Four Justices Will Consider the Issue Sufficiently Meritorious to Grant Certiorari.

This Court has granted certiorari in comparable cases involving government privileges in discovery, *In re United States*, 583 U.S. 29, 31 (2017) (granting petition for writ of certiorari), and a high-ranking government official's deposition, *Dep't of Com.* v. *New York*, 139 S. Ct. 953 (2019) (granting petition for writ of certiorari before

judgment). This Court's review is warranted due to the "conflict[] with relevant decisions of this Court" and "conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a), (c). These compelling reasons make it reasonably probable that four justices will consider the issue sufficiently meritorious to grant certiorari. *Hollingsworth*, 558 U.S. at 190 (citation omitted).

A. The decision below conflicts with relevant decisions of this Court.

The district court's order warrants review because it decided important federal questions "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As already discussed, *supra* Part I.B, the district court's decision authorizing inquiry into legislative motives conflicts with *Fletcher* v. *Peck*, *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *Gravel* v. *United States*, *Lake Country Ests., Inc.* v. *Tahoe Reg'l Plan. Agency*, and a host of other decisions of this Court. The district court's decision finding the legislative privilege waived when the President and Speaker intervened to defend state law conflicts with *United States* v. *Helstoski* and effectively voids *Berger* v. *N. Carolina State Conf. of the NAACP*. And its decision compelling depositions to probe the President's and Speaker's motives conflicts with *United States* v. *Morgan*.

B. The decision below conflicts with the decision of another court of appeals on the same important matter.

1. 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 provide the same protection 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). Though 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 (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. *LUPE II*, 93 F.4th at 323.

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* v. *Florida Bd. of Governors of State Univ.*, 84 F.4th 1339, 1344 (11th Cir. 2023). 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.*, 62 F.3d at 421; *MINPECO, S.A.* v. *Conticommodity Servs., Inc.*, 844 F.2d 856, 863 (D.C. Cir. 1988). Finding that 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 does not. *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*, 908 F.3d at 1187-88; *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.

2. The Ninth Circuit refused to reject the district court's holding that "[a] waiver of legislative privilege need not be explicit or unequivocal" and the President and Speaker waived it by intervening. Pet. Add. 1A-2A, 8A. This decision is contrary to decisions by two circuits that have applied *Helstoski*'s "explicit and unequivocal renunciation" standard. *See, e.g.*, *Senate Permanent Subcomm. on Investigations*, 856 F.3d at 1086-87; *Brown & Williamson Tobacco Corp.*, 62 F.3d at 421 n.11; *Biaggi*, 853 F.2d at 103. Its reasoning also conflicts with the reasoning of a Fifth Circuit decision that upheld the legislative privilege for documents possessed by an intervenor-defendant. *LUPE II*, 93 F.4th at 314, 325.

3. The Ninth Circuit left in place the district court's holding that intervention waived the *Morgan* doctrine. Pet. Add. 1A-2A, 11A-12A. This 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 by 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 at 706 (former Secretary of Education).

III. There Is a Fair Prospect That a Majority of the Court Will Vote to Reverse the Judgment Below.

A "fair prospect of reversal" exists when "[t]he issues underlying this case are important and difficult," and it does not require "anticipating [the Court's] views on the merits." *Times-Picayune Publ'g Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1309 (1974) (Powell, J., in chambers). A stay is appropriate if "petitioner's position … cannot be deemed insubstantial," *McLeod* v. *General Elec. Co.*, 87 S. Ct. 5, 6 (1966)

(Harlan, J., in chambers), and the Court need not "think it more probable than not that" reversal will occur, *Certain Named and Unnamed Non-Citizen Children and Their Parents* v. *Texas*, 448 U.S. 1327, 1332 (1980) (Powell, J., in chambers).

The importance of the legislative privilege has been recognized for more than 400 years. *See Tenney*, 341 U.S. at 373; *Johnson*, 383 U.S. at 178. Likewise, this Court has rejected inquiry into legislative motives for more than 200 years. *Fletcher*, 10 U.S. at 131. 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.

As demonstrated by Parts I.B and II, *supra*, the President's and Speaker's positions are not insubstantial. The district court's order directly conflicts with clear precedents of this Court prohibiting discovery into legislative motives and requiring an "explicit and unequivocal renunciation" to waive legislative privilege. These direct conflicts, and the split with the overwhelming weight of authority of the courts of appeals, make it more probable than not that reversal will occur.

The implications of the district court's ruling, and its unique harm to the legislature, also make reversal more probable than not. 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.

The 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.

This Court's assessment of the "fair prospect of reversal" also can be guided by its decision in *Berger* v. *N. Carolina State Conf. of the NAACP*, 597 U.S. 179 (2022). Just two years ago, eight justices held that North Carolina's legislative leaders were entitled to intervene because that state "authorized the leaders of their legislature to defend duly enacted state statutes against constitutional challenge." *Berger*, 597 U.S.

at 200. The people of Arizona have made the same choice, ARIZ. REV. STAT. § 12-1841(A), (D), and like in *Berger*, the President and Speaker sought to exercise their statutory right to defend the constitutionality of a state law. "Ordinarily, a federal court must respect that kind of sovereign choice." *Berger*, 597 U.S. at 200. Instead, the district court's *per se* waiver rule "evince[s] disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials" and "risk[s] turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *Id.* at 191.

For the reasons set forth in this application and in the accompanying petition, this case presents a "fair prospect of reversal."

IV. Irreparable Harm Will Result from the Denial of a Stay.

The irreparable harm to the President and Speaker if a stay is not granted is clear and manifest. The district court's order requires the President and Speaker to sit for depositions to probe their motives. Pet. Add. 12A. Absent a stay, the President and Speaker will be forced to provide testimony and produce documents normally protected by the legislative privilege, such as their motives and the legislative process.

This disclosure will irreparably harm the President and Speaker. A party likely will suffer irreparable harm "if erroneously required to disclose privileged materials or communications." *Admiral Ins. Co.*, 881 F.2d at 1491. This is because "an adverse party's review of privileged materials seriously injures the privilege holder." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 175 (citing cases);

see also In re Perrigo Co., 128 F.3d 430, 437 (6th Cir. 1997) ("forced disclosure of privileged material may bring about irreparable harm"). Recognizing the "inherent harmfulness resulting from the discovery of privileged communications," *In re Lott*, 139 F. App'x at 662, the courts of appeals have found that "the breach of privilege alone constituted irreparable harm." *Id.* (citing *United States* v. *Philip Morris, Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003)). Forcing the President and Speaker to produce privileged documents and testimony will irreparably harm them.

The President and Speaker also will be irreparably harmed by "the intrusion of the deposition itself." *In re U.S. Dep't of Educ.*, 25 F.4th at 705. Absent a stay, the President and Speaker will be forced to spend time preparing for and sitting for the depositions. This "harm is not correctable on appeal, even if [the] testimony is excluded at trial." *Id.*; *see also In re Kirkland*, 75 F.4th at 1051 ("[T]he violation of having to give testimony when the bankruptcy court has no authority to compel them to do so cannot be fully remedied post-judgment."). Forcing the President and Speaker to sit for depositions will irreparably harm them.

Not just the President and Speaker will be irreparably harmed. The Arizona Legislature also will be irreparably harmed. "[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 [Speech or Debate] Clause's purpose of protecting against disruption of the legislative process." *Rayburn House Off. Bldg.*, 497 F.3d at 661. Forcing the President and Speaker to produce privilege documents and testify about their motives will inevitably chill the legislative process for future legislation

as well as effectively deny legislators intervention to defend state laws in the future. This will irreparably harm the Arizona Legislature.

This significant and irreparable harm warrants a stay.

V. The Balancing of Equities Strongly Favors a Stay.

Although this is not such a case, "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Karcher* v. *Daggett*, 455 U.S. 1303, 1305–06 (1982) (Brennan, J., in chambers) (citation omitted). Should the Court balance the equities here, they clearly support a stay.

The President and Speaker will suffer irreparable harm by sitting for depositions, testifying about their motives, and producing privileged documents to an adverse party. *See* Part IV, *supra*. In contrast, Respondents will not suffer any irreparable harm. No defendant sought documents or depositions from the President or Speaker. No defendant opposed the stay before the district court or the court of appeals. Thus, no defendant will be injured by a stay.

Only Plaintiffs have sought the contested discovery, and a stay will not substantially injure them. Since July 2023, Plaintiffs have enjoyed the relief they sought from the lawsuit: a preliminary injunction enjoining enforcement of the Act against them. D. Ct. Doc. 127, at 35. Plaintiffs thus will not be harmed by a stay pending the disposition of Applicants' petition and any further proceedings in this Court. Underscoring the lack of harm to any Respondent, Plaintiffs have repeatedly sought unopposed extensions of the district court's fact discovery deadline to allow

for judicial review of the discovery sought from the President and Speaker. D. Ct. Doc. 205, at 2; D. Ct. Doc. 223, at 2.

The public interest also supports a stay. The public has a strong interest in upholding the legislative privilege. Legislative privilege protects state legislators from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney*, 341 U.S. at 377. Indeed, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone* v. *United States*, 493 U.S. 265, 279 (1990). Protecting legislative privilege facilitates better public policy by "allow[ing] duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box." *Lee*, 908 F.3d at 1187.

The public also has a strong interest in preventing depositions of high-ranking government officials. Such depositions could affect policy development and decisions by these officials. *See In re U.S. Dep't of Educ.*, 25 F.4th at 705 ("The threat of having to spend their personal time and resources preparing for and sitting for depositions could hamper and distract officials from their duties while in office."). These depositions also could affect who is willing to enter public service or hold legislative leadership positions. *See id.* ("If allowed the minute cabinet secretaries leave office, overwhelming and unnecessary discovery could also discourage them from taking that office in the first place or leaving office when there is controversy.").

Finally, the public has a strong interest in upholding state laws and state choices about its representation. Acting through their legislature and governor, the people of Arizona have empowered the President and Speaker to intervene in lawsuits challenging the constitutionality of state laws. ARIZ. REV. STAT. § 12-1841(A), (D). 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. Foisting on 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, "risk[s] allowing a private plaintiff to pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests." *Berger*, 597 U.S. at 195.

The public good is in jeopardy if the legislative privilege is pierced and high-ranking legislators are deposed. The public interest thus strongly supports a stay.

CONCLUSION

This Court should stay the order entered by the United States District Court for the District of Arizona on June 20, 2024 (Pet. Add. 3A-16A), which requires the President and Speaker to sit for depositions and to produce documents protected by the legislative privilege, pending the disposition of Applicants' petition for a writ of mandamus and any further proceedings in this Court.

August 20, 2024

Respectfully submitted,

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ADDENDUM

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

Order of the United States District Court for the District of Arizona Denying Intervenor-Defendants' Motion for Stay Pending Appeal, D. Ct. Doc. 218 (July 12, 2024) 17A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 8 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.	No. 24-4335 D.C. No. 4:23-cv-185 District of Arizona, Tucson 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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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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Helen Doe, et al., Plaintiffs, v. Thomas C Horne, et al., Defendants.	No. CV-23-00185-TUC-JGZ **ORDER**

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

20 **I. BACKGROUND**

21 The Plaintiffs filed suit on April 17, 2023, alleging that A.R.S. § 15-120.02, a law
22 that prohibits transgender girls from competing on girls' school sports teams, violates their
23 rights under the Equal Protection Clause, Title IX, the Americans with Disabilities Act
24 (ADA), and Section 504 of the Rehabilitation Act (RA). (Doc. 1.) Plaintiffs named five
25 defendants in their Complaint: (1) Thomas C. Horne, in his official capacity as State
26 Superintendent of Public Instruction; (2) Laura Toenjes, in her official capacity as

27 [1] The Plaintiffs also filed a Second Motion for Extension of Time to Complete Discovery.
28 (Doc. 205.) The Court granted this request during oral argument on May 7, 2024. (Doc. 207.)

1 Superintendent of the Kyrene School District; (3) the Kyrene School District; (4) the
2 Gregory School; and (5) the Arizona Interscholastic Association (AIA).[2] (*Id.*)
3 Before any defendant made an appearance, Senator Warren Peterson, President of
4 the Arizona State Senate, and Representative Ben Toma, Speaker of the Arizona House of
5 Representatives, filed a Motion to Intervene pursuant to Rule 24 of the Federal Rules of
6 Civil Procedure. (Doc. 19.) The Court initially granted President Peterson and Speaker
7 Toma limited intervention and allowed them to present arguments and evidence in
8 opposition to the Plaintiffs' Motion for Preliminary Injunction. (Doc. 79.) Later, the Court
9 amended its decision and allowed President Peterson and Speaker Toma to participate fully
10 as a party in the litigation. (Doc. 111, 142.)
11 The Intervenor-Defendants have fully participated in this action. On September 12,
12 2023, in lieu of an answer, Intervenor-Defendants filed a motion to dismiss the complaint
13 for failure to state a claim. (Doc. 146 at 10.) Since October 2023, the Intervenor-Defendants
14 have actively participated in discovery. On October 30, 2023, the Plaintiffs served nine
15 Interrogatories and nine Requests for Production on the Intervenor-Defendants. (Doc. 191
16 at 8.) On November 13, 2023, the Intervenor-Defendants served twenty-one Requests for
17 Admissions, ten Interrogatories, and five Requests for Production on each Plaintiff. (*Id.*)
18 The Intervenor-Defendants also served three Requests for Production and twelve
19 Interrogatories on AIA. (*Id.*)
20 The pending motions center on the Intervenor-Defendants' objections to Plaintiffs'
21 discovery requests. In their November 29, 2023 responses, the Intervenor-Defendants
22 objected to several Requests for Production on the basis of legislative privilege and
23 deliberative process privilege. (*Id.*) On February 8, 2024, the Intervenor-Defendants
24 objected to Plaintiffs' requests to depose them on the basis of legislative privilege, the
25 *Morgan* doctrine, and relevance. (Doc. 191-2 at 95-97.)
26 After the parties conferred, the Plaintiffs filed the instant Motion to Compel
27 requesting that the Court order the Intervenor-Defendants to produce the documents at

28 [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.)

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

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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.)

1 establishing that the discovery sought is relevant. *Mi Familia Vota v. Hobbs*, 343 F.R.D.
2 71, 81 (D. Ariz. 2022). This "is a relatively low bar." *Id*. A party asserting an evidentiary
3 privilege "has the burden to demonstrate that the privilege applies to the information in
4 question." *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 667 (D. Ariz. 2016).

5 **2. Relevance**

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

14 "Legislative motive is relevant in Equal Protection claims." *Vision Church v. Vill.*
15 *of Long Grove*, 226 F.R.D. 323, 326 (N.D. Ill. 2005); *see also Mi Familia Vota v. Hobbs*,
16 682 F. Supp. 3d at 784–85 (explaining that the legislature's purpose in enacting state voting
17 laws was "at the heart" of plaintiffs' Equal Protection challenge); *Grossbaum v.*
18 *Indianapolis-Marion County Bldg. Auth*., 100 F.3d 1287, 1292 (7th Cir. 1996) ("In an
19 Equal Protection Clause analysis . . . courts often inquire into the motives of legislators or
20 other government actors."); *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp.
21 3d 323, 339 (E.D. Va. 2015) (proof of legislative intent is "relevant and extremely
22 important as direct evidence."). Courts have recognized the relevance of discovering
23 legislative materials in Equal Protection cases. *See Bethune-Hill*, 114 F. Supp. 3d at 339
24 ("[A]ny documents containing the opinions and subjective beliefs of legislators or their
25 key advisors would be relevant to the broader inquiry into legislative intent."); *Harris v.*
26 *Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1071 (D. Ariz. 2014) ("Motive
27 is often most easily discovered by examining the unguarded acts and statements of those
28 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.).

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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*

1 *Familia Vota*, the Plaintiffs did not seek discovery from the Intervenor-Defendants until
2 they intervened in this action. In moving to intervene, the Intervenor-Defendants
3 emphasized their "unique interest in defending the constitutionality of laws duly enacted
4 by the Arizona legislature." (Doc. 19 at 1.) Finally, like *Mi Familia Vota*, the Intervenor-
5 Defendants put their legislative intent at issue in their assertions that (1) the law does not
6 discriminate on the basis of transgender status, (Doc. 82 at 13), and (2) the purpose of the
7 law is to "redress past discrimination against women in athletics" and "promote equality
8 of athletic opportunity between the sexes" in school sports. (Doc. 19 at 12).
9 The Intervenor-Defendants argue that *Mi Familia Vota* is distinguishable. They
10 claim they had a heightened interest in intervening in this case because the Arizona
11 Attorney General disqualified herself from defending A.R.S. § 15-120.02. The Intervenor-
12 Defendants also argue that they did not put their motives at issue and that the Plaintiffs
13 have not alleged discriminatory intent in this suit. (Doc. 198 at 6, 8.) These arguments are
14 unpersuasive.
15 Whether the Intervenor-Defendants had an interest or a heightened interest in
16 intervention is of no moment. They intervened in this litigation voluntarily. Under Arizona
17 law, the Speaker and President are "entitled to be heard" "[i]n any proceeding in which a
18 state statute … is alleged to be unconstitutional." A.R.S. § 12-1841(A). The Speaker and
19 President may, in their discretion, (1) intervene as a party, (2) file briefs in the lawsuit, or
20 (3) "*choose not to participate"* in the lawsuit. A.R.S. § 12-1841(D) (emphasis added). The
21 Intervenor-Defendants chose to intervene.[4] Furthermore, although Attorney General
22 Mayes disqualified herself from defending the law, she authorized Defendant Horne, a
23 named defendant in the Plaintiffs' Complaint, to defend the law.[5] At the time intervention

24 [4] While the Intervenor-Defendants have not yet filed an answer in this case, as was the case
25 in *Mi Familia Vota*, they did file a Motion to Intervene (Doc. 19), Response to the
26 Plaintiffs' Motion for Preliminary Injunction (Doc. 82), and a Motion to Dismiss Plaintiffs'
claims (Doc. 146).

27 [5] Under A.R.S. § 41-192(E), in the event that the attorney general is disqualified, "the state
28 agency is authorized to make expenditures and incur indebtedness to employ attorneys to
provide the representation or services."

1 was granted, Defendant Horne had already retained counsel, filed several motions,
2 answered the complaint, and confirmed his intention to vigorously defend this lawsuit. (*See*
3 Doc. 20, 21, 24, 31, 39, 42, 57, 58, 66, 67, 71, 72, 73.)

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

14 **4. Deliberative Process Privilege**

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

17 Deliberative process privilege is a form of executive privilege that shields from
18 disclosure "documents reflecting advisory opinions, recommendations and deliberations
19 comprising part of a process by which governmental decisions and policies are
20 formulated." *United States Fish & Wildlife Serv. v. Sierra Club, Inc*., 592 U.S. 261, 267
21 (2021) (quoting *NLRB v. Sears, Roebuck & Co*., 421 U. S. 132, 150 (1975)) (emphasis
22 added). The purpose of deliberative process privilege is to protect government agencies
23 from being "forced to operate in a fishbowl." *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 87
24 (1973)). Deliberative process privilege does not apply here because it is an executive
25 privilege rendering executive agencies immune from normal disclosure or discovery in
26 civil litigation.

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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.

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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 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.

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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.

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©. 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;
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> 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
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> 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] Thus, the Court will impose proposed limitations 1 and 3.

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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 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.)

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 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.

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[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.

1 **IT IS FURTHER ORDERED** re-setting the remaining case deadlines as follows:
2 1. Plaintiffs' Disclosure of Rule 26(a)(2) Expert Witnesses Material: August 12,
3 2024;
4 2. Close of Fact Discovery: August 20, 2024
5 3. Disclosure of Lay Witnesses: August 20, 2024
6 4. Defendants' Disclosure of Rule 26(a)(2) Expert Witnesses Material: September
7 11, 2024
8 5. Rebuttal Expert Opinions: October 25, 2024
9 6. Close of Expert Discovery: December 30, 2024
10 7. Dispositive Motions: January 28, 2025.
11 Dated this 20th day of June, 2024.
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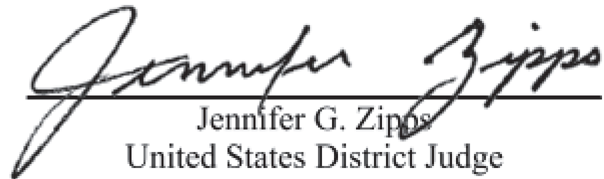
14 
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Helen Doe, et al.,
Plaintiffs,
v.
Thomas C Horne, et al.,
Defendants.

No. CV-23-00185-TUC-JGZ

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

1 brought by the same Intervenor-Defendants, the Ninth Circuit ultimately concluded that
2 the district court did not clearly err in determining that the legislators waived their
3 legislative privilege by intervening in the action. *See In re Toma*, 2023 WL 8167206, at *1
4 (9th Cir. Nov. 24, 2023) (unpublished) (reasoning that the district court could not clearly
5 err where no Ninth Circuit authority prohibited the course taken by the district court).
6 Intervenor-Defendants are unlikely to succeed on their claim that the *Morgan*
7 *Doctrine* shields Intervenor-Defendants from being deposed. The *Morgan* doctrine serves
8 to protect high ranking officials from being "unduly entangled" in civil litigation. *In re*
9 *Gold King Mine Release in San Juan Cnty*., 2021 WL 3207351, at *2 (D.N.M. Mar. 20,
10 2021). The underlying rationale of protecting high ranking officials from being forced to
11 participate in litigation is not applicable where the high ranking officials request to and
12 voluntarily insert themselves as a party to a litigation and actively request discovery from
13 other parties. Though Intervenor-Defendants argue that intervention does not affect the
14 *Morgan* doctrine's application, they cite no relevant caselaw that would suggest this Court
15 clearly erred in reaching its conclusion. *See In re U.S. Dep't of Educ.,* 25 F.4th 692, 698
16 (9th Cir. 2022) ("[T]he district court has erred when [the Ninth Circuit] has already directly
17 addressed the question at issue or when similar cases from [the Ninth Circuit], cases from
18 the Supreme Court, cases from other circuits, the Constitution, or statutory language
19 definitively show us that a mistake has been committed."). Accordingly,
20 **IT IS ORDERED** that Intervenor-Defendant's Motion for Stay Pending Appeal
21 and Request for Administrative Stay (Doc. 212) is **denied**.
22 Dated this 12th day of July, 2024.
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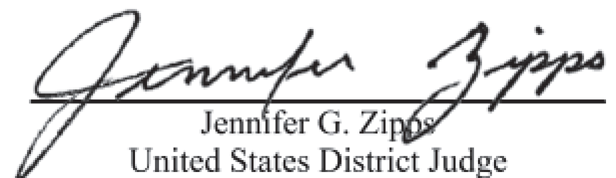

Jennifer G. Zipps
United States District Judge