No. 24-219

In the Supreme Court of the United States

IN RE WARREN PETERSEN, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Deputy Solicitor General

Counsel for Amici States

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INTEREST OF AMICI CURIAE

Amici States have a strong interest in the proper interpretation and application of the legislative privilege, which for the last five centuries has stood to protect the process by which the People's representatives decide what laws will govern. Nevertheless, plaintiffs challenging the constitutionality of state laws routinely attempt to inquire into legislative motives by seeking discovery into legislative deliberations. Until earlier this month, a broad consensus had emerged that such efforts to breach this centuries-old legislative prerogative are impermissible. *See La Union del Pueblo Entero v. Abbott*, 93 F.4th 310 (5th Cir. 2024) ("*LUPE II*"); *Pernell v. Fla. Bd. of Govs. of State Univ.*, 84 F.4th 1339 (11th Cir. 2023); *In re N.D. Legis. Assembly*, 70 F.4th 460 (8th Cir. 2023), *vacated as moot sub. nom. Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly*, No. 23-847, 2024 WL 3259672 (U.S. July 2, 2024); *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228 (5th Cir. 2023) ("*LUPE I*"); *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015); *accord Smith v. Iowa Dist. Ct. for Polk Cnty.*, 3 N.W.3d 524 (Iowa 2024).

To sidestep these precedents—including binding case law in its own Circuit, *Lee*, 908 F.3d at 1186-88—the district court fashioned a novel waiver rule that any legislator who actively participates in constitutional litigation waives the privilege based on a twenty-three-year-old Third Circuit case that questioned the very *existence* of the legislative privilege. *See* App.10a-11a (citing *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001)). Because Arizona's duly elected Attorney General recused *her entire office* from defending a presumptively valid state law,

this rule—implicitly blessed by the Ninth Circuit—puts the President of the Arizona Senate ("President") and the Speaker of the Arizona House of Representatives ("Speaker") to a Hobson's choice: defend their law or defend their centuries-old privilege. Regardless of the merits of the underlying dispute, this error calls out for correction before a State's "duly authorized representatives are excluded from participating in federal litigation challenging state law." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022). Because no authority empowered the district court to erect roadblocks to the Arizona Legislature's "sovereign choice" as to which state officials should defend the State's interests in federal court, *id.* at 200, the Court should grant the petition for a writ of mandamus.[1]

SUMMARY OF ARGUMENT

I. For centuries, the legislative privilege has protected lawmakers in both Britain and America "from arrest or civil process for what they do or say in legislative proceedings." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). When it applies, a legislator "may not be made to answer—either in terms of questions *or* in terms of defending himself from prosecution." *Gravel v. United States*, 408 U.S. 606, 616 (1972) (emphasis added). Although state legislators may not claim the privilege in criminal proceedings on public corruption charges initiated by the federal government, it continues to provide robust protections for state legislators in "civil actions." *See Gillock v. United States*, 445 U.S. 360, 373 (1980); *see also In re Grand Jury*, 821 F.2d 946, 958 (3d Cir. 1987).

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

Drawing from this Court's decisions, an unbroken string of precedents from at least five circuits has recognized that the legislative privilege protects state lawmakers from being compelled in civil actions to produce documents or testimony regarding their motivations for taking legislative acts, including their reasons for supporting the passage of certain laws under constitutional challenge. *See LUPE II*, 93 F.4th at 321-25; *Pernell*, 84 F.4th at 1343; *N.D. Legis. Assembly*, 70 F.4th at 463-64; *LUPE I*, 68 F.4th at 235-36; *Alviti*, 14 F.4th at 87; *Lee*, 908 F.3d at 1187-88; *Hubbard*, 803 F.3d at 1311.

II. A routine application of these precedents should have led the district court in this case—and the Ninth Circuit after it—to reject the plaintiffs' efforts to compel testimony and documents from the President and Speaker regarding Arizona legislators' motivations for supporting the passage of the law challenged in this case. Instead, the district court bypassed these precedents by adopting a novel theory: that the President and Speaker waived their legislative privilege when they intervened into this lawsuit to defend the Arizona law after the State's Attorney General refused to do so.

The waiver rule divined by the district court directly conflicts with the rules for waiver announced by this Court and other circuits. *See, e.g.*, *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979); *LUPE I*, 68 F.4th at 236-37. And if such a rule were consistently applied in the context of other common-law privileges, like the attorney-client or spousal privileges, it would work a sea change in the applicability of such commonplace privileges, vitiating them for any litigant who "actively participate[s] in th[e] litigation,"—even as a defendant. App.10a. Moreover, by requiring the President and Speaker to forgo their legislative privilege in order to

intervene in this litigation, the district court has created a rule that intrudes on the State's sovereign prerogative to determine which officials will defend its interests in federal court. *See Berger*, 597 U.S. at 191-92; *Cameron v. EMW Women's Surgical Ctr. P.S.C.*, 595 U.S. 267, 277 (2022). That rule should not stand.

ARGUMENT

I. The Legislative Privilege Bars Inquiries into Legislative Motives.

A. For centuries the legislative privilege has safeguarded legislative independence.

The legislative privilege shields from inquiry acts of legislators and their agents undertaken when "acting in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. It both "protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts'" and "precludes any showing of how [a legislator] acted, voted, or decided." *Helstoski*, 442 U.S. at 489 (alteration in original) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). "The privilege protects the legislative process itself, and therefore covers," *Hubbard*, 803 F.3d at 1308, not only "words spoken in debate," but also "[c]ommittee reports, resolutions, and the act of voting" and "things generally done" during a legislature's session "by one of its members in relation to the business before it," *Gravel*, 408 U.S. at 617. When it applies, a legislator "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution." *Id.* at 616.

The common-law roots of the legislative privilege run deep, stretching back to the English "Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney*, 341 U.S. at 372. But "[s]ince the Glorious

Revolution in Britain"—not to mention a not-so-glorious civil war culminating in judicially sanctioned regicide—"the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Brewster*, 408 U.S. at 508. Haunted by the "ghost of Charles I," by the timing of the Founding, "[f]reedom of speech and action in the legislature was taken as a matter of course" by both all Englishmen and their colonial relatives. *Tenney*, 341 U.S. at 372.

In the federal Constitution, the legislative privilege is reflected in the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6. That federal provision was preceded by similarly robust protections in some of the earliest state constitutions, *see Tenney*, 341 U.S. at 375-77, as well as the Articles of Confederation, *id.* at 372. Today, it is codified not only in the United States Constitution, but also in the constitutions of more than 40 states. 26A WRIGHT & MILLER, FED. PRAC. & PROC. EVID., § 5675 (1st ed. June 2024 Update).

Although the "Federal Speech or Debate Clause . . . by its terms is confined to federal legislators," *Gillock*, 445 U.S at 374, the legislative privilege also shields state legislators in federal court via "federal common law, as applied through Rule 501 of the Federal Rules of Evidence," *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017); *see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) ("The Federal Rules of Evidence provide that evidentiary privileges 'shall be governed by the principles of the common law . . . in the light of reason and experience.'" (alteration in original) (quoting Fed. R. Evid. 501)). This Court "generally ha[s] equated" the scope of

the privilege afforded to federal legislators via the Constitution and the privilege afforded to state legislators via the common law. *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980). For good reason. The federal-common-law legislative-privilege "is similar in origin and rationale" to its constitutional counterpart, *id.* at 732, and inevitably, concerns of "federalism and comity . . . are at stake when a federal court orders state lawmakers to produce documents" or testimony, *LUPE I*, 68 F.4th at 234.

B. The circuits broadly agree that the legislative privilege bars inquiry into state legislators' motivations for legislative acts.

Drawing from this Court's precedents, the Federal Courts of Appeals have formed a robust consensus that because "the interests in legislative independence served by the Speech or Debate Clause remain relevant in the common-law context," legislative privilege bars inquiry—whether through depositions or document requests—into the motives for the legislative activity of state legislators. *Alviti*, 14 F.4th at 87 (citing *Gillock*, 445 U.S. at 372). That consensus is evidenced by an unbroken string of recent decisions from at least five circuits.

1. Most relevant here, in *Lee*, the Ninth Circuit affirmed a district-court order that prohibited plaintiffs from deposing several city councilmembers and the mayor of Los Angeles in a racial gerrymandering case on the grounds of legislative privilege. 908 F.3d at 1181, 1186-88. The court observed that this Court "has repeatedly stressed that 'judicial inquiries into legislative or executive motivation represent a substantial intrusion' such that calling a decision maker as a witness 'is therefore usually to be avoided.'" *Id.* at 1187 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S.

252, 268 n.18 (1977)). Even acknowledging that the case involved "serious allegations" of racial gerrymandering during the redistricting process, the Court nevertheless found no justification for "the 'substantial intrusion' into the legislative process" that civil discovery would cause. *Id.* at 1188. And the court emphatically rejected the plaintiffs' "call for a categorical exception whenever a constitutional claim directly implicates the government's intent" because such an exception "would render the privilege 'of little value.'" *Id.* (quoting *Tenney*, 341 U.S. at 377).

2. Similarly, in *Alviti*, the First Circuit applied the legislative privilege to bar subpoenas that "sought evidence of [Rhode Island] State Officials' legislative acts and underlying motives." *Alviti*, 14 F.4th at 87. The court recognized that the rule that "federal courts will often sustain assertions of legislative privilege by state legislators" is subject to an exception when "'important federal interests are at stake,' such as in a federal criminal prosecution." *Id.* (quoting *Gillock*, 445 U.S. at 373). But it squarely rejected the notion that the "mere assertion of a federal claim" was sufficient to bring a case within that exception, concluding that such a rule would render the privilege "unavailable largely whenever it is needed." *Id.* at 88. The court also held that "proof of the subjective intent of state lawmakers is unlikely to be significant enough . . . to warrant setting aside the privilege," *id.* at 88-89, noting that this Court "has warned against relying too heavily" on such evidence, which "is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose," *id.* at 90.

3. The Eleventh Circuit has issued a pair of decisions to the same effect. In *Hubbard*, the Eleventh Circuit held that the common-law legislative privilege

protects state legislators from private, civil discovery into their motivations for legislative acts even in cases raising issues of constitutional significance. *Hubbard*, 803 F.3d at 1311-12. Looking to the common-law origins of the legislative privilege, the court reasoned that "[t]he privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." *Id.* at 1310. And because "[t]he subpoenas' only purpose was to support the lawsuit's inquiry into the motivation[s]" of legislators, the court concluded that it "str[uck] at the heart of the legislative privilege." *Id.*

Like *Alviti*, *Hubbard* recognized that "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests such as 'the enforcement of federal criminal statutes.'" *Id.* at 1311 (quoting *Gillock*, 445 U.S. at 373). But like its sister circuit, the Eleventh Circuit had no cause to fully explore what those circumstances might be because the privilege is *not* overcome in private, civil litigation brought under section 1983 challenging an "otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it." *Id.* at 1312.

In *Pernell*, the Eleventh Circuit applied *Hubbard* to bar a subpoena seeking "information about the motives for legislative votes and legislative enactments,'" 84 F.4th at 1344—notwithstanding allegations that the law "ha[d] a racially discriminatory purpose," *id.* at 1341. The court further held that "[t]he privilege applies with full force" even to what plaintiffs insisted were "factual documents in the Florida legislators' possession." *Id.* at 1344 (quoting *Hubbard*, 803 F.3d at 1310). The court rejected the plaintiffs' bid to categorically "except civil-rights actions from the application of the legislative

privilege," as inconsistent with this Court's decisions in *Tenney* and *Gillock*. *Id.* Moreover, the court explained that a rule "that the privilege must give way when the claim depends on proof of legislative intent" would serve as a "deterrent to the uninhibited discharge of [legislators'] legislative duty" and "render the privilege of little value." *Id.* at 1345 (cleaned up).

4. Following *Hubbard*, the Fifth Circuit also issued a pair of decisions rejecting plaintiffs' efforts to breach the legislative privilege of Texas lawmakers. In *LUPE I*, the court explained that "[s]tate lawmakers can invoke legislative privilege to protect actions that occurred within 'the sphere of legitimate legislative activity' or within 'the regular course of the legislative process.'" 68 F.4th at 235 (quoting *Tenney*, 341 U.S. at 376, and *Helstoski*, 442 U.S. at 489). Pulling directly from this Court's case law, the Fifth Circuit held that—like any privilege—the legislative privilege's scope is determined by its purpose and thus "is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process," including even "communications with third parties, such as private communications with advocacy groups." *Id.* at 235-36.

The court also held that section 1983 and Voting Rights Act claims were not exceptional civil claims within the meaning of *Gillock* and thus did not warrant jettisoning the legislative privilege. *Id.* at 237-38. Instead, the court observed that this Court has "drawn the line at civil actions," *id.*, "even when constitutional rights are at stake" and "[e]ven for allegations involving racial animus or retaliation for the exercise of First Amendment rights," *id.* at 238 (citing *Tenney*, 341 U.S. at 377, and *Bogan v. Scott-Harris*, 523 U.S. 44, 47, 49, 53 (1998)).

The Fifth Circuit reaffirmed *LUPE I* just a few months ago in *LUPE II*. There plaintiffs tried to avoid the legislative privilege—and binding precedent in *LUPE I*—by arguing that they could simply ask persons with whom the legislators communicated, rather than the legislators themselves, for the otherwise privileged documents and testimony. *LUPE II*, 93 F.4th at 323. Relying on this Court's holding that legislators' aides and assistants can claim the legislative privilege when performing acts occurring within the legislative process that were done at the direction or instruction of a legislator, *see Gravel*, 408 U.S. at 616, the Fifth Circuit rejected this effort at evasion to hold that "when a legislator brings third parties into the legislative process, those third parties may invoke the privilege on that legislator's behalf for acts done at the direction of, instruction of, or for the legislators," *LUPE II*, 93 F.4th at 322.

5. Finally, the Eighth Circuit upheld claims of legislative privilege by "several current or former members of the North Dakota Legislative Assembly and a legislative aide" in *North Dakota Legislative Assembly.* 70 F.4th at 462. The plaintiffs there sought "documents or testimony" aimed at "develop[ing] evidence of alleged 'illicit motive' by legislators" to support their claim under Section 2 of the Voting Rights Act in redistricting litigation. *Id.* But the Eighth Circuit joined its sister circuits to hold that because the plaintiffs sought documents and testimony "concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota"—acts that undisputedly "were undertaken within the sphere of legitimate legislative activity"—those "acts [were] therefore privileged from inquiry." *Id.* at 463-64.

Although the Eighth Circuit's ruling was later vacated when the larger dispute became moot, *North*

Dakota Legislative Assembly reflects a general consensus among the courts of appeals: Accusations that a State's legislature acted with improper motive, standing alone, cannot justify the affront to both the horizontal and vertical separation of powers inherent in a federal court overseeing discovery into a state legislator's deliberations.

II. The District Court Clearly Erred By Holding that the Leaders of Arizona's Legislature Waived the Privilege By Intervening to Defend State Law.

Under a straightforward application of these precedents—and particularly *Lee*—the district court should have denied the plaintiffs' motion to compel the production of documents and testimony from the President and the Speaker. Instead, the district court sidestepped these precedents by crafting a novel theory of litigation-conduct waiver that disregards the nature of waiver and is at odds with precedent defining the contours of the legislative privilege. And its decision puts the President and the Speaker to an improper choice: Exercise their statutory right intervene to defend a state law under constitutional challenge when the State's executive refuses to do so or protect the privilege that has safeguarded the democratic process in the Anglo-American tradition for half a millennium. Such an order "amount[s] to a judicial 'usurpation of [a sovereign State's] power,'" to decide who will defend it in federal court, as well as a "'clear abuse of [the] discretion'" generally afforded to the court to oversee the discovery process. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967), and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

A. The documents sought were privileged.

There can be little question that the material here fell within *Lee*'s test for what is protected by privilege in the Ninth Circuit—as well as anywhere else that a circuit court has opined on the question. The district court expressly acknowledged that the plaintiffs "seek evidence in discovery to evaluate" "[l]egislative purpose and motive," which it concluded were "at issue due to the very nature of the claim" plaintiffs brought under the Equal Protection Clause. *See* App.12a-13a.

But as this Court has explained, "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the working" of those branches and "even" in "some extraordinary instances [where] members might be called to ... testify concerning the purpose of the official action ... such testimony frequently will be barred by privilege." *Vill. of Arlington Heights*, 429 U.S. at 268 & n.18. That is why the Courts of Appeals unanimously hold that such inquiries "strike[] at the heart of the legislative privilege," and are therefore protected from discovery in private civil litigation. *Hubbard*, 803 F.3d at 1310; *see also Pernell*, 84 F.4th at 1343; *N.D. Legis. Assembly*, 70 F.4th at 463-64; *LUPE I*, 68 F.4th at 235-36; *Alviti*, 14 F.4th at 87; *Lee*, 908 F.3d at 1187-88.

B. Intervention did not waive the privilege.

1. Such a deviation from well-established rules cannot be justified by principles of waiver. Ordinarily, waiver occurs anytime there "'is the intentional relinquishment or abandonment of a known right.'" *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). But this Court has held that "[t]he ordinary rules for determining the appropriate standard of waiver do not apply in th[e]

setting" of federal legislative privilege. *Helstoski*, 442 U.S. at 490-91. Instead, such a waiver "can be found only after explicit and unequivocal renunciation of the protection." *Id.* Indeed, in *Helstoski* this Court held that not even a legislator's "voluntar[y]" testimony "before grand juries on 10 occasions" concerning "his practices in introducing private immigration bills," and his "produc[tion]" of "his files on numerous private bills" waived his legislative privilege. *Id.* at 480-81, 492.

True, this Court has not yet had occasion to address application of waiver principles in the context of *state* legislators' federal-common-law privilege. But as noted above, it has treated the two concepts as generally analogous. *Supra* at 5-6. Following this Court's lead, the Fifth Circuit has held that such a waiver occurs only "when the Legislator *publicly* reveal[s]" the documents at issue. *LUPE I*, 68 F.4th at 236-37 (alteration in original). Likewise, though it did not directly rule on the issue, the Eighth Circuit observed that the district court in its case held that a legislator "waived his legislative privilege by testifying at a preliminary injunction hearing in another case concerning redistricting legislation." *N.D. Legis. Assembly*, 70 F.4th at 465.

Under any of the case law discussed above, the district court clearly abused its discretion to find an implied waiver in this case. To start, the court's *implied* waiver-by-litigation-conduct theory is the opposite of the "explicit and unequivocal renunciation of the protection" required under *Helstoski*. *See* 442 U.S. at 491. Yes, the President and the Speaker intervened to defend state law when the executive officer charged with doing so by state law recused herself and her entire office. But they have stopped well short of disclosing the contents of privileged communications or documents—which this Court

held was insufficient to establish waiver in *Helstoski*. *See id.* at 492. Nor have they publicly revealed the contents of legislatively privileged conversations outside of court, *LUPE I*, 68 F.4th at 236-37, or given public testimony about such privileged acts in other cases, *N.D. Legis. Assembly*, 80 F.4th at 465.

2. In nonetheless finding waiver by conduct, the district court—and presumptively the Ninth Circuit, though its ruling is entirely unreasoned—relied on a single Arizona district-court case that itself draws from the Third Circuit's twenty-three-year-old decision in *Powell*. App.10a-11a. But if it is even relevant at all, *Powell* is not persuasive for at least four reasons.

First, the decision is wholly inapposite because it did not discuss the circumstances under which the legislative privilege may be waived, let alone hold that intervention in litigation waives the privilege. Instead, *Powell* was about appellate jurisdiction—specifically, whether legislators could rely on the collateral-order doctrine to immediately appeal an order compelling them to produce privileged documents. 247 F.3d at 526-27. While the court recognized that a claim of legislative *immunity* would be subject to an interlocutory appeal under the collateral-order doctrine, *id.* at 524, it held that a claim of legislative *privilege* was not, *id.* at 526-27. No question of this Court's appellate jurisdiction is present in this original mandamus proceeding. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

Second, in reaching its appellate-jurisdiction conclusion, the Third Circuit accused the state legislators of "assert[ing] a privilege that does not exist." *Powell*, 247 F.3d at 525. That striking description cannot be reconciled with this Court's precedents in *Tenney* and *Gillock* acknowledging that state legislators enjoy a

legislative privilege in civil cases. *See supra* at 4-5. Nor can it be squared with the overwhelming weight of circuit precedent both recognizing and applying this historical common-law privilege. *See supra* at 6-11.

Third, the court erred by implying that recognition of a legislative privilege would be incongruous with the legislative-immunity doctrine because the former would not "further[] the underlying goals of the [latter] doctrine." *Powell*, 247 F.3d at 526. As other courts have recognized, immunity and privilege are "corollary" concepts that derive from the same historical tradition and advance the same essential purposes, including safeguarding legislative independence and "minimizing the 'distraction' of 'divert[ing] [legislators'] time, energy, and attention from their legislative tasks to defend the litigation.'" *Lee*, 908 F.3d at 1187 (first alteration in original) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975)).

In practice, the concepts are mutually reinforcing. The "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). That is why the D.C. Circuit has concluded that there is no "difference in the vigor with which the privilege protects against compelling a [legislator's] testimony as opposed to the protection it provides against suit." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995). And it is why this Court has treated these two concepts as two sides of the same coin, holding that a legislator "may not be made to answer—either in terms of questions *or* in terms of defending himself from prosecution." *Gravel*, 408 U.S. at 616 (emphasis added).

Fourth, the Third Circuit evidenced a fundamental misunderstanding of the nature of waiver when it suggested that it would be unfair to permit legislators to simultaneously intervene in a case but assert a legislative privilege with respect to certain discovery requests. *Powell*, 247 F.3d at 525. In particular, the court was troubled that this privilege would allow the legislators "to continue to actively participate in this litigation . . . yet allow them to refuse to comply with and, most likely, appeal from every adverse order." *Id.* But apart from the issue of appealability, the same could be said of most evidentiary privileges. Nevertheless, because courts recognize that privileges serve vital societal functions, they continue to apply even—indeed, especially—when a party becomes involved in litigation.

As this Court explained nearly half a century ago, legislative privilege "was designed neither to assure fair trials nor to avoid coercion. *Helstoski*, 442 U.S. at 491. Nor was it designed "to protect against disclosure in general." *LUPE I*, 68 F.4th at 233. Instead, "the purpose of legislative privilege" is "to foster the 'public good' by protecting lawmakers from 'deterrents to the uninhibited discharge of their legislative duty.'" *Id.* (quoting *Tenney*, 341 U.S. at 377). In that way, "[t]he privilege protects the legislative process itself," *Hubbard*, 803 F.3d at 1308, by respecting federal-state "comity" and safeguarding "legislative independence," *Alviti*, 14 F.4th at 87. The privilege thus "allow[s] duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box." *Lee*, 908 F.3d at 1187. And it "reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of

personal liability or the distraction of incessant litigation." *N.D. Legis. Assembly*, 70 F.4th at 463.

The operation of the legislative privilege is hardly unusual in this respect. To the contrary, it functions much the same as any other common-law privilege, such as the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), executive privilege, *United States v. Nixon*, 418 U.S. 683, 705 (1974), spousal privilege, *Trammel v. United States*, 445 U.S. 40, 53 (1980), or psychotherapist-patient privilege, *Jaffee v. Redmond*, 518 U.S. 1, 10-15 (1996). Each of these privileges makes an exception to the public's "right to every man's evidence" that is "justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

No one would suggest, for example, that a litigant waives the attorney-client privilege merely because he or she has intervened into litigation and "actively participate[s] in th[e] litigation." App.10a. Indeed, such a suggestion would be nonsensical given that the attorney-client privilege is, at bottom, a rule of *evidence*, which has little or no meaning outside the context of litigation. *Cf Mohawk*, 558 U.S. at 109. That explains why just two years ago this Court upheld the federal government's invocation of the state-secrets privilege without suggesting it waived the right to assert it—even though the United States had intervened into the case for the sole purpose of defending that privilege. *See United States v. Zubaydah*, 595 U.S. 195, 198-99 (2022). There is no reason that the centuries-old legislative privilege should be treated any differently.

True, this Court has held that an *immunity from suit* might be waived by litigation conduct. *See Lapides v. Bd.*

of Regents of Univ. Sys. of Ga., 535 U.S. 613, 616, 619-21 (2002) (holding that removal to federal court waives a State's sovereign immunity). So might a contractual right to arbitration. *See Morgan*, 596 U.S. at 416-17 (indicating that engaging in protracted litigation before asserting a contractual right to arbitration might result in waiver of that right). But that is because asserting a right to be free of a federal judicial forum—whether by constitutional right or contractual right—is "anomalous or inconsistent" with the act of simultaneously litigating *in* that forum. *Lapides*, 535 U.S. at 619. The same cannot be said of asserting a common-law evidentiary or testimonial privilege, which concerns the type of evidence that may be discovered and used in the case—not the propriety of the forum itself. Nothing about intervening in a lawsuit is "anomalous or inconsistent" with asserting an evidentiary privilege from disclosure. *Id.*

C. Conditioning intervention on waiver of the legislative privilege impedes the State's sovereign prerogative to defend state laws.

In addition to contravening fundamental principles of waiver and the precedents defining the contours of legislative privilege, the district court's ruling fails to give adequate "[r]espect for state sovereignty," which includes the prerogative "to structure its" government "in a way that empowers multiple officials to defend its sovereign interests in federal court." *Cameron*, 595 U.S. at 277.

1. This Court has repeatedly recognized that "'a State must be able to designate agents to represent it in federal court' and may authorize its legislature 'to litigate on the State's behalf, either generally or in a defined set of cases.'" *Berger*, 597 U.S. at 192 (quoting *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663, 664 (2019)). This principle flows naturally from "deep[]. . .

constitutional considerations." *Cameron*, 595 U.S. at 277. Specifically, when the federal Constitution "'split the atom of sovereignty'" between the federal government and the several States, *id.* (alteration omitted) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)), it "'limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty,'" *id.* (quoting *Murphy v. NCAA*, 584 U.S. 453, 470 (2018)).

"Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Id.* (citing U.S. Const. art. VI, § 2). And "it is through the power to 'structure . . . its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign.'" *Berger*, 597 U.S. at 191 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

Under this rubric, "'state law may provide for other officials,' besides an attorney general, 'to speak for the State in federal court' as some States have done for their 'presiding legislative officers.'" *Id.* at 192-93 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013)); *see also Karcher v. May*, 484 U.S. 72, 75, 81-82 (1987). Arizona has decided to do precisely that, authorizing the President and Speaker, as well as the Attorney General, to "intervene as a party," in "any proceeding in which a state statute . . . is alleged to be unconstitutional." Ariz. Rev. Stat. § 12-1841 (A), (D).

"The reasons why a State might choose to proceed this way are understandable enough." *Berger*, 597 U.S. at 185. "Sometimes leaders in different branches of government may see the States' interests at stake in litigation differently." *Id.* And "[s]ome States may judge that important public perspectives would be lost without a mechanism allowing multiple officials to respond." *Id.*

Such policy judgments take on special resonance in circumstances, like here, involving "divided state government." *Id.*

2. The district court's holding, implicitly endorsed by the Ninth Circuit, that President and Speaker *cannot* intervene in federal litigation without waiving legislative privilege poses a direct threat to Arizona's choice to "authorize multiple officials to defend the[] [State's] practical interests in cases like these." *Id.* at 184.

After all, conditioning the President's and the Speaker's intervention into this lawsuit—but not the Attorney General's—on waiver of a critical, centuries-old common-law privilege will have the predictable result of making it *less* likely that such officials will intervene to defend a state law subject to constitutional challenge. By making it more likely that a State's "duly authorized representatives are excluded from participating in federal litigation challenging state law," the district court's rule both "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.

If applied more broadly, the rule would also "tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably or quickly." *Id.* at 191-92. Even where such tactics do not render the case technically collusive (thus nonjusticiable), they thwart "informed federal-court decisionmaking," and thus increase the risk of "setting aside duly enacted state law based on an incomplete understanding of relevant state interests." *Id.* at 192. And all of this "would risk a hobbled litigation rather than a full and fair adversarial testing of the

States' interests and arguments." *Id.* In so doing, the district court's rule would thus harm not just the legislative process guarded by the privilege, but the judicial one furthered by its correct application.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Deputy Solicitor General

Counsel for Amici Curiae

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Counsel for Additional Amici States:

STEVE MARSHALL
Attorney General
of Alabama

TREG TAYLOR
Attorney General
of Alaska

TIM GRIFFIN
Attorney General
of Arkansas

ASHLEY MOODY
Attorney General
of Florida

CHRISTOPHER M. CARR
Attorney General
of Georgia

RAÚL LABRADOR
Attorney General
of Idaho

THEODORE E. ROKITA
Attorney General
of Indiana

BRENNA BIRD
Attorney General
of Iowa

KRIS KOBACH
Attorney General
of Kansas

RUSSELL COLEMAN
Attorney General
of Kentucky

LIZ MURRILL
Attorney General
of Louisiana

LYNN FITCH
Attorney General
of Mississippi

AUSTIN KNUDSEN
Attorney General
of Montana

MICHAEL T. HILGERS
Attorney General
of Nebraska

DREW H. WRIGLEY
Attorney General
of North Dakota

GENTNER DRUMMOND
Attorney General
of Oklahoma

ALAN WILSON
Attorney General
of South Carolina

MARTY JACKLEY
Attorney General
of South Dakota

SEAN REYES
Attorney General
of Utah

JASON MIYARES
Attorney General
of Virginia

PATRICK MORRISEY
Attorney General
of West Virginia