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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

15
16
17 Thomas C. Horne, in his official capacity
18 as State Superintendent of Public
19 Instruction, *et al.*,

20 Defendants.
21

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

**Motion to Intervene of the President of
the Arizona Senate and Speaker of the
Arizona House of Representatives**

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INTRODUCTION

1
2 Proposed Intervenors Senator Warren Petersen, President of the Arizona State
3 Senate, and Representative Ben Toma, Speaker of the Arizona House of Representatives
4 (together “the Legislative Leaders” or “President” and “Speaker”), seek intervention to
5 defend their interests, which include exercising statutory rights to protect women’s sports.
6 The President and Speaker are entitled to intervene as a matter of statutory right, and no
7 other party will adequately represent their unique interests.

8 An Arizona law expressly permits the Legislative Leaders to intervene in cases
9 challenging the constitutionality of state statutes. *See* A.R.S. § 12-1841. The Supreme
10 Court of the United States recently held that such state laws plainly authorize intervention
11 by legislative leaders. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022).
12 Here, Plaintiffs challenge the constitutionality of a state statute that prohibits biological
13 males from competing in women’s athletic events at Arizona public schools, colleges, and
14 universities. A.R.S. § 15-120.02. Intervention has been granted recently to the Legislative
15 Leaders in two other cases to defend state laws. *See Isaacson v. Mayes*, 2:21-cv-01417-
16 DLR, 2023 WL 2403519, at *2 (D. Ariz. Mar. 8, 2023); *Mi Familia Vota v. Fontes*, 2:22-
17 cv-00509-SRB (D. Ariz. Apr. 26, 2023).

18 Plaintiffs have informed counsel for the Proposed Intervenors that they oppose this
19 motion to intervene. As of the time of filing, counsel have not appeared for any defendant.

20 The President and Speaker have a unique interest in defending the constitutionality
21 of laws duly enacted by the Arizona Legislature. This is especially true when the laws’
22 usual defenders are not available to defend them. Arizona Attorney General Kris Mayes
23 has determined she is disqualified from defending this law. *See* A.R.S. § 41-192(E).
24 Because Attorney General Mayes will not defend the constitutionality of the challenged
25 law, the existing parties do not adequately represent the Legislative Leaders’ interests, and
26 the Court should grant their motion to intervene.¹

27
28 ¹ Consistent with the Ninth Circuit’s practical approach to interpreting Rule 24(c), and the
fact that the Defendants’ answer is not yet due, the Legislative Leaders have not included

FACTUAL BACKGROUND

The Challenged Law

Arizona enacted S.B. 1165, the “Save Women’s Sports Act,” more than one year ago. On March 30, 2022, then-Governor Doug Ducey signed S.B. 1165 into law.

The key provision to the Save Women’s Sports Act provides: “Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ may not be open to students of the male sex.” A.R.S. § 15-120.02(B). The Act applies to all public schools or private schools whose students or teams compete against a public school. *Id.* at § 15-120.02(A). The Act covers all educational age levels, applying from kindergarten through grade twelve and to all institutions of higher education. *Id.* at § 15-120.02(I).

When the law passed S.B. 1165, the Arizona legislature made a series of legislative findings that inherent, physiological differences between biological males and females create a “sports performance gap” between males and females. *See* S.B. 1165, § 2(1), (5), (7), and (9) (2022). The legislature further found that “[h]aving separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavors.” *Id.* at § 2(14). When he signed S.B. 1165, Governor Ducey recognized that S.B. 1165 creates a “level playing field” and “simply ensures that the girls and young women who have dedicated themselves to their sport do not miss out on hard-earned opportunities including their titles, standings and scholarships due to unfair competition.” Letter from Governor Douglas A. Ducey to Secretary of State Katie Hobbs (Mar. 30, 2022), *at* <https://www.azleg.gov/govlettr/55leg/2r/sb1165.pdf>.

a proposed pleading with their motion, which itself notifies the existing parties of the Leaders’ interests in the litigation.

1 Plaintiffs' Lawsuit

2 On April 17, 2023, over a year after the law was passed, Plaintiffs filed a complaint
3 seeking injunctive and declaratory relief. Doc. 1. On the same day, Plaintiffs filed a motion
4 for preliminary injunction. Doc. 3. Plaintiffs allege that the Save Women's Sports Act
5 violates the Equal Protection Clause, Title IX, and the Americans with Disabilities Act.
6 Doc. 1 at 16-20.

7 Proposed Intervenors

8 The President and Speaker, on behalf of their respective legislative Houses, are
9 entitled to intervene and be heard in this case. *See* Ariz. Const. art. 4, pt. 2, § 8 (authorizing
10 each house of the Legislature to "determine its own rules of procedure"); A.R.S. § 12-
11 1841(A), (D) (granting the President and Speaker "the right to be heard" and the right to
12 "intervene as a party" in "any proceeding in which a state statute . . . is alleged to be
13 unconstitutional"); Ariz. House of Representatives Rule 4(K); Arizona State Senate Rule
14 2(N). President Petersen was a co-sponsor of S.B. 1165, and personally advocated and
15 voted for the Save Women's Sports Act. Speaker Toma also personally advocated and
16 voted for S.B. 1165, and seeks to defend the law challenged in this action.

17 LEGAL STANDARD

18 Under Federal Rule of Civil Procedure 24(a), a court must permit intervention when
19 (1) the application is timely; (2) the applicant has a significant protectable interest in the
20 action; (3) the disposition of the action may, as a practical matter, impair or impede the
21 applicant's ability to protect its interest; and (4) the existing parties may not adequately
22 represent the applicant's interest. *See* FED. R. CIV. P. 24(a)(2); *Prete v. Bradbury*, 438 F.3d
23 949, 954 (9th Cir. 2006); *see also Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).
24 Courts may also grant permissive intervention when an applicant has a claim or defense
25 that shares common questions of law or fact with the main action. FED. R. CIV. P.
26 24(b)(1)(B).

27 "[T]he requirements for intervention are broadly interpreted in favor of
28 intervention," *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004),

1 precisely because a “liberal policy in favor of intervention serves both efficient resolution
2 of issues and broadened access to the courts.” *Forest Conservation Council v. United States*
3 *Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (internal citation omitted) (abrogated
4 by further broadening of intervention under a specific statute in *Wilderness Soc’y v. United*
5 *States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). In evaluating this motion, this Court
6 should “take all well-pleaded, nonconclusory allegations in the motion to intervene . . . and
7 declaration[] supporting the motion as true absent sham, frivolity or other objections.” *Sw.*
8 *Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

9 ARGUMENT

10 I. The President and Speaker are entitled to intervention as of right.

11 A. The motion is timely.

12 Courts evaluate three factors when assessing timeliness: “(1) the stage of the
13 proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and
14 (3) the reason for and length of the delay.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843,
15 854 (9th Cir. 2016) (citation omitted). The “crucial date” for determining timeliness is
16 when the proposed intervenor “should have been aware that their interests would not be
17 adequately protected by the existing parties.” *Id.* (citation omitted). Here, the President
18 and Speaker first became aware that their interests would not be adequately represented on
19 April 21, 2023, when Attorney General Kris Mayes informed Defendant Horne that the
20 Attorney General’s Office was disqualified from representing him in this case under A.R.S.
21 § 41-192(E). *See* Ex. A, Letter from Kevin D. Ray to Defendant Horne, Apr. 21, 2023.
22 Because this proceeding just began and the Legislative Leaders only recently learned of
23 their need to intervene, all relevant factors demonstrate that their motion is timely.

24 First, the motion is timely because the case just began. Plaintiffs filed this lawsuit
25 just a few weeks ago, on April 17, 2023. Defendants’ answers to the Complaint and
26 opposition to the Motion for Preliminary Injunction are not yet due. Under these
27 circumstances, timeliness is satisfied. *See, e.g., Citizens for Balanced Use v. Montana*
28 *Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding timely a motion to intervene

1 filed ten days after the defendant’s answer); *Northwest Forest Resource Council v.*
2 *Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (finding timely a motion to intervene filed less
3 than one week after the complaint and before the defendants had filed an answer).

4 Second, the existing parties will not suffer any prejudice from the Legislative
5 Leaders’ intervention. The Ninth Circuit has emphasized that “one key principle guides
6 our prejudice analysis: The only ‘prejudice’ that is relevant . . . is that which flows from a
7 prospective intervenor’s failure to intervene after he knew, or reasonably should have
8 known, that his interests were not being adequately represented.” *Kalbers v. United States*
9 *Dep’t of Just.*, 22 F.4th 816, 825 (9th Cir. 2021) (quoting *Smith*, 830 F.3d at 857). In other
10 words, courts may only consider the proposed intervenors’ delay in filing a motion, and
11 “the fact that including another party in the case might make resolution more difficult does
12 not constitute prejudice.” *Id.* The Legislative Leaders’ motion is not prejudicial to the
13 parties because the litigation just began, and the President and Speaker filed this motion
14 just days after learning that Attorney General Mayes would not defend the law.

15 Finally, the President and Speaker did not delay in filing this motion. The
16 Legislative Leaders first learned that their interests may no longer be adequately
17 represented when they learned that Attorney General Mayes had determined her office was
18 disqualified from defending the law on April 21, 2023. The Legislative Leaders promptly
19 retained counsel and began work to intervene. Because this case just began, there can be
20 little question that this motion is timely, and courts have granted intervention much later in
21 cases. *See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D.
22 369, 373 (D. Ariz. 2010) (finding that motion to intervene as of right was timely when filed
23 “approximately nine months after the case was filed and six months after the Amended
24 Complaint”); *Georgia v. U.S. Army Corps of Eng’rs*, 302 F.3d 1242, 1259-60 (11th Cir.
25 2002) (finding motion to intervene as of right was timely even though intervenor knew of
26 case for six months before moving to intervene, at which time “discovery was largely
27 complete”); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 999
28 (8th Cir. 1993) (finding motion to intervene timely even though filed “some eighteen

1 months after suit had been commenced and nine months after the deadline for filing
2 motions to add parties”).

3 **B. The President and Speaker have a significant protectable interest in this**
4 **matter that may be practically impaired or impeded without their**
5 **participation.**

6 Consistent with courts’ liberal policy in favor of intervention, the Ninth Circuit has
7 clarified that Rule 24(a)(2) does not require proposed intervenors to identify any specific
8 statutory, legal, or equitable interest. *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173,
9 1179 (9th Cir. 2011) (citation omitted). “Rather, it is generally enough that the interest is
10 protectable under some law, and that there is a relationship between the legally protected
11 interest and the claims at issue.” *Id.* (cleaned up). When a proposed intervenor has a
12 protectable interest, courts often “have little difficulty concluding that the disposition of a
13 case may, as a practical matter, affect” their interest. *Cal. Ex rel. Lockyer v. United States*,
14 450 F.3d 436, 442 (9th Cir. 2006).

15 These standards are readily satisfied here. The State of Arizona has expressly
16 authorized the President of the State Senate and the Speaker of the House of
17 Representatives to intervene and file briefs in any case challenging the constitutionality of
18 a state statute. A.R.S. § 12-1841(D). Simply put, when a state statute is challenged as
19 unconstitutional, the Legislative Leaders “shall be entitled to be heard.” *Id.* § 12-1841(A).
20 For this reason, Arizona law requires plaintiffs challenging state statutes to notify the
21 Speaker and President and provide information to facilitate their participation. *Id.* § 12-
22 1841(A) & (B). Accordingly, the Legislative Leaders have a crucial interest—bestowed
23 by the people of Arizona through their elected representatives in the Legislature, duly
24 enacted in state law—in defending the constitutionality of state statutes.

25 Consistent with the Legislative Leaders’ rights under § 12-1841, the Arizona State
26 Senate Rules authorize the President “to bring or assert in any forum on behalf of the Senate
27 any claim or right arising out of any injury to the Senate’s powers or duties under the
28 constitution or laws of this state.” State of Arizona, *Senate Rules, 56th Legislature*
2023-2024, Rule 2(N), available at <https://bit.ly/3WXFLDv>. Likewise, the

1 Arizona House of Representatives Rules authorize the Speaker “to bring or assert in any
2 forum on behalf of the House any claim or right arising out of any injury to the House’s
3 powers or duties under the Constitution or Laws of this state.” State of Arizona, *Rules of*
4 *the Ariz. House of Representatives, 56th Legislature 2023-2024*, Rule 4(K),
5 available at <https://bit.ly/3HuL9bz>. Accordingly, the Legislative Leaders do not
6 merely speak for themselves; they speak on behalf of their respective houses of the Arizona
7 Legislature as a whole.

8 The Supreme Court of the United States recently held that statutes like § 12-1841
9 endow legislative leaders with a protectable interest that would be impaired absent
10 intervention. *Berger*, 142 S. Ct. at 2194. Like Arizona, North Carolina has a law that
11 allows the leaders of its legislature to participate in proceedings challenging the
12 constitutionality of state statutes. *Id.* at 2198 (citing N.C. GEN. STAT. ANN. § 1-72.2).
13 The district court and Fourth Circuit denied the legislative leaders’ motions to intervene,
14 but the Supreme Court reversed. *Id.*

15 The Supreme Court began its analysis by reiterating that “States possess a legitimate
16 interest in the continued enforcement of their own statutes,” and that “States may organize
17 themselves in a variety of ways.” *Id.* at 2201 (cleaned up). When faced with a
18 constitutional challenge, some states have organized themselves to mount a defense
19 through the single voice of an attorney general. *Id.* at 2197. But “not every State has
20 structured itself this way.” *Id.* “Some have chosen to authorize multiple officials to defend
21 their practical interests in cases like these.” *Id.* Like Arizona, North Carolina “empowered
22 the leaders of its two legislative houses to participate in litigation on the State’s behalf
23 under certain circumstances and with counsel of their own choosing.” *Id.* The Supreme
24 Court noted that such an approach is “understandable” because, as here, an elected attorney
25 general may “oppose[] laws enacted by the [Legislature] and decline[] to defend them fully
26 in federal litigation.” *Id.*

27 The Supreme Court’s teachings on this issue have been “many, clear, and recent.”
28 *Id.* at 2202. States are “free to empower multiple officials to defend [their] sovereign

1 interests in federal court.” *Id.* (quoting *Cameron v. EMW Women’s Surgical Ctr., P.S.C.*,
2 142 S. Ct. 1002, 1011 (2022)) (cleaned up). A state “must be able to designate agents to
3 represent it in federal court” and may authorize its legislature “to litigate on the State’s
4 behalf, either generally or in a defined class of cases.” *Va. House of Delegates v. Bethune-*
5 *Hill*, 139 S. Ct. 1945, 1951–52 (2019) (cleaned up). “The choice belongs to [the sovereign
6 State].” *Id.* at 1952 (cleaned up). “[S]tate law may provide for other officials, besides an
7 attorney general, to speak for the State in federal court as some States have done for their
8 presiding legislative officers.” *Id.* (citation omitted).

9 The Supreme Court recounted its prior decisions concluding that “state legislative
10 leaders authorized under state law to represent the State’s interests in federal court could
11 defend state laws there as parties.” *Id.* (citing *Karcher v. May*, 484 U.S. 72, 81–82 (1987))
12 (cleaned up). Indeed, intervention by legislative leaders is commonplace. *See, e.g., Horne*
13 *v. Flores*, 557 U.S. 433, 443 (2009) (noting that the President of Arizona State Senate and
14 Speaker of the Arizona House of Representatives were allowed to intervene); *Yniguez v.*
15 *State of Ariz.*, 939 F.2d 727, 732 (9th Cir. 1991) (“[T]he Supreme Court held that state
16 legislators who intervened in their official capacities to defend a lawsuit challenging the
17 constitutionality of a statute” only lacked standing after they left office); *Powell v. Ridge*,
18 247 F.3d 520, 522 (3rd Cir. 2001) (granting legislative leaders’ motion to intervene as
19 defendants to “articulate to the Court the unique perspective of the legislative branch of the
20 Pennsylvania government”); *Clairton Sportsmen’s Club v. Pa. Turnpike Comm’n*, 882 F.
21 Supp. 455, 462-463 (W.D. Pa. 1995) (permitting intervention of state legislators to submit
22 briefs and make arguments concerning the decision to build a highway system).

23 In *Berger*, the Supreme Court cautioned that “[a]ppropriate respect for these realities
24 suggests that federal courts should rarely question that a State’s interests will be practically
25 impaired or impeded if its duly authorized representatives are excluded from participating
26 in federal litigation challenging state law.” 142 S. Ct. at 2201. “To hold otherwise,” the
27 Court reasoned, would (1) “evinced disrespect for a State’s chosen means of diffusing its
28 sovereign powers among various branches and officials,”(2) “risk turning a deaf federal

1 ear to voices the State has deemed crucial to understanding the full range of its interests,”
2 (3) “encourage plaintiffs to make strategic choices to control which state agents they will
3 face across the aisle in federal court,” and (4) “tempt litigants to select as their defendants
4 those individual officials they consider most sympathetic to their cause or most inclined to
5 settle favorably and quickly.” *Id.* Taken together, this would “risk a hobbled litigation
6 rather than a full and fair adversarial testing of the State’s interests and arguments.” *Id.*

7 “These principles and precedents are dispositive here.” *Id.* at 2202. Like North
8 Carolina, Arizona has expressly authorized the Legislative Leaders to intervene,
9 participate, and file briefs to defend the constitutionality of state statutes. A.R.S. § 12-
10 1841(D). And for good reason. Attorney General Mayes has determined her office is
11 disqualified from defending the law at issue in this litigation. If the Speaker and President
12 are not allowed to intervene, they will not be able to exercise their statutory right to mount
13 a defense, and the duly enacted laws challenged here may receive no adequate defense, or
14 even no defense at all. As the Supreme Court advised, federal courts should not second-
15 guess whom a State selects to represent its interests. *Berger*, 142 S. Ct. at 2201. The
16 Legislative Leaders have a statutorily granted interest in defending the challenged laws as
17 intervenors.

18 To be sure, prior to *Berger*, one decision in this District held that “A.R.S. § 12-1841
19 does not confer blanket authority upon [the President of the State Senate and Speaker of
20 the House of Representatives] to defend the constitutionality of a state law—particularly
21 where the attorney general is already defending the law.” *Miracle v. Hobbs*, 333 F.R.D.
22 151, 155 (D. Ariz. 2019). But *Miracle* is readily distinguishable because Attorney General
23 Mayes is *not* defending the challenged statute. More importantly, *Miracle* pre-dates the
24 Supreme Court’s decision in *Berger* and, to the extent it is inconsistent with *Berger*, it has
25 been superseded. Notably, another decision in this District characterized *Miracle*’s holding
26 as just one side of a then-still-disputed issue, presenting the matter as a “close call” that
27 this Court had not yet “resolve[d].” *See Arizonans for Fair Elections v. Hobbs*, 335 F.R.D.
28 269, 274 (D. Ariz. 2020). That case recounted the plain language of § 12-1841 and noted

1 that there is “force to the argument that, at least under Arizona law, the House Speaker and
2 Senate President possess a unique stature that resembles that of the Attorney General and
3 distinguishes them from a run-of-the-mill individual legislator whose generalized interest
4 in defending the constitutionality of a statute would be insufficient to confer standing.” *Id.*

5 In the last two months, two other courts in this District granted the Legislative
6 Leaders intervention as of right to defend the constitutionality of other state laws. *See*
7 *Isaacson v. Mayes*, 2:21-cv-01417-DLR, 2023 WL 2403519, at *2 (D. Ariz. Mar. 8, 2023);
8 *Mi Familia Vota v. Fontes*, 2:22-cv-00509-SRB (D. Ariz. Apr. 26, 2023). In *Isaacson*, the
9 Court found that, unlike the *Miracle* and *Arizonans for Fair Elections* cases, in which state
10 legislative leaders’ interests were deemed adequately represented, denying the Legislative
11 Leaders’ motion to intervene would cause the challenged laws will go undefended, which
12 “risk[s] turning a deaf ear to the voices the State has deemed crucial to understanding the
13 full range of its interests.” *Isaacson*, 2023 WL 2403519, at *1 (quoting *Berger*, 142 S.Ct.
14 at 2201).

15 To the extent that this District previously questioned the effect of A.R.S. § 12-1841,
16 *Berger* definitively resolved that question in favor of intervention for legislative leaders.
17 Because Arizona authorizes the Speaker and President to defend state statutes, they have a
18 significant protectable interest that would be impaired if the Plaintiffs were to prevail and
19 the laws are enjoined and declared unconstitutional.

20 **C. The Legislative Leaders are not adequately represented.**

21 Courts consider three factors when determining whether existing parties adequately
22 represent the interests of the proposed intervenor: “(1) whether the interest of a present
23 party is such that it will *undoubtedly* make all of a proposed intervenor’s arguments; (2)
24 whether the present party is capable and willing to make such arguments; and (3) whether
25 a proposed intervenor would offer any necessary elements to the proceeding that other
26 parties would neglect.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)
27 (emphasis added). The Speaker and President must only show “that representation of [its]
28 interest ‘*may be*’ inadequate” to satisfy this element for intervention. *Trbovich v. United*

1 *Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added).
2 And “the burden of making that showing should be treated as minimal.” *Id.*

3 Attorney General Mayes has determined that her office is disqualified from
4 defending the state law at issue in this litigation, and thus it is clear that General Mayes
5 will not adequately represent the Legislative Leaders’ interests. Ex. A. Moreover,
6 although Attorney General Mayes has authorized Defendant Horne to retain counsel, no
7 counsel have entered an appearance on behalf of Defendant Horne, despite an imminent
8 briefing deadline on Plaintiffs’ motion for preliminary injunction. In fact, no other party
9 has filed an entry of appearance to defend the statutes at issue. Thus, it is clear that no
10 party adequately represents the interests of the Legislative Leaders. Moreover, even if
11 Defendant Horne or another party were to file an appearance, it is unlikely that that party
12 or party would defend the unique *legislative* interests reflected by the Legislative Leaders.
13 Defendant Horne, as an executive officer, necessarily represents different interests than the
14 Legislative Leaders, who have a unique, unqualified interest in defending the validity of
15 the statute enacted by the legislature.

16 The Supreme Court has confirmed that intervention of right is warranted where, as
17 here, a proposed intervenor has raised “sufficient doubt about the adequacy of
18 representation[.]” *Trbovich*, 404 U.S. at 538. In *Trbovich*, the official prosecuting the law
19 was “performing his duties, broadly conceived, as well as can be expected,” but the
20 Supreme Court recognized that the individual whose interests were at stake may have valid
21 concerns about deficiencies in the official’s representation and may not take “precisely the
22 same approach to the conduct of the litigation.” *Id.* at 539. Intervention is even more
23 appropriate here, where the Attorney General has determined that she is disqualified from
24 defending the law. The Legislative Leaders have a significant protectable interest in
25 defending the constitutionality of state statutes, and that interest will be gravely impaired
26 by an order enjoining the challenged laws. The Speaker and President are entitled to
27 intervention of right.

28

1 **II. In the alternative, the Court should grant permissive intervention.**

2 In the alternative, and at a minimum, this Court should exercise its discretion to grant
3 permissive intervention. Under Rule 24(b), courts may grant permissive intervention to
4 anyone who “has a claim or defense that shares with the main action a common question
5 of law or fact.” A court’s discretion in determining whether permissive intervention is
6 appropriate may be guided by factors such as “the nature and extent of the intervenors’
7 interest, their standing to raise relevant legal issues, the legal position they seek to advance,
8 and its probable relation to the merits of the case.” *Spangler v. Pasadena City Bd. of Educ.*,
9 552 F.2d 1326, 1329 (9th Cir. 1977). It “may also consider whether changes have occurred
10 in the litigation so that intervention that was once denied should be reexamined, whether
11 the intervenors’ interests are adequately represented by other parties, whether intervention
12 will prolong or unduly delay the litigation, and whether parties seeking intervention will
13 significantly contribute to full development of the underlying factual issues in the suit and
14 to the just and equitable adjudication of the legal questions presented.” *Id.*

15 The Legislative Leaders’ anticipated defense—that the challenged laws are
16 constitutional—plainly shares common questions of law and fact with Plaintiffs’ action.
17 As explained above, *see supra* Sections I.B. and I.C, the President and Speaker have an
18 important interest in defending the challenged law, and Attorney General Mayes has
19 determined her office is disqualified from defending it. Given these weighty interests and
20 the need for parties willing to defend the challenged laws, the Court should grant
21 permissive intervention.

22 **CONCLUSION**

23 The Speaker and President have unique interests in defending legislation that the
24 Attorney General will not protect. Intervention is therefore proper. Accordingly, the
25 Legislative Leaders respectfully request that this Court grant them intervention as of right,
26 or in the alternative, permissive intervention.

1 Dated: May 1, 2023

Respectfully submitted,

2
3 JAMES OTIS LAW GROUP, LLC

4 /s/ Justin D. Smith

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CERTIFICATE OF SERVICE

I hereby certify that, on May 1, 2023, I caused a true and correct copy of the foregoing to be filed by the Court’s electronic filing system, to be served by operation of the Court’s electronic filing system on counsel for all parties who have entered in the case.

/s/ Justin D. Smith



KRIS MAYES
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE GOVERNMENT DIVISION/EDUCATION & HEALTH SECTION

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April 21, 2023

Tom Horne
State Superintendent of Public Instruction
Arizona Department of Education
1535 West Washington Street
Phoenix, AZ, 85007
Sent via email to: Tom.Horne@azed.gov

Re: Disqualification of AGO in the *Jane Doe, et. al., v. Horne, et. al.* Transgender Girls Sports Lawsuit

Dear Superintendent Horne:

On behalf of the Attorney General, this letter serves as notice under A.R.S. § 41-192(E) that this Office is disqualified from representing you in the above-referenced matter. Accordingly, you are authorized to employ legal counsel under A.R.S. § 41-192(E) in accordance with applicable state procurement laws. A list of outside counsel procured by this Office is attached for your convenience.

Sincerely,

/s/ Kevin D. Ray
Kevin D. Ray
Section Chief Counsel
Education and Health Section

KDR
#11187359

EXHIBIT

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

Jane Doe, *et al.*,

Plaintiffs,

v.

Thomas C. Horne, in his official capacity
as State Superintendent of Public
Instruction, *et al.*,

Defendants.

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

[Proposed] Order on Motion to Intervene

15 Senator Warren Petersen, President of the Arizona State Senate, and Representative
16 Ben Toma, Speaker of the Arizona House of Representatives (together “the Legislative
17 Leaders”), seek intervention to defend their interests, which include exercising statutory
18 rights to protect women’s sports. Plaintiffs oppose the motion. For the reasons set forth
19 herein, the Court grants the Legislative Leaders’ Motion to Intervene.

20
21

LEGAL STANDARD

22 Under Federal Rule of Civil Procedure 24(a), a court must permit intervention when
23 (1) the application is timely; (2) the applicant has a significant protectable interest in the
24 action; (3) the disposition of the action may, as a practical matter, impair or impede the
25 applicant’s ability to protect its interest; and (4) the existing parties may not adequately
26 represent the applicant’s interest. *See* Fed. R. Civ. P. 24(a)(2); *Prete v. Bradbury*, 438 F.3d
27 949, 954 (9th Cir. 2006); *see also Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).
28 Courts may also grant permissive intervention when an applicant has a claim or defense
that shares common questions of law or fact with the main action. Fed. R. Civ. P.

1 24(b)(1)(B).

2 “[T]he requirements for intervention are broadly interpreted in favor of
3 intervention,” *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004),
4 precisely because a “liberal policy in favor of intervention serves both efficient resolution
5 of issues and broadened access to the courts.” *Forest Conservation Council v. United States*
6 *Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (internal citation omitted) (abrogated
7 by further broadening of intervention under a specific statute in *Wilderness Soc’y v. United*
8 *States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). In evaluating this motion, this Court
9 should “take all well-pleaded, nonconclusory allegations in the motion to intervene . . . and
10 declaration[] supporting the motion as true absent sham, frivolity or other objections.” *Sw.*
11 *Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

12 ANALYSIS

13 I. The Legislative Leaders’ application is timely.

14 Courts evaluate three factors when assessing timeliness: “(1) the stage of the
15 proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and
16 (3) the reason for and length of the delay.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843,
17 854 (9th Cir. 2016) (citation omitted). The “crucial date” for determining timeliness is
18 when the proposed intervenor “should have been aware that their interests would not be
19 adequately protected by the existing parties.” *Id.* (citation omitted). Here, the President
20 and Speaker first became aware that their interests would not be adequately represented on
21 April 21, 2023, when Attorney General Kris Mayes informed Defendant Horne that the
22 Attorney General’s Office was disqualified from representing him in this case under A.R.S.
23 § 41-192(E).

24 The motion is timely for three reasons. First, the case just began. Plaintiffs filed
25 their Complaint on April 17, 2023. Responsive pleadings are not yet due.

26 Second, the existing parties will not suffer any prejudice from the Legislative
27 Leaders’ intervention. The Legislative Leaders’ motion is not prejudicial to the parties
28 because the litigation just began, and the Legislative Leaders filed this motion just days

1 after learning that Attorney General Mayes would not defend the law.

2 Finally, the Legislative Leaders did not delay in filing this motion. The Legislative
3 Leaders first learned that their interests may no longer be adequately represented when they
4 learned that Attorney General Mayes had determined her office was disqualified from
5 defending the law on April 21, 2023. The Legislative Leaders promptly retained counsel
6 and began work to intervene. Because this case just began, there can be little question that
7 this motion is timely, and courts have granted intervention much later in cases.

8 **II. The Legislative Leaders have a significant protectable interest in this**
9 **matter that may be practically impaired or impeded without their**
10 **participation.**

11 Consistent with courts' liberal policy in favor of intervention, the Ninth Circuit has
12 clarified that Rule 24(a)(2) does not require proposed intervenors to identify any specific
13 statutory, legal, or equitable interest. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173,
14 1179 (9th Cir. 2011) (citation omitted). "Rather, it is generally enough that the interest is
15 protectable under some law, and that there is a relationship between the legally protected
16 interest and the claims at issue." *Id.* (cleaned up). When a proposed intervenor has a
17 protectable interest, courts often "have little difficulty concluding that the disposition of a
18 case may, as a practical matter, affect" their interest. *Cal. Ex rel. Lockyer v. United States*,
450 F.3d 436, 442 (9th Cir. 2006).

19 These standards are readily satisfied here. The State of Arizona has expressly
20 authorized the President of the State Senate and the Speaker of the House of
21 Representatives to intervene and file briefs in any case challenging the constitutionality of
22 a state statute. A.R.S. § 12-1841(D). Simply put, when a state statute is challenged as
23 unconstitutional, the Legislative Leaders "shall be entitled to be heard." *Id.* § 12-1841(A).
24 For this reason, Arizona law requires plaintiffs challenging state statutes to notify the
25 Speaker and President and provide information to facilitate their participation. *Id.* § 12-
26 1841(A) & (B). Accordingly, the Legislative Leaders have a crucial interest—bestowed
27 by the people of Arizona through their elected representatives in the Legislature, duly
28 enacted in state law—in defending the constitutionality of state statutes.

1 Consistent with the Legislative Leaders’ rights under § 12-1841, the Arizona State
2 Senate Rules authorize the President “to bring or assert in any forum on behalf of the Senate
3 any claim or right arising out of any injury to the Senate’s powers or duties under the
4 constitution or laws of this state.” State of Arizona, *Senate Rules, 56th Legislature*
5 *2023-2024*, Rule 2(N), available at <https://bit.ly/3WXFLDv>. Likewise, the
6 Arizona House of Representatives Rules authorize the Speaker “to bring or assert in any
7 forum on behalf of the House any claim or right arising out of any injury to the House’s
8 powers or duties under the Constitution or Laws of this state.” State of Arizona, *Rules of*
9 *the Ariz. House of Representatives, 56th Legislature 2023-2024*, Rule 4(K),
10 available at <https://bit.ly/3HuL9bz>. Accordingly, the Legislative Leaders do not
11 merely speak for themselves; they speak on behalf of their respective houses of the Arizona
12 Legislature as a whole.

13 The Supreme Court of the United States recently held that statutes like § 12-1841
14 endow legislative leaders with a protectable interest that would be impaired absent
15 intervention. *Berger*, 142 S. Ct. at 2194. States are “free to empower multiple officials to
16 defend [their] sovereign interests in federal court.” *Id.* at 2202. A state “must be able to
17 designate agents to represent it in federal court” and may authorize its legislature “to litigate
18 on the State’s behalf, either generally or in a defined class of cases.” *Va. House of*
19 *Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019) (cleaned up). “The choice
20 belongs to [the sovereign State].” *Id.* at 1952 (cleaned up). “[S]tate law may provide for
21 other officials, besides an attorney general, to speak for the State in federal court as some
22 States have done for their presiding legislative officers.” *Id.* (citation omitted).

23 “These principles and precedents are dispositive here.” *Id.* at 2202. Like North
24 Carolina, Arizona has expressly authorized the Legislative Leaders to intervene,
25 participate, and file briefs to defend the constitutionality of state statutes. A.R.S. § 12-
26 1841(D). Attorney General Mayes has determined her office is disqualified from
27 defending the law at issue in this litigation. If the Speaker and President are not allowed
28 to intervene, they will not be able to exercise their statutory right to mount a defense, and

1 the duly enacted laws challenged here may receive no adequate defense, or even no defense
2 at all. As the Supreme Court advised, federal courts should not second-guess whom a State
3 selects to represent its interests. *Berger*, 142 S. Ct. at 2201. The Legislative Leaders have
4 a statutorily granted interest in defending the challenged laws as intervenors.

5 In the last two months, two other courts in this District granted the Legislative
6 Leaders intervention as of right to defend the constitutionality of other state laws. *See*
7 *Isaacson v. Mayes*, 2:21-cv-01417-DLR, 2023 WL 2403519, at *2 (D. Ariz. Mar. 8, 2023);
8 *Mi Familia Vota v. Fontes*, 2:22-cv-00509-SRB (D. Ariz. Apr. 26, 2023). In *Isaacson*, the
9 Court found that denying the Legislative Leaders’ motion to intervene would cause the
10 challenged laws will go undefended, which “risk[s] turning a deaf ear to the voices the
11 State has deemed crucial to understanding the full range of its interests.” *Isaacson*, 2023
12 WL 2403519, at *1 (quoting *Berger*, 142 S.Ct. at 2201).

13 Because Arizona authorizes the Speaker and President to defend state statutes, they
14 have a significant protectable interest that would be impaired if the Plaintiffs were to
15 prevail and the laws are enjoined and declared unconstitutional.

16 **III. The Legislative Leaders are not adequately represented.**

17 Courts consider three factors when determining whether existing parties adequately
18 represent the interests of the proposed intervenor: “(1) whether the interest of a present
19 party is such that it will *undoubtedly* make all of a proposed intervenor’s arguments; (2)
20 whether the present party is capable and willing to make such arguments; and (3) whether
21 a proposed intervenor would offer any necessary elements to the proceeding that other
22 parties would neglect.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)
23 (emphasis added). The Legislative Leaders must only show “that representation of [its]
24 interest ‘*may be*’ inadequate” to satisfy this element for intervention. *Trbovich v. United*
25 *Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added).
26 And “the burden of making that showing should be treated as minimal.” *Id.*

27 Attorney General Mayes has determined that her office is disqualified from
28 defending the state law at issue in this litigation, and thus it is clear that General Mayes

1 will not adequately represent the Legislative Leaders’ interests. Moreover, although
2 Attorney General Mayes has authorized Defendant Horne to retain counsel, no counsel
3 have entered an appearance on behalf of Defendant Horne, despite an imminent briefing
4 deadline on Plaintiffs’ motion for preliminary injunction. In fact, no other party has filed
5 an entry of appearance to defend the statutes at issue. Thus, it is clear that no party
6 adequately represents the interests of the Legislative Leaders. Moreover, even if Defendant
7 Horne or another party were to file an appearance, it is unlikely that that party or party
8 would defend the unique *legislative* interests reflected by the Legislative Leaders.
9 Defendant Horne, as an executive officer, necessarily represents different interests than the
10 Legislative Leaders, who have a unique, unqualified interest in defending the validity of
11 the statute enacted by the legislature.

12 The Supreme Court has confirmed that intervention of right is warranted where, as
13 here, a proposed intervenor has raised “sufficient doubt about the adequacy of
14 representation[.]” *Trbovich*, 404 U.S. at 538. In *Trbovich*, the official prosecuting the law
15 was “performing his duties, broadly conceived, as well as can be expected,” but the
16 Supreme Court recognized that the individual whose interests were at stake may have valid
17 concerns about deficiencies in the official’s representation and may not take “precisely the
18 same approach to the conduct of the litigation.” *Id.* at 539. Intervention is even more
19 appropriate here, where the Attorney General has determined that she is disqualified from
20 defending the law. The Legislative Leaders have a significant protectable interest in
21 defending the constitutionality of state statutes, and that interest will be impaired by an
22 order enjoining the challenged laws. The Legislative Leaders are entitled to intervention
23 of right.

24 Even if the Court did not grant intervention as of right, the Court would exercise its
25 discretion to grant permissive intervention. Under Rule 24(b), courts may grant permissive
26 intervention to anyone who “has a claim or defense that shares with the main action a
27 common question of law or fact.” A court’s discretion in determining whether permissive
28 intervention is appropriate may be guided by factors such as “the nature and extent of the

1 intervenors’ interest, their standing to raise relevant legal issues, the legal position they
2 seek to advance, and its probable relation to the merits of the case.” *Spangler v. Pasadena*
3 *City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). It “may also consider whether
4 changes have occurred in the litigation so that intervention that was once denied should be
5 reexamined, whether the intervenors’ interests are adequately represented by other parties,
6 whether intervention will prolong or unduly delay the litigation, and whether parties
7 seeking intervention will significantly contribute to full development of the underlying
8 factual issues in the suit and to the just and equitable adjudication of the legal questions
9 presented.” *Id.*

10 The Legislative Leaders’ anticipated defense—that the challenged laws are
11 constitutional—plainly shares common questions of law and fact with Plaintiffs’ action.
12 The Legislative Leaders have an important interest in defending the challenged law, and
13 Attorney General Mayes has determined her office is disqualified from defending it. Given
14 these weighty interests and the need for parties willing to defend the challenged laws, the
15 Court should grant permissive intervention.

16 CONCLUSION

17 Senator Petersen and Representative Toma have unique interests in defending
18 legislation. Intervention is therefore proper. Accordingly, the Court grants the Legislative
19 Leaders intervention as of right.

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