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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**
13 **TUCSON DIVISION**

14 Jane Doe, by her next friend and parents
15 Helen Doe and James Doe; and Megan Roe,
16 by her next friend and parents, Kate Roe and
17 Robert Roe,
18 Plaintiffs,

19 v.

20 Thomas C. Horne in his official capacity as
21 State Superintendent of Public Instruction;
22 Laura Toenjes, in her official capacity as
23 Superintendent of the Kyrene School
24 District; Kyrene School District; The
25 Gregory School; and Arizona Interscholastic
26 Association Inc.,
27 Defendants.

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

**PLAINTIFFS' OPPOSITION TO MOTION
TO INTERVENE**

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3 Educ. (Apr. 11, 2023), <https://www.azed.gov/communications/horne-proposed-title-ix-change-would-decimate-women%E2%80%99s-sports..> 3
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5 Warren Petersen, *President Warren Petersen Takes Action to Defend the “Save Women’s
6 Sports Act” in Court*, Ariz. St. S. (May 1, 2023),
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1 **INTRODUCTION**

2 The Speaker of the Arizona House of Representatives and President of the Arizona
3 Senate’s motion to intervene should be denied for two straightforward reasons. First, the
4 Proposed Intervenors’ asserted interests are adequately represented by Defendant State
5 Superintendent Thomas C. Horne, who has appeared in this case and intends to
6 vigorously defend A.R.S. § 15-120.02 (the “Ban”). Second, the Proposed Intervenors
7 lack any significant protectable interest in this action that will be impaired if they are not
8 granted party status. None of the authority Proposed Intervenors discuss supports a
9 different result.

10 Accordingly, the Motion to Intervene should be denied.

11 **FACTUAL BACKGROUND**

12 Plaintiffs Jane Doe and Megan Roe filed this lawsuit on April 17, 2023, seeking
13 injunctive and declaratory relief that the Ban, as applied to them, violates the Constitution
14 and various federal statutes. (*See* Dkt 1.) Plaintiffs sued five defendants: (1) Thomas C.
15 Horne, in his official capacity as State Superintendent of Public Instruction; (2) Laura
16 Toenjes, in her official capacity as Superintendent of the Kyrene School District; (3) the
17 Kyrene School District; (4) The Gregory School; and (5) the Arizona Interscholastic
18 Association. That same day, Plaintiffs filed a motion for a preliminary injunction.
19 (Dkt. 3.)

20 Before any defendant filed an appearance, Proposed Intervenors Warren Petersen
21 (President of the Arizona State Senate) and Ben Toma (Speaker of the Arizona House of
22 Representatives) filed a motion to intervene. (Dkt. 19.) The Proposed Intervenors’
23 motion notes that Arizona Attorney General Kristin K. Mayes informed Defendant Horne
24 she was “disqualified” from representing him and authorized him to retain outside
25 counsel to defend this litigation. (*See id.* at 1, 9, 11, 12; *see also* Dkt. 19-1.)

26 The next day, counsel for Defendant Horne appeared and filed a joint stipulation
27 to extend the briefing schedule, along with an opposed motion to transfer the case to the
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1 Phoenix Division. (Dkt. 20, 21.) All defendants except the Kyrene School District and
2 its Superintendent, Laura Toenjes, have now appeared in this case.

3 ARGUMENT

4 **I. The Court Should Deny Intervention as of Right.**

5 The Proposed Intervenors cannot intervene as of right. To intervene as of right,
6 the Proposed Intervenors must satisfy Federal Rule of Civil Procedure 24(a), which
7 requires in relevant part that: (1) their “interest must not be adequately represented by
8 existing parties” and (2) they “must have a significantly protectable interest” in the
9 lawsuit that will be impaired absent their participation. *Perry v. Proposition 8 Official*
10 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).¹ “Failure to satisfy any one of the
11 requirements is fatal to the application, and [the Court] need not reach the remaining
12 elements if one of the elements is not satisfied.” *Id.* The Proposed Intervenors cannot
13 satisfy either of these requirements.

14 As a preliminary matter, the Proposed Intervenors claim that an Arizona statute,
15 A.R.S. § 12-1841, “expressly permits” them to intervene in this case. (Mot. at 1.) But
16 federal courts, including in this District, have held that “this state policy does not
17 supersede Rule 24(a)’s requirements[.]” *Isaacson v. Mayes*, 2023 WL 2403519, at *1 (D.
18 Ariz. Mar. 8, 2023); *see also Miracle v. Hobbs*, 333 F.R.D. 151, 153 n.3 (D. Ariz. 2019)
19 (“In sum, Proposed Intervenors must still satisfy the requirements for intervention under
20 Rule 24 and cannot use A.R.S. 12-1841(A) to circumvent the Federal Rules of Civil
21 Procedure.”). And the Supreme Court recently explained when assessing a statute
22 similarly purporting to authorize intervention by legislative leaders: “Our starting point
23 lies in Rule 24(a)(2) of the Federal Rules of Civil Procedure.” *Berger v. N.C. State Conf.*
24 *of the NAACP*, 142 S. Ct. 2191, 2200 (2022). Thus, whatever effect A.R.S. § 12-1841
25 might have in state court, the statute does not negate or override the standard for
26 intervention in federal court.

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¹ Plaintiffs do not dispute that the Proposed Intervenors’ motion was timely filed pursuant to Rule 24(a).

1 **A. The Existing Defendants Will Adequately Represent the Proposed**
 2 **Intervenors’ Purported Interests.**

3 Proposed Intervenors fail to explain why any purported interests they have in this
 4 litigation will not be “adequately represented by a present party to the action” now that
 5 Defendant Horne has made clear his intention to defend this lawsuit. *Perry*, 587 F.3d at
 6 950. The Proposed Intervenors merely argue their interests will not be adequately
 7 represented because “Attorney General Mayes has determined that her office is
 8 disqualified from defending the state law at issue in this litigation” and because, at the
 9 time the motion was filed, “no counsel have entered an appearance on behalf of
 10 Defendant Horne.” (Mot. at 11.) However, Defendant Horne subsequently retained
 11 experienced counsel who appeared in this case, stipulated to a briefing schedule on the
 12 preliminary injunction motion, and moved to transfer this case to the Phoenix Division.
 13 (Dkt. 20, 21.) Moreover, Defendant Horne has conducted numerous press interviews
 14 publicly confirming his intention to defend this lawsuit vigorously.²

15 Courts in this District have consistently held that the Speaker and Senate President
 16 are not entitled to intervene when the State itself is defending the challenged statutes—
 17 here, through Defendant Horne. *See Arizonans for Fair Elections v. Hobbs*, 335 F.R.D.
 18 269, 275 (D. Ariz. 2020) (“It is difficult to see how Proposed Intervenors’ interest

19 _____
 20 ² *See, e.g.,* Elliot Polakoff, *Arizona Transgender Girls File Lawsuit Against Sports*
 21 *Ban In State Schools*, Ariz. Family (Apr. 21, 2023),
 22 [https://www.azfamily.com/2023/04/21/arizona-transgender-girls-file-lawsuit-against-](https://www.azfamily.com/2023/04/21/arizona-transgender-girls-file-lawsuit-against-sports-ban-state-schools/)
 23 [sports-ban-state-schools/](https://www.azfamily.com/2023/04/21/arizona-transgender-girls-file-lawsuit-against-sports-ban-state-schools/) (stating: “When it comes to playing sports, they should compete
 24 against the same people that they do in muscle mass and bone structure ... [otherwise]
 25 [t]here’d be a chance of serious injury. ... We divide male from female sports for a good
 26 reason. And we have to keep that.”); Kevin Stone, *Arizona GOP Leaders Want to*
 27 *Protect Law that Limits Transgender Student Athletes*, KTAR News (May 2, 2023),
 28 [https://ktar.com/story/5490910/arizona-gop-leaders-want-to-protect-law-that-limits-](https://ktar.com/story/5490910/arizona-gop-leaders-want-to-protect-law-that-limits-transgender-student-athletes/)
[transgender-student-athletes/](https://ktar.com/story/5490910/arizona-gop-leaders-want-to-protect-law-that-limits-transgender-student-athletes/); *see also Horne: Proposed Title IX Change Would*
Decimate Women’s Sports, Ariz. Dep’t. of Educ. (Apr. 11, 2023),
[https://www.azed.gov/communications/horne-proposed-title-ix-change-would-decimate-](https://www.azed.gov/communications/horne-proposed-title-ix-change-would-decimate-women%E2%80%99s-sports)
[women%E2%80%99s-sports](https://www.azed.gov/communications/horne-proposed-title-ix-change-would-decimate-women%E2%80%99s-sports). The Proposed Intervenors’ public comments in relation to
 this lawsuit entirely echo those of Defendant Horne. *See, e.g.,* Warren Petersen,
President Warren Petersen Takes Action to Defend the “Save Women’s Sports Act” in
Court, Ariz. St. S. (May 1, 2023), [https://www.azsenaterepublicans.com/post/president-](https://www.azsenaterepublicans.com/post/president-warren-petersen-takes-action-to-defend-the-save-women-s-sports-act-in-court)
[warren-petersen-takes-action-to-defend-the-save-women-s-sports-act-in-court](https://www.azsenaterepublicans.com/post/president-warren-petersen-takes-action-to-defend-the-save-women-s-sports-act-in-court) (“By
 allowing males to compete against females, we’re essentially subjecting young girls to
 greater risk of injury, as well as stripping them of athletic opportunities their female
 predecessors have long fought for.”).

1 diverges from the State’s, and the State is already a party to this case. In other words, ‘it
2 is apparent that the ultimate objective’ of the Proposed Intervenors and the State is
3 identical—‘defending the constitutionality’ of state laws.” (quoting *Perry*, 587 F.3d at
4 951)); *Miracle*, 333 F.R.D. at 156 (concluding that the Proposed Intervenors were not
5 entitled to intervene in light of the State’s active defense of the law). Proposed
6 Intervenors have not cited any authority to the contrary. In *Isaacson*, the court permitted
7 intervention only because no other state official was defending the challenged law. *See*
8 *Isaacson*, 2023 WL 2403519, at *1 (permitting intervention where otherwise “the
9 challenged laws will go undefended” but noting that “this Court has previously denied
10 intervention where, for example, the state legislative leaders’ interests were adequately
11 represented by other parties”).³ That is not the case here.

12 Similarly, this case is nothing like *Horne v. Flores*, 557 U.S. 433, 443 (2009), in
13 which the state defendants “sid[ed] with the plaintiffs” and declined to appeal adverse
14 lower court orders, or *Yniguez v. State of Ariz.*, 939 F.2d 727, 732 (9th Cir. 1991), in
15 which the state defendant similarly declined to appeal a district court decision
16 invalidating a ballot initiative. In stark contrast to those cases relied upon by Proposed
17 Intervenors, the State here is vigorously defending the challenged law.

18 The Proposed Intervenors identify no reason why Defendant Horne will not
19 adequately defend the Ban. They assert only in a vague and conclusory fashion that they
20 have “unique legislative interests” that will need protection even if he appears. (Mot. at
21 11.) Nor have the Proposed Intervenors identified any arguments that they, but not
22 Defendant Horne, would make in defense of the Ban as applied to Plaintiffs. *See Perry*,
23 587 F.3d at 951–52 (affirming denial of motion to intervene where proposed intervenor
24 shared the defendants’ “ultimate objective” of defending the challenged law and
25 intervenors “failed to make a compelling showing” that defendants “will not mount an
26 adequate defense”). In any event, “mere differences in litigation strategy” would not be

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28 ³ The Proposed Intervenors also cite *Mi Familia Vota v. Fontes*, 2:22-cv-00509-SRB,
Dkt. 363 (D. Ariz. Apr. 26, 2023). However, their motion to intervene in *Mi Familia* was
granted as unopposed, once the State announced its agreement with the plaintiffs. *See*
id.; *see also* Dkt. 348 at 5–6.

1 “enough to justify intervention as a matter of right.” *United States v. City of L.A.*, 288
2 F.3d 391, 402–03 (9th Cir. 2002).

3 The Supreme Court’s decision in *Berger* also strongly supports denial of Proposed
4 Intervenors’ motion. 142 S. Ct. 2191 (2022). There, the Supreme Court held that
5 legislative leaders were entitled to intervene to defend their State’s statute—but only
6 because no other state official was defending the law. The Court recognized intervention
7 should be denied when “the interests of existing parties will come to overlap fully with
8 the interests of any remaining proposed intervenor” such that the existing defendants will
9 adequately represent the State’s interests. *Id.* at 2205. *Berger* permitted state legislative
10 leaders to intervene out of a concern that, otherwise, litigants would be “tempt[ed]” to
11 “select as their defendants those individual officials they consider most sympathetic to
12 their cause or most inclined to settle favorably and quickly,” which “would risk a hobbled
13 litigation rather than a full and fair adversarial testing of the State’s interests and
14 arguments.” *Id.* at 2201; *see also id.* at 2205 (concluding that “this litigation illustrates
15 how divided state governments sometimes warrant participation by multiple state
16 officials” because the named defendants there had declined to vigorously defend the law).
17 Thus, *Berger*’s concern was that “[i]f Putative Intervenors are not permitted to intervene,
18 the challenged laws will go undefended, which ‘risk[s] turning a deaf ear’” to the State’s
19 interest in the challenged law. *Isaacson*, 2023 WL 2403519, at *1 (quoting *Berger*, 142
20 S. Ct. at 2201). Yet as the Ninth Circuit subsequently held, the requirement that a
21 proposed intervenor make a “compelling showing of inadequate representation . . .
22 remains on firm legal footing after *Berger*” when the intervenor shares the same interest
23 as an existing party. *Callahan v. Brooksdale Senior Living Cmty.*, 42 F.4th 1013, 1021
24 n.5 (9th Cir. 2022).

25 The Proposed Intervenors cannot make such a showing here. Plaintiffs have sued
26 Defendant Horne in the full expectation that he would undertake a vigorous defense of
27 the Ban. Moreover, Defendant Horne is the proper State defendant because he is “the
28 executive officer responsible for the execution of policies” of the Department of

1 Education. A.R.S. § 15-231(B)(2). The Proposed Intervenors therefore cannot show that
2 their interest “diverges from the State’s” or that their interests will not be adequately
3 defended. *Arizonans for Fair Elections*, 335 F.R.D. at 275. Unlike *Berger*, “this is the
4 case where the interests of the existing party overlap fully with the interests of the
5 proposed intervenor.” *United States v. Idaho*, 2023 WL 1767387, at *3 (D. Idaho Feb. 3,
6 2023) (emphasis in original) (rejecting Legislature’s motion to intervene as of right
7 following *Berger*).

8 **B. Proposed Intervenors Lack Any Significant Protectable Interest That**
9 **Would Be Impaired Without Their Participation.**

10 The Proposed Intervenors have also failed to show that they have a significant
11 protectable interest in this litigation that would be impaired absent their participation.
12 The Proposed Intervenors rely exclusively on A.R.S. § 12-1841 to support their
13 argument. However, as previously discussed, that statute does not negate or override the
14 federal standard for intervention. It also “does not confer blanket authority upon
15 Proposed Intervenors to defend the constitutionality of a state law—particularly where
16 the [State] is already defending the law.” *Miracle*, 333 F.R.D. at 155. The Proposed
17 Intervenors offer only a “highly generalized argument” that they “have an interest in
18 upholding the constitutionality” of the challenged law, which is insufficient to “satisfy
19 the ‘significantly protectable interest’ requirement of Rule 24(a).” *Id.*; see Mot. at 6.

20 The Proposed Intervenors have no response to *Miracle* except to claim that it was
21 abrogated by the Supreme Court’s decision in *Berger*—a misreading which cannot be
22 squared with *Berger* or the cases interpreting it. *Berger* concluded that state legislators
23 might *sometimes* have a distinct interest in the litigation, but only when their participation
24 was necessary to avoid a “hobbled litigation rather than a full and fair adversarial testing
25 of the State’s interests and arguments.” 142 S. Ct. at 2201. Here, “unlike in *Berger*, the
26 Legislature has failed to show that it brings a distinct state interest to bear on this
27 litigation” because the State will provide “a full-throated defense of the law on the
28 merits.” *United States v. Idaho*, 342 F.R.D. 144, 150 (D. Idaho 2022).

1 Nor have the Proposed Intervenors shown that their supposed protectable interest
2 will be impaired absent their participation in this lawsuit. “Simply stating that [A.R.S.
3 § 12-1841] ‘confers upon them the interest in upholding the constitutionality of Arizona
4 laws’ does not establish that they are ‘so situated that the disposition of the action may as
5 a practical matter impair or impede [their] ability to protect that interest.’” *Miracle*, 333
6 F.R.D. at 155 (internal citation omitted). Rather, because Defendant Horne will
7 vigorously defend the Ban, Proposed Intervenors fail to satisfy Rule 24(a)’s practical
8 impairment requirement.

9 II. The Court Should Deny Permissive Intervention.

10 Permissive intervention requires that the applicant “has a claim or defense that
11 shares with the main action a common question of law or fact.” Fed. R. Civ. P.
12 24(b)(1)(B). The Court may also consider “whether the intervenors’ interests are
13 adequately represented by other parties . . . and whether parties seeking intervention will
14 significantly contribute to full development of the underlying factual issues in the suit
15 and to the just and equitable adjudication of the legal questions presented.” *Callahan*, 42
16 F.4th at 1022.

17 The Proposed Intervenors offer no argument in favor of permissive intervention
18 other than their desire to argue that “the challenged laws are constitutional,” their
19 supposed “important interest in defending the law,” and the Attorney General’s decision
20 to recuse from defending the law. (Mot. at 12.) But none of these assertions warrant
21 permissive intervention. A generalized desire to argue that the law is constitutional is not
22 a basis for permissive intervention. Proposed Intervenors do not have a unique or
23 independent interest in the law, and there is no danger that the State will fail to
24 vigorously and fully defend it. Defendant Horne will defend the Ban on behalf of the
25 State, as his words and actions to date demonstrate, and courts in this District have
26 declined to allow legislators to intervene by permission when the State intends to defend
27 the challenged law. *See Arizonans for Fair Elections*, 335 F.R.D. at 276 (“Proposed
28 Intervenors’ interests align with the State’s, and the Court doesn’t see how Proposed

1 Intervenor can more adequately defend state laws than the State itself. In the same vein,
2 Proposed Intervenor’s participation is unnecessary to the full development of this case.”);
3 *see also Miracle*, 333 F.R.D. at 156 (denying permissive intervention for similar
4 reasons). The Proposed Intervenor has not sufficiently shown how their interests
5 diverge from Defendant Horne’s or that his defense will be inadequate to defend the Ban.
6 The Court should accordingly decline to grant permissive intervention.

7 **CONCLUSION**

8 For the reasons stated above, the Court should deny the Motion to Intervene.

9 Respectfully submitted this 15th day of May,
10 2023.

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I hereby certify that on May 15, 2023, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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