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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.

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

21 Defendants.
22

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

**Reply in Support of 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 Plaintiffs oppose the Legislative Leaders’ motion to intervene by arguing that the
3 state defendant they selected is the only adequate representative to protect the State’s
4 interests. But Plaintiffs’ arguments fail.

5 Plaintiffs are incorrect that the Legislative Leaders are adequately represented by an
6 existing party, as filings already demonstrate. Unlike Defendant Horne, the Legislative
7 Leaders filed a motion to dismiss, raised strong legal arguments, submitted three expert
8 declarations prepared for this case, and did not suggest alternative remedies. Horne has
9 informed the court that the attorney general “has refused to pay for his independent
10 counsel.” Horne’s financial concern coupled with the filings to date make it apparent that
11 Horne does not adequately represent the Legislative Leaders’ interests. The Legislative
12 Leaders offer important contributions to the proceeding that Horne and other parties do not
13 provide, from expert testimony to legal arguments.

14 Plaintiffs also are incorrect that the Legislative Leaders do not have a significant
15 protectable interest that will be impaired without their participation. The Ninth Circuit has
16 recognized that state law can confer a protectable interest. Here, Arizona law provides that
17 interest by empowering the Legislative Leaders to intervene to defend the constitutionality
18 of state law, which they are exercising in this case. This interest will be impaired if they
19 are not allowed to intervene.

20 The Legislative Leaders also satisfy the standard for permissive intervention.
21 Plaintiffs do not challenge the initial conditions under Rule 24 to establish permissive
22 intervention. Instead, they challenge only two of six discretionary factors. As already
23 demonstrated, Horne does not adequately represent the Legislative Leaders’ interests. And
24 the Legislative Leaders will significantly contribute to full development of the underlying
25 factual issues in the suit, such as through expert declarations, and to the just and equitable
26 adjudication of the legal questions presented.

27 Therefore, the Legislative Leaders satisfy the requirements for both intervention as
28 of right and permissive intervention.

ARGUMENT

I. Intervention should be granted as of right.

Plaintiffs do not dispute the general principles favoring intervention. Mot. to Intervene of the President of the Arizona Senate and Speaker of the Arizona House of Representatives, Doc. 19 (“Mot. to Intervene”), 3-4. Courts construe the requirements to intervene as of right “broadly in favor of proposed intervenors.” *U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (holding the district court erred in denying government’s motion to intervene). “A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir.1995) (reversing denial of State of Arizona’s motion to intervene) (abrogated by further broadening of intervention under a specific statute in *Wilderness Soc’y v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)) (internal quotation omitted) (emphasis original). For these reasons, “there is a presumption in favor of intervention.” *Cooper v. Newsom*, 13 F.4th 857, 870–71 (9th Cir. 2021) (VanDyke, J., dissenting) (internal quotation omitted).

Plaintiffs’ arguments do not overcome the presumption and policy favoring the Legislative Leaders’ intervention.

A. Intervention is necessary to adequately represent the Legislative Leaders’ interests.

Plaintiffs’ primary argument against intervention is that Defendant Horne has retained experienced counsel and made statements in the press agreeing substantively with the challenged law. Pls.’ Opp’n to Mot. to Intervene, Doc. 35 (“Pls.’ Opp’n”), 3-6. But these points do not establish that the Legislative Leaders are adequately represented.

Plaintiffs concede that the Legislative Leaders need only show that representation

1 of their interests *may be* inadequate and that this showing should be treated as minimal.
2 Mot. to Intervene, 10-11. Plaintiffs also do not contest any of the three factors the Ninth
3 Circuit evaluates to consider whether existing parties adequately represent the interests of
4 the proposed intervenor. *Id.* at 10 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th
5 Cir. 2003)). Each of these three factors satisfies the Legislative Leaders’ minimal burden
6 to show that representation of their interests may be inadequate.

7 **1. The existing defendants will not undoubtedly make all of the**
8 **Legislative Leaders’ arguments.**

9 Plaintiffs argue that the Legislative Leaders “fail to explain why any purported
10 interests they have in this litigation will not be ‘adequately represented by a present party
11 to the action’ now that Defendant Horne has made clear his intention to defend this
12 lawsuit.” Pls.’ Opp’n, 3. As Plaintiffs note, the Legislative Leaders moved to intervene
13 before any defendant filed an appearance or took any action. *Id.* at 2.

14 Filings since the Legislative Leaders’ motion confirm that their interests will not be
15 adequately represented because Horne will not make all of the arguments the Legislative
16 Leaders would make.¹ The Legislative Leaders filed a proposed motion to dismiss
17 Plaintiffs’ Complaint. [Intervenors’ Proposed] Motion to Dismiss, Doc. 38-1. Horne, on
18 the other hand, filed an answer. Def. Horne’s Answer, Doc. 39. In his answer, Horne did
19 not specifically identify any affirmative defense or otherwise assert any of the dispositive
20 arguments raised by Intervenors in their proposed motion to dismiss. *Id.* at 7. Horne’s
21 response to Plaintiffs’ motion for preliminary injunction also did not make arguments
22 raised by Intervenors, such as the definition of “sex” under Title IX. *Compare* Def. Horne’s
23 Resp. to Pls.’ Mot. for a Prelim. Inj., Doc. 40 (“Horne’s PI Opp’n”), *with* [Intervenors’
24 Proposed] Opp’n to Pls.’ Mot. for a Prelim. Inj. and Mem. Of Law in Supp. Thereof, Doc.
25 38-2, 14-15. And Horne suggested a remedy beyond the challenged law in the form of a
26 court order requiring a co-ed team, which Horne believes “would be a much more

27
28 ¹ Plaintiffs do not argue that any defendant other than Horne may represent the Legislative
Leaders’ interests. Thus, Horne is the only defendant addressed in this reply.

1 reasonable proposed remedy.” Horne’s PI Opp’n, 16. The Legislative Leaders have not
2 suggested any alternative relief.

3 These are more than “mere differences in litigation strategy.” Pls.’ Opp’n, 4-5. The
4 Ninth Circuit reversed the denial of intervention as of right when the intervening party
5 made a compelling showing of inadequate representation by identifying arguments that the
6 existing parties did not raise. *W. Watersheds Project v. Haaland*, 22 F.4th 828, 841 (9th
7 Cir. 2022) (“Thus, we need not determine whether these arguments are likely to prevail.
8 That they are colorable is sufficient at this stage.”). Even the case cited by Plaintiffs for
9 their litigation-strategy argument ultimately granted intervention of right to one party and
10 permissive intervention to a group of other parties. *See United States v. City of Los*
11 *Angeles, Cal.*, 288 F.3d 391, 402-03 (9th Cir. 2002). The differences identified by the
12 Legislative Leaders comprise much more than the disagreement over three stipulated facts
13 in another case cited by Plaintiffs. *See Perry v. Proposition 8 Off. Proponents*, 587 F.3d
14 947, 954 (9th Cir. 2009). And the Legislative Leaders have provided specific examples of
15 differences between them and Horne, unlike in another case cited by Plaintiffs. *Arizonans*
16 *for Fair Elections v. Hobbs*, 335 F.R.D. 269, 275 (D. Ariz. 2020). The Legislative Leaders
17 have satisfied the minimal showing for the first adequacy of representation factor.

18 **2. The existing defendants are not capable or willing to make all of**
19 **Legislative Leaders’ arguments.**

20 Filings also show that Horne, through no fault of his own, is not capable of making
21 all the arguments that the Legislative Leaders would make in this litigation. According to
22 Horne, the attorney general “has refused to pay for his independent counsel.” Horne’s PI
23 Opp’n, 3. Further, Horne directs a state agency that does not carry a budget for
24 constitutional defense of statutes. Horne’s opposition to Plaintiffs’ motion for preliminary
25 injunction also did not attach any expert declarations prepared for this litigation. Instead,
26 Horne attached an affidavit prepared by an expert for a different litigation. Doc 40-1.
27 Horne reports that he “will need at least 90 days to full develop more evidence in support
28 of the scientific evidence referenced above.” Horne’s PI Opp’n, 3. The Legislative

1 Leaders, on the other hand, retained three experts who provided extensive declarations for
2 this case, including the expert for whom Horne submitted a different case’s affidavit. *See*
3 Docs. 38-3, 38-4, and 38-5.

4 Allowing Plaintiffs to benefit from litigating against a state official who does not
5 typically defend the State and who does not have the budgetary resources for a complete,
6 vigorous defense of the statute violates the same principles the *Berger* court identified
7 when it held legislative leaders could intervene to defend their state’s interests:

8 It would encourage plaintiffs to make strategic choices to
9 control which state agents they will face across the aisle in
10 federal court. It would tempt litigants to select as their
11 defendants those individual officials they consider most
12 sympathetic to their cause or most inclined to settle favorably
and quickly. All of which would risk a hobbled litigation rather
than a full and fair adversarial testing of the State’s interests
and arguments.

13 *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022). The
14 Legislative Leaders have satisfied the minimal showing for the second factor.

15 **3. The Legislative Leaders will offer necessary elements to the**
16 **proceeding that other parties would neglect.**

17 The Legislative Leaders will offer critical elements to the proceedings that would
18 be neglected by other parties. As the Superintendent of Public Instruction, Horne is
19 responsible for superintending the schools of the state, directing the performance of the
20 department of education, and executing polices of the state board of education. A.R.S.
21 §§ 15-231(B), 15-251. The Legislative Leaders represent the interests of the legislature
22 that passed the challenged law. These interests may diverge as the litigation progresses
23 since the interests of schools may not be the same as the interests of the legislature in the
24 legislation. “[I]t is not Applicants’ burden at this stage in the litigation to anticipate specific
25 differences in trial strategy. It is sufficient for Applicants to show that, because of the
26 difference in interests, it is likely that Defendants will not advance the same arguments as
27 Applicants.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001)
28 (reversing denial of motion for leave to intervene as of right). The Legislative Leaders

1 have satisfied the minimal showing for the third factor. In fact, the likelihood that Horne
2 “will not advance the same arguments as Applicants,” *id.*, is already manifest in the
3 significant differences between Horne’s and the Legislative Leaders’ responsive pleadings
4 and responses to the pending motion for preliminary injunction.

5 Accordingly, the Legislative Leaders have satisfied the minimal showing that Horne
6 does not adequately represent their interests.

7 **B. The Legislative Leaders have a significant protectable interest that will**
8 **be impaired without their participation.**

9 Plaintiffs argue the statute authorizing the Legislative Leaders to intervene should
10 be ignored based on their repeated argument that the “State” is defending the challenged
11 law. Pls.’ Opp’n, 6. Although not expressly argued by Plaintiffs, the Legislative Leaders
12 satisfy both elements the Ninth Circuit considers to determine whether a significant
13 protectable interest exists. Mot. to Intervene, 6 (quoting *Wilderness Soc’y v. U.S. Forest*
14 *Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (“Rather, it is generally enough that the interest
15 is protectable under some law, and that there is a relationship between the legally protected
16 interest and the claims at issue.”).

17 **1. The Legislative Leaders have an interest protectable under some law.**

18 Plaintiffs attempt to discount § 12-1841 by arguing that it “does not negate or
19 override the federal standard for intervention.” Pls.’ Opp’n, 6. This argument misses the
20 mark. Section 12-1841 recognizes that the Legislative Leaders have an interest in
21 defending the constitutionality of a state law, and it protects that interest by authorizing
22 them to intervene in that litigation. A.R.S. § 12-1841(A), (D). As this Court recently
23 found, “§ 12-1841 nonetheless demonstrates Arizona has made a policy decision to vest in
24 its legislative leaders an interest in defending the constitutionality of the legislature’s
25 enactments.” *Isaacson v. Mayes*, No. CV-21-01417-PHX-DLR, 2023 WL 2403519, at *1
26 (D. Ariz. Mar. 8, 2023). The Ninth Circuit has held that a state law provides a legally
27 protected interest for purposes of Rule 24(a)(2). *California Dep’t of Toxic Substances*
28 *Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1092 (9th Cir. 2022). In addition, “[n]o one

1 questions that States possess a legitimate interest in the continued enforcement of their own
2 statutes.” *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022))
3 (internal quotation omitted); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“[A]
4 State clearly has a legitimate interest in the continued enforceability of its own statutes.”).

5 Contrary to Plaintiffs’ claims, *Berger* abrogated *Miracle* by holding that legislative
6 leaders could intervene to defend a challenged law on the reasoning that “federal courts
7 should rarely question that a State’s interests will be practically impaired or impeded if its
8 duly authorized representatives are excluded from participating in federal litigation
9 challenging state law.” *Berger*, 142 S. Ct. at 2201. And in the case that Plaintiffs rely on
10 to argue that *Berger* did not materially change the law, the district court granted the Idaho
11 Legislature permissive intervention to present evidence and arguments that were not
12 covered by the State. *United States v. Idaho*, 342 F.R.D. 144, 152 (D. Idaho 2022). The
13 *Idaho* decision also relied heavily on the fact that the named defendant was the State of
14 Idaho, which included the legislature; and the fact that the state attorney general was
15 defending the law—both facts that are not present in this litigation. Thus, the Legislative
16 Leaders satisfy the significant interest requirement.

17 **2. A relationship exists between the legally protected interest and the**
18 **claims at issue.**

19 The Legislative Leaders also satisfy the relationship requirement. “The relationship
20 requirement is met if the resolution of the plaintiff’s claims actually will affect the
21 applicant.” *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 398 (9th Cir. 2002)
22 (internal quotation omitted). “[A]ny time a State is enjoined by a court from effectuating
23 statutes enacted by representatives of its people, it suffers a form of irreparable injury.”
24 *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (internal
25 quotation omitted); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir.
26 1997) (“it is clear that a state suffers irreparable injury whenever an enactment of its people
27 or their representatives is enjoined”).

28 Plaintiffs’ reliance on *Miracle* is misplaced. Pls.’ Opp’n, 4. In addition to no longer

1 being good law after *Berger*, *Miracle* relied on facts that distinguish it from this case. In
2 *Miracle*, the Arizona attorney general was representing the defendant and already had
3 moved to dismiss the complaint. *Miracle v. Hobbs*, 333 F.R.D. 151, 155 (D. Ariz. 2019).
4 Here, the attorney general is not participating and Horne did not move to dismiss the
5 complaint.

6 Granting Plaintiffs' relief and declaring that § 15-120.02 is unconstitutional affects
7 the Legislative Leaders and satisfies both the relationship requirement and the practical
8 impairment requirement.

9 **II. Permissive intervention should be granted.**

10 Plaintiffs incorrectly claim permissive intervention should be denied unless the
11 Legislative Leaders can show that "their interests diverge from Defendant Horne's or that
12 his defense will be inadequate to defend the Ban." Pls.' Opp'n, 7. Plaintiffs support their
13 argument with a partial list of additional factors the court may consider in reaching its
14 discretionary decision. *Id.* (quoting *Callahan v. Brookdale Senior Living Communities,*
15 *Inc.*, 42 F.4th 1013, 1022 (9th Cir. 2022)).

16 Before it reached any additional factors, *Callahan* noted that the district court may
17 permit intervention when the movant presents "(1) an independent ground for jurisdiction;
18 (2) a timely motion; and (3) a common question of law and fact between the movant's
19 claim or defense and the main action." *Callahan*, 42 F.4th at 1022. All three elements are
20 present here. First, jurisdiction exists because there is a federal question and the Legislative
21 Leaders do not seek to bring any counterclaims or cross-claims. *Freedom from Religion*
22 *Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("We therefore clarify that the
23 independent jurisdictional grounds requirement does not apply to proposed intervenors in
24 federal-question cases when the proposed intervenor is not raising new claims."). Second,
25 Plaintiffs do not contest the timeliness of the motion. Pls.' Opp'n, 2 n.1. Third, there is a
26 common question of law and fact between the Legislative Leaders' defense and the main
27 action as demonstrated by the Legislative Leaders' motion to dismiss and opposition to
28 Plaintiffs' motion for preliminary injunction. Thus, the Legislative Leaders satisfy the

1 initial conditions for permissive intervention.

2 Plaintiffs do not contest the initial conditions for permissive intervention, and
3 instead argue the factors that are considered only after the initial conditions are met.
4 Therefore, Plaintiffs have conceded that the Legislative Leaders have met the initial
5 conditions for permissive intervention.

6 The court may consider other factors after it determines that the initial conditions
7 for permissive intervention are met. *Callahan* lists six factors: (1) “the nature and extent
8 of the intervenors’ interest;” (2) “their standing to raise relevant legal issues, the legal
9 position they seek to advance, and its probable relation to the merits of the case;” (3)
10 “whether changes have occurred in the litigation so that intervention that was once denied
11 should be reexamined;” (4) “whether the intervenors’ interests are adequately represented
12 by other parties;” (5) “whether intervention will prolong or unduly delay the litigation;”
13 and (6) “whether parties seeking intervention will significantly contribute to full
14 development of the underlying factual issues in the suit and to the just and equitable
15 adjudication of the legal questions presented.” *Callahan*, 42 F.4th at 1022. Plaintiffs offer
16 argument only relating to factors (4) and (6).

17 With respect to the fourth factor, the Legislative Leaders already have demonstrated
18 why Horne does not adequately represent their interests. Horne has not filed a motion to
19 dismiss, has not raised certain legal arguments, and has not submitted expert declarations
20 prepared for this case in opposition to the motion for preliminary injunction. The
21 inadequacy of Horne’s representation distinguishes this case from the decisions in
22 *Arizonans for Fair Elections* and *Miracle*. The fourth factor favors the Legislative Leaders.

23 With respect to the sixth factor, the Legislative Leaders’ participation will
24 significantly contribute to full development of the underlying factual issues in the suit. The
25 Legislative Leaders already have significantly contributed to the case by submitting three
26 detailed expert declarations that address important factual issues. The Legislative Leaders’
27 legal arguments, many of which have not been raised by Horne, will significantly
28 contribute to the just and equitable adjudication of the legal questions presented.

1 Dated: May 22, 2023

Respectfully submitted,

2
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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 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