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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 **Notice of Supplemental Authority in Support of Motion to Intervene of the President of the Arizona Senate and Speaker of the Arizona House of Representatives**

Since Senator Petersen and Representative Toma (the "Legislative Leaders") filed their motion to intervene and reply in this action, *see* Docs. 19 and 43, the Ninth Circuit has issued a ruling that further supports the Legislative Leaders' motion.

Yesterday, the Ninth Circuit granted a motion to intervene filed by the Legislative

Leaders.[1] *See* Order, *Isaacson v. Mayes*, 23-15234, Doc. 47, 1 (9th Cir. May 30, 2023), attached as Exhibit 1. In support of their motion to intervene to defend the constitutionality of a state statute, the Legislative Leaders raised very similar arguments to the Ninth Circuit that they have presented to this Court. *See* Mot. of Intervenors-Defendants Arizona Senate President Petersen and Speaker of the Arizona House of Representatives Toma to Participate as Appellees on Appeal, 23-15234, Doc. 27 (9th Cir. Apr. 20, 2023), attached as Exhibit 2.

The arguments to the Ninth Circuit in opposition to the Legislative Leaders' request closely resemble the arguments before this Court. *See* Plaintiffs-Appellants' Resp. in Opp'n to Mot. to Participate as Appellees, 23-15234, Doc. 39 (9th Cir. May 1, 2023), attached as Exhibit 3. Like the Plaintiffs in this case, the *Isaacson* plaintiffs argued that A.R.S. § 12-1841 did not give the Legislative Leaders a significant protectable interest in the appeal. *Id.* at 6-9. Also like the Plaintiffs in this case, the *Isaacson* plaintiffs argued that the Supreme Court's decision in *Berger* did not support the Legislative Leaders' motion to intervene. *Id.* at 10-13. Finally, again like the Plaintiffs in this case, the *Isaacson* plaintiffs also opposed the Ninth Circuit granting the Legislative Leaders permissive intervention. *Id.* at 17-19.

In a single sentence order, the Ninth Circuit rejected the *Isaacson* plaintiffs' arguments and granted the Legislative Leaders' motion to intervene. Ex. 1 at 1. Thus, the Ninth Circuit upheld the Legislative Leaders' entitlement to intervene to defend the constitutionality of a state statute.

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[1] The Legislative Leaders previously cited the district court's decision in *Isaacson* granting their motion to intervene. *See* Mot. to Intervene of the President of the Arizona Senate and Speaker of the Arizona House of Representatives, Doc. 19, 1, 10 (citing *Isaacson v. Mayes*, 2:21-cv-01417-DLR, 2023 WL 2403519, at *2 (D. Ariz. Mar. 8, 2023)). Because the *Isaacson* plaintiffs filed an appeal of the district court's denial of preliminary injunction before the district court granted the Legislative Leaders' motion to intervene, the Legislative Leaders moved to intervene in the Ninth Circuit in order to become parties to that appeal.

In light of the Ninth Circuit's decision yesterday granting the Legislative Leaders' motion to intervene, the Legislative Leaders respectfully renew their motion to intervene in this litigation.

Dated: May 31, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 30 2023

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

PAUL A. ISAACSON, M.D., on behalf of himself and his patients; et al.,

Plaintiffs-Appellants,

v.

KRISTIN K. MAYES, in her official capacity as Arizona Attorney General; et al.,

Defendants-Appellees,

and

MICHAEL B. WHITING, County Attorney for Apache County, in his official capacity; et al.,

Defendants,

BEN TOMA; WARREN PETERSEN,

Intervenors.

No. 23-15234

D.C. No. 2:21-cv-01417-DLR
District of Arizona, Phoenix

ORDER

Before: FRIEDLAND and SUNG, Circuit Judges.

The motion to intervene in this appeal by defendant-intervenors Peterson and Toma (Docket Entry No. 27) is granted.

The opening brief and excerpts of record have been filed. Appellees have filed a notice of no position on appeal and have notified the court of their intent not

EXHIBIT 1

to file an answering brief or participate in argument. The Clerk will file the intervenors' brief submitted on May 18, 2023. Appellants' optional reply brief is due June 21, 2023.

APPEAL NO. 23-15234

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., on behalf of himself and his patients; ERIC M. REUSS, M.D., M.P.H,; on behalf of himself and his patients; NATIONAL COUNCIL OF JEWISH WOMEN, INC., Arizona Section; ARIZONA NATIONAL ORGANIZATION FOR WOMEN; ARIZONA MEDICAL ASSOCIATION, on behalf of itself, its members and its members patients,

Plaintiffs-Appellants,

v.

KRISTIN K. MAYES, in her official capacity as Arizona Attorney General; ARIZONA DEPARTMENT OF HEALTH SERVICES; JENNIFER CUNICO, in her official capacity as Interim Director of the Arizona Department of Health Services; ARIZONA MEDICAL BOARD; PATRICIA MCSORLEY, Executive Director of the Arizona Medical Board, in her official capacity,

Defendants-Appellees,

and

MICHAEL B. WHITING, County Attorney for Apache County, in his official capacity; BRIAN M. MCINTYRE, County Attorney for Cochise County, in his official capacity; WILLIAM PATRICK RING, County Attorney for Coconino County, in his official capacity; BRADLEY D. BEAUCHAMP, County Attorney for Gila County, in his official capacity; SCOTT BENNETT, County Attorney for Graham County, in his official capacity; JEREMY FORD, County Attorney for Greenlee County, in his official capacity; TONY ROGERS, County Attorney for La Paz County, in his official capacity; ALLISTER ADEL, County Attorney for Maricopa County, in her official capacity; MATTHEW SMITH, County Attorney for Mohave County, in his official capacity; BRAD CARLYON, County Attorney for Navajo County, in his official capacity; LAURA CONOVER, County Attorney for Pima County, in her official capacity; KENT VOLKMER, County Attorney for Pinal County, in

EXHIBIT
2

his official capacity; GEORGE SILVA, County Attorney for Santa Cruz County, in his official capacity; SHEILA POLK, County Attorney for Yavapai County, in her official capacity; JON RODNEY SMITH, County Attorney for Yuma County, in his official capacity,

Defendants,

and

WARREN PETERSEN, Arizona Senate President, and BEN TOMA, Speaker of the Arizona House of Representatives,

Intervenors-Defendants/Proposed Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:21-cv-01417-DLR / Hon. Douglas L. Rayes

MOTION OF INTERVENORS-DEFENDANTS ARIZONA SENATE PRESIDENT PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES TOMA TO PARTICIPATE AS APPELLEES ON APPEAL

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INTRODUCTION

The district court properly granted intervention in this case to President Peterson and Speaker Toma (the "Legislative Leaders"). No party appealed that order, nor could they. But 15 days before the district court granted the Legislative Leaders' motion to intervene, Plaintiffs filed a notice of appeal in this Court.[1] Accordingly, though already parties to the underlying case, the Legislative Leaders seek this Court's formal approval of their status as Appellees in this appeal. All parties but Petitioners would stipulate to the Legislative Leaders' participation to defend their interests, which include exercising statutory rights to defend the constitutionality of state statutes, and advocating for the life and equal dignity of vulnerable unborn children. As the district court concluded, the President and Speaker are entitled to intervene as a matter of statutory right, and no other party will represent their interests or adequately defend the challenged laws.

Arizona law expressly authorizes the Legislative Leaders to intervene in cases challenging the constitutionality of state statutes. *See* A.R.S. § 12-1841 (2010). *Accord Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022). Here, Plaintiffs challenge the constitutionality of two state statutes. The first prohibits the

[1] Plaintiffs included Arizona Medical Association, Arizona National Organization for Women, Paul A. Isaacson, National Council of Jewish Women, and Eric M Reuss.

discriminatory killing of an unborn child because of his or her race, sex, or genetic abnormality ("Reason Regulations"). A.R.S. § 13-3603.02(A) (2021). The second requires that state laws be interpreted to acknowledge that unborn children share all rights and privileges available to other persons ("Interpretation Policy"). A.R.S. § 1-219(A) (2021).

Arizona Attorney General Kris Mayes has vowed she will *not* defend the constitutionality of these two statutes. It is therefore certain that the existing parties do not adequately represent the Legislative Leaders' unique interest in defending the constitutionality of laws duly enacted by the Arizona Legislature, and the Court should grant their motion to participate as Appellees in this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Since 2011, Arizona has protected the most vulnerable members of society from discrimination by prohibiting any person from "perform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." A.R.S. § 13-3603.02 (A)(1). In 2021, Arizona extended the Reason Regulations' safeguards by promulgating S.B. 1457 to "protect[] the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. The law prohibits any person from "perform[ing] an abortion knowing that the abortion is

sought solely because of a genetic abnormality of that child." S.B. 1457 § 2. "Genetic abnormality" is defined as "the presence or presumed presence of an abnormal gene expression in an unborn child, including a chromosomal disorder or morphological malformation occurring as the result of abnormal gene expression." A.R.S. § 13-3603.02 (G)(2).

The Act contains two exceptions. First, a "[g]enetic abnormality . . . [d]oes not include a lethal fetal condition." *Id.* Second, a "medical emergency" exception allows abortions necessary, in "the physician's good faith clinical judgment," to prevent the death or "substantial and irreversible impairment of a major bodily function" of the pregnant woman. A.R.S. § 13-3603.02 (A), (G)(3); § 36-2151 (6). Moreover, the Act exempts from all criminal or civil liability a woman who aborts her child because of the child's genetic abnormality. A.R.S. § 13-3603.02 (F).

In passing the law, Arizona noted that "prohibiting persons from performing abortions knowing that the abortion is sought because of a genetic abnormality of the child advances at least three compelling state interests." S.B. 1457 § 15. The Act: (1) "protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions," (2) protects Arizona citizens from coercive medical practices "that encourage selective abortions of persons with genetic abnormalities," and (3) "protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortion." *Id.*

The legislature also enacted a statute—the Interpretation Policy—which provides that "[t]he laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court." A.R.S. § 1-219 (A).

President Petersen was a co-sponsor of S.B. 1457, and personally advocated and voted for the Interpretation Policy and non-discrimination protections for unborn children with genetic abnormalities. He consistently advocated for pro-life legislation during his time as a representative (2012 to 2016) and as a senator (2016 to present). Speaker Toma also personally advocated and voted for S.B. 1457, and he has promoted pro-life legislation since his election to the Arizona House of Representatives in 2017.

Kris Mayes was sworn in as the new Arizona Attorney General on January 2, 2023. Consistent with her campaign promise not to defend S.B. 1457 if elected, she has refused to do so in this litigation.[2]

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[2] *See* ECF No. 160; Kris Mayes, *12 Point Plan*, https://bit.ly/3DEiEHf; Associated Press, *U.S. Supreme Court: Arizona Can Enforce Genetic Issue Abortion Ban*, KTAR NEWS (June 30, 2022), http://bit.ly/3RvhRy5. Attorney General Mayes has also refused to appeal the Arizona Court of Appeals' ruling invalidating Arizona's pre-*Roe* pro-life law. Greg Hahne, *Arizona Attorney General Kris Mayes Will Not Challenge Appellate*

PROCEDURAL HISTORY

Plaintiffs filed a complaint in district court seeking injunctive and declaratory relief and filed a motion for preliminary injunction on August 18, 2021. ECF No. 10; *see also* ECF Nos. 125, 146.[3] They alleged that the Reason Ban and Interpretation Policy violate various provisions of the U.S. Constitution. ECF No. 1 at 29–32.

After *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), made clear that the U.S. Constitution contains no right to abortion, Plaintiffs filed another motion for preliminary injunction. *See* ECF Nos. 121, 125. The district court denied the motion on January 19, 2023, ECF No. 152; and on February 3, 2023, the Legislative Leaders moved to intervene in the district court proceedings pursuant to Federal Rule of Civil Procedure 24, ECF No. 155.[4]

Ruling on Territorial Abortion Law, KJZZ (Jan. 3, 2023), https://bit.ly/40u4ORO.

[3] Plaintiffs included Arizona Medical Association, Arizona National Organization for Women, Paul A. Isaacson, National Council of Jewish Women, and Eric M Reuss.

Sharing Down Syndrome, a public interest group that advocates for people with Down Syndrome, moved to intervene in November 2021, while the previous Attorney General, Mark Brnovich, was still in office. ECF No. 62. The court denied that motion, finding that, at that time, the Attorney General was adequately defending the shared interests of the state and Sharing Down Syndrome. ECF No. 83 at 3.

Attorney General Mayes took no position on the intervention motion and told the court she "[would] not defend the constitutionality of those laws going forward." ECF No. 160. The Arizona Medical Board and Arizona Department of Health Services also took no position on the motion. ECF Nos. 158, 161. Plaintiffs opposed intervention. ECF No. 159.

Before the district court could rule on the intervention motion, Plaintiffs appealed the court's denial of the preliminary injunction and moved to stay district-court proceedings pending appeal. ECF Nos. 162–163. The next day, the court granted the stay except as to the pending motion to intervene. ECF No. 164. Fourteen days later, it granted the Legislative Leaders' motion to intervene. ECF No. 167.

In its order granting intervention, the district court reviewed applicable federal and state law and concluded, "If Putative Intervenors are not permitted to intervene, the challenged laws will go undefended, which 'risk[s] turning a deaf ear to the voices the State has deemed crucial to understanding the full range of its interests.'" ECF No. 167 at 2 (quoting *Berger*, 142 S. Ct. at 2201).

President and Speaker now seek to participate as Intervenors-Appellees in this appeal. Attorney General Mayes, Arizona Medical Board, and the Arizona Department of Health Services do not oppose the motion. Plaintiffs oppose the motion.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 24, a court must allow intervention when (1) the application is timely; (2) the applicant has a significant protectable interest in the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. See FED. R. CIV. P. 24(a)(2); *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006); *see also Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *see generally Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010–11 (2022) (analyzing, pursuant to Rule 24, an attorney general's motion to intervene on appeal).

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

ARGUMENT

I. The Legislative Leaders are entitled to intervention as of right.

"[T]he requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). This is because a "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (cleaned up) (abrogated by further broadening of intervention under a specific statute in *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). Intervention is favored, at both the district and appellate levels, where, as here, a state official "asserts a substantial legal interest that sounds in deeper, constitutional considerations" that implicate its "power to enact and enforce any laws that do not conflict with federal law." *Cameron*, 142 S. Ct. at 1010–11 (2022) (citing U.S. Const., Art. VI, § 2).

A. The motion is timely.

The Legislative Leaders' motion to intervene on appeal is timely. For months, Plaintiffs have been aware of the Legislative Leaders' desire to represent the state's interest. Plaintiffs did not dispute timeliness below. The Legislative Leaders file this motion before merits briefing has begun and timely respond to Plaintiffs' brief and all deadlines on appeal in this Court.

The timeliness of a motion to intervene must be "determined from all the circumstances." *Cameron*, 142 S. Ct. at 1012 (discussing timeliness in the context of states' sovereignty interests in litigation). Relevant considerations include how long the movant waited to intervene, and the degree to which intervention may cause a disruption. *Id.* at 1013.

The timeliness factor favors the Legislative Leaders because the parties briefed the issue before Plaintiffs even filed their notice of appeal. *See* ECF Nos. 155, 158–162. Plaintiffs did not object to timeliness then and did not even brief the issue. *See* ECF No. 159. If timeliness was not an issue in the district court, it is not an issue now—particularly considering that Plaintiffs have yet to file their merits brief. *Cf. Berger*, 142 S. Ct. at 2200–01 (only considering remaining factors in intervention analysis where there was no dispute over timeliness).

B. The Legislative Leaders have a significant protectable interest in this matter that will be impaired without their participation.

The Legislative Leaders have a significant protectable interest in the outcome of this litigation: a law they passed as representatives of the people of Arizona may be struck down if Plaintiffs succeed on appeal. And when a proposed intervenor has a protectable interest, courts often "have little difficulty concluding that the disposition of a case may, as a practical matter, affect" their interest. *Cal. Ex rel.*

Lockyer v. United States, 450 F.3d 436, 442 (9th Cir. 2006). No current Defendant will defend S.B. 1457 on appeal, leaving the legislation without any defender on appeal. Legislative Leaders' participation is therefore crucial.

Under the Constitution, a state retains "the sovereign power[] . . . to enact and enforce any laws that do not conflict with federal law," because it "clearly has a legitimate interest in the continued enforceability of its own statutes, and a federal court must respect the place of the States in our federal system." *Cameron*, 142 S. Ct. at 1011. "This means that a State's opportunity to defend its laws in federal court should not be lightly cut off." *Id.* Respecting a state's sovereignty requires an appellate court to consider the state's authority to structure its system in a way that "empowers multiple officials to defend its sovereign interests in federal court." *Id* (considering a statute that enabled two members of a state's executive branch to represent the state's interests in court).

The State of Arizona has expressly authorized the President of the State Senate and the Speaker of the House of Representatives to intervene and file briefs in any case challenging the constitutionality of a state statute. A.R.S. § 12-1841 (D). When a state statute is challenged as unconstitutional, the Legislative Leaders "shall be entitled to be heard." *Id.* § 12-1841(A). For this reason, Arizona law requires plaintiffs challenging state statutes to notify the Speaker and President and

provide information to facilitate their participation. *See* § 12-1841(A) & (B). Accordingly, the Legislative Leaders have a crucial interest—bestowed by the people of Arizona through their elected representatives—in defending the constitutionality of state statutes.

Consistent with the Legislative Leaders' rights under § 12-1841, the Arizona State Senate Rules authorize the President "to bring or assert in any forum on behalf of the Senate any claim or right arising out of any injury to the Senate's powers or duties under the 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 Arizona House of Representatives Rules authorize the Speaker "to bring or assert in any forum on behalf of the House any claim or right arising out of any injury to the House's powers or duties under the Constitution or Laws of this state." State of Arizona, *Rules of the Ariz. House of Representatives, 56th Legislature 2023-2024*, Rule 4(K), available at https://bit.ly/3HuL9bz. The Legislative Leaders do not merely speak for themselves; they speak on behalf of their respective chambers as a whole.

The U.S. Supreme Court recently held that statutes like § 12-1841 endow legislative leaders with a protectable interest that would be impaired absent intervention. *Berger*, 142 S. Ct. at 2194. Like § 12-1841, the North Carolina statute in *Berger* allowed the leaders of that state's legislature to participate in proceedings challenging the

constitutionality of state statutes. *Id.* at 2198 (citing N.C. GEN. STAT. ANN. § 1–72.2). The district court and Fourth Circuit concluded that the president of the state senate and speaker of the house of representatives were not entitled to intervene in a lawsuit implicating state election law. *Id.* at 2199–2200. The Supreme Court reversed.

The *Berger* Court stated that its instructions on this issue have been "many, clear, and recent." *Id.* at 2202. A state is "free to empower multiple officials to defend its sovereign interests in federal court." *Id* (quoting *Cameron*, 142 S. Ct. at 1011) (cleaned up). 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 class of cases." *Id.* (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019)) (cleaned up). "The choice belongs to [the sovereign State]." *Id.* (cleaned up).

The Supreme Court reiterated that "States possess a legitimate interest in the continued enforcement of their own statutes," and that they "may organize themselves in a variety of ways." *Id.* at 2201 (cleaned up). For example, when faced with a constitutional challenge, some states have organized themselves to mount a defense through the single voice of an attorney general. *Id.* at 2197. On the other hand, "[s]ome have chosen to authorize multiple officials to defend their practical interests in cases like these." *Id.* Like Arizona, North Carolina "empowered the leaders of its two legislative houses to participate in

litigation on the State's behalf under certain circumstances and with counsel of their own choosing." *Id.* Such an approach is "understandable," because a partisan attorney general may "oppose[] laws enacted by the [Legislature] and decline[ ] to defend them fully in federal litigation." *Id.* Indeed.

The *Berger* Court reaffirmed that "state legislative leaders authorized under state law to represent the State's interests in federal court could defend state laws there as parties." *Id.* (citing *Karcher v. May*, 484 U.S. 72, 81–82 (1987)) (cleaned up). And intervention by legislative officials is commonplace. *E.g.*, *Yniguez v. State of Ariz.*, 939 F.2d 727, 732 (9th Cir. 1991) (noting that in *Karcher*, the Supreme Court clearly indicated that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office).[5] The Court cautioned that "[a]ppropriate respect for these realities suggests that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." 142 S. Ct. at 2201.

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[5] *See also Horne v. Flores*, 557 U.S. 433, 443 (2009) (noting that the President of Arizona State Senate and Speaker of the Arizona House of Representatives were allowed to intervene); *Powell v. Ridge*, 247 F.3d 520, 522 (3rd Cir. 2001) (granting legislative leaders' motion to intervene as defendants to "articulate to the Court the unique perspective of the legislative branch").

Excluding authorized representatives would (1) "evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials,"(2) "risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests," (3) "encourage plaintiffs to make strategic choices to control which state agents they will face across the aisle in federal court," and (4) "tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably and quickly." *Id.* Taken together, this would "risk a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Id.*

Like North Carolina, Arizona has expressly authorized the Legislative Leaders to intervene, participate, and file briefs to defend the constitutionality of state statutes. A.R.S. § 12-1841 (D). The wisdom of this provision is evident when considering how it provides for instances like this one—in which a state attorney general refuses to defend a state law. ECF No. 160. But to her credit, the Attorney General has consented to the Legislative Leaders' intervention rather than question the authority of the President and Speaker to defend the statute. Even so, the Attorney General could still reach an agreement with Plaintiffs to "settle favorably and quickly" absent the Legislative Leaders' formal participation on appeal. *Berger*, 142 S. Ct. at 2201.

If the Legislative Leaders are not allowed to participate as Appellees on appeal, they will be deprived of their statutory right to mount a defense, and the duly enacted laws challenged here may receive no defense at all.

C. The existing parties do not adequately represent the Legislative Leaders.

The Legislative Leaders are designated by Arizona law to represent the state's interest in defending a duly enacted law. The Attorney General has assured a federal court that she will not defend the statute; other Defendants will not do so; and the Legislative Leaders are best suited to make the arguments that will otherwise be entirely neglected. Plaintiffs desire to shut the Legislative Leaders out of the process would result in litigation without true adversity, risk a potential settlement, block the voice of the people of Arizona, and deprive this Court of a full and fair consideration of the arguments.

Courts consider three factors when determining whether existing parties adequately represent the interests of the proposed intervenor:

> (1) whether the interest of a present party is such that it will *undoubtedly* make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added). The Legislative Leaders must only show "that representation of [their] interest[s] '*may be*' inadequate" to satisfy this element for intervention. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added). And "the burden of making that showing should be treated as minimal." *Id.* Intervention of right is warranted where, as here, a proposed intervenor has raised "sufficient doubt about the adequacy of representation." *Id.* at 538.

The question whether Attorney Mayes and other Defendants will "undoubtedly make all of [Legislative Leaders'] arguments," *Arakaki*, 324 F.3d at 1086, is settled. They "undoubtedly" *will not* make those arguments. In her response to the Legislative Leaders' motion to intervene, the Attorney General told the district court that she "[would] not defend the constitutionality of those laws going forward." ECF No. 160.

Other Defendants are not defending S.B. 1457 before this Court. And Plaintiffs' desire to cut the Legislative Leaders out of the process "evince[s] disrespect" for Arizona law and encourages this Court to "turn[ ] a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *See Berger*, 142 S. Ct. at 2201. Some might even say that it appears to be a "strategic choice[] to control which state agents they will face across the aisle in federal court." *Id.* And if Plaintiffs have it their way, they will face no meaningful

adversary at all. The appeal would be reduced to a "hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Id.*

Appellate litigation is not about gamesmanship, and if Plaintiffs successfully bar the Legislative Leaders from participating as Appellees on appeal—even though the Legislative Leaders have already successfully intervened in the district court and are parties to the underlying litigation—justice will be substantially undermined. Left emptyhanded will be the people of Arizona—not to mention this Court, which will be unable to consider fully each parties' arguments in this controversial matter.

The Legislative Leaders' motion to intervene is timely, and as representatives of the people of Arizona, they have a significant protectable interest in the outcome of this case. Without the Attorney General to protect the state's interest in defending its duly enacted statues, the task necessarily falls to the Legislative Leaders, who are statutorily authorized and should be permitted to do so.

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

In the alternative, and at a minimum, this Court should exercise its discretion to grant permissive intervention. Under Rule 24(b), courts may grant permissive intervention to anyone who "has a claim or defense that shares with the main action a common question of law or

fact." A court's discretion in determining whether permissive intervention is appropriate may be guided by factors such as "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). A court may also consider other factors: whether changed circumstances justify intervention that was once denied; whether other parties adequately represent the intervenors' interests; whether intervention will delay litigation; and whether parties seeking intervention will significantly contribute to the court's understanding of the factual issues and the best resolution of the legal questions. *Id.*

The Legislative Leaders' anticipated defense—that the challenged laws are constitutional—shares common questions of law and fact with Plaintiffs' appeal. Both concern the constitutionality of the same statute and require the Court to consider whether the legislation chills abortionists' efforts to run their businesses, which enjoy no constitutional protections. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (holding that abortionists have no "freestanding right to perform abortions"). Further, the Legislative Leaders have an important interest in defending the constitutionality of the challenged legislation, which was passed in part because of their votes and leadership.

Given these weighty interests and the obvious need for a party who is willing to defend the challenged laws—and given the Legislative Leaders' status as Intervenors-Defendants in the district court litigation—permissive intervention is appropriate.

CONCLUSION

The Legislative Leaders have unique interests in defending legislation that the Attorney General will not. They have a statutory right, too. Their participation as Appellees in this appeal is proper and consistent with Arizona law. Accordingly, the Legislative Leaders respectfully request that this Court grant intervention as of right, or in the alternative, permissive intervention.

Respectfully submitted this 20th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2023, I electronically filed the foregoing Motion to Participate as Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/Kevin H. Theriot
Kevin H. Theriot

Dated: April 20, 2023.

No. 23-15234

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., ET AL.,
Plaintiffs-Appellants,

v.

KRISTIN K. MAYES, ATTORNEY GENERAL OF ARIZONA, IN HER OFFICIAL CAPACITY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
No. 2:21-cv-01417-DLR

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INTRODUCTION

The motion of Arizona Senate President Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma (together, the "Proposed Intervenors") to intervene as appellees should be denied. As set forth below, Proposed Intervenors lack a significant protectable interest in this appeal, and any putative interest would not be impaired by their absence from this appeal. *See Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1086 (9th Cir. 2022).

First, Proposed Intervenors incorrectly claim to derive a significant protectable interest in this action, as required under Federal Rule of Civil Procedure 24(a)(2), from an Arizona statute establishing state court procedural rules for declaratory judgments, but that statute has no application in federal court. Nor can Proposed Intervenors rely on the Supreme Court's recent decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), because, unlike in *Berger*, the Arizona statute Proposed Intervenors attempt to invoke does not apply in federal court, does not expressly designate Proposed Intervenors as agents of the State of Arizona, and does not empower them to litigate on the State's behalf.

Second, even if Proposed Intervenors had identified a significant protectable interest, their motion would still fail for an additional reason: Proposed Intervenors cannot show that any putative interest would be practically impaired or impeded by the Court's resolution of this interlocutory appeal, which concerns only the threshold

question of the sufficiency of Plaintiffs' Article III injuries. Proposed Intervenors have made clear that their *sole* interest is in upholding the constitutionality of the laws Plaintiffs have challenged. But the merits of Plaintiffs' claims, or any defense of the laws' constitutionality, is not before the Court in this appeal. Indeed, even if Plaintiffs prevail in this appeal, that will have no impact on Proposed Intervenors' ability to defend the constitutionality of the challenged statutes before the district court, where they have already been granted intervention.

Finally, Proposed Intervenors do not satisfy the criteria for permissive intervention under Rule 24(b), and the Court should therefore exercise its "broad discretion" and deny their alternative request. *See Orange County v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). In addition to the reasons set forth above, Proposed Intervenors ignored the explicit procedure for legislative intervention laid out in the very statute they ostensibly seek to defend—a statutory procedure they advocated for and voted into Arizona law. *See* Mot. of Intervenors-Defs. Ariz. Sen. Pres. Petersen & Speaker of the Ariz. House of Reps. Toma to Participate as Appellees on Appeal ("Appellate Intervention Mot.") (Dkt. 27) at 4. That statute specifies that the Arizona Legislature may, "by concurrent resolution," "appoint one or more of its members who sponsored or cosponsored this act in the member's official capacity to intervene as a matter of right in any case in which the constitutionality of this act is challenged." S.B. 1457 § 16, 55th Leg., 1st Reg. Sess. (Ariz. 2021) ("Section 16").

There has been no concurrent resolution by the Arizona Legislature appointing either of the Proposed Intervenors, and Proposed Intervenor Speaker Toma is not even eligible for the appointment because he was not a sponsor or cosponsor of the law. Their attempt to skirt this explicit procedure for intervention further counsels in favor of denying Proposed Intervenors' alternative request for permissive intervention under Rule 24(b).

RELEVANT PROCEDURAL HISTORY

In September 2022, Plaintiffs moved for a preliminary injunction of the Reason Scheme (*i.e.*, A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D), (E), 36-2157(A)(1), 36-2158(A)(2)(d), 36-2161(A)(25)), (together, "the Reason Scheme"), due to its unconstitutional vagueness. ECF No. 125.[1] The Reason Scheme criminalizes the provision of abortion if the provider has some uncertain level of knowledge that a patient's decision is to some uncertain degree motivated by an unclearly defined set of "genetic abnormalities." On January 19, 2023, the district court denied Plaintiffs' Renewed Motion for Preliminary Injunction, erroneously concluding that Plaintiffs could not demonstrate a sufficient injury to support federal jurisdiction under Article III. ECF No. 152. The district court did not reach the merits of Plaintiffs' constitutional challenge to the Reason Scheme.

[1] A full recounting of the procedural history of this case is set out in Plaintiffs-Appellants' opening brief. *See* Pls.-Appellants' Br. (Dkt. 25) at 21–25.

On February 3, 2023, Proposed Intervenors filed a motion to intervene in the district court. ECF No. 155. On February 21, 2023, Plaintiffs noticed their appeal of the district court's opinion and moved to stay proceedings during the pendency of the appeal. ECF Nos. 162, 163. The court granted the stay motion on February 22, 2023, except as to the pending intervention motion. ECF No. 164. Shortly thereafter, the court granted Proposed Intervenors' motion for intervention as of right under Federal Rule of Civil Procedure 24(a)(2) on March 8, 2023. ECF No. 167.

ARGUMENT

I. PROPOSED INTERVENORS DO NOT HAVE A SIGNIFICANT PROTECTABLE INTEREST THAT WOULD BE IMPAIRED BY THE DISPOSITION OF THIS APPEAL.

"Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for imperative reasons." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (internal quotation marks omitted). While "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," appellate courts are to consider "the policies underlying intervention in the district courts, including the legal 'interest' that a party seeks to 'protect' through intervention on appeal." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022) (quoting Fed. R. Civ. P. 24(a)(2)) (internal quotation marks and citation omitted); *see also Bates*, 127 F.3d at 873 ("Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure.").

Under Rule 24(a)(2), a non-party[2] is entitled to intervene as of right only when it demonstrates that "(1) it has a significant protectable interest as to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately meet the applicant's interest." *Jim Dobbas*, 54 F.4th at 1086. "A putative intervenor has the burden of establishing all four requirements," *id.*, and the "[f]ailure to satisfy any one of the requirements is fatal to the application," *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). Here, as set forth below, Proposed Intervenors cannot satisfy either of the first two prongs and, therefore, this Court "need not reach the remaining elements." *Id.*

A. Proposed Intervenors Cannot Establish A Significant Protectable Interest In This Appeal.

To be a "significant protectable interest," Rule 24(a)(2) requires, at an "irreducible minimum," "that the asserted interest be protectable under some law

[2] The filing of the notice of appeal, which occurred before Proposed Intervenors were made parties to the case below, divested the district court of jurisdiction over the preliminary injunction motion and conferred jurisdiction on this Court. *See Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012). As Proposed Intervenors implicitly acknowledge by citing the standard for intervention, *see* Appellate Intervention Mot. at 7, they cannot merely be granted "formal approval" of "their status as Appellees" in the appeal of the denial of that preliminary injunction based solely on their intervention below. *Id.* at 1. Rather, they must meet the requirements for intervention under Rule 24.

and that there exist a relationship between the legally protected interest and the claims at issue. If these two core elements are not satisfied, a putative intervenor lacks any 'interest' under Rule 24(a)(2), full stop." *Jim Dobbas*, 54 F.4th at 1086, 1088 (internal quotation marks and citation omitted). Proposed Intervenors cannot demonstrate such an interest here.

1. Section 12-1841 governs state court litigation and does not grant Proposed Intervenors a significant protectable interest in this federal appeal.

Proposed Intervenors claim that A.R.S. § 12-1841 ("Section 12-1841") confers upon them a sufficient legally protected interest in intervening in any constitutional challenge to an Arizona statute, no matter where that challenge is lodged. But this is an incorrect reading of the statute.[3]

Section 12-1841 is located within Arizona's Uniform Declaratory Judgments Act ("UDJA"), a statutory scheme establishing the procedures for obtaining declaratory relief in state court. It requires, *inter alia*, that the Speaker of the House of Representatives and the President of the Senate shall be served with any pleading, motion, or document filed in state court challenging the constitutionality of a state statute, and also provides for their ability to be heard in any such state court proceeding. A.R.S. § 12-1841(A). As Arizona courts have recognized, Section 12-

[3] While the district court agreed with Proposed Intervenors' interpretation, ECF No. 167, it is a misreading of the state court procedural rules contained in Section 12-1841 for the reasons set forth below.

1841 is "purely procedural" and merely "relates to the manner and means by which a right to recover is enforced or provides no more than the method by which to proceed." *DeVries v. Arizona*, 198 P.3d 580, 584–85 (Ariz. Ct. App. 2008) (citing *Aranda v. Indus. Comm'n*, 11 P.3d 1006, 1009 (Ariz. 2000)). Federal courts have likewise long recognized that the UDJA prescribes state court procedures. *See, e.g.*, *Planned Parenthood Ass'n v. Nelson*, 327 F. Supp. 1290, 1293 (D. Ariz. 1971) (noting that the UDJA affords litigants a "state remedy"); *Westfield Ins. Co. v. Double AA Builders, Ltd.*, No. CV-13-00012-PHX-GMS, 2013 WL 4051625, at *5 (D. Ariz. Aug. 12, 2013) (same). That the UDJA was explicitly and exclusively intended to govern state court procedure is precisely why a claim brought under it, upon removal to federal court, "must be converted to a claim brought under the" Federal Declaratory Judgment Act. *See 757BD LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 330 F. Supp. 3d 1153, 1159 (D. Ariz. 2016) (internal citation omitted).

Section 12-1841's inapplicability to federal court proceedings is clear from an examination of its other provisions as well. For example, Section 12-1841(C) permits a court to "vacate any finding of unconstitutionality" "on motion by the attorney general, the speaker of the house of representatives or the president of the senate" if "the speaker of the house of representatives and the president of the senate are not served in a timely manner with notice pursuant to" Section 12-1841(A). In

fact, Arizona courts have even held that noncompliance with Section 12-1841 means that a party "has not properly presented a constitutional challenge" and that the court therefore "lacks jurisdiction over [the] attempted constitutional challenge." *City of Scottsdale v. Stuart*, No. 1 CA-CV 20-0693, 2021 WL 4958841, at *2 (Ariz. Ct. App. Oct. 26, 2021). But it goes without saying that Section 12-1841(C) does not empower a non-party to force the automatic vacatur of a federal court ruling for noncompliance with a state procedural rule. And even where federal courts reference Section 12-1841, it is not for the proposition that such procedures are required in federal court, nor do plaintiffs in federal court challenging state statutes as unconstitutional actually file the "notice of claim of unconstitutionality" contemplated by Section 12-1841(B). *See, e.g.*, *United Food & Com. Workers Loc. 99 v. Bennett*, 934 F. Supp. 2d 1167, 1189 (D. Ariz. 2013); *cf.* Pet'r's Resp. to Brs. of Amici Curiae, *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307 (Ariz. 2020) (No. CV-19-0247-PR), 2020 WL 5746248, at *25 n.16 (Attorney General characterizing Section 12-1841 as "providing [an] intervention right *in state court*" in briefing before the Arizona Supreme Court (emphasis added)).

Notwithstanding the plain meaning of Section 12-1841 as a whole, Proposed Intervenors misconstrue Section 12-1841's application to "any proceeding" to argue that the section was intended to create a significant protectable interest in federal cases, as well. *See* A.R.S. § 12-1841(A). But assuming Section 12-1841 applies to

"any case," Appellate Intervention Mot. at 10, shorn of the statute's proper context, obfuscates its far more limited nature. As explained above, Section 12-1841 only creates procedures applicable to *state* proceedings: who must be made a party when declaratory relief is sought, who must be noticed, the content of the notice, and the repercussions for failure to notify the proper parties. Indeed, the provision in Section 12-1841(A) providing that the Speaker of the House of Representatives and the President of the Senate "shall be entitled to be heard" in "any proceeding" challenging the constitutionality of a state statute follows that same provision's requirement that they be served with copies of the pleadings—a procedural requirement only applicable in state court. Likewise, Section 12-1841(D) provides that Proposed Intervenors "may intervene as a party," but only "in a proceeding that is subject to the notice requirements of this section," which, again, is only state court proceedings. Simply put, Proposed Intervenors cannot cherry-pick the phrase "any proceeding" and isolate it from the exclusively state court procedural requirements contained in Section 12-1841. Accordingly, Proposed Intervenors have not asserted a sufficient "relationship between the legally protected interest" under state court procedural rules and the federal "claims at issue" in this appeal. *Jim Dobbas*, 54 F.4th at 1088 (citation omitted).[4]

[4] Notably, while Section 12-1841 does not confer on Proposed Intervenors a significant protectable interest here, as one of the sponsors of S.B. 1457, Senate

2. Section 12-1841 is distinguishable from the statute at issue in *Berger*.

Proposed Intervenors' reliance on the Supreme Court's recent decision in *Berger* is misplaced. In *Berger*, the Supreme Court held that two leaders of North Carolina's state legislature established a significant protectable interest for purposes of Rule 24(a) in light of a state statute explicitly delegating them the authority to (i) act as agents of the State (ii) in federal court. 142 S. Ct. at 2202, 2206. Here, the text of Section 12-1841 reveals that it is applicable solely to state court proceedings, but even if that were not the case, Section 12-1841 differs markedly from the statute at issue in *Berger* in several crucial respects.

To start, as discussed *supra*, unlike the statute in *Berger*, Section 12-1841 exclusively governs the process by which Proposed Intervenors may participate as a party in certain state court proceedings. By contrast, the North Carolina statute in *Berger* made explicit that "[i]t is the public policy of the State of North Carolina that *in any action in any federal court* in which the validity or constitutionality of an act

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President Warren Petersen could have sought intervention pursuant to Section 16 of that statute, which provides that the Arizona Legislature may, "by concurrent resolution," "appoint one or more of its members who sponsored or cosponsored this act in the member's official capacity to intervene as a matter of right in any case in which the constitutionality of this act is challenged." S.B. 1457 § 16. Yet, despite sponsoring, advocating for, and ultimately voting into law an explicit path for asserting a significant protectable interest in the defense of S.B. 1457, President Petersen blatantly ignored it. *See also infra* Part II.

of the General Assembly or a provision of the North Carolina Constitution is challenged," "*a federal court* presiding over any such action . . . is requested to allow . . . the legislative branch . . . of the State of North Carolina to participate in any such action as a party." N.C. Gen. Stat. Ann. § 1-72.2(a) (emphases added). Based on the law's unambiguous directive that the Speaker and the Senate President shall "constitute the State of North Carolina" for the purposes of defending the constitutionality of a state law "in any action *in any federal court*," *id.* (emphasis added), the Supreme Court concluded that North Carolina had expressly permitted the legislative intervenors "to speak for the State in federal court," thereby creating a significant protectable interest for purposes of Rule 24(a). *Berger*, 142 S. Ct. at 2202 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013)). Section 12-1841 contains no analogous provision related to federal court actions, as it only creates procedural rules for state court UDJA actions.

Indeed, even if it did not apply only to state court proceedings, Section 12-1841 does not appear to create any authority for the Proposed Intervenors to act *on behalf of the State* at all, unlike North Carolina's statute. In *Berger*, the Supreme Court made abundantly clear that the "dispositive" consideration in assessing whether the statute at issue created a significant protectable interest for purposes of Rule 24 was that it "empowe[red]" the putative intervenor "to defend [the State's] sovereign interests in federal court." 142 S. Ct. at 2202 (quoting *Cameron*, 142 S.

Ct. at 1011). That is, the putative legislative intervenor could show a significant protectable interest because it demonstrated that the State had "designate[d]" it as an "agent[] to represent [the State] in federal court." *Id.* (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019)). The plain text of the North Carolina statute left little doubt that the legislative intervenors had been so designated, as it explicitly provided that "the public policy of the State of North Carolina" was that, "in any action in any federal court in which the validity or constitutionality" of a state law "is challenged," "the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate" "*constitute the State of North Carolina*," along with the governor. N.C. Gen. Stat. Ann. § 1-72.2(a) (emphasis added).

In stark contrast, Section 12-1841 does not specifically authorize the Speaker and Senate President to act as agents *for* the State. Rather, Section 12-1841 merely provides that the Speaker and Senate President are "entitled to be heard" in a challenge to the constitutionality of any Arizona law. *See* A.R.S. § 12-1841(A); *see also id.* § 12-1841(D) (legislative intervention is entirely discretionary).

Further, while North Carolina law makes state legislative leaders necessary parties in any constitutional attack on a state statute, Section 12-1841 does precisely the opposite; thus, the permissive nature of Section 12-1841 is wholly distinct from the North Carolina statutory scheme that established a significant protectable interest

in *Berger*. Under North Carolina law, "the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly" are "*necessary parties*" "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any . . . federal court." N.C. Gen. Stat. Ann. § 120-32.6(b) (emphasis added). In Arizona, however, Section 12-1841 "shall not be construed to compel . . . the speaker of the house of representatives or the president of the senate to intervene as a party in any proceeding or to permit them to be named as defendants in a proceeding." A.R.S. § 12-1841(D).[5]

Accordingly, the features of the North Carolina statute in *Berger* that the Supreme Court credited in finding a significant protectable interest for purposes of Rule 24(a) are entirely absent from Section 12-1841. Thus, even if that statute were not limited to state court, *Berger* does not support Proposed Intervenors' assertion that they have a significant protectable interest based on Section 12-1841 in intervening in this appeal.

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[5] Proposed Intervenors suggest that the rules adopted by their respective legislative bodies also confer upon them a significant protectable interest. *See* Appellate Intervention Mot. at 11. But the rules of a *single house* of a bicameral legislature cannot possibly constitute the *State's* "designat[ion]" of the legislative leaders as "agents to represent it in federal court." *See Berger*, 142 S. Ct. at 2202 (quoting *Bethune-Hill*, 139 S. Ct. at 1951); *cf. Bethune-Hill*, 139 S. Ct. at 1953 ("The Court's precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment.").

B. Proposed Intervenors' Putative Interest Would Not Be Impaired By Their Absence From This Appellate Proceeding.

Even if Proposed Intervenors could identify a significant protectable interest for purposes of Rule 24, Proposed Intervenors have failed to demonstrate that the disposition of *this appeal* may, "as a practical matter, impair or impede [their] ability to protect [their] interest." *Jim Dobbas*, 54 F.4th at 1086. "Simply stating that [Section 12-1841] confers upon them the interest in upholding the constitutionality of Arizona laws does not establish that [Proposed Intervenors] are so situated that the disposition of the [appeal] may as a practical matter impair or impede [their] ability to protect that interest." *Miracle v. Hobbs*, 333 F.R.D. 151, 155 (D. Ariz. 2019) (internal quotation marks omitted). That is because this appeal does not concern the constitutional validity of the Reason Scheme—an issue that was not reached by the district court below. Instead, Plaintiffs have appealed the district court's erroneous conclusion that they have not suffered a sufficient Article III injury-in-fact. In other words, the appeal concerns a threshold jurisdictional question that is unrelated, as a matter of law, to the underlying subject matter of the statute or the merits of Plaintiffs' constitutional attack on the challenged statutory scheme. *See Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (noting "the Supreme Court has cautioned that standing in no way depends on the merits" (internal quotation marks omitted)). Moreover, Proposed Intervenors have already been granted intervention

in the district court for purposes of future proceedings on the merits.[6] Thus, while Proposed Intervenors may for some reason prefer that this case be litigated as a post-enforcement challenge, Proposed Intervenors' motion nevertheless fails to explain how their putative interest in defending the constitutionality of the underlying abortion ban would actually be impaired or impeded if they do not participate in this appeal.

Indeed, Proposed Intervenors' motion dramatically misrepresents what is at stake in this appeal, asserting that, absent their participation, "[n]o current Defendant will defend *S.B. 1457* on appeal, leaving *the legislation* without any defender on appeal." Appellate Intervention Mot. at 10 (emphasis added). But this appeal does not actually implicate, much less require any defense of, S.B. 1457's constitutionality. Instead, Plaintiffs have challenged the district court's conclusion that they have not suffered an injury-in-fact sufficient to satisfy Article III.[7] Thus,

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[6] Although the district court's order permitting Proposed Intervenors to intervene in the proceedings below is not appealable until final judgment, *see Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014), Plaintiffs maintain that the district court erred in finding that Proposed Intervenors have a significant protectable interest in intervening in the proceedings below, for the reasons set forth above. *See supra* Part I.A. However, even if this Court disagrees, it still can and should deny Proposed Intervenors' motion here, on the ground that any such interest would not be impaired or impeded by the disposition of this appeal, which would not impact their intervention below.

[7] The jurisdictional nature of the questions presented on appeal also means that the Attorney General's belief as to the constitutionality or unconstitutionality of the

even if Plaintiffs prevail on appeal—indeed, *especially* if Plaintiffs prevail—Proposed Intervenors will still be able to litigate the merits of Plaintiffs' constitutional claims on remand to the district court, where they have *already* been granted intervention. By the same token, the only interests that Proposed Intervenors assert in their motion—*i.e.*, "exercising statutory rights" under Section 12-1841 and "advocating for" certain anti-abortion views, Appellate Intervention Mot. at 1—would not be impeded or impaired if they were denied intervention in this appeal, which does not concern questions specific to the State's interests in prohibiting abortions for certain reasons, or to abortion at all.[8] In short, no matter how the Court ultimately decides the non-merits questions presented on appeal, Proposed Intervenors' "interests are not impaired," especially where they have "other means by which [they] may protect [their] interests" before the district court. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

If Proposed Intervenors have any views on the jurisdictional questions presented on appeal, they need not take the "unusual" path of "[i]ntervention at the

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Reason Scheme is irrelevant in assessing whether or not Proposed Intervenors' purported interest in the law's defense is practically impaired. In any event, the Attorney General has not indicated either way whether she intends to defend the district court's ruling regarding Plaintiffs' Article III injury.

[8] Similarly, while Proposed Intervenors make the conclusory assertion that if they do not participate in this appeal "justice will be substantially undermined," Appellate Intervention Mot. at 17, they fail to explain why this would be.

appellate stage." *Bates*, 127 F.3d at 873. Rather, they can provide the Court with their views on these questions as an amicus under Federal Rule of Appellate Procedure 29.

II. THIS COURT SHOULD DENY PROPOSED INTERVENORS' ALTERNATIVE REQUEST FOR PERMISSIVE INTERVENTION.

"A motion for permissive intervention pursuant to Rule 24(b) is directed to the sound discretion of the . . . court." *San Jose Mercury News, Inc. v. U.S. Dist. Ct. – N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). In the Ninth Circuit, there are "three necessary prerequisites for allowing permissive intervention pursuant to Rule 24(b)(2)," which require an applicant to show "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Id.* (internal quotation marks omitted). Proposed Intervenors have not shown they meet the third threshold requirement, because their "anticipated defense," which they state will be "that the challenged laws are constitutional," Appellate Intervention Mot. at 18, has no bearing on this appeal about Plaintiffs' suffered injuries from the Reason Scheme, as described *supra*.

But "[e]ven if an applicant satisfies [the] threshold requirements," a "court has discretion to deny permissive intervention," *see Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005) (second alteration in original) (internal quotation marks omitted), which this Court should do here. In addition to the reasons set forth

above, to grant permissive intervention in this case would sanction an end run around the specific mechanism the Arizona Legislature created for authorizing certain members to intervene on its behalf in defense of the very law at issue in this case.

As the Supreme Court recognized in *Berger*, "federal courts should rarely question" and should respect "a State's chosen means of diffusing its sovereign powers among various branches and officials." 142 S. Ct. at 2201. Here, the Legislature considered, debated, and passed Section 16 of S.B. 1457, which allows the Legislature to authorize intervention to defend S.B. 1457 by passing a concurrent resolution appointing either a sponsor or cosponsor of the bill to intervene. This process not only designates which specific members may intervene in defense of the Reason Scheme but gives the entirety of the Arizona Legislature the opportunity to consider whether that intervention should be authorized.

Because Proposed Intervenors failed to follow the procedure set forth in Section 16, we do not know whether the Senate President, who actually cosponsored S.B. 1457, would have been appointed by the Legislature to intervene in defense of S.B. 1457's constitutionality, nor is there any guarantee that the Legislature would have deemed intervention appropriate at all. And, notably, the Speaker would not even have been eligible for the appointment because he was not a sponsor or cosponsor of the law. *See* S.B. 1457 § 16. Allowing Proposed Intervenors to permissively intervene would remove the intervention decision from the hands of *all*

of the people's elected representatives and "evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials." *Berger*, 142 S. Ct. at 2201. The Court should therefore refuse Proposed Intervenors' invitation to skirt state law and the democratic process and should deny their alternative request for permissive intervention.

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court deny Proposed Intervenors' motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system. I further certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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