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

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

**Intervenor-Defendants’ Response to
Plaintiffs’ “Objection to Defendant
Horne and Permissive Intervenor’s New
Expert Declarations and Motion for
Leave to File Supplemental Exhibits and
Amended Proposed Findings of Fact
and Conclusions of Law”**

25 Plaintiffs request leave to file additional expert declarations one business day before
26 the hearing on their pending motion for preliminary injunction in this case. Doc. 96, at 2-
27 3. Plaintiffs’ motion is untimely and prejudicial. The Court should deny the motion.
28

1 On June 12, 2023, the Court held a scheduling conference to discuss scheduling of
2 the hearing on the motion for preliminary injunction. In advance of the conference, the
3 parties met and conferred about scheduling. At that meeting, Plaintiffs proposed
4 submitting the motion for preliminary injunction on the basis of written declarations and
5 exhibits and oral argument, without live witness testimony. This proposal benefited
6 Plaintiffs because it would greatly facilitate scheduling the hearing before fall sports
7 tryouts. Intervenors agreed to Plaintiffs' proposal on the specific understanding that there
8 would be an opportunity to present additional evidence and declarations to the Court, in
9 lieu of the live testimony that Intervenors would otherwise be able to present at the hearing.

10 At the scheduling conference on June 12, 2023, the parties presented this agreement
11 to the Court and requested three hours of oral argument for the hearing. This agreement,
12 which was adopted at Plaintiffs' request, benefited all parties, including Plaintiffs. At the
13 June 12 conference, counsel for both Defendant Horne and Intervenors announced that they
14 would be submitting additional declarations to the Court in advance of the hearing.
15 Counsel for Defendant Horne specifically stated that they were preparing their own expert
16 declarations, and counsel for Intervenors stated that they also planned to submit additional
17 declarations. Intervenors' additional declarations serve to make the points that Intervenors'
18 experts would have made during live testimony, if live testimony were to occur.

19 The Court, having been apprised of both Horne's and Intervenors' plans to submit
20 additional declarations, entered a scheduling order by docket entry on June 14, 2023, which
21 explicitly authorized all parties to file additional declarations by June 29, 2023. That order
22 states:

23 In light of the parties' decision to present declarations in lieu of witness
24 testimony, each party is directed to submit a statement identifying the
25 documentary exhibits and declarations that the party intends to rely on for
26 purposes of the hearing by close of business on June 29, 2023. If those
27 documents are already in the record, they need not be re-filed but the party
28 must specifically identify where each document may be found. Any exhibit

1 or declaration that is not yet in the record must be filed on or before June 29,
2 2023.

3 Doc. 80 (text entry). Consistent with Horne’s and Intervenors’ statements in open court,
4 the Court specifically authorized the filing of *new* declarations on June 29, 2023: “Any ...
5 declaration *that is not yet in the record* must be filed on or before June 29, 2023.” *Id.*
6 (emphasis added). And the Court recognized that these new declarations were being
7 submitted “[i]n light of the parties’ decision to present declarations in lieu of witness
8 testimony.” *Id.*

9 Notably, the Court’s scheduling order applied to all parties, not just Horne and
10 Intervenors. Plaintiffs, too, had a full and fair opportunity to file any additional
11 declarations of experts or others by June 29, 2023, in lieu of the live testimony of those
12 individuals that the parties agreed to forego.

13 Plaintiffs, however, did not do so. Instead, on June 30, 2023, Plaintiffs filed a
14 motion for leave to file an *additional* round of expert declarations by July 7, 2023—one
15 business day before the scheduled hearing on their motion for preliminary injunction. Doc.
16 96, at 2-3. Astonishingly, Plaintiffs’ motion does not mention the June 12, 2023 scheduling
17 conference or the Court’s June 14, 2023 order authorizing the filing of new declarations on
18 June 29, 2023, so Plaintiffs have waived any argument addressing those proceedings.

19 The Court should deny this motion because it is both untimely and prejudicial. First,
20 the motion is untimely because Plaintiffs have known since at least June 12, 2023, that
21 Defendant Horne and Intervenors planned to file additional expert declarations on June 29,
22 2023. Counsel for both Horne and Intevenors explicitly stated as much during the June 12
23 teleconference, and the Court specifically authorized them to do so on June 14. If Plaintiffs
24 thought that this scheduling arrangement was improper, they had ample opportunity to
25 complain, both at the June 12 conference and in the 17 days since then. But they raised no
26 objection – either with counsel for Defendant and Intervenors, or with the Court – until
27 *after* the new declarations had already been filed. Plaintiffs had a full and fair opportunity
28 to object in a timely fashion, and to file their own additional declarations by June 29, but

1 they did not do so. The Court should not reward their belated attempt to do so now.

2 Second, the request for a last-minute submission of declarations immediately before
3 the hearing is prejudicial, both to the parties and the Court. The Court emphasized during
4 the June 12 scheduling conference that, due to the week of the July 4 holiday, June 29 was
5 the last day on which it would be practical to submit exhibits and declarations, to allow
6 sufficient time to review them before the hearing. Now, Plaintiffs seek to amend that
7 schedule to allow them, and *only* them, to file additional declarations a single business day
8 before the hearing. Plaintiffs' request would give Defendant Horne and Intevenors no
9 meaningful opportunity to review, analyze, and prepare responsive arguments to any new
10 points from Plaintiffs before the hearing. The Court should not adopt a proposed briefing
11 schedule that would effectively allow Plaintiffs to ambush Defendant and Intervenors at
12 the last minute before the hearing.

13 Finally, to the extent that Plaintiffs pose an "objection" to Defendant Horne's and
14 Proposed Intervenor's declarations filed on June 29, 2023, that "objection" should be
15 overruled. The additional declarations, filed in lieu of live witness testimony, were
16 specifically authorized by the Court's scheduling order of June 14, 2023, and any
17 "objection" to them is therefore meritless.

18 CONCLUSION

19 For the reasons stated, the Court should deny Plaintiffs' "Objection to Defendant
20 Horne's and Permissive Intervenors' New Expert Declarations and Motion for Leave to
21 File Supplemental Exhibits and Amended Proposed Findings of Fact and Conclusions of
22 Law," Doc. 96.

23
24 Dated: July 3, 2023

Respectfully submitted,

25
26 JAMES OTIS LAW GROUP, LLC

27 /s/ Justin D. Smith
28 D. John Sauer, Mo. Bar No. 58721*

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CERTIFICATE OF SERVICE

I hereby certify that, on July 3, 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

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