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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.

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

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

**Intervenor-Defendants President
Petersen's and Speaker Toma's
Opposition to Plaintiffs' Motion to
Extend Fact Discovery**

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21 Defendants.

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23 Last August, Plaintiffs proposed an expedited case schedule to which all parties and
24 the Court agreed. Yet on multiple occasions, Plaintiffs have delayed the discovery process.
25 Plaintiffs now rely on that self-inflicted harm to justify a two-month extension of all case
26 deadlines and the right to seek new discovery. Since Plaintiffs have not diligently pursued
27 discovery, the Court should deny Plaintiffs' motion or limit any extension to a shorter time
28 period to resolve currently pending issues.

1 **Legal Standard**

2 “Although the existence or degree of prejudice to the party opposing the
3 modification might supply additional reasons to deny a motion, the focus of the inquiry is
4 upon the moving party’s reasons for seeking modification. If that party was not diligent,
5 the inquiry should end.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th
6 Cir. 1992) (internal citation omitted). The Ninth Circuit has affirmed the denial of
7 discovery extension requests when a party has failed to show it acted diligently. *See*
8 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *see also Moore*
9 *v. City of Boise*, 829 F. App’x 810, 811 (9th Cir. 2020).

10 **I. Plaintiffs have not diligently pursued discovery.**

11 Last August, Plaintiffs proposed that fact discovery conclude on March 8, 2024, and
12 the other parties agreed. Doc. 141 at 7, Doc. 143 at 9. In agreeing to the original deadline
13 that Plaintiffs themselves proposed, Intervenor-Defendants President of the Arizona Senate
14 Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma (the
15 “Legislative Leaders”) relied on the fact that all parties—including Plaintiffs—were
16 required to act diligently in moving the case forward to discovery. The Court adopted
17 Plaintiffs’ proposed schedule in an order filed August 28, 2023. Doc. 144, at 2.

18 Plaintiffs delayed more than 60 days in serving discovery. Plaintiffs did not serve
19 their first discovery requests until October 30, 2023. Doc. 164. The Legislative Leaders
20 timely responded with written responses, documents, and a privilege log on November 29,
21 2023. Doc. 168.

22 Plaintiffs delayed more than 30 days in raising issues with discovery. Plaintiffs did
23 not raise any issues with the Legislative Leaders’ written responses until January 2, 2024.

24 Plaintiffs delayed 30 days in producing documents. Shortly after Plaintiffs served
25 discovery, the Legislative Leaders served discovery requests on Plaintiffs on November
26 13, 2023. Doc. 167. Plaintiffs provided written responses but no documents on December
27 13, 2023. Doc. 173. When asked the next day about documents, Plaintiffs reported that
28 they would not produce documents until January 5, 2024. The Legislative Leaders warned

1 Plaintiffs that the looming fact discovery deadline would require the parties to move
2 quickly: “Given that the 23 additional days that Plaintiffs claim are necessary comprise
3 more than 25% of the remaining fact discovery period, we trust that Plaintiffs will provide
4 a full and complete production and respond expeditiously to any issues.”

5 Plaintiffs still delayed in completely responding to discovery. Plaintiffs provided
6 documents on January 5, 2024, but they did not provide a privilege log—for nine
7 documents—until January 12, 2024.

8 Despite Plaintiffs’ delays, the Legislative Leaders raised issues relating to Plaintiffs’
9 discovery on January 19, 2024, just seven days after receiving Plaintiffs’ completed
10 production. The Legislative Leaders also produced additional documents, leaving only
11 five documents withheld due to privilege. The Legislative Leaders sought updated
12 responses from Plaintiffs by January 31, 2024, and a meet and confer by February 2, 2024,
13 which would allow the parties to serve any additional discovery requests and receive
14 responses before fact discovery closed.

15 But Plaintiffs are delaying resolution of discovery issues. The Legislative Leaders
16 offered to meet and confer any day this week or next week to work through outstanding
17 discovery issues between the parties. Plaintiffs have declined. Instead, Plaintiffs say they
18 will not respond to the Legislative Leaders until February 9, 2024, and they have not
19 proposed a meet and confer until the week after February 9.

20 At each step in the process, Plaintiffs could have moved more diligently. Even now,
21 Plaintiffs’ three law firms could diligently work with the Legislative Leaders to resolve the
22 limited discovery issues that exist. Completion of fact discovery by March 8, 2024 was
23 and still is possible. But Plaintiffs declined to consider a more expeditious schedule. They
24 also declined a request from the Legislative Leaders during the meet and confer to consider
25 more narrow relief from the Court, such as a shorter extension to resolve only outstanding
26 discovery issues.

27 Events just yesterday exposed the thin justifications presented by Plaintiffs for the
28 extension. Plaintiffs said an extension was needed because of discovery that AIA owed to

1 the Legislative Leaders. Doc. 182, at 2. Besides the fact that this was an issue for the
2 Legislative Leaders, not Plaintiffs, AIA served discovery responses minutes after Plaintiffs
3 moved for the extension. Doc. 183. Despite Plaintiffs' concern that AIA's response "could
4 result in a sizable document production," AIA produced only nine pages of documents,
5 seven of which came from Plaintiffs. Similarly, Plaintiffs did not even mention depositions
6 until their extension request.

7 Because Plaintiffs have not been diligent, the inquiry should end. *See Johnson*, 975
8 F.2d at 609. Considering the current deadline to serve new discovery arrives in seven days,
9 Plaintiffs certainly should not be rewarded with 60 days to serve new discovery.

10 **II. A 60-day extension will prejudice the Legislative Leaders.**

11 From the Legislative Leaders' perspective, time is of the essence to reach a decision
12 on the merits. The State is suffering ongoing harm because a law passed by the Arizona
13 Legislature is under a preliminary injunction. *See Maryland v. King*, 567 U.S. 1301, 1303
14 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from
15 effectuating statutes enacted by representatives of its people, it suffers a form of irreparable
16 injury.") (internal quotation omitted); *see also Coalition for Economic Equity v. Wilson*,
17 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury
18 whenever an enactment of its people or their representatives is enjoined"); *L. W. by &*
19 *through Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023).

20 In West Virginia, a similar law placed under a preliminary injunction was later
21 upheld on summary judgment. *Compare B. P. J. v. W. Virginia State Bd. of Educ.*, 550 F.
22 Supp. 3d 347, 357 (S.D. W. Va. 2021) *with B. P. J. v. W. Virginia State Bd. of Educ.*, 649
23 F. Supp. 3d 220, 233 (S.D. W. Va. 2023). Like the West Virginia case showed, "findings
24 of fact and conclusions of law made by a court granting a preliminary injunction are not
25 binding at trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).
26 Plaintiffs cannot dismiss harm to the State caused by their delay with a ruling that is not
27 binding on the merits. The Legislative Leaders could serve additional discovery during a
28 60-day extension, but they are more interested in moving the case toward resolution.

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Conclusion

The Court should deny Plaintiffs’ motion or limit any extension to a shorter time period to resolve currently pending issues.

Dated: January 31, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2024, 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