

1 Colin M. Proksel (034133)
2 OSBORN MALEDON, P.A.
3 2929 North Central Avenue, 21st Floor
4 Phoenix, Arizona 85012-2793
5 State Bar No. 034133
6 Telephone: (602) 640-9000
7 Facsimile: (602) 640-9050
8 Email: cproksel@omlaw.com

9 *Attorney for Plaintiffs*
10 *Additional counsel listed in signature block*

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

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

18 Plaintiffs,

19 v.

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

27 Defendants,

28 Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

**PLAINTIFFS' MOTION TO COMPEL
DISCOVERY AS TO INTERVENOR-
DEFENDANTS**

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INTRODUCTION

1
2 Despite personally advocating and voting for A.R.S. § 15-120.02 (the “Ban”),
3 voluntarily intervening in this action to defend the Ban, and seeking broad discovery
4 from Plaintiffs and Defendant Arizona Interscholastic Association Inc. (“AIA”),
5 Intervenor-Defendants now seek to shield certain documents from discovery and
6 immunize themselves from depositions based on the legislative and deliberative process
7 privileges. Legislative privilege has been waived, deliberative process privilege does not
8 apply, and, in any event, both privileges would be easily overcome in this case.
9 Intervenor-Defendants cannot enjoy all of the rights and privileges of party status while
10 also refusing to be subject to the same discovery obligations as every other party in this
11 action.

12 After this Court granted Intervenor-Defendants permissive intervention to defend
13 the Ban, Intervenor-Defendants have taken an active role in defending this litigation.
14 They filed an opposition to Plaintiffs’ motion for a preliminary injunction with
15 supporting expert declarations, took a central role at oral argument, filed a motion to
16 dismiss all of Plaintiffs’ claims, and served twenty-one Requests for Admission, ten
17 Interrogatories, and five Requests for Production on each Plaintiff. Despite this zealous
18 advocacy, however, Intervenor-Defendants now invoke the legislative and deliberative
19 process privileges over several documents and communications and in response to
20 Plaintiffs’ intention to depose them.

21 Neither the legislative privilege nor the deliberative process privilege is properly
22 asserted here. Intervenor-Defendants waived the legislative privilege when they
23 voluntarily intervened as parties and proceeded to actively defend the Ban. Even if their
24 intervention was not a waiver of that privilege, the legislative privilege is easily
25 overcome because all five relevant factors favor Plaintiffs. Nor can the deliberative
26 process privilege shield Intervenor-Defendants from producing relevant documents or
27 testifying. Courts across the country have found that the privilege does not apply where,
28 as here, the legislature’s motive for the Ban is at issue. Moreover, the deliberative

1 process privilege envisions the protection of *executive* decision-making processes, not
2 legislative ones. Finally, it too is a qualified privilege that can be, and is, overcome in
3 this case.

4 Plaintiffs respectfully request that the Court compel Intervenor-Defendants to
5 (1) produce documents and information improperly withheld on the basis of the purported
6 legislative or deliberative process privilege; (2) revise their privilege log accordingly; and
7 (3) sit for depositions.

8 **FACTUAL BACKGROUND**

9 Plaintiffs Jane Doe and Megan Roe filed this lawsuit on April 17, 2023,
10 challenging the Ban as applied to them for violating the Constitution and various federal
11 statutes. (*See* Dkt. 1.) Plaintiffs named five defendants: (1) Thomas C. Horne, in his
12 official capacity as State Superintendent of Public Instruction; (2) Laura Toenjes, in her
13 official capacity as Superintendent of the Kyrene School District; (3) the Kyrene School
14 District; (4) The Gregory School; and (5) AIA.

15 On May 1, 2023, Intervenor-Defendants moved to intervene to “defend their
16 interests,” noting their “unique interest in defending the constitutionality of laws duly
17 enacted by the Arizona Legislature.” (Dkt. 19 at 1.) Intervenor-Defendants represented
18 that they both “personally advocated and voted for” the Ban. (*Id.* at 3.) The Court
19 initially granted the motion but limited Intervenor-Defendants to “present[ing] argument
20 and evidence in opposition to Plaintiffs’ pending Motion for Preliminary Injunction.”
21 (Dkt. 79 at 1.) Intervenor-Defendants fully participated in the preliminary injunction
22 phase, filing a motion in opposition with supporting declarations (Dkt. 82), over thirty
23 exhibits (Dkt. 87), proposed findings of fact and conclusions of law with Defendant
24 Horne (Dkts. 104, 116, 119), and presenting oral argument (Dkt. 115). After granting
25 Plaintiffs’ motion for a preliminary injunction, the Court granted Intervenor-Defendants
26 the opportunity to fully “represent their interests in the entirety of this action.”
27 (Dkt. 142 at 1.)

28

1 On October 30, 2023, Plaintiffs served nine Interrogatories and nine Requests for
2 Production on Intervenor-Defendants. (*See* Exs. 1, 2.)¹ On November 13, 2023,
3 Intervenor-Defendants served twenty-one Requests for Admission, ten Interrogatories,
4 and five Requests for Production on each Plaintiff. (*See id.* at ¶ 11.) They also served
5 three Requests for Production and twelve Interrogatories on Defendant AIA. (*See id.* at
6 ¶ 12.)

7 On November 29, 2023, Intervenor-Defendants served their Responses and
8 Objections to Plaintiffs' discovery requests, in which they raised legislative and
9 deliberative process privilege objections and withheld documents pursuant to those
10 asserted privileges. (*See* Exs. 3–5.)

11 On January 2, 2024, Plaintiffs sent Intervenor-Defendants a letter setting out the
12 various deficiencies in Intervenor-Defendants' discovery responses, particularly the
13 improper invocation of the legislative and deliberative process privileges. (*See* Ex. 6.)
14 On January 19, 2024, Intervenor-Defendants responded, withdrawing their privilege
15 claims for most documents in the privilege log because counsel discovered that those
16 documents were publicly available on the websites for the Arizona Legislature and the
17 Center for Arizona Policy. (*See* Ex. 7.) Intervenor-Defendants did not withdraw their
18 privilege claims for Documents Nos. 3, 6, 14, 15, and 18. (*See id.*)

19 On February 9, 2024, Plaintiffs replied to Intervenor-Defendants, reasserting the
20 deficiencies in Intervenor-Defendants' discovery but stating a willingness to revise the
21 relevant discovery period to August 19, 2019 to the present. (*See* Ex. 8.) Following a
22 meet and confer on February 16, 2024, Intervenor-Defendants confirmed that they were
23 not withholding any responsive documents or information in their responses to
24 Interrogatories Nos. 2, 3, 4, and 5 and agreed to produce responsive documents from
25 August 19, 2019 to the present, although those documents have not yet been produced.
26 (*See* Berg Decl. at ¶ 13.) Intervenor-Defendants continue to assert the legislative and
27

28 ¹ Citations to “Ex. ___” refer to the exhibits attached to the accompanying
Declaration of Rachel H. Berg (“Berg Decl.”).

1 deliberative process privileges over the remaining documents, and have further objected
2 to Rule 30(b)(1) depositions on the same grounds. (*See* Ex. 9; Berg Decl. at ¶ 13.)

3 LEGAL STANDARD

4 **I. Legislative Privilege**

5 The legislative privilege is a qualified privilege that shields legislators from
6 evidentiary inquiries into acts that occur during the legislative process. *Mi Familia Vota*
7 *v. Hobbs*, 2023 WL 4595824, at *4 (D. Ariz. July 18, 2023) (“*Hobbs*”). It “is a personal
8 [privilege] and may be waived or asserted by each individual legislator.” *Marylanders*
9 *for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). Waiver
10 need not be explicit; it may occur, for example, “when a party testifies as to otherwise
11 privileged matters, or when purportedly privileged communications are shared with
12 outsiders,” *Favors v. Cuomo*, 285 F.R.D. 187, 211–12 (E.D.N.Y. 2012), or “implicitly
13 through [a party’s] litigation conduct in a civil case,” *Singleton v. Merrill*,
14 576 F. Supp. 3d 931, 939–40 (N.D. Ala. 2021). “To determine whether the legislative
15 privilege precludes disclosure, a court must balance the interests of the party seeking the
16 evidence against the interests of the individual claiming the privilege.” *Hobbs*, 2023 WL
17 4595824, at *9 (citation and quotation marks omitted). Courts consider the following
18 factors to determine if the privilege is overcome: “(i) the relevance of the evidence
19 sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the
20 litigation and the issues involved; (iv) the role of government in the litigation; and (v) the
21 purposes of the privilege.” *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 672 (D. Ariz. 2016).

22 **II. Deliberative Process Privilege**

23 The deliberative process privilege is an executive privilege “[t]he ultimate purpose
24 of [which] is to protect the quality of agency decisions.” *FTC v. Warner Commc’ns, Inc.*,
25 742 F.2d 1156, 1161 (9th Cir. 1984); *see also Kay v. City of Rancho Palos Verdes*,
26 2003 WL 25294710, at *15 (C.D. Cal. Oct. 10, 2003) (“[T]he deliberative process
27 privilege protects decisionmaking processes of the *executive* branch in order to safeguard
28 the quality and integrity of governmental decisions.” (emphasis in original) (citation and

1 quotation marks omitted)). The deliberative process privilege “permits the government to
2 withhold documents that reflect advisory opinions, recommendations and deliberations
3 comprising part of a process by which government decisions and policies are
4 formulated.” *Toomey v. Arizona*, 2022 WL 1452747, at *4 (D. Ariz. May 9, 2022)
5 (quoting *Warner*, 742 F.2d at 1161). The deliberative process privilege applies only
6 when the relevant document is both “predecisional—it must have been generated before
7 the adoption of an agency’s policy or decision” and “deliberative in nature, containing
8 opinions, recommendations or advice about agency policy.” *Ariz. Rehabilitation Hosp.,*
9 *Inc. v. Shalala*, 185 F.R.D. 263, 268 (D. Ariz. 1998). Like the legislative privilege, the
10 deliberative process privilege is qualified. “A litigant may obtain deliberative materials if
11 his or her need for the materials and the need for accurate fact-finding override the
12 government’s interest in non-disclosure.” *Warner*, 742 F.2d at 1161. “Among the
13 factors to be considered in making this determination are: 1) the relevance of the
14 evidence; 2) the availability of other evidence; 3) the government’s role in the litigation;
15 and 4) the extent to which disclosure would hinder frank and independent discussion
16 regarding contemplated policies and decisions.” *Id.* “The party asserting an evidentiary
17 privilege has the burden to demonstrate that the privilege applies to the information in
18 question.” *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988).

19 ARGUMENT

20 Intervenor-Defendants assert the legislative privilege and deliberative process
21 privilege in their privilege log and as grounds for objecting to depositions.² Neither
22 privilege is properly asserted.

23 **I. Intervenor-Defendants Have Waived Legislative Privilege.**

24 Intervenor-Defendants have waived the legislative privilege by voluntarily
25 injecting themselves into this lawsuit to assert a “unique interest in defending the
26

27 ² At the meet-and-confer, Intervenor-Defendants agreed to produce documents from
28 August 19, 2019 to the present. (Berg Decl. at ¶ 13.) Although Plaintiffs have not
yet received an updated production, they anticipate that Intervenor-Defendants
will assert similar legislative and deliberative process privilege objections in that
production.

1 constitutionality” of the Ban. (Dkt. 19 at 1.) Intervenor-Defendants cannot have it both
2 ways; they cannot seek the Court’s permission to intervene to protect their asserted
3 interests and vigorously defend those interests while simultaneously evading their
4 discovery obligations related to the same. (*See id.* at 3 (“President Petersen was a co-
5 sponsor of S.B. 1165, and personally advocated and voted for the Save Women’s Sports
6 Act. Speaker Toma also personally advocated and voted for S.B. 1165, and seeks to
7 defend the law challenged in this action.”).) Courts across the country, including in this
8 District, have found that an intervening legislative party waives the legislative privilege
9 when it chooses to intervene to defend a law that it has passed. *See, e.g., Mi Familia*
10 *Vota v. Fontes* (“*Mi Familia Vota*”), 2023 WL 8183557, at *2–3
11 (D. Ariz. Sept. 14, 2023), *stay denied sub nom. Toma v. U.S. Dist. Ct. for Dist. of Ariz.*,
12 144 S. Ct. 443 (2023) (finding that intervening state legislators waived the legislative
13 privilege “by intervening to ‘fully defend’ the Voting Laws and putting their motives at
14 issue”); *Powell v. Ridge*, 247 F.3d 520, 522–23 (3d Cir. 2001) (rejecting state legislators’
15 claim of legislative privilege, which would have “enable[d] them to seek discovery, but
16 not respond to it; take depositions, but not be deposed; and testify at trial, but not be
17 cross-examined”); *Singleton*, 576 F. Supp. 3d at 940 (finding that intervening state
18 legislators waived the legislative privilege when they improperly sought “to use their
19 unique position as [the bill’s] principal drafters as a sword to defend the law on its merits,
20 but intermittently [sought] to retreat behind the shield of legislative privilege when it
21 suit[ed] them”).

22 *Mi Familia Vota* is squarely on point. There, a court in this District rejected the
23 same claim to legislative privilege made by the same Intervenor-Defendants (Speaker
24 Toma and President Peterson), finding that because they intervened “to fully defend the
25 [at-issue voting law]” and “put[] their motives at issue” when denying allegations of
26 discriminatory intent, they waived the legislative privilege.³ *Mi Familia Vota*,

27
28 ³ The United States Supreme Court and the Ninth Circuit both confirmed this ruling. The Ninth Circuit first granted then lifted Intervenor-Defendants’ stay application, *In re Toma*, 2023 WL 8183568 (9th Cir. Nov. 16, 2023), and the Supreme Court

1 2023 WL 8183557, at *2. The court found that Intervenor-Defendants could not
2 “actively participate in this litigation yet avoid the burden of discovery regarding their
3 legislative activities” and ordered them to produce documents and to sit for depositions.
4 *Id.* at *2–3 (internal quotations omitted).

5 This Court should reach the same result. As in *Mi Familia Vota*, Intervenor-
6 Defendants moved to intervene here citing their “unique interest in defending the
7 constitutionality of laws duly enacted by the Arizona legislature.” (Dkt. 19 at 1;
8 *see Mi Familia Vota*, Dkt. 348 at 2.) And as in *Mi Familia Vota*, the “heart” of this case
9 is determining the Ban’s constitutionality, which may involve a determination of what the
10 legislators’ motives were in passing the Ban. 2023 WL 8183557, at *2. In order to
11 determine whether the Ban can survive heightened scrutiny, Intervenor-Defendants must
12 demonstrate an “exceedingly persuasive justification” that the Ban serves important
13 governmental objectives and that it is substantially related to those objectives. *U.S. v.*
14 *Virginia*, 518 U.S. 515, 531–33 (1996) (citations and quotation marks omitted). The
15 justification must be “genuine” and cannot be “hypothesized or invented *post hoc* in
16 response to litigation.” *Id.* at 533. And even if—as Intervenor-Defendants improperly
17 contend—rational basis review applies, the Court would still need to consider the intent
18 of the Ban because the “bare . . . desire to harm a politically unpopular group cannot
19 constitute a legitimate government interest.” *U.S. Dep’t of Agric. v. Moreno*,
20 413 U.S. 528, 534 (1973). As the *Mi Familia Vota* court found, “[m]otive is often most
21 easily discovered by examining the unguarded acts and statements of those who would
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23
24 ultimately denied Intervenor-Defendants’ emergency stay application, ensuring
25 that the district court’s finding remained intact. *See Toma v. U.S. Dist. Ct. for*
26 *Dist. of Ariz.*, 144 S. Ct. 443 (2023). In a separate opinion denying Intervenor-
27 Defendants’ petition for the issuance of a writ of mandamus, the Ninth Circuit
28 stated that “[t]he district court did not clearly err in determining that Petitioners
waived their legislative privilege by voluntarily intervening and putting their intent
at issue by denying Plaintiffs’ allegations.” *In re Toma*, 2023 WL 8167206, at *1
(9th Cir. Nov. 24, 2023).

1 otherwise attempt to conceal evidence of discriminatory intent”—in this case, Intervenor-
2 Defendants. 2023 WL 8183557, at *2 (citation and quotation marks omitted).⁴

3 Intervenor-Defendants’ arguments in their correspondence to Plaintiffs fail. *First*,
4 contrary to Intervenor-Defendants’ assertions, their actions in this litigation do not “differ
5 materially” from those they took in *Mi Familia Vota*. (Ex. 7 at 13.) Intervenor-
6 Defendants’ strategic decisions relating to whether to answer the complaint or file a
7 motion to dismiss or whether to testify are not relevant to the waiver analysis, and
8 Intervenor-Defendants have not offered any authority to the contrary. *Second*,
9 Intervenor-Defendants argue that they have a “heightened” interest here because, unlike
10 in *Mi Familia Vota*, the Arizona Attorney General determined that she was disqualified
11 from defending the Ban. (*Id.* at 12.) But Intervenor-Defendants’ interest in
12 intervening—“heightened” or not—is similarly irrelevant to whether that intervention
13 functioned as a waiver of privilege.⁵ *Third*, Intervenor-Defendants wrongly state that *Mi*
14 *Familia Vota* identified “avoiding the distraction of litigation” as the “only” purpose for
15 the legislative privilege. (*Id.*) Not so. Instead, *Mi Familia Vota* also considered the
16 legislative privilege’s purpose of “allow[ing] duly elected legislators to discharge their
17 public duties without concern of adverse consequences outside the ballot box.”
18 2023 WL 8183557, at *3. *Fourth*, granting Plaintiffs’ motion would not require
19 Intervenor-Defendants to waive the privilege of other legislators. Only “communications
20 *sent or received* by either the Speaker or the President” fall within the scope of
21 Intervenor-Defendants’ legislative privilege, which they waived upon intervention.
22 *Id.* at *3 (emphasis added).

23
24 ⁴ Nor, as the *Mi Familia Vota* court correctly found, does the statutory authority to
25 intervene under A.R.S. § 12-1841(A) change this result. 2023 WL 8183557, at *2
26 (“This argument would allow the Arizona Legislature to exercise its self-created
right to intervene yet shield its leaders from ever waiving the legislative
privilege.”).

27 ⁵ Intervenor-Defendants’ other arguments for a heightened standard of waiver,
28 which analogize to inapt cases concerning criminal prosecution, are also
unconvincing. (Ex. 7 at 12.) Intervenor-Defendants point to no cases, and
Plaintiffs know of none, where a heightened standard of waiver is applied to the
legislative privilege of voluntary intervenors like Intervenor-Defendants.

1 Accordingly, the Court should find that Intervenor-Defendants waived the
2 legislative privilege by voluntarily intervening in this litigation to defend the Ban.

3 **II. Even If Intervenor-Defendants Had Not Waived Legislative Privilege,**
4 **It Would Be Easily Overcome.**

5 Even if the legislative privilege were not waived, all five factors that courts assess
6 to determine whether the privilege has been overcome warrant disclosure.

7 *First*, the evidence sought is highly relevant to Plaintiffs’ claims that the Ban is
8 discriminatory and violates the Constitution and multiple federal statutes. *See Sol v.*
9 *Whiting*, 2013 WL 12098752, at *3 (D. Ariz. Dec. 11, 2013) (ordering the production of
10 communications between legislators and third-party advisors that the court determined
11 were “likely to contain admissible evidence or lead to the discovery of admissible
12 evidence of those legislators’ intent in drafting and supporting [the legislation] as
13 contemporary statements by members of the decisionmaking body” (citation and internal
14 quotation marks removed)). The subjects of the emails over which Intervenor-
15 Defendants assert the legislative privilege include “Re: SB 1165,” “Womens Sports
16 Talking pts,” and “Save Women’s Sports Act 2022 Talking Points.” (Ex. 5, Doc. Nos.
17 14, 15, and 18.) A request for these documents is reasonably calculated to uncover
18 “[w]hat motivated the Arizona legislature to act” and pass the Ban, which “is at the heart
19 of this litigation.” *Hobbs*, 2023 WL 4595824, at *10; *see also Harris v. Ariz. Indep.*
20 *Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1070–71 (D. Ariz. 2014), *aff’d*,
21 578 U.S. 253 (2016) (“Because what motivated the Commission to deviate from equal
22 district populations is at the heart of this litigation, evidence bearing on what justifies
23 these deviations is highly relevant.”). The same is true of Plaintiffs’ anticipated
24 questioning at Intervenor-Defendants’ depositions.

25 *Second*, no other evidence is available as there is no substitute for direct legislative
26 evidence in demonstrating legislative intent. If the legislators “were motivated by an
27 impermissible purpose, [they] would likely have kept out of the public record evidence
28 making that purpose apparent.” *Harris*, 993 F. Supp. 2d at 1070–71.

1 *Third*, there can be no dispute over the seriousness of the issues in this litigation,
2 which involves the protection of Plaintiffs’ constitutional rights and the right to be free
3 from discrimination under federal law. “At the heart of the Constitution’s guarantee of
4 equal protection lies the simple command that the Government must treat citizens as
5 individuals, not as simply components of a racial, religious, sexual or national class.”
6 *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation marks and citation omitted). As
7 this Court and the Ninth Circuit have already concluded, discrimination based on
8 transgender status is discrimination based on sex and impermissible under the
9 Constitution and Title IX. *Hecox v. Little*, 79 F.4th 1009, 1026–27 (9th Cir. 2023)
10 (Constitution); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (Title IX); (Dkt. 127,
11 Order on Motion for Preliminary Injunction, at 25–32.) The importance of the litigation
12 and the rights at issue cannot be overstated. *See Favors*, 285 F.R.D. at 219 (finding third
13 factor favored disclosure and observing that the factor is “intended to give due
14 consideration to some of the most invidious forms of government malfeasance”).

15 *Fourth*, Intervenor-Defendants are government actors who have a direct role in
16 this litigation, and the intent of these government actors is at the heart of this action,
17 favoring disclosure. Plaintiffs raise “serious charges about the fairness and impartiality
18 of some of the central institutions of [Arizona’s] state government.” *Rodriguez v. Pataki*,
19 280 F. Supp. 2d 89, 102 (S.D.N.Y. 2003) (finding legislative privilege “should be
20 accorded only limited deference” in redistricting case). And Intervenor-Defendants’
21 involvement in the litigation is hardly a collateral matter; they voluntarily intervened to
22 defend the Ban on the facts. Because Intervenor-Defendants voluntarily intervened,
23 disclosure does not constitute an unwarranted intrusion into the legislative process. The
24 government’s “subjective decision-making process remains at the core of [] [P]laintiffs’
25 claims . . . [and] the legislature’s direct role in the litigation supports overcoming the
26 privilege.” *Favors*, 285 F.R.D. at 220 (finding fourth factor supported disclosure).

27 *Fifth*, the legislative privilege theoretically serves important purposes including
28 encouraging “the fullest liberty of speech” in legislative debate. *Lee v. City of Los*

1 *Angeles*, 908 F.3d 1175, 1186 (9th Cir. 2018) (citation and quotation marks omitted).
2 However, Intervenor-Defendants cannot hide behind those purposes when they have put
3 their communications and documents directly at issue through their voluntary
4 intervention and affirmative participation in this case.

5 Therefore, all factors favor disclosure.

6 **III. The Deliberative Process Privilege Is Inapplicable.**

7 Intervenor-Defendants also assert the deliberative process privilege in their
8 discovery responses, but that privilege is inapplicable here for the following reasons.

9 *First*, the government’s intent is central to Plaintiffs’ case. Several courts have
10 held that the deliberative process privilege does not apply in actions where the
11 government’s decision-making or intent are central to the plaintiff’s case. *See, e.g., In re*
12 *Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *on rehearing*
13 *156 F.3d 1279* (D.C. Cir. 1998) (“If the plaintiff’s cause of action is directed to the
14 government’s intent . . . it makes no sense to permit the government to use the
15 [deliberative process] privilege as a shield.”); *Stone v. Trump*, 335 F. Supp. 3d 749, 755
16 (D. Md. 2018), *vacated in part on other grounds* 402 F. Supp. 3d 153 (D. Md. 2019)
17 (explaining that the privilege does not protect documents “likely to contain evidence
18 reflecting Defendants’ intent” where that intent “is at the very heart of th[e] litigation”).

19 The centrality of the government’s intent to Plaintiffs’ case bars the deliberative
20 process privilege’s application and, thus, obviates the need to proceed to the balancing
21 analysis. *U.S. v. Lake Cnty. Bd. of Comm’rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005)
22 (“[T]he deliberative process privilege is vitiated entirely at step one when the
23 government’s decisionmaking process is central to the plaintiff’s case.”); *Scott v. Bd. of*
24 *Educ.*, 219 F.R.D. 333, 337 (D.N.J. 2004) (“[I]n a civil rights action where the
25 deliberative process of State or local officials is itself genuinely in dispute, privileges
26 designed to shield that process from public scrutiny must yield to the overriding public
27 policies expressed in the civil rights laws.” (citation and quotation marks omitted)).
28 Because Intervenor-Defendants’ “intent to discriminate is at issue,” “the deliberative

1 process privilege simply does not apply” and no further analysis is needed. *Lake Cnty.*,
2 233 F.R.D. at 526.

3 *Second*, the deliberative process privilege is widely understood as an executive
4 privilege and, thus, does not extend to Intervenor-Defendants, legislators who intervened
5 “on behalf of their respective legislative Houses” to defend their “unique *legislative*
6 interests.” (Dkt. 19 at 3, 11); *see e.g., Assembly of State of Cal. v. U.S. Dep’t of Com.*,
7 968 F.2d 916, 921 (9th Cir. 1992) (“The underlying purpose of the deliberative process
8 privilege is to ensure that *agencies* are not forced to ‘operate in a fishbowl.’” (emphasis
9 added)); *EEOC v. Swissport Fueling, Inc.*, 2012 WL 1648416, at *15
10 (D. Ariz. May 10, 2012) (noting that deliberative process privilege “must be raised by a
11 formal claim made by the head of the agency after she has personally considered the
12 material in question prior to the invocation of the privilege”).

13 *Third*, Intervenor-Defendants have not made the required showing that the
14 relevant documents are both pre-decisional and deliberative. Simply stating that a
15 document was “part of the decision-making process and contributed to the legislative
16 action” (Ex. 5, Doc. No. 15) is insufficient to demonstrate that it contains anything
17 deliberative at all warranting protection. *See U.S. v. ex rel. Poehling v. UnitedHealth*
18 *Grp., Inc.*, 2018 WL 8459926, at *10 (C.D. Cal. Dec. 14, 2018) (“it is widely accepted
19 that the privilege protects opinions and deliberations, but generally not ‘facts and
20 evidence’”) (citing *Warner*, 742 F.2d at 1161); *see also Tohono O’odham Nation v.*
21 *Ducey*, 2016 WL 3402391, at *7, n.3 (D. Ariz. June 21, 2016) (finding that the
22 deliberative process privilege did not apply because “[n]owhere does the Nation show
23 that the documents and testimony at issue are protected by the deliberative process
24 privilege”).

25 **IV. The Deliberative Process Privilege Is Easily Overcome.**

26 Even if the deliberative process privilege applies (it does not), it is overcome for
27 substantially the same reasons the legislative privilege is overcome.⁶ Given that “the

28 ⁶ As discussed above, to assess whether the deliberative process privilege is
overcome, courts weigh: “1) the relevance of the evidence; 2) the availability of

1 common-law deliberative process privilege [is] weaker than, and thus more readily
2 outweighed than” the legislative privilege, the deliberative process privilege is easily
3 overridden by the same considerations articulated above. *Kay*, 2003 WL 25294710, at
4 *18 (emphasis omitted); *see also Toomey*, 2022 WL 1452747, at *5 (finding the factors
5 favored disclosure in case concerning documents about surgery to treat gender
6 dysphoria); *Ariz. Dream Act. Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. Jan. 15,
7 2014) (emphasizing Arizona’s “policy in favor of full and open disclosure” of
8 government action in finding that the deliberative process privilege did not shield
9 documents concerning the state’s policy to deny driver’s licenses based on immigration
10 status); *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1125 (N.D. Cal. 2003)
11 (analyzing deliberative process privilege asserted by local legislators, finding it
12 overcome, and permitting the plaintiff to “question the City Council members about the
13 decisionmaking process with respect to [the relevant condition], including the motive and
14 intent behind approval of the condition” where government misconduct was central to the
15 plaintiff’s Equal Protection claim).

16 CONCLUSION

17 For the foregoing reasons, the Court should grant Plaintiffs’ motion to compel
18 Intervenor-Defendants to produce documents and information, both those five documents
19 in the privilege log and any further documents, improperly withheld on the basis of the
20 legislative and deliberative process privileges; to revise their privilege log accordingly;
21 and to sit for depositions.

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27 other evidence; 3) the government's role in the litigation; and 4) the extent to
28 which disclosure would hinder frank and independent discussion regarding
contemplated policies and decisions.” *Warner*, 742 F.2d at 1161. These factors
overlap with those considered in the legislative privilege analysis.

Respectfully submitted this March 1, 2024.

/s/ Colin M. Proksel

Colin M. Proksel (034133)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: cproksel@omlaw.com

Jyotin Hamid*
Justin R. Rassi*
Amy C. Zimmerman*
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, New York 10001
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Email: jhamid@debevoise.com
Email: jrassi@debevoise.com
Email: azimmerman@debevoise.com

Amy Whelan*
Rachel Berg*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 343-7679
Facsimile: (415) 392-8442
Email: awhelan@nclrights.org
Email: rberg@nclrights.org

**Admitted pro hac vice.*

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1 Colin M. Proksel (034133)
2 OSBORN MALEDON, P.A.
3 2929 North Central Avenue, 21st Floor
4 Phoenix, Arizona 85012-2793
5 State Bar No. 034133
6 Telephone: (602) 640-9000
7 Facsimile: (602) 640-9050
8 Email: cproksel@omlaw.com

9 *Attorney for Plaintiffs*
10 *Additional counsel listed in signature block*

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

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

18 Plaintiffs,

19 v.

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

27 Defendants,

28 Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

PLAINTIFFS' LRCIV 7.2(J)-(K)
AND 37.1 STATEMENT

1 Pursuant to Local Rule of Civil Procedure 7.2(j)-(k) and 37.1(a), Plaintiffs hereby
2 submit the following statement (the “Statement”) in support of Plaintiffs’ motion to
3 compel.

4 **LRCIV 7.2(J)-(K) Statement**

5 Plaintiffs served their First Sets of Interrogatories and Requests for Production of
6 Documents to Intervenor-Defendants on October 30, 2021. (Exs. 1–2.) Intervenor-
7 Defendants served Responses and Objections to the Interrogatories and Document
8 Requests and a Privilege Log on November 29, 2023. (Exs. 3–5.) On February 7, 2024,
9 Plaintiffs alerted Intervenor-Defendants of their intent to take Rule 30(b)(1) depositions.
10 (Ex. 9.) Intervenor-Defendants objected on February 8, 2024 by email. (*Id.*)

11 Plaintiffs first identified the issues raised in this motion in a letter to Intervenor-
12 Defendants dated January 2, 2024. (Ex. 6.) Plaintiff subsequently addressed these issues
13 in a correspondence dated February 9, 2024 and February 12, 2024. (Exs. 8–9.)
14 Intervenor-Defendants addressed these issues in correspondence dated January 19, 2024.
15 (Ex. 7.) The parties met and conferred about issues on February 16, 2024.

16 While the parties have resolved other discovery disputes that have arisen in this
17 case, they have not been able to resolve the issues raised in this motion despite sincere,
18 good-faith efforts to do so.

19 **LRCIV 37.1 Statement**

20 **Plaintiffs’ Request No. 1**

21 **1. Request:** “All documents and communications concerning S.B. 1165 or
22 Ariz. Rev. Stat. § 15-120.02, including without limitation documents and
23 communications concerning its enactment, legislative history, the governmental interests
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1 that are allegedly advanced by S.B. 1165 or Ariz. Rev. Stat. § 15-120.02, its
2 development, interpretation, and implementation, any complaints, concerns, emails, and
3 texts regarding the impact of S.B. 1165, Ariz. Rev. Stat. § 15-120.02, and any other
4 legislation that was considered regarding the participation of transgender athletes in
5 Arizona.”

6
7 **2. Objection/Response:** “The Legislative Leaders object to the extent this
8 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of*
9 *Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
10 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks
11 documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
12 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
13 Legislative Leaders further object to the extent this request seeks documents protected by
14 the attorney-client privilege and/or the work product privilege. The Legislative Leaders
15 further object because the legislative history for S.B. 1165 is public information and
16 Plaintiffs thus have more convenient, less burdensome, and less expensive access to this
17 information than reproducing it here. The Legislative Leaders further object to this
18 request’s relevant time period, which according to Instruction #8 is January 1, 2015 to the
19 date of the response, as outside the scope permitted by Rule 26(b)(1) because documents
20 from legislative sessions in which S.B. 1165 did not pass is not relevant to any party’s
21 claim or defense and is not proportional to the needs of the case. The Legislative Leaders
22 further object to this request because “any other legislation that was considered” is
23 outside the scope permitted by Rule 26(b)(1) since legislation other than S.B. 1165 is not
24 relevant to any party’s claim or defense, and in addition is vague and ambiguous about
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1 what is ‘legislation that was considered.’

2 Subject to and without waiving these objections, the Legislative Leaders are
3 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022,
4 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
5 Regular Session until the day the Arizona Governor signed S.B. 1165.”

6
7 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative and
8 deliberative process privileges over information related to the motive behind the Ban’s
9 passage. As set forth in the motion, Intervenor-Defendants waived the legislative
10 privilege when voluntarily intervening in defense of the Ban, the deliberative process
11 privilege does not apply, and the information requested is directly relevant to Plaintiffs’
12 claims. In any event, both privileges asserted by Intervenor-Defendants are qualified
13 privileges that are overcome. Thus, Plaintiffs are entitled to documents related to the
14 Ban’s passage.
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17 **Plaintiffs’ Request No. 2**

18 **1. Request:** “Without time limitation, all documents, policies, and
19 communications concerning the participation of transgender students in any school sports
20 at any level in Arizona, including without limitation communications between you and
21 any school district; complaints or concerns you have received; and briefing materials
22 provided to you.”
23

24 **2. Objection/Response:** “The Legislative Leaders object to the extent this
25 request seeks documents protected by the legislative privilege, such as ‘briefing
26 materials.’ *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018);
27 *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative Leaders further
28

1 object to the extent this request seeks documents like ‘briefing materials’ protected by the
2 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
3 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders
4 further object to the extent this request seeks documents protected by the attorney-client
5 privilege and/or the work product privilege. The Legislative Leaders further object to
6 this request’s lack of time limitation as outside the scope permitted by Rule 26(b)(1)
7 because documents from legislative sessions in which S.B. 1165 did not pass is not
8 relevant to any party’s claim or defense and is not proportional to the needs of the case.
9

10 Subject to and without waiving these objections, the Legislative Leaders are
11 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022,
12 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
13 Regular Session until the day the Arizona Governor signed S.B. 1165.”
14

15 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative
16 privilege over information related to the motive behind passing the Ban. As set forth in
17 the motion, Intervenor-Defendants waived the legislative privilege when voluntarily
18 intervening in defense of the Ban, the deliberative process privilege does not apply, and
19 the information requested is directly relevant to Plaintiffs’ claims. In any event, both
20 privileges asserted by Intervenor-Defendants are qualified privileges that are overcome.
21 Thus, Plaintiffs are entitled to documents related to the decision-making process behind
22 the Ban’s passage.
23

24 **Plaintiffs’ Request No. 3**

25 **1. Request:** “All documents and communications concerning Plaintiffs or
26 this action.”
27
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1 **2. Objection/Response:** “The Legislative Leaders object to the extent this
2 request seeks documents for ‘this action’ protected by the legislative privilege. *See, e.g.,*
3 *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643
4 F.3d 278, 290 (9th Cir. 2011). The Legislative Leaders further object to the extent this
5 request seeks documents for ‘this action’ protected by the deliberative process privilege.
6 *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5
7 (E.D. Cal. June 19, 2008). The Legislative Leaders further object to the extent this
8 request seeks documents protected by the attorney-client privilege and/or the work
9 product privilege. The Legislative Leaders further object to this request’s relevant time
10 period, which according to Instruction #8 is January 1, 2015 to the date of the response,
11 as outside the scope permitted by Rule 26(b)(1) because documents from legislative
12 sessions in which S.B. 1165 did not pass is not relevant to any party’s claim or defense
13 and is not proportional to the needs of the case.
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17 Subject to and without waiving these objections, the Legislative Leaders are
18 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022,
19 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
20 Regular Session until the day the Arizona Governor signed S.B. 1165.”
21

22 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative and
23 deliberative process privileges over documents and communications concerning Plaintiffs
24 or this action. As set forth in the motion, Intervenor-Defendants waived the legislative
25 privilege when voluntarily intervening in defense of the Ban, the deliberative process
26 privilege does not apply, and the information requested is directly relevant to Plaintiffs’
27 claims. In any event, both privileges asserted by Intervenor-Defendants are qualified
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1 privileges that are overcome. Thus, Plaintiffs are entitled to documents related this action
2 and/ or Plaintiffs.

3 **Plaintiffs’ Request No. 5**

4 **1. Request:** “All documents, policies, and communications concerning sex-
5 based separation in school sports in Arizona.”

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7 **2. Objection/Response:** “The Legislative Leaders object to the extent this
8 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of*
9 *Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
10 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks
11 documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
12 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
13 Legislative Leaders further object to the extent this request seeks documents protected by
14 the attorney-client privilege and/or the work product privilege. The Legislative Leaders
15 further object to this request’s relevant time period, which according to Instruction #8 is
16 January 1, 2015 to the date of the response, as outside the scope permitted by Rule
17 26(b)(1) because documents from legislative sessions in which S.B. 1165 did not pass is
18 not relevant to any party’s claim or defense and is not proportional to the needs of the
19 case.
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23 Subject to and without waiving these objections, the Legislative Leaders are
24 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022,
25 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
26 Regular Session until the day the Arizona Governor signed S.B. 1165.”

27
28 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative

1 privilege over information related to sex-based separation in school sports in Arizona. As
2 set forth in the motion, Intervenor-Defendants waived the legislative privilege when
3 voluntarily intervening in defense of the Ban, and the information requested is directly
4 relevant to Plaintiffs' claims. Thus, Plaintiffs are entitled to learn about information
5 related to sex-based separation in school sports in Arizona.
6

7 **Plaintiffs' Request No. 6**

8 **1. Request:** "Without time limitation, all documents and communications,
9 including without limitation data, reports, research, and/or studies, concerning any impact
10 the participation of transgender students in interscholastic and/or intramural sports has or
11 had on non-transgender students, including without limitation: (a) the opportunities for
12 non-transgender students to participate in interscholastic and/or intramural sports and to
13 advance in their respective interscholastic and/or intramural sports, including by
14 obtaining college scholarships; (b) the fairness or preservation of girls' sports; and (c) the
15 safety of non-transgender girls who participate in interscholastic and/or intramural sports,
16 including any injuries incurred as a result of the participation of transgender students on
17 sports teams."
18

19
20 **2. Objection/Response:** "The Legislative Leaders object to the extent this
21 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of*
22 *Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
23 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks
24 documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
25 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
26 Legislative Leaders further object to the extent this request seeks documents protected by
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1 the attorney-client privilege and/or the work product privilege. The Legislative Leaders
2 further object that this request for “all documents and communications” is outside the
3 scope permitted by Rule 26(b)(1) because it is not proportional to the needs of the case
4 and Plaintiffs have more convenient, less burdensome, and less expensive access to these
5 documents than reproducing them here. The Legislative Leaders and Defendant Horne
6 have filed and cited hundreds of pages of expert declarations, studies, and other evidence
7 that are too voluminous to reproduce here. The burden of reproducing the requested
8 documents outweighs its likely benefit. The Legislative Leaders further object to the
9 extent this request seeks premature disclosure of expert reports, which the Legislative
10 Leaders will produce in accordance with the Court’s Scheduling Order.
11

12
13 Subject to and without waiving these objections, the Legislative Leaders identify
14 and incorporate by reference the following documents and the documents cited within
15 these documents:
16

- 17 • Facts and studies cited in S.B. 1165 § 2.
- 18 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support of
19 [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
20 Injunction.
- 21 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
22 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.
- 23 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support
24 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
25 Injunction.
- 26 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
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1 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
2 Preliminary Injunction.

- 3 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support of
4 Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
5 Injunction.
- 6 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
7 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
8 Preliminary Injunction.
- 9 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
10 preliminary injunction hearing.
- 11 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 12 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
13 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 14 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
15 preliminary injunction hearing.
- 16 • Documents produced in response to Plaintiffs’ First Set of Requests for Production
17 of Documents to Intervenor-Defendants President Warren Peterson [*sic*] and
18 Speaker Ben Toma.

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23 Intervenor-Defendants will supplement this response if additional responsive, non-
24 privileged documents are located.”

25
26 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative and
27 deliberative process privileges over documents and communications regarding any
28 impact the participation of transgender students in interscholastic and/or intramural sports

1 has or had on non-transgender students. As set forth in the motion, Intervenor-
2 Defendants waived the legislative privilege when voluntarily intervening in defense of
3 the Ban, the deliberative process privilege does not apply, and the information requested
4 is directly relevant to Plaintiffs' claims. Further, Intervenor-Defendants incorrectly assert
5 that the request "is not proportional to the needs of the case and Plaintiffs have more
6 convenient, less burdensome, and less expensive access to these documents than
7 reproducing them here." The studies and related documents and communications are
8 central to the issues in this case. Intervenor-Defendants admit that they have "filed and
9 cited" the studies, reports and related documents Plaintiffs request, and are in custody and
10 control of these documents as they have already relied on and considered them. While
11 the volume may be large, Plaintiffs are entitled to them and Intervenor-Defendants have a
12 lesser burden and are in the best position to provide them given they are already in or
13 have been in possession of the requested documents and communications. Thus,
14 Plaintiffs are entitled to receive documents and communications regarding any impact the
15 participation of transgender students in interscholastic and/or intramural sports has or had
16 on non-transgender students.

17 **Plaintiffs' Request No. 7**

18 **1. Request:** "All documents from or exchanged between, and
19 communications with, any representative of any advocacy organization, including
20 without limitation the Alliance Defending Freedom, the Heritage Foundation, Eagle
21 Forum, and the Family Research Council concerning the participation of transgender
22 students in interscholastic and/or intramural sports in Arizona."

23 **2. Objection/Response:** "The Legislative Leaders object to the extent this
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1 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of*
2 *Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
3 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks
4 documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
5 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
6 Legislative Leaders further object to the extent this request seeks documents protected by
7 the attorney-client privilege and/or the work product privilege. The Legislative Leaders
8 further object to this request’s relevant time period, which according to Instruction #8 is
9 January 1, 2015 to the date of the response, as outside the scope permitted by Rule
10 26(b)(1) because documents from legislative sessions in which S.B. 1165 did not pass is
11 not relevant to any party’s claim or defense and is not proportional to the needs of the
12 case.
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15 Subject to and without waiving these objections, the Legislative Leaders are
16 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022,
17 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
18 Regular Session until the day the Arizona Governor signed S.B. 1165.”
19

20
21 **3. Reason for Deficiency:** Intervenor-Defendants assert the legislative and
22 deliberative process privileges over documents and communications regarding any
23 impact the participation of transgender students in interscholastic and/or intramural sports
24 has or had on non-transgender students. As set forth in the motion, Intervenor-
25 Defendants waived the legislative privilege when voluntarily intervening in defense of
26 the Ban, the deliberative process privilege does not apply, and the information requested
27 is directly relevant to Plaintiffs’ claims. Thus, Plaintiffs are entitled to documents related
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1 to documents and communications exchanged with representatives of any advocacy
2 organization.

3 **Plaintiffs' Request No. 8**

4 **1. Request:** "For each of the governmental interests you identified in response
5 to Interrogatory No. 6, produce all documents and communications that support each
6 interest."
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8 **2. Objection/Response:** "The Legislative Leaders object to the extent this
9 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of*
10 *Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
11 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks
12 documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
13 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
14 Legislative Leaders further object to the extent this request seeks documents protected by
15 the attorney-client privilege and/or the work product privilege. The Legislative Leaders
16 further object that this request for "all documents and communications" is outside the
17 scope permitted by Rule 26(b)(1) because it is not proportional to the needs of the case
18 and Plaintiffs have more convenient, less burdensome, and less expensive access to these
19 documents than reproducing them here. The Legislative Leaders and Defendant Horne
20 have filed and cited hundreds of pages of expert declarations, studies, and other evidence
21 that are too voluminous to reproduce here. The burden of reproducing the requested
22 documents outweighs its likely benefit. The Legislative Leaders further object to the
23 extent this request seeks premature disclosure of expert reports, which the Legislative
24 Leaders will produce in accordance with the Court's Scheduling Order.
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1 Subject to and without waiving these objections, the Legislative Leaders identify
2 and incorporate by reference the following documents and the documents cited within
3 these documents:

- 4 • Facts and studies cited in S.B. 1165 § 2.
- 5 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support of
6 [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
7 Injunction.
- 8 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
9 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.
- 10 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support
11 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
12 Injunction.
- 13 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
14 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
15 Preliminary Injunction.
- 16 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support of
17 Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
18 Injunction.
- 19 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
20 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
21 Preliminary Injunction.
- 22 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
23 preliminary injunction hearing.
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- Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the preliminary injunction hearing.
- Documents produced in response to Plaintiffs’ First Set of Requests for Production of Documents to Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.

Intervenor-Defendants will supplement this response if additional responsive, non-privileged documents are located.”

3. Reason for Deficiency: Intervenor-Defendants assert the legislative and

deliberative process privileges over documents and communications regarding governmental interests Intervenor-Defendants identified in response to Interrogatory No. 6. As set forth in the motion, Intervenor-Defendants waived the legislative privilege when voluntarily intervening in defense of the Ban, the deliberative process privilege does not apply, and the information requested is directly relevant to Plaintiffs’ claims. Further, Intervenor-Defendants incorrectly assert that the request “is not proportional to the needs of the case and Plaintiffs have more convenient, less burdensome, and less expensive access to these documents than reproducing them here.” The studies and related documents and communications are central to the issues in this case. Intervenor-Defendants admit that they have “filed and cited” the studies, reports and related documents Plaintiffs request, and are in custody and control of these documents as they have already relied on and considered them. While the volume may be large, Plaintiffs

1 are entitled to them and Intervenor-Defendants have a lesser burden and are in the best
2 position to provide them given they are already in or have been in possession of the
3 requested documents and communications. Thus, Plaintiffs are entitled to receive
4 documents and communications regarding governmental interests Intervenor-Defendants
5 identified in response to Interrogatory No. 6.
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7 **Intervenor-Defendants' Privilege Log Doc. No. 3**

- 8 **1. Email Subject:** "Third Read Consent Calendar #8 Protests"
9 **2. Description:** "Communication from third party providing information to
10 legislators pertinent to pending legislation."
11 **3. Objection/Response:** "Legislative Privilege"
12 **4. Reason for Deficiency:** Intervenor-Defendants assert the legislative
13 privilege over this document. As set forth in the motion, Intervenor-Defendants waived
14 the legislative privilege when voluntarily intervening in defense of the Ban. In any event,
15 the legislative process privilege is overcome. Thus, Plaintiffs are entitled to this
16 document to learn more about the motive behind the Ban's passage.
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19 **Intervenor-Defendants' Privilege Log Doc. No. 6**

- 20 **1. Email Subject:** "Caucus Information for 3/15/22 »
21 **2. Request:** "Communication from legislator providing information to other
22 legislators and legislative staff pertinent to pending legislation."
23 **3. Objection/Response:** "Legislative privilege"
24 **4. Reason for Deficiency:** *See* Intervenor-Defendants' Privilege Log Doc.
25

26
27 No. 3, *supra*.

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1 **Intervenor-Defendants’ Privilege Log Doc. No. 14**

2 1. **Email Subject:** “Fw: Womens Sports Talking pts”

3 2. **Request:** “Communication from legislator providing information to other
4 legislators and legislative staff pertinent to pending legislation.”

5 3. **Objection/Response:** “Legislative Privilege”

6 4. **Reason for Deficiency:** *See* Intervenor-Defendants’ Privilege Log Doc.
7 No. 3, *supra*.

8
9 **Intervenor-Defendants’ Privilege Log Doc. No. 15**

10 1. **Email Subject:** “Save Women’s Sports Act 2022 Talking Points
11 <2002_SWS_Act.12.2021_Tps.docx> [attachment to LLPRIV000080]”

12 2. **Request:** “Document from legislator providing information to other
13 legislators pertinent to pending legislation. Document also was part of the decision-
14 making process and contributed to the legislative action.”

15 3. **Objection/Response:** “Legislative Privilege; Deliberative Process
16 Privilege”

17 4. **Reason for Deficiency:** Intervenor-Defendants assert the legislative and
18 deliberative process privileges over this document. As set forth in the motion,
19 Intervenor-Defendants waived the legislative privilege when voluntarily intervening in
20 defense of the Ban. Intervenor-Defendants have not carried their burden to show that this
21 document is both predecisional and deliberative, as is required for the deliberative
22 process privilege. In any event, both privileges are qualified and are overcome. Thus,
23 Plaintiffs are entitled to this document to learn more about the motive behind the Ban’s
24 passage.
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Intervenor-Defendants' Privilege Log Doc. No. 18

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1. **Email Subject:** “Re: SB 1165”
2. **Request:** “Communication from legislator to other legislators and third party pertinent to pending legislation.”
3. **Objection/Response:** “Legislative Privilege”
4. **Reason for Deficiency:** *See* Intervenor-Defendants’ Privilege Log Doc.

No. 3, *supra*.

Respectfully submitted this March 1, 2024.

/s/ Colin M. Proksel
Colin M. Proksel (034133)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: cproksel@omlaw.com

Jyotin Hamid*
Justin R. Rassi*
Amy C. Zimmerman*
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, New York 10001
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Email: jhamid@debevoise.com
Email: jrassi@debevoise.com
Email: azimmerman@debevoise.com

Amy Whelan*
Rachel Berg*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 343-7679
Facsimile: (415) 392-8442
Email: awhelan@nclrights.org
Email: rberg@nclrights.org

**Admitted pro hac vice.*

1 Colin Proksel (034133)
2 OSBORN MALEDON, P.A.
3 2929 North Central Avenue, 21st Floor
4 Phoenix, Arizona 85012-2793
5 State Bar No. 034133
6 Telephone: (602) 640-9000
7 Facsimile: (602) 640-9050
8 Email: cproksel@omlaw.com

9 *Attorney for Plaintiffs*
10 *Additional counsel listed in signature block*

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

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

18 Plaintiffs,

19 v.

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

27 Defendants,

28 Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

**DECLARATION OF RACHEL H. BERG IN
SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL DISCOVERY AS TO
INTERVENOR-DEFENDANTS**

DECLARATION OF RACHEL H. BERG

I, Rachel H. Berg, hereby declare as follows:

1. I am a staff attorney at the National Center for Lesbian Rights and counsel for Plaintiffs Jane Doe and Megan Roe in the above-captioned action. I am a member of the bar of the State of New York and the State of Tennessee. I submit this declaration in support of Plaintiffs’ Motion To Compel Discovery as to Intervenor-Defendants.

2. Attached hereto as Exhibit 1 is a true and correct copy of Plaintiffs’ First Set of Interrogatories to Intervenor-Defendants dated October 30, 2023.

3. Attached hereto as Exhibit 2 is a true and correct copy of Plaintiffs’ First Set of Requests for Production of Documents to Intervenor-Defendants dated October 30, 2023.

4. Attached hereto as Exhibit 3 is a true and correct copy of Intervenor-Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories, dated November 29, 2023.

5. Attached hereto as Exhibit 4 is a true and correct copy of Intervenor-Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents, dated November 29, 2023.

6. Attached hereto as Exhibit 5 is a true and correct copy of Intervenor-Defendants’ Privilege Log, dated November 29, 2023.

7. Attached hereto as Exhibit 6 is a true and correct copy of Plaintiffs’ January 2, 2024 Letter.

8. Attached hereto as Exhibit 7 is a true and correct copy of Intervenor-Defendants’ January 19, 2024 Letter.

9. Attached here as Exhibit 8 is a true and correct copy of Plaintiffs’ February 9, 2024 Letter.

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10. Attached here as Exhibit 9 is a true and correct copy of the Parties' correspondence regarding depositions and includes Intervenor-Defendants' February 8, 2024 email objecting to Plaintiffs' deposition requests and Plaintiffs' February 12, 2024 response.

11. I submit that, on November 13, 2023, Intervenor-Defendants served twenty-one Requests for Admission, ten Interrogatories, and five Requests for Production on each Plaintiff.

12. I submit that, on November 13, 2023, Intervenor-Defendants served three Requests for Production and twelve Interrogatories on Defendant Arizona Interscholastic Association.

13. I submit that the Parties held a meet and confer by telephone on February 16, 2024, after which Intervenor-Defendants confirmed that they were not withholding any responsive documents or information in their responses to Interrogatories Nos. 2, 3, 4, and 5 and agreed to produce responsive documents from August 19, 2019 to present, but continued to assert the legislative and deliberative process privileges.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 1, 2024
Nashville, Tennessee

/s/ Rachel H. Berg

Rachel H. Berg

Exhibit 1

Colin Proksel (034133)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
State Bar No. 034133
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: cproksel@omlaw.com

Attorney for Plaintiffs
Additional counsel listed in signature block

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION**

Jane Doe, by her next friend and parents
Helen Doe and James Doe; and Megan Roe,
by her next friend and parents, Kate Roe and
Robert Roe,

Plaintiffs,

v.

Thomas C. Horne in his official capacity as
State Superintendent of Public Instruction;
Laura Toenjes, in her official capacity as
Superintendent of the Kyrene School
District; Kyrene School District; The
Gregory School; and Arizona Interscholastic
Association Inc.,

Defendants,

Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

**PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO
INTERVENOR-DEFENDANTS
PRESIDENT WARREN PETERSON
AND SPEAKER BEN TOMA**

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1 Pursuant to Rules 33 and 26 of the Federal Rules of Civil Procedure, Plaintiffs
2 serve the following Interrogatories on Intervenor-Defendants President Warren Peterson
3 and Speaker Ben Toma. Intervenor-Defendants must respond to these Interrogatories
4 within 30 days of service.

5 **DEFINITIONS**

6 1. “Action” means the above-captioned litigation.

7 2. “Non-transgender” means a person whose gender identity corresponds with
8 their birth sex.

9 3. “Communication” means any transmission of information from one person
10 to another, including without limitation meetings, conversations or other oral statements,
11 negotiations, telephone conferences, letters, notes, presentations, memoranda and other
12 written materials, electronic mail, instant messages, text messages, online or bulletin
13 board postings, electronic chat rooms and other similar forms of electronic
14 correspondence, social media messaging, recordings (including without limitation audio,
15 video, and/or any form of electronic recording), teleconference, facsimile, and all other
16 forms of exchange, whether written or oral.

17 4. “Concerning” is defined as information, things, communications, or
18 documents that reflect, relate to, identify, constitute, embody, describe, discuss,
19 summarize, evidence, reference, comment on, or concern in any way the subject matter of
20 the request.

21 5. “Intervenor-Defendant,” “you,” and “your” means and includes President
22 Warren Peterson and Speaker Ben Toma and their representatives, employees, officers,
23 directors, or agents.

24 6. “Documents” means, by way of example and without limitation, the
25 following items, including those permanently recorded or reproduced by any mechanical
26 or electronic process or written or produced by hand: agreements, contracts,
27 communications, state and federal governmental hearings and reports, correspondence,
28 facsimiles, pleadings, telegrams, memoranda, records, compilations, summaries and

1 records of telephone conversations, summaries and records of personal conversations and
2 interviews, diaries, calendars, notes, notices, invoices, purchase orders, graphs, reports,
3 notebooks, charts, plans, drawings, sketches, maps, summaries and records of meetings
4 and conferences, summaries and reports of investigations and negotiations, summaries
5 and reports of consultants, photographs, motion picture film, microfilm, videotape, tape
6 recordings, brochures, pamphlets, advertising, circulars, press releases, drafts, letters,
7 emails, computer files or memory devices of any kind (including hard drives, software,
8 CD-ROM, RAM, ROM, tape drives, and floppy disks), text message or SMS logs, social
9 media, instant message, or e-mail chat logs, any marginal comments appearing on any
10 documents, and any other original or duplicative writings, recordings, or photographs,
11 whether or not labeled “confidential.”

12 7. “Persons” means any natural persons or any business, legal, or
13 governmental entities or associations or any other cognizable entity, and all other forms
14 of legal entities, whether or not in the employ of any party. The acts and knowledge of a
15 “person” are defined to include the acts and knowledge of that person’s directors,
16 officers, members, employees, representatives, agents, and attorneys.

17 8. “Plaintiffs” means Jane Doe, a minor, by and through parents Helen Doe
18 and James Doe; and Megan Roe, a minor, by and through parents Kate Roe and Robert
19 Roe.

20 9. “Policy” means any policy, procedure, rule, protocol, guideline, regulation,
21 practice, or other principle or course of action as well as any drafts of such policies or
22 communications involved in drafting such policies.

23 10. As used in these requests “any” means “all” and vice versa.

24 11. “And” and “or” means “and” or “or;” that is, the conjunctive or disjunctive
25 and each shall include the other wherever such dual construction will serve to bring
26 within the scope of these discovery requests information or documents that otherwise
27 would not be brought within their scope.

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1 address, and telephone number; (b) their relationship to you and to Plaintiffs; and (c) a
2 detailed description of the information that they provided.

3 **RESPONSE TO INTERROGATORY NO. 1:**

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5 **INTERROGATORY NO. 2:** Without time limitation, identify any and all student
6 athletes who have contacted you who are playing school sports in Arizona and who feel
7 that they have been treated unfairly or faced unfair or unsafe competition as a result of a
8 transgender girl's participation in their sport.

9 **RESPONSE TO INTERROGATORY NO. 2:**

10
11 **INTERROGATORY NO. 3:** Without time limitation, identify any and all complaints
12 that you have received because of a transgender girl competing with or against students in
13 a girls' school sports contest, and identify the complainant's affiliation with the school
14 featured in the complaint.

15 **RESPONSE TO INTERROGATORY NO. 2:**

16
17 **INTERROGATORY NO. 4:** Without time limitation, identify any and all Arizona
18 student athletes who have reported to you that they have been physically injured by a
19 transgender athlete, including the age and grade of the athletes involved, the sport in
20 which the injury occurred, the date or dates of the alleged injuries, any known witnesses
21 to the alleged injury, and the circumstances surrounding the alleged injury.

22 **RESPONSE TO INTERROGATORY NO. 4:**

23
24 **INTERROGATORY NO. 5:** Without time limitation, identify all students who
25 participated in or are participating in interscholastic and/or intramural sports in Arizona
26 who have reported to you that they have been denied the opportunity to advance in their
27 respective sports, including but not limited to being denied a spot on a team or failing to
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1 obtain a college scholarship, because of students who are transgender participating on
2 sports teams.

3 **RESPONSE TO INTERROGATORY NO. 5:**

4
5 **INTERROGATORY NO. 6:** Identify all governmental interests that you believe are
6 advanced by Ariz. Rev. Stat. § 15-120.02.

7 **RESPONSE TO INTERROGATORY NO. 6:**

8
9 **INTERROGATORY NO. 7:** For each of the governmental interests you identified in
10 response to Interrogatory No. 6, state all facts that support your contention that Ariz. Rev.
11 Stat. § 15-120.02 advances those governmental interests.

12 **RESPONSE TO INTERROGATORY NO. 7:**

13
14 **INTERROGATORY NO. 8:** Explain how excluding Plaintiffs from competing in girls'
15 school sports in Arizona remedies past discrimination and provides equal opportunities
16 for women and safety to women athletes. *See* Intervenor-Defendants' Opposition to
17 Plaintiffs' Motion for a Preliminary Injunction at 5, 13.

18 **RESPONSE TO INTERROGATORY NO. 8:**

19
20 **INTERROGATORY NO. 9:** Identify all persons involved in drafting, lobbying for,
21 testifying in support of, and/or advancing S.B. 1165 or Ariz. Rev. Stat. § 15-120.02, or
22 any other potential legislation regarding the participation of transgender athletes in
23 Arizona. For each such person, state the following: (a) their name, address, and telephone
24 number; (b) their relationship to you and/or Plaintiffs; and (c) a detailed description of
25 their involvement.

26 **RESPONSE TO INTERROGATORY NO. 9:**

1 Dated: Phoenix, Arizona

2 October 30, 2023

3
4 s/Colin M. Proksel

5 Colin M. Proksel (034133)
6 OSBORN MALEDON, P.A.
7 2929 North Central Avenue, 21st Floor
8 Phoenix, Arizona 85012-2793
9 Telephone: (602) 640-9000
10 Facsimile: (602) 640-9050
11 Email: cproksel@omlaw.com

12 Jyotin Hamid*
13 Justin R. Rassi*
14 Amy C. Zimmerman*
15 DEBEVOISE & PLIMPTON LLP
16 66 Hudson Boulevard
17 New York, New York 10001
18 Telephone: (212) 909-6000
19 Facsimile: (212) 909-6836
20 Email: jhamid@debevoise.com
21 Email: jrassi@debevoise.com
22 Email: azimmerman@debevoise.com

23 Amy Whelan*
24 Rachel Berg*
25 NATIONAL CENTER FOR LESBIAN RIGHTS
26 870 Market Street, Suite 370
27 San Francisco, California 94102
28 Telephone: (415) 343-7679
Facsimile: (415) 392-8442
Email: awhelan@nclrights.org
Email: rberg@nclrights.org

*Admitted pro hac vice.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I served the foregoing document via electronic mail to the following recipients:

Dennis I. Wilenchik
McKay Worthington
WILENCHIK & BARTNESS, PC
diw@wb-law.com
mckayw@wb-law.com

-and-

Maria Syms
Arizona Department of Education
Maria.Syms@azed.gov
Attorneys for Defendant Thomas C. Horne

David C. Potts
Ashley E. Caballero-Daltrey
JONES, SKELTON & HOCHULI, P.L.C.
dpotts@jshfirm.com
adaltrey@jshfirm.com

-and-

Lisa Anne Smith
DECONCINI MCDONALD YETWIN & LACY, P.C.
lasmith@dmyl.com
Attorneys for Defendant The Gregory School

Kristian E. Nelson
LEWIS BRISBOIS BISGAARD & SMITH LLP
kristian.nelson@lewisbrisbois.com
Attorneys for Defendant Arizona Interscholastic Association, Inc.

Jordan T. Ellel
TEMPE TRI-DISTRICT LEGAL SERVICES
jellel@tuhsd.k12.az.us
Counsel for Defendants Toenjes and Kyrene School District

D. John Sauer
Justin D. Smith
JAMES OTIS LAW GROUP, LLC
John.Sauer@james-otis.com
Justin.Smith@james-otis.com
*Attorneys for Intervenor-Defendants
President Petersen and Speaker Toma*

s/Rebecca Aniol

Exhibit 2

Colin Proksel (034133)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
State Bar No. 034133
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: cproksel@omlaw.com

Attorney for Plaintiffs
Additional counsel listed in signature block

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION**

Jane Doe, by her next friend and parents
Helen Doe and James Doe; and Megan Roe,
by her next friend and parents, Kate Roe and
Robert Roe,

Plaintiffs,

v.

Thomas C. Horne in his official capacity as
State Superintendent of Public Instruction;
Laura Toenjes, in her official capacity as
Superintendent of the Kyrene School
District; Kyrene School District; The
Gregory School; and Arizona Interscholastic
Association Inc.,

Defendants,

Warren Petersen, in his official capacity as
President of the Arizona State Senate, and
Ben Toma, in his official capacity as
Speaker of the Arizona House of
Representatives,

Intervenor-Defendants.

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

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION
OF DOCUMENTS TO
INTERVENOR-DEFENDANTS
PRESIDENT WARREN
PETERSON AND SPEAKER
BEN TOMA**

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1 Pursuant to Rules 34 and 26 of the Federal Rules of Civil Procedure, Plaintiffs
2 serve the following Requests for Production of Documents on Intervenor-Defendants
3 President Warren Peterson and Speaker Ben Toma. Intervenor-Defendants must produce
4 these documents within 30 days of service.

5 **DEFINITIONS**

6 1. “Action” means the above-captioned litigation.

7 2. “Non-transgender” means a person whose sense of gender identity
8 corresponds with their birth sex.

9 3. “Communication” means any transmission of information from one person
10 to another, including without limitation meetings, conversations or other oral statements,
11 negotiations, telephone conferences, letters, notes, presentations, memoranda and other
12 written materials, electronic mail, instant messages, text messages, online or bulletin
13 board postings, electronic chat rooms and other similar forms of electronic
14 correspondence, social media messaging, recordings (including without limitation audio,
15 video, and/or any form of electronic recording), teleconference, facsimile, and all other
16 forms of exchange, whether written or oral.

17 4. “Concerning” is defined as information, things, communications, or
18 documents that reflect, relate to, identify, constitute, embody, describe, discuss,
19 summarize, evidence, reference, comment on, or concern in any way the subject matter of
20 the request.

21 5. “Intervenor-Defendant,” “you,” and “your” means and includes President
22 Warren Peterson and Speaker Ben Toma and their representatives, employees, officers,
23 directors, or agents.

24 6. “Documents” means, by way of example and without limitation, the
25 following items, including those permanently recorded or reproduced by any mechanical
26 or electronic process or written or produced by hand: agreements, contracts,
27 communications, state and federal governmental hearings and reports, correspondence,
28 facsimiles, pleadings, telegrams, memoranda, records, compilations, summaries and

1 records of telephone conversations, summaries and records of personal conversations and
2 interviews, diaries, calendars, notes, notices, invoices, purchase orders, graphs, reports,
3 notebooks, charts, plans, drawings, sketches, maps, summaries and records of meetings
4 and conferences, summaries and reports of investigations and negotiations, summaries
5 and reports of consultants, photographs, motion picture film, microfilm, videotape, tape
6 recordings, brochures, pamphlets, advertising, circulars, press releases, drafts, letters,
7 emails, computer files or memory devices of any kind (including hard drives, software,
8 CD-ROM, RAM, ROM, tape drives, and floppy disks), text message or SMS logs, social
9 media, instant message, or e-mail chat logs, any marginal comments appearing on any
10 documents, and any other original or duplicative writings, recordings, or photographs,
11 whether or not labeled “confidential.”

12 7. “Persons” means any natural persons or any business, legal, or
13 governmental entities or associations or any other cognizable entity, and all other forms
14 of legal entities, whether or not in the employ of any party. The acts and knowledge of a
15 “person” are defined to include the acts and knowledge of that person’s directors,
16 officers, members, employees, representatives, agents, and attorneys.

17 8. “Plaintiffs” means Jane Doe, a minor, by and through parents Helen Doe
18 and James Doe; and Megan Roe, a minor, by and through parents Kate Roe and Robert
19 Roe.

20 9. “Policy” means any policy, procedure, rule, protocol, guideline, regulation,
21 practice, or other principle or course of action as well as any drafts of such policies or
22 communications involved in drafting such policies.

23 10. As used in these requests “any” means “all” and vice versa.

24 11. “And” and “or” means “and” or “or;” that is, the conjunctive or disjunctive
25 and each shall include the other wherever such dual construction will serve to bring
26 within the scope of these discovery requests information or documents that otherwise
27 would not be brought within their scope.

28

1 **REQUEST NO. 3:** All documents and communications concerning Plaintiffs or this
2 action.

3 **REQUEST NO. 4:** All documents and communications you contend support your
4 assertion that banning transgender girls from competing in girls-only school sports
5 remedies past discrimination and provides equal opportunities for women and safety to
6 women athletes. *See* Intervenor-Defendants' Opposition to Plaintiffs' Motion for a
7 Preliminary Injunction at 5, 13.

8 **REQUEST NO. 5:** All documents, policies, and communications concerning sex-based
9 separation in school sports in Arizona.

10 **REQUEST NO. 6:** Without time limitation, all documents and communications,
11 including without limitation data, reports, research, and/or studies, concerning any impact
12 the participation of transgender students in interscholastic and/or intramural sports has or
13 had on non-transgender students, including without limitation: (a) the opportunities for
14 non-transgender students to participate in interscholastic and/or intramural sports and to
15 advance in their respective interscholastic and/or intramural sports, including by
16 obtaining college scholarships; (b) the fairness or preservation of girls' sports; and (c) the
17 safety of non-transgender girls who participate in interscholastic and/or intramural sports,
18 including any injuries incurred as a result of the participation of transgender students on
19 sports teams.

20 **REQUEST NO. 7:** All documents from or exchanged between, and communications
21 with, any representative of any advocacy organization, including without limitation the
22 Alliance Defending Freedom, the Heritage Foundation, Eagle Forum, and the Family
23 Research Council concerning the participation of transgender students in interscholastic
24 and/or intramural sports in Arizona.

25 **REQUEST NO. 8:** For each of the governmental interests you identified in response to
26 Interrogatory No. 6, produce all documents and communications that support each
27 interest.
28

1 **REQUEST NO. 9:** All documents used by you or relied on by you in preparing your
2 Motion to Dismiss, Opposition to Plaintiffs' Motion for a Preliminary Injunction,
3 responses to Plaintiffs' First Set of Interrogatories, and your responses to these Requests
4 for Production.

5
6 Dated: Phoenix, Arizona

7 October 30, 2023

8
9 *s/Colin M. Proksel*

10 _____
Colin M. Proksel (034133)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: cproksel@omlaw.com

11
12
13
14 Jyotin Hamid*
Justin R. Rassi*
Amy C. Zimmerman*
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, New York 10001
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Email: jhamid@debevoise.com
Email: jrassi@debevoise.com
Email: azimmerman@debevoise.com

15
16
17
18
19
20 Amy Whelan*
Rachel Berg*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 343-7679
Facsimile: (415) 392-8442
Email: awhelan@nclrights.org
Email: rberg@nclrights.org

21
22
23
24
25 **Admitted pro hac vice.*

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I served the foregoing document via electronic mail to the following recipients:

Dennis I. Wilenchik
McKay Worthington
WILENCHIK & BARTNESS, PC
diw@wb-law.com
mckayw@wb-law.com

-and-
Maria Syms
Arizona Department of Education
Maria.Syms@azed.gov
Attorneys for Defendant Thomas C. Horne

David C. Potts
Ashley E. Caballero-Daltrey
JONES, SKELTON & HOCHULI, P.L.C.
dpotts@jshfirm.com
adaltrey@jshfirm.com

-and-
Lisa Anne Smith
DECONCINI MCDONALD YETWIN & LACY, P.C.
lasmith@dmyl.com
Attorneys for Defendant The Gregory School

Kristian E. Nelson
LEWIS BRISBOIS BISGAARD & SMITH LLP
kristian.nelson@lewisbrisbois.com
Attorneys for Defendant Arizona Interscholastic Association, Inc.

Jordan T. Ellel
TEMPE TRI-DISTRICT LEGAL SERVICES
jellel@tuhsd.k12.az.us
Counsel for Defendants Toenjes and Kyrene School District

D. John Sauer
Justin D. Smith
JAMES OTIS LAW GROUP, LLC
John.Sauer@james-otis.com
Justin.Smith@james-otis.com
*Attorneys for Intervenor-Defendants
President Petersen and Speaker Toma*

s/Rebecca Aniol

Exhibit 3

1 D. John Sauer, Mo. Bar No. 58721*
2 Justin D. Smith, Mo. Bar No. 63253*
3 James Otis Law Group, LLC
4 13321 North Outer Forty Road, Suite 300
5 St. Louis, Missouri 63017
6 Telephone: (314) 562-0031
7 John.Sauer@james-otis.com

8 *Attorneys for Intervenor-Defendants President Petersen and Speaker Toma*

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

15
16
17 Thomas C. Horne, in his official capacity
18 as State Superintendent of Public
19 Instruction, *et al.*,

**Intervenor-Defendants’ Objections and
Responses to Plaintiffs’ First Set of
Interrogatories**

20 Defendants.
21

22 Intervenor-Defendants Senate President Warren Petersen and Speaker of the House
23 Ben Toma (the “Legislative Leaders”), by and through undersigned counsel, hereby serve
24 their Objections and Responses to Plaintiffs’ First Set of Interrogatories.

25 **INTERROGATORIES**

26 **INTERROGATORY NO. 1:** Identify each person who provided information in preparing
27 your Motion to Dismiss, Opposition to Plaintiffs’ Motion for a Preliminary Injunction, and
28 responses to Plaintiffs’ First Set of Requests for Production of Documents and these

1 Interrogatories, and for each such person, state the following: (a) their name, address, and
2 telephone number; (b) their relationship to you and to Plaintiffs; and (c) a detailed
3 description of the information that they provided.

4 **RESPONSE TO INTERROGATORY NO. 1:** The Legislative Leaders object that this
5 interrogatory seeks attorney work product and mental impressions. *See, e.g., Becker v. TIG Ins.*
6 *Co.*, No. 3:21-CV-05185-JHC, 2022 WL 13925733, at *1 (W.D. Wash. Oct. 24, 2022)
7 (citing cases). The Legislative Leaders further object that this interrogatory is outside the
8 scope permitted by Rule 26(b)(1) because it is not relevant to any party’s claim or defense.

9
10 **INTERROGATORY NO. 2:** Without time limitation, identify any and all student athletes
11 who have contacted you who are playing school sports in Arizona and who feel that they
12 have been treated unfairly or faced unfair or unsafe competition as a result of a transgender
13 girl’s participation in their sport.

14 **RESPONSE TO INTERROGATORY NO. 2:** The Legislative Leaders object to this
15 interrogatory’s lack of time limitation as outside the scope permitted by Rule 26(b)(1)
16 because information from legislative sessions in which S.B. 1165 did not pass is not
17 relevant to any party’s claim or defense, is not proportional to the needs of the case, and
18 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
19 Legislative Leaders further object to the extent this interrogatory seeks information
20 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
21 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative
22 Leaders further object to the extent this request seeks documents protected by the
23 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
24 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
25 object to the definition of “you” to the extent it encompasses other legislators and staff of
26 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

27 Subject to and without waiving these objections, the Legislative Leaders provide
28 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,

1 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
2 Regular Session until the day the Arizona Governor signed S.B. 1165. All testimony
3 received by the Arizona Senate Committee on the Judiciary and Arizona House of
4 Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022
5 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs.
6 *See* Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
7 Legislature, Second Regular Session (Jan. 20, 2022), *at*
8 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B. 1165 before
9 the Arizona House of Representatives Committee on Judiciary, 55th Legislature, Second
10 Regular Session (Mar. 9, 2022), *at*
11 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Correspondence received by
12 President Petersen and Speaker Toma relating to S.B. 1165 is available in the documents
13 produced in response to Plaintiffs’ First Set of Requests for Production of Documents to
14 Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.
15 Intervenor-Defendants will supplement this response if additional responsive, non-
16 privileged information is located.

17
18 **INTERROGATORY NO. 3:** Without time limitation, identify any and all complaints that you
19 have received because of a transgender girl competing with or against students in a girls’ school
20 sports contest, and identify the complainant’s affiliation with the school featured in the complaint.

21 **RESPONSE TO INTERROGATORY NO. 3:** The Legislative Leaders object to this
22 interrogatory’s lack of time limitation as outside the scope permitted by Rule 26(b)(1)
23 because information from legislative sessions in which S.B. 1165 did not pass is not
24 relevant to any party’s claim or defense, is not proportional to the needs of the case, and
25 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
26 Legislative Leaders further object to the extent this interrogatory seeks information
27 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
28 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative

1 Leaders further object to the extent this request seeks documents protected by the
2 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
3 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
4 object to the definition of “you” to the extent it encompasses other legislators and staff of
5 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

6 Subject to and without waiving these objections, the Legislative Leaders provide
7 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
8 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
9 Regular Session until the day the Arizona Governor signed S.B. 1165. All testimony
10 received by the Arizona Senate Committee on the Judiciary and Arizona House of
11 Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022
12 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs.
13 *See* Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
14 Legislature, Second Regular Session (Jan. 20, 2022), *at*
15 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B. 1165 before
16 the Arizona House of Representatives Committee on Judiciary, 55th Legislature, Second
17 Regular Session (Mar. 9, 2022), *at*
18 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Correspondence received by
19 President Petersen and Speaker Toma relating to S.B. 1165 is available in the documents
20 produced in response to Plaintiffs’ First Set of Requests for Production of Documents to
21 Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.
22 Intervenor-Defendants will supplement this response if additional responsive, non-
23 privileged information is located.

24
25 **INTERROGATORY NO. 4:** Without time limitation, identify any and all Arizona
26 student athletes who have reported to you that they have been physically injured by a
27 transgender athlete, including the age and grade of the athletes involved, the sport in which
28 the injury occurred, the date or dates of the alleged injuries, any known witnesses to the

1 alleged injury, and the circumstances surrounding the alleged injury.

2 **RESPONSE TO INTERROGATORY NO. 4:** The Legislative Leaders object to this
3 interrogatory's lack of time limitation as outside the scope permitted by Rule 26(b)(1)
4 because information from legislative sessions in which S.B. 1165 did not pass is not
5 relevant to any party's claim or defense, is not proportional to the needs of the case, and
6 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
7 Legislative Leaders further object to the extent this interrogatory seeks information
8 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
9 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative
10 Leaders further object to the extent this request seeks documents protected by the
11 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
12 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
13 object to the definition of "you" to the extent it encompasses other legislators and staff of
14 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

15 Subject to and without waiving these objections, the Legislative Leaders provide
16 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
17 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
18 Regular Session until the day the Arizona Governor signed S.B. 1165. All testimony
19 received by the Arizona Senate Committee on the Judiciary and Arizona House of
20 Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022
21 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs.
22 *See* Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
23 Legislature, Second Regular Session (Jan. 20, 2022), *at*
24 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B. 1165 before
25 the Arizona House of Representatives Committee on Judiciary, 55th Legislature, Second
26 Regular Session (Mar. 9, 2022), *at*
27 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Correspondence received by
28 President Petersen and Speaker Toma relating to S.B. 1165 is available in the documents

1 produced in response to Plaintiffs' First Set of Requests for Production of Documents to
2 Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.
3 Intervenor-Defendants will supplement this response if additional responsive, non-
4 privileged information is located.

5
6 **INTERROGATORY NO. 5:** Without time limitation, identify all students who
7 participated in or are participating in interscholastic and/or intramural sports in Arizona
8 who have reported to you that they have been denied the opportunity to advance in their
9 respective sports, including but not limited to being denied a spot on a team or failing to
10 obtain a college scholarship, because of students who are transgender participating on
11 sports teams.

12 **RESPONSE TO INTERROGATORY NO. 5:** The Legislative Leaders object to this
13 interrogatory's lack of time limitation as outside the scope permitted by Rule 26(b)(1)
14 because information from legislative sessions in which S.B. 1165 did not pass is not
15 relevant to any party's claim or defense, is not proportional to the needs of the case, and
16 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
17 Legislative Leaders further object to the extent this interrogatory seeks information
18 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
19 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative
20 Leaders further object to the extent this request seeks documents protected by the
21 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
22 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
23 object to the definition of "you" to the extent it encompasses other legislators and staff of
24 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

25 Subject to and without waiving these objections, the Legislative Leaders provide
26 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
27 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
28 Regular Session until the day the Arizona Governor signed S.B. 1165. All testimony

1 received by the Arizona Senate Committee on the Judiciary and Arizona House of
2 Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022
3 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs.
4 See Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
5 Legislature, Second Regular Session (Jan. 20, 2022), at
6 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B. 1165 before
7 the Arizona House of Representatives Committee on Judiciary, 55th Legislature, Second
8 Regular Session (Mar. 9, 2022), at
9 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Correspondence received by
10 President Petersen and Speaker Toma relating to S.B. 1165 is available in the documents
11 produced in response to Plaintiffs' First Set of Requests for Production of Documents to
12 Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.
13 Intervenor-Defendants will supplement this response if additional responsive, non-
14 privileged information is located.

15
16 **INTERROGATORY NO. 6:** Identify all governmental interests that you believe are
17 advanced by Ariz. Rev. Stat. § 15-120.02.

18 **RESPONSE TO INTERROGATORY NO. 6:** The Legislative Leaders object to the
19 definition of “you” to the extent it encompasses other legislators and staff of the Arizona
20 Senate and House of Representatives who are not parties to this lawsuit. Subject to and
21 without waiving this objection, the Legislative Leaders identify the governmental interests
22 that are expressed in S.B. 1165 § 2, the legislative record for S.B. 1165, and all briefing by
23 the Legislative Leaders in this case, including but not limited to:

- 24 • Redressing past discrimination against women in athletics;
- 25 • Promoting fairness and equal opportunities for women in athletics;
- 26 • Providing safety for women in athletics;
- 27 • Providing clear and consistent application of sex separation rules in athletics;
- 28 and

- 1 • Providing public accountability through an elected legislative body for sex
2 separation rules in athletics.

3
4 **INTERROGATORY NO. 7:** For each of the governmental interests you identified in
5 response to Interrogatory No. 6, state all facts that support your contention that Ariz. Rev.
6 Stat. § 15-120.02 advances those governmental interests.

7 **RESPONSE TO INTERROGATORY NO. 7:** The Legislative Leaders object that this
8 interrogatory’s requests for “all facts” is outside the scope permitted by Rule 26(b)(1)
9 because it is not proportional to the needs of the case and Plaintiffs have more convenient,
10 less burdensome, and less expensive access to this information than reproducing it here.
11 The Legislative Leaders and Defendant Horne have filed and cited hundreds of pages of
12 expert declarations, studies, and other evidence that support the governmental interests
13 identified in response to Interrogatory No. 6 and which are too voluminous to reproduce
14 here. The burden on the Intervenor-Defendants of reproducing the requested facts here
15 outweighs its likely benefit. The Legislative Leaders further object to the extent this
16 interrogatory seeks premature disclosure of expert reports, which the Legislative Leaders
17 will produce in accordance with the Court’s Scheduling Order. The Legislative Leaders
18 further object to the definition of “you” to the extent it encompasses other legislators and
19 staff of the Arizona Senate and House of Representatives who are not parties to this lawsuit.

20 Subject to and without waiving this objection, the Legislative Leaders identify and
21 incorporate by reference the facts in the following documents:

- 22 • Facts and studies cited in S.B. 1165 § 2.
23 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support
24 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
25 Injunction.
26 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
27 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.
28 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support

1 of [Intervenors' Proposed] Opposition to Plaintiffs' Motion for a Preliminary
2 Injunction.

- 3 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
4 Further Support of Intervenor-Defendants' Opposition to Plaintiffs' Motion for
5 a Preliminary Injunction.
- 6 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support
7 of Intervenor-Defendants' Opposition to Plaintiffs' Motion for a Preliminary
8 Injunction.
- 9 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
10 Further Support of Intervenor-Defendants' Opposition to Plaintiffs' Motion for
11 a Preliminary Injunction.
- 12 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
13 preliminary injunction hearing.
- 14 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 15 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
16 Horne's Response to Plaintiffs' Motion for Preliminary Injunction.
- 17 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
18 preliminary injunction hearing.
- 19 • Testimony received by the Arizona Senate Committee on the Judiciary and
20 Arizona House of Representatives Committee on the Judiciary in hearings on
21 S.B. 1165 on January 20, 2022 and March 9, 2022, respectively, is publicly
22 available and equally accessible to Plaintiffs. *See* Hearing on S.B. 1165 before
23 the Arizona Senate Committee on the Judiciary, 55th Legislature, Second
24 Regular Session (Jan. 20, 2022), *at*
25 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B.
26 1165 before the Arizona House of Representatives Committee on Judiciary, 55th
27 Legislature, Second Regular Session (Mar. 9, 2022), *at*
28 <https://www.azleg.gov/videoplayer/?eventID=2022031027>.

- 1 • Documents produced in response to Plaintiffs’ First Set of Requests for
2 Production of Documents to Intervenor-Defendants President Warren Peterson
3 [sic] and Speaker Ben Toma.

4 Intervenor-Defendants will supplement this response if additional responsive, non-
5 privileged information is located.

6
7 **INTERROGATORY NO. 8:** Explain how excluding Plaintiffs from competing in girls’
8 school sports in Arizona remedies past discrimination and provides equal opportunities for
9 women and safety to women athletes. *See* Intervenor-Defendants’ Opposition to Plaintiffs’
10 Motion for a Preliminary Injunction at 5, 13.

11 **RESPONSE TO INTERROGATORY NO. 8:** The Legislative Leaders object to this
12 interrogatory to the extent it misstates the law by implying that a statute classifying on the
13 basis of sex must be perfectly tailored. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001); *see*
14 *also United States v. Edge Broad. Co.*, 509 U.S. 418, 427 (1993). The Legislative Leaders
15 further object that the Legislative Leaders have not yet received discovery from Plaintiffs.
16 Subject to and without waiving these objections, the Legislative Leaders identify facts in
17 S.B. 1165 § 2, the legislative record for S.B. 1165, and all briefing by the Legislative
18 Leaders in this case, including but not limited to:

- 19 • Remediating past discrimination and providing equal opportunities for women by
20 preventing displacement of biological females on an athletic team or in an
21 athletic competition by biological males.
22 • Remediating past discrimination and providing equal opportunities for women by
23 preventing biological males from receiving awards, scholarships, or other
24 recognition that otherwise would have been received by a biological female.
25 • Providing safety to women athletes by preventing biological males from
26 competing against biological females in female sports.

27 Intervenor-Defendants will supplement this response if additional responsive, non-
28 privileged information is obtained.

1
2 **INTERROGATORY NO. 9:** Identify all persons involved in drafting, lobbying for,
3 testifying in support of, and/or advancing S.B. 1165 or Ariz. Rev. Stat. § 15-120.02, or any
4 other potential legislation regarding the participation of transgender athletes in Arizona.
5 For each such person, state the following: (a) their name, address, and telephone number;
6 (b) their relationship to you and/or Plaintiffs; and (c) a detailed description of their
7 involvement.

8 **RESPONSE TO INTERROGATORY NO. 9:** The Legislative Leaders object to the
9 extent this interrogatory, and its requests relating to “drafting,” “lobbying for,” and
10 “advancing,” seek information protected by the legislative privilege. *See, e.g., Lee v. City*
11 *of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290
12 (9th Cir. 2011). The Legislative Leaders further object to the extent this interrogatory seeks
13 information protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*,
14 No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The
15 Legislative Leaders further object because who testified in support of S.B. 1165 is public
16 information and Plaintiffs thus have more convenient, less burdensome, and less expensive
17 access to this information than reproducing it here. The Legislative Leaders further object
18 to this interrogatory’s relevant time period, which according to Instruction #9 is January 1,
19 2015 to the date of the response, as outside the scope permitted by Rule 26(b)(1) because
20 information from legislative sessions in which S.B. 1165 did not pass is not relevant to any
21 party’s claim or defense, is not proportional to the needs of the case, and imposes an undue
22 burden on the Legislative Leaders that outweighs its benefit. The Legislative Leaders
23 further object to this interrogatory because “advancing” is vague and ambiguous. The
24 Legislative Leaders further object to this interrogatory because “any other potential
25 legislation” is outside the scope permitted by Rule 26(b)(1) since legislation other than S.B.
26 1165 is not relevant to any party’s claim or defense, and in addition is vague and ambiguous
27 about what is considered “potential legislation.”

28 Subject to and without waiving these objections, the Legislative Leaders provide

1 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
2 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
3 Regular Session until the day the Arizona Governor signed S.B. 1165.

4 1. Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
5 Legislature, Second Regular Session (Jan. 20, 2022), *at*
6 <https://www.azleg.gov/videoplayer/?eventID=2022011057>. Witnesses who
7 testified in favor of S.B. 1165 included:

- 8 a. Matt Sharp
- 9 b. Amber Colon
- 10 c. Christine Pierce
- 11 d. Jadis Argiope
- 12 e. Nicole Eidson
- 13 f. Linda Rizzo

14 2. Hearing on S.B. 1165 before the Arizona House of Representatives Committee on
15 Judiciary, 55th Legislature, Second Regular Session (Mar. 9, 2022), *at*
16 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Witnesses who
17 requested to speak in favor of S.B. 1165 included:

- 18 a. Cathi Herrod
- 19 b. Cynthia Couture
- 20 c. Barbara Wyllie
- 21 d. Julie Egea
- 22 e. Carol Rogala
- 23 f. Amber Zenczak
- 24 g. Jadis Argiope
- 25 h. James Bissonett
- 26 i. Ron Johnson
- 27 j. Kara Leong
- 28 k. Shirley Dye

- 1 l. Buffalo Rick Galeener
- 2 m. Kay Reardon
- 3 n. Sandi Bartlett
- 4 o. Jere Fredenburgh
- 5 p. Rose Sperry
- 6 q. Richard Rutkowski
- 7 r. Susan Hicks
- 8 s. Dennis Genge
- 9 t. Dennis Beals
- 10 u. Edward Treick
- 11 v. Jennifer Wellsman
- 12 w. Brent Backus
- 13 x. Todd Maxcy
- 14 y. George Kundert
- 15 z. Mike MacDonald
- 16 aa. Mark Logan
- 17 bb. Richard Sperry
- 18 cc. Steven Pettigrew
- 19 dd. Terrence Gillespie
- 20 ee. Jerry Clingman
- 21 ff. Theresa Logan
- 22 gg. Charles McCain
- 23 hh. Geline Coulbourne
- 24 ii. Sheryl Scala
- 25 jj. Dan Van Dusen
- 26 kk. Baron Benham
- 27 ll. Rachel Bauer
- 28 mm. Chuck Kirkhuff

1 nn. Paul Rowe
2 oo. Stephen Harris
3 pp. Mary Morris
4 qq. Corinne Haynes
5 rr. Valerie Giramberk
6 ss. Bob Jolley
7 tt. Barry Graham
8 uu. Richard Reitz
9 vv. Jeffrey Scott Christopher
10 ww. Margie Heffnleder
11 xx. Merrienne Gelsdorf
12 yy. Cindy New
13 zz. Dorie Duff
14 aaa. Kathy Walker
15 bbb. Marcia Barlow
16 ccc. Lois Scale
17 ddd. Charmaine Roth
18 eee. Nikki Colletti
19 fff. Dianna Gates
20 ggg. Sheryl Schauer
21 hhh. Linda Wix
22 iii. James McFadzean
23 jjj. Belva Barrick
24 kkk. David Genge
25 ll. Hannah Toth
26 mmm. Lynn Ludwig
27 nnn. Linda Barnes
28 ooo. Carol Wyatt

1 ppp. Beverly Ross
2 qqq. Mary Grace Werner
3 rrr. Diana Dare
4 sss. Bee Gordon
5 ttt. Scott Kummerfeldt
6 uuu. Alison Morris
7 vvv. Vicki Smith
8 www. Lorelei Nelson-DeNapoli
9 xxx. Tami Smith
10 yyy. Marcia Weiss
11 zzz. Barbara Jennings
12 aaaa. Craig Stephan
13 bbbb. Catherine Tunget
14 cccc. Barbara Smith
15 dddd. Phillip Klein
16 eeee. Rachel Walden
17 ffff. Peggy Bricker
18 gggg. John Pio
19 hhhh. Linda Pio
20 iiii. Carrie Heikkala
21 jjjj. Diane Elrod
22 kkkk. Jill Dunican
23 llll. Robert Louchheim
24 mmmm. JL Simpson
25 nnnn. Henry Ganster
26 oooo. Michelle Sullivan
27 pppp. Denise Lockwood
28 qqqq. Ruth Edwards

1 rrrr. Reid Gottschalk
2 ssss. Kristine Rodriguez
3 tttt. Annie Gold
4 uuuu. Claire Haggerty
5 vvvv. Michael Sullivan
6 wwww. Carrie Cox
7 xxxx. James Roth
8 yyyy. Christine Pierce
9 zzzz. Janis Flavin
10 aaaaa. E Seeley
11 bbbbb. D Seeley
12 ccccc. Lisa Fink
13 ddddd. C David
14 eeeee. Cathi Herrod
15 fffff. Maral Moffitt
16 ggggg. George Jennings
17 hhhhh. Douglas Jennings
18 iiiii. Mary Ganster
19 jjjjj. John Justus
20 kkkkk. Leslie Morrison
21 lllll. David Seligson
22 mmmmm. Wendy Jonessee

23 3. Individuals identified in documents produced in response to Plaintiffs' First Set of
24 Requests for Production of Documents to Intervenor-Defendants President Warren
25 Peterson [*sic*] and Speaker Ben Toma.
26
27
28

1 Dated: November 29, 2023

Respectfully submitted,

2
3 JAMES OTIS LAW GROUP, LLC

4 /s/ Justin D. Smith

5 D. John Sauer, Mo. Bar No. 58721*

6 Justin D. Smith, Mo. Bar No. 63253*

7 13321 North Outer Forty Road, Suite 300

8 St. Louis, Missouri 63017

9 (816) 678-2103

10 Justin.Smith@james-otis.com

11 * *pro hac vice*

12 *Attorneys for Intervenor-Defendants*

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Exhibit 4

1 D. John Sauer, Mo. Bar No. 58721*
2 Justin D. Smith, Mo. Bar No. 63253*
3 James Otis Law Group, LLC
4 13321 North Outer Forty Road, Suite 300
5 St. Louis, Missouri 63017
6 Telephone: (314) 562-0031
7 John.Sauer@james-otis.com

8 *Attorneys for Intervenor-Defendants President Petersen and Speaker Toma*

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.

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

18 Defendants.
19
20
21

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

**Intervenor-Defendants’ Objections and
Responses to Plaintiffs’ First Set of
Requests for Production of Documents**

22 Intervenor-Defendants Senate President Warren Petersen and Speaker of the House
23 Ben Toma (the “Legislative Leaders”), by and through undersigned counsel, hereby serve
24 their Objections and Responses to Plaintiffs’ First Set of Requests for Production of
25 Documents.

26 **DOCUMENT REQUESTS**

27 **REQUEST NO. 1:** All documents and communications concerning S.B. 1165 or Ariz.
28 Rev. Stat. § 15-120.02, including without limitation documents and communications

1 concerning its enactment, legislative history, the governmental interests that are allegedly
2 advanced by S.B. 1165 or Ariz. Rev. Stat. § 15-120.02, its development, interpretation, and
3 implementation, any complaints, concerns, emails, and texts regarding the impact of S.B.
4 1165, Ariz. Rev. Stat. § 15-120.02, and any other legislation that was considered regarding
5 the participation of transgender athletes in Arizona.

6 **RESPONSE TO REQUEST NO. 1:** The Legislative Leaders object to the extent this
7 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
8 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
9 2011). The Legislative Leaders further object to the extent this request seeks documents
10 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
11 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
12 Leaders further object to the extent this request seeks documents protected by the attorney-
13 client privilege and/or the work product privilege. The Legislative Leaders further object
14 because the legislative history for S.B. 1165 is public information and Plaintiffs thus have
15 more convenient, less burdensome, and less expensive access to this information than
16 reproducing it here. The Legislative Leaders further object to this request’s relevant time
17 period, which according to Instruction #8 is January 1, 2015 to the date of the response, as
18 outside the scope permitted by Rule 26(b)(1) because documents from legislative sessions
19 in which S.B. 1165 did not pass is not relevant to any party’s claim or defense and is not
20 proportional to the needs of the case. The Legislative Leaders further object to this request
21 because “any other legislation that was considered” is outside the scope permitted by Rule
22 26(b)(1) since legislation other than S.B. 1165 is not relevant to any party’s claim or
23 defense, and in addition is vague and ambiguous about what is “legislation that was
24 considered.”

25 Subject to and without waiving these objections, the Legislative Leaders are
26 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which
27 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular
28 Session until the day the Arizona Governor signed S.B. 1165.

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REQUEST NO. 2: Without time limitation, all documents, policies, and communications concerning the participation of transgender students in any school sports at any level in Arizona, including without limitation communications between you and any school district; complaints or concerns you have received; and briefing materials provided to you.

RESPONSE TO REQUEST NO. 2: The Legislative Leaders object to the extent this request seeks documents protected by the legislative privilege, such as “briefing materials.” *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks documents like “briefing materials” protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further object to the extent this request seeks documents protected by the attorney-client privilege and/or the work product privilege. The Legislative Leaders further object to this request’s lack of time limitation as outside the scope permitted by Rule 26(b)(1) because documents from legislative sessions in which S.B. 1165 did not pass is not relevant to any party’s claim or defense and is not proportional to the needs of the case.

Subject to and without waiving these objections, the Legislative Leaders are producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular Session until the day the Arizona Governor signed S.B. 1165.

REQUEST NO. 3: All documents and communications concerning Plaintiffs or this action.

RESPONSE TO REQUEST NO. 3: The Legislative Leaders object to the extent this request seeks documents for “this action” protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d

1 278, 290 (9th Cir. 2011). The Legislative Leaders further object to the extent this request
2 seeks documents for “this action” protected by the deliberative process privilege. *Fabbrini*
3 *v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal.
4 June 19, 2008). The Legislative Leaders further object to the extent this request seeks
5 documents protected by the attorney-client privilege and/or the work product privilege.
6 The Legislative Leaders further object to this request’s relevant time period, which
7 according to Instruction #8 is January 1, 2015 to the date of the response, as outside the
8 scope permitted by Rule 26(b)(1) because documents from legislative sessions in which
9 S.B. 1165 did not pass is not relevant to any party’s claim or defense and is not proportional
10 to the needs of the case.

11 Subject to and without waiving these objections, the Legislative Leaders are
12 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which
13 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular
14 Session until the day the Arizona Governor signed S.B. 1165.

15
16 **REQUEST NO. 4:** All documents and communications you contend support your
17 assertion that banning transgender girls from competing in girls-only school sports
18 remedies past discrimination and provides equal opportunities for women and safety to
19 women athletes. *See* Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
20 Preliminary Injunction at 5, 13.

21 **RESPONSE TO REQUEST NO. 4:** The Legislative Leaders further object that this
22 request for “all documents and communications” is outside the scope permitted by Rule
23 26(b)(1) because it is not proportional to the needs of the case and Plaintiffs have more
24 convenient, less burdensome, and less expensive access to these documents than
25 reproducing them here. The Legislative Leaders and Defendant Horne have filed and cited
26 hundreds of pages of expert declarations, studies, and other evidence that are too
27 voluminous to reproduce here. The burden of reproducing the requested documents
28 outweighs its likely benefit. The Legislative Leaders further object to the extent this

1 request seeks premature disclosure of expert reports, which the Legislative Leaders will
2 produce in accordance with the Court’s Scheduling Order. The Legislative Leaders further
3 object to the definition of “you” to the extent it encompasses other legislators and staff of
4 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

5 Subject to and without waiving these objections, the Legislative Leaders identify
6 and incorporate by reference the following documents and the documents cited within these
7 documents:

- 8 • Facts and studies cited in S.B. 1165 § 2.
- 9 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support
10 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
11 Injunction.
- 12 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
13 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.
- 14 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support
15 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
16 Injunction.
- 17 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
18 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
19 a Preliminary Injunction.
- 20 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support
21 of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
22 Injunction.
- 23 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
24 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
25 a Preliminary Injunction.
- 26 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
27 preliminary injunction hearing.
- 28 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.

- 1 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
- 2 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 3 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
- 4 preliminary injunction hearing.
- 5 • Documents produced in response to Plaintiffs’ First Set of Requests for
- 6 Production of Documents to Intervenor-Defendants President Warren Peterson
- 7 [sic] and Speaker Ben Toma.

8 Intervenor-Defendants will supplement this response if additional responsive, non-
9 privileged documents are located.

10
11 **REQUEST NO. 5:** All documents, policies, and communications concerning sex-based
12 separation in school sports in Arizona.

13 **RESPONSE TO REQUEST NO. 5:** The Legislative Leaders object to the extent this
14 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
15 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
16 2011). The Legislative Leaders further object to the extent this request seeks documents
17 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
18 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
19 Leaders further object to the extent this request seeks documents protected by the attorney-
20 client privilege and/or the work product privilege. The Legislative Leaders further object
21 to this request’s relevant time period, which according to Instruction #8 is January 1, 2015
22 to the date of the response, as outside the scope permitted by Rule 26(b)(1) because
23 documents from legislative sessions in which S.B. 1165 did not pass is not relevant to any
24 party’s claim or defense and is not proportional to the needs of the case.

25 Subject to and without waiving these objections, the Legislative Leaders are
26 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which
27 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular
28 Session until the day the Arizona Governor signed S.B. 1165.

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REQUEST NO. 6: Without time limitation, all documents and communications, including without limitation data, reports, research, and/or studies, concerning any impact the participation of transgender students in interscholastic and/or intramural sports has or had on non-transgender students, including without limitation: (a) the opportunities for non-transgender students to participate in interscholastic and/or intramural sports and to advance in their respective interscholastic and/or intramural sports, including by obtaining college scholarships; (b) the fairness or preservation of girls’ sports; and (c) the safety of non-transgender girls who participate in interscholastic and/or intramural sports, including any injuries incurred as a result of the participation of transgender students on sports teams.

RESPONSE TO REQUEST NO. 6: The Legislative Leaders object to the extent this request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative Leaders further object to the extent this request seeks documents protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further object to the extent this request seeks documents protected by the attorney-client privilege and/or the work product privilege. The Legislative Leaders further object that this request for “all documents and communications” is outside the scope permitted by Rule 26(b)(1) because it is not proportional to the needs of the case and Plaintiffs have more convenient, less burdensome, and less expensive access to these documents than reproducing them here. The Legislative Leaders and Defendant Horne have filed and cited hundreds of pages of expert declarations, studies, and other evidence that are too voluminous to reproduce here. The burden of reproducing the requested documents outweighs its likely benefit. The Legislative Leaders further object to the extent this request seeks premature disclosure of expert reports, which the Legislative Leaders will produce in accordance with the Court’s Scheduling Order.

Subject to and without waiving these objections, the Legislative Leaders identify

1 and incorporate by reference the following documents and the documents cited within these
2 documents:

- 3 • Facts and studies cited in S.B. 1165 § 2.
- 4 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support
5 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
6 Injunction.
- 7 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
8 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.
- 9 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support
10 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
11 Injunction.
- 12 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
13 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
14 a Preliminary Injunction.
- 15 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support
16 of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
17 Injunction.
- 18 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
19 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
20 a Preliminary Injunction.
- 21 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
22 preliminary injunction hearing.
- 23 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 24 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
25 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 26 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
27 preliminary injunction hearing.
- 28 • Documents produced in response to Plaintiffs’ First Set of Requests for

1 Production of Documents to Intervenor-Defendants President Warren Peterson
2 [sic] and Speaker Ben Toma.

3 Intervenor-Defendants will supplement this response if additional responsive, non-
4 privileged documents are located.

5

6 **REQUEST NO. 7:** All documents from or exchanged between, and communications with,
7 any representative of any advocacy organization, including without limitation the Alliance
8 Defending Freedom, the Heritage Foundation, Eagle Forum, and the Family Research
9 Council concerning the participation of transgender students in interscholastic and/or
10 intramural sports in Arizona.

11 **RESPONSE TO REQUEST NO. 7:** The Legislative Leaders object to the extent this
12 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
13 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
14 2011). The Legislative Leaders further object to the extent this request seeks documents
15 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
16 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
17 Leaders further object to the extent this request seeks documents protected by the attorney-
18 client privilege and/or the work product privilege. The Legislative Leaders further object
19 to this request's relevant time period, which according to Instruction #8 is January 1, 2015
20 to the date of the response, as outside the scope permitted by Rule 26(b)(1) because
21 documents from legislative sessions in which S.B. 1165 did not pass is not relevant to any
22 party's claim or defense and is not proportional to the needs of the case.

23

24 Subject to and without waiving these objections, the Legislative Leaders are
25 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which
26 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular
27 Session until the day the Arizona Governor signed S.B. 1165.

28

REQUEST NO. 8: For each of the governmental interests you identified in response to

1 Interrogatory No. 6, produce all documents and communications that support each
2 interest.

3 **RESPONSE TO REQUEST NO. 8:** The Legislative Leaders object to the extent this
4 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
5 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
6 2011). The Legislative Leaders further object to the extent this request seeks documents
7 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
8 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
9 Leaders further object to the extent this request seeks documents protected by the attorney-
10 client privilege and/or the work product privilege. The Legislative Leaders further object
11 that this request for “all documents and communications” is outside the scope permitted by
12 Rule 26(b)(1) because it is not proportional to the needs of the case and Plaintiffs have
13 more convenient, less burdensome, and less expensive access to these documents than
14 reproducing them here. The Legislative Leaders and Defendant Horne have filed and cited
15 hundreds of pages of expert declarations, studies, and other evidence that are too
16 voluminous to reproduce here. The burden of reproducing the requested documents
17 outweighs its likely benefit. The Legislative Leaders further object to the extent this
18 request seeks premature disclosure of expert reports, which the Legislative Leaders will
19 produce in accordance with the Court’s Scheduling Order.

20 Subject to and without waiving these objections, the Legislative Leaders identify
21 and incorporate by reference the following documents and the documents cited within these
22 documents:

- 23 • Facts and studies cited in S.B. 1165 § 2.
- 24 • Doc. 82-1 – Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in support
25 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
26 Injunction.
- 27 • Doc. 82-2 – Declaration of James M. Cantor, Ph.D., in Support of [Intervenors’
28 Proposed] Opposition to Plaintiffs’ Motion for a Preliminary Injunction.

- 1 • Doc. 82-3 – Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support
2 of [Intervenors’ Proposed] Opposition to Plaintiffs’ Motion for a Preliminary
3 Injunction.
- 4 • Doc. 87-1 – Rebuttal Declaration of Dr. Gregory A. Brown, Ph.D., FACSM in
5 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
6 a Preliminary Injunction.
- 7 • Doc. 87-2 – Rebuttal Declaration of James M. Cantor, Ph.D., in Further Support
8 of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
9 Injunction.
- 10 • Doc. 87-3 – Supplemental Declaration of Dr. Chad Carlson, M.D., FACSM in
11 Further Support of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for
12 a Preliminary Injunction.
- 13 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
14 preliminary injunction hearing.
- 15 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 16 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
17 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 18 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
19 preliminary injunction hearing.
- 20 • Documents produced in response to Plaintiffs’ First Set of Requests for
21 Production of Documents to Intervenor-Defendants President Warren Peterson
22 [*sic*] and Speaker Ben Toma.

23 Intervenor-Defendants will supplement this response if additional responsive, non-
24 privileged documents are located.

25
26 **REQUEST NO. 9:** All documents used by you or relied on by you in preparing your
27 Motion to Dismiss, Opposition to Plaintiffs’ Motion for a Preliminary Injunction,
28 responses to Plaintiffs’ First Set of Interrogatories, and your responses to these Requests

1 for Production.

2 **RESPONSE TO REQUEST NO. 9:** The Legislative Leaders object that this request seeks
3 attorney work product and mental impressions. *See, e.g., Becker v. TIG Ins. Co.*, No. 3:21-
4 CV-05185-JHC, 2022 WL 13925733, at *1 (W.D. Wash. Oct. 24, 2022) (citing cases).
5 The Legislative Leaders further object that this request is outside the scope permitted by
6 Rule 26(b)(1) because it is not relevant to any party's claim or defense.

7
8 Dated: November 29, 2023

Respectfully submitted,

9
10 JAMES OTIS LAW GROUP, LLC

11 /s/ Justin D. Smith

12 D. John Sauer, Mo. Bar No. 58721*

13 Justin D. Smith, Mo. Bar No. 63253*

14 13321 North Outer Forty Road, Suite 300

15 St. Louis, Missouri 63017

16 (816) 678-2103

17 Justin.Smith@james-otis.com

18 * *pro hac vice*

19 *Attorneys for Intervenor-Defendants*
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Exhibit 5

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
1	LLPRIV 000001	LLPRIV 000001	3/23/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Ben Toma <btoma@azleg.gov>]		Please Support SB 1165	Legislative Privilege	Communication from third party providing information to legislators pertinent to pending legislation.
2	LLPRIV 000002	LLPRIV 000005	3/23/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Ben Toma <btoma@azleg.gov>]		Family Issue Fact Sheet for the Save Women's Sports Act <f22_01_Save-Womens-Sports-Act_Final.pdf> [attachment to LLPRIV000001]	Legislative Privilege	Document from third party providing information to legislators pertinent to pending legislation.
3	LLPRIV 000006	LLPRIV 000006	3/15/2022	Danny Frank <DFrank@azleg.gov>	".All House Users" <AllHouseUsers@azleg.gov>		Third Read Consent Calendar #8 Protests	Legislative Privilege	Communication from legislative staff providing information to legislators and legislative staff pertinent to pending legislation.
4	LLPRIV 000007	LLPRIV 000008	3/23/2022	Danny Frank <DFrank@azleg.gov>	".All House Users" <AllHouseUsers@azleg.gov>		COW Calendar for Thurs. 3/24/2022 [redacted].	Legislative Privilege	Communication from legislative staff providing information to legislators and legislative staff pertinent to pending legislation.
5	LLPRIV 000009	LLPRIV 000009	3/23/2022	Danny Frank <DFrank@azleg.gov>	".All House Users" <AllHouseUsers@azleg.gov>		Arizona House of Representatives Active Calendar Committee of the Whole for March 24, 2022 <324COW1_2R.pdf> [attachment to LLPRIV000007]	Legislative Privilege	Document from legislative staff providing information to legislators and legislative staff pertinent to pending legislation.

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
6	LLPRIV 000010	LLPRIV 000010	3/14/2022	Leo Biasiucci <LBiasiucci@azleg.gov>	".HMAJMEMS" <MMAJMEMS@azleg.gov>	".HMAJSECS" <HMAJSECS@azleg.gov>, ".House Majority Policy Staff" <HouseMajorityStaff@azleg.gov>, ".House Research Staff" <HouseResearchStaff@azleg.gov>, ".Chief Clerk's" <cclerks@azleg.gov>	Caucus Information for 03/15/22	Legislative Privilege	Communication from legislator providing information to other legislators and legislative staff pertinent to pending legislation.
7	LLPRIV 000011	LLPRIV 000070	3/14/2022	Leo Biasiucci <LBiasiucci@azleg.gov>	".HMAJMEMS" <MMAJMEMS@azleg.gov>	".HMAJSECS" <HMAJSECS@azleg.gov>, ".House Majority Policy Staff" <HouseMajorityStaff@azleg.gov>, ".House Research Staff" <HouseResearchStaff@azleg.gov>, ".Chief Clerk's" <cclerks@azleg.gov>	Arizona House of Representatives Caucus Agenda for March 15, 2022 <Caucus_Packet_9_031522_.docx> [attachment to LLPRIV000010]	Legislative Privilege	Document from legislator providing information to other legislators and legislative staff pertinent to pending legislation.

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
8	LLPRIV 000071	LLPRIV 000071	1/24/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Consent Calendar for Monday, January 24, 2022	Legislative Privilege	Communication from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
9	LLPRIV 000072	LLPRIV 000072	1/24/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Arizona State Senate Unanimous Consent Calendar for January 24, 2022 <124CONSENT1_2.docx> [attachment to LLPRIV000071]	Legislative Privilege	Document from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
10	LLPRIV 000073	LLPRIV 000073	1/31/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Caucus Calendar for Tuesday, February 1, 2022	Legislative Privilege	Communication from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
11	LLPRIV 000074	LLPRIV 000077	1/31/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Senate Caucus Calendar for February 1, 2022 <21CAUCUS1_125.docx> [attachment to LLPRIV000073]	Legislative Privilege	Document from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
12	LLPRIV 000078	LLPRIV 000078	2/2/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Third Reading #2 for Today	Legislative Privilege	Communication from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
13	LLPRIV 000079	LLPRIV 000079	2/2/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Arizona State Senate Third Reading #2 for February 2, 2022 <223RD2_2R.docx> [attachment to LLPRIV000078]	Legislative Privilege	Document from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
14	LLPRIV 000080	LLPRIV 000080	1/20/2022	Nancy Barto <NBarto@azleg.gov>	Warren Petersen <wpetersen@azleg.gov>	Wendy Rogers <WRogers@azleg.gov>, Vince Leach <VLeach@azleg.gov>, "Sonny Borrelli" <sborrelli@azleg.gov>	Fw: Womens Sports Talking pts	Legislative Privilege	Communication from legislator providing information to other legislators pertinent to pending legislation.
15	LLPRIV 000081	LLPRIV 000090	1/20/2022	Nancy Barto <NBarto@azleg.gov>	Warren Petersen <wpetersen@azleg.gov>	Wendy Rogers <WRogers@azleg.gov>, Vince Leach <VLeach@azleg.gov>, "Sonny Borrelli" <sborrelli@azleg.gov>	Save Women's Sports Act 2022 Talking Points <2022_SWS_Act.12.2021_TPs.docx> [attachment to LLPRIV000080]	Legislative Privilege; Deliberative Process Privilege	Document from legislator providing information to other legislators pertinent to pending legislation. Document also was part of the decision-making process and contributed to the legislative action.
16	LLPRIV 000091	LLPRIV 000091	2/1/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		COW Calendar for Wednesday, February 2, 2022	Legislative Privilege	Communication from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.
17	LLPRIV 000092	LLPRIV 000092	2/1/2022	Susan Aceves <saceves@azleg.gov>	".ALLSUSER" <ALLSUSER@azleg.gov>		Arizona State Senate Active Calendar Committee of the Whole for February 2, 2022 <22COW1_2R.docx> [attachment to LLPRIV000091]	Legislative Privilege	Document from legislative staff providing information to other legislators and legislative staff pertinent to pending legislation.

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
18	LLPRIV 000093	LLPRIV 000093	1/17/2022	Vince Leach <VLeach@azleg.gov>	Stephenie Murphy <stepheniemurphy@hotmail.com>, Nancy Barto <NBarto@azleg.gov>, "sborelli@azleg.gov" <sborelli@azleg.gov>, Wendy Rogers <WRogers@azleg.gov>, Warren Petersen <wpetersen@azleg.gov>		Re: SB 1165	Legislative Privilege	Communication from legislator to other legislators and third party pertinent to pending legislation.
19	LLPRIV 000094	LLPRIV 000094	1/19/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Warren Petersen <wpetersen@azleg.gov>]		CAP- Supported SB 1165 on Judiciary Calendar Thursday, January 20	Legislative Privilege	Communication from third party providing information to legislators pertinent to pending legislation.
20	LLPRIV 000095	LLPRIV 000098	1/19/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Warren Petersen <wpetersen@azleg.gov>]		Family Issue Fact Sheet for the Save Women's Sports Act <f22_01_Save-Womens-Sports-Act_Final.pdf> [attachment to LLPRIV000094]	Legislative Privilege	Document from third party providing information to legislators pertinent to pending legislation.
21	LLPRIV 000099	LLPRIV 000099	2/1/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Warren Petersen <wpetersen@azleg.gov>]		Please support SB 1165 on the Senate Floor	Legislative Privilege	Communication from third party providing information to legislators pertinent to pending legislation.

Legislative Leaders Privilege Log

November 29, 2023

Doc. #	Bates Start	Bates End	Date	From	To	Cc	Subject	Privilege	Description
22	LLPRIV 000100	LLPRIV 000103	2/1/2022	Dalton Abbitt <dabbitt@azpolicy.org>	Undisclosed recipients [received by Warren Petersen <wpetersen@azleg.gov>]		Family Issue Fact Sheet for the Save Women's Sports Act <f22_01_Save-Womens- Sports-Act_Final.pdf> [attachment to LLPRIV000099]	Legislative Privilege	Document from third party providing information to legislators pertinent to pending legislation.

Exhibit 6

January 2, 2024

BY EMAIL

D. John Sauer
Justin D. Smith
James Otis Law Group, LLC
13321 North Outer Forty Road, Suite 300
St. Louis, Missouri 63017

**Re: *Jane Doe, et al. v. Thomas Horne, et al.*,
Case No. 4:23-cv-00185-JGZ**

Dear Counsel,

We write on behalf of Plaintiffs Jane Doe and Megan Roe (“Plaintiffs”) to address the deficient responses by Intervenor-Defendants Senate President Warren Petersen and Speaker of the House Ben Toma (“Intervenor-Defendants”) to Plaintiffs’ discovery requests set forth in Plaintiffs’ First Set of Interrogatories dated October 30, 2023 (“Interrogatories”) and Plaintiffs’ First Set of Requests for Production of Documents dated October 30, 2023 (“RFPs” or the “Requests”). As explained further below, Intervenor-Defendants must revise their Responses to Plaintiffs’ Interrogatories and RFPs and promptly produce the improperly withheld documents and information described below. Intervenor-Defendants must also promptly review and revise their privilege log to remedy the deficiencies set out herein. Plaintiffs reserve all rights to raise additional deficiencies and to seek the Court’s assistance as necessary should those deficiencies remain unresolved.

1. Intervenor-Defendants Raise Improper Legislative and Deliberative Process Privilege Objections

Intervenor-Defendants broadly and repeatedly assert legislative privilege and deliberative process privilege in their Responses to Plaintiffs’ Interrogatories, Responses to Plaintiffs’ RFPs, and privilege log. Neither privilege is properly asserted.

a. Intervenor-Defendants Have Waived Legislative Privilege

Intervenor-Defendants assert legislative privilege in response to Plaintiffs’ Interrogatories Nos. 2–5 and 9, Plaintiffs’ Requests Nos. 1–3 and 5–8, and as the basis to withhold every document—Nos. 1–22—listed in their privilege log. However, Intervenor-Defendants have waived legislative privilege by choosing to intervene in this lawsuit and asserting a “unique interest in defending the constitutionality of” Ariz. Rev. Stat. § 15-120.02. *See* Dkt. 19, at 1.

Courts in this Circuit have already rejected the same claim to legislative privilege made by Speaker Toma and President Petersen in analogous circumstances in which they chose to intervene in a suit in defense of the laws they passed. *See Mi Familia Vota v. Fontes*, 2023 WL 8183557, at *2 (D. Ariz. Sept. 14, 2023) (holding that Intervenor Ben Toma and Warren Petersen waived their legislative privilege, and could be deposed about their involvement in the voting laws’ legislative process, because they sought to “fully defend the laws passed by the legislature” and put their own motives at issue when denying allegations of discriminatory intent).¹ This case is no different.

As a practical matter, Intervenor-Defendants cannot “actively participate in this litigation yet avoid the burden of discovery regarding their legislative activities.” *Id.* at *17; *Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001) (rejecting legislator-intervenor’s legislative privilege argument because they incorrectly asserted the privilege “which would allow them to continue to actively participate in litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with, and most likely, appeal from every adverse order”). Likewise, as in *Mi Familia Vota*, Intervenor-Defendants are full participants in the present litigation and seek to defend Ariz. Rev. Stat. § 15-120.02 against allegations of discriminatory intent. Intervenor-Defendants have thus waived legislative privilege.

b. Deliberative Process Privilege Does Not Apply

Nor does deliberative process privilege, which Intervenor-Defendants assert in response to Plaintiffs’ Interrogatories Nos. 2–5 and 9, Plaintiffs’ Requests Nos. 1–3 and 5–8, and as the basis to withhold Document No. 15 in their privilege log, apply. As a threshold matter, deliberative process privilege is well understood, including in the Ninth Circuit, as an executive privilege. *See, e.g., Assembly of State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (explaining that the “underlying purpose of the deliberative process privilege is to ensure that *agencies* are not forced to “operate in a fishbowl”); *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (“The ultimate purpose of the privilege is to protect the quality of *agency* decisions.”) (emphasis added).

¹ Despite Intervenor Toma’s and Petersen’s attempts to avoid their discovery obligations, the Ninth Circuit first granted, then lifted Intervenor’s stay application, *sub nom. Representatives v. United States Dist. Ct. for the Dist. Of Ariz. (In re Toma)*, No. 23-70179 (9th Cir. 2023), and the Supreme Court ultimately denied Intervenor’s emergency stay application, ensuring that the District Court’s holding remains intact. *See Toma v. United States Dist. Ct.*, _ S. Ct. _ (Nov. 27, 2023).

Moreover, even if the deliberative process privilege applied to legislative acts, *all* of the relevant factors that courts assess in determining whether deliberative process privilege should be overcome weigh in favor of disclosure. *See Toomey v. Arizona*, 2021 WL 1545990, at *2–4 (D. Ariz. Apr. 20, 2021) (listing the relevant factors—the relevance of the evidence, the availability of other evidence, the government’s role in the litigation, and the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions—and finding, in analogous circumstances to the present case, that all four factors favored disclosure).

Disclosure is necessary and particularly important where, as here, the government’s intent is at issue. *Id.* at *3 (noting that if “the government itself is accused of wrongdoing, then the privilege . . . might shield government malfeasance”); *see also In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (“If the plaintiff’s cause of action is directed at the government’s intent, . . . it makes no sense to permit the government to use the privilege as a shield.”). Intervenor-Defendants can not rely on deliberative process privilege to skirt their discovery obligations, especially where apparent concerns over the ability of the legislature to hold candid discussions may serve as a veil behind which legislators instead reveal discriminatory intent.

Accordingly, Intervenor-Defendants must promptly produce any documents and information improperly withheld on the basis of these privileges and accordingly revise their Responses and privilege log.

2. Intervenor-Defendants Improperly Limit their Responses to the 2022 Legislative Session

Intervenor-Defendants have improperly asserted an objection to Interrogatories Nos. 2–5 and 9, and Requests Nos. 1–3, 5, and 7 regarding the timeframe or lack of timeframe specified. Contrary to Intervenor-Defendants’ assertion, Plaintiffs are entitled to information outside of the July 1, 2021 to March 30, 2022 timeframe—in other words, outside of the limited parameters of the Fifty-fifth Legislature-Second Regular Session. There is no reason to believe that all or even some of the requested information, which is necessary to demonstrate the Parties’ claims and defenses, would fall within the timeframe of a single legislative session. Moreover, a very similar bill, H.B. 2706, was proposed in the Arizona Legislature in 2020. Information regarding H.B. 2706 is highly relevant to issues in this litigation. Therefore, Intervenor-Defendants must promptly produce any documents and information improperly withheld based on their objection to the instructed timeframe and accordingly revise their Responses.

3. Additional Deficiencies in Intervenor-Defendants’ Interrogatory Responses

In addition, Intervenor-Defendants’ responses and objections to several of Plaintiffs’ Interrogatories are boilerplate and therefore fail to meet their burden of providing specific objections to the requested discovery and/or ignore the actual

Interrogatory in favor of repeating the same, limited, and insufficient responses. Plaintiffs outline these deficiencies in turn below.

- *Interrogatory No. 1* requests that Intervenor-Defendants “[i]dentify each person who provided information in preparing” their Motion to Dismiss, Opposition to Plaintiffs’ Motion for a Preliminary Injunction, and responses to Plaintiffs’ First Set of Requests for Production of Documents and Plaintiffs’ First Set of Interrogatories. Intervenor-Defendants object to this request on the basis that it seeks attorney work product and mental impressions. But a request for a party to identify its potential witnesses as here is not seeking privileged or protected information—it has no relationship to opposing counsel’s case strategy, opinions, or mental impressions. *See, e.g., Kolker v. VNUS Med. Techs., Inc.*, 2011 WL 5057094, at *6 (N.D. Cal. Oct. 24, 2011) (granting motion to compel and finding that the work-product privilege did not protect the mere “identity” of relevant witnesses); Fed. R. Civ. P. 26 note on amendments (Advisory Committee 2015) (noting that discovery of matters such as “the identity and location of persons who know of any discoverable matter” “is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case.”). In fact, Intervenor-Defendants have included a nearly identical request to Plaintiffs in their own First Set of Interrogatories dated November 13, 2023. *See* Intervenor-Defendants’ Interrogatory No. 1 (“Identify all persons involved in answering or assisting in answering Intervenor-Defendants’ First Set of Interrogatories and Requests for Production of Documents to you.”). Intervenor-Defendants cannot in good faith object to an Interrogatory that they themselves have also raised on the grounds that it is allegedly protected work product. Accordingly, Intervenor-Defendants must promptly supplement their response to Plaintiffs’ Interrogatory No. 1 and provide Plaintiffs with a list of individuals who provided Intervenor-Defendants with the information used to prepare their filings and discovery requests in this action. This is especially the case where Intervenor-Defendants have failed to include any fact witnesses in their initial disclosures.
- *Interrogatories Nos. 2, 3, 4, and 5* similarly request that Intervenor-Defendants identify individuals or complaints relevant to the Parties’ claims and defenses. Simply pointing Plaintiffs to public videos of the legislative hearings is not responsive to the request that Intervenor-Defendants identify the individuals or complaints described in Interrogatories Nos. 2, 3, 4, and 5. Notwithstanding Intervenor-Defendants’ repeated and boilerplate objections, *see* Fed. R. of Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity”), these Interrogatories are highly relevant to the purported government justifications behind Ariz. Rev. Stat. § 15-120.02. Intervenor-Defendants must directly respond to these Interrogatories.

* * *

We are available to meet and confer by January 16, 2024 to discuss the issues addressed above as necessary. To facilitate that discussion and narrow the issues in dispute, please provide a written response to this letter as soon as possible. We look forward to resolving these issues promptly.

Very truly yours,



Justin R. Rassi

cc: Colin M. Proksel
OSBORN MALEDON, P.A.

Amy Whelan
Rachel Berg
NATIONAL CENTER FOR LESBIAN RIGHTS
Attorneys for Plaintiffs

Dennis I. Wilenchik
Karl Worthington
WILENCHIK & BARTNESS PC
Attorney for Defendant Thomas C. Horne

Maria Syms
ARIZONA DEPARTMENT OF EDUCATION
Attorney for Defendant Thomas C. Horne

David C. Potts
Ashley E. Caballero-Daltrey
JONES, SKELTON & HOCHULI, P.L.C.
Attorneys for Defendant The Gregory School

Lisa Anne Smith
DECONCINI MCDONALD YETWIN & LACY, P.C.
Attorney for Defendant The Gregory School

Kristian E. Nelson
Gregg E. Clifton
LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorneys for Defendant Arizona Interscholastic Association, Inc.

Jordan T. Ellel
TEMPE TRI-DISTRICT LEGAL SERVICES
Attorney for Defendants Kyrene School District and Laura Toenjes

Exhibit 7

James Otis Law Group, LLC

13321 North Outer Forty Road, Suite 300
St. Louis, Missouri 63017
(816) 678-2103

Justin D. Smith
Justin.Smith@james-otis.com

January 19, 2024

Colin M. Proksel
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2000
Phoenix, AZ 85012
cproksel@omlaw.com

Jyotin Hamid
Justin R. Rassi
Amy C. Zimmerman
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
jhamid@debevoise.com
jrassi@debevoise.com
azimmerman@debevoise.com

Amy Whelan
Rachel Berg
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market St., Suite 370
San Francisco, CA 94102
awhelan@nclrights.org
rberg@nclrights.org

RE: Plaintiffs’ discovery deficiencies and issues

Dear Counsel:

This letter addresses deficiencies in Plaintiffs’ discovery responses. This letter also responds to Plaintiffs’ January 2, 2024 letter relating to discovery.

I. Plaintiffs’ discovery deficiencies

On November 13, 2023, Intervenor-Defendants Senate President Warren Petersen and Speaker of the House Ben Toma (the “Legislative Leaders”) served Plaintiffs Jane Doe and Megan Roe with their First Set of Interrogatories, First Set of Requests for Production, and First Set of Requests for Admission. Plaintiffs provided their written responses on December 13, 2023. Plaintiffs did not produce any documents until January 5, 2024, and Plaintiffs did not produce a privilege log until January 12, 2024.

Plaintiffs have included meritless objections that rely on boilerplate language, outdated rules, and frivolous speculation. Please correct these issues by January 31, 2024.

A. Plaintiffs’ January 5, 2024 document production is deficient.

On January 5, 2024, Plaintiffs produced documents in response to the Legislative Leaders’ First Set of Requests for Production. These documents contain issues that must be corrected.

1. Documents improperly designated as highly confidential.

Plaintiffs have misused the “Highly Confidential – Attorney’s Eyes Only” designation for documents that do not qualify for this stringent level of protection. Plaintiffs produced 3,666 documents in their January 5, 2024 production. Plaintiffs marked almost every document—3,656

documents—as “Highly Confidential – Attorney’s Eyes Only.”

The Protective Order created an exacting standard to designate a document as “Highly Confidential – Attorney’s Eyes Only.” Under this exacting standard, “Any party may designate a Document as ‘Highly Confidential – Attorney’s Eyes Only’ only if, in the good faith belief of such party and its counsel and despite the provisions of this Order, there may be a substantial risk of harm to the disclosing party if that Document and its Confidential Information is disclosed to all other parties or non-parties to this action.” Doc. 149, ¶ 4(b).

Many of the documents produced by Plaintiffs that are designated as “Highly Confidential – Attorney’s Eyes Only” do not appear to satisfy this exacting standard.

- ***Communications with an opposing party.*** Plaintiffs designated as “Highly Confidential – Attorney’s Eyes Only” at least 90 documents (not counting attachments) between Plaintiffs’ next friends and parents and employees of Defendants Kyrene School District and The Gregory School.¹ Some emails with school officials even related to this litigation.² And some emails sent by the Defendant schools were sent to all parents. *See, e.g.*, PLTF00000626, PLTF00000661.
- ***Communications with the media.*** Plaintiffs designated as “Highly Confidential – Attorney’s Eyes Only” at least 25 documents (not counting attachments) between Plaintiffs’ next friends and parents and media organizations.³ Some documents contain text of published articles. *See* PLTF00000812, PLTF00000905. Other documents contain scripts of legislative testimony (PLTF00000322) or a YouTube video featuring Plaintiffs’ next friends and parents speaking in opposition to S.B. 1165. *See* PLTF00000317, PLTF00000903.
- ***Documents circulated by third-party advocacy group.*** Plaintiffs designated as “Highly Confidential – Attorney’s Eyes Only” at least 44 documents (not counting attachments) sent by and to the Human Rights Campaign Arizona staff.⁴

¹ *See* PLTF00000528, PLTF00000530, PLTF00000531, PLTF00000532, PLTF00000533, PLTF00000534, PLTF00000536, PLTF00000538, PLTF00000540, PLTF00000542, PLTF00000543, PLTF00000544, PLTF00000545, PLTF00000546, PLTF00000549, PLTF00000550, PLTF00000554, PLTF00000557, PLTF00000568, PLTF00000575, PLTF00000579, PLTF00000580, PLTF00000581, PLTF00000584, PLTF00000586, PLTF00000589, PLTF00000592, PLTF00000594, PLTF00000596, PLTF00000598, PLTF00000601, PLTF00000603, PLTF00000604, PLTF00000605, PLTF00000606, PLTF00000607, PLTF00000609, PLTF00000611, PLTF00000612, PLTF00000614, PLTF00000616, PLTF00000618, PLTF00000626, PLTF00000631, PLTF00000632, PLTF00000634, PLTF00000635, PLTF00000636, PLTF00000637, PLTF00000638, PLTF00000639, PLTF00000641, PLTF00000642, PLTF00000643, PLTF00000644, PLTF00000645, PLTF00000646, PLTF00000647, PLTF00000648, PLTF00000649, PLTF00000651, PLTF00000653, PLTF00000656, PLTF00000657, PLTF00000658, PLTF00000659, PLTF00000661, PLTF00000662, PLTF00000664, PLTF00000666, PLTF00000667, PLTF00000668, PLTF00000669, PLTF00000673, PLTF00000675, PLTF00000681, PLTF00000682, PLTF00000683, PLTF00000684, PLTF00000685, PLTF00000706, PLTF00000707, PLTF00000711, PLTF00000772, PLTF00000937, PLTF00000941.

² *See* PLTF00000517, PLTF00000523, PLTF00000524, PLTF00000526.

³ *See* PLTF00000368, PLTF00000371, PLTF00000374, PLTF00000377, PLTF00000380, PLTF00000384, PLTF00000387, PLTF00000390, PLTF00000462, PLTF00000477, PLTF00000480, PLTF00000693, PLTF00000695, PLTF00000697, PLTF00000699, PLTF00000702, PLTF00000794, PLTF00000798, PLTF00000905, PLTF00000909, PLTF00000912, PLTF00000915, PLTF00000918, PLTF00000920, PLTF00000922.

⁴ *See* PLTF00000482, PLTF00000483, PLTF00000484, PLTF00000486, PLTF00000488, PLTF00000498,

- **Documents circulated to third parties.** In addition to the documents already mentioned, Plaintiffs designated as “Highly Confidential – Attorney’s Eyes Only” at least 21 documents (not counting attachments and replies) exchanged with third parties.⁵ One of the “Highly Confidential – Attorney’s Eyes Only” documents is a screenshot of a discussion on a Facebook group. PLTF00000359.
- **Other documents.** Plaintiffs’ over-designation of “Highly Confidential – Attorney’s Eyes Only” captured an advertisement for a sports physicals fundraiser (PLTF00000627), map of the Arizona Capitol (PLTF00000498), a list of sports seasons at The Gregory School (PLTF00000628), and at least eight blank documents.⁶

It is unclear how communications with an opposing party, the media, third-party activists, or posters and maps can be marked as “Highly Confidential – Attorney’s Eyes Only.” For that matter, many of the documents do not appear to satisfy even the “Confidential” designation standard. Doc. 149, ¶ 4(a).

Please remove all improper uses of the “Highly Confidential – Attorney’s Eyes Only” designation.

2. Improperly redacted personal identifying information.

Plaintiffs redacted the email addresses of most individuals for “PII,” which presumably is personal identifying information. In the emails sent to and from the Human Rights Campaign staff, Plaintiffs also redacted both the names and email addresses of virtually every recipient. *See, e.g.,* note 5, *supra*.

Plaintiffs did not provide a legal basis for redacting adult names and email addresses. The Protective Order does not appear to support Plaintiffs’ redaction of adult names and email addresses. The Protective Order in this case defines “Confidential Information” to include certain personal identifying information. Doc. 149, ¶ 1. However, the list of personal identifying information does not include email addresses. *Id.* Names of other individuals are listed only if they “would reveal the identity of any pseudonymous party.” *Id.* Here, Plaintiffs left *unredacted* the names of Plaintiffs’ parents and next friends. Furthermore, the Protective Order allows Confidential Information to be protected through appropriate designation as “Confidential” or “Highly Confidential – Attorney’s Eyes Only,” and makes no provision for redaction of the information. *See* Doc. 149.

PLTF00000499, PLTF00000500, PLTF00000502, PLTF00000505, PLTF00000509, PLTF00000510, PLTF00000511, PLTF00000513, PLTF00000561, PLTF00000712, PLTF00000714, PLTF00000716, PLTF00000718, PLTF00000719, PLTF00000721, PLTF00000722, PLTF00000723, PLTF00000724, PLTF00000732, PLTF00000733, PLTF00000735, PLTF00000740, PLTF00000743, PLTF00000746, PLTF00000749, PLTF00000752, PLTF00000753, PLTF00000754, PLTF00000755, PLTF00000757, PLTF00000759, PLTF00000760, PLTF00000761, PLTF00000763, PLTF00000765, PLTF00000766, PLTF00000768, PLTF00000878.

⁵ PLTF00000396, PLTF00000398, PLTF00000401, PLTF00000404, PLTF00000407, PLTF00000410, PLTF00000419, PLTF00000422, PLTF00000427, PLTF00000444, PLTF00000459, PLTF00000551, PLTF00000687, PLTF00000690, PLTF00000728, PLTF00000925, PLTF00000928, PLTF00000931, PLTF00000933, PLTF00000935, PLTF00000936.

⁶ PLTF00000367, PLTF00000537, PLTF00000539, PLTF00000571, PLTF00000574, PLTF00000578, PLTF00000621, PLTF00000625.

The federal and local rules also do not appear to support Plaintiffs' redaction of adult names and email addresses. Rule 5.2(a) requires redaction of an individual's social-security number, taxpayer-identification number, birth date, minor's name, and financial-account number. FED. R. CIV. P. 5.2(a). However, adult names and email addresses are not listed. Likewise, the District of Arizona's Electronic Case Filing Administrative Policies and Procedures Manual mentions "personal identifiers" only relating to electronically filed transcripts. *See, e.g.*, Electronic Case Filing Administrative Policies and Procedures Manual In the United States District Court for the District of Arizona (May 2023), § II(P) (p. 20), at <https://www.azd.uscourts.gov/sites/azd/files/adm%20manual.pdf>. The Manual defines "personal identifiers" as "Social Security numbers, financial account numbers, names of minor children, dates of birth, and in criminal cases, home addresses." *Id.* Courts in the District of Arizona have rejected attempts to redact personal identifying information not encompassed by an earlier Manual provision that required redactions of certain personal identifiers from any court filing. *See, e.g., Baker v. Fair, Isaac & Co.*, No. CIV 03-0525 PHXRCB, 2006 WL 2989026, at *2–3 (D. Ariz. Oct. 18, 2006) (rejecting request to redact plaintiffs' driver's license, home telephone number, and home address); *Baker v. Fair, Isaac & Co.*, No. CIV 030525-PCT-RCB, 2006 WL 2668981, at *1 (D. Ariz. Sept. 15, 2006) (rejecting request to redact plaintiff's driver's license and home telephone number).

Withholding adult names prevents the Legislative Leaders from identifying potential witnesses. Withholding email addresses prevents the Legislative Leaders from understanding information that may be relevant to the case, such as the organization or employer of individuals.

Please produce all documents without redactions for Personal Identifying Information.

3. Improperly redacted information after privilege waived.

Plaintiffs waived privilege by forwarding emails to a third party who does not appear to share an attorney-client relationship. These messages should be produced without redactions.

Plaintiffs produced messages between Kate Roe and a third-party individual without privilege redactions. PLTF00000562. Plaintiffs also produced the message the third-party individual sent to Kate Roe and two different attorneys without privilege redactions. PLTF00000566, PLTF00000709.

But Plaintiffs redacted the attorney's initial response, even though it was received by the third-party individual. PLTF00000709, PLTF00000792. Plaintiffs also redacted an email chain that Kate Roe forwarded to the third-party individual. PLTF00000563. "[V]oluntarily disclosing privileged documents to third parties will generally destroy the privilege." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1075 n.6 (N.D. Cal. 2002) ("If an e-mail with otherwise privileged attachments is sent to a third party, [the asserting party] loses the privilege with respect to that e-mail *and all of the attached e-mails.*") (emphasis original).

Plaintiffs waived the privilege by sending emails to a third party. Please produce unredacted versions of all messages that were provided to third parties.

4. Improperly redacted medical information.

All of the medical records produced by Plaintiffs contain redactions for “Privileged and Confidential Medical Information.” Because these objections are improper, please produce unredacted versions of the medical records.

i. Any mental health privilege has been waived.

Plaintiffs raise a medical privilege objection in the document redactions and in their written responses to Request for Production #1. In their written response, Plaintiffs state, “Plaintiffs object to this Request to the extent it calls for materials protected by the mental health provider-patient privilege.”

To the extent the privilege applies, a plaintiff waives it when he or she puts his mental or emotional condition at issue. *Lahrichi v. Lumera Corp.*, 433 F. App’x 519, 521 (9th Cir. 2011). Courts in the Ninth Circuit have found the psychotherapist-patient privilege waived when plaintiffs put their mental health at issue, such as by raising anxiety and depression diagnoses. *Erickson v. Biogen, Inc.*, No. C18-1029-JCC, 2019 WL 3238470, at *2 (W.D. Wash. July 18, 2019); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (ADA claim based on clinical depression diagnosis); *see also A.H. v. Cnty. of Los Angeles*, No. CV 22-03671-SB (ASX), 2023 WL 3035349, at *2 (C.D. Cal. Jan. 19, 2023) (citing cases). Other courts held that the privilege is waived when the plaintiff’s mental condition is at the heart of the litigation or when the plaintiff affirmatively relies on psychotherapist-patient communications to prove his or her claims. *Valois v. SkyWest Airlines*, No. CV 10-2030 RGK(JCX), 2011 WL 13042434, at *2 (C.D. Cal. Apr. 4, 2011).

Under all of these approaches, Plaintiffs have waived the psychotherapist-patient privilege. Plaintiffs put their mental health at issue by raising their gender dysphoria diagnosis. Compl., Doc. 1, ¶¶ 32-33, 45, 55, 57, 67. Plaintiffs’ mental condition is at the heart of the litigation and Count III, in which Plaintiffs claim a disability under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act “based on their gender dysphoria, which results from physical impairments.” *Id.* at ¶ 84. Finally, Plaintiffs have affirmatively relied on psychotherapist-patient communications to prove their claims, such as by repeatedly referencing their “medically-prescribed treatment.” Compl., Doc. 1, ¶¶ 46, 51-52, 59-60, 65.

Because Plaintiffs have waived any privilege by putting their mental health at issue and by affirmatively relying on communications with medical professionals, please withdraw the objection to the mental health provider-patient privilege in response to Request #1 and produce in unredacted form all documents that were redacted under this objection.

ii. Any confidentiality objection is inapplicable.

Plaintiffs also raise a confidentiality objection in the document redactions and in their written responses to Request for Production #1. In their written response, Plaintiffs state, “Plaintiffs object to this Request to the extent it calls for protected and confidential medical information.”

Unless the scope of discovery is limited by court order, Rule 26(b)(1) allows parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense

and proportional to the needs of the case, . . .” Plaintiffs drafted a protective order for confidential documents to which the parties agreed with minimal changes. Any documents containing “Confidential Information” may be handled in accordance with the protective order, Doc. 149. *See Morton v. Cnty. of San Diego*, No. 21-CV-1428-MMA-DDL, 2023 WL 6150402, at *11 (S.D. Cal. Sept. 20, 2023), *objections overruled*, No. 21-CV-1428-MMA-DDL, 2023 WL 7389021 (S.D. Cal. Nov. 8, 2023) (holding that protective order addressed objections to medical record confidentiality); *A.H. v. Cnty. of Los Angeles*, No. CV 22-03671-SB (ASX), 2023 WL 3035349, at *4 (C.D. Cal. Jan. 19, 2023) (“Although Plaintiffs do not raise specific privacy concerns, the Court finds that any privacy issues can be addressed pursuant to the terms of the parties’ Protective Order.”).

Because the Court has entered a Protective Order allowing the production and protection of Confidential Information, please withdraw the objection to protected and confidential medical information in response to Request #1 and produce in unredacted form all documents that were redacted under this objection.

B. Plaintiffs’ December 13, 2023 written discovery responses are deficient.

Plaintiffs’ written responses to the Legislative Leaders’ First Set of Requests for Production contain 16 “General Objections” as well as boilerplate objections in response to specific requests. General objections are disfavored and have been stricken. *See, e.g., Kristensen v. Credit Payment Servs., Inc.*, No. 2:12-CV-0528-APG, 2014 WL 6675748, at *4 (D. Nev. Nov. 25, 2014) (“The court finds that [the defendant’s] general and additional objections are boilerplate objections which are designed to evade, obfuscate, and obstruct discovery.”).

As detailed below, Plaintiffs’ written responses contain numerous objections that should be withdrawn.

1. General Objection #2 – Nonpublic confidential or personal documents

According to General Objection #2, Plaintiffs may be withholding documents they consider nonpublic confidential or personal documents. In full, General Objection #2 states, “Plaintiffs object to the Requests to the extent they seek production of nonpublic confidential or personal documents.” Plaintiffs provided no legal authority for the objection.

Unless the scope of discovery is limited by court order, Rule 26(b)(1) allows parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, . . .” Rule 26 does not provide an exception for “nonpublic confidential or personal documents.”

In addition, Plaintiffs drafted a protective order for confidential documents to which the parties agreed with minimal changes. Any documents containing “Confidential Information” may be handled in accordance with the protective order, Doc. 149. *See A.H. v. Cnty. of Los Angeles*, No. CV 22-03671-SB (ASX), 2023 WL 3035349, at *4 (C.D. Cal. Jan. 19, 2023).

Because Rule 26 does not allow a party to withhold documents simply because they are “nonpublic confidential or personal,” and the Court has entered a protective order allowing the production and protection of Confidential Information, please withdraw General Objection #2 and

produce any documents that were withheld under this objection.

2. General Objection #13 – discovery to other parties

According to General Objection #13, Plaintiffs may be withholding documents based on requests they speculate that the Legislative Leaders may serve on non-parties. In full, General Objection #13 states, “Plaintiffs object to the Requests to the extent they are cumulative or duplicative of requests for the production of documents or information that Intervenor-Defendants may serve on non-parties.”

The Legislative Leaders have not attempted to seek discovery from any non-party. Plaintiffs’ objection is thus based on speculation that the Legislative Leaders will seek discovery from a non-party, and on further speculation that the non-party discovery will be cumulative or duplicative of discovery sought now from Plaintiffs.

Even if the Legislative Leaders had sought discovery from a non-party, a court in the District of Arizona recently rejected Plaintiffs’ same objection because “a party’s discovery obligations are different than a non-party and [a party] will not be permitted to shift the burden of production in this case to non-parties.” *Photography By Frank Diaz LLC v. Friends of David Schweikert*, No. CV-22-01170-PHX-JAT, 2023 WL 3078664, at *4 (D. Ariz. Apr. 25, 2023) (emphasis original). In fact, courts protect non-parties from the burden of production when the same discovery is available from a party, not the other way around as Plaintiffs suggest. *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 410 (C.D. Cal. 2014) (citing cases).

Because Rule 34 obligates Plaintiffs to produce responsive documents and courts have rejected attempts by parties to shift discovery obligations to non-parties, please withdraw General Objection #13 and produce any documents that were withheld under this objection.

3. General Objection #14 – search protocol

According to General Objection #14, Plaintiffs may be withholding documents based on a non-existent search protocol. In full, General Objection #14 states:

Plaintiffs object to the Requests to the extent they purport to require Plaintiffs to search for “ANY” and “ALL” documents. Consistent with their obligations under Federal Rules of Civil Procedure 26 and 34, and subject to these objections, when a response states that the requested documents will be produced, the response shall be construed to mean that Plaintiffs will produce documents located through a reasonable search of documents in their possession, custody, or control that are readily accessible without undue burden or expense pursuant to a search protocol for custodians, date range, search terms, and/or targeted document collections to be agreed to following negotiations and conferral with Plaintiff [*sic*] (the “Search Protocol”).

Plaintiffs have not approached the Legislative Leaders regarding a “Search Protocol.” Since Plaintiffs raised it as an objection, however, please state what searches, if any, have not yet been run

and how many documents, if any, were withheld under General Objection #14.

4. Boilerplate objection – relevance

Plaintiffs raise a boilerplate relevance objection in response to Requests #1, #2, #3, and #4. In full, Plaintiffs state, “Plaintiffs object to this Request because it seeks documents that are not relevant to any cause of action or defense of any party in this action nor proportional to the needs of the case.”

Plaintiffs never explain why the documents requested are not relevant. “[B]oilerplate relevancy objections, without setting forth any explanation or argument why the requested documents are not relevant, are improper.” *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); *see also Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (“Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all.”).

Nor are Plaintiffs’ boilerplate relevance objections well-founded. For example, Plaintiffs object on relevance grounds to Request #1 for their medical records when they claim a disability based on a medical condition. Plaintiffs object on relevance grounds to Requests #2 and #3 for communications with their schools and Defendant Arizona Interscholastic Association about their desire to play sports when this litigation concerns their desire to play sports. And Plaintiffs object on relevance grounds to Request #4, which requests “all documents and communications concerning this litigation or the Save Women’s Sports Act (S.B. 1165).” It is unclear how Plaintiffs can contend in good faith that these requests are not relevant.

Because Plaintiffs have presented boilerplate objections that are not well-founded, please withdraw the objection to relevance in response to Requests #1, #2, #3, and #4 and produce any documents that were withheld under this objection.

5. Response to Request #2 – communications with schools about sports

Plaintiffs raise a proportionality objection in response to Request #2 that should be withdrawn. In response to Request #2, Plaintiffs claim the request is not proportional to the needs of the case because “it requests all documents and communications relating to Plaintiffs’ desires to join ‘girls’ sports’ without regard for whether those sports are related to Plaintiffs’ schools.”

But Request #2 is limited to “documents and communications directed to your school.” Either Plaintiffs wrote their school about school sports, which would be covered by S.B. 1165, or they wrote their school about non-school sports that they claim in this litigation are not available. *See, e.g.*, Plaintiffs’ Reply to Defendant Horne and the Proposed Intervenors in Support of Plaintiffs’ Motion for a Preliminary Injunction, Doc. 65, at 13 (June 1, 2023) (“for Plaintiffs, losing the ability to play on girls’ teams forecloses the ability to play on *any* sports teams”) (emphasis original). Both are relevant and proportional to Plaintiffs’ claims and the Legislative Leaders’ defenses.

Because Request #2 is relevant and proportional, please withdraw the objection to proportionality in response to Request #2 and produce any documents that were withheld under this objection or Plaintiffs’ improperly narrowed interpretation of Request #2.

6. Response to Request #3 – communications with AIA about sports

Similar to the objection in response to Request #2 discussed in the previous section, Plaintiffs raise a proportionality objection in response to Request #3 that should be withdrawn. In response to Request #3, Plaintiffs claim the request is not proportional to the needs of the case because “it requests all documents and communications related to Plaintiffs’ desire or request to participate in “girls’ sports” without regard to whether those sports are regulated by AIA guidelines.”

But Request #3 is limited to “documents and communications directed to Defendant Arizona Interscholastic Association.” Either Plaintiffs wrote AIA about sports regulated by AIA, or they wrote AIA about sports not regulated by AIA. Both are relevant and proportional to Plaintiffs’ claims and the Legislative Leaders’ defenses.

Because Request #3 is relevant and proportional, please withdraw the objection to proportionality in response to Request #3 and produce any documents that were withheld under this objection or Plaintiffs’ improperly narrowed interpretation of Request #3.

C. Plaintiffs’ Responses to the Legislative Leaders’ First Set of Interrogatories

1. Improper general objections should be withdrawn.

Plaintiffs raise almost the same general objections to the interrogatories as they did to the requests for production. For the reasons set forth above in response to general objections #2 and #13 to the Legislative Leaders’ First Set of Requests for Production, respectively, please withdraw general objections #2 and #12 to the Legislative Leaders’ First Set of Interrogatories and produce any information that was withheld under these objections.

2. Improper objections to Interrogatories #6 and #7 should be withdrawn and the interrogatories should be answered.

Plaintiffs also improperly failed to respond to Interrogatories #6 and #7. These interrogatories ask whether Plaintiffs “contend that the Save Women’s Sports Act (S.B. 1165) prevents [male-] [female-] identifying biological males from competing on an interscholastic or intramural athletic team or sport that is sponsored by an Arizona public school or a private school whose students or teams compete against a public school?” Plaintiffs objected on three grounds, all of which are insufficient for Plaintiffs to stand on their objections.

Plaintiffs first object that both requests were vague and scientifically inaccurate in the use of “male-identifying biological male” and “female-identifying biological male.” First, “scientifically inaccurate” is not a basis for objecting to an interrogatory. Second, the requests were not vague because the Legislative Leaders defined both terms. *See* Definitions #5 (“‘Female’ or ‘biological female’ means a human person with XX chromosomes and female reproductive organs.”) and #11 (“‘Male’ or ‘biological male’ means a human person with XY chromosomes and male reproductive organs.”). Thus, Plaintiffs have no valid basis to object that the requests were vague and scientifically inaccurate.

Plaintiffs next object that Interrogatories #6 and #7 “seek[] information that is not relevant to any claim or defense in this action nor proportional to the needs of the case given the as-applied nature of Plaintiffs’ claims in this litigation.” But Plaintiffs have claimed that the Save Women’s Sports Act violates the Equal Protection Clause and Title IX because it discriminates on the basis of sex. Compl., Doc. 1, ¶¶ 71, 80. Interrogatories #6 and #7 thus seeks relevant information regarding Plaintiffs’ contentions about the law’s effect on males and females. Answering these two straightforward interrogatories is not disproportional to the needs of the case.

Finally, Plaintiffs object that Interrogatories #6 and #7 “call[] for a legal opinion.” Under the federal rules, “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, . . .” FED. R. CIV. P. 33(a)(2). “Requests for opinions or contentions that ask for opinions or contentions that relate to fact or the application of law to fact, ‘can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.’” *United States v. JP Morgan Chase Bank*, No. CV12-0155-PHX-MHB, 2013 WL 12204174, at *2 (D. Ariz. Sept. 16, 2013) (quoting 1970 Adv. Comm. Note to Fed. R. Civ. P. 33(b)). As the advisory committee notes state, “Opinion and contention interrogatories are used routinely.” 2007 Adv. Comm. Note to Fed. R. Civ. P. 33.

Plaintiffs refused to answer Interrogatories #6 and #7, but the objections raised by Plaintiffs are baseless. Please withdraw the objections and propound responses to Interrogatories #6 and #7.

D. Plaintiffs’ Responses to the Legislative Leaders’ First Set of Requests for Admission

Plaintiffs raise almost the same general objections to the requests for admission as they did to the requests for production. For the reasons set forth above in response to general objection #13 to the Legislative Leaders’ First Set of Requests for Production, please withdraw general objection #12 to the Legislative Leaders’ First Set of Requests for Admission and answer the Requests for Admissions without this objection.

E. Conclusion

Plaintiffs have raised meritless objections that must be withdrawn. Please withdraw the objections identified in this letter by January 31, 2024.

II. Response to Plaintiffs’ January 2, 2024 correspondence

On October 30, 2023, Plaintiffs served the Legislative Leaders with their First Set of Interrogatories and First Set of Requests for Production. The Legislative Leaders timely responded on November 29, 2023. Plaintiffs contacted the Legislative Leaders about the substance of their responses on January 2, 2024.

The Legislative Leaders have carefully reviewed each response challenged by Plaintiffs. During the due diligence for this response, counsel discovered that some withheld documents were publicly available on the websites for the Arizona Legislature and the Center for Arizona Policy. The Legislative Leaders therefore withdraw the privilege claims to Documents #1, #2, #4, #5, #7, #8, #9, #10, #11, #12, #13, #16, #17, #19, #20, #21, and #22, and produce these documents as

LL000336-LL000424.

The Legislative Leaders disagree with Plaintiffs' views on the discovery responses. The Legislative Leaders have responded in good faith and in accordance with the law. The Legislative Leaders set forth their position below on the five objections raised by Plaintiffs.

A. Legislative privilege has been properly asserted.

Plaintiffs' only challenge to the Legislative Leaders' assertion of legislative privilege is waiver by intervening in this litigation. Plaintiffs do not contest that, if it was not waived, the legislative privilege protects from disclosure the documents in the Legislative Leaders' privilege log and any information responsive to interrogatories. Thus, Plaintiffs' challenge to the legislative privilege fails if it has not been waived.

The Legislative Leaders have not waived the legislative privilege by intervening in this litigation. Waiver has not occurred because of principles underlying the legislative privilege; the purpose of intervention; the lack of explicit waiver; and the inability to waive the legislative privilege for the body or any individual legislator. The discovery sought also is not relevant.

1. The legislative privilege protects internal deliberations.

As cited in the Legislative Leaders' discovery responses, the legislative privilege is well-established in the Ninth Circuit. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). Plaintiffs do not challenge the existence of the legislative privilege or distinguish any of the cases cited by the Legislative Leaders.

In a recent decision that carefully analyzed the legislative privilege, Judge Lanza found that maintaining confidentiality within the legislature and protecting the legislative process were purposes of the legislative privilege. *Mi Familia Vota v. Hobbs*, No. CV-21-01423-PHX-DWL, 2023 WL 4595824, at *5 (D. Ariz. July 18, 2023). As the Eighth Circuit decision quoted by *Mi Familia Vota* explained, "The privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly." *In re N. Dakota Legislative Assembly*, 70 F.4th 460, 464 (8th Cir. 2023).

The two cases relied upon by Plaintiffs did not consider either the confidentiality or legislative functioning purposes underlying the legislative privilege. *See* Plaintiffs' Letter, at 2. The Third Circuit addressed only legislative immunity and did not recognize that the legislative privilege existed. *Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001). Judge Bolton relied heavily on the Third Circuit's inapposite decision, and the only purpose she identified for the legislative privilege was, like legislative immunity, avoiding the distraction of litigation. *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8183557, at *3 (D. Ariz. Sept. 14, 2023).

Documents remaining on the Legislative Leaders' privilege log, such as caucus information and talking points for legislation, relate to core legislative activity. Plaintiffs do not argue otherwise. Maintaining confidentiality of these legislative documents is important to protect legislative deliberations and the functioning of the legislature.

The legislative privilege exists to protect internal legislative documents like those on the Legislative Leaders' privilege log.

2. President Petersen and Speaker Toma intervened by law to protect institutional interests.

Arizona law expressly permits the president of the Arizona Senate and speaker of the Arizona House of Representatives to intervene as parties in any matter challenging the constitutionality of a state statute. ARIZ. REV. STAT. § 12-1841(D). So important is the ability of the Legislative Leaders to be heard that, if a plaintiff fails to timely serve them with notice of the lawsuit, “the court shall vacate any finding of unconstitutionality” and provide the Legislative Leaders with a “reasonable opportunity to prepare and be heard.” *Id.* at § 12-1841(C). Similarly, each chamber adopted rules authorizing their leaders “to bring or assert in any forum on behalf of the [Senate] [House] any claim or right arising out of any injury to the [Senate’s] [House’s] powers or duties under the Constitution or Laws of this state.” Ariz. State Senate Rule 2(N); Ariz. House of Representatives Rule 4(K).

When President Petersen and Speaker Toma moved to intervene, they did so to exercise their authority under state law and legislative rules to defend the interest of the Arizona legislature in legislation being found constitutional. *See Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (“States possess a legitimate interest in the continued enforcement of their own statutes.”) (cleaned up). Unlike in the *Mi Familia* case cited by Plaintiffs, this interest is heightened in this case because the Arizona Attorney General determined that she was disqualified from defending the statute at issue in this litigation. *See id.* at 2197 (empowering legislative leaders to defend legislation “understandable” since “[m]ore than once a North Carolina attorney general has opposed laws enacted by the General Assembly and declined to defend them fully in federal litigation”).

No court decision has been found in which intervention by the United States Department of Justice or Arizona attorney general to defend the constitutionality of a statute waived executive privilege, attorney-client privilege, or other privileges held by those officials. So, too, President Petersen and Speaker Toma retain their legislative privilege when they exercise an institutional interest provided by state law and chamber rules.

3. Neither Arizona law nor the Legislative Leaders waived legislative privilege.

The Arizona statute that expressly permits intervention by the Legislative Leaders does not expressly waive legislative privilege. *See* ARIZ. REV. STAT. § 12-1841. The Senate and House rules empowering the Legislative Leaders to act also do not expressly waive legislative privilege. Ariz. State Senate Rule 2(N); Ariz. House of Representatives Rule 4(K).

Waiver of the legislative privilege must be explicit and unequivocal. In the context of legislative immunity in a criminal case, the Supreme Court has held that “waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting.” *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Because the legislative privilege exists to protect confidentiality and the legislative process, “a waiver should not be lightly inferred.” *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).

Courts have found that participating in litigation alone does not waive the legislative privilege. *See, e.g., Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012) (“the Court nevertheless rejects the notion that the defendants’ participation in this lawsuit, standing alone, automatically waives the legislative privilege in all respects”). That is consistent with decisions in other litigation participation contexts. *See, e.g., Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (“A party does not automatically waive [the attorney-client, work product, and executive] privileges, which protect the formulation of legal opinions or litigation strategy, simply by bringing suit.”).

The Legislative Leaders’ actions in this case differ materially from the *Mi Familia* case relied on by Plaintiffs. Unlike in *Mi Familia*, the Legislative Leaders have not filed an answer in this litigation. Plaintiffs also did not allege discriminatory intent by the legislature in their Complaint or Motion for Preliminary Injunction, and thus the Legislative Leaders could not have placed their motives at issue when they moved to intervene. Also unlike in *Mi Familia*, the Legislative Leaders definitively state from the outset that they will not testify in this matter. Finally, after a good faith search, the Legislative Leaders have not publicly shared any of the remaining withheld documents and have no evidence that any third-party has shared them. *See La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 237 (5th Cir. 2023) (“The very fact that Plaintiffs need discovery to access these documents shows that they have not been shared publicly.”).

4. President Petersen and Speaker Toma cannot waive the legislative privilege for other legislators.

It is well-established that no legislator can waive the legislative privilege held by a fellow legislator or the chamber as a whole. *See, e.g., Puente Arizona v. Arpaio*, 314 F.R.D. 664, 671 (D. Ariz. 2016) (“The legislative privilege ‘is a personal one and may be waived or asserted by each individual legislator.’”) (internal citation omitted). Agreeing with Judge Campbell’s opinion, Judge Bolton found in the case relied upon by Plaintiffs that “the Speaker or President could not waive the privilege for their fellow legislators.” *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8183557, at *3 (D. Ariz. Sept. 14, 2023). Thus, “[t]o the extent Plaintiffs seek information held by other members of the Arizona Legislature, it remains protected by the legislative privilege.” *Id.*

None of the remaining documents withheld by the Legislative Leaders were created or sent by President Petersen or Speaker Toma. Documents #14, #15, and #18 were sent by other senators not parties to this litigation. Document #6 was sent by another representative not party to this litigation. And Document #3 was sent by legislative staff employed by the chamber and not party to this litigation. *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011) (“The protections of the privilege extend, however, not only to legislators but to legislative aides and assistants, . . .”).

President Petersen and Speaker Toma cannot waive the legislative privilege for other senators, representatives, or legislative staff that serve the entire chamber, certainly not by intervening.

5. Motives of individual legislators are not relevant.

Plaintiffs reveal that their discovery seeks to explore the Legislative Leaders’ motives.

Plaintiffs' Letter, at 2. But the Supreme Court and the Ninth Circuit have rejected this line of inquiry. As the Ninth Circuit recognized, the Supreme Court "has repeatedly stressed that 'judicial inquiries into legislative or executive motivation represent a substantial intrusion'" and "'usually to be avoided.'" *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)). "The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). In addition, "the statements of a handful of lawmakers" are generally insufficient to show discriminatory intent because they "may not be probative of the intent of the legislature as a whole." *United States v. Carillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023).

Because Plaintiffs admit that their discovery seeks to explore motives of individual legislators, the discovery requests are not relevant.

The Legislative Leaders have properly asserted the legislative privilege.

B. Deliberative process privilege has been properly asserted.

Plaintiffs' primary challenge to the assertion of deliberative process privilege is to italicize the word "agency" from two cases and argue, without any other support, that the privilege is an executive privilege. Plaintiffs do not distinguish the case cited by the Legislative Leaders in which a court in the Ninth Circuit applied the deliberative process privilege to discussions by city council members. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The *Fabbrini* court specifically concluded that the deliberative process privilege applies to any act, including legislative acts. *Id.* According to another court in the Ninth Circuit, "Many lower courts have also extended the [deliberative process] privilege to protect the decisionmaking processes of local legislators, reasoning that, '[i]n terms of the alleged need for secrecy surrounding deliberations, there is no principled distinction between [local legislators] and those government officials who currently enjoy a deliberative process privilege.'" *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1121 (N.D. Cal. 2003) (citing *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989)). Plaintiffs do not grapple with any of these on point cases.

Plaintiffs also summarily claim that all factors to overcome the deliberative process privilege weigh in favor of disclosure. This is incorrect. For example, as discussed above, the motives of individual legislators are not relevant. And disclosure of communications between individual legislators would "hinder frank and independent discussion regarding contemplated policies and decisions." By failing to argue the factors, Plaintiffs have failed to override the government's interest in non-disclosure. *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

The Legislative Leaders have properly asserted the deliberative process privilege.

C. The Legislative Leaders produced information and documents from the relevant time period.

Plaintiffs' discovery requests sought information from January 1, 2015 to present. *See* Plaintiffs' First Set of Requests for Production of Documents to Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma, Instruction #8; Plaintiffs' First Set of Interrogatories

to Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma, Instruction #9. But President Peterson and Speaker Toma were not even members of their chambers in 2015.

The bill at issue in this litigation, S.B. 1165, passed in the 2022 legislative session. The Legislative Leaders produced information and documents from the entire interim session preceding the 2022 legislative session until the governor signed S.B. 1165. This is the relevant legislative record associated with S.B. 1165.

In their Complaint, Plaintiffs do not make allegations relating to any other bill or any past legislative session. *See* Compl., Doc. 1. In their letter, Plaintiffs continue to demand documents back to 2015. However, the only justification that Plaintiffs provide now for discovery outside of the 2022 legislative session is a single bill in 2020. Plaintiffs have failed to explain the relevance of the views of individual legislators on a bill from a past session that did not pass and is not part of the litigation. And Plaintiffs have not explained why discovery back to 2015 is proportional to the needs of the case. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) (“District courts need not condone the use of discovery to engage in ‘fishing expedition[s].’”).

While the Legislative Leaders are willing to consider any further explanation by Plaintiffs of the relevance of discovery to 2015 to their complaint, and how that discovery is proportional to the needs of the case and not a fishing expedition, Plaintiffs have thus far failed to demonstrate relevance or proportionality.

D. The Legislative Leaders appropriately objected to Interrogatory #1.

In Interrogatory #1, Plaintiffs sought the identities of individuals who helped prepare various legal documents in this case. The Legislative Leaders objected on attorney work product and relevance grounds.

In their letter, Plaintiffs recharacterize Interrogatory #1 as “a request for a party to identify its potential witnesses” and cite case law for that proposition. But that was not Plaintiffs’ request. Asking a party to identify who prepared or assisted with preparing legal documents, such as a motion to dismiss or an opposition to a motion for preliminary injunction, seeks attorney work product, not witness identities.

Plaintiffs are not entitled to the identity of any individual who assisted with the preparation of these legal documents. *See, e.g., Becker v. TIG Ins. Co.*, No. 3:21-CV-05185-JHC, 2022 WL 13925733, at *1 (W.D. Wash. Oct. 24, 2022) (citing cases); *see also United States v. Travelers Cas. & Sur. Co. of Am.*, No. 22-CV-00242 DHU/JHR, 2023 WL 5275382, at *3 (D.N.M. Aug. 16, 2023); *Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 62 (E.D.N.Y. 2007). Plaintiffs also already possess information necessary to identify witnesses or evaluate positions through the documents produced by the Legislative Leaders, the citations in the Legislative Leaders’ briefs, the six detailed expert declarations submitted by the Legislative Leaders, and the exhibits included on the Legislative Leaders’ exhibit list for the preliminary injunction hearing.

Finally, Plaintiffs claim that the Legislative Leaders “have failed to include any fact witnesses in their initial disclosures.” This is not true. The Legislative Leaders identified six fact witnesses in their initial disclosures. The Legislative Leaders will disclose any fact witnesses or expert witnesses in accordance with the Court’s scheduling order and the Federal Rules of Civil

Procedure.

E. The Legislative Leaders appropriately responded to Interrogatory #2, #3, #4, and #5.

Plaintiffs' final objection to the Legislative Leaders' discovery responses is that "[s]imply pointing Plaintiffs to public videos of the legislative hearings is not responsive to the request that Intervenor-Defendants identify the individuals or complaints described in Interrogatories Nos. 2, 3, 4, and 5." Plaintiffs' Letter, at 4. This is wrong in two respects.

First, the Legislative Leaders provided both publicly available information for the legislative hearings and hundreds of emails received by constituents about S.B. 1165. These sources contain the information received by the Legislative Leaders about the bill at issue in this litigation.

Second, as stated in the Legislative Leaders' response, "[a]ll testimony received by the Arizona Senate Committee on the Judiciary and Arizona House of Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs." Proving the hearings were equally accessible, before even receiving the Legislative Leaders' discovery responses, Plaintiffs had a court reporter transcribe these hearings and the floor debate in the Arizona Senate and Arizona House of Representatives.⁷ With transcripts already in hand, Plaintiffs have no basis to complain about the Legislative Leaders' responses.

III. Conclusion

By January 31, 2024, Plaintiffs must withdraw their meritless objections and correct their deficient discovery responses. In this letter, the Legislative Leaders have demonstrated the appropriateness of their responses to Plaintiffs' discovery requests.

The Legislative Leaders are available to meet and confer by February 2, 2024 if Plaintiffs have not fully corrected their discovery responses, or if Plaintiffs have any remaining questions relating to the Legislative Leaders' discovery responses.

Sincerely,



Justin D. Smith
Counsel for the Legislative Leaders
President Petersen and Speaker Toma

⁷ See PLTF00000959 (March 9, 2022 – House Judiciary); PLTF00001028 (January 20, 2022 – Senate Judiciary); PLTF00001104 (labeled Senate Judiciary, but appears to be March 24, 2022 – House Third Reading); PLTF00001126 (March 24, 2022 – House COW); PLTF00001293 (February 2, 2022 – Senate Third Reading); PLTF00001322 (February 2, 2022 – Senate COW and Senate Third Reading).

Exhibit 8

February 8, 2024

BY EMAIL

D. John Sauer
Justin D. Smith
James Otis Law Group, LLC
13321 North Outer Forty Road, Suite 300
St. Louis, Missouri 63017

**Re: *Jane Doe, et al. v. Thomas Horne, et al.*,
Case No. 4:23-cv-00185-JGZ**

Dear Counsel,

We write on behalf of Plaintiffs Jane Doe and Megan Roe (“Plaintiffs”) to address the January 19, 2024 letter (the “January 19 Letter”) from Intervenor-Defendants Senate President Warren Petersen and Speaker of the House Ben Toma (“Intervenor-Defendants”) and also to discuss the remaining deficiencies in Intervenor-Defendants’ responses and objections.

I. Plaintiffs’ Responses to the Deficiencies Raised by Intervenor-Defendants.

A. Documents Designated as “Highly Confidential – Attorney’s Eyes Only.”

As an initial matter, Plaintiffs produced approximately 350 documents with a “Highly Confidential – Attorney’s Eyes Only” designation in their January 5, 2024 production—not 3,665. The vast majority of these documents contain the names of Plaintiffs (or their parents) who are proceeding in this action via pseudonym pursuant to the Court’s order. (*See* Dkt. No. 44.) When granting Plaintiffs’ motion to proceed via pseudonym, the Court recognized that Plaintiffs reasonably fear lost privacy, discrimination, and severe harassment if their identities were to become public. (*Id.*) Given the obvious risk to Plaintiffs if these materials become public, any document containing Plaintiffs’ or their parents’ names must be sealed if filed on the docket.

Plaintiffs disagree with Intervenor-Defendant’s position that they have misused the “Highly Confidential” designation as it relates to communications with an opposing

party, communications with the media, documents circulated by the Human Rights Campaign (“HRC”), and documents circulated to third parties. Plaintiffs quite reasonably are concerned about providing Defendants with information about their own identities and the identities of other individuals with similar privacy concerns that are not connected with this lawsuit.

However, to avoid further litigation over this issue, Plaintiffs will undertake the burdensome effort to revise their confidentiality designations and downgrade the vast majority of the documents highlighted in Intervenor-Defendants’ letter to “Confidential” instead.

B. Redactions of Personal Identifying Information.

Plaintiffs disagree with Intervenor-Defendants’ position that they improperly redacted the email addresses and other personal identifying information (“PII”) belonging to non-parties to this litigation. Given the undue burden of redacting only the email addresses in a long block of names and email addresses, Plaintiffs redacted the full list of email recipients on mass email chains from HRC and The Gregory School (“TGS”). The names of these individuals are plainly not relevant to this litigation. However, to avoid further litigation over this issue, Plaintiffs will remove the PII redactions (including names and emails) of parties and non-parties on the HRC and TGS communications Intervenor-Defendants identified (*see* January 19 Letter, at 2–3, n. 4).

To the extent that Intervenor-Defendants request Plaintiffs to reproduce the remaining documents in which their email addresses, phone numbers, addresses, and other identifying information are presently redacted, this request is unduly burdensome and disproportionate to the litigation. Plaintiffs redacted their email addresses and other PII in the majority of documents. Intervenor-Defendants can request Plaintiffs’ email addresses, addresses, or phone numbers from Plaintiffs’ counsel. Outside of the HRC and TGS documents from which Plaintiffs agree to remove the redactions, Plaintiffs will leave redacted their addresses, emails, and phone numbers to the extent they are already redacted in the documents.

C. Alleged Privilege Waiver.

To avoid further litigation and without waiver of any applicable privileges, Plaintiffs will reproduce without redactions the documents bearing Bates numbers PLTF00000709; PLTF00000792; and PLTF00000563.

D. Redaction of Medical Information.

Defendants are not entitled in this litigation to unfettered access to the entirety of Plaintiffs’ medical histories including routine medical visits and wellness visits going back many years. To protect their privacy, Plaintiffs chose to redact information in their medical records that was unrelated to gender dysphoria. However, Plaintiffs will agree to remove these redactions to avoid further litigation on this issue. Plaintiffs maintain that these documents are “Highly Confidential – Attorney’s Eyes Only” as previously designated.

Plaintiffs further disagree with Intervenor-Defendants' contention that they have waived the mental health provider-patient privilege or that their mental health is at issue in this lawsuit. Other than their diagnoses of gender dysphoria, documents about which have been produced, Plaintiffs do not intend to rely on any communications between themselves and their mental health providers. In any event, none of the redactions in the medical records were based on the mental health provider-patient privilege.

E. Responses to Written Requests.

1. General Objection Nos. 2, 13, and 14.

Plaintiffs will not withdraw General Objection Nos. 2, 13, or 14, but are not withholding any documents based on these objections.

2. Relevance & Proportionality Objections.

Plaintiffs will not withdraw their objections to RFPs Nos. 1–4 based on the proportionality and/or relevance of the requested information. As to RFPs Nos. 2–4, however, Plaintiffs have not withheld any documents based on these objections.

As to RFP No. 1, Plaintiffs note that the only documents they are withholding under this objection are psychotherapist notes. Plaintiffs have produced letters from psychotherapists confirming a gender dysphoria diagnosis but have not produced any underlying treatment records because such records are protected by the psychotherapist patient privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 14 (1996). These records also contain highly private personal mental health information that is not related to the central issue in this case—whether Plaintiffs have an unfair athletic advantage over other girls in school sports. Accordingly, Plaintiffs have not put these underlying mental health records at issue in this litigation, and they are not relevant. *See Prado v. Equifax Info. Servs. LLC*, 331 F.R.D. 134, 137–38 (N.D. Cal. 2019) (recognizing that “legitimate privacy interests are a consideration in evaluating proportionality[]” and denying the defendant’s “speculative requests” for “private and highly sensitive” medical records).

3. Interrogatories.

Plaintiffs will not withdraw any General Objections to Intervenor-Defendants' Interrogatories, but Plaintiffs are not withholding any information based on these objections.

Plaintiffs will also not withdraw their objections to Interrogatory Nos. 6 and 7. Plaintiffs will not respond to these Interrogatories for the reasons stated in their objections. Moreover, these broad theoretical questions are not relevant to the issues in this case, which center on a narrow as-applied challenge to A.R.S. § 15-120.02 (the “Ban”).

4. *RFAs.*

Plaintiffs will not withdraw any General Objections to Intervenor-Defendants' Requests for Admission. However, Plaintiffs note that they are not withholding any information under these objections.

II. Intervenor-Defendants' Remaining Deficiencies.

On January 2, 2024, Plaintiffs alerted Intervenor-Defendants to several deficiencies in their initial discovery responses to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production (the "January 2 Letter"). On January 19, 2024, Intervenor-Defendants responded, continuing to assert legislative and deliberative process privilege objections, although withdrawing their privilege claims from all but five documents and their interrogatory responses. Plaintiffs reiterate that neither the legislative privilege nor deliberative process privilege have been properly asserted and to the extent that Intervenor-Defendants continue to improperly withhold documents and information based on these privileges, they must immediately supplement their responses and produce all relevant documents and information.

A. Intervenor-Defendants Have Waived Any Legislative Privilege.

Intervenor-Defendants continue to assert legislative privilege over the five remaining documents in their privilege log and in response to Plaintiffs' Interrogatories Nos. 2–5 and 9. However, as explained in Plaintiffs' January 2 Letter, Intervenor-Defendants have waived any legislative privilege by injecting themselves into this lawsuit to assert a "unique interest in defending the constitutionality" of the Ban. (Dkt. No. 19 at 1.) Because Intervenor-Defendants chose to intervene in this litigation and fully participate, they cannot now avoid discovery into the very grounds on which they seek to defeat Plaintiffs' case. *See Mi Familia Vota v. Fontes*, —F. Supp. 3d —, 2023 WL 8183557, at *2–*3 (D. Ariz. Sept. 14, 2023). Most tellingly, Intervenor-Defendants point to no case law whatsoever in which a legislator that seeks intervention can nevertheless maintain the legislative privilege.

Finally, Plaintiffs do not argue that Intervenor-Defendants' intervention can waive the privilege of other legislators; they argue only that Intervenor-Defendants cannot withhold "communications *sent or received* by either the Speaker or the President which have been withheld on legislative privilege grounds." *Mi Familia Vota*, 2023 WL 8183557, at *3 (emphasis added).

B. Even If Intervenor-Defendants Had Not Waived Legislative Privilege, It Would Be Easily Overcome.

Even if the legislative privilege was not waived, all the relevant factors that courts assess in determining whether this privilege would be overcome weigh in favor of disclosure. In determining whether the privilege has been overcome, courts consider the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of government in the litigation; and (v) the purposes of the

privilege.” *Mi Familia Vota v. Hobbs*, — F. Supp. 3d —, 2023 WL 4595824, at *8 (D. Ariz. July 18, 2023) (internal citation and quotation marks omitted). All five factors favor disclosure here.

First, the evidence sought is highly relevant to Plaintiffs’ claims that A.R.S. § 15-120.02 is discriminatory and violates the Constitution and multiple federal statutes. (Dkt. 127, Order on Motion for Preliminary Injunction, at 30-31 (“the Act fails even under the rational basis test because it is not related to any important government interest. ‘[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’” (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).) *Second*, no other evidence is available as there is no substitute for direct legislative evidence in demonstrating legislative intent. *Third*, there can be no dispute over the seriousness of the issues in this litigation. *Fourth*, the Arizona legislature—through Intervenor-Defendants—has a direct role in this litigation, and the rationale of these government actors is at the heart of this action, favoring disclosure. *Fifth*, although Plaintiffs recognize that the legislative privilege serves important purposes, Intervenor-Defendants cannot hide behind that privilege where they have put their communications and documents directly at issue through their intervention and affirmative participation in the defense of this case.

C. Deliberative Process Privilege Has Not Been Properly Asserted And, Regardless, Would Be Overcome.

Despite Intervenor-Defendants’ protests to the contrary, the deliberative process privilege is well understood in the Ninth Circuit to be an executive privilege. *EEOC v. Swissport Fueling, Inc.*, 2012 WL 1648416 at *15 (D. Ariz. May 10, 2012) (“the claim of deliberative due process privilege must be raised by a formal claim made by the head of the agency after she has personally considered the material in question prior to the invocation of the privilege”); *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710, at *15 (C.D. Cal. Oct. 10, 2003) (“the deliberative process privilege protects decisionmaking processes of the *executive* branch in order to safeguard the quality and integrity of governmental decisions”) (emphasis in original and internal citation and quotation marks omitted). As such, it does not extend to those acts taken by Intervenor-Defendants, both legislators who intervened “on behalf of their respective legislative Houses” to defend their “unique *legislative* interests.” (Dkt. No. 19 at 3, 11 (emphasis in original).)

Even if the deliberative process privilege were to apply, it would be overcome here for substantially the same reasons the legislative privilege is overcome. The test for the deliberative process privilege largely mimics that for the legislative process privilege, and as demonstrated above, the factors considered by courts in the legislative privilege analysis favor disclosure. *See FTC v. Warner Communc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Toomey v. Arizona*, 2021 WL 3854860 at *4–7 (D. Ariz. Aug. 27, 2021) (outlining the factors and analysis for the deliberative process privilege). Given that “the common-law deliberative process privilege [is] weaker than, and thus more readily

outweighed than[]” the legislative privilege, the deliberative process privilege is also easily overcome. *See Kay*, 2003 WL 25294710, at *18.

D. Relevant Time Period.

Plaintiffs are entitled to information outside of the July 1, 2021 to March 30, 2022 time frame—in other words, outside of the limited parameters of the Fifty-fifth Legislature-Second Regular Session—for two reasons. *First*, there is no reason to believe that all or even some of the requested information, which is necessary to demonstrate the Parties’ claims and defenses, would fall within the timeframe of a single legislative session. *Second*, a very similar bill to the Ban at issue here, H.B. 2706, was proposed in the Arizona Legislature in 2020. As such, information regarding that bill is highly relevant to issues in this litigation. Accordingly, Plaintiffs are willing to revise their timeline to August 19, 2019—six months prior H.B. 2706’s introduction—to present.

E. Interrogatory Responses.

Plaintiffs reiterate that Interrogatory No. 1 is a request for Intervenor-Defendants to identify potential fact witnesses and, therefore, does not seek privileged or protected information. An appropriate response to this Interrogatory is especially necessary given Intervenor-Defendants’ failure to include any of their own fact witnesses outside of the other parties in this litigation in their initial disclosures.

Intervenor-Defendants state that they have appropriately responded to Interrogatories Nos. 2, 3, 4, and 5. Plaintiffs thus request that Intervenor-Defendants confirm that they have produced all relevant documents in their possession responsive to those Interrogatories. For the reasons stated above, Intervenor-Defendants should also promptly produce any information being withheld on the grounds of the legislative privilege or deliberative process privilege.

III. Conclusion

Plaintiffs will be producing their revised document production on February 9, 2024. Please provide dates to meet and confer regarding the foregoing.

Very truly yours,



Justin R. Rassi

cc: Dennis I. Wilenchik
Karl Worthington
WILENCHIK & BARTNESS PC
Attorney for Defendant Thomas C. Horne

Maria Syms
ARIZONA DEPARTMENT OF EDUCATION
Attorney for Defendant Thomas C. Horne

David C. Potts
Ashley E. Caballero-Daltrey
JONES, SKELTON & HOCHULI, P.L.C.
Attorneys for Defendant The Gregory School

Lisa Anne Smith
DECONCINI MCDONALD YETWIN & LACY, P.C.
Attorney for Defendant The Gregory School

Kristian E. Nelson
Gregg E. Clifton
LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorneys for Defendant Arizona Interscholastic Association, Inc.

Jordan T. Ellel
TEMPE TRI-DISTRICT LEGAL SERVICES
Attorney for Defendants Kyrene School District and Laura Toenjes

Exhibit 9

Colin Proksel

From: Rassi, Justin R.
Sent: Monday, February 12, 2024 1:21 PM
To: 'Justin Smith'; John Sauer
Cc: Colin Proksel; Hamid, Jyotin; Zimmerman, Amy; Amy Whelan; Rachel Berg; 'Dennis Wilenchik'; 'McKay Worthington'; 'maria.syms@azed.gov'; 'jellel@tuhsd.k12.az.us'; 'dpotts@jshfirm.com'; 'lasmith@dmyl.com'; 'Ashley Caballero-Daltrey'; 'Kristian.Nelson@lewisbrisbois.com'
Subject: RE: 4:23-cv-00185 Doe v. Horne - Depositions

Colleagues:

Below is our response to your email from Thursday, both as it relates to the depositions of Plaintiffs and the Legislative Leaders.

Plaintiffs

Your “conditional” request to depose Plaintiffs—two of whom who are minors—simply on the basis that Plaintiffs have exercised their legal right to depose Intervenor-Defendants is unacceptable and we object. Your email confirms that but-for Plaintiffs notifying their intent to depose Intervenor-Defendants, Intervenor-Defendants did not intend to take any depositions, including of Plaintiffs and their parents, and therefore such depositions were not necessary to Intervenor-Defendants’ defense in this litigation. Courts do not take lightly to Parties using discovery tools punitively and, as you know, discovery requests must always be made in good faith. *Jalowsky v. Provident Life and Accident Ins. Co.*, 2020 WL 3639727, at *3 (D. Ariz. July 6, 2020) (discovery under the federal rules “require[s] the utmost good faith of attorneys at all times”). It follows that discovery under the Federal Rules of Civil Procedure is not to be conducted on a “tit-for-tat” basis. *Nat’l Acad. of Recording Arts & Sci., Inc. v. On Point Events, LP*, 256 F.R.D. 678, 680 (C.D. Cal. 2009); *see also Sabo v. Fiskars Brands, Inc.*, 2013 WL 6816693, at *1 (D. Idaho Dec. 20, 2013) (“Discovery is not a sport, and the Court does not encourage tit-for-tat discovery concessions.”).

In addition, Plaintiffs object to you taking the depositions of the minor Plaintiffs because such testimony is redundant of the testimony of their mothers and therefore unduly burdensome and not proportional to the needs of the litigation. In addition, depending on the nature of the questioning, such depositions may be emotionally difficult and harmful to the minor Plaintiffs.

Legislative Leaders

Plaintiffs are entitled to depose Intervenor-Defendants pursuant to Rules 30(a)(1) and (b)(1). Intervenor-Defendants affirmatively moved to become parties in this case and, having obtained party status, have since asserted numerous factual allegations to support the purported lawfulness of A.R.S. 15-120.02. Plaintiffs are fully entitled, by oral examination at a deposition, to test those factual assertions. Should Intervenor-Defendants refuse to attend and be deposed, Plaintiffs shall move to compel their attendance.

Intervenor-Defendants’ meritless claims of legislative immunity, legislative privilege, the apex doctrine, and relevance are no bar to a deposition. *First*, depositions of Intervenor-Defendants are directly relevant to this case, including such topics as the legislative history of S.B. 1165 and the government’s purported justifications for S.B. 1165. *Second*, Intervenor-Defendants have waived legislative immunity and its corollary, legislative privilege, in this action as we have already explained to you by separate correspondence. *Third*, for many of the same reasons that Intervenor-Defendants do not enjoy legislative immunity or legislative privilege, they also cannot rely on the apex doctrine to shield themselves from being deposed. Intervenor-Defendants cannot seek the Court’s permission to intervene in this suit to protect their asserted interests, vigorously defend the suit, and only then assert a claimed lack of knowledge of the facts at issue to evade discovery. (*See* Dkt. No. 19 at 3 (“President Petersen was a co-sponsor of S.B. 1165, and *personally advocated* and voted

for the Save Women’s Sports Act. Speaker Toma also *personally advocated* and voted for S.B. 1165, and seeks to defend the law challenged in this action.”))

Finally, Plaintiffs are not required to “exhaust” other discovery methods prior to a deposition. Even if that were a rule—which it is not—Plaintiffs have already served requests for production, requests for admission, and interrogatories on Intervenor-Defendants. Plaintiffs have determined that depositions of the Legislative Leaders are needed at this time. Intervenor-Defendants, both of whom reside in Phoenix and are backed by the resources of the State, cannot credibly complain that a single local deposition per Intervenor-Defendant is burdensome or that Plaintiffs should first manufacture further written requests that Plaintiffs do not presently believe they need. If it was going to be too burdensome for Intervenor-Defendants to sit for a deposition, then they should not have voluntarily sought to intervene in this case—particularly when S.B. 1165 was already being vigorously defended by another government actor.

In the circumstances, we propose that we meet and confer on Friday, February 16 after 11am (Tucson) together with our other meet-and-confer pertaining to discovery. Please advise if 12:00pm (Tucson) on Friday works and we shall send a Zoom link or advise another time on Friday afternoon.

Regards,

Justin

Justin R. Rassi (he/him/his) | Associate | Debevoise & Plimpton LLP | jrassi@debevoise.com | [+1 212 909 6182](tel:+12129096182) | 66 Hudson Boulevard, New York, NY 10001 | www.debevoise.com

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From: Justin Smith <Justin.Smith@james-otis.com>
Sent: Thursday, February 8, 2024 9:58 AM
To: Rachel Berg <rberg@nclrights.org>
Cc: Amy Whelan <awhelan@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Hamid, Jyotin <jhamid@debevoise.com>; Rassi, Justin R. <jrassi@debevoise.com>; Zimmerman, Amy <azimmerman@debevoise.com>; John Sauer <john.sauer@james-otis.com>
Subject: RE: 4:23-cv-00185 Doe v. Horne - Depositions

EXTERNAL

Rachel,

President Petersen and Speaker Toma object to Plaintiffs’ deposition requests on the grounds of legislative immunity, legislative privilege, the apex doctrine, and relevance.

As set forth in the Legislative Leaders’ January 19, 2024 letter, legislative privilege covers these deposition requests. Although Plaintiffs have not yet responded to this letter, they have promised a written response by tomorrow, February 9, 2024. The Legislative Leaders look forward to reviewing Plaintiffs’ response.

President Petersen and Speaker Toma are the leaders of the Arizona Senate and the Arizona House of Representatives. Both chambers are currently in session. President Petersen and Speaker Toma do not have unique, non-repetitive knowledge of the facts relating to S.B. 1165, which are contained in the publicly available legislative record that Plaintiffs have transcribed and the documents that have been produced.

In addition, Plaintiffs have not exhausted other less intrusive discovery methods. Plaintiffs have decided not to depose any other fact witnesses or parties. Plaintiffs served only nine interrogatories and nine requests for production on the Legislative Leaders before requesting their depositions. The Legislative Leaders thoroughly answered all of Plaintiffs' requests about S.B. 1165, produced all but five documents that related to S.B. 1165, and have been prepared for weeks to meet and confer over Plaintiffs' limited objections relating to a past bill and litigation information. Finally, after requesting the Legislative Leaders' depositions, Plaintiffs demonstrated that less intrusive discovery methods are available when they then served requests for admission on the Legislative Leaders and written discovery requests in lieu of depositions on Defendants Horne and AIA.

The Legislative Leaders welcome a written response from Plaintiffs to understand why these legal protections for legislators and high-ranking officials do not apply here. As set forth in the Legislative Leaders' January 19, 2024 letter, the *Mi Familia* case cited by Plaintiffs is distinguishable in numerous ways and is inapplicable here.

The Legislative Leaders will not testify at trial in this matter and have not sought depositions from any other party or witness to date. Unlike the cases cited by Plaintiffs, this is not a situation where the Legislative Leaders have taken depositions but are unwilling to be deposed. However, to preserve their interests in the event that situation changes against the Legislative Leaders' will, the Legislative Leaders conditionally request depositions of Jane Doe, Helen Doe, Megan Roe, and Kate Roe as soon as mutually convenient after any depositions of the Legislative Leaders.

Thank you,

Justin

Justin Smith
816.678.2103
Justin.Smith@james-otis.com

From: Rachel Berg <RBerg@nclrights.org>
Sent: Wednesday, February 7, 2024 4:31 PM
To: John Sauer <john.sauer@james-otis.com>; Justin Smith <Justin.Smith@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; McKay Worthington <mckayw@wb-law.com>; Syms, Maria <maria.syms@azed.gov>; jellel@tuhsd.k12.az.us; DAVID POTTS <DPotts@jshfirm.com>; Smith, Lisa Anne <lasmith@dmyl.com>; Ashley Caballero-Daltrey <ADaltrey@jshfirm.com>; 'Nelson, Kristian' <Kristian.Nelson@lewisbrisbois.com>
Cc: Amy Whelan <AWhelan@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Jyotin Hamid <jhamid@debevoise.com>; Rassi, Justin R. <jrassi@debevoise.com>; Zimmerman, Amy <azimmerman@debevoise.com>
Subject: 4:23-cv-00185 Doe v. Horne - Depositions

Counsel,

Because the Judge has not yet ruled on Plaintiffs' motion to extend the fact discovery deadline and the fact discovery deadline is currently March 8, Plaintiffs would like to communicate the following regarding depositions they currently plan to take in this matter.

Given the current deadline, Plaintiffs do not plan to take any depositions of any fact witnesses from any of the Defendants in this litigation. Plaintiffs, however, reserve their rights to depose any fact witnesses from Defendants if the discovery deadline is extended and based on additional documents and/or discovery responses that are produced in this case.

Pursuant to Rule 30(b)(1), Plaintiffs will depose Intervenor-Defendants Warren Petersen and Ben Toma. The depositions will take place at Osborn Maledon's office in Phoenix. Please provide Plaintiffs with the witnesses' availability for the last two weeks of the current fact discovery period (week of February 26 and March 4). Once the deposition dates are decided, Plaintiffs will serve a formal deposition notice. Given that discovery issues remain outstanding with Intervenor-Defendants, Plaintiffs further reserve their rights to re-depose these witnesses and/or additional witnesses based on documents and/or discovery responses that are served after the deposition dates.

Thanks,
Rachel

Rachel H. Berg | Staff Attorney

(Pronouns: she/her)

rberg@nclrights.org

(415) 343-7679 office

Licensed to practice law in Tennessee and New York

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