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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 FOR A
PROTECTIVE ORDER**

INTRODUCTION

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2 Pursuant to Federal Rule of Civil Procedure 26(c), Plaintiffs Jane Doe and Megan
3 Roe move for a protective order preventing Intervenor-Defendants President Warren
4 Petersen and Speaker Ben Toma from noticing depositions of Jane and Megan or, in the
5 alternative, setting reasonable limits on any depositions noticed.

6 Intervenor-Defendants have requested the depositions of Jane Doe, Helen Doe,
7 Megan Roe, and Kate Roe only if the Court compels Intervenor-Defendants to sit for
8 depositions. Accordingly, this Motion will ripen if the Court grants Plaintiffs’
9 previously-filed Motion to Compel. (*See* Dkt. 191.)

10 Deposing Jane and Megan, who are twelve and sixteen years old respectively, is
11 unduly burdensome and not proportional to the needs of this litigation. Sitting for a
12 deposition will likely be emotionally harmful to Jane and Megan because they will
13 inevitably involve highly confidential, sensitive, and private topics. Jane’s and Megan’s
14 testimony will also be redundant of their mothers’ testimony and other discovery
15 responses and documents provided in this litigation. To prevent harm and undue burden,
16 Plaintiffs respectfully seek a protective order.

BACKGROUND

I. Plaintiffs Jane Doe and Megan Roe.

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19 Plaintiffs Jane Doe and Megan Roe are transgender children who seek to play on
20 girls’ sports teams with their friends. Megan and Jane are young girls—Megan is sixteen
21 years old and Jane is just twelve. Because of their status as minors, they are proceeding
22 in this case through their parents. Though both are fortunate to have family and friends
23 who support them, Megan and Jane daily face social stigma and state-imposed
24 discrimination simply for being themselves. Living openly as the girls that they are,
25 including playing on girls’ sports teams and receiving essential medical care, has required
26 them to navigate many legal, administrative, and medical hurdles. The intimate details of
27 Plaintiffs’ medical treatment related to their gender identity and gender dysphoria are
28 highly confidential, sensitive, and personal.

1 II. Depositions of Jane Doe and Megan Roe.

2 Intervenor-Defendants expressed their intent to depose Jane and Megan on
3 February 8, 2024 as a response to Plaintiffs notifying Intervenor-Defendants that they
4 would be deposed. (Ex. A at 4–5.)¹ Specifically, after Plaintiffs explained that they
5 would serve deposition notices on Intervenor-Defendants, Intervenor-Defendants
6 responded that, “to preserve their interests in the event” they were required to sit for
7 depositions, they “conditionally request[ed] depositions of Jane Doe, Helen Doe, Megan
8 Roe, and Kate Roe.” (*Id.*) Plaintiffs objected to this request as to Jane and Megan,
9 noting that deposing Jane and Megan would be unduly burdensome and unnecessary.
10 (*Id.* at 2–3.) In response, Intervenor-Defendants argued that depositions of Megan and
11 Jane would be appropriate because the two girls “fil[ed] a complaint,” “signed
12 declarations in support of their preliminary injunction motions,” and identified
13 themselves in their initial disclosures. (*Id.* at 1.)

14 At a meet and confer on February 16, 2024, Plaintiffs informed Intervenor-
15 Defendants that they would seek a protective order to prevent any depositions of Jane and
16 Megan, but that they would not seek a protective order regarding the depositions of Helen
17 Doe and Kate Roe (Jane’s and Megan’s mothers). (Berg Decl. ¶¶ 3–4.) In the event the
18 Court denies Plaintiffs’ motion for a protective order, Plaintiffs also asked all Defendants
19 to agree to certain limitations to minimize the potential harm of such a deposition on Jane
20 and Megan. (Ex. B at 7–8.) Following an email exchange and a second meet and confer
21 on February 29, 2024, Intervenor-Defendants agreed to some but not all of the proposed
22 limitations;² Defendant Arizona Interscholastic Association, Inc. (the “AIA”) also

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

25 ² All Parties have already agreed to the following limitations: (1) Intervenor-
26 Defendants/Defendants agree to refer to the minor Plaintiffs using their
27 pseudonyms in this case and to not use any pronouns; (2) Intervenor-
28 Defendants/Defendants agree to not use minor Plaintiffs’ birth names; (3)
Intervenor-Defendants/Defendants agree to redact minor Plaintiffs’ birth names on
any documents used in their depositions; (4) In the room for the depositions of the
minor Plaintiffs, Intervenor-Defendants/Defendants agree that there will not be
more than one attorney per Party in the room; (5) In the room for the depositions
of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that the minor
Plaintiffs can be accompanied by one of their parents; (6) Intervenor-

1 objected to one of the limitations, though it currently does not intend to notice any
 2 deposition of Jane and Megan. (Berg Decl. ¶¶ 6–11; Ex. C. at 1.)³ All other Defendants
 3 have agreed to all of the proposed limitations. (Berg Decl. ¶¶ 6–10; Ex. C. at 2.)

4 ARGUMENT

5 **I. Good Cause Exists to Issue a Protective Order to Prevent the** 6 **Depositions of Jane Doe and Megan Roe.**

7 Under Federal Rule of Civil Procedure 26(c)(1), a court “may, for good cause,
 8 issue an order to protect a party or person from annoyance, embarrassment, oppression,
 9 or undue burden or expense” in the discovery process, including an order “forbidding
 10 inquiry into certain matters, or limiting the scope of disclosure or discovery to certain
 11 matters.” This provision “was enacted as a safeguard for the protection of parties and
 12 witnesses in view of the broad discovery rights authorized in Rule 26(b).” *U.S. v.*
 13 *Columbia Broad. Sys., Inc.*, 666 F.2d 364, 368–69 (9th Cir. 1982). To demonstrate good
 14 cause, “the party seeking protection bears the burden of showing specific prejudice or
 15 harm will result if no protective order is granted.” *Phillips ex rel. Ests. of Byrd v. Gen.*
 16 *Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002).

17 Plaintiffs have met that burden here. Megan and Jane are young transgender
 18 girls—Megan is sixteen years old and Jane is just twelve. Though both are fortunate to
 19 have family and friends who support them, Megan and Jane daily face social stigma and
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21 Defendants/Defendants agree to not ask any questions regarding the minor
 22 Plaintiffs’ genitalia or that focus on their bodies; (7) Intervenor-
 23 Defendants/Defendants agree there will not be questions that attempt to probe
 24 whether serious issues of trauma have occurred in the minor Plaintiffs’ lives; (8)
 25 Intervenor-Defendants/Defendants agree to not ask questions that attack or
 26 undermine the minor Plaintiffs’ parents or family members; and (9) Intervenor-
 27 Defendants/Defendants agree that they will not reference the minor Plaintiffs as a
 28 “male” or “boy.” (Berg Decl. ¶ 8.)

³ As discussed in greater detail below, Intervenor-Defendants objected to the
 following limitations: (1) Intervenor-Defendants/Defendants agree there will not
 be questioning concerning either the legitimacy or appropriateness of the minor
 Plaintiffs’ medical and/or mental health treatment; (2) Intervenor-
 Defendants/Defendants agree there will not be references to the minor Plaintiffs’
 medical records and letters from mental health providers or questions about the
 contents of those records/letters; and (3) Intervenor-Defendants/Defendants agree
 that they will not ask questions referencing sexual abuse, assault, or misconduct.
 The AIA objected to the second of these limitations. (See Berg Decl. ¶¶ 9–10.)

1 state-imposed discrimination simply for being themselves. Living openly as the girls that
2 they are, including playing on girls’ sports teams and receiving essential medical care,
3 has required them to navigate many legal, administrative, and medical issues. In addition
4 to other topics, Intervenor-Defendants plan to ask Megan and Jane questions about their
5 gender dysphoria and related medical treatment, including the legitimacy and
6 appropriateness of such treatment. (Berg Decl. ¶ 9; *see also* Ex. B at 4.) They also plan
7 to ask them questions about the impact of gender dysphoria on their lives, which would
8 necessarily include their mental health history. (Berg Decl. ¶ 9; *see also* Ex. B at 4.)
9 This is a substantial burden to place on any two young girls, and particularly two girls
10 who are transgender. For this reason alone, the Court should exercise its power under
11 Rule 26(c) to issue an order protecting them from “embarrassment, oppression, or undue
12 burden.” *Cf. Najera-Aguirre v. Riverside*, No. 18-CV-762, 2019 WL 3249613, at *4
13 (C.D. Cal. Apr. 16, 2019) (noting the “burden and potential trauma to the minor plaintiffs
14 that would be caused by their depositions” and denying the defendants’ request to take
15 their depositions).

16 A protective order is also warranted because Intervenor-Defendants have
17 alternative, less intrusive ways to obtain any relevant information through depositions of
18 Jane’s and Megan’s mothers, Helen Doe and Kate Roe. Helen and Kate are well-
19 positioned to answer any questions Intervenor-Defendants may direct toward Megan and
20 Jane. For example, both Helen and Kate can provide information about their daughters’
21 gender identity, gender dysphoria, social transition, medical transition, medical records,
22 mental health history, involvement in school sports, the impact that playing on girls’
23 sports teams has had on their daughters’ lives, and their daughters’ inability to play on
24 boys’ sports teams. Intervenor-Defendants have failed to identify a single topic that they
25 would ask Jane and Megan that could not be answered by Helen and Kate instead. Thus,
26 while Jane and Megan would suffer significant harm from being deposed, Intervenor-
27 Defendants will not be prejudiced by not deposing them.⁴ *Cf. Najera-Aguirre*,

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⁴ The lack of prejudice is further confirmed by the fact that Intervenor-Defendants do not even seek to depose Plaintiffs unless the Court grants Plaintiffs’ motion to

1 2019 WL 3249613, at *4 (“Defendants also fail to explain what additional information
2 the minor plaintiffs could provide in their depositions that their mother and guardian ad
3 litem, Lucia Salgado, or their step-sister, Saira Armenta, could not have provided in their
4 depositions already taken.”).

5 While the reasons not to depose Megan and Jane are significant, Intervenor-
6 Defendants’ explanations of why the depositions are necessary are comparably feeble.
7 Intervenor-Defendants have pointed to the fact that Megan and Jane “fil[ed] a
8 complaint,” “signed declarations in support of their preliminary injunction motions,” and
9 identified themselves in their initial disclosures. (Ex. A at 1.) But Megan’s and Jane’s
10 filing of this lawsuit to protect their legal rights, as well as their compliance with federal
11 discovery rules, does not automatically entitle Intervenor-Defendants to depose them.
12 Where good cause is shown to protect “a[ny] party or person,” including plaintiffs, from
13 unnecessary, burdensome, or embarrassing forms of discovery, the Federal Rules of Civil
14 Procedure empower courts to prevent that discovery. Fed. R Civ. P. 26(c)(1).
15 Accordingly, Plaintiffs have met their burden of showing good cause, and the Court
16 should enter a protective order preventing the depositions of Megan and Jane.

17 **II. If the Court Declines to Issue a Protective Order, Any Deposition of**
18 **Jane Doe and Megan Roe Should Be Subject to Reasonable**
19 **Limitations.**

20 The Court should prevent the depositions of both Jane and Megan entirely. In the
21 alternative, if the Court does not prevent the depositions (or prevents the deposition as to
22 the younger Plaintiff (Jane) but not the older Plaintiff (Megan)), Plaintiffs request that
23 Intervenor-Defendants (as well as any other Defendant that notices a deposition of Megan
24 and/or Jane or participates in such depositions) be subject to reasonable limitations.
25 Specifically, Plaintiffs request that the Court order that:

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compel the depositions of Intervenor-Defendants. If Jane and Megan truly had
information that was necessary to Intervenor-Defendants’ defenses, they would
not have made their request “conditional.” (See Ex. A at 4–5.)

1 **1. Intervenor-Defendants/Defendants cannot pursue questioning**
2 **concerning either the legitimacy or the appropriateness of the minor Plaintiffs’**
3 **medical and/or mental health treatment.** As the Court already ruled in its decision
4 granting Plaintiffs’ Motion for a Preliminary Injunction, the “appropriateness of medical
5 treatment for gender dysphoria is not at issue in this case.” (Dkt. 127 at 17.) To the
6 extent Intervenor-Defendants intend to question Plaintiffs about these topics, those
7 questions should be limited to any depositions with Jane’s and Megan’s mothers. It
8 would be highly inappropriate to question children about the necessity of their medical
9 care, and those questions could also unnecessarily interfere with Jane’s and Megan’s
10 relationships with their medical providers. This questioning could also involve highly
11 personal and sensitive details regarding the children’s mental health and medical history,
12 including the intimate decisions they have made with their parents and doctors.

13 **2. Intervenor-Defendants/Defendants cannot refer to the minor Plaintiffs’**
14 **medical records and letters from mental health providers or questions about the**
15 **contents of those records/letters.** Again, this topic would be extremely harmful for Jane
16 and Megan to discuss because it involves highly sensitive and invasive questions
17 regarding their private medical and mental health histories. Jane and Megan should not
18 be required to discuss such information with adverse parties. This is especially true given
19 that (1) Plaintiffs have answered written discovery regarding their medical treatment;
20 (2) Plaintiffs have produced entirely unredacted copies of their medical records and
21 letters from mental health providers; and (3) Jane’s and Megan’s mothers can answer any
22 questions related to these records and letters in their depositions.

23 **3. Intervenor-Defendants/Defendants cannot ask questions referencing**
24 **sexual abuse, assault, or misconduct.** Plaintiffs included this request in an excess of
25 caution based on their counsel’s experience in another case involving depositions of
26 transgender minors’ parents. In that case, there were questions suggesting that trauma,
27 such as sexual abuse or other misconduct, caused the plaintiffs’ gender dysphoria—a
28 theory with absolutely no basis in science or medicine. Intervenor-Defendants have

1 agreed to prohibit questions about any acts committed against Jane and Megan. They did
2 not agree, however, to refrain from asking questions about unspecified actions by Jane
3 and Megan. (Ex. B at 5.) When asked what this could mean, Intervenor-Defendants
4 suggested there could be inappropriate actions the minor Plaintiffs may have engaged in,
5 such as in locker rooms or other areas. (Berg Decl. ¶ 10.) There is no evidence or
6 information that minor Plaintiffs have engaged in any improper conduct whatsoever.
7 Moreover, these topics are irrelevant to the issues in this case. Accordingly, if the
8 depositions of Jane and Megan are permitted, Plaintiffs request a protective order
9 prohibiting all questioning related to sexual abuse, assault, or misconduct.⁵

10 Accordingly, if the depositions of Jane and Megan are permitted, a protective
11 order limiting questioning on these three topics is exactly the sort of reasonable limitation
12 the Court is authorized to issue under Rule 26(c)(1).

13 CONCLUSION

14 Because Plaintiffs have shown good cause that deposing Megan and Jane will be
15 both substantially burdensome and unnecessary, Plaintiffs request that this Court issue an
16 order of protection either preventing the depositions or, in the alternative, imposing the
17 limitations articulated above.

18 Respectfully submitted this 8th day of March,
19 2024.

20 */s/ Colin M. Proksel*
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28 ⁵ These limitations are in addition to those Intervenor-Defendants and Defendants
have already agreed to during the Parties' previous exchanges. *See supra* pp. 2–3
n.2.

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**Admitted pro hac vice.*

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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 Toenjies, 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 FOR
A PROTECTIVE ORDER**

DECLARATION OF RACHEL H. BERG

1
2 I, Rachel H. Berg, hereby declare as follows:

3 1. I am a staff attorney at the National Center for Lesbian Rights and
4 counsel for Plaintiffs Jane Doe and Megan Roe in the above-captioned action. I am a
5 member of the bar of the State of New York and the State of Tennessee. I submit this
6 declaration in support of Plaintiffs’ Motion for a Protective Order.

7 2. On February 16, 2024, counsel for Plaintiffs and Intervenor-Defendants
8 held a meet and confer in an effort to resolve outstanding discovery issues.

9 3. At the February 16, 2024 meet and confer, Plaintiffs informed Intervenor-
10 Defendants that they would seek a protective order to prevent any depositions of Jane
11 Doe or Megan Roe.

12 4. At the same meet and confer, Plaintiffs also informed Intervenor-
13 Defendants that they would not seek a protective order as to any depositions of Helen
14 Doe or Kate Roe.

15 5. Following the February 16, 2024 meet and confer, Plaintiffs sent
16 opposing counsel for all Parties a list of proposed limitations for all Parties to abide by
17 in any deposition of Jane Doe and Megan Roe.

18 6. By e-mail correspondence, counsel for all Parties, except Intervenor-
19 Defendants and Arizona Interscholastic Association, Inc. (the “AIA”), agreed to abide
20 by all of the proposed limitations.

21 7. On February 29, 2024, counsel for Plaintiffs, Intervenor-Defendants, and
22 the AIA held another meet and confer to address the Plaintiffs’ proposed limitations.

23 8. At the February 29, 2024 meet and confer and by email correspondence,
24 counsel for Intervenor-Defendants agreed to the following nine limitations:
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- Intervenor-Defendants/Defendants agree to refer to the minor Plaintiffs using their pseudonyms in this case and to not use any pronouns;
- Intervenor-Defendants/Defendants agree to not use minor Plaintiffs’ birth names;
- Intervenor-Defendants/Defendants agree to redact minor Plaintiffs’ birth names on any documents used in their depositions;
- In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that there will not be more than one attorney per Party in the room;
- In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that the minor Plaintiffs can be accompanied by one of their parents;
- Intervenor-Defendants/Defendants agree to not ask any questions regarding the minor Plaintiffs’ genitalia or that focus on their bodies;
- Intervenor-Defendants/Defendants agree there will not be questions that attempt to probe whether serious issues of trauma have occurred in the minor Plaintiffs’ lives;
- Intervenor-Defendants/Defendants agree to not ask questions that attack or undermine the minor Plaintiffs’ parents or family members;
- Intervenor-Defendants/Defendants agree that they will not reference the minor Plaintiffs as a “male” or “boy.”

9. Intervenor-Defendants did not agree to the following limitations:

- Intervenor-Defendants/Defendants agree there will not be questioning concerning either the legitimacy or appropriateness of the minor Plaintiffs’ medical and/or mental health treatment;
- Intervenor-Defendants/Defendants agree there will not be references to the minor Plaintiffs’ medical records and letters from mental health providers or questions about the contents of those records/letters;
- Intervenor-Defendants/Defendants agree that they will not ask questions referencing sexual abuse, assault, or misconduct.

10. As to the third of the limitations discussed in Paragraph 9, Intervenor-Defendants agreed not to ask about any acts committed against Jane Doe or Megan Roe. Intervenor-Defendants did not agree not to ask about any acts committed by Jane Doe or Megan Roe. Intervenor-Defendants indicated that Jane Doe and Megan Roe

1 may have committed inappropriate actions in locker rooms or other areas and that they
2 wanted to ask about these topics.

3 11. Defendant AIA also did not agree to the proposed limitation that “there
4 will not be references to the minor Plaintiffs’ medical records and letters from mental
5 health providers or questions about the contents of those records/letters” but otherwise
6 agreed to all proposed limitations.
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8 12. Attached hereto as Exhibit A is a true and correct copy of the Parties’
9 correspondence regarding depositions, including Intervenor-Defendants’
10 February 14, 2024 email explaining their basis for seeking depositions of Jane Doe and
11 Megan Roe.

12 13. Attached hereto as Exhibit B is a true and correct copy of the Parties’
13 correspondence regarding the depositions of Jane Doe and Megan Roe, including
14 Plaintiffs’ request for limitations on the scope of any deposition and Intervenor-
15 Defendants’ response thereto.
16

17 14. Attached hereto as Exhibit C is a true and correct copy of the Parties’
18 correspondence regarding the depositions of Jane Doe and Megan Roe, including the
19 responses of Parties other than Intervenor-Defendants to Plaintiffs’ proposed
20 limitations.
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22 I declare under penalty of perjury that the foregoing is true and correct.

23
24 Dated: March 8, 2024
Nashville, Tennessee

25 /s/Rachel H. Berg

26 Rachel H. Berg
27
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EXHIBIT A

Zimmerman, Amy

From: Justin Smith <Justin.Smith@james-otis.com>
Sent: Wednesday, February 14, 2024 9:39 AM
To: Rassi, Justin R.
Cc: Colin Proksel; Hamid, Jyotin; Zimmerman, Amy; Amy Whelan; Rachel Berg; John Sauer
Subject: RE: 4:23-cv-00185 Doe v. Horne - Depositions

EXTERNAL

Justin,

We are available Friday at 12 p.m. Arizona time to meet and confer about both written discovery and depositions. We hope the parties can have a productive conversation.

Plaintiffs' double-standard on depositions is surprising. In Plaintiffs' view, they can depose an intervening party (despite relevance and privilege barriers), but that same party cannot depose them, the individuals that initiated the lawsuit. It is well-settled that a defendant has the right to depose the plaintiff. *Susilo v. Robertson*, No. CV129796CASPJWX, 2013 WL 12151377, at *1 (C.D. Cal. Aug. 30, 2013); *Diaz v. Vigil*, No. 103CV05108OWWLJOPC, 2007 WL 427122, at *1 (E.D. Cal. Feb. 6, 2007). This is true even for minor plaintiffs. *A.G.1 v. City of Fresno*, No. 116CV01914LJOSAB, 2018 WL 2045092, at *1 (E.D. Cal. Apr. 30, 2018) ("While the Court is sympathetic that these depositions are emotional for the minors involved, the minors brought the claims in this action and Defendants are entitled to depose them."); *see also M.M. v. United States*, No. EDCV19631JGBSPX, 2020 WL 4037165, at *3 (C.D. Cal. June 30, 2020).

The Legislative Leaders have a clear good faith basis for seeking Plaintiffs' depositions. In addition to filing a complaint, Plaintiffs Jane Doe and Megan Roe signed declarations in support of their preliminary injunction motions. In their initial disclosures, they also identified themselves as witnesses that Plaintiffs may use to support their claims or defenses. Since both Plaintiffs and their mothers testified separately in declarations and are listed separately in the initial disclosures, Plaintiffs apparently do not believe their testimony is redundant.

We are disappointed that Plaintiffs would stoop to making baseless accusations. To be clear: We are protecting our privilege to not be deposed, and our research suggests this privilege may be weakened if we take depositions to which we are clearly entitled. But in the event the privilege is breached over our objection, we have a responsibility to ensure that we are not harmed a second time by not taking discovery we otherwise would have. This is no "tit-for-tat."

We already have provided positions on the other issues in dispute and see no need to elaborate further before Friday. We look forward to our discussion.

Thank you,

Justin

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

From: Rassi, Justin R. <jrassi@debevoise.com>

Sent: Monday, February 12, 2024 2:21 PM

To: Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>

Cc: Colin Proksel <cproksel@omlaw.com>; Hamid, Jyotin <jhamid@debevoise.com>; Zimmerman, Amy <azimmerman@debevoise.com>; Amy Whelan <awhelan@nclrights.org>; Rachel Berg <rberg@nclrights.org>; 'Dennis Wilenchik' <diw@wb-law.com>; 'McKay Worthington' <mckayw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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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EXHIBIT B

Zimmerman, Amy

From: Rachel Berg <RBerg@nclrights.org>
Sent: Thursday, February 29, 2024 4:55 PM
To: elson, ristian; Justin Smith; John Sauer; Mc ay Worthington; Dennis Wilenchik; maria.syms@a ed.gov; jellel@tuhsd.k12.a .us; dpotts@jsh irm.com; lasmith@dmyl.com; Ashley Caballero-Daltrey
Cc: Amy Whelan; Colin Proksel; Hamid, Jyotin; Rassi, Justin R.; Zimmerman, Amy
Subject: RE: 4:23-cv-00185 Doe v. Horne - Discovery

EXTERNAL

Counsel,

Thank you for your time earlier today. As discussed on our prior call with counsel for Intervenor-Defendants, Intervenor-Defendants confirmed 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 continue to assert the legislative and deliberative process privileges. They also agreed to supplement their response to Interrogatory No. 1. On today's call, Intervenor-Defendants stated that they plan to serve their supplemental production and interrogatory response in the next several business days.

As to the deposition parameters outlined below, Plaintiffs and Intervenor-Defendants reached agreement on 1-6 and 9-11 at today's meet and confer, with 7,8, and 12 to be the subject of Plaintiffs' motion for a protective order. AIA also disputes 8.

As to a briefing schedule regarding the motion for a protective order, Plaintiffs propose the following. **e e con r m t e e ro o e d d t e or or ou nd e re c out to t e Court b e m n**

March 8 Motion Due
March 22 Opposition Due
March 29 Reply Due

Given the large number of participants involved, the parties also discussed putting deposition dates on the calendar. Plaintiffs have reached out to their clients regarding deposition dates to reserve on the calendar with the understanding that they may be moved/cancelled depending on the judge's ruling and timing of such ruling. We should be getting back to you on options for dates in the next couple business days.

Best,
Rachel

From: Nelson, Kristian <Kristian.Nelson@lewisbrisbois.com>

Sent: Monday, February 26, 2024 8:04 PM

To: Justin Smith <Justin.Smith@james-otis.com>; Rachel Berg <RBerg@nclrights.org>; John Sauer <john.sauer@james-otis.com>; McKay Worthington <mckayw@wb-law.com>; Dennis Wilenchik <diw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.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: RE: 4:23-cv-00185 Doe v. Horne - Discovery

Rachel,

I am available anytime on Thursday or Friday - except 10:00 a.m. MST 11:00 a.m. MST. I'm tied up at that time on both days.

Regards,

Kristian



r t n E Ne on

rtner

Kristian.Nelson@lewisbrisbois.com

T:

F:

Phoenix Plaza Tower II

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Re re ent n c ent rom co t to co t e our oc t on n t on de

Mansfield Rule

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From: Justin Smith <Justin.Smith@james-otis.com>

Sent: Monday, February 26, 2024 4:02 PM

To: Rachel Berg <RBerg@nclrights.org>; John Sauer <john.sauer@james-otis.com>; McKay Worthington <mckayw@wb-law.com>; Dennis Wilenchik <

[law.com](#)>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <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: E T RE: 4:23-cv-00185 Doe v. Horne - Discovery

Rachel,

I am available on Thursday except for 1:30-2:30 Arizona time, as well as Friday morning.

Thank you,

Justin

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

From: Rachel Berg <RBerg@nclrights.org>
Sent: Monday, February 26, 2024 9:56 AM
To: Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; McKay Worthington <mckayw@wb-law.com>; Dennis Wilenchik <diw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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: RE: 4:23-cv-00185 Doe v. Horne - Discovery

All,

Thank you for getting back to us. As to counsel for the Intervenor-Defendants and AIA, are you available on Thursday (2/29) or Friday (3/1) for a meet and confer regarding the below Please let me know a good time.

Given that we will need time to negotiate the below, Plaintiffs will go ahead with reaching out to the Court regarding their motion to compel with the briefing schedule we previously agreed upon and will reserve their right to file a motion for a protective order after we have finished our discussions and if the issue becomes ripe after the district court's decision. Plaintiffs plan to reach out to the Court today regarding the motion to compel.

Best,
Rachel

From: Justin Smith <Justin.Smith@james-otis.com>

Sent: Friday, February 23, 2024 1:23 PM

To: McKay Worthington <mckayw@wb-law.com>; Rachel Berg <RBerg@nclrights.org>; John Sauer <john.sauer@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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: RE: 4:23-cv-00185 Doe v. Horne - Discovery

Rachel,

The Legislative Leaders renew the commitment we made during last week's meet and confer to conduct any depositions professionally and with respect toward Plaintiffs and everyone else involved. We appreciate counsel's protectiveness over their clients, and we have attempted to accommodate the parameters provided by Plaintiffs to the greatest extent possible.

As explained below, we agree to six of Plaintiffs' proposed parameters outright and seek clarifications or stipulations that would allow agreement on four more. We object to only two of the 12 parameters that Plaintiffs proposed because they seek substantive limitations related to Plaintiffs' claims.

We do not object to parameters #2, #3, #4, #5, and #11. Parameter #1, if imposed by a court, would violate the First Amendment, *see, e.g., Meriwether v. Hartop*, 992 F.3d 492, 511-12 (6th Cir. 2021), and the Legislative Leaders' position is that, for purposes of school sports, each plaintiff is biologically male. That said, we believe we can avoid litigating these concerns by referring to Plaintiffs by their pseudonyms in this case rather than by pronouns.

We will not object to parameter #6 if Plaintiffs agree to stipulate that they have male genitalia and do not have any intersex condition or genetic abnormality.

We cannot agree to parameters #7 and #8. Plaintiffs have placed their medical treatment at issue. For example, Count III claims that Plaintiffs are disabled because of a substantial limitation on a major life activity. In their interrogatory responses, Plaintiffs have identified a lengthy list of affected major life activities. Pls.' Responses and Objections to Intervenor-Defs.' First Set of Interrogatories, Interrog. No. 9. In addition, Plaintiffs have raised their gender dysphoria diagnosis and treatment as the basis for all of their claims. *See, e.g.,* Compl., Doc. 1, ¶¶ 32-33, 45-46, 51-52, 55, 57, 59-60, 65, 67. We are entitled to explore those allegations, including through medical records that Plaintiffs have produced.

We will not object to parameter #9 if Plaintiffs agree to stipulate that they have not had any serious issues of trauma, including suicidal ideation or self-harm attempts, either before or after beginning their treatment for gender dysphoria. *See, e.g.*, Compl., Doc. 1, ¶ 33; Decl. of Dr. Stephanie Budge, Ph.D., Doc. 4, ¶ 33.

We ask for clarification on parameter #10 and its prohibition on questions that “attack or undermine the minor Plaintiffs’ parents or family members.” We have no desire to attack or undermine anyone, including Plaintiffs’ family. However, to ensure the parties are on the same page on language that could be subject to a wide range of interpretation, we would appreciate further explanation or examples of what Plaintiffs consider to be questions that “attack or undermine.”

We propose modifying parameter #12 to prohibit questions about any acts committed against Plaintiffs. This would preserve our right to ask questions relating to any relevant actions by Plaintiffs.

We are willing to continue working with Plaintiffs to seek common ground on these issues if the depositions proceed. Please let us know if you would like to meet and confer.

Thank you,

Justin

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

From: McKay Worthington <mckayw@wb-law.com>

Sent: Wednesday, February 21, 2024 3:53 PM

To: Rachel Berg <RBerg@nclrights.org>; Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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: RE: 4:23-cv-00185 Doe v. Horne - Discovery

Rachel,

Superintendent Horne does not intend to brief or argue either of the discovery disputes you identify below. Nor does Superintendent Horne intend to depose Plaintiffs. We therefore neither oppose nor endorse your proposed approach on taking the discovery disputes to the Court.

McKay



www.wb-law.com

McKay Worthington
Attorney at Law
mckayw@wb-law.com

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From: Rachel Berg <RBerg@nclrights.org>

Sent: Friday, February 16, 2024 4:16 PM

To: 'Justin Smith' <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; McKay Worthington <mckayw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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 - Discovery

Counsel,

Plaintiffs and Intervenor-Defendants had a meet and confer earlier this afternoon regarding their outstanding discovery disputes. Plaintiffs will be moving to compel Intervenor-Defendants to sit for a deposition and to produce all documents and information that they have withheld based on the legislative privilege

and deliberative process privilege. Plaintiffs will also be moving for a protective order regarding the depositions of Jane Doe and Megan Roe because, *inter alia*, 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.

Judge Zipps mentioned in our case management conference and her scheduling order that she prefers the parties call Chambers to see if she can rule on discovery issues before filing motions on the docket. Given the difficulty of arranging a time with the large number of parties involved and the judge's calendar as well as the desire to avoid any ex parte communications, Plaintiffs are proposing emailing Chambers and cc'ing all parties to request a time for a status conference for all parties or for the Court to go ahead and order a briefing schedule regarding the above disputes. Plaintiffs and Intervenor-Defendants agreed to the following proposed briefing schedule on our meet and confer: March 1 opening briefs, March 18 opposition briefs, March 25 reply briefs. **e e et u no et er ou ree t t ro c b edne d**

As to the depositions of Jane Doe and Megan Roe (minor Plaintiffs), Plaintiffs will be requesting that if the Judge denies their motion for a protective order that she order certain parameters to the depositions. Please see below for the requested parameters. Plaintiffs ask that any party who is planning to question the minor Plaintiffs agree to these parameters. **e e et u no b Fr d et er ou ree to t e e r meter nd not e c edu e me to meet nd con er t ree nt r e to d cu n out t nd n ue**

Best,
Rachel

Intervenor-Defendants/Defendants agree to use she/her pronouns for the minor Plaintiffs and use the pseudonyms in this case.

Intervenor-Defendants/Defendants agree to not use minor Plaintiffs' birth names.

Intervenor-Defendants/Defendants agree to redact minor Plaintiffs' birth names on any documents used in their depositions.

In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that there will not be more than one attorney per party in the room.

In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that the minor Plaintiffs can be accompanied by one of their parents.

Intervenor-Defendants/Defendants agree to not ask any questions regarding the minor Plaintiffs' genitalia or that focus on their bodies.

Intervenor-Defendants/Defendants agree there will not be questioning concerning either the legitimacy or appropriateness of the minor Plaintiffs' medical and/or mental health treatment.

Intervenor-Defendants/Defendants agree there will not be references to the minor Plaintiffs' medical records and letters from mental health providers or questions about the contents of those records/letters.

Intervenor-Defendants/Defendants agree there will not be questions that attempt to probe whether serious issues of trauma have occurred in the minor Plaintiffs' lives. Those questions could in and of themselves be upsetting and there is nothing in the record that would support such questioning.

Intervenor-Defendants/Defendants agree to not ask questions that attack or undermine the minor Plaintiffs' parents or family members.

Intervenor-Defendants/Defendants agree that they will not reference the minor Plaintiffs as a male or boy.

Intervenor-Defendants/Defendants agree that they will not ask questions referencing sexual abuse, assault, or misconduct (including given the lack of any basis for such questions based on the record).

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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EXHIBIT

Mc au in, race

From: elson, ristian <ristian.elson@lewisbrisbois.com>
Sent: Friday, February 23, 2024 10:11 PM
To: DAVID POTTIS; Jordan Elle; Rachel Berg; Justin Smith; John Sauer; Dennis Wilenchik; McKay Worthington; maria.syms@azed.gov; lasmith@dmyl.com; Ashley Caballero-Daltrey
Cc: Amy Whelan; Colin Proksel; Hamid, Jyotin; Rassi, Justin R.; Zimmerman, Amy; Neil Hardin
Subject: RE: ETERNAL 4:23-cv-00185 Doe v. Horne - Discovery

Rachel,

The AIA is agreeable with your approach on the discovery disputes and e-mailing the court about briefing.

If the depositions of the minor Plaintiff's go forward, the AIA willing to agree to most of the requested limitations. The only one I am having trouble with is the references to medical records/letters from the providers and the contents of the same. That limitation seems overly restrictive. Questions in which the minors are asked if they (as opposed to their parents) ever reported XYZ info that is discussed in the records would certainly be a relevant topic of examination. I am confident that such questions could be asked in a way that is not harmful to either of the minors. Also, it is really impossible to know whether the AIA will need to question the minors at all – as that likely depends on responses to questions from Intervenor-Defendants, counsel for other defendants or even Plaintiffs' counsel. With all this said, the AIA does not anticipate a need to ask many questions and, thus, its participation will be quite limited like that of TGS and Kyrene.

Regards,

Kristian



Kristian E. Nelson
Partner
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From: DAVID POTTS <DPotts@JSHFIRM.COM>
Sent: Monday, February 19, 2024 12:15 PM
To: Jordan Elle <jellel@tuhsd.k12.az.us>; Rachel Berg <RBerg@nclrights.org>; Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; McKay Worthington <mckayw@wb-law.com>; maria.syms@azed.gov; 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>; Gail Hardin <GHardin@JSHFIRM.COM>

Subject: [EXT] RE: [External] 4:23-cv-00185 Doe v. Horne - Discovery

TGS:

1. Agrees to the approach outlined in terms of bringing the discovery dispute to the Court's attention, though we aren't going to be taking a position on any of these issues.
2. Agrees to the proposed parameters if the minor plaintiffs are deposed, though, as with Kyrene, I strongly suspect that we will have limited participation/questioning (if any at all) in these depositions.

Sincerely,

David



DAVID C. POTTS | Partner
Jones, Skelton & Hochuli, P.L.C.
40 N. Central Avenue, Suite 2700 | Phoenix, AZ 85004
P 602.263.4547 | M 480.268.6390 | F 602.200.7829
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From: Jordan Ellel <jellel@tuhsd.k12.az.us>

Sent: Monday, February 19, 2024 10:19 AM

To: Rachel Berg <RBerg@nclrights.org>; Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; Dennis Wilenchik <diw@wb-law.com>; McKay Worthington <mckayw@wb-law.com>; maria.syms@azed.gov; DAVID POTTS <DPotts@JSHFIRM.COM>; lasmith@dmyl.com; Ashley Caballero-Daltrey <ADaltrey@JSHFIRM.COM>; 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: RE: [External] 4:23-cv-00185 Doe v. Horne - Discovery

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Rachel,

Defendants Kyrene and Superintendent Toenjes do not plan to participate in the proposed depositions for any party, and, therefore, have no objections to the parameters set forth below.

Additionally, while I can be available for a call with chambers, Defendants Kyrene and Superintendent Toenjes do not have any position on the current discovery disputes, so please feel free to proceed in my absence.

Sincerely,
-Jordan

From: Rachel Berg <RBerg@nclrights.org>

Sent: Friday, February 16, 2024 4:16 PM

To: 'Justin Smith' <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; 'Dennis Wilenchik'

<diw@wb-law.com>; 'McKay Worthington' <mckayw@wb-law.com>; 'maria.syms@azed.gov' <maria.syms@azed.gov>; 'jellel@tuhsd.k12.az.us' <jellel@tuhsd.k12.az.us>; 'dpotts@jshfirm.com' <dpotts@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'Ashley Caballero-Daltrey' <adaltrey@jshfirm.com>; 'Kristian.Nelson@lewisbrisbois.com' <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: [External] 4:23-cv-00185 Doe v. Horne - Discovery

Counsel,

Plaintiffs and Intervenor-Defendants had a meet and confer earlier this afternoon regarding their outstanding discovery disputes. Plaintiffs will be moving to compel Intervenor-Defendants to sit for a deposition and to produce all documents and information that they have withheld based on the legislative privilege and deliberative process privilege. Plaintiffs will also be moving for a protective order regarding the depositions of Jane Doe and Megan Roe because, *inter alia*, 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.

Judge Zips mentioned in our case management conference and her scheduling order that she prefers the parties call Chambers to see if she can rule on discovery issues before filing motions on the docket. Given the difficulty of arranging a time with the large number of parties involved and the judge's calendar as well as the desire to avoid any ex parte communications, Plaintiffs are proposing emailing Chambers and cc'ing all parties to request a time for a status conference for all parties or for the Court to go ahead and order a briefing schedule regarding the above disputes. Plaintiffs and Intervenor-Defendants agreed to the following proposed briefing schedule on our meet and confer: March 1 – opening briefs, March 18 – opposition briefs, March 25 – reply briefs. **Please let us know whether you agree with this approach by Wednesday (2/21).**

As to the depositions of Jane Doe and Megan Roe (minor Plaintiffs), Plaintiffs will be requesting that if the Judge denies their motion for a protective order that she order certain parameters to the depositions. Please see below for the requested parameters. Plaintiffs ask that any party who is planning to question the minor Plaintiffs agree to these parameters. **Please let us know by Friday (2/23) whether you agree to these parameters and if not, we will schedule a time to meet and confer with all relevant parties to discuss any outstanding issues.**

Best,
Rachel

Intervenor-Defendants/Defendants agree to use she/her pronouns for the minor Plaintiffs and use the pseudonyms in this case.

Intervenor-Defendants/Defendants agree to not use minor Plaintiffs' birth names.

Intervenor-Defendants/Defendants agree to redact minor Plaintiffs' birth names on any documents used in their depositions.

In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that there will not be more than one attorney per party in the room.

In the room for the depositions of the minor Plaintiffs, Intervenor-Defendants/Defendants agree that the minor Plaintiffs can be accompanied by one of their parents.

Intervenor-Defendants/Defendants agree to not ask any questions regarding the minor Plaintiffs' genitalia or that focus on their bodies.

Intervenor-Defendants/Defendants agree there will not be questioning concerning either the legitimacy or appropriateness of the minor Plaintiffs' medical and/or mental health treatment.

Intervenor-Defendants/Defendants agree there will not be references to the minor Plaintiffs' medical records and letters from mental health providers or questions about the contents of those records/letters.

Intervenor-Defendants/Defendants agree there will not be questions that attempt to probe whether serious issues of trauma have occurred in the minor Plaintiffs' lives. Those questions could in and of themselves be upsetting and there is nothing in the record that would support such questioning.

Intervenor-Defendants/Defendants agree to not ask questions that attack or undermine the minor Plaintiffs' parents or family members.

Intervenor-Defendants/Defendants agree that they will not reference the minor Plaintiffs as a "male" or "boy."

Intervenor-Defendants/Defendants agree that they will not ask questions referencing sexual abuse, assault, or misconduct (including given the lack of any basis for such questions based on the record).

Rachel H. Berg | Staff Attorney

(Pronouns she/her)

rberg@nclrights.org

(415) 343-7679 office

Licensed to practice law in Tennessee and New York



National Center for Lesbian Rights

Feminist Founded, Advocates for All

nclrights.org | [Facebook](#) | [Twitter](#) | [Instagram](#)

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**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

**ORDER GRANTING PLAINTIFFS'
MOTION FOR A PROTECTIVE ORDER**

Pending before the Court is Plaintiffs' Motion for a Protective Order. Pursuant to Federal Rule of Civil Procedure 26(c) and for the reasons articulated in Plaintiffs' Motion, I find that good cause exists to prevent the depositions of Jane Doe and Megan Roe. I therefore GRANT Plaintiffs' Motion and ORDER a protective order preventing Defendants and Intervenor-Defendants from deposing Jane Doe and Megan Roe.

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DATED this _____ day of _____, 20_____.

Jennifer G. Zipps
United States District Judge