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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Jane Doe, *et al.*,

12 Plaintiffs,

13
14 v.

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

19
20 Defendants.

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

**Intervenor-Defendants President
Petersen’s and Speaker Toma’s
Opposition to Plaintiffs’ Motion to
Compel Discovery**

Oral Argument Requested

21
22 Plaintiffs seek to pierce an indispensable privilege and subject high-ranking
23 government officials to intrusive depositions in search of irrelevant legislative motives.
24 But defending institutional interests does not come at the high price of other institutional
25 interests. Plaintiffs also have failed to demonstrate the “extraordinary circumstances”
26 necessary to obtain the discovery they seek. At the same time, Plaintiffs seek to prevent
27 their own depositions and exploration of claims they put at issue. The Court should deny
28 Plaintiffs’ motion to compel, which then moots Plaintiffs’ motion for a protective order.

FACTUAL BACKGROUND

1
2 President Warren Petersen and Speaker Ben Toma are the elected leaders of
3 Arizona’s legislative branch. After the Arizona Attorney General declined to defend the
4 law challenged by Plaintiffs, Doc. 19-1, the Legislative Leaders sought intervention under
5 the authority granted by chamber rules and state law to defend institutional interests and
6 the constitutionality of a state law. Doc. 19. Plaintiffs opposed, arguing the Legislative
7 Leaders’ interests were adequately represented by Defendant Horne. Doc. 35, 5. Plaintiffs
8 did not allege discriminatory motives or factual issues relating to the Legislature in their
9 Complaint, Motion for Preliminary Injunction, or intervention briefing. *See* Docs. 1, 3, 35.

10 The Legislative Leaders have diligently complied with their discovery obligations.
11 The Legislative Leaders thoroughly answered every interrogatory and request for
12 production propounded by Plaintiffs. Doc. 191-2, Exs. 3, 4. Plaintiffs’ motion to compel
13 does not raise any issues relating to the Legislative Leaders’ interrogatory responses or
14 written responses to the requests for production. Plaintiffs have not used 16 of their
15 interrogatories. *Compare* Doc. 191-2, Ex. 3 *with* Fed. R. Civ. P. 33(a)(1).

16 The Legislative Leaders have produced more than 400 documents and 1,100 pages
17 of records. Declaration of Justin D. Smith (“Smith Decl.”), ¶ 2. The Legislative Leaders
18 have withheld as privileged only five documents—totaling just 14 pages. *Id.* at ¶ 7.

19 Plaintiffs have not taken any depositions in this case. *Id.* at ¶ 14. Plaintiffs informed
20 all parties that they did not “plan to take any depositions of any fact witnesses from any of
21 the Defendants in this litigation.” Doc. 191-2, Ex. 9. At the same time, Plaintiffs demanded
22 to depose President Petersen and Speaker Toma. *Id.* Exploring legislative motives
23 underlying the challenged law appears to be Plaintiffs’ only basis for these depositions.
24 Doc. 191, at 9.

25 Shortly after requesting the depositions, Plaintiffs served the Legislative Leaders
26 with requests for admission. Smith Decl., ¶ 10. Beyond these requests for admission,
27 Plaintiffs “do not presently believe they need” any further written discovery from the
28 Legislative Leaders. Doc. 191-2, Ex. 9, at 2 (PDF p. 95).

ARGUMENT

I. The Legislative Privilege Applies.

A. The legislative privilege protects legislative independence.

The legislative privilege has been an indispensable part of legislative independence for more than 300 years. “Since the Glorious Revolution in Britain, and throughout United States history, the [legislative] privilege has been recognized as an important protection of the independence and integrity of the legislature.” *United States v. Johnson*, 383 U.S. 169, 178 (1966) (internal citations omitted). James Wilson, a drafter of the Constitution and one of America’s first Supreme Court justices, explained the privilege’s importance: “In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.” *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (internal citation omitted).

Enshrining the legislative privilege in our Constitution is the Speech or Debate Clause, which the framers approved “without discussion and without opposition.” *Johnson*, 383 U.S. at 177 (1966) (internal citations omitted)). Almost all states, including Arizona, have adopted comparable privileges in their constitutions. *Tenney*, 341 U.S. at 375 n.5 (citing state constitutions); ARIZ. CONST. art. IV, Pt. 2 § 7. Courts have extended the legislative privilege to state legislators. *Tenney*, 341 U.S. at 377.

The protections provided by the legislative privilege exist “to protect the integrity of the legislative process by insuring [*sic*] the independence of individual legislators.” *United States v. Brewster*, 408 U.S. 501, 507 (1972). The legislative privilege also maintains confidentiality within the legislature and protects the legislative process itself. *Mi Familia Vota v. Hobbs*, No. CV-21-01423, 2023 WL 4595824, at *5 (D. Ariz. July 18, 2023); *see also In re N. Dakota Legislative Assembly*, 70 F.4th 460, 464 (8th Cir. 2023) (“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.”).

1 **B. The legislative privilege prevents exploration of legislator motives.**

2 According to Plaintiffs, they seek the Legislative Leaders’ depositions and
3 privileged documents “to uncover ‘[w]hat motivated the Arizona legislature to act.’” Doc.
4 191, at 9. Well-settled precedent bars this effort, rendering this evidence both privileged
5 and irrelevant, and thus impermissible under Rule 26(b)(1).

6 The Supreme Court has repeatedly ruled that courts may not inquire into legislative
7 motives, including of state legislators. The Court has been clear: “no inquiry may be made
8 concerning the motives or wisdom of a state Legislature acting within its proper powers.”
9 *State of Arizona v. State of California*, 283 U.S. 423, 455 (1931) n.7 (citing cases). The
10 Court has prevented inquiries into legislative motives because they “are a hazardous
11 matter.” *United States v. O’Brien*, 391 U.S. 367, 383 (1968).

12 Inquiries into legislative motives are prohibited even when, like here, a party alleges
13 discrimination violated the Equal Protection Clause. *See Vill. of Arlington Heights v.*
14 *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *Tenney*, 341 U.S. at 788-89. The
15 Ninth Circuit has specifically rejected attempts in equal protection cases to depose
16 legislators about their motives. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th
17 Cir. 2018); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984). As the *City*
18 *of Las Vegas* decision noted, “[a]llowing discovery of legislative motives” would “create
19 a major departure from the precedent rejecting the use of legislative motives” *City of*
20 *Las Vegas*, 747 F.2d at 1298. Plaintiffs argue that legislative motives are the “heart” of
21 constitutional cases like this one, Doc. 191, at 7, but the Ninth Circuit already rejected such
22 an exception to the legislative privilege: “Although Plaintiffs call for a categorical
23 exception whenever a constitutional claim directly implicates the government’s intent, that
24 exception would render the privilege ‘of little value.’” *Lee*, 908 F.3d at 1188 (internal
25 citation omitted).¹

26 Important policy justifications underlie these decisions. The public is best served

27 ¹ The *Mi Familia* decision, upon which Plaintiffs’ argument hinges, did not address this
28 binding precedent. *See Mi Familia Vota v. Fontes*, No. CV-22-00509, 2023 WL 8183557,
at *2 (D. Ariz. Sept. 14, 2023).

1 by legislators who are not concerned about subsequent litigation and discovery. As the
2 Court explained with respect to a comparable privilege, “[h]uman experience teaches that
3 those who expect public dissemination of their remarks may well temper candor with a
4 concern for appearances and for their own interests to the detriment of the decisionmaking
5 process.” *United States v. Nixon*, 418 U.S. 683, 705 (1974). Legislative privilege protects
6 “the uninhibited discharge of their legislative duty, not for their private indulgence but for
7 the public good.” *Tenney*, 341 U.S. at 377. Piercing the legislative privilege by compelling
8 discovery will have a chilling effect on the legislative process and thus hurt the public.
9 Moreover, ballot boxes, not courtrooms, are where legislative motives should be judged:
10 “In times of political passion, dishonest or vindictive motives are readily attributed to
11 legislative conduct and as readily believed. Courts are not the place for such controversies.
12 Self-discipline and the voters must be the ultimate reliance for discouraging or correcting
13 such abuses.” *Id.* at 378.

14 Finally, discovery from individual legislators does not provide information the court
15 can use. “What motivates one legislator to make a speech about a statute is not necessarily
16 what motivates scores of others to enact it, and the stakes are sufficiently high for us to
17 eschew guesswork.” *O’Brien*, 391 U.S. at 384. Thus, “[e]ven when an argument about
18 legislative motive is backed by statements made by legislators who voted for a law, [the
19 Court has] been reluctant to attribute those motives to the legislative body as a whole.”
20 *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 253–54 (2022). Courts have
21 characterized inquiries into legislative motives as “impracticable and futile.” *City of Las*
22 *Vegas*, 747 F.2d at 1297 (quoting *Soon Hing v. Crowley*, 113 U.S. 703, 710–11 (1885)).
23 Accordingly, “the statements of a handful of lawmakers” are generally insufficient to show
24 discriminatory intent because they “may not be probative of the intent of the legislature as
25 a whole.” *United States v. Carillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023).

26 Plaintiffs’ only stated basis for the discovery from the Legislative Leaders is barred
27 because legislative motivations are privileged and not relevant.

28 **C. The legislative privilege has not been waived.**

1 Plaintiffs incorrectly assert that the Legislative Leaders waived their legislative
2 privilege by intervening in this case. Doc. 191, at 5-9. But acting to protect institutional
3 interests does not simultaneously waive protection of other institutional interests.

4 **1. The Legislative Leaders intervened by state law and legislative rules**
5 **to protect institutional interests.**

6 The Arizona Constitution expressly provides that the Arizona Senate and House of
7 Representatives shall each “choose its own officers” and “determine its own rules of
8 procedure.” ARIZ. CONST. art. IV, Pt. 2 § 8. Pursuant to this constitutional authority, the
9 Arizona Senate and House of Representatives have empowered their elected leaders to
10 defend institutional interests on behalf of their respective legislative chambers. Ariz. State
11 Senate Rule 2(N); Ariz. House of Representatives Rule 4(K). State law specifically
12 designates the Legislative Leaders with the authority to defend the constitutionality of a
13 state statute enacted by the Arizona Legislature. ARIZ. REV. STAT. § 12-1841(A), (D). So
14 important is the ability of the Legislative Leaders to be heard that, if a plaintiff fails to
15 timely serve them with notice of a lawsuit challenging a state statute’s constitutionality,
16 “the court shall vacate any finding of unconstitutionality” and provide the Legislative
17 Leaders with a “reasonable opportunity to prepare and be heard.” *Id.* at § 12-1841(C).

18 When President Petersen and Speaker Toma moved to intervene, they did so to
19 exercise their authority under state law and legislative rules to defend the interest of the
20 Arizona Legislature in legislation being found constitutional. *See Berger v. N.C. State*
21 *Conf. of the NAACP*, 597 U.S. 179, 191 (2022) (“States possess a legitimate interest in the
22 continued enforcement of their own statutes.”) (cleaned up). Unlike in the *Mi Familia* case
23 cited by Plaintiffs, Doc. 191, at 6, the Legislature’s interest was heightened in this case
24 because the Arizona Attorney General determined that she was disqualified from defending
25 the statute at issue. *See Berger*, 597 U.S. at 185.

26 Plaintiffs do not dispute that the Legislative Leaders have a “heightened” interest,
27 Doc. 191, at 8, but they argue the privilege remains waived. Not so. The Supreme Court
28 considers it “understandable” that a state may empower its legislative leaders to defend

1 legislation when “[m]ore than once a North Carolina attorney general has opposed laws
2 enacted by the General Assembly and declined to defend them fully in federal litigation.”
3 *Id.* The Supreme Court gave no indication that defending institutional interests,
4 particularly when the attorney general will not, risked waiving an indispensable privilege.²
5 *See id.*

6 President Petersen and Speaker Toma retain their legislative privilege when they
7 exercise an institutional interest provided by state law and chamber rules.

8 **2. Arizona law did not waive legislative privilege.**

9 Waiver of the legislative privilege must be explicit and unequivocal. In the context
10 of legislative immunity in a criminal case, the Supreme Court has held that “waiver can be
11 found only after explicit and unequivocal renunciation of the protection. The ordinary rules
12 for determining the appropriate standard of waiver do not apply in this setting.” *United*
13 *States v. Helstoski*, 442 U.S. 477, 491 (1979). Because the legislative privilege exists to
14 protect confidentiality and the legislative process, “a waiver should not be lightly inferred.”
15 *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997). Plaintiffs dismiss these decisions
16 as “inapt cases concerning criminal prosecution,” Doc. 191, at 8 n.5, but the legislative
17 privilege for state legislators is stronger in civil cases than in criminal cases. *See United*
18 *States v. Gillock*, 445 U.S. 360, 372 (1980). Waiver in civil cases thus should at least be
19 as strong as the heightened standard in criminal cases.

20 Plaintiffs make no claim that the legal authority for intervention waived the
21 privilege. They could not. The Arizona statute and legislative rules empowering the
22 Legislative Leaders to act do not expressly waive legislative privilege. *See* ARIZ. REV.
23 STAT. § 12-1841; Ariz. State Senate Rule 2(N); Ariz. House of Representatives Rule 4(K).

24
25 ² Plaintiffs contend that the Legislative Leaders did not need to intervene “when S.B. 1165
26 was already being vigorously defended by another government actor,” Doc. 191-2, Ex. 9,
27 at 2 (PDF p. 95), but “a plaintiff who chooses to name this or that official defendant does
28 not necessarily and always capture all relevant state interests.” *Berger*, 597 U.S. at 195.
Not allowing a State to decide which officials may defend state law “would risk allowing
a private plaintiff to pick its preferred defendants and potentially silence those whom the
State deems essential to a fair understanding of its interests.” *Id.*

1 Exercising rights permitted by this legal authority should not waive legislative privilege.

2 **3. The Legislative Leaders’ conduct did not waive legislative privilege.**

3 Plaintiffs also do not claim that the Legislative Leaders’ conduct in this litigation
4 waived the privilege. When the Legislative Leaders moved to intervene, Plaintiffs’
5 Complaint and Motion for Preliminary Injunction did not allege discriminatory intent by
6 the Legislature. *See* Docs. 1, 3. The Legislative Leaders have not filed an answer or made
7 any factual assertions. *Contra Mi Familia Vota v. Fontes*, No. CV-22-00509, 2023 WL
8 8183557, at *2 (D. Ariz. Sept. 14, 2023); *Singleton v. Merrill*, 576 F. Supp. 3d 931, 937
9 (N.D. Ala. 2021). No party, including Plaintiffs, identified the Legislative Leaders as
10 witnesses in initial disclosures, Smith Decl., ¶ 13, and the Legislative Leaders will not
11 testify in this matter. Doc. 191-2, Ex. 7, at 13 (PDF p. 81). The Legislative Leaders have
12 not put themselves or factual matters at issue, and thus even under Plaintiffs’ theory have
13 not waived the legislative privilege. These are not irrelevant “strategic decisions,” Doc.
14 191, at 8; they completely distinguish this case from *Mi Familia* and the principal case
15 upon which it relied. *See Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001).

16 Plaintiffs’ entire waiver argument rests on the act of intervention. But courts have
17 found that participating in litigation alone does not waive the legislative privilege. *See*,
18 *e.g., Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012) (“the Court nevertheless
19 rejects the notion that the defendants’ participation in this lawsuit, standing alone,
20 automatically waives the legislative privilege in all respects”). That is consistent with
21 decisions in other litigation participation contexts, *see, e.g., Zenith Radio Corp. v. United*
22 *States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (“A party does not automatically waive [the
23 attorney-client, work product, and executive] privileges, which protect the formulation of
24 legal opinions or litigation strategy, simply by bringing suit.”), and the broader federalism
25 principle that counsels against lightly concluding a State waived a privilege it could
26 otherwise invoke, *cf. Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (noting waiver of
27 immunity “to other types of relief does not waive immunity to damages”).

28 **4. Other parties do not waive their privileges by intervening.**

1 Reinforcing the conclusion that waiver has not occurred is how courts treat
2 comparable privileges possessed by other government branches. No court decision has
3 been found in which intervention by an executive branch actor—for example, the United
4 States Department of Justice, a state attorney general, a governor, or government agency—
5 waived the executive privilege or deliberative process privilege. Instead, executive branch
6 officials can intervene without waiving privileges or immunities. *See, e.g., Faulk v. Union*
7 *Pac. R. Co.*, 449 F. App’x 357, 363 (5th Cir. 2011) (“If forcing the State to intervene could
8 compel a waiver of sovereign immunity, any plaintiff could ‘essentially nullify the
9 Eleventh Amendment’ by raising a state constitutional challenge in federal court.”)
10 (internal citation omitted); *Union Elec. Co. v. Missouri Dep’t of Conservation*, 366 F.3d
11 655, 660 (8th Cir. 2004) (the “effort to cast the Attorney General’s application to intervene
12 in this case as a voluntary invocation of federal jurisdiction is fruitless”); *In re Uehling*,
13 No. 1:14-MC-00009, 2014 WL 1577459, at *5 (E.D. Cal. Apr. 17, 2014) (intervention by
14 government in *qui tam* action did not waive work product and attorney client privileges)
15 (citing cases). Likewise, no court decision has been found in which intervention by a judge
16 waived judicial immunity. Under separation of powers principles, privileges of the
17 legislative branch are entitled to the same respect.

18 The legislative branch also is entitled to at least as much protection as private
19 parties. No court decision has been found in which intervention by a private party waived
20 the First Amendment privilege or other privileges. To the contrary, private parties in both
21 civil and criminal matters may intervene to seek protective orders to prevent the disclosure
22 of privileged information. *See, e.g., United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d
23 Cir. 1979); *Paskenta Band of Nomlaki Indians v. Crosby*, No. 215-CV-00538, 2020 WL
24 2745665, at *3 (E.D. Cal. May 27, 2020). Indeed, Plaintiffs themselves believe that
25 becoming a party to litigation does not waive privileges, as they continue to assert
26 privileges like the psychotherapist-patient privilege. Doc. 191-2, Ex. 8, at 3 (PDF. p. 88).

27 **5. Plaintiffs’ cases do not control and are not persuasive.**

28 Plaintiffs rely on three non-precedential cases to argue that the Legislative Leaders

1 waived their legislative privilege. Doc. 191, at 6 (citing *Mi Familia, Powell, Singleton*).
2 In addition to not binding this court, none of the cases provide persuasive authority. None
3 of the cases grappled with precedent prohibiting inquiry into legislative motives because it
4 is intrusive and not relevant. All of the cases conflated the legislative immunity interest in
5 being free from the burdens of litigation with the litigation privilege interest in protecting
6 the legislative process. And none of the cases considered the ability of other branches to
7 intervene without waiving applicable privileges. Given the strong authority supporting the
8 Legislative Leaders, Plaintiffs’ cases should be dismissed.

9 **6. The Legislative Leaders cannot waive the legislative privilege for**
10 **other legislators.**

11 It is well-established that no legislator can waive the legislative privilege held by a
12 fellow legislator or the chamber as a whole. *See, e.g., Puente Arizona v. Arpaio*, 314 F.R.D.
13 664, 671 (D. Ariz. 2016) (“The legislative privilege ‘is a personal one and may be waived
14 or asserted by each individual legislator.’”) (internal citation omitted). Agreeing with
15 Judge Campbell’s opinion, Judge Bolton found in the case relied upon by Plaintiffs that
16 “the Speaker or President could not waive the privilege for their fellow legislators.” *Mi*
17 *Familia Vota v. Fontes*, 2023 WL 8183557, at *3. Thus, “[t]o the extent Plaintiffs seek
18 information held by other members of the Arizona Legislature, it remains protected by the
19 legislative privilege.” *Id.*

20 No document withheld by the Legislative Leaders was created or sent by President
21 Petersen or Speaker Toma. Doc. 191-2, Ex. 7, at 13 (PDF p. 81). Plaintiffs incorrectly
22 claim that communications received by the Legislative Leaders are within their legislative
23 privilege. Doc. 191, at 8. But legislators “may not testify to the legislative acts of
24 legislators who have invoked the privilege or to those of staffers or consultants who are
25 protected by the privilege.” *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179–80 (C.D. Cal.
26 2002). Indeed, the Second Circuit rejected using one legislator to discover statements he
27 heard from other legislators because the legislative privilege “cannot be waived by another
28 member.” *United States Football League v. National Football League*, 842 F.2d 1335,

1 1374–75 (2d Cir. 1988). The “underlying purpose” of the legislative privilege would be
2 “‘ill-served’ if such waivers were permitted.” *Id.* at 1375. *Mi Familia*’s decision to grant
3 discovery of communications legislators received from other legislators strayed beyond
4 these principles.

5 Senators and representatives not participating in this litigation hold the legislative
6 privilege over the documents at issue. President Petersen and Speaker Toma cannot waive
7 their privilege, by intervening or otherwise.

8 **D. The legislative privilege has not been overcome.**

9 This Court should decline Plaintiffs’ invitation to allow a balancing test to overcome
10 the legislative privilege asserted by legislators concerning legislative acts. Plaintiffs argue
11 that five factors demonstrate the privilege is “easily overcome.” Doc. 191, at 9. However,
12 Plaintiffs cite no controlling precedent applying factors to “overcome” the legislative
13 privilege. *Id.* at 9-10.

14 Controlling precedent requires Plaintiffs to prove “extraordinary circumstances” to
15 compel the Legislative Leaders to testify, and “even in these circumstances the testimony
16 may be barred by privilege.” *City of Las Vegas v. Foley*, 747 F.2d at 1298 (citing *Vill. of*
17 *Arlington Heights*, 429 U.S. at 268). This is because for more than 200 years, the Supreme
18 Court has recognized the “substantial intrusion” that judicial inquiry into legislative
19 motivation represents. *Vill. of Arlington Heights*, 429 U.S. at 268 n.18. This precedent
20 sets a far higher standard for overcoming the legislative privilege than Plaintiffs’ five-
21 factor balancing test.

22 Plaintiffs have not alleged extraordinary circumstances exist to compel depositions
23 here, let alone proven it. Even if they had, *Village of Arlington Heights* and *City of Las*
24 *Vegas* question whether even that showing would pierce the privilege. This case contains
25 no extraordinary circumstances: it is an as applied challenge; Plaintiffs’ Complaint alleged
26 no legislative misconduct; and to date Plaintiffs’ only alleged discrimination is one article
27 citation in a statutory preamble and 30 words spoken by two senators during a committee
28 hearing. Doc. 65, at 6. Plaintiffs cannot come close to satisfying the extraordinary standard

1 required to even consider whether to pierce the privilege.³

2 Besides failing to argue the applicable test, Plaintiffs do not cite a single case that
3 overcame legislative privilege asserted by legislators concerning legislative acts. *See id.*
4 None of Plaintiffs' smattering of district court cases applying Plaintiffs' five-factor test
5 involved legislators performing legislative acts. *See Harris v. Arizona Indep. Redistricting*
6 *Comm'n*, 993 F. Supp. 2d 1042, 1069 (D. Ariz. 2014) (legislative privilege not extended
7 to non-legislator redistricting commissioners); *Sol v. Whiting*, No. CV-10-01061, 2013 WL
8 12098752, at *3 (D. Ariz. Dec. 11, 2013) (legislative privilege not raised because movants
9 were non-profit organizations); *Favors v. Cuomo*, 285 F.R.D. 187, 213 (E.D.N.Y. 2012)
10 (legislative privilege is qualified in redistricting case); *Rodriguez v. Pataki*, 280 F. Supp.
11 2d 89, 100 (S.D.N.Y.) (same). Notably, *Rodriguez* declined to apply the five-factor test
12 and denied a motion to compel for "information concerning the actual deliberations of the
13 Legislature—or individual legislators—which took place outside [the redistricting
14 advisory group], or after the proposed redistricting plan reached the floor of the Legislature,
15 . . ." *Rodriguez*, 280 F. Supp. 2d at 103. As the Eleventh Circuit recently explained when
16 it rejected allowing a balancing test to overcome the legislative privilege, "absent the
17 Supreme Court's imprimatur, we are reluctant to adopt a manipulable balancing test, like
18 the one employed by the district court, that links the derogation of the legislative privilege
19 to a subjective judgment of the case's importance. . . . None of our sister circuits have
20 subjected the privilege to such a test, and at least four of them have rejected this approach."
21 *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1345 (11th Cir. 2023) (citing
22 cases).

23 **II. High-Ranking Government Officials Are Protected from Depositions.**

24 The *Morgan* doctrine provides independent grounds to deny Plaintiffs' deposition

25 ³ Because it would be inappropriate to apply Plaintiffs' balancing test here, the Legislative
26 Leaders do not need to argue, and the Court does not need to reach, Plaintiffs' five factors.
27 In any event, the Legislative Leaders already contest all five factors: legislative motive
28 evidence is not relevant (§ I.B); Plaintiffs have not sought other available evidence (§ II.3);
courts have denied discovery of legislative motivations in strict scrutiny cases (§ I.B); the
Legislative Leaders are high-ranking government officials (§ II); and piercing the
legislative privilege could chill future legislative action (§ I.B).

1 requests.⁴ Under this doctrine, high-ranking government officials may not be deposed
2 unless “extraordinary circumstances” exist. *In re U.S. Dep’t of Educ.*, 25 F.4th 692, 701
3 (9th Cir. 2022). “Although district courts have occasionally ordered such depositions,
4 circuit courts have issued writs of mandamus to stop them when asked to, generally finding
5 that the circumstances before them were not extraordinary.” *Id.* (citing decisions by six
6 circuits); *see also In re Off. of the Utah Att’y Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022).
7 The doctrine applies whether the high-ranking official is a party or a non-party. *See id.*

8 The *Morgan* doctrine applies to Plaintiffs’ deposition requests of the Legislative
9 Leaders. “Numerous courts have applied the *Morgan* framework to deposition subpoenas
10 targeted at legislative officials.” *League of United Latin Am. Citizens v. Abbott*, No. 21-
11 cv-00259, 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022) (citing cases). After *Abbott*
12 required the United States to show exceptional circumstances to depose the Speaker of the
13 Texas House of Representatives, *id.* at *4, the United States dropped its deposition request.
14 *Abbott*, 21-cv-00259, Doc. 429 (W.D. Tex. July 19, 2022). Courts have quashed
15 depositions under this doctrine without reaching the legislative privilege issue. *See, e.g.,*
16 *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 440 n.16 (S.D.N.Y. 2014).

17 President Petersen and Speaker Toma are the elected leaders of the Arizona Senate
18 and Arizona House of Representatives, respectively. It cannot be disputed that they are
19 high-ranking government officials.

20 To establish extraordinary circumstances to take a high-ranking government
21 official’s deposition, the Ninth Circuit requires Plaintiffs to demonstrate “(1) a showing of
22 agency bad faith; (2) the information sought from the [high-ranking official] is essential to
23 the case; and (3) the information sought from the [high-ranking official] cannot be obtained
24 in any other way.” *In re U.S. Dep’t of Educ.*, 25 F.4th at 702. All three factors must be

25
26 ⁴ The *Morgan* doctrine “rest[s] on a constitutional foundation,” and thus the Ninth Circuit
27 views it as “distinct from the ‘apex doctrine.’” *In re U.S. Dep’t of Educ.*, 25 F.4th 692,
28 700 n.1 (9th Cir. 2022). For the same reasons as set forth in this section, the apex doctrine
also bars Plaintiffs’ deposition requests. *See Topete v. City of Mesa*, No. CV-18-03127,
2020 WL 8872800, at *1 (D. Ariz. Apr. 29, 2020). Neither *Mi Familia* nor the other cases
relied on by Plaintiffs considered the applicability of the *Morgan* or apex doctrines.

1 satisfied. *Id.* Plaintiffs have neither argued nor satisfied any factor.

2 1. No Bad Faith. Plaintiffs must make “a strong showing of bad faith or
3 improper behavior” before they can depose the Legislative Leaders. *Id.* at 703 (quoting
4 *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). Plaintiffs also
5 have the burden to overcome the “strong ‘presumption of good faith’ on the part of
6 legislators.” *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023) (quoting
7 *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Plaintiffs’ Complaint contained no
8 allegations of bad faith or improper behavior by the Arizona Legislature. Doc. 1. Despite
9 possessing the entire legislative record for the statute, including all public hearings and
10 legislative debate, and virtually all correspondence the Legislative Leaders sent or received
11 about the statute, Plaintiffs have criticized the Legislature for only two benign sentences
12 spoken in hearings and one article citation from the legislative findings. This does not
13 overcome the strong presumption of good faith or make a strong showing of bad faith.

14 2. Not essential to case. “If the information is not absolutely needed for a case,”
15 the Ninth Circuit has ruled that a court “cannot allow a deposition to disrupt the normal
16 governmental balance of powers.” *In re U.S. Dep’t of Educ.*, 25 F.4th at 703. It is not
17 enough to show that information is relevant; it must be necessary. *Id.* Plaintiffs have made
18 no allegation that any information from the Legislative Leaders is essential to their case.
19 In granting a writ of mandamus to block the deposition of a high-ranking government
20 official, the Ninth Circuit heavily weighed the fact that the party seeking the deposition
21 believed it “likely could win relief on the existing record.” *Id.* at 704. Plaintiffs already
22 have obtained preliminary injunctive relief in this case. Doc. 127. Plaintiffs have not, and
23 cannot, show that information from the Legislative Leaders is essential to their case.

24 3. Other sources not exhausted. The Ninth Circuit requires Plaintiffs to
25 establish that the Legislative Leaders “possess information . . . which is not obtainable from
26 another source.” *In re U.S. Dep’t of Educ.*, 25 F.4th at 704. The Ninth Circuit has rejected
27 the argument, which Plaintiffs also have made, Doc. 191-2, Ex. 9, at 2 (PDF p. 95), that a
28 party is “not required to exhaust all other means of discovery before taking [a high-ranking

1 government official’s] deposition.” *In re U.S. Dep’t of Educ.*, 25 F.4th at 704. In *U.S.*
2 *Department of Education*, the party seeking the deposition “did not use all of their
3 interrogatories and never took a Rule 30(b)(6) deposition.” *Id.* Plaintiffs here also have
4 not used all of their interrogatories to the Legislative Leaders or any other party. *See, e.g.*,
5 Doc. 191-2, Ex. 1 (nine interrogatories). Plaintiffs do not plan to take any further written
6 discovery from the Legislative Leaders. *Id.* at Ex. 9, at 2 (PDF p. 95). Not only have
7 Plaintiffs not taken a single deposition, but they also have informed all parties that they
8 “do not plan to take any depositions of any fact witnesses from any Defendants in this
9 litigation.” *Id.* at Ex. 9, at 3 (PDF p. 96).

10 “Exhaustion of all reasonable alternative sources is required, and that requirement
11 was not met here.” *In re U.S. Dep’t of Educ.*, 25 F.4th at 704. Plaintiffs have failed to
12 exhaust all other less intrusive means of discovery, which fails this factor.⁵

13 The Ninth Circuit demands that Plaintiffs establish all three factors. Plaintiffs have
14 established none. Plaintiffs’ deposition requests must be denied.

15 **III. The Deliberative Process Privilege Applies.**⁶

16 The deliberative process privilege “permits the government to withhold documents
17 that reflect advisory opinions, recommendations and deliberations comprising part of a
18 process by which government decisions and policies are formulated.” *F.T.C. v. Warner*
19 *Comm’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The privilege exists “to promote
20 frank and independent discussion among those responsible for making government
21 decisions” and thus “to protect the quality of agency decisions.” *Id.*

22 The privilege protects documents that are predecisional and deliberative. To be
23 predecisional, the document “must have been generated before the adoption of an agency’s
24 policy or decision.” *Id.* at 1161. The only document withheld under deliberative process

25 ⁵ Just two hours after requesting the Legislative Leaders’ depositions, Plaintiffs
26 demonstrated that less intrusive written discovery is available by serving requests for
27 admission on the Legislative Leaders and written discovery requests on Defendants Horne
and AIA. Smith Decl., ¶ 11.

28 ⁶ The Court does not need to reach the deliberative process privilege if it finds the
legislative privilege applies since the only document withheld under deliberative process
privilege is also withheld under legislative privilege.

1 privilege, privilege log Doc. #15, was generated on January 20, 2022. Doc. 191-2, Ex. 5,
2 at 4 (PDF p. 58). January 20, 2022 was before either the Arizona Senate or Arizona House
3 of Representatives voted on S.B. 1165. Thus, Doc. 15 is predecisional.

4 To be deliberative, the document must “contain[] opinions, recommendations, or
5 advice about agency policies.” *Warner Commc’ns Inc.*, 742 F.2d at 1161. Doc. 15 was
6 “part of the decision-making process and contributed to the legislative action.” Doc. 191-
7 2, Ex. 5, at 4 (PDF p. 58). In addition, courts have applied the privilege to documents, like
8 Doc. 15, containing talking points about a decision. *See, e.g., Leopold v. U.S. Dep’t of*
9 *Just.*, 411 F. Supp. 3d 1094, 1106 (C.D. Cal. 2019); *see also Nat. Res. Def. Council v.*
10 *United States Env’t Prot. Agency*, 19 F.4th 177, 185-89 (2d Cir. 2021).

11 Plaintiffs contend that the deliberative process privilege does not apply to
12 legislators. Doc. 191, at 12. But Plaintiffs have repeatedly ignored decisions cited by the
13 Legislative Leaders from courts in the Ninth Circuit that reached the contrary conclusion.
14 The Eastern District of California applied the deliberative process privilege to discussions
15 by city council members. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099, 2008 WL
16 2523550, at *5 (E.D. Cal. June 19, 2008). The *Fabbrini* court specifically concluded that
17 the deliberative process privilege applies to any act, including legislative acts. *Id.*
18 According to another court in the Ninth Circuit, “Many lower courts have also extended
19 the [deliberative process] privilege to protect the decisionmaking processes of local
20 legislators, reasoning that, ‘[i]n terms of the alleged need for secrecy surrounding
21 deliberations, there is no principled distinction between [local legislators] and those
22 government officials who currently enjoy a deliberative process privilege.’” *N. Pacifica,*
23 *LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1121 (N.D. Cal. 2003) (citing *United States*
24 *v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989)). Plaintiffs do not grapple with any of these
25 on-point cases and instead include scattered quotations containing the word “agency.”

26 Finally, Plaintiffs argue that the privilege should not apply because “the
27 government’s intent is central to Plaintiffs’ case.” Doc. 191, at 11. But Plaintiffs did not
28 include a single allegation about the Arizona Legislature’s intent in their Complaint or

1 Motion for Preliminary Injunction. *See* Docs. 1, 3. Plaintiffs cite to no controlling
2 precedent, or any precedent in this Circuit, that allows them to bypass the deliberative
3 process privilege under their theory, particularly in the absence of any allegations against
4 the Legislature.

5 Plaintiffs elide that the principal decision on which they rely was clarified on
6 rehearing to limit its holding “to those circumstances in which the cause of action is
7 directed at the agency’s subjective motivation.”⁷ *In re Subpoena Duces Tecum Served on*
8 *Off. of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998). Based on this
9 narrowed holding and the well-settled prohibitions on inquiring into motives of individual
10 legislators, a district court in the Ninth Circuit upheld assertion of the deliberative process
11 privilege even though the plaintiff brought an equal protection claim and alleged improper
12 government motives. *First Resort, Inc. v. Herrera*, No. CV 11-5534 SBA (KAW), 2014
13 WL 589054, at *4 (N.D. Cal. Feb. 14, 2014).

14 Plaintiffs also claim that all factors to overcome the deliberative process privilege
15 weigh in favor of disclosure. This is incorrect. For example, as discussed above, the
16 motives of individual legislators are not relevant; Plaintiffs have not exhausted other
17 discovery methods to search for other available evidence; the Legislative Leaders have
18 intervened to protect institutional interests; and disclosure of communications between
19 individual legislators would hinder frank and independent discussion regarding
20 contemplated policies and decisions. By failing to establish these factors, Plaintiffs have
21 failed to override the government’s interest in non-disclosure. *Warner Commc’ns Inc.*, 742
22 F.2d at 1161.

23 The Legislative Leaders have properly asserted the deliberative process privilege.

24 **CONCLUSION**

25 The Court should deny Plaintiffs’ Motion to Compel.

26
27

⁷ Any attempt by Plaintiffs to explore the Legislative Leaders’ subjective, uncommunicated
28 motivations would be barred by the mental process privilege. *See N. Pacifica, LLC*, 274
F. Supp. 2d at 1122-23, 1125.

1 Dated: March 18, 2024

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*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that, on March 18, 2024, I caused a true and correct copy of the
15 foregoing to be filed by the Court's electronic filing system, to be served by operation of
16 the Court's electronic filing system on counsel for all parties who have entered in the case.

17 /s/ Justin D. Smith

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 Jane Doe, *et al.*,

12 Plaintiffs,

13
14 v.

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

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

**Declaration of Justin D. Smith in
Opposition to Plaintiffs’ Motion to
Compel Discovery**

19 Defendants.
20

21 I, Justin D. Smith, declare as follows:

22 1. I am an attorney at the James Otis Law Group, LLC and counsel for
23 Intervenor-Defendants President Warren Petersen and Speaker Ben Toma (the
24 “Legislative Leaders”) in the above-captioned matter. I am a member of the bar of the
25 State of Missouri. I submit this declaration in opposition to Plaintiffs’ Motion to Compel
26 Discovery.

27 2. In this action, the Legislative Leaders have produced 415 documents totaling
28

1 1,130 pages of records.

2 3. Attached as Exhibit A is a true and correct copy of correspondence dated
3 March 7, 2024 relating to the Legislative Leaders' production of discovery.

4 4. On November 29, 2023, the Legislative Leaders produced 335 pages of
5 documents. Ex. A, at 2.

6 5. On January 19, 2024, the Legislative Leaders produced 89 pages of
7 documents. *Id.* at 1.

8 6. On March 7, 2024, the Legislative Leaders produced 706 pages of
9 documents. *Id.*

10 7. As set forth on their privilege log, the Legislative Leaders have withheld as
11 privileged only five documents that total a combined 14 pages. *See* Doc. 191-2, Ex. 5,
12 Doc. #3, #6, #14, #15, #18.

13 8. Attached as Exhibit B is a true and correct copy of Intervenor-Defendants'
14 Supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories, dated
15 March 7, 2024.

16 9. Attached as Exhibit C is a true and correct copy of Intervenor-Defendants'
17 Supplemental Objections and Responses to Plaintiffs' First Set of Requests for Production
18 of Documents, dated March 7, 2024.

19 10. Attached as Exhibit D is a true and correct copy of correspondence dated
20 February 7, 2024 from Plaintiffs' counsel containing requests for admission to the
21 Legislative Leaders as well as discovery requests to Defendant Superintendent Horne and
22 Defendant AIA.

23 11. Plaintiffs' counsel sent written discovery to the Legislative Leaders,
24 Defendant Horne, and Defendant AIA approximately two hours after demanding the
25 depositions of the Legislative Leaders. *Compare* Exhibit D *with* Doc. 191-2, Ex. 9, at 3
26 (PDF p. 96).

27 12. Attached as Exhibit E is a true and correct copy of Plaintiffs' Initial Rule
28 26(a)(1) Disclosures dated September 29, 2023.

1 13. No party identified the Legislative Leaders as witnesses in their initial
2 disclosures.

3 14. Plaintiffs have not taken any depositions in this case.

4 I declare under penalty of perjury that the foregoing is true and correct to the best
5 of my knowledge and belief.

6
7 Dated: March 18, 2024

/s/ Justin D. Smith

Justin D. Smith

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Justin Smith

From: Ken Capps
Sent: Thursday, March 7, 2024 4:19 PM
To: cproksel@omlaw.com; azimmerman@debevoise.com; jrassi@debevoise.com; jhamid@debevoise.com; awhelan@nclrights.org; rberg@nclrights.org; diw@wb-law.com; mckayw@wb-law.com; maria.syms@azed.gov; jellel@tuhsd.k12.az.us; dpotts@jshfirm.com; adaltrey@jshfirm.com; lasmith@dmyl.com; kristian.nelson@lewisbrisbois.com
Cc: Justin Smith; John Sauer; Michael Talent
Subject: RE: Doe v Horne - 4:23-cv-00185 - Intervenor Defendants Responses and Objections - Discovery
Attachments: 2024.03.07 LL Supplemental Objections and Responses to Ps First Interrogatories.pdf; 2024.03.07 LL Supplemental Objections and Responses to Ps First RFPs.pdf

Dear Counsel,

Regarding Doe v. Horne, 4:23-cv-00185, on behalf of Intervenor-Defendants please find the attached documents: (1) Supplemental objections and responses to Plaintiffs' first set of interrogatories; and (2) Supplemental objections and responses to Plaintiffs' first set of requests for production.

Additionally, each of you should soon receive a separate email with a secure link to complete the secure file transfer of a third production by Legislative Leaders. The documents span LL000425 – LL001130. The password to access the zip-file is: [REDACTED].

Please know that no document has been withheld that needs to be added to the privilege log. Plaintiffs previously agreed that privileged communications between counsel and clients did not need to be logged. No other documents have been withheld as privileged.

Thank you,

Ken Capps

From: Ken Capps
Sent: Friday, January 19, 2024 4:24 PM
To: cproksel@omlaw.com; azimmerman@debevoise.com; jrassi@debevoise.com; jhamid@debevoise.com; awhelan@nclrights.org; rberg@nclrights.org; diw@wb-law.com; mckayw@wb-law.com; maria.syms@azed.gov; jellel@tuhsd.k12.az.us; dpotts@jshfirm.com; adaltrey@jshfirm.com; lasmith@dmyl.com; kristian.nelson@lewisbrisbois.com
Cc: Justin Smith <Justin.Smith@james-otis.com>; John Sauer <john.sauer@james-otis.com>; Michael Talent <Michael.Talent@james-otis.com>
Subject: RE: Doe v Horne - 4:23-cv-00185 - Intervenor Defendants Responses and Objections - Discovery

Dear Counsel,

Regarding Doe v. Horne, 4:23-cv-00185, each of you should have received a separate email with a secure link to complete the secure file transfer of the second production by Legislative Leaders. The documents span LL000336 - LL000424. The password to access the zip-file is: [REDACTED].

Thank you,



Ken Capps

From: Ken Capps

Sent: Wednesday, November 29, 2023 2:57 PM

To: 'cproksel@omlaw.com' <cproksel@omlaw.com>; 'azimmerman@debevoise.com' <azimmerman@debevoise.com>; 'jrassi@debevoise.com' <jrassi@debevoise.com>; 'jhamid@debevoise.com' <jhamid@debevoise.com>; 'awhelan@nclrights.org' <awhelan@nclrights.org>; 'rberg@nclrights.org' <rberg@nclrights.org>; 'diw@wb-law.com' <diw@wb-law.com>; 'mckayw@wb-law.com' <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>; 'adaltrey@jshfirm.com' <adaltrey@jshfirm.com>; 'lasmith@dmyl.com' <lasmith@dmyl.com>; 'kristian.nelson@lewisbrisbois.com' <kristian.nelson@lewisbrisbois.com>

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

Subject: Doe v Horne - 4:23-cv-00185 - Intervenor Defendants Responses and Objections - Discovery

Dear Counsel,

Regarding Doe v. Horne, 4:23-cv-00185, on behalf of Intervenor-Defendants please find the attached documents: (1) Objections and Responses to Plaintiffs' first set of interrogatories; (2) Objections and Responses to Plaintiffs' first set of requests for production; and (3) a privilege log accompanying Intervenor-Defendants' document production.

The document production consists of documents bates-stamped LL000001 - LL000335. Each of you will receive a separate email with a secure link to complete the secure file transfer of those documents. The password to access the zip-file is: [REDACTED].

Thank you,

Ken Capps | Attorney
James Otis Law Group
ken.capps@james-otis.com

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’ Supplemental
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 Supplemental 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 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1:** Subject to and
10 without waiving all objections previously asserted, the Legislative Leaders provide the
11 following non-privileged information.

12 No person provided the Legislative Leaders with information to prepare their
13 Motion to Dismiss.

14 The only individuals that provided the Legislative Leaders with information to
15 prepare their Opposition to Plaintiffs' Motion for a Preliminary Injunction were Dr.
16 Gregory A. Brown, Dr. James. M. Cantor, and Dr. Chad Thomas Carlson. All information
17 they provided is contained in their publicly filed declarations, Docs. 82-1, 82-2, 82-3, 87-
18 1, 87-2, and 87-3. They may be contacted through counsel for the Legislative Leaders.

19 No person provided the Legislative Leaders with information to prepare their
20 responses to Plaintiffs' First Set of Requests for Production or First Set of Interrogatories.

21
22 **INTERROGATORY NO. 2:** Without time limitation, identify any and all student athletes
23 who have contacted you who are playing school sports in Arizona and who feel that they
24 have been treated unfairly or faced unfair or unsafe competition as a result of a transgender
25 girl's participation in their sport.

26 **RESPONSE TO INTERROGATORY NO. 2:** The Legislative Leaders object to this
27 interrogatory's lack of time limitation as outside the scope permitted by Rule 26(b)(1)
28 because information from legislative sessions in which S.B. 1165 did not pass is not

1 relevant to any party’s claim or defense, is not proportional to the needs of the case, and
2 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
3 Legislative Leaders further object to the extent this interrogatory seeks information
4 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
5 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative
6 Leaders further object to the extent this request seeks documents protected by the
7 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
8 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
9 object to the definition of “you” to the extent it encompasses other legislators and staff of
10 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

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

1 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:** Subject to and
2 without waiving all objections previously asserted, the Legislative Leaders provide the
3 following non-privileged information. All testimony received by the Arizona House of
4 Representatives Committee on Health & Human Services in a hearing on H.B. 2706 on
5 February 13, 2020, is publicly available and equally accessible to Plaintiffs. *See* Hearing
6 on H.B. 2706 before the Arizona House of Representatives Committee on Health & Human
7 Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), at
8 <https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055>;
9 <https://www.azleg.gov/videoplayer/?eventID=2020021413>.

10 Correspondence received by President Petersen and Speaker Toma from August 19,
11 2019 to present is available in the documents produced in response to Plaintiffs' First Set
12 of Requests for Production of Documents to Intervenor-Defendants President Warren
13 Peterson [*sic*] and Speaker Ben Toma.

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

16
17 **INTERROGATORY NO. 3:** Without time limitation, identify any and all complaints that you
18 have received because of a transgender girl competing with or against students in a girls' school
19 sports contest, and identify the complainant's affiliation with the school featured in the complaint.

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

1 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
2 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). 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 provide
6 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
7 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second
8 Regular Session until the day the Arizona Governor signed S.B. 1165. All testimony
9 received by the Arizona Senate Committee on the Judiciary and Arizona House of
10 Representatives Committee on the Judiciary in hearings on S.B. 1165 on January 20, 2022
11 and March 9, 2022, respectively, is publicly available and equally accessible to Plaintiffs.
12 *See* Hearing on S.B. 1165 before the Arizona Senate Committee on the Judiciary, 55th
13 Legislature, Second Regular Session (Jan. 20, 2022), *at*
14 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B. 1165 before
15 the Arizona House of Representatives Committee on Judiciary, 55th Legislature, Second
16 Regular Session (Mar. 9, 2022), *at*
17 <https://www.azleg.gov/videoplayer/?eventID=2022031027>. Correspondence received by
18 President Petersen and Speaker Toma relating to S.B. 1165 is available in the documents
19 produced in response to Plaintiffs’ First Set of Requests for Production of Documents to
20 Intervenor-Defendants President Warren Peterson [*sic*] and Speaker Ben Toma.
21 Intervenor-Defendants will supplement this response if additional responsive, non-
22 privileged information is located.

23 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:** Subject to and
24 without waiving all objections previously asserted, the Legislative Leaders provide the
25 following non-privileged information. All testimony received by the Arizona House of
26 Representatives Committee on Health & Human Services in a hearing on H.B. 2706 on
27 February 13, 2020, is publicly available and equally accessible to Plaintiffs. *See* Hearing
28 on H.B. 2706 before the Arizona House of Representatives Committee on Health & Human

1 Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), at
2 <https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055>;
3 <https://www.azleg.gov/videoplayer/?eventID=2020021413>.

4 Correspondence received by President Petersen and Speaker Toma from August 19,
5 2019 to present is available in the documents produced in response to Plaintiffs' First Set
6 of Requests for Production of Documents to Intervenor-Defendants President Warren
7 Peterson [*sic*] and Speaker Ben Toma.

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

10
11 **INTERROGATORY NO. 4:** Without time limitation, identify any and all Arizona
12 student athletes who have reported to you that they have been physically injured by a
13 transgender athlete, including the age and grade of the athletes involved, the sport in which
14 the injury occurred, the date or dates of the alleged injuries, any known witnesses to the
15 alleged injury, and the circumstances surrounding the alleged injury.

16 **RESPONSE TO INTERROGATORY NO. 4:** The Legislative Leaders object to this
17 interrogatory's lack of time limitation as outside the scope permitted by Rule 26(b)(1)
18 because information from legislative sessions in which S.B. 1165 did not pass is not
19 relevant to any party's claim or defense, is not proportional to the needs of the case, and
20 imposes an undue burden on the Legislative Leaders that outweighs its benefit. The
21 Legislative Leaders further object to the extent this interrogatory seeks information
22 protected by the legislative privilege. *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175,
23 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011). The Legislative
24 Leaders further object to the extent this request seeks documents protected by the
25 deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-
26 CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further
27 object to the definition of "you" to the extent it encompasses other legislators and staff of
28 the Arizona Senate and House of Representatives who are not parties to this lawsuit.

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

19 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4:** Subject to and
20 without waiving all objections previously asserted, the Legislative Leaders provide the
21 following non-privileged information. All testimony received by the Arizona House of
22 Representatives Committee on Health & Human Services in a hearing on H.B. 2706 on
23 February 13, 2020, is publicly available and equally accessible to Plaintiffs. *See* Hearing
24 on H.B. 2706 before the Arizona House of Representatives Committee on Health & Human
25 Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), *at*
26 <https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055>;
27 <https://www.azleg.gov/videoplayer/?eventID=2020021413>.

28 Correspondence received by President Petersen and Speaker Toma from August 19,

1 2019 to present is available in the documents produced in response to Plaintiffs’ First Set
2 of Requests for Production of Documents to Intervenor-Defendants President Warren
3 Peterson [*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. 5:** Without time limitation, identify all students who
8 participated in or are participating in interscholastic and/or intramural sports in Arizona
9 who have reported to you that they have been denied the opportunity to advance in their
10 respective sports, including but not limited to being denied a spot on a team or failing to
11 obtain a college scholarship, because of students who are transgender participating on
12 sports teams.

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

26 Subject to and without waiving these objections, the Legislative Leaders provide
27 the following relevant, non-privileged information from July 1, 2021 to March 30, 2022,
28 which encompasses the entire interim session prior to the Fifty-fifth Legislature – Second

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

16 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:** Subject to and
17 without waiving all objections previously asserted, the Legislative Leaders provide the
18 following non-privileged information. All testimony received by the Arizona House of
19 Representatives Committee on Health & Human Services in a hearing on H.B. 2706 on
20 February 13, 2020, is publicly available and equally accessible to Plaintiffs. *See* Hearing
21 on H.B. 2706 before the Arizona House of Representatives Committee on Health & Human
22 Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), *at*
23 <https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055>;
24 <https://www.azleg.gov/videoplayer/?eventID=2020021413>.

25 Correspondence received by President Petersen and Speaker Toma from August 19,
26 2019 to present is available in the documents produced in response to Plaintiffs' First Set
27 of Requests for Production of Documents to Intervenor-Defendants President Warren
28 Peterson [*sic*] and Speaker Ben Toma.

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

3
4 **INTERROGATORY NO. 6:** Identify all governmental interests that you believe are
5 advanced by Ariz. Rev. Stat. § 15-120.02.

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

- 12 • Redressing past discrimination against women in athletics;
- 13 • Promoting fairness and equal opportunities for women in athletics;
- 14 • Providing safety for women in athletics;
- 15 • Providing clear and consistent application of sex separation rules in athletics;
- 16 and
- 17 • Providing public accountability through an elected legislative body for sex
18 separation rules in athletics.

19
20 **INTERROGATORY NO. 7:** For each of the governmental interests you identified in
21 response to Interrogatory No. 6, state all facts that support your contention that Ariz. Rev.
22 Stat. § 15-120.02 advances those governmental interests.

23 **RESPONSE TO INTERROGATORY NO. 7:** The Legislative Leaders object that this
24 interrogatory’s requests for “all facts” is outside the scope permitted by Rule 26(b)(1)
25 because it is not proportional to the needs of the case and Plaintiffs have more convenient,
26 less burdensome, and less expensive access to this information than reproducing it here.
27 The Legislative Leaders and Defendant Horne have filed and cited hundreds of pages of
28 expert declarations, studies, and other evidence that support the governmental interests

1 identified in response to Interrogatory No. 6 and which are too voluminous to reproduce
2 here. The burden on the Intervenor-Defendants of reproducing the requested facts here
3 outweighs its likely benefit. The Legislative Leaders further object to the extent this
4 interrogatory seeks premature disclosure of expert reports, which the Legislative Leaders
5 will produce in accordance with the Court's Scheduling Order. The Legislative Leaders
6 further object to the definition of "you" to the extent it encompasses other legislators and
7 staff of the Arizona Senate and House of Representatives who are not parties to this lawsuit.

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

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

1 preliminary injunction hearing.

- 2 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 3 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
- 4 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 5 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
- 6 preliminary injunction hearing.
- 7 • Testimony received by the Arizona Senate Committee on the Judiciary and
- 8 Arizona House of Representatives Committee on the Judiciary in hearings on
- 9 S.B. 1165 on January 20, 2022 and March 9, 2022, respectively, is publicly
- 10 available and equally accessible to Plaintiffs. *See* Hearing on S.B. 1165 before
- 11 the Arizona Senate Committee on the Judiciary, 55th Legislature, Second
- 12 Regular Session (Jan. 20, 2022), *at*
- 13 <https://www.azleg.gov/videoplayer/?eventID=2022011057>; Hearing on S.B.
- 14 1165 before the Arizona House of Representatives Committee on Judiciary, 55th
- 15 Legislature, Second Regular Session (Mar. 9, 2022), *at*
- 16 <https://www.azleg.gov/videoplayer/?eventID=2022031027>.
- 17 • Documents produced in response to Plaintiffs’ First Set of Requests for
- 18 Production of Documents to Intervenor-Defendants President Warren Peterson
- 19 [*sic*] and Speaker Ben Toma.

20 Intervenor-Defendants will supplement this response if additional responsive, non-

21 privileged information is located.

22 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:** Subject to and

23 without waiving all objections previously asserted, the Legislative Leaders provide the

24 following non-privileged information.

- 25 • Testimony received by the Arizona House of Representatives Committee on
- 26 Health & Human Services in a hearing on H.B. 2706 on February 13, 2020, is
- 27 publicly available and equally accessible to Plaintiffs. *See* Hearing on H.B. 2706
- 28 before the Arizona House of Representatives Committee on Health & Human

1 Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), at
2 [https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=30](https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055)
3 [55; https://www.azleg.gov/videoplayer/?eventID=2020021413](https://www.azleg.gov/videoplayer/?eventID=2020021413).

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

28 Intervenor-Defendants will supplement this response if additional responsive, non-
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 iii. Carrie Heikkala
21 jjj. Diane Elrod
22 kkkk. Jill Dunican
23 ll. 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 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:** Subject to and
27 without waiving all objections previously asserted, the Legislative Leaders provide the
28 following non-privileged information.

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- Testimony received by the Arizona House of Representatives Committee on Health & Human Services in a hearing on H.B. 2706 on February 13, 2020, is publicly available and equally accessible to Plaintiffs. See Hearing on H.B. 2706 before the Arizona House of Representatives Committee on Health & Human Services, 54th Legislature, Second Regular Session (Feb. 13, 2020), at <https://www.azleg.gov/videoplayer/?eventID=2020021411&startStreamAt=3055>; <https://www.azleg.gov/videoplayer/?eventID=2020021413>.

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

Dated: March 7, 2024

Respectfully submitted,

JAMES OTIS LAW GROUP, LLC

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

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

18 Defendants.

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

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

19
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23 Intervenor-Defendants Senate President Warren Petersen and Speaker of the House
24 Ben Toma (the “Legislative Leaders”), by and through undersigned counsel, hereby serve
25 their Supplemental Objections and Responses to Plaintiffs’ First Set of Requests for
26 Production of Documents.

27 **DOCUMENT REQUESTS**

28 **REQUEST NO. 1:** All documents and communications concerning S.B. 1165 or Ariz.



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

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

26 Subject to and without waiving these objections, the Legislative Leaders are
27 producing relevant, non-privileged documents from July 1, 2021 to March 30, 2022, which
28 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular

1 Session until the day the Arizona Governor signed S.B. 1165.

2 **SUPPLEMENTAL RESPONSE TO REQUEST NO. 1:** Subject to and without waiving
3 all objections previously asserted, the Legislative Leaders are producing responsive, non-
4 privileged documents from August 19, 2019 to present.

5
6 **REQUEST NO. 2:** Without time limitation, all documents, policies,
7 and communications concerning the participation of transgender students in any school
8 sports at any level in Arizona, including without limitation communications between you
9 and any school district; complaints or concerns you have received; and briefing materials
10 provided to you.

11 **RESPONSE TO REQUEST NO. 2:** The Legislative Leaders object to the extent this
12 request seeks documents protected by the legislative privilege, such as “briefing materials.”
13 *See, e.g., Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*,
14 643 F.3d 278, 290 (9th Cir. 2011). The Legislative Leaders further object to the extent this
15 request seeks documents like “briefing materials” protected by the deliberative process
16 privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099-GEB-CMK, 2008 WL
17 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative Leaders further object to the
18 extent this request seeks documents protected by the attorney-client privilege and/or the
19 work product privilege. The Legislative Leaders further object to this request’s lack of
20 time limitation as outside the scope permitted by Rule 26(b)(1) because documents from
21 legislative sessions in which S.B. 1165 did not pass is not relevant to any party’s claim or
22 defense and is not proportional to the needs of the case.

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, which
25 encompasses the entire interim session prior to the Fifty-fifth Legislature – Second Regular
26 Session until the day the Arizona Governor signed S.B. 1165.

27 **SUPPLEMENTAL RESPONSE TO REQUEST NO. 2:** Subject to and without waiving
28 all objections previously asserted, the Legislative Leaders are producing responsive, non-

1 privileged documents from August 19, 2019 to present.

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

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

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

22 **SUPPLEMENTAL RESPONSE TO REQUEST NO. 3:** Subject to and without waiving
23 all objections previously asserted, the Legislative Leaders are producing responsive, non-
24 privileged documents from August 19, 2019 to present.

25
26 **REQUEST NO. 4:** All documents and communications you contend support your
27 assertion that banning transgender girls from competing in girls-only school sports
28 remedies past discrimination and provides equal opportunities for women and safety to

1 women athletes. *See* Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a
2 Preliminary Injunction at 5, 13.

3 **RESPONSE TO REQUEST NO. 4:** The Legislative Leaders further object that this
4 request for “all documents and communications” is outside the scope permitted by Rule
5 26(b)(1) because it 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 Legislative Leaders and Defendant Horne have filed and cited
8 hundreds of pages of expert declarations, studies, and other evidence that are too
9 voluminous to reproduce here. The burden of reproducing the requested documents
10 outweighs its likely benefit. The Legislative Leaders further object to the extent this
11 request seeks premature disclosure of expert reports, which the Legislative Leaders will
12 produce in accordance with the Court’s Scheduling Order. 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 identify
16 and incorporate by reference the following documents and the documents cited within these
17 documents:

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

1 a Preliminary Injunction.

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

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

20
21 **REQUEST NO. 5:** All documents, policies, and communications concerning sex-based
22 separation in school sports in Arizona.

23 **RESPONSE TO REQUEST NO. 5:** The Legislative Leaders object to the extent this
24 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
25 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
26 2011). The Legislative Leaders further object to the extent this request seeks documents
27 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
28 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative

1 Leaders further object to the extent this request seeks documents protected by the attorney-
2 client privilege and/or the work product privilege. The Legislative Leaders further object
3 to this request's relevant time period, which according to Instruction #8 is January 1, 2015
4 to the date of the response, as outside the scope permitted by Rule 26(b)(1) because
5 documents from legislative sessions in which S.B. 1165 did not pass is not relevant to any
6 party's claim or defense and is not proportional to the needs of the case.

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

11 **SUPPLEMENTAL RESPONSE TO REQUEST NO. 5:** Subject to and without waiving
12 all objections previously asserted, the Legislative Leaders are producing responsive, non-
13 privileged documents from August 19, 2019 to present.

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

24 **RESPONSE TO REQUEST NO. 6:** The Legislative Leaders object to the extent this
25 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
26 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
27 2011). The Legislative Leaders further object to the extent this request seeks documents
28 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-

1 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
2 Leaders further object to the extent this request seeks documents protected by the attorney-
3 client privilege and/or the work product privilege. The Legislative Leaders further object
4 that this request for “all documents and communications” is outside the scope permitted by
5 Rule 26(b)(1) because it is not proportional to the needs of the case and Plaintiffs have
6 more convenient, less burdensome, and less expensive access to these documents than
7 reproducing them here. The Legislative Leaders and Defendant Horne have filed and cited
8 hundreds of pages of expert declarations, studies, and other evidence that are too
9 voluminous to reproduce here. The burden of reproducing the requested documents
10 outweighs its likely benefit. The Legislative Leaders further object to the extent this
11 request seeks premature disclosure of expert reports, which the Legislative Leaders will
12 produce in accordance with the Court’s Scheduling Order.

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 these
15 documents:

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

1 of Intervenor-Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary
2 Injunction.

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

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

18
19 **REQUEST NO. 7:** All documents from or exchanged between, and communications with,
20 any representative of any advocacy organization, including without limitation the Alliance
21 Defending Freedom, the Heritage Foundation, Eagle Forum, and the Family Research
22 Council concerning the participation of transgender students in interscholastic and/or
23 intramural sports in Arizona.

24 **RESPONSE TO REQUEST NO. 7:** The Legislative Leaders object to the extent this
25 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
26 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
27 2011). The Legislative Leaders further object to the extent this request seeks documents
28 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-

1 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
2 Leaders further object to the extent this request seeks documents protected by the attorney-
3 client privilege and/or the work product privilege. The Legislative Leaders further object
4 to this request’s relevant time period, which according to Instruction #8 is January 1, 2015
5 to the date of the response, as outside the scope permitted by Rule 26(b)(1) because
6 documents from legislative sessions in which S.B. 1165 did not pass is not relevant to any
7 party’s claim or defense and is not proportional to the needs of the case.

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

12 **SUPPLEMENTAL RESPONSE TO REQUEST NO. 7:** Subject to and without waiving
13 all objections previously asserted, the Legislative Leaders are producing responsive, non-
14 privileged documents from August 19, 2019 to present.

15
16 **REQUEST NO. 8:** For each of the governmental interests you identified in response to
17 Interrogatory No. 6, produce all documents and communications that support each
18 interest.

19 **RESPONSE TO REQUEST NO. 8:** The Legislative Leaders object to the extent this
20 request seeks documents protected by the legislative privilege. *See, e.g., Lee v. City of Los*
21 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir.
22 2011). The Legislative Leaders further object to the extent this request seeks documents
23 protected by the deliberative process privilege. *Fabbrini v. City of Dunsmuir*, No. CIVS07-
24 1099-GEB-CMK, 2008 WL 2523550, at *5 (E.D. Cal. June 19, 2008). The Legislative
25 Leaders further object to the extent this request seeks documents protected by the attorney-
26 client privilege and/or the work product privilege. The Legislative Leaders further object
27 that this request for “all documents and communications” is outside the scope permitted by
28 Rule 26(b)(1) because it is not proportional to the needs of the case and Plaintiffs have

1 more convenient, less burdensome, and less expensive access to these documents than
2 reproducing them here. The Legislative Leaders and Defendant Horne have filed and cited
3 hundreds of pages of expert declarations, studies, and other evidence that are too
4 voluminous to reproduce here. The burden of reproducing the requested documents
5 outweighs its likely benefit. The Legislative Leaders further object to the extent this
6 request seeks premature disclosure of expert reports, which the Legislative Leaders will
7 produce in accordance with the Court's Scheduling Order.

8 Subject to and without waiving these objections, the Legislative Leaders identify
9 and incorporate by reference the following documents and the documents cited within these
10 documents:

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

- 1 • Doc. 87-4 to Doc. 87-31 – Exhibits 7-34 filed by Intervenor-Defendants for the
- 2 preliminary injunction hearing.
- 3 • Doc. 92-8 – Expert witness statement of Emma Hilton, PhD.
- 4 • Doc. 92-9 – Declaration of Dr. Linda Blade, Ph.D., in Support of Defendant
- 5 Horne’s Response to Plaintiffs’ Motion for Preliminary Injunction.
- 6 • Doc. 92-10 to Doc. 92-37 – Exhibits 6-33 filed by Defendant Horne for the
- 7 preliminary injunction hearing.
- 8 • Documents produced in response to Plaintiffs’ First Set of Requests for
- 9 Production of Documents to Intervenor-Defendants President Warren Peterson
- 10 [*sic*] and Speaker Ben Toma.

11 Intervenor-Defendants will supplement this response if additional responsive, non-

12 privileged documents are located.

13

14 **REQUEST NO. 9:** All documents used by you or relied on by you in preparing your

15 Motion to Dismiss, Opposition to Plaintiffs’ Motion for a Preliminary Injunction,

16 responses to Plaintiffs’ First Set of Interrogatories, and your responses to these Requests

17 for Production.

18 **RESPONSE TO REQUEST NO. 9:** The Legislative Leaders object that this request seeks

19 attorney work product and mental impressions. *See, e.g., Becker v. TIG Ins. Co.*, No. 3:21-

20 CV-05185-JHC, 2022 WL 13925733, at *1 (W.D. Wash. Oct. 24, 2022) (citing cases).

21 The Legislative Leaders further object that this request is outside the scope permitted by

22 Rule 26(b)(1) because it is not relevant to any party’s claim or defense.

23

24 Dated: March 7, 2024

Respectfully submitted,

JAMES OTIS LAW GROUP, LLC

27 /s/ Justin D. Smith

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

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* *pro hac vice*

Attorneys for Intervenor-Defendants

Justin Smith

From: Colin Proksel cproksel@omlaw.com
Sent: Wednesday, February 7, 2024 1:59 PM
To: diw@wb-law.com ; mckayw@wb-law.com ; Maria.Syms@azed.gov ; dpotts@jshfirm.com ; adaltrey@jshfirm.com ; lasmith@dmyl.com ; kristian.nelson@lewisbrisbois.com ; jellel@tuhsd.k12.az.us ; John Sauer; Justin Smith
Cc: jhamid@debevoise.com ; jrassi@debevoise.com ; azimmerman@debevoise.com ; awhelan@nclrights.org ; rberg@nclrights.org
Subject: Doe v. Horne - Written Discovery Requests to Defendants Horne, I, and Intervenor
Attachments: 2024-02-07 Doe v Horne - Third Set of Responses to I .pdf; 2024-02-07 Doe v Horne - First Set of Responses to Horne.pdf; 2024-02-07 Doe v Horne - First Set of Responses to Intervenor.pdf; 2024-02-07 Doe v Horne - Second Set of Responses to I .pdf; 2024-02-07 Doe v Horne - Second Set of RFPs to I .pdf

All,

Please see the attached.

Best,

Colin Proksel

Colin M. Proksel
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 3 Phoenix, Arizona 85012-2793
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 4 Telephone: (602) 640-9000
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 Email: cproksel@omlaw.com
 6 *Attorney for Plaintiffs*
 7 *Additional counsel listed in signature block*

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

10 Jane Doe, by her next friend and parents
 Helen Doe and James Doe; and Megan Roe,
 11 by her next friend and parents, Kate Roe and
 Robert Roe,
 12 **Plaintiffs,**

13 v.

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

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

**PLAINTIFFS' INITIAL RULE 26(a)(1)
 DISCLOSURES**

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1 Plaintiffs Jane Doe, by her next friends and parents Helen Doe and James Doe, and
2 Megan Roe, by her next friends and parents Kate Roe and Robert Roe (collectively,
3 “Plaintiffs”), by and through their undersigned counsel, and pursuant to Federal Rule of
4 Civil Procedure 26(a)(1), hereby submit the following Initial Disclosures (“Disclosures”).

5 These disclosures are based on the information reasonably available to Plaintiffs as
6 of this date and represent a good faith effort by Plaintiffs to identify discoverable
7 information that they reasonably believe may be used to support their claims or defenses,
8 as required. These disclosures are made without waiving: (1) any claim of privilege or
9 work product; (2) the right to object on the grounds of competency, relevancy and
10 materiality, hearsay, or any other proper ground, to the use of any such information, for
11 any purpose, in whole or in part, in any subsequent proceeding in this action or any other
12 action; and (3) the right to object to any and all grounds, at any time, to any other discovery
13 request or proceeding involving or relating to the subject matter of these Disclosures.

14 Plaintiffs expressly reserve the right to supplement or modify these Disclosures as
15 additional information becomes available. These Disclosures do not include information
16 that may be used solely for impeachment purposes, or identify or otherwise include
17 information concerning experts, as this subject is not covered by Fed. R. Civ. P. 26(a)(1).
18 Plaintiffs will provide their expert disclosures, if applicable, pursuant to Fed. R. Civ. P.
19 26(a)(2) and the case management order.

20 1. Witnesses (the name, and if known, the address and telephone number of the
21 individual likely to have discoverable information—along with the subjects of the
22 information—that the disclosing party may use to support its claims or defenses, unless
23 solely for impeachment).

24 ///

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Name	Contact Information	Subject(s) of Information
Jane Doe	Through counsel	That she is a girl who is transgender and has gender dysphoria; that she wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, humiliating, and deprives her of the well-known physical, mental, emotional, and developmental benefits of sports.
Helen Doe	Through counsel	That her daughter is a girl who is transgender and has gender dysphoria; that her daughter wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, and humiliating to her child and to their family, and deprives her child of the well-known physical, mental, emotional, and developmental benefits of sports.
James Doe	Through counsel	That his daughter is a girl who is transgender and has gender dysphoria; that his daughter wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, and humiliating to his child and to their family, and deprives his child of the well-known physical, mental, emotional, and developmental benefits of sports.
Megan Roe	Through counsel	That she is a girl who is transgender and has gender dysphoria; that she wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, humiliating, and deprives her of the well-known physical, mental, emotional, and developmental benefits of sports.

1 2 3 4 5 6 7	Kate Roe	Through counsel	That her daughter is a girl who is transgender and has gender dysphoria; that her daughter wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, and humiliating to her child and to their family, and deprives her child of the well-known physical, mental, emotional, and developmental benefits of sports.
8 9 10 11 12 13 14	Robert Roe	Through counsel	That his daughter is a girl who is transgender and has gender dysphoria; that his daughter wishes to compete in and experience the benefits of school sports like other girls; that the ban is stigmatizing, isolating, and humiliating to his child and to their family, and deprives his child of the well-known physical, mental, emotional, and developmental benefits of sports.
15 16	Representatives of the Arizona Interscholastic Association	Through defense counsel	Information related to defendants' defenses; information related to AIA policies prior to Ariz. Rev. Stat. § 15-120.02.
17 18 19	Dr. Julie Sherrill, Head of School at The Gregory School	Through defense counsel	Information related to defenses.

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Plaintiffs also include other current and former employees and staff of the Arizona Department of Education (“ADOE”) and the Arizona State Legislature not yet known to Plaintiffs. Plaintiffs further incorporate the witnesses identified by Defendants or any other party in this matter, whether those witnesses are later withdrawn or de-designated. Plaintiffs also include any custodians of records or other witnesses necessary to provide the required foundation for any exhibits, documents, or other materials.

27
28

Plaintiffs reserve the right to seek discovery from, and relating to, other persons that may subsequently become known as persons likely to have discoverable information.

1 Plaintiffs further reserve the right to designate or call further witnesses at trial, including
2 for purposes of rebuttal or impeachment. If any persons not included herein are identified
3 in any further discovery responses by either party or are deposed in this case, Plaintiffs
4 hereby incorporate those persons as individuals likely to have discoverable information
5 that Plaintiffs may use to support their claims or defenses.

6 2. Documents (A copy of, or a description by category and location of, all
7 documents, electronically stored information, and tangible things that are in the possession,
8 custody, or control of the disclosing party that the disclosing party may use to support its
9 claims or defenses, unless solely for impeachment).

10 Without waiving any objections or claims of privilege or work product or stipulating
11 to the relevancy of any materials; and expressly reserving their right to supplement,
12 Plaintiffs identify the following hardcopy or electronic records in their possession, custody,
13 or control:

- 14 i) All pleadings in this matter and attachments thereto;
- 15 ii) All discovery, documents, communications, or other information that is
16 produced, served, exchanged, or filed in this matter;
- 17 iii) All depositions taken in this matter and exhibits thereto.

18 Plaintiffs incorporate those documents identified by Defendants or any other party
19 in this matter and reserve their right to supplement this list during discovery.

20 3. Damages (A computation of any category or damages claimed by the
21 disclosing party, making available for inspection and copying as under Rule 34 the
22 documents or other evidentiary material, not privileged or protected from disclosure, on
23 which such computation is based, including materials bearing on the nature and extent of
24 injuries suffered).

25 Plaintiffs seek injunctive and declaratory relief and any other relief the Court deems
26 proper. Plaintiffs do not seek monetary damages.

27 4. Insurance Agreements (For inspection and copying as under Rule 34 any
28 insurance agreement under which any person carrying on an insurance business may be

1 liable to satisfy part or all of a judgment which may be entered in the action or to indemnify
2 or reimburse for payments made to satisfy the judgment).

3 Plaintiffs are not subject to, or aware of, any applicable insurance agreements.
4

5 Dated: September 29, 2023

6 /s/ Colin M. Proksel

7 Colin M. Proksel (034133)
8 OSBORN MALEDON, P.A.
9 2929 North Central Avenue, 21st Floor
10 Phoenix, Arizona 85012-2793
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25 Amy Whelan*
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Email: awhelan@nclrights.org
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**Admitted pro hac vice.*