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23 **UNITED STATES DISTRICT COURT**  
24 **DISTRICT OF ARIZONA**

25 Russell B. Toomey,  
26 Plaintiff,  
27 vs.  
28 State of Arizona et al.,  
Defendants.

Case No: CV-19-00035-TUC-RM (LAB)

**REPLY IN SUPPORT OF MOTION OF  
ARIZONA SENATE PRESIDENT  
PETERSEN AND SPEAKER OF THE  
ARIZONA HOUSE OF  
REPRESENTATIVES TOMA FOR  
LEAVE TO FILE A BRIEF AS *AMICUS  
CURIAE***

**REPLY IN SUPPORT OF MOTION FOR LEAVE**

1  
2 Speaker of the Arizona House of Representatives Ben Toma and Arizona Senate  
3 President Warren Petersen (collectively, the “Legislative Leaders”) respectfully submit  
4 this reply in support of their motion requesting leave to file an *amicus curiae* brief.

5 As discussed in their motion, the Legislative Leaders submitted their brief to  
6 provide the Court with relevant information and legal authority that the parties failed to  
7 address in their proposed settlement. Neither the State of Arizona nor any other defendant  
8 has filed any response or objection to the Legislative Leaders’ motion. And Plaintiffs’  
9 opposition illustrates precisely why the motion should be granted for three reasons.

10 *First*, most of Plaintiffs’ opposition is spent responding to the merits of the  
11 Legislative Leaders’ proposed amicus brief. Doc.355 at 4-11. Specifically, Plaintiffs  
12 argue that: (1) this case is not mooted by the Governor’s Executive Order 2023-12;  
13 (2) the proposed Consent Decree does not conflict with A.R.S. § 32-3230(A)—a statute  
14 that took effect only four months ago, as Legislative Leaders explain in their proposed  
15 amicus brief; and (3) the taxpayer-funded award of \$500,000 for Plaintiffs’ attorneys’  
16 fees is reasonable. Plaintiffs’ substantive responses to the proposed amicus brief  
17 contradict Plaintiffs’ assertions that the Legislative Leaders possess only generalized or  
18 non-cognizable interests in this case. It is abundantly clear—under Arizona law and  
19 binding precedent—that Speaker Toma and President Petersen have an interest in  
20 protecting the separation of powers, the plenary authority of the Arizona Legislature, and  
21 the constitutionality of Arizona statutes, especially when a proposed Consent Decree puts  
22 these interests at risk. *See* A.R.S. § 12-1841 (entitling the Speaker and President “to be  
23 heard” in any case involving the constitutionality of a state statute); *Keith v. Volpe*, 118  
24 F.3d 1386, 1393 (9th Cir. 1997) (parties cannot agree to terms in a consent decree that  
25 would exceed their authority or supplant state law); *Stone v. City and County of San*  
26 *Francisco*, 968 F.2d 850, 852-55 (9th Cir. 1992) (vacating part of a consent decree that  
27 would have allowed a sheriff “to override applicable state laws”, accepting a city’s  
28

1 amicus brief that raised “principles of federalism,” and stating that courts “have  
2 jurisdiction to consider the federalism questions raised by the *amicus*”).

3         *Second*, Plaintiffs’ arguments confirm that the proposed Consent Decree  
4 implicates A.R.S. § 32-3230(A) and presents significant separation of powers concerns.  
5 Plaintiffs argue the proposed Consent Decree “does not address the legality of gender  
6 reassignment surgery” and “only addresses insurance coverage for gender-affirming  
7 healthcare.” Doc. 355 at 10. Yet Plaintiffs then explain that *despite* the prohibition in  
8 A.R.S. § 32-3230(A) against irreversible gender reassignment surgery to minors in  
9 Arizona, the state healthcare plan could still “cover those procedures when performed by  
10 a participating provider in another state.” Doc. 355 at 10-11. Plaintiffs also suggest that  
11 the proposed Consent Decree could override the prohibition in A.R.S. § 32-3230(A)  
12 because the decree provides Plaintiffs with “virtually the same permanent relief that Dr.  
13 Toomey and the Certified Classes would have received if they had prevailed on their  
14 Title VII and equal protection claims.” Doc. 355 at 11. (This novel theory, however,  
15 contradicts Plaintiffs’ own assertion that the parties “are not in complete agreement”  
16 because “no Defendant admits liability for Plaintiff’s claims under Title VII and the  
17 Equal Protection Clause.” Doc. 355 at 9.) Plaintiffs’ arguments unquestionably present  
18 significant and uncertain legal questions that require judicial interpretation of A.R.S.  
19 § 32-3230 and resolution by a court with jurisdiction over a case and controversy. U.S.  
20 Const. art. III, § 2, cl. 1. Those questions cannot be implicitly resolved through a consent  
21 decree without violating the federalism doctrine and Arizona law. *See Keith*, 118 F.3d at  
22 1393; *Stone*, 968 F.2d at 852-55.

23         Indeed, Plaintiffs’ opposition to leave actually confirms the useful role that the  
24 Legislative Leaders have *already* played in this action. Absent their motion for leave, the  
25 parties apparently had no intent to address A.R.S. § 32-3230 and how it interacts with the  
26 proposed Consent Decree. By bringing an important issue to this Court’s attention that  
27 the parties would otherwise have buried, Legislative Leaders have served a crucial  
28 function that amply warrants the leave sought.

1 *Third*, Plaintiffs complain (Doc. 355 at 2 & n.2) that this case has been lingering  
2 for four years and that the Speaker and President only recently filed their motion and  
3 sought to participate as amici. That contention ignores the recent events that impelled the  
4 Legislative Leaders to act. As explained in the motion, the Legislative Leaders’ interests  
5 in this litigation were motivated by the following chain of events: A.R.S. § 32-3230 took  
6 effect on April 1, 2023, Governor Hobbs issued Executive Order 2023-12 on June 27,  
7 2023, and the parties submitted a proposed settlement to this Court on July 7, 2023. On  
8 July 10, 2023—the *very next business day*—the Legislative Leaders promptly filed their  
9 motion and the proposed amicus brief to raise the relevance of A.R.S. § 32-3230 and  
10 Executive Order No. 2023-12 to the broad language and terms of the proposed  
11 settlement. And up until the proposed settlement, the State had been defending itself in  
12 this action, even filing a motion for summary judgment in the State’s favor that is still  
13 pending before this Court. Accordingly, Plaintiffs’ insinuation that the Legislative  
14 Leaders’ motion is untimely lacks merit.

15 **CONCLUSION**

16 As discussed in the Legislative Leaders’ motion, the Arizona Legislature has an  
17 unquestionable role in vindicating provisions of Arizona law under Arizona statutes and  
18 settled precedent. Legislative Leaders reiterate that they do not seek intervention but  
19 merely wish to articulate their legislative perspective on the important issues of law and  
20 federalism implicated by the parties’ proposed settlement. The Legislative Leaders  
21 respectfully request this Court to grant their motion and accept their proposed *amicus*  
22 *curiae* brief.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of July, 2023, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for Filing, which will transmit a Notice of Electronic Filing to counsel for all parties to the case that are registered CM/ECF users.

s/ Drew C. Ensign