No. 23A452

IN THE

Supreme Court of the United States

BEN TOMA, *et al.*,

Applicants,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *et al.*,

Respondents.

On Application for a Stay Pending the Filing of a Petition for a Writ of Mandamus

NON-U.S. PLAINTIFFS' OPPOSITION

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INTRODUCTION

In the litigation from which this emergency stay application arises, the United States and seven other groups of plaintiffs sued to challenge two Arizona election laws enacted last year, laws that make it harder to register to vote, harder to stay registered, and harder to cast a ballot. No plaintiff, however, sued either Arizona House Speaker Ben Toma or Arizona Senate President Warren Petersen (hereafter "the legislators"). They instead injected themselves into the case—after the litigation had been underway for more than a year—moving to intervene as defendants to, in their words, "*fully defend* the [two] laws." D.Ct. Dkt. 348 at 11 (emphasis added).[1]

Until the legislators intervened, no party sought discovery from either of them. But once they voluntarily joined the litigation, and then made assertions about a key disputed question of fact—whether the Arizona legislature passed the challenged laws with discriminatory intent—plaintiffs sought to test the legislators' position in discovery, as plaintiffs had done with other defendants. Unlike other defendants, however, the legislators balked, asserting that legislative privilege rendered them immune to having their factual assertions tested in discovery to the full extent allowed by the Federal Rules of Civil Procedure. The district court rejected that claim, ruling that the legislators had waived the privilege by choosing to intervene and engage on a critical factual dispute, and hence that they could be deposed and had to produce the documents they had withheld as privileged.

[1] Citations herein to electronically filed documents are to page numbers of the original document rather than numbers added by the ECF system.

Challenging that interlocutory discovery ruling, the legislators asked the Ninth Circuit to embrace—through the extraordinary remedy of mandamus, no less—a position that *no court has ever approved*. The legislators' position is that a party can both voluntarily intervene as a defendant in litigation ("to fully defend" against the claims, D.Ct. Dkt. 348 at 11) *and* make assertions about a core disputed factual issue, but then invoke privilege to block the other side from exploring those assertions through the discovery process to which every other party is subject under the Federal Rules of Civil Procedure. The reason no court has ever approved that position—and contrary to the legislators' claims, several courts have rejected it—is likely because it is wholly foreign to foundational principles of our adversarial judicial system, and to basic fairness. Parties cannot abuse a privilege by offering their views on key issues in a case (the legislators, for example, paid half the fees for an expert who told the district court that he had not seen any indication of discriminatory intent by the Arizona legislature) and then raise the privilege to prevent the other side from fairly testing those views and developing evidence to support the contrary view. Again, the legislators have never cited a single case supporting that proposition. Nor have they ever explained why what they seek *should* be allowed, or why their position is not grossly unfair. Instead, they have tried to turn the question around, demanding that plaintiffs explain why the *legislators' position* is unfair. The reason is obvious: Plaintiffs bear the burden to prove their claims, and the legislators' approach allows them and other defendants to submit *their* evidence and arguments to the courts, while denying plaintiffs the opportunity to do the same. This would not only leave the evidentiary picture unduly skewed, but also allow the legislators and other defendants to claim that the balance of

evidence tips in their favor and hence that plaintiffs have not carried their burden of proof.

After briefing and oral argument, the Ninth Circuit unanimously vacated the stay that had been imposed by a divided motions panel (although that panel had entered the stay without offering any analysis of the stay factors, *see* C.A. Dkt. 9). The legislators have thus come to this Court for a stay so that they can again request mandamus. But the lack of *any* judicial support for the legislators' inequitable position means that mandamus is unavailable, because that extraordinary remedy requires the legislators to show, first and foremost, that they have a "clear and indisputable" right to relief, *United States* v. *Duell*, 172 U.S. 576, 582 (1899). They cannot make that showing when no case has ever recognized the underlying right they claim. Indeed, to say that a party can establish a "clear and indisputable" right to relief when no case in history supports its position would drain all meaning from that bedrock mandamus requirement, one this Court has followed for well over a century. *See id.*

The legislators separately do not show any clear and indisputable right to relief because the district court's holding regarding legislative privilege can be sustained on an alternative argument plaintiffs made in moving to compel: that even if the legislators' qualified privilege is not waived, it is overcome under a commonly used five-factor balancing test. The district court did not need to reach that argument, but the argument was preserved below and fully supports the court's ruling that privilege is not a barrier to the discovery plaintiffs seek. The legislators claim that appellate courts have not yet *approved* the five-factor test, but that is irrelevant; no appellate court has *rejected* it in a case concerning legislative intent (and district courts around the country

regularly use it). Under those circumstances, the legislators cannot show they have a clear and indisputable right to relief from the district court's privilege holding.

As for the legislators' argument that the discovery plaintiffs seek is irrelevant, that is both forfeited and meritless. It is forfeited because the legislators did not make that argument to the district court until *after* the court issued the challenged order. (And even then, the legislators made the argument only in seeking a stay pending appeal, not in seeking reconsideration.) That is too late. Having forfeited the argument, the legislators cannot obtain a stay pending their promised mandamus petition based on it. They cannot show any prospect that this Court will conclude they have a clear and indisputable right to relief on an argument they did not preserve below.

In any event, the relevance argument lacks merit (even putting aside that this Court manifestly should not be spending its scarce resources on an emergency stay application based on a discovery dispute about relevance). The legislators' argument rests entirely on the notion that plaintiffs seek to inquire about the legislators' personal motives for voting for the challenged laws. Plaintiffs have never asked (or sought to ask) about that. The interrogatories that plaintiffs sent to the legislators, the document requests they propounded, and the deposition topics they proposed were all about the *legislature's* intent (or other relevant topics), not the legislators' or other individual legislators' personal motives in voting for the challenged laws. And as the legislators have rightly conceded, the legislature's intent is a proper subject for discovery because plaintiffs' claims in this litigation include that the challenged laws violate the Equal

Protection Clause; one element of such a claim is discriminatory intent or purpose by the legislature.

The foregoing explains why the legislators cannot show the requisite "fair prospect" that the Court will conclude they have a clear and indisputable right to mandamus, and hence why a stay is unavailable. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). But it is also unavailable because the legislators likewise cannot make a second required showing for both mandamus and a stay: that they have no other way to obtain their desired relief. Their desired relief is to avoid disclosing supposedly privileged materials without securing appellate review of the district court's discovery order. This Court, however, has explained that there is a "long-recognized" alternative way of obtaining that relief, which is not to comply with the discovery order and then appeal any resulting sanctions or contempt order. *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009); *accord, e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971) (citing cases). The availability of that alternative is not only "adequate" for purposes of the mandamus standard, but it also prevents the legislators from showing—as required to obtain a stay—that they will likely suffer irreparable harm absent a stay.

If more were somehow needed, the legislators also will not be able to make the required showing that mandamus is appropriate under the circumstances. That is partly for the reason already given: The legislators voluntarily injected themselves into the lawsuit and made factual assertions about a central issue in the case. Having done so, the legislators have no sound claim to equitable relief from the limited discovery plaintiffs seek into those assertions. But mandamus is also inappropriate given the legislators' delay tactics. Having waited over a year to intervene in litigation where all

other parties have cooperated in moving quickly (so that plaintiffs' claims can be resolved before the 2024 elections begin), and having engaged in repeated delay tactics since then, the legislators should not be rewarded with extraordinary relief from this Court that would interfere with the district court's ability to fully evaluate whether the challenged laws infringe many thousands of Arizonans' fundamental right to vote.

A stay should be denied so that plaintiffs can finally have a full and fair opportunity to answer arguments and evidence that the legislators have put forth about the legislature's intent and, more generally, to develop evidence bearing on an element of one of their claims in this litigation.

STATEMENT

Arizona enacted the two voting laws challenged here (H.B. 2492 and 2243) in 2022. The laws impose various barriers to registration and voting. For example, the laws penalize those who do not provide satisfactory documentary proof of U.S. citizenship; those penalties include possible investigation and prosecution, as well as an outright ban on voting in most elections—including for president of the United States—and on voting by mail in *any* election (the method roughly 80 percent of Arizonans use to vote).[2]

[2] The legislators' claim that they played no special role in the laws' passage, *e.g.*, C.A. Dkt. 1 at 13, is inaccurate. Toma co-sponsored one of the two laws (H.B. 2492), and Petersen was responsible for a key floor amendment to the other (H.B. 2243). *See* Petersen Floor Amendment, https://www.azleg.gov/legtext/55leg/2R/adopted/S.2243PETERSEN0501.docx.htm (visited November 22, 2023). Without that amendment—which bears directly on the issue of discriminatory legislative intent because it involved a "[d]eparture[] from the normal procedural sequence," *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977)—the law could not have been passed before the legislative session ended.

The United States and the other plaintiffs in these eight consolidated cases sued to challenge the two Arizona bills as violating federal law (not just the Constitution, as the legislators wrongly suggest (Appl. 5), but also federal statutes). Recognizing the need to have their claims resolved before the 2024 elections, so that those elections could be conducted in an orderly fashion, plaintiffs moved fast; indeed, this litigation began *one day* after the first challenged bill was signed into law. The legislators, by contrast, have sought to delay at every turn. First, they did not intervene until *over a year* after this litigation began. (Their excuse is that until then, the state attorney general was fully defending the challenged laws, but that did not mean the legislators could not intervene shortly after the complaints were filed—as the Republican National Committee chose to do.) Second, the legislators did not make the required initial disclosures by the Federal Rules' deadline. Third, they requested extensions of time just to *object* to plaintiffs' discovery requests. And finally, when the district court rejected their privilege-based plea to avoid complying with those requests, they waited over a week—at a time when trial was less than two months away—to ask that court for a stay.

After receiving full briefing, the district court denied a stay, finding that the legislators had waived legislative privilege by (1) intervening to (in their words) "fully defend the [challenged] laws," D.Ct. Dkt. 348 at 11, i.e., choosing to "actively participate in the litigation," D.Ct. Dkt. 535 at 3, and (2) disputing a critical factual allegation in "denying … that the Arizona Legislature enacted the Voting Laws with discriminatory intent," *id.*

The legislators then sought a stay from the Ninth Circuit, which a divided motions panel granted. C.A. Dkt. 9. The panel majority did not state that the legislators were likely to succeed in obtaining mandamus, that they had no alternative means of obtaining the desired relief, or that they would likely suffer irreparable harm absent a stay. In fact, the majority offered no analysis of any of the stay factors. *See id.*

After briefing and oral argument, a merits panel unanimously lifted the stay "immediately," stating that its reasoning would be provided in a later opinion. C.A. Dkt. 24. Plaintiffs had urged the panel to act quickly because the legislators had already managed to delay matters so much that trial in the case was well underway (indeed, largely concluded) when oral argument in the court of appeals occurred. Plaintiffs explained to the merits panel that lifting the stay promptly would allow the requested discovery to occur in time for the district court (which conducted a bench trial) to give whatever weight it deemed appropriate to the results of the discovery in resolving the important issues in this case. In turn, the district court has agreed to keep the trial record open until December 12 to allow the legislative discovery to proceed. D.Ct. Dkt. 663.

The legislators, however—having fully put forth their side of the story to the court at trial, and determined as ever to use delay in order to prevent plaintiffs from having a chance to fully present *their* side—now request an emergency stay from this Court, asserting that they will soon file a mandamus petition and claiming that there is a fair prospect this Court will issue the extraordinary relief of mandamus in the context of an interlocutory discovery order.

LEGAL STANDARD

As this Court has explained, a "stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly 'is not a matter of right, even if irreparable injury might otherwise result.'" *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginia Railway Company* v. *United States*, 272 U.S. 658, 672 (1926) (citation and other quotation marks omitted)). The stay applicant bears the burden of showing that a stay is warranted. *Id.* at 433-434.

In the context of a pending mandamus petition, the Court has explained that a stay is warranted only if there is both "a fair prospect that a majority of the Court will vote to grant mandamus" and "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. And "[b]efore a writ of mandamus may issue, a party must establish that (1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is clear and indisputable,' and (3) 'the writ is appropriate under the circumstances.'" *Id.* (alteration in original) (quoting *Cheney* v. *United States District Court*, 542 U.S. 367, 380-381 (2004)) (other quotation marks omitted).

ARGUMENT

I. THE LEGISLATORS HAVE NOT SHOWN LIKELY IRREPARABLE HARM ABSENT A STAY

For the reasons given in Part II, there is no fair prospect that this Court will, if the legislators file a mandamus petition, deem them to have satisfied the exceedingly high standards required for mandamus. But this Court need not even reach that question, because the legislators have not shown the *sine qua non* of any stay, which is likely irreparable harm absent a stay. They argue (Appl. 3) that they will be

irreparably harmed by having "to be deposed and divulge their privileged testimony" before obtaining "further appellate review of the [challenged] order." That argument fails for either of two independent reasons.

First, this Court has rejected the notion that the harm the legislators posit is irreparable. In *Mohawk*, the Court explained that "[a]ppellate courts *can* remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence," 558 U.S. at 109 (emphasis added). In fact, the Court's reasoning applies *a fortiori* here, given that the legislative privilege, unlike the (absolute) attorney-client privilege at issue in *Mohawk*, is only a qualified privilege. *See, e.g.*, *Jefferson Community Health Care Centers, Inc.* v. *Jefferson Parish Government*, 849 F.3d 615, 624 (5th Cir. 2017); *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987).

Second and perhaps more fundamentally, this Court has repeatedly made clear that a party faced with an order to disclose purportedly privileged information can "obtain postjudgment review *without* having to reveal its privileged information," through what the Court called a "long-recognized option": "defy[ing] a disclosure order and incur[ring] court-imposed sanctions" or "contempt," and then "appeal[ing] … from that ruling." *Mohawk*, 558 U.S. at 111 (emphasis added) (citing cases); *accord, e.g.*, *Ryan*, 402 U.S. at 533 (a party subject to a discovery order "is free to refuse compliance and, … in such event, he may obtain full review of his claims *before* undertaking any burden of compliance" (emphasis added)). The legislators cannot possibly show "likely" irreparable harm absent a stay from a pre-appeal disclosure of privileged information

when they unquestionably have a "long-recognized" way, *Mohawk*, 558 U.S. at 111, of avoiding that harm.

When plaintiffs made this argument below, the legislators responded by rhetorically asking: "Does the Court really want to encourage state officials to ignore federal court orders in order to seek relief?" C.A. Dkt. 5 at 6. As just explained, this Court has already answered that question, holding that not complying with an order to disclose allegedly privileged information and then appealing any resulting sanctions and/or contempt is a firmly established and legitimate path. To the extent the legislators were seeking an exception to that path for government officials, courts of appeals have rejected such an exception. They have held that although this Court held in *United States* v. *Nixon*, 418 U.S. 683 (1974), that the *president* need not submit to contempt proceedings to obtain judicial review, *see id.* at 691-692, that carve-out arose from the "unique context of [the] case.' *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 914 (8th Cir. 1997), and does not apply to other "government officials[]" or agencies, *Bennett* v. *City of Boston*, 54 F.3d 18, 20-21 (1st Cir. 1995) (collecting cases); *accord, e.g.*, *Newton* v. *National Broadcasting Company*, 726 F.2d 591, 593-594 (9th Cir. 1984) (per curiam). In other words, "generalized arguments that it would be unseemly to require state officials to adhere to" the contempt-appeal route are unavailing. *Simmons* v. *City of Racine, PFC*, 37 F.3d 325, 328 (7th Cir. 1994).

Before this Court, the legislators shift to two other responses. First, they deride as "contrary to common sense" (Appl. 21) that one can avoid irreparable harm via this "long-recognized" option, *Mohawk*, 500 U.S. at 111. Second, they say that since

Mohawk, lower "courts have continued to recognize the irreparable harm that arises from disclosure of privileged material." Appl. 19. Each argument fails.

As to the first, while the legislators may think that *Mohawk*, *Ryan*, and other decisions of this Court are "contrary to common sense" (Appl. 21), each decision is still good law (and the legislators do not ask this Court to revisit any of them—nor could they, having failed to preserve any such argument below). And collectively, those cases establish that, as explained, a party that wishes to avoid disclosing privileged information before appellate review may do so by declining to comply with the disclosure order and then appealing any contempt or sanctions ruling. The legislators cannot wave away this body of law by deriding it as senseless. In any event, it is not senseless. For example, by limiting the availability of mandamus and collateral-order review, it prevents appellate courts from being overwhelmed with a flood of interlocutory appeals from routine discovery orders.

Equally infirm is the legislators' reliance on post-*Mohawk* lower-court decisions. To the extent those decisions conflict with *Mohawk*, it is of course this Court's precedent, and not cases that ignored that precedent, that is binding here. Moreover, not one of the post-*Mohawk* cases the legislators cite addressed the argument made here, much less attempted to reconcile any holding regarding irreparable harm with this Court's view in *Mohawk* and other cases about a litigant's ability to avoid disclosure of privileged information prior to appellate review by not complying with a disclosure order and then appealing any sanctions or contempt order. In short, the

legislators cannot show likely irreparable harm by relying on cases that, at best, just ignored this Court's clear precedent.[3]

Finally, any disclosure of privileged information here would be the result of the legislators' voluntary choice to intervene in the litigation and make assertions about a key contested factual issue. As courts of appeals have recognized, "[s]elf-inflicted wounds are not irreparable injury." *Al Otro Lado* v. *Wolf*, 952 F.3d 999, 1008 (9th Cir. 2000) (citing decisions of other circuits).

Because the legislators have shown no likely irreparable harm absent a stay, "a stay may not issue, regardless of … the other … factors," *Leiva-Perez* v. *Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (citing *Nken*, 556 U.S. at 432-433).

II. THERE IS NO FAIR PROSPECT THAT THE LEGISLATORS' PROMISED MANDAMUS PETITION WILL SATISFY THE DEMANDING REQUIREMENTS FOR THE EXTRAORDINARY RELIEF OF MANDAMUS

This Court has repeatedly recognized that mandamus is a "drastic and extraordinary" remedy, "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947). Here, it is unavailable for several reasons—any one of which suffices to show that there is no fair prospect of the legislators obtaining mandamus, meaning that a stay pending their promised petition is unavailable.

[3] In addition, virtually all of the post-*Mohawk* cases the legislators cite involved either the (absolute) attorney-client privilege or fundamental First Amendment freedoms. Whether or not the weighty interests underlying that absolute privilege and those core freedoms might warrant a relaxed rule regarding the availability of mandamus, the qualified legislative privilege does not.

A. The Legislators Will Not Be Able To Show Any Clear And Indisputable Right To Mandamus

1. No Case Supports The Legislators' Position Regarding Waiver Of Privilege, And The Most Analogous Cases Reject It

a. Mandamus "requires a showing of a 'clear and indisputable' right to the … writ." *Miller* v. *French*, 530 U.S. 327, 339 (2000); *accord Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). There is no fair prospect that the legislators will meet this demanding standard given that they cite *not one case* accepting their position that a legislator does not waive legislative privilege by intervening in a lawsuit and making factual assertions about a core issue in the litigation, as the legislators have done (*see* D.Ct. Dkt. 535 at 3). The absence of any such case is all this Court needs to conclude that this is not the rare, "really extraordinary" case warranting mandamus, *Fahey*, 332 U.S. at 260.

The legislators contend, however (e.g., Appl. 14-15), that their position is supported by *In re North Dakota Legislative Assembly*, 70 F.4th 460 (8th Cir. 2023), which the legislators label "[t]he most analogous circuit court decision." But as plaintiffs have explained repeatedly throughout these proceedings, and as the legislators now acknowledge (Appl. 15), the state legislators in that case had not voluntarily intervened in the litigation (they *were not parties at all*), nor had they disputed core factual allegations (save for one of them, discussed later in this paragraph). *See* 70 F.4th at 465. There was accordingly no question in the case of whether those legislators had waived privilege by trying to have things both ways, i.e., defending the propriety of the legislature's intent but asserting privilege to block discovery into that issue. In fact, the Eighth Circuit denied mandamus as to the one

legislator who the district court ruled *had* waived privilege, precisely because he inserted himself into a factual dispute related to legislative intent. *See id.* If anything, then, the legislators' leading case undermines the notion that they can meet the high bar required for mandamus.

The legislators respond by saying that the fact that they voluntarily intervened in this case, whereas the legislators in *In re North Dakota* were not parties, actually *supports* "mandamus relief and confirms that the district court's order is wrong." Appl. 15. As a threshold matter, it bears noting that here, as in so many other places in their application, the legislators do not even claim that the *actual* mandamus standard—clear and indisputable right to relief—is met, instead venturing more tepid claims, such as that the district court was "wrong" (*id.*). That aside, the legislators offer no coherent argument as to why their status as parties who made factual assertions about a central disputed issue of fact supports the conclusion that they did not waive privilege. They assert (*id.*) that they "are empowered by state law to intervene and be heard in cases that involve constitutional challenges to state statutes" and that they "invoked that authority in their official capacities here to articulate the state's interests and ensure that any adverse ruling would be appealed." But even indulging for argument's sake the highly dubious assumption that the "state law" to which they refer (Arizona Revised Statutes §12-1841) has *any* relevance in federal court, the simple answer to their argument is, so what? When it comes to federal-law claims in federal court (which is what are involved here), state law does not control anything about privileges, including their waiver; federal law controls all such issues. *See* Fed. R. Evid. 501. So even if the legislators' intervention was authorized—as a matter of state law—by the

statute they pervasively invoke, that would have no bearing on whether their conduct waived the privilege. As with so many other cases they must try to explain away, the legislators are just throwing out an almost random distinction without explaining its import, apparently in hopes this Court will fill the (yawning) gaps in their reasoning. That is not the Court's job. *In re North Dakota* provides no support for the legislators' position that a legislator can choose to become a *party* to a case and engage on a critical disputed factual question but then invoke legislative privilege to block the other side's discovery into that issue.

Moreover, while the legislators suggest (Appl. 15) that they *had* to intervene in order to ensure a full defense of the challenged laws, including on appeal, that is wrong. Arizona's attorney general is representing the state's interests in the litigation, opposing most of plaintiffs' challenges. And to the extent the legislators fault her for not opposing *all* of plaintiffs' challenges, they could have offered their perspective in precisely the way they claim to want to (making only "legal arguments" (Appl. 14)), by participating as amici. That includes on any appeal, whether one brought by the attorney general, a plaintiff, or another defendant like the Republican National Committee. (The RNC—having not waited a year to intervene, as the legislators did—is fully defending the laws and, as the legislators are aware, has already made clear its intent to appeal adverse rulings. *See* D.Ct. Dkt. 557.) The legislators have only themselves to blame for forgoing the option of participating as amici and thereby avoiding being subjected to the same discovery to which every other party in civil litigation is subject under the Federal Rules of Civil Procedure.

The option to participate as amici likewise resolves the legislators' policy argument—one notably supported by neither evidence nor authority—that the district court's waiver ruling will make "legislative leaders … hesitate to participate in cases attacking the constitutionality of state laws," Appl. 36. There will be no such hesitation because legislators will know they can almost certainly defend state laws *as amici* without risking a privilege waiver (just as the legislators could have). To the extent state legislators might "hesitate" because they could not engage in the deeply unfair conduct of inserting themselves as parties in litigation and presenting their side of the story on an important issue of fact without being subject to the same discovery obligations that the Federal Rules apply to every other party, that possibility should give this Court no pause whatsoever.

b. The case that is actually "[t]he most analogous circuit court decision" (Appl. 14)—and a case that thoroughly belies the legislators' claim that they "are not aware of any" case supporting the district court's ruling (*id.*)—is *Powell* v. *Ridge*, 247 F.3d 520 (3d Cir. 2001). As the district court here explained, *Powell* held that the state legislators there could not do the same things the legislators here seek to do: (1) "intervene[] in the lawsuit, 'citing … the need to articulate to the Court the unique perspective of the [state] legislative branch'"; (2) "'concu[r]' in the other defendants' [dispositive] motion"; and then (3) "asser[t] the legislative privilege after the plaintiffs sought discovery." D.Ct. Dkt. 535 at 3 (quoting *Powell*, 247 F.3d at 522-523, 525) (other quotation marks omitted). The legislators here cannot possibly show a fair prospect that this Court will deem them to have a clear and indisputable right to relief when (1) no case rejects the district court's conclusion—again, neither *In re North Dakota*

Legislative Assembly nor *any other case* the legislators cite involved a party that had voluntarily intervened in litigation and made assertions about a core disputed factual issue—and (2) the Third Circuit reached the same conclusion in a closely analogous case.

Perhaps recognizing this, the legislators seek (Appl. 15-16) to distinguish *Powell* in various ways. But for starters, the legislators cannot prevail simply by distinguishing *Powell*, because that would in no way establish a fair prospect that this Court will conclude—despite the absence of *any* case supporting their view—that the legislators have a clear and indisputable right to the extraordinary relief of mandamus.

In any event, the legislators' distinctions of *Powell* lack merit.

First, the legislators say that *Powell* did not find a privilege *waiver*. *See* Appl. 16. But that is because (as the legislators admit, *see id.*) *Powell* held that the privilege being claimed did not exist at all. That assuredly does not help the legislators, because they are asserting the very privilege that *Powell* held did not exist, i.e., "a privilege which would allow [legislators] to … actively participate in this litigation … yet allow them to refuse to comply with … every adverse order." 247 F.3d at 525. Put another way, whether the conclusion is framed as a waiver of the privilege or the non-existence of the privilege is immaterial. What matters is that courts have disallowed the machinations the legislators are attempting here.

The legislators also say (Appl. 25) that *Powell* is distinguishable because they "have not used the legislative privilege as a sword and shield." That is exactly what they have done: They brought themselves into this case voluntarily and brandished a "sword" by disputing one of plaintiffs' central claims, i.e., that the laws were enacted with discriminatory intent. Specifically, the legislators declared it to be their "position

that the Challenged Laws were not intended to discriminate against any individual on the basis of race or national origin," D.Ct. Dkt. 500-1, Ex. A at 5. The legislators then raised a "shield" by asserting that plaintiffs could not test that assertion through discovery. That is archetypal "sword-shield" conduct.

The legislators contend, however (Appl. 25), that there is no sword/shield problem here because they "have not used *privileged* materials" in their defense (emphasis added). But as the legislators themselves say just a few pages later, "[t]he 'overarching consideration' in an implied waiver analysis 'is whether allowing the privilege to protect against disclosure of the information would be *manifestly unfair* to the opposing party." Appl. 28 (quoting *Home Indemnity Company* v. *Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995)). Such manifest unfairness is present here, as the legislators have asserted that the challenged laws were not passed with discriminatory intent—an assertion bearing directly on plaintiffs' equal-protection claims—and then insisted that plaintiffs cannot explore that assertion in discovery to the full extent allowed by the Federal Rules of Civil Procedure. *Powell* correctly held that allowing that would be deeply unfair, as did the district court.

The legislators also try to distinguish *Powell* on the ground that the state legislators there (unlike the legislators here) sought "to offer their own testimony at trial [while] refusing to answer questions put to them." Appl. 15. But again, the legislators are simply tossing out any factual distinction they happen to have noticed, without addressing why that distinction should matter. It doesn't matter. What matters is that the legislators here have asserted privilege to block plaintiffs' discovery, after not only inserting themselves into this litigation (just like the legislators in

Powell) but also *fully participating* in the defense of the challenged laws. In particular, the legislators—just like the other defendants here—filed an answer denying plaintiffs' claims (including discriminatory intent by the legislature), D.Ct. Dkt. 348-1; responded to an interrogatory by explicitly denying (as quoted above) that any such intent existed, D.Ct. Dkt. 500-1, Ex. A at 5; attended depositions (and objected to questions asked during depositions); sat at defense counsel table for every minute of trial, where they objected to questions plaintiffs asked of witnesses and cross-examined plaintiffs' witnesses; and (as noted at the outset) paid half the fees for an expert who testified at trial that he had reviewed plaintiffs' evidence and "didn't see any evidence of discriminatory intent in there," App. 22a:5-6. *See also* App. 17a:4-18a:1, 20a:18-22a:6. They also, just like the RNC, sought summary judgment on all of plaintiffs' claims. *See* D.Ct. Dkt. 369. And they filed a pre-trial brief in which they asserted that "[p]laintiffs do not have any evidence establishing an improper collective motive" and that "[t]he public record" (i.e., legislative fact sheets and a public letter from the Governor they cite as evidence of their benign intent) "shows that the [challenged laws] were intended to ensure that persons who are not eligible to vote are not allowed to register to vote in Arizona." D.Ct. Dkt. 583 at 8, 9. Having fully participated in the (legal *and* factual) defense of the challenged laws throughout the district-court proceedings—from the moment of their intervention all the way through trial—the legislators cannot possibly show a fair prospect that this Court will deem the district court's waiver ruling a "judicial usurpation of power," or a "clear abuse of discretion," as required for mandamus, *Cheney*, 542 U.S. at 380. As *Powell* explained, there is simply no precedent for the legislators' proposed one-sided approach to litigation.

Lastly as to *Powell*, the legislators argue (Appl. 26) that "*Powell* did not involve legislative leaders' intervention in an official capacity pursuant to state statute. The legislators in *Powell* intervened in their *personal* capacities and had no statutory authority to intervene. Thus, unlike this case, they were not acting as representatives of the State." That is grossly misleading. As the *Powell* legislators themselves told this Court in their (unsuccessful) petition for certiorari, they intervened because "under the Pennsylvania Constitution, the General Assembly is responsible for public education in Pennsylvania," such that "any decision in the underlying case … [would] necessarily affect the General Assembly and its members, and, in particular, the duties of [the intervenors] *as presiding officers*." Pet. for Cert. 5, *Ryan* v. *Powell*, No. 00-1854, 2001 WL 34125228 (U.S. June 12, 2001) (emphasis added). Consistent with that, the legislators' motion to intervene there cited their desire to "articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government," *Powell*, 247 F.3d at 522.

c. Nor is *Powell* the only case that rejects the legislators' position. (Again, though, plaintiffs do not need *any* supporting authority to prevail here; it is the legislators and not plaintiffs who are seeking a stay pending a mandamus petition, and thus it is the legislators, and not plaintiffs, who must show a fair prospect that they will satisfy the exceedingly high mandamus standards.) A three-judge district court reached the same conclusion in *Singleton* v. *Merrill*, 576 F.Supp.3d 931 (N.D. Ala. 2021) (subsequent history omitted), which involved challenges to Alabama's congressional redistricting plan. The state legislators who intervened there made the very arguments made here—i.e., that they were "uniquely positioned" to defend the plan by virtue of

their role on the Alabama legislature's reapportionment committee. *Id.* at 934. And just like the legislators here, the legislators in *Singleton* filed answers denying any discriminatory intent by the legislature. *See id.* at 937. When they then moved for a protective order to prevent their depositions and written discovery, the three-judge court denied the motion, allowing the discovery on the ground that the legislators had waived the privilege through their litigation conduct:

> The Legislators here have the same sword/shield problem [as in *Powell*]. The Legislators seek to use their unique position as [the redistricting plan]'s principal drafters as a sword to defend the law on its merits, but intermittently seek to retreat behind the shield of legislative privilege when it suits them.

Id. at 940. Once more, the legislators here cannot establish a fair prospect that they will satisfy the demanding clear-and-indisputable standard required for mandamus when relevant case law squarely supports the district court's challenged order.

d. Two final points on waiver. *First*, the legislators suggest in places (Appl. 14, 28) that the district court erred in not analyzing whether the discovery plaintiffs seek is "vital" to plaintiffs' claims. That argument was forfeited both in the district court (where it was *never* made) and again in the court of appeals (where it was not made in the legislators' stay motion, stay reply, or mandamus petition, but only in their mandamus reply). Having been forfeited, the argument cannot support mandamus.

The argument also fails on the merits. When the legislators finally made the argument below, they claimed that the Ninth Circuit's decisions in *Bittaker* v. *Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc), and *United States* v. *Amlani*, 169 F.3d 1189 (9th Cir. 1999), establish a "vital" test for privilege claims that the district court erroneously failed to apply. C.A. Dkt. 20 at 13. But no Ninth Circuit (or other

appellate) decision reads either or both of those cases that way, i.e., as adopting an actual "test" that a district court must apply. Much less does any case hold that failure to apply such a test constitutes a judicial usurpation of authority. And, certainly, this Court has established no such test. In any event, *Bittaker* and *Amlani* each involved the attorney-client privilege, which as noted is meaningfully different from the legislative privilege in that the latter is only a qualified privilege. Even if *Bittaker* and/or *Amlani* had created a "vital" test, then, it would apply under those cases' actual holdings only to claims of attorney-client privilege—and absent any controlling authority applying the test to the legislative privilege, it could not have been a judicial usurpation of authority, *Cheney*, 542 U.S. at 380, for the district court not to have applied a "vital" test to the question here of a waiver of legislative privilege (again, setting aside that the legislators *never* argued this to that court).

Second, the legislators repeatedly invoke "federalism" concerns, arguing for example that "courts should 'respect' a State's 'sovereign choice' to authorize legislative leaders to 'defend duly enacted state statutes.'" Appl. 26-27 (quoting *Berger* v. *North Carolina State Conference of the NAACP*, 142 S.Ct. 2191, 2206 (2022)). But the district court's order does not preclude the legislators from defending the challenged laws. It simply prevents Arizona from granting itself or its officials unilateral exemptions from the Federal Rules of Civil Procedure. That is entirely proper: If a state (or state official) *chooses* to participate in federal litigation, it must do so on the terms prescribed by federal law (including in the Federal Rules of Civil Procedure). Neither the state

nor its official can dictate those terms. And neither *Berger* nor any other case the legislators cite holds otherwise.[4]

2. The Legislators' Relevance Arguments Are Forfeited And Meritless

The legislators contend (Appl. 29-34) that even if they waived legislative privilege, the district court's interlocutory discovery order satisfies the high standards for mandamus because their *personal motives* for approving the challenged laws are irrelevant. That argument cannot establish a fair prospect that the legislators will show a clear and indisputable right to relief, both because the argument was forfeited below and because it is wrong.

a. The legislators' brief to the district court on this issue (D.Ct. Dkt. 499) never asserted that the discovery plaintiffs seek is irrelevant. (Indeed, the brief implicitly conceded that that discovery *is* relevant, arguing to the court only that there was other *better* evidence of legislative intent. *See id.* at 10.) Nor did the legislators object to plaintiffs' discovery requests on relevance grounds. To the contrary, in response to plaintiffs' interrogatory asking about "the purposes of the Challenged Laws," D.Ct. Dkt. 500-1, Ex. A at 4, the legislators averred that they (and their colleagues who voted on the laws) "may have knowledge relevant to the above interrogatory," *id.* at 5-6. That bears repeating: The legislators stated below that they "may have knowledge relevant to" "the purposes of the Challenged Laws." The

[4] The legislators often pair their federalism arguments with references to the separation of powers. *E.g.*, Appl. 26. But separation of powers, of course, is about the division of *federal* power among the three branches of the *federal* government. As the legislators are not federal officials, the order they challenge has no bearing on the separation of powers.

legislators also separately confirmed that they are "not withholding" documents on relevance grounds. *Id.* Ex. C at 2. And, of course, a stated purpose of their intervention was to provide "a unique perspective that is important to a full understanding of the State's interests." D.Ct. Dkt. 348 at 10-11. The legislators forfeited their relevance argument below. The argument accordingly cannot support mandamus.[5]

b. In any event, the legislators' relevance argument fails. As the legislators acknowledged in their Ninth Circuit mandamus petition (quoting this Court's precedent), "Plaintiffs claim the [challenged laws] violate" equal protection, "and '[p]roof of racially discriminatory intent or purpose' is required to show such a violation." C.A. Dkt. 1 at 23 (alteration in original) (quoting *Arlington Heights*, 429 U.S. at 265). The Arizona legislature's "intent or purpose" in enacting the challenged laws (*id.*) is thus unquestionably relevant.

Recognizing this, the legislators argue ad nauseum as though plaintiffs sought in discovery to inquire about their "personal motives." *E.g.*, Appl. 29-34. That is wrong. For example, of the four interrogatories, four document requests, and nine proposed deposition topics that plaintiffs sent the legislators, *not one* asked about any legislator's personal motives. Plaintiffs have instead asked about matters such as "the purposes of the Challenged Laws" and "instance[s] in which the Arizona Legislature has established

[5] Any argument in the legislators' reply to this opposition that they argued relevance in seeking a *stay* in the district court would be unavailing. By then, the court had ruled—and the legislators did not even seek reconsideration of that ruling based on relevance arguments. First presenting those arguments in a stay motion was too late. *See* D.Ct. Dkt. 544 at 7.

that a non-U.S. citizen has registered to vote in Arizona." D.Ct. Dkt. 500-1, Ex. A, at 4, 6; *see also id.* Ex. F (nine proposed deposition topics); App. 1a-15a. Put simply, the legislators' extended arguments regarding "personal motives" do nothing to show any error by the district court, much less the extreme error required for mandamus, because the discovery the legislators seek to avoid is largely *not* about their (or any legislator's) personal motives. This point—as well as the legislators' waiver of their relevance argument—distinguishes this case from *all* of those that the legislators cite regarding relevance, such as *City of Las Vegas* v. *Foley*, 747 F.2d 1294 (9th Cir. 1984).

When plaintiffs made this same argument in the Ninth Circuit, *see* C.A. Dkt. 4-1 at 14-15, the legislators responded simply by repeating that "the testimony of one or two legislators … cannot prove collective intent," C.A. Dkt. 5 at 10. That is entirely *un*responsive; as just stated, the discovery the legislators seek to avoid is not about their (or any legislator's) personal motives. The legislators' failure to offer any actual response underscores the infirmity of their "personal motives" argument. In any event, discovery is not limited to facts that "prove" a disputed fact; rather, discovery is permitted into matters "relevant to any party's claim or defense," Fed. R. Civ. P. 26(b)(1), with relevance broadly construed.[6]

The legislators also responded below by noting (as they do in their stay application here (e.g., Appl. 10)) that the district court's discovery order referred

[6] The legislators say (Appl. 32) that plaintiffs "shifted positions" on appeal to argue that the discovery at issue is not about legislators' personal motivations. That is false—which is why the legislators' claim is supported by no citation to any filing plaintiffs made in the district court (or any other court). Plaintiffs' arguments on this point have been consistent throughout; no "shift[ing]" occurred.

several times to the legislators' personal motivations, including stating that privilege had been waived as to those motivations. But as it has said over and over, "'[t]his Court reviews judgments, not statements in opinions.'" *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (alteration in original) (quoting *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam)); *see also*, *e.g.*, *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (describing courts' power "to correct wrong judgments, not to revise opinions"). The district court's challenged *order* (the relevant analogue here to a judgment) required the legislators to produce previously withheld documents that are responsive to plaintiffs' discovery requests and to sit for depositions—discovery that, as noted, does not concern the legislators' personal motives. Again, then, the legislators' extended arguments about their "personal motives" does nothing to show a clear and indisputable right to mandamus.

3. The District Court's Legislative-Privilege Holding Can Be Upheld On An Alternative Ground Preserved Below, Namely That The Legislators' Qualified Privilege, Even If Not Waived, Is Overcome

In their motion asking the district court to compel the requested discovery, plaintiffs argued (D.Ct. Dkt. 500 at 7-9) that doing so was warranted even if legislative privilege had *not* been waived, because that qualified privilege was overcome here under a five-factor test that district courts often employ, *see, e.g.*, *Mi Familia Vota* v. *Hobbs*, ___ F.Supp.3d ___, 2023 WL 4595824, *9 (D. Ariz. July 18, 2023) ("*MFV*"). The district court did not need to reach that argument given its waiver ruling. *See* D.Ct. Dkt. 535 at 5 n.1. But because the argument was raised below, it provides a valid basis to uphold the court's discovery order. *See, e.g.*, *Dahda* v. *United States*, 138 S.Ct. 1491, 1498 (2018). And as explained, the legislators must, in order to obtain a stay, show a fair

prospect that this Court will deem that order to be a judicial usurpation of authority. They cannot do so as to that alternative argument for several reasons.

First, as with so many of their other arguments, the legislators forfeited this one below. Their brief to the district court on this issue (D.Ct. Dkt. 499) made no argument whatsoever about the five factors. They then sought to blame *plaintiffs* for *their* waiver, and tried to rectify it by asking the district court for permission to file a supplemental brief arguing the five-factor test. D.Ct. Dkt. 506. The court denied that request, D.Ct. Dkt. 517, thereby cementing the legislators' waiver.

Second, applying the five factors shows that the qualified legislative privilege is indeed overcome here—and assuredly shows that such a conclusion does not satisfy the mandamus standard. Those factors are: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of government in the litigation; and (v) the purposes of the privilege." *MFV*, 2023 WL 4595824, at *8.

Relevance. As courts have recognized in prior constitutional challenges to Arizona legislation, materials related to the legislative process are highly relevant to establishing whether the legislature acted with a discriminatory intent or purpose. *See Sol* v. *Whiting*, 2013 WL 12098752, at *3 (D. Ariz. Dec. 11, 2013) (citing *Village of Arlington Heights*, 429 U.S. at 268). In one case, for example, the court reasoned that communications between legislators and third-party advisors "likely … contain admissible evidence or lead to the discovery of admissible evidence of those legislators' intent in drafting and supporting [the legislation] as contemporary statements by members of the decisionmaking body." *Id.* (quotation marks omitted). Similarly, the

court in another similar case—though ultimately holding the privilege not overcome where the legislators were not parties—found that the relevance factor favored disclosure because "[w]hat motivated the Arizona legislature to enact [the challenged law] is at the heart of this litigation." *MFV*, 2023 WL 4595824, at *10. Indeed, the relevance here is so clear that the legislators, as noted, did not assert relevance as a basis for resisting production, and affirmatively stated that they may have evidence relevant to the legislators' intent in passing the challenged laws. *See supra* pp.24-25.

Alternative evidence. The legislators repeatedly touted their "unique" interests and perspective as a basis for intervention. D.Ct. Dkt. 348 at 2, 11, 13. By definition, "unique" information cannot be obtained elsewhere.

Seriousness of the litigation. There can be no dispute over the seriousness of the issues here. As a district judge recently noted in another Arizona election-law challenge, "[t]he federal interest in protecting voting rights is a serious one," and "the right to be free from discrimination on the basis of race is a vital constitutional right." *MFV*, 2023 WL 4595824, at *10. Indeed, the legislators in that case rightly conceded that the third factor favored disclosure.

Role of government. Courts have differed in their application of this factor. Some have deemed it "inapt in the legislative privilege context." *MFV*, 2023 WL 4595824, at *12. Others have found that it favors disclosure where a plaintiff's allegations "rais[e] serious charges about the fairness and impartiality of some of the central institutions of our state government" or where "legislative immunity is not under threat," *id.*—considerations that likewise favor disclosure here. Still others have found the factor weighs against disclosure where state officials sought to protect the

legislative process from "unwarranted intrusion" or to "uphold the validity of the challenged legislation." *Id.* Here there is no "unwarranted intrusion," as the legislators voluntarily intervened as full-party defendants. And this is not a case in which state officials seek to "uphold … challenged legislation" as a matter of law; the legislators intervened to defend the laws on the facts, asserting that the challenged laws "were not intended to discriminate against any individual on the basis of race or national origin." D.Ct. Dkt. 500-1, Ex. A at 5. No matter its proper interpretation, then, the fourth factor favors disclosure.

Purpose of the privilege. Plaintiffs recognize that legislative privilege serves important purposes, including "protect[ing] confidential communications between lawmakers and their staff." *MFV*, 2023 WL 4595824, at *12. But the legislators' interest in protecting the confidentiality of their communications or the substance of their debates should yield where, as here, they put such matters directly at issue through their intervention and affirmative participation in the defense of this case.

In short, this is not a close call; all five factors weigh in favor of disclosure. And again, the legislators make no argument in their brief on this issue to the district court regarding the five factors. Given that, and (separately) because a proper application of the five-factor test suffices to uphold the challenged discovery order, the legislators cannot show that they will satisfy the stringent mandamus standard as to the order.

The legislators argued below that, although district courts regularly use the five-factor test, "neither the Ninth Circuit nor the Supreme Court ha[s] approved [its] use." C.A. Dkt. 5 at 11. But neither has any appellate court (much less this Court) rejected the test. The legislators cannot establish a fair prospect that they will satisfy the

exacting mandamus standard when the proper application of a test routinely used by district courts, and rejected by no appellate court, leads to the conclusion that the district court's *order*—for production of the requested documents and participation in depositions—was proper.

* * *

For the myriad independent reasons laid out above, the legislators have not shown the requisite fair prospect that their promised mandamus petition will establish a clear and indisputable right to that extraordinary relief: No case supports their position, their relevance arguments are waived and meritless, and the district court's decision can rest on an alternate ground that the legislators waived below.

B. The Legislators Will Not Be Able To Show That They Have No Adequate Alternative Means To Attain The Desired Relief

As noted earlier, mandamus is unavailable unless the petitioner can show it "ha[s] no other adequate means to attain the relief … desire[d]." *Kerr*, 426 U.S. at 403. The legislators have not demonstrated any fair prospect that they will be able to make this showing. That provides an independent basis to deny their application.

As explained in Part I, the legislators' desired relief is to obtain appellate review of the district court's interlocutory discovery order before having to disclose any privileged material. As also explained, this Court has made clear that a party seeking that relief can "obtain postjudgment review *without* having to reveal its privileged information," via the "long-recognized option" of "defy[ing] a disclosure order and incur[ring] court-imposed sanctions" or "contempt," and then "appeal[ing] … from that ruling." *Mohawk*, 558 U.S. at 111. The availability of that "long-recognized option," *id.*, means not only that the legislators cannot show the likely irreparable harm that is

required for a stay (as discussed in Part I), but also cannot show the absence of an adequate alternative that is required for mandamus (and hence required for a stay under the fair-prospect factor).

The points made in Part I address most of the legislators' arguments regarding the option not to comply with a discovery order to disclose privileged material. But one argument they offer bears on the relevant mandamus prerequisite (no alternative means of attaining the desired relief) rather than the irreparable-harm stay factor. Specifically, they assert (Appl. 21) that if *Mohawk*'s "long-recognized" alternative precludes a showing that there is no adequate alternative means of attaining the desired relief, as required for mandamus, then mandamus would never be available. But that cannot be right, the legislators continue, because "*Mohawk* itself recognizes otherwise." *Id.* This argument fails.

To begin with, it is not true that if *Mohawk*, *Ryan*, and other decisions of this Court mean what plaintiffs say, then mandamus "would *never* be appropriate" (Appl. 21). Those cases address *discovery* orders; they do not speak to other kinds of orders. Hence, what *Mohawk* called a "long-recognized" way of not disclosing privileged material, 558 U.S. at 111, would not preclude mandamus with non-discovery orders, so long as the demanding requirements for the writ were otherwise satisfied.

Mohawk made clear, moreover (as this Court's other cases do), just how rare mandamus is, particularly with a discovery order. The case *Mohawk* cited in explaining the possibility of mandamus with such an order was *Cheney*. *See* 558 U.S. at 111. In that case, this Court first reiterated that with most "discovery orders," "interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 542 U.S. at

381. And it held that mandamus *might* be available with the order before it only because the subjects of the order were "those in closest operational proximity to the President," *id.*, such that the order threatened to "interfer[e] with a coequal branch's ability to discharge its constitutional responsibilities," *id.* at 382. As willing as they are to make histrionic predictions about the order here, the legislators cannot credibly claim that this case implicates anything remotely as weighty. As noted, for example, this case does not in any way involve the separation of powers that lay at the heart of the decision in *Cheney*. *See supra* n.5. Hence, the fact that *Mohawk* recognized the ongoing availability of mandamus in truly extraordinary circumstances does nothing to undermine its holding that it is *not* available in most cases (including this one), where the contempt/sanctions route to pre-disclosure appellate review is available. Because the legislators have that well-established alternate route to obtaining the relief they desire, mandamus will be unavailable on any petition they file. A stay pending any such petition is therefore unwarranted.

C. Mandamus Would Not Be "Appropriate Under The Circumstances"

Even if a petitioner shows both a clear and indisputable right to mandamus and the absence of any adequate alternative remedy, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. The legislators cannot show a fair prospect that they will satisfy this third requirement any more than they can with either of the first two.

For starters, mandamus would not be appropriate under the circumstances because, as discussed, the legislators voluntarily intervened as full parties and then

made factual assertions about a core issue in the case. Having done that, they have no credible claim to equitable relief from discovery regarding those assertions.

Mandamus would also be not appropriate for two additional reasons. First, it would reward the legislators' repeated efforts to delay this litigation, *see supra* pp.7-8, despite the importance of the litigation proceeding quickly so that Arizona's 2024 elections can be conducted without any uncertainty about the validity and applicability of the challenged laws. Second and relatedly, mandamus would not be appropriate because it would interfere with the district court's ability to fully evaluate plaintiffs' claims that the challenged laws violate federal law and infringe the fundamental right to vote of many thousands of Arizonans.

III. IF PERTINENT, THE LEGISLATORS' ARGUMENTS REGARDING HARM TO PLAINTIFFS AND THE PUBLIC INTEREST LACK MERIT

The legislators briefly argue (Appl. 37-38) that the third and fourth of the traditional four stay factors—harm to the party or parties opposing a stay and the public interest—support a stay here. But as discussed, this Court's most recent precedent regarding a stay in the mandamus context does not discuss those factors, and instead considers only the two factors discussed above.

In any event, the legislators' arguments on the two additional factors fail.

A. Harm To Plaintiffs

As discussed at the outset, time is of the essence here. Plaintiffs' claims need to be resolved promptly so that Arizona's 2024 elections can be conducted in an orderly fashion. That is why the district court and the parties (other than the legislators) all cooperated to push this case from filing through trial so quickly, so the court could make

its rulings sufficiently far in advance of the March elections. But through their delaying tactics, the legislators have so far deprived plaintiffs of the ability to fully and fairly present their case to the court—and likewise deprived the court of information it might deem pertinent to plaintiffs' claims. That obstruction constitutes very substantial harm.

The legislators' only contrary argument (Appl. 37) is that a stay would not harm plaintiffs "because the discovery sought is improper." That claim (which fails for the reasons already given) reiterates the legislators' likelihood-of-success arguments; it is not an independent argument under this factor.

B. Public Interest

The public interest does not warrant a stay because the public has a strong interest in transparent government—including knowing whether legislators enacted laws based on discriminatory intent. The public also has an interest in orderly elections, which as explained will be promoted by a prompt resolution of all of plaintiffs' claims.

The legislators counter by speculating that not adequately protecting legislative privilege would "chill legislative debate and impede the legislative process." Appl. 38. But once more, the legislators advance an argument *Mohawk* rejected; this Court explained that not protecting the attorney-client privilege in the way urged there (allowing collateral-order appeal of disclosure orders) would not cause any "discernible chill" because "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order." 558 U.S. at 110. Again, the same is true here—*a fortiori*, in fact, because even if any legislators or staff *did* "focus on the remote prospect of [a] … disclosure order" like the one here, *id.*, they would know they could avoid being subject to such an order by simply not intervening in

litigation and making assertions about facts central to the plaintiffs' claims. Moreover, the legislators have never offered any evidence of a "chill" in legislative debate in the 22 years since the Third Circuit decided *Powell*, further undermining any assertion that the sky will fall if the legislators have to sit for deposition (just like every other state and county party defendant has done in this case). In short, the legislators' chill argument is even weaker than the one *Mohawk* rejected.

Finally, the legislators argue that the public interest favors a stay because judicial scrutiny into their "personal motives" (Appl. 37) would impede legislation. But as discussed, the discovery sought here is not about their (or other legislators') "personal motives." The legislators' argument thus does not to support a stay.

CONCLUSION

The legislators' stay application should be denied.

November 22, 2023

Respectfully submitted,

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APPENDIX

APPENDIX
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota, et al., Plaintiffs, v. Adrian Fontes, in his official capacity as Arizona Secretary of State, et al., Defendants.	Case No. 2:22-cv-00509-SRB (Lead) **CONSOLIDATED PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO INTERVENOR-DEFENDANTS SPEAKER OF THE HOUSE BEN TOMA AND SENATE PRESIDENT WARREN PETERSEN**
AND CONSOLIDATED CASES.	No. CV-22-00519-PHX-SRB No. CV-22-01003-PHX-SRB No. CV-22-01124-PHX-SRB No. CV-22-01369-PHX-SRB No. CV-22-01381-PHX-SRB No. CV-22-01602-PHX-SRB No. CV-22-01901-PHX-SRB

PROPOUNDING PARTY: Consolidated Plaintiffs

RESPONDING PARTY: Intervenor-Defendants Speaker of the House Ben Toma and Senate President Warren Petersen

SET NUMBER: ONE (1)

Pursuant to Federal Rules of Civil Procedure 26 and 34, consolidated Plaintiffs, by and through counsel, serve the following requests for production upon Intervenor-Defendants Speaker of the House Ben Toma and Senate President Warren Petersen.

Responses to these requests must be produced within thirty (30) days after service in accordance with Rule 34. As agreed among the parties, all discovery responses and documents shall be produced to all counsel of record. Each request for production is subject to the Definitions and Instructions set forth below.

DEFINITIONS

Except as specifically defined below, the terms used in these requests shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "Any" or "all" means "any and all."

2. "Arizona Legislature" means the members and staff of the Arizona Senate and Arizona House of Representatives.

3. "Attorney General" means the Arizona Attorney General's Office and includes the Arizona Attorney General and her predecessors and successors in their official capacities as Arizona Attorney General, including but not limited to former Arizona Attorney General Mark Brnovich, as well as the current and former employees, officers, attorneys, agents, trustees, investigators, representatives, contractors, and consultants of the Arizona Attorney General's Office.

4. "Challenged Laws" means Arizona House Bill 2492 ("H.B. 2492") signed into law by the Governor on March 30, 2022, Chapter 99 to Session Laws from the Fifty-Fifth Legislature Second Regular Session 2022, and Arizona House Bill 2243 ("H.B. 2243") signed into law by the Governor on July 6, 2022, Chapter 370 to Session Laws from the Fifty-Fifth Legislature Second Regular Session 2022.

5. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means. It includes communications entirely internal to the Arizona Legislature, as

well as communications that include or are with entities and individuals outside of the Arizona Legislature.

6. "County Recorders" means the County Recorders of Arizona's fifteen counties and their predecessors and successors, as well as the current and former employees, officers, attorneys, agents, trustees, investigators, representatives, contractors, and consultants of the County Recorders.

7. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 34 and "writings" and "recordings" as defined in Federal Rules of Evidence 1001, and it includes, but is not limited to, records, reports, lists, data, statistics, summaries, analyses, communications (as defined above), any computer discs, tapes, printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and in whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

8. "Governor" means the Office of the Arizona Governor and includes the Arizona Governor and her predecessors and successors in their official capacities as Arizona Governor, as well as the current and former employees, officers, attorneys, agents, trustees, investigators, representatives, contractors, and consultants of the Office of the Arizona Governor.

9. "H.B. 2617" means House Bill 2617 introduced into the Arizona House of Representatives on January 31, 2022 from Fifty-Fifth Legislature Second Regular Session 2022.

10. "Including" means "including but not limited to."

11. "Nonstandard Address" means, but is not limited to, residential addresses that do not include a complete address number and/or a street name; addresses that appear to be directions (such as "between mile markers x and y" or "the second house on the left"); addresses that include a complete address number and street name or otherwise resemble a standard address, but are not listed in nontribal governmental databases; and other addresses that lack address coordinators or are not typically geocoded.

12. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trust groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

13. "Relating to," "regarding," or "concurring" and their cognates are to be understood in their broadest sense and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

14. "Secretary of State" means the Arizona Secretary of State's Office and includes the Arizona Secretary of State and his predecessors and successors in their official capacities as Arizona Secretary of State, as well as the current and former employees, officers, attorneys, agents, trustees, investigators, representatives, contractors, and consultants of the Arizona Secretary of State's Office.

15. "Senate President" means the position and office of the President of the Arizona Senate, including all members and staff of that office.

16. "Speaker of the House" means the position and office of the Speaker of the Arizona House of Representatives, including all members and staff of that office.

17. "You" and "your" mean Intervenor-Defendants Speaker of the House Ben Toma and Senate President Warren Petersen, and include any successors to the positions of Speaker of the House or the Senate President; any predecessors occupying those offices since January 1, 2020; any past and present employees, staff, agents, assigns, and representatives of the Speaker of the House or the Senate President; and any other persons or entities that, at any time, acted on behalf or for the benefit of the Speaker of the House or the Senate President.

INSTRUCTIONS

You are to follow the instructions set forth below in responding to these requests.

1. You shall produce materials and serve responses and any objections on Plaintiffs' counsel within 30 days after service of these requests for production.

2. Pursuant to Federal Rule of Civil Procedure 34(b)(2)(B) and (C), if you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. All objections must be noted with specificity. Any ground not stated in a timely objection is waived.

3. If, in responding to these requests, you encounter any ambiguities when construing a request or definition, set forth in your response what you find to be vague, overbroad, or ambiguous and the construction you used in responding. Where you, in good faith, doubt the meaning or intended scope of a request, and the sole objection would be to its vagueness, overbreadth, or ambiguity, please contact Plaintiffs' counsel for clarification in advance of asserting an objection.

4. With respect to any document withheld on a claim of privilege or work product protection, provide a written privilege log identifying each document individually and containing all information required by Federal Rule of Civil Procedure 26(b)(5), including a description of the basis of the claimed privilege and all information necessary for Plaintiffs to assess the claim of privilege.

5. In accordance with the Federal Rules of Civil Procedure, the scope of discovery sought through these requests for production extends to all relevant and non-privileged materials that might reasonably lead to the discovery of admissible evidence. You should produce all documents available to you or subject to your access or control that are responsive to the following requests for production. This includes documents in your actual or constructive possession or control, as well as any non-privileged information in the actual or constructive possession or control of your attorneys, investigators, experts, agents, and any other persons acting on your behalf.

6. Documents are to be produced as they are kept in the ordinary course of business. Accordingly, documents should be produced in their entirety, without abbreviation, redaction, or expurgation; file folders with tabs or labels identifying

documents responsive to this request should be produced intact with the documents; and documents attached to each other should not be separated.

7. Subject to any Electronically Stored Information ("ESI") order subsequently entered in this case, all documents are to be produced in electronic form pursuant to these instructions. All documents, including emails, should be produced in single page TIFF format, showing comments and track changes where applicable, with text extract and database load files containing standard fielded information and metadata. TIFF images shall be placed in an Images folder with any given subfolder not to exceed 5,000 images per folder and accompanied by an .opt placed in a Data folder. Each page of a document should be assigned a unique production number (aka Bates number) electronically "burned" onto the image at a location that does not unreasonably conceal or interfere with information on the document. The number should be consistent across the production, contain no special characters, and be numerically sequential within a given document. Attachments to documents should be assigned numbers that directly follow in sequential order the Bates numbers on the documents to which they were attached. If a number or set of numbers is skipped, the skipped number or set of numbers should be noted, for example with a placeholder.

8. If there are no documents responsive to a particular request, so indicate in your response. Similarly, to the extent that you do not have any means of recording the information requested herein, please so indicate in your responses to the specific production request.

9. If any otherwise responsive document was, but is no longer, in existence or in your possession, custody, or control, identify the type of information contained in the document, its current or last known custodian, the location/address of such document, and the identity of all persons having knowledge or who had knowledge of the document, as well as describe in full the circumstances surrounding its destruction, loss, or other disposition from your possession or control.

10. These requests for production are continuing in nature, up to and during trial. Materials sought by these requests for production that become available after you serve

your responses must be disclosed to counsel for Plaintiffs by supplementary response or responses.

11. Pursuant to Federal Rule of Civil Procedure 26(e), you are under a duty to promptly supplement or correct your responses to these requests for production if you learn that an answer is in some material respect incomplete or incorrect. If you expect to obtain further information or expect the accuracy of a response given to change between the time responses are served and the time of trial, you should state this fact in each response. Supplementary answers are to be served upon Plaintiffs' counsel as soon as practicable after you receive this new information, but, in any event, no later than 14 days after its receipt.

12. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to any document request or any subsection thereof, then in response to the appropriate document request: (a) produce all such documents as are available to you without undertaking what you contend to be an unreasonably burdensome effort; (b) describe with particularity the efforts made by you or on your behalf to produce such documents, including identification of persons consulted, description of files, records and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spent and the nature of work done by such person; and (c) state with particularity the grounds upon which you contend the additional efforts to produce such documents would be unreasonably burdensome.

13. The past-tense forms of verbs in these requests include their present-tense forms, and vice versa.

14. The singular form of a noun or pronoun includes the plural form, and the plural form indicates the singular.

15. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of a document production topic all responses that otherwise might be construed to be outside its scope.

16. A reference to an entity, agency, department, or board in this request shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All Documents and Communications regarding the introduction, passage, and enactment of the Challenged Laws, as well as the attempted passage of H.B. 2617, including but not limited to all such Documents and Communications with the Governor, the Secretary of State, the Attorney General, any County Recorder, the Arizona Legislature, the Arizona Free Enterprise Club, the Republican National Committee, the Arizona Republican Party, the Republican State Leadership Committee, the Republican Legislative Campaign Committee, or any other Person. This Request includes, but is not limited to, all Documents and Communications relied upon to draft the Challenged Laws and H.B. 2617.

REQUEST FOR PRODUCTION NO. 2:

All Documents and Communications regarding the purposes of the Challenged Laws, including but not limited to Documents and Communications regarding what they were aimed at accomplishing and their anticipated or likely impact or effect. This includes, but is not limited to, any Documents and Communications cited or relied upon in preparing your response to Interrogatory No. 1.

REQUEST FOR PRODUCTION NO. 3:

All Documents and Communications regarding misconduct, fraud, election security, or a lack of voter confidence in election integrity related to citizenship, voters' residences, or proof of citizenship or residential addresses in voter registration, including but not limited to all such Documents and Communications with the Governor, the Secretary of State, the Attorney General, any County Recorder, the Arizona Legislature, the Arizona Free Enterprise Club, the Republican National Committee, the Arizona

Republican Party, the Republican State Leadership Committee, the Republican Legislative Campaign Committee, or any other Person.

REQUEST FOR PRODUCTION NO. 4:

All Documents and Communications regarding Nonstandard Addresses, including but not limited to the types of documents a person who resides in a location with only a Nonstandard Address can use to prove the location of their residence under A.R.S. § 16-123 or any previous or draft version of the Challenged Laws; the availability of such documentation to people residing at a location with only a Nonstandard Address; the process by which a person residing at a location with only a Nonstandard Address may obtain such documentation; the process by which a person residing at a location with only a Nonstandard Address may obtain a standard address, such as a house number and/or street name; the geographic location and distribution of persons residing at a location with only a Nonstandard Address; and the demographic characteristics of persons residing at a location with only a Nonstandard Address, including but not limited to race or ethnicity, tribal membership, or location on tribal land.

/s/ *Christopher Dodge (with permission)*

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2023, I served the foregoing **CONSOLIDATED PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO INTERVENOR-DEFENDANTS SPEAKER OF THE HOUSE BEN TOMA AND SENATE PRESIDENT WARREN PETERSEN** on counsel of record for all parties by email.

Dated: May 17, 2023

/s/ Daniel Arellano

Daniel Arellano

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

_____

Mi Familia Vota, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	2:22-cv-00509-SRB
	)	
Adrian Fontes, et al.,	)	
	)	Phoenix, Arizona
Defendants.	)	November 15, 2023
	)	1:05 P.M.

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL - DAY 7 P.M.

(Pages 1677 through 1842)

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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

you don't know that that's true. 02:46:16

Q. All right. Let's go back now to Exhibit 907. I think it's now ripe to discuss this one.

A. Yeah. So the other issue is, you know, he's making this argument that when -- you know that because -- well, let me back up. 02:46:29

My understanding is one of the claims in this case is that -- is whether or not there was discriminatory intent on the part of the legislature; right? Did they intend to discriminate against minority voters? And so then one relevant question is, well, let's look at the people who are arguably impacted by this. And so what I'm pointing out in this table is essential. It's a reproduction of his table but I'm also computing the number of non-Hispanic Whites and the number of minorities which is in columns three and five. 02:46:46 02:47:07

And so what you see is that you actually have, you know, more White people, 10,361, than you have minorities who are going to be impacted by this.

And so if you want to believe that there's discriminatory intent and that's, like, I guess your call, right; but if you want to believe that, you would have to believe that that discriminatory legislature is willing to sort of harm or disenfranchise more White people than non-White people. And that's an odd model of discrimination to have in the context of voting but that's what you would have to 02:47:25 02:47:43

believe. 02:47:47

Q. All right. One more. We're going to look at Exhibit 909.

What is this, sir?

THE COURT: This is still 907.

BY MR. LANGHOFER: 02:48:01

Q. I'm sorry. I need to press one more button on my iPad. There we go.

A. Yeah. So this shows what the difference is. You know if you were to use the alternative benchmark of Arizona population instead of registered voters which, again, is appropriate to 02:48:16 the extent that you think some of these -- so, well, potentially all of those people on these lists or all of the people on some of those categories are not citizens. What essentially I'm doing is saying, well, how similar are the numbers to what you would expect if the numbers were 02:48:33 proportionate to the Arizona population?

And so in column -- in column two we have the actual numbers and in column three what we have is, well, what would we expect if things were proportionate to the Arizona population? And what that shows is those two numbers are 02:48:52 really similar to each other.

So his choice of benchmark is, like, super meaningful and it's based on this assumption that all of those people in those groups are citizens.

\\\

publication record and that's about it. 03:21:54

Q. Had you reviewed any of her work prior to your engagement in this case?

A. No.

Q. Were you aware of her book The Myth of Voter Fraud prior to your work in this case? 03:22:00

A. No.

Q. Did you read The Myth of Voter Fraud in preparing your response to her report?

A. No. 03:22:11

Q. Can you identify for the Court the parties here who are have retained you in this litigation?

A. Yes. So the RNC and the State Senate and the State House.

Q. So fair to say you have not been retained by the Attorney General and the State in this case? 03:22:31

A. That's correct.

Q. You testified on direct that the Arizona Attorney General actually had retained you as an expert in a different matter regarding criminal issues, though; is that right?

A. Yeah. So if I said -- if I said the State Attorney General, I would have misspoken. I believe it's Maricopa Prosecutor's Office. So if I misspoke about that, I apologize but it's a criminal case so it's -- and I believe they were Maricopa. 03:22:41

Q. I appreciate that clarification. 03:22:59

setting aside Dr. Minnite's report I'm curious if you do think these laws regulate nonvoter actors in the electoral process? 03:45:12

A. It could potentially impact what, you know, what third parties can do with respect to registering, say, non-citizens to vote. 03:45:28

Q. You don't offer any examples in your report of a non-citizen in Arizona who registered to vote without fraudulent intent. Fair to say?

A. I didn't discuss any one-off examples at all in my report.

MR. DODGE: Could we pull up paragraphs 52 through 54 of Dr. Hoekstra's report? 03:45:44

BY MR. DODGE:

Q. And I'm glad to zoom in if you like.

A. Zooming in would be great.

Q. You quote a couple of legislators here who testified in the hearings regarding the bills at issue here. Fair? 03:45:57

A. Yes.

Q. But you would agree with me that you didn't comprehensively review the legislative history of the Challenged Laws? 03:46:16

A. So that's true. I attempted to find the transcript that Professor Minnite referred to when she cited these same things. I wasn't able to find them. I'm quoting them and presumably she thought -- I mean my understanding is she didn't testify to this part of her report. But she was making some accusations 03:46:31

about the people who supported this and I'm pointing out that she has no evidence of that. 03:46:36

Q. I'm just trying to understand the scope of what you looked at for your report and I think you answered my question which is that you didn't comprehensively look at the record it when came to the legislative debates over this bill? 03:46:48

A. That's correct. I looked at the things that she cited as evidence of essentially discriminatory intent by the supporters and I pointed out that it doesn't actually have any evidence of that. 03:47:05

Q. A moment ago you said something I think very closely to the effect of the kind of fraud -- the kind of behavior legislators were intending to prevent with this law. Do you recall that?

A. Sure. I think so. 03:47:17

Q. But you're not offering an opinion on what the legislators who voted for these laws, what their actual legislative intent was in enacting them?

A. I'm pointing out that if you take them at their word as quoted in Professor Minnite's report, they seem to be interested in preventing voting by non-citizens and they didn't seem to make any claim in what she quoted at least that they were only interested in stopping this if there was criminal intent or intent to corrupt the process. 03:47:33

Q. Fair to say, though, that your opinion is limited to your 03:47:55

review of those particular quotes cited in your report? 03:47:59
A. Yeah. I was responding to, again, these accusations by Professor Minnite about essentially the discriminatory intent of those legislators and that's -- yeah. So that's the evidence that I evaluated and I didn't see any evidence of 03:48:16
discriminatory intent in there.
Q. You make no claim in your report that County Recorders in Arizona are themselves participating in any kind of electoral fraud. Fair?
A. I certainly hope not. I didn't make any accusations 03:48:30
there. I didn't say anything about that. I hope they are not doing that.
Q. Let's briefly hopefully talk about some of the peer-reviewed literature that Dr. Minnite discusses in her report and that you respond to. You're aware of an article on 03:48:44
the prevalence of voter fraud by Professor Jesse Richman. Is that fair to say?
A. I'm aware of it in the sense that I -- yeah, I looked through it briefly. I didn't spend lots of time thinking about it. 03:48:59
Q. And as a general matter, you're aware that it purported to find fairly substantial evidence of non-citizen voting in the 2008 presidential election?
A. That's right.
Q. And you're aware that there was a fair amount of criticism 03:49:12

CERTIFICATE OF SERVICE

I, Seth P. Waxman, a member of the bar of this Court, certify that on this 22d day of November, 2023, I caused all parties requiring service in this matter to be served with a copy of the foregoing by email and overnight courier to the addresses below:

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