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ARIZONA COURT OF APPEALS
DIVISION ONE

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; and the ARIZONA SENATE, a house of the Arizona Legislature,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP, in his official capacity as a judge of the Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. 1 CA-SA 21-0141

Maricopa County Superior Court No. CV2021-008265

REPLY IN SUPPORT OF PETITIONERS' EMERGENCY MOTION FOR STAY

Petitioners Arizona Senate; Karen Fann, in her official capacity as President of the Arizona Senate; and Warren Petersen, in his official capacity as Chairman of the Senate Judiciary Committee (collectively, the "Senate") respectfully submit this Reply in support of their Emergency Motion for a Stay of the Superior Court's orders and proceedings.

I. Procedural Prerequisites

Before addressing the factual misstatements and legal misapprehensions that pervade the Response, three preliminary issues merit attention.

A. The Senate Was Not Required to Request a Stay in the Superior Court

American Oversight's contention that the Senate was required to ask the Superior Court for a stay of all pending proceedings (and not just the August 2 order) before moving this Court for the same relief is incorrect. While A.R.C.A.P. 7(a) does contemplate an antecedent request to the trial court, the Senate separately seeks relief under Special Action Rule 7(c), which imposes no such condition precedent to a stay in the special action context. The divergence between the two sets of Rules on this point presumably was deliberate, and derives from the special action's character as "a separate, original proceeding where an appellate court examines the action or inaction of public officials and may issue orders (similar to a common law writ) affecting future proceedings in a case," *Coffee v. Ryan-Touhill in & for County of Maricopa*, 247 Ariz. 68, 71–72, ¶ 14 (App. 2019)—rather than merely the continuation of a single, unitary proceeding (as in a direct

appeal). While the Rules of Procedure for Special Actions rely heavily on many facets of the Rules of Civil Appellate Procedures, the former always prevail over the latter in the event of a conflict or inconsistency. *See* Ariz. R. P. Special Action 7(i). In short, nothing in Special Action Rule 7(c) expressly or implicitly renders a stay contingent upon a prior request to the trial court.[1]

B. The Superior Court Fully Adjudicated the Legislative Immunity Issue

More baffling is American Oversight's assertion that the issue of legislative immunity is "new" and "has not been fully briefed, let alone considered." Response at 10. Such a revelation likely would come as a surprise to the Superior Court, which entertained relatively extensive briefing of the defense by both parties, *see* APPV2-0091–0101; APPV2-0112–0116, before explicitly holding that the claims in this case "are definitely not subsumed within the Speech and Debate immunity clause of the Arizona Constitution."

[1] And as a practical matter, the Superior Court's refusal to stay a single discrete order clearly operated as a *de facto* denial of an even more expansive stay. Respect for judicial economy and common sense counsel against a finding that another stay request to the Superior Court would have been a fruitful use of the parties' or the Court's resources.

APPV1-0008. The Senate is at a loss to discern what further rulings, exactly, American Oversight expects the Superior Court to issue on the question of legislative immunity.[2]

C. The Senate Does Not Have the Burden of Proving the Absence of Spoliation

Finally, American Oversight charges the Senate with inverting the burden of proof by arguing that there is no evidence to support the denial of a stay. Response at 8. But it is not the Senate's onus to prove the *absence* of the putative spoliation that animated the Superior Court's denial of a stay. As set forth in the Motion, there is simply no record evidence whatsoever that spoliation has occurred, is occurring or will occur. A trial court that premises a decision on facts nowhere found in the record necessarily has abused its discretion. *See State v. Wein*, 242 Ariz. 372, 374, ¶ 7 (App. 2017) ("An abuse of discretion

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[2] To the extent the Response is adumbrating some sort of waiver argument, that theory is so spurious that even the Superior Court eschewed it. "Assuming that [waiver of legislative privilege] is possible . . . waiver can be found only after explicit and unequivocal renunciation of the protection." *United States v. Helsotski*, 442 U.S. 477, 490-91 (1979). And it certainly is not among the few and enumerated technical threshold defenses—such as lack of personal jurisdiction or defective service of process—that is impliedly waived unless raised in the defendant's initial response to the complaint. *See* Ariz. R. Civ. P. 12(h). The Senate here presented legislative immunity arguments at an early and appropriate procedural juncture, as a defense against a motion to enter against the Senate an order commanding its presiding officer to commandeer a third party's internal documents. While the Superior Court acknowledged that claims of legislative *privilege* as to particular documents may be forthcoming, *see* APPV1-0007, the question of legislative immunity has been briefed and adjudicated in full.

finding is appropriate when the record fails to provide substantial support for the trial court's decision.").

American Oversight's distorted rendering of the standard governing review of the denial of a stay—which demands that the Senate affirmatively rebut speculative ruminations of the Superior Court that were never grounded in actual record evidence—bears no resemblance to any controlling rule or precedent.

II. <u>The Senate Has Satisfied the Necessary Criteria for a Stay</u>

A. The Senate Is Likely to Succeed on the Merits Because Legislative Immunity Extends to Decisions to Release or Withhold Alleged Legislative Records and the Superior Court's Notion of "Constructive" Custody Is Wrong as a Matter of Law

Given that it had already just filed a special action petition that filled some 30 pages with arguments elucidating why the Senate believes it is entitled to relief, the Senate saw no point in burdening the Court with a cut-and-paste repetition of those positions in its Motion for a Stay. But American Oversight apparently believes that such a recapitulation is necessary, and so the Senate will do so here.

In short, the Superior Court committed two errors of law. First, its conclusion that the Senate is not immune from judicial diktats ordering it to divulge alleged legislative records flies in the face of more than a century of federal and Arizona precedents recognizing legislative immunity as a bulwark against ***all*** claims seeking ***any*** variant of relief that arise out of an official legislative function, such as the audit. *See Arizona Indep.*

Redistricting Comm'n v. Fields, 206 Ariz. 130, 136, ¶¶ 15–16 (App. 2003) (When legislators "are acting within their 'legitimate legislative sphere,' the Speech or Debate Clause [in Article IV, Part 2, Section 7 of the Arizona Constitution] serves as an absolute bar to . . . civil liability."); *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 725–26, 733 (1980) (holding that legislative immunity precluded claims for declaratory and injunctive relief).

The Superior Court's reasoning that the Public Records Act ostensibly requires the disclosures that American Oversight demands relies on the fallacy that legislative immunity is conditioned upon the legislator's compliance with the allegedly applicable law (which, of course, would defeat the entire point of immunity in the first place)—when it is in fact a categorical constitutional bar to judicial intervention in the legislative realm. *See Mesnard v. Campagnolo*, -- Ariz. --, 2021 WL 2678473, at *5, ¶ 25 (Jun. 30, 2021) ("Whether Mesnard violated House rules, statutory law, or even the state or federal Constitution has no bearing on whether his actions were legislative functions and thus afforded immunity.").

Second, citing a facially inapplicable indemnification clause in the Senate's contract with its vendor, the Superior Court found that the Senate was required to fetch and produce the internal corporate records of not only its corporate vendor but also the *sub*contractors of the vendor. To rationalize this invasive and sweeping command, the Superior Court coined a concept it termed "constructive possession," APPV2-0067—a notion that is

foreign to the text of the Public Records Act and to the germane Arizona (and analogous federal) precedents. Tellingly, the trial court cited not a single Arizona authority to sustain its doctrinal creation, beyond invoking substantively irrelevant cases for generalized bromides about transparency. Further, the fruits of the Superior Court's error will not be confined to this case; if it stands, all private vendors serving virtually every division of state, county and municipal government in Arizona will be potentially exposed to liability under the Public Records Act, and all internal files bearing a substantial nexus to its governmental engagements will be swept within the statute's purview.

B. The Absence of A Stay Will Irreparably Injure the Senate By Extinguishing Key Defenses

American Oversight's assurances that the absence of a stay will require the Senate only to "obtain and prepare for production the documents at issue," Response at 12, blithely bypasses the entire point of this special action: the constitutional and statutory propriety of an order requiring the Senate to "obtain" from third parties their internal corporate records is precisely the issue now in dispute. Even assuming *arguendo* that the Senate can, as a factual matter, wrest control of Cyber Ninjas' and Cyber Ninjas' subcontractors' internal files, its procurement of those materials necessarily would substantially impair, if not entirely moot, a key defense to Public Records Act claims—*i.e.*, that the Senate lacks actual

physical custody of its vendors' records—if not in this proceeding, then certainly in other pending and future Public Records Act lawsuits.[3]

C. The Balance of Equities and Public Policy Considerations Favor a Stay

American Oversight faults the Senate's appeal to the separation of powers and constitutionally secured immunity in arguing for the importance of a stay. *See* Response at 18. While American Oversight apparently considers such trifling issues easily eclipsed by its pressing partisan pursuits, the constitutional undercurrents to this case are of critical and enduring importance. When, as here, "a civil action is brought by private parties, judicial power is still brought to bear on Members of [the Legislature] and legislative independence is imperiled." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). A wrongful abrogation of legislative immunity is not merely a transient inconvenience to the institution and its members; it works an irreparable corrosion of the constitutional boundaries demarcating the legislative and judicial spheres.

By contrast, American Oversight seemingly struggles to articulate its own equities, beyond a rote recitation of pleasant-sounding platitudes about "transparency." If American

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[3] American Oversight also bizarrely contends that the Senate's argument to the trial court that it should defer entering any order pending the completion of discovery undermines its theory of irreparable injury. *See* Response at 11. But it was precisely because the Superior Court *rejected* the Senate's argument—holding instead that discovery or additional pleadings were unnecessary and entering an immediately effective order against the Senate, *see* APPV1-0007—that the Senate was impelled to bring this special action and request for emergency relief.

Oversight really is entitled to the documents it seeks (to the extent they exist), it will get them in due course. There is no record evidence of any material risk of spoliation, and there is no equitable or policy imperative that requires that these materials be obtained, produced or otherwise made available ***now***, before the Court can carefully weigh the substantial legal questions presented by the Petition for Special Action, and ensure that all cognizable constitutional immunities and statutory protections are vindicated.

III. The Response Contains Several Factual Misstatements

Although not critical to the disposition of the Motion, it bears mention that American Oversight's Response contains at least two misstatements of fact.

First, American Oversight asserts that "the Senate Defendants apparently have not sent a similar preservation letter to [Audit Liaison Ken] Bennett or the subcontractors working on the audit." Response at 5 n.2. To the contrary, as American Oversight knows from the Senate's submissions to the Superior Court, "records custodians—including Senate liaisons Ken Bennett and Randy Pullen, and Senate vendor and subvendors Cyber Ninjas, CyFIR, Wake Technology Services, [and] StratTech Solutions—were advised two months ago to preserve all records relating to the audit." APPV2-0143.

Second, American Oversight asserts that the Senate has "stopped production" of public records and "ha[s] not continued to produce Bennett records." Response at 2 & n.1. But—as American Oversight knows—the Senate is "working on a review of 15,000

additional documents." July 7, 2021 Hearing Tr. 17:14-15.[4] This time and resource intensive project is progressing, and while the Senate believes that it is constitutionally and statutorily inappropriate for the judiciary to surveil and police the Legislature's document production decisions and practices, it fully intends to supply to American Oversight—and anyone else who requests them—all non-privileged public records in its actual custody.

CONCLUSION

For the foregoing reasons, the Senate requests that this Court stay (1) all orders and pending proceedings in the Superior Court or, in the alternative (2) the Superior Court's August 2 Order.

RESPECTFULLY SUBMITTED this 9th day of August, 2021.

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[4] Subsequent searches and refinement of search terms have yielded an actual total of documents undergoing review that is closer to 30,000.