**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

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| KAREN FANN, et al.,<br><br>Petitioners,<br><br>v.<br><br>HON. MICHAEL KEMP, Judge of the Superior Court, Maricopa County,<br><br>Respondent Judge,<br><br>AMERICAN OVERSIGHT,<br><br>Real Party In Interest. | Court of Appeals<br>Division One<br>No. 1 CA-SA 21-0216<br><br>Maricopa County<br>Superior Court<br>No. CV2021-008265 |

# RESPONSE TO PETITION FOR SPECIAL ACTION

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## Introduction

In their Petition for Special Action, Senate President Karen Fann, Senator Warren Peterson, and the Arizona Senate again ask this Court to give judicial imprimatur to their ongoing efforts to withhold from public view key public records related to an "audit" of Maricopa County's 2020 general election results. Three months ago, this Court rejected Petitioners' contention that legislative immunity excused them from complying with Arizona's Public Records Law. *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. Ct. App. Aug. 19, 2021). Then, as now, Petitioners relied on "sky-is-falling" hyperbole to try to shield from view public records relating to what was promised to be "the most transparent audit in history." Rejecting Petitioners' legislative immunity defense, this Court held that the public records relating to the audit must be produced unless "confidentiality, privacy, or the best interests of the state" overcome the presumption of disclosure. *Id.* ¶ 15.

Yet here we are again. Petitioners are still withholding 694 documents solely on legislative privilege grounds, and another 402 documents based in part on legislative privilege. As the trial court properly found, "[n]early every communication between or among"

Senator Fann, Senator Peterson, Senate Liaison Ken Bennett or Senate Liaison Randy Pullen "relating to the audit [has] been withheld on the basis of legislative privilege." [APP008] Arizonans thus remain in the dark about the audit's planning and execution, whether its conclusions were predetermined, and what Petitioners and their "auditors" promised the financial backers who paid millions to subsidize the audit. In the meantime, from the start of the "audit" in February 2021 through the release of the final report on September 24, 2021, Petitioners and their agents made scores of public statements about the audit, what it allegedly uncovered, and who funded and worked on it. Many of those statements appear to be inaccurate and incomplete.

The trial court considered all this and rejected Petitioners' "blanket exemption approach" to legislative privilege, finding it "clearly overbroad." [APP008] It did so because, among other things, "communications regarding this audit are not an integral part of deliberations or communications regarding proposed legislation." [APP009] Petitioners also "failed to show how disclosure of documents and communications regarding the audit would result in any impairment of future legislative deliberations." [*Id.*] And beyond that, the trial court

found that Petitioners waived legislative privilege "by making numerous public statements to traditional media and social media about the audit," "releasing selective documents about the audit," releasing the final audit report, and then holding a "hearing" about that report that "was more akin to a press conference." [APP012-13]

Petitioners now seek extraordinary relief based – yet again – on hyperbolic assertions. They proclaim [at 1] that absent reversal, "the Superior Court's ruling will judicially exterminate the legislative privilege in Arizona." But the trial court's ruling does no such thing, and instead reflects settled Arizona law: the legislative privilege applies beyond "words spoken in debate" only if the communication at issue relates to "an integral part of the deliberative and communicative processes relating to proposed legislation or other matters placed within the jurisdiction of the legislature, and when necessary to prevent indirect impairment of such deliberations." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶ 18 (App. 2003). Below, Petitioners barely acknowledged this standard and made no effort to meet it. They did not carry their burden to establish (i) that the withheld communications relating to the audit are an integral part of the legislature's deliberative

and communicative process, (ii) that the withheld information is tethered to some proposed legislation or similar matter (such as redistricting or expulsion of a member) and (iii) that disclosure of the withheld documents would impair legislative deliberations. Instead, Petitioners implicitly argued that because legislative subpoenas were used to obtain from Maricopa County the underlying materials needed to conduct the audit, some aura of "legislative function" permits them to broadly designate communications as privileged without regard to the test.

In sum, Petitioners' blanket legislative privilege argument is a backhanded attempt to relitigate their failed legislative immunity claim. Petitioners seek to use the doctrine of legislative immunity—which exists to benefit the public by immunizing their legislators from liability for speech made in legislative debate—to bar the public from obtaining public records, even when there has been no legislative debate (or proposed legislation) and no showing that disclosure would impair the (nonexistent) deliberative process. As detailed further below, this Court should deny relief and direct the timely production of public records in Petitioners' custody.

## Jurisdictional Statement

Special action jurisdiction is discretionary, "reserved for 'extraordinary circumstances,'" and unavailable "where there is an equally plain, speedy, and adequate remedy by appeal." *Stapert v. Arizona Bd. of Psych. Examiners*, 210 Ariz. 177, 182 ¶ 7 (App. 2005). Under present circumstances, Real Party in Interest American Oversight ("AO") neither concedes nor contests Petitioners' claims about the propriety of this Court's exercise of special action jurisdiction.

## Statement of the Issues

The Petition raises four issues:

1. In *Fields*, this Court held that legislative privilege extends beyond pure "speech and debate" in the legislature only as to communications that are "an integral part of the deliberative and communicative processes relating to proposed legislation or other matters placed within the jurisdiction of the legislature" and only "when necessary to prevent indirect impairment of such deliberations." Did the trial court abuse its discretion in concluding that Petitioners failed to carry their burden to show that the privilege applies to communications about the planning, financing, and conduct of the audit?

2. In *Fann*, this Court rejected Petitioners' sweeping claim that they enjoyed legislative immunity from suit under the PRL. When legislative privilege exists only as a function of legislative immunity, did the trial court abuse its discretion by applying the law of this case to Petitioners' equally broad invocation of legislative privilege?

3. Did the trial court abuse its discretion when ruling in the alternative that, even assuming legislative privilege applies, the public's significant interest under the PRL in the public records at issue outweighs Petitioners' interest in confidentiality under art. IV, pt. 2, § 7 of the Arizona Constitution?

4. In *Fields*, this Court held that the legislative privilege can – like other privileges – be waived by conduct inconsistent with its assertion. Did the trial court abuse its discretion by holding that Petitioners waived any legislative privilege over the audit given Petitioners' selective release of information, public statements, and "hearing" about the audit's alleged findings?

## Statement of Facts and Statement of the Case

As this Court confirmed in *Fann*, Petitioners are two "public officers" and a "public body" subject to the requirements of the PRL. After

Petitioners announced they were commissioning an "audit" of Maricopa County's 2020 general election results and selected an unqualified, highly partisan conspiracy theorist to lead that "audit," they received public records requests, including from AO. [*See* SA007-011[1] ¶¶ 19-45 (describing the audit's partisan origins, statements of Cyber Ninjas' CEO, and fundraising for the audit conducted by other known conspiracy theorists); SA013-017 ¶¶ 57-71 (describing AO's public records requests)].

Petitioners' failure to produce records required AO to sue under the PRL. AO first sued to obtain records physically possessed by Petitioners' agents (which Petitioners refused to produce) and later amended its verified complaint to seek records possessed by Petitioners' themselves (which they failed to timely produce). After AO sued, the Senate began uploading documents into a public "reading room." Though Petitioners correctly state [at 4] that they've uploaded "22,000 records in their entirety" constituting around "80,000 pages," what they omit is any discussion of the substance of those "records" and "pages." In short,

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[1] Record cites beginning with "SA" are to AO's Separate Appendix to Response to Petition for Special Action, filed concurrently with this Response.

Petitioners have withheld virtually every substantive text message and email about the audit and still have not produced the agreements between the multiple subcontractors and Cyber Ninjas. All the while, they have provided AO (and the public at large) with many thousands of pages of irrelevant materials, such as multiple copies of newspaper articles, generic emails from members of the public commenting on the audit and even multiple copies of already-public filings from this and other litigation. Petitioners have also been forced to supplement their production as AO and others repeatedly pointed out deficiencies. [*E.g.*, SA021-023 ¶¶ 81-93 (summarizing AO's counsel's efforts to obtain records between May and July 2021)]

Petitioners supplied a privilege log spanning hundreds of pages that reflected their continued withholding of 694 documents "solely on the ground of legislative privilege; of those, approximately 272 have already been disclosed in redacted form" [Pet. at 5]. Another 492 documents were withheld in part on legislative privilege grounds and in part on attorney-client or work product grounds. The privilege log's descriptions of these documents is as vague as can be, with most entries generically referring to a document being "internal" or "legislative" or

simply "discussions" on a vaguely defined topic.[2] And as noted above, the withheld documents include (1) most communications between or among Senator Fann, Senator Peterson, Senate Liaison Ken Bennett or Senate Liaison Randy Pullen relating to the Audit, and (2) communications between any of the those individuals on the one hand and anyone at Cyber Ninjas or the various subcontractors who conducted the audit on the other. [APP008]

Petitioners' obstinance led AO to file a Motion to Compel. [APPV2-002-085]. After a response [APPV2-086-108] and reply [APPV2-109-120], the trial court held a hearing on October 7, 2021. [SA843-917] Six days later, the trial court granted the Motion in a well-reasoned 11-page minute entry order. [APP006-016] In pertinent parts, the trial court held:

- Petitioners' "position is clearly overbroad" [APP008];

[2] Petitioners' original privilege log generally described these topics in the barest of terms, such as "discussions regarding audit," or "discussions regarding subpoenas." [SA340-608] The revised version provided about one month later expanded on these descriptions only minimally, mentioning for instance, "discussions regarding audit process and procedure," or "discussions regarding audit scope." [SA609-842]

- "Legislative privilege is narrower than legislative immunity and this Court again rejects the blanket exemption approach taken by [Petitioners]. This is the law of the case." [*Id.*]
- "[C]ommunications regarding this audit are not an integral part of deliberations or communications regarding proposed legislation. There is no proposed legislation pending . . . [t]he audit was not done in the course of the process of enacting legislation . . . [and the audit does] not bear the hallmarks of traditional legislation." [APP009]
- Petitioners "failed to show how disclosure of documents and communications regarding the audit would result in any impairment of future legislative deliberations" and failed to make "a showing to persuade this Court that future deliberations on future legislation relating to this case or any other legislation would be compromised or diminished" [*Id.*; APP011]
- "Factual communications or records relating to procedures, protocols or practices relating to the audit, as well as findings and conclusions, are not privileged." [APP010]

- "The public has a right to know the basis for these conclusions and findings and to challenge and scrutinize those findings. The public has a right to know how the audit was done, who paid for it and how much was paid. The public also has a right to know the identity of any political organizations who financed the audit" [APP011]
- Petitioners "clearly and expressly waived legislative immunity as it relates to this audit by making numerous public statements to traditional media and social media about the audit and its findings and releasing selective documents about the audit to the public," issuing final audit report, and holding a "hearing" on September 24, 2021 related to the audit that "clearly was not a traditional legislative proceeding" but a "political act." [APP0013]

In sum, "[t]he audit was not an integral part of a deliberative process, the withheld information is not tethered to proposed legislation, and there is no showing that disclosure of the records sought would impair legislative deliberations," and Petitioners "clearly waived any claim to immunity or privilege." [APP015]

To date, Petitioners have yet to produce records withheld on legislative privilege grounds. The Petition and this Court's limited stay followed.

## Argument

### I. Petitioners Did Not Carry Their Burden of Establishing That Legislative Privilege Applies.

Petitioners bore the burden of establishing that legislative privilege properly applies to the withheld materials, a burden they failed to carry. Petitioners identify nothing in the record supporting their claim that legislative privilege applies to the records at issue, and the trial court rightly held that they failed to meet their burden. [APP006-016] Legislative privilege is a narrow privilege arising from the Speech and Debate Clause of the Arizona Constitution, protecting legislators from liability for their "words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. The privilege may extend beyond the bounds of that limited constitutional text only for materials integral to the deliberative process associated with proposed legislation or other such matters within the legislature's jurisdiction, and only "when necessary to prevent indirect impairment of such deliberations." *Fields*, 206 Ariz. at 137 ¶ 19.

Given its narrow purpose and scope, and as with other privileges and immunities under Arizona law, *see, e.g.*, *Doe v. State*, 200 Ariz. 174, 176 ¶ 4 (2001), legislative privilege must be narrowly construed. The purpose of the privilege is not "to protect legislators' individual interests," but "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Fields*, 206 Ariz. at 136 ¶ 17.[3] By the same token, "because the privilege was designed to preserve legislative independence, not supremacy, invocations of it that go beyond what is needed to protect legislative independence must be closely scrutinized." *United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 126-27 (1979)) (quotation marks omitted). Indeed, as the trial court noted, "[s]weeping assertions of legislative privilege are disfavored and the shield extends only as far as necessary

[3] That this action is a public records case against the Senate as a whole, seeking to enforce the body's compliance with the mundane, statutory requirement of producing public records, and not a civil or criminal action against an individual member in their personal capacity or implicating their individual actions underscores why the rationale for the privilege does not apply here.

to preserve the integrity of the legislative process." [APP007 (citing *United States v. Brewster*, 408 U.S. 501, 517 (1972))].

Petitioners carry the heavy burden to establish that the records they seek to withhold fall within this narrow privilege. *See Menendez*, 831 F.3d at 165 ("A Member seeking to invoke the Clause's protections bears 'the burden of establishing the applicability of legislative immunity . . . by a preponderance of the evidence.'") (citation omitted); *see also Clements v. Bernini*, 249 Ariz. 434, 439-440 ¶ 8 (2020) ("[T]he party claiming [a] privilege has the burden of making a prima facie showing that the privilege applies to a specific communication").

Yet Petitioners have made no such showing. The materials Petitioners seek to withhold do not amount to a member's "words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. Thus, for the privilege to apply, Petitioners must prove that they meet the test set forth in *Fields*, discussed above. But they haven't, and they can't. Petitioners offered no evidence to establish that the hundreds of communications reflected on their privilege log containing "discussions regarding" the audit are "an integral part of deliberations or communications regarding proposed

legislation or other matters placed within the jurisdiction of the legislature." *Fields*, 206 Ariz. at 137 ¶ 19.[4]

As Petitioners' counsel conceded, there is no proposed legislation being deliberated, and the legislature is not even in session. [SA877 ("[The] Legislature doesn't meet again until January. There's not a pending bill that I know of.")]. Petitioners only point to a handful of general suggestions made by Cyber Ninjas within their report to consider future legislation on various topics. [*See* Pet. at 19 (citing Cyber Ninjas, *Maricopa County Forensic Election Audit, Vol. 1: Executive Summary & Recommendations* (Sept. 24, 2021), available at https://www.azsenaterepublicans.com/cyber-ninjas-report)]. To begin, by the terms of their contract, the Cyber Ninjas were not hired to propose legislation, and their report does not do so beyond occasional, highly

[4] Indeed, anemic though its descriptions are, the privilege log appears to show that the communications Petitioners seek to withhold do not relate to proposed legislation or similar matters. Rather, the descriptions suggest that the withheld materials relate to logistical and procedural aspects of the audit, which cannot be integral to the deliberative process relating to proposed legislation. In other words, on its face, the privilege log establishes the opposite of Petitioners' burden. And absent evidence of a deliberative process, it is no wonder that Petitioners have similarly failed to establish that disclosure of any of the documents at issue could impair such (nonexistent) deliberations.

generalized recommendations. [*See id.*; SA132-142] Beyond that, as the trial court noted, simply pointing to the specter of potential future legislation does not suffice to meet Petitioners' burden. [APP014 ("There is no pending legislative inquiry or legislation although legislation could someday result from this audit. Senate Defendants have not met their burden."); *see also Steiger v. Superior Ct. for Maricopa Cty.*, 112 Ariz. 1, 3 (1975) (finding an investigation that could have led to future legislation could not meet burden since the investigation was unrelated to any pending congressional inquiry or legislation)]

Even if the allusions to possible future legislation in the report highlighted by Petitioners were enough to invoke the privilege (they are not), Petitioners still failed to meet their burden here. Petitioners have not established that the withheld materials relate specifically to any legislative recommendations, rather than the routine logistics and decision making necessary to conduct the purportedly factual portion of the "audit." But to show the privilege properly applies, Petitioners bear the burden of showing that the withheld material is tethered to legislative proposals and its disclosure would impair legislative

deliberations. They have not even tried to make these required showings and thus failed to meet their burden.

## II. The Trial Court Correctly Rejected Petitioners' Sweeping Assertion of Legislative Privilege Under the Law of This Case.

The trial court held that "[l]egislative privilege is narrower than legislative immunity and [it] . . . again reject[ed] the blanket exemption approach taken by Defendants." [APP008][5] It did so in large part because this Court rejected Petitioners' blanket claims of legislative immunity:

> [T]hough there is a presumption in favor of disclosing public records, this presumption can be rebutted by a demonstration of "confidentiality, privacy, or the best interests of the state." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9 (1998) (citation and internal quotation marks omitted). If any of these interests outweigh the public's right to access the records, the legislature can refuse disclosure. *Id.* However, the legislature is not afforded a blanket exemption from compliance with the PRL, nor is it exempt from lawsuits contesting a denial of access to public records.

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[5] As this Court held in reaching its legislative immunity determination, the trial court also acknowledged that while Petitioners' blanket claims of privilege are indefensible, particular documents might be properly "withheld on grounds of confidentiality, privacy or best interests of the State if those interests outweigh the public's interest to those records." [APP015] However, the trial court then cautioned that "[t]his is narrow indeed and must be specifically outlined in the privilege log." *Id.* Petitioners have thus far failed to make such a particularized showing with respect to any specific documents.

*Fann*, 2021 WL 3674157, at *3 ¶ 16; *see also* APPV2-005 (pointing out Petitioners' failure to assert "the grounds of 'confidentiality, privacy, or the best interests of the state.'"); APPV2-111 (same).

Just as Petitioners failed to establish a compelling confidentiality interest outweighing the public interest in connection with their legislative immunity claim, so too have they failed in connection with their legislative privilege claim. If legislative immunity did not permit Petitioners to avoid suit to enforce the PRL, legislative privilege should not shield these communications from public view, particularly given Petitioners' failure to meet their burden of showing that the privilege applies to these communications.

## III. The Audit Was Unconnected to the Legislature's Deliberative Process and the Communications at Issue would not Impair Any Such Deliberations.

Even if Petitioners had made a more robust effort to meet their evidentiary burden as a procedural matter, as a substantive matter, they cannot establish that the legislative privilege applies to records related to the audit. As discussed above, the legislative privilege permits Petitioners to withhold public records in their possession "only when such matters are 'an integral part of the deliberative and communicative

processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature, and 'when necessary to prevent indirect impairment of such deliberations.'" *Fields*, 206 Ariz. at 137 ¶ 18 (citation omitted). In short, determining whether legislative privilege can be invoked implicates a three-part test: (i) the matter must be an integral part of the legislature's deliberative process, (ii) the withheld information must be tethered to proposed legislation or other matters, and (iii) a showing must be made that disclosure of the record(s) sought would impair legislative deliberations.

As discussed above, Petitioners failed to show <u>any</u> of these requirements, let alone all three. Moreover, the trial court correctly held that because "communications regarding this audit are not an integral part of deliberations or communications regarding proposed legislation," the privilege does not generally apply to the records in question. [*See* APP015] In their effort to undermine the trial court's analysis, Petitioners continue to overstate the law about the narrow privilege they seek to assert and try to extend it far beyond its proper and traditional reach.

### A. Petitioners Overstate the Scope of the Legislative Privilege.

In their quest to invoke the legislative privilege, Petitioners continue to overlook the threshold requirement that these records must be integral to deliberations about lawmaking and similar matters. Petitioners claim that the *Fields/Gravel* formulation "extends the privilege's ambit to *all* 'matters placed within the jurisdiction of the legislature.'" [Pet. at 16 (quoting *Fields*, 206 Ariz. at 137 ¶ 18) (emphasis added)]. This assertion betrays Petitioners' ongoing attempt to extend the privilege beyond all recognizable parameters.

The privilege does not extend to "all" matters. Indeed, *Fields* explicitly states that the "legislative privilege does not extend to cloak 'all things in any way related to the legislative process.'" *Fields*, 206 Ariz. at 137, ¶ 18 (emphasis added) (citation omitted). Rather, *Fields* holds that "matters" are covered by the privilege only when they are both "an integral part of the deliberative and communicative processes" and "relat[e] to proposed legislation or other matters placed within the jurisdiction of the legislature." *See Fields*, 206 Ariz. at 137, ¶ 18 (quoting *Gravel*, 408 U.S. at 625). Moreover, even upon meeting those standards,

the privilege is extended to those matters only "when necessary to prevent indirect impairment of such deliberations." *Id.*

Petitioners double down on their misleading and overbroad interpretation by suggesting that the formulation of the protection set forth in *Brewster*—covering "activities and communications undertaken in the 'due functioning of the [legislative] process'"—covers all matters within the legislature's jurisdiction. [Pet. at 16 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972))] But *Brewster* and the cases it cites align with the holding of *Fields*: legislative immunity applies to shield legislators from suit only for conduct that involves deliberative and communicative processes. *Brewster*, 408 U.S. at 516 n.10 (listing cases with activities at issue such as "voting for a resolution"; "harassment of witness by state legislator during a legislative hearing"; "making a speech on House floor"; "subpoenaing records for committee hearing"; and "voting for a resolution"). In *Brewster*, the Supreme Court rejected Brewster's attempt to expand legislative immunity and held he could be prosecuted for bribery. *Id.* at 512-13 ("Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things generally done in a session of the House by one of its

members in relation to the business before it or things said or done by him, as a representative, in the exercise of the functions of that office.") (quotations omitted). Petitioners cannot escape the fact that not all activities undertaken by the legislature fall under the umbrella of the Speech or Debate Clause, and that the withheld documents related to the audit are not within those bounds.

Nor can Petitioners avoid their obligation to prove that disclosure of the records would impair the deliberative process. Their attempt to do so falls flat. Ignoring the plain language of *Fields*, Petitioners cite two D.C. Circuit cases for the proposition that they need not make a "'showing' of some articulable 'impairment' [as] a prerequisite to the invocation of the legislative privilege." [Pet. at 17 (citing *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988), and *Brown & Williamson Tobacco Cop. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995))] However, the D.C. Circuit takes a particularly expansive view of the privilege as broad and "absolute," based on an interpretation of the federal Speech or Debate Clause (which is broader than Arizona's) as protecting all written materials falling "within the sphere of legitimate legislative activity." *See United States v. Rayburn House Office Building,*

*Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 660 (D.C. Cir. 2007); *Brown & Williamson*, 62 F.3d at 420-21.

But this expansive view of legislative privilege conflicts with controlling Arizona law as laid out in *Fields*. It's also been rejected by both the Ninth Circuit and Third Circuit. *See United States v. Renzi*, 651 F.3d 1012, 1034-37 (9th Cir. 2011); *In re Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc. ("Fattah")*, 802 F.3d 516, 529 (3d Cir. 2015). Both *Renzi* and *Fattah* disagree with the D.C. Circuit on whether the purpose of preventing "distraction" should be weighed against the purpose of preserving the "independence" of the separate branches of government. *See Renzi*, 651 F.3d at 1036 ("Were we to join the D.C. Circuit in precluding review of any documentary 'legislative act' evidence, even as part of an investigation into unprotected activity, for fear of distracting Members, we would thus only harm legislative independence."). By focusing on these two D.C. Circuit cases, Petitioners ignore the precedential, Arizona-specific test delineated by this Court in *Fields* and properly applied in the trial court's decision below. [*See* APP007, APP010] They

also ignore the material distinction that exists between the Arizona and United States constitutional provisions, as discussed in Section IV below.

### B. Communications About the Audit Are Not Integral to Deliberative Processes about Proposed Legislation or Other Matters.

Petitioners' sweeping privilege claim over the records at issue echoes their overstatement of the relevant legal concepts. Indeed, Defendants' claim to "legislative independence against all trespasses into internal communications concerning the business of the house" [Pet. at 17] both overstates the law and ignores the fact that during the period these public records were created, there was no "business of the house" relating to the audit.

"Only those acts generally done in the course of the process of enacting legislation are protected" by the privilege. *Steiger*, 112 Ariz. at 3. Cyber Ninjas was not contracted to craft legislation. Nowhere does the audit's Statement of Work describe Cyber Ninja's contracting work as including drafting, evaluating, proposing, or recommending legislation in any form. [*See* SA132-142] The scope as described is "for a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona," including "auditing

the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results." [SA133] Petitioners offer no support for the claim that the documents they seek to withhold were about anything but the planning, execution, and results of the audit[6]—*i.e.*, exactly what Cyber Ninjas was contracted to do. [*See* Section II, *supra* (describing privilege log entries reflecting in large part mundane, administrative matters connected to the conduct of the audit, rather than deliberations about "business of the house")]

Petitioners try to overcome this deficiency by arguing that the audit is a factual investigation inherently integral to legislative functions. This misunderstands the *Fields* test, which provides that the privilege is available only when the legislative activities "are 'an integral part of the deliberative and communicative processes' relating to proposed

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[6] Cyber Ninjas' September 24, 2021 report on the results of the audit did include a handful of highly general recommendations to consider as legislation, the closest Petitioners have come to meeting the "proposed legislation" standard under *Fields*. AO disputes that these references are enough to invoke legislative privilege over the withheld communications that predate the report, and Petitioners have not established that the withheld materials relate specifically to the preparation of Cyber Ninjas' recommendations, rather than the general logistics of conducting the "audit." In any event, as detailed below, *infra* Section V, Petitioners have waived the privilege over those materials.

legislation or other matters placed within the jurisdiction of the legislature, and 'when necessary to prevent indirect impairment of such deliberations.'" *Fields*, 206 Ariz. at 137 ¶ 18 (citations omitted). As the trial court properly found, there was no showing that communications relating to Cyber Ninjas' audit were essential to the deliberative process about proposed legislation.

Petitioners also ignore the temporal flaw in their argument. Pre-legislative acts and negotiations with private parties are not protected by legislative privilege. *Renzi*, 651 F.3d at 1023 ("In *Brewster*, the Court rejected Renzi's first argument—the contention that a Member's pre-legislative act negotiations with private parties are themselves "legislative acts.") (citations omitted). Petitioners now assert [at 19] that "legislators are currently drafting legislation," citing the Cyber Ninjas September 24, 2021 report and Senator Fann's letter to Attorney General Brnovich of that same date. Neither document says that the legislature is drafting legislation, only that it might in the future. More important, the withheld communications pre-date September 2021, most of them by many months.

In any event, the "audit" here bears none of the hallmarks of the types of investigations that courts have found to be protected. First, the contracts executed with Cyber Ninjas and other subcontractors were signed by President Fann and bear no authorization or approval from the entire Senate or a Senate committee. The review undertaken by Cyber Ninjas was not a formal investigation of the Senate authorized by a vote by any Senate committee or by a vote of the Senate as a whole. Nor were the subpoenas preceding the audit authorized by any vote by the Senate or a Senate committee. "The Supreme Court has never recognized investigations by an individual Member to be protected [by the legislative privilege]. It has held only that when Congress, acting as a body, employs its constitutional power to investigate, such official investigations are quintessential 'legislative acts.'" *Renzi*, 651 F.3d at 1026 n.10 (citations omitted).

Furthermore, the cases Petitioners cite to shoehorn the audit into the type of investigation sometimes protected by legislative immunity or privilege simply reconfirm these principles. For instance, several cited cases confirm the privilege can only apply when there has been full congressional or committee authorization of an investigation or discuss

the privilege in the context of traditional legislative activities, such as committee hearings. *See McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc) (noting "requirement of congressional authorization of the inquiry by the particular subcommittee involved" and finding it met where a Senate Resolution authorized the investigation); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (subpoenas issued by committees of the U.S. House of Representatives in connection with investigation of president's taxes); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (subpoena issued by Senate Subcommittee); *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927) (Senate resolution authorizing investigation of alleged DOJ malfeasance); *MINPECO*, 84 F.2d at 860 (protecting statements elicited at subcommittee hearing); *Brown & Williamson*, 62 F.3d 408 (analyzing privilege in connection with allegedly stolen documents provided to subcommittee conducting hearings on related topic). Other cases cited by Petitioners discuss the privilege in connection with actual, specific proposed legislation, also absent here. *See, e.g.*, *Steiger*, 112 Ariz. at 3 ("only those acts generally done in the course of the process of enacting legislation are protected"); *Assoc. of Am. Physicians & Surgeons v. Schiff*,

518 F. Supp. 3d 505, 519 (D.D.C. 2021) (finding congressman's "actions constitute legislative acts protected by the Clause" after noting "a resolution [the congressman] proposed in the House of Representatives as the legislative nexus for the letters"); *Citizens Union of NY. v. AG of NY*, 269 F. Supp. 3d 124 (S.D.N.Y. 2017) (assessing privilege claims over documents connected to draft legislation); *Jewish War Vets v. Gates*, 506 F. Supp. 2d 30, 58 (D.D.C. 2007) (privilege applicable to "legislative acts," including sponsorship of a bill but not to materials gathered in connection with "activities that were political rather than legislative in nature").[7]

In short, as *Fields* instructs, the "legislative privilege does not extend to cloak 'all things in any way related to the legislative process.'" *Fields*, 206 Ariz. at 137 ¶ 18. As the cases described above make clear, factfinding untethered to proposed legislation under deliberation by the legislature does not qualify for the privilege, particularly where it falls

[7] Additional cases cited by Petitioners are also readily distinguishable from this case. *See SEC v. Ways & Means Comm.*, 161 F. Supp. 3d 199 (S.D.N.Y. 2015) (executive branch issuance of subpoena to House subcommittee interfered with legislative process in violation of Speech and Debate clause where committee and subcommittee were actively considering proposed legislation); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (analyzing whether confidential source of material inserted into congressional record could be privileged).

well outside the scope of traditional, duly authorized legislative investigations. Petitioners' so-called audit of the November 2020 Presidential Election is simply an evaluation of a historical event spearheaded by two individual members without the input or approval of the broader body. There is no pending legislation that the legislature is now deliberating, and there certainly was no legislation proposed or pending in the period when the communications at issue were sent. The investigation thus does not "bear the 'hallmarks of traditional legislation by reflecting a discretionary, policymaking decision," *Montgomery v. Mathis*, 231 Ariz. 103, 123 ¶ 79 (App. 2012), such that the narrowly applied legislative privilege shields production of these documents under the PRL.

## IV. The Public Interest in the Records at Issue Outweighs Any Confidentiality Interests of Petitioners.

In an alternative basis for denying application of legislative privilege to shield these public records from view, the trial court properly found that the public interest in the records outweighs Petitioners' interest in confidentiality. [APP010 ("AO's interest on behalf of the public at large substantially outweighs the Senate Defendants' interest in non-disclosure.")] Petitioners argue [at 11] that legislative privilege is

"absolute," reasoning that "legislative privilege originates from the Arizona Constitution and generally is congruent with the protections conferred on members of Congress by the Speech or Debate Clause of the U.S. Constitution." But no Arizona court has held that legislative privilege—as contrasted with legislative immunity—is "absolute."[8] And the significant difference in language between the state and federal constitutions makes this an area where protections for Arizona legislators are not congruent with those afforded by federal law to federal legislators.[9]

Arizona's constitutional grant of legislative immunity provides: "No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. The Speech or Debate Clause, in contrast, provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art I, § 6, cl. 1. This broad constitutional

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[8] In *Mesnard*, the court held [at ¶ 13] that legislators are absolutely immunized from liability, which follows the express language of art. IV, pt. 2, § 7, but is irrelevant to whether they have a privilege to withhold documents.

[9] Of course, federal legislators are also not covered by federal Freedom of Information Act, unlike Arizona legislators under the PRL.

prohibition on any testimonial burden is the foundation on which the federal decisions cited by Petitioners rest. [*See* Pet. at 14 (citing *Brown & Williamson Tobacco Co. v. Williamson*, 62 F.3d 408, 416 (D.C. Cir. 1995))] Indeed, the *Brown & Williamson* court noted that given the language, legislative privilege could be stronger than legislative immunity: "Based on the text of the Constitution, it would seem that the immunity from suit derives from the testimonial privilege, not the other way around." *Id.* at 418; s*ee also Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975) ("The applicability of the Clause to private civil actions is supported by the absoluteness of the terms 'shall not be questioned' and the sweep of the term 'in any other Place.'"). But Arizona's constitutional framers elected to shield legislators from liability, not "questioning," and the federal cases on the "absolute" nature of legislative privilege need not be adopted by Arizona courts.

Moreover, as this Court has already held, "legislative immunity does not prevent this action against legislators . . . or the legislature, for [their] failure to comply with statutory obligations" under the PRL. *Fann* ¶ 14 (citing *Brnovich* and rejecting Petitioners' argument that legislative immunity is absolute).

Thus, in considering whether Petitioners' invocation of legislative privilege should fare any better than their invocation of legislative immunity, the trial court reasoned by analogy to the balancing test applied when state legislators sued in federal court invoke legislative privilege. In those cases, courts quite sensibly balance the legislator's interest in shielding the communications from public view against the interests to be vindicated. Arizona has a strong and well-established public interest in the disclosure of public records. *See, e.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91 (1984) (the PRL presumes that all records are "open to the public for inspection as public records," and there is thus a "clear policy favoring disclosure"). That interest is heightened in this case, which involves a matter of significant public interest surrounding an audit of election results.

This litigation merely seeks production of public records. Personal liability is not sought against Petitioners for any alleged misconduct, so the only interest against which the PRL concerns are balanced is the judicially created extension of art. 4, pt. 2, § 7 to encompass evidentiary protections (legislative privilege) for legislators along with the freedom

from liability (legislative immunity) that is express in that constitutional provision.

Balancing these interests, the trial court did not abuse its discretion in holding that Petitioner's interests in shielding public records reflecting communications between and among Petitioners, legislative liaisons, contractors/subcontractors and many others (nearly all of whom are not legislators) is outweighed by the significant public interest in disclosure. As a result, the public interest should win the day and these records should be released.

## V. Petitioners Waived Legislative Privilege.

Petitioners concede, as they must, that the legislative privilege can be waived. They quibble, however, with the trial court's determination that the legislative privilege—if it could even apply—was waived here as to the withheld documents. Petitioners try [at 25-28] to characterize the trial court's ruling as sweeping and fatal to the privilege itself. But the trial court relied on specific facts, including Petitioners' designation of liaisons to communicate with the public about all aspects of the audit and

their decision to share details of the audit along the way, to support a finding of waiver in this case.[10] This Court should affirm.

The legislative privilege is no different than other privileges under Arizona law. Acts that waive the privilege include testifying about otherwise privileged matters and sharing otherwise privileged communications with persons who have no confidential relationship with the privilege holder. Petitioners shared information about the audit, including plans, procedures, and substance, with "liaisons" Ken Bennett and Randy Pullen for the express purpose of communicating with the public. Yet Petitioners are withholding communications with Bennett and Pullen claiming now that they are privileged. Similarly, Petitioners publicized details about the audit's purpose, procedures, and findings at

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[10] Petitioners do not dispute the facts relied on by the Court. Indeed, they argue [at 8-9] that whether Petitioners waived the privilege is a pure legal issue where, as here, the underlying facts are uncontested. Among other uncontested facts, Petitioners do not dispute American Oversight's Verified Complaint, which is part of the evidentiary record. Thus, the trial court did not decide that Petitioners waived the legislative privilege in a vacuum, but instead considered the many public statements, reports, and communications about the details of the audit process and findings when deciding that Petitioners waived any applicable legislative privilege. After all, Petitioners cannot selectively disseminate audit-related information while simultaneously claiming a privilege over records that contain the same information.

various times during the audit, including at the end of the audit, but are withholding hundreds of records that are presumably directly related to each of those orchestrated communications.

Petitioners argue that a waiver of legislative privilege must be explicit and unequivocal as to every separate withheld document. But unlike a waiver of legislative immunity, a waiver of the legislative privilege need not be explicit and unequivocal. *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 671 (D. Ariz. 2016); *Favors v. Cuomo*, 285 F.R.D. 187, 211-212 (E.D.N.Y. 2012). The privilege is also waived as to all communications relating to a particular subject when the party holding the privilege acts in a manner inconsistent with the claim of privilege. *Fields*, 206 Ariz. at 144 ¶ 48; *see also Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980) (waiver can be "established by evidence of acts inconsistent with an intent to assert the right").

Allowing Petitioners to selectively disclose information that they now claim is subject to legislative privilege while hiding the source documents that would reveal the full story of the audit conflicts with the longstanding principle of waiver that applies to rights and privileges of all sorts.

## Rule 4(g) Notice

AO requests an award of its attorneys' fees and costs incurred in responding to the Petition under A.R.S. § 39-121.02(B), A.R.S. § 12-341, the private attorney general doctrine (*see, e.g.*, *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 8 ¶ 26 (2013)), or any other applicable statute or equitable doctrine.

## Conclusion

Petitioners may not withhold every substantive communication and document relating to the audit on grounds of legislative privilege because the privilege does not generally apply to these audit-related activities. And even if it did, it has been waived. For all the reasons discussed above, the Court should deny Petitioners' request for special action relief and lift the stay of the trial court's order.

RESPECTFULLY SUBMITTED this 15th day of November, 2021.

**COPPERSMITH BROCKELMAN PLC**

By: /s/ Keith Beauchamp
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Roopali H. Desai
D. Andrew Gaona

**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

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| KAREN FANN, et al.,<br><br>Petitioners,<br><br>v.<br><br>HON. MICHAEL KEMP, Judge of the Superior Court, Maricopa County,<br><br>Respondent Judge,<br><br>AMERICAN OVERSIGHT,<br><br>Real Party In Interest. | No. 1 CA-SA 21-0216<br><br>Maricopa County Superior Court No. CV2021-008265 |

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Pursuant to Rule 7(e), Ariz. R. P. Spec. Act., undersigned counsel certifies that Real Party in Interest American Oversight's Response to Petition for Special Action contains double-spaced, proportionately spaced typeface, was prepared in Century Schoolbook 14 point font, and contains 7,155 words (according to the word count feature of counsel's word processing system), and thus complies with the requirements of Rule 7(e).

RESPECTFULLY SUBMITTED this 15th day of November, 2021.

**COPPERSMITH BROCKELMAN PLC**

By:/s/ Keith Beauchamp
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I hereby certify that on November 15, 2021, Real Party in Interest American Oversight electronically filed their Response to Petition for Special Action and served a copy of the same, via TurboCourt and email, on the following persons:

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RESPECTFULLY SUBMITTED this 15th day of November, 2021.

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