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12 **ARIZONA SUPERIOR COURT**
13 **MARICOPA COUNTY**

14 AMERICAN OVERSIGHT,) No. CV2021-008265
15)
16 Plaintiff,) **STIPULATED MOTION TO JOIN**
17) **CYBER NINJAS, INC. AS A PARTY**
18 v.)
19) (Assigned to the Hon. Michael Kemp)
20 KAREN FANN, et al.)
21) (Expedited consideration requested)
22 Defendants. ,)
23)
24)
25)
26)

27 Pursuant to Rule 19(a) and Rule 20(b) of the Arizona Rules of Civil Procedure, as well
28 as Rule 2(b) of the Rules of Procedure for Special Actions, American Oversight and
29 Defendants hereby stipulate and request that Cyber Ninjas be joined as a party to this action.
30 Cyber Ninjas possesses public records that the Defendants have been ordered to produce in this
31 matter. Defendants have made demand on Cyber Ninjas for those public records, but Cyber
32 Ninjas has not provided them to the Senate Defendants for production.

33 Complete relief in this action cannot be afforded unless Cyber Ninjas is joined as a
34 party and made directly responsible for complying with this Court's orders. Therefore,
35 American Oversight and Defendants respectfully request that the Court (1) join Cyber Ninjas

1 as a Real Party in Interest by allowing Plaintiff to file the proposed Second Amended Special
2 Action Complaint attached as Exhibit A hereto; (2) order Cyber Ninjas to produce to the
3 Senate Defendants (who may assert claims of privilege, as appropriate, on their own behalf),
4 all public records (as defined in this Court’s orders) relating to the audit of Maricopa County’s
5 2020 election results conducted by Cyber Ninjas and its subvendors; and (3) order Cyber
6 Ninjas to preserve all communications, documents and records that relate in any way to the
7 Arizona audit pending production of the public records in its possession. A proposed form of
8 order is submitted herewith.

9 The parties request that the Court accelerate its decision on this joint request.

10 **I. Factual and Procedural Background**

11 In April 2021, American Oversight sent its first set of public records requests to
12 Defendants seeking records and communications related to the conduct of the audit, including
13 records in the possession of its agents, contractors and subcontractors. On May 19, American
14 Oversight filed its Verified Complaint challenging Defendants’ failure to produce records in
15 the possession of Cyber Ninjas and other agents.

16 In its minute entry dated July 15, 2021, this Court ruled, inter alia, that “Cyber Ninjas
17 and the subvendors are clearly agents of the Senate Defendants”; that “any and all documents
18 with a substantial nexus to the audit activities are public records”; and that the “Senate
19 Defendants must demand the records from CNI and the subvendors or invoke the
20 indemnification clause of the contract” between Cyber Ninjas and Defendants.

21 On August 2, 2021 this Court ordered “that the Senate Defendants comply with A.R.S.
22 § 39-121 et seq., and immediately provide AO with access to (or copies of)” the public records
23 in the custody of Cyber Ninjas. Senate Defendants have not produced the public records
24 relating to the audit that are in the custody of Cyber Ninjas because Cyber Ninjas has not
25 provided those public records to the Senate for production.

1 There is reason to believe that Cyber Ninjas possesses—but has not produced—public
2 records that should be produced pursuant to this Court’s August 2 Order. On August 19, 2021
3 Cyber Ninjas represented to Judge Hannah of the Arizona Superior Court that it had “records
4 of around sixty thousand digital communications (emails, text messages, etc.) in its system
5 since November [and its] audit is ongoing; and so ‘communications regarding the performance,
6 funding and/or staffing of the Audit’ continue to occur . . .”. Exhibit B, Cyber Ninjas’
7 Response to Appl. for OSC at 3, No. LC2021-000180. Similarly, on August 31, 2021 Cyber
8 Ninjas stated in its Petition for Special Action filed with the Arizona Court of Appeals (at 1) in
9 that it possessed “around sixty thousand (60,000) documents” relating to the audit. On
10 September 15, 2021, during oral argument on Cyber Ninjas’ motion to stay the production
11 order entered in matter No. LC2021-000180, its counsel represented to the Arizona Court of
12 Appeals that Cyber Ninjas would review the approximately 60,000 audit-related documents in
13 its possession and complete production to the Senate within 30 days.

14 The Senate Defendants have been unable to obtain the public records possessed by
15 Cyber Ninjas. On September 14, 2021, following Defendants’ unsuccessful effort to obtain
16 special action relief in this case, the Senate Defendants demanded that Cyber Ninjas provide
17 the public records possessed by Cyber Ninjas and its subvendors. [Exhibit C, 09/14/21 letter
18 from K. Fann to D. Logan]

19 On September 17, 2021, Cyber Ninjas responded that it would not provide any records
20 in the immediate future, that it had no legal obligation to provide records at all, and that the
21 Senate supposedly already had “all records that are reasonably necessary or appropriate to
22 maintain an accurate knowledge of activities concerning the 2020 Maricopa County election
23 audit.” [Exhibit D, 09/17/21 email from J. Wilenchik to K. Langhofer] In short:

- 24 • Cyber Ninjas claimed to have no “legal obligation” to produce documents,
25 so any production would be done “out of goodwill”;

- 1 • Cyber Ninjas claimed not to understand what was meant by the phrase
2 “substantial nexus to the audit;”
- 3 • Cyber Ninjas said would not provide internal emails about “its own contractual
4 relationship with the Senate or its own performance of its contract with the
5 Senate”;
- 6 • Cyber Ninjas said would not provide its communications with those funding the
7 audit;
- 8 • Cyber Ninjas said it would not provide information about those staffing the audit;
- 9 • Cyber Ninjas said nothing about whether it or its subcontractors had preserved
10 and would produce text messages; and
- 11 • Cyber Ninjas said it would not produce “all records that are reasonably necessary
12 or appropriate to maintain an accurate knowledge of activities concerning the
13 2020 Maricopa County election audit”¹

13 (Exhibit D, 09/17/21 email from J. Wilenchik to K. Langhofer)

14 Notwithstanding its repeated claims that it possessed approximately 60,000 records
15 relating to the audit, Cyber Ninjas has provided only approximately 300 documents to the
16 Senate Defendants for review and production. Of those, approximately 185 were produced to
17 the public reading room by the Senate Defendants.

18 On October 26, 2021 the Senate Defendants advised Cyber Ninjas that its inadequate
19 response to the September 14 demand letter placed it in breach of the Master Services
20 Agreement between the parties. The Senate Defendants reiterated their demand for all public
21 records relating to the audit. [Exhibit E, 10/26/21 letter from K. Fann to D. Logan]

22 Even after receiving the Senate’s October 26 letter, Cyber Ninjas did not produce
23 additional documents. Instead, it rejected any legal obligation to do so, advising that this
24

25 ¹ The Senate has always represented to this Court that it does not possess communications
26 between/among CNI and subcontractors, audit funders, and others except in the very few
instances when it was copied.

1 Court’s ruling that Cyber Ninjas possessed public records was “transparently erroneous”
2 (notwithstanding that the Court of Appeals found otherwise). [Exhibit F, 10/28/21 D. Logan
3 letter to K. Fann.]

4 Cyber Ninjas’ CEO Doug Logan stated in his October 28, 2021 letter to Senate
5 President Fann that “I do not know, or have any way of knowing, how many of” the total
6 number of records possessed by Cyber Ninjas have “a substantial nexus to the Senate’s audit.”
7 [*Id.* at 1.] But Mr. Logan made clear that Cyber Ninjas had not reviewed its documents to
8 ascertain which had a “substantial nexus” to the audit, and had no intention of doing so: “to
9 determine which documents have a ‘substantial nexus’ to the audit, my company would have
10 to review all ten thousand of those documents.” [*Id.*]

11 On October 28, 2021 counsel for Cyber Ninjas represented to Judge Hannah in the
12 Arizona Superior Court that the total number of documents held by the company during the
13 time period relevant to the audit was somewhere in the range of 60,000 to 10,000, and that
14 these had not been reviewed to determine which of them had a substantial nexus to the audit.
15 [Exhibit G, 10/28/21 Hrn’g Transcript in *Phoenix Newspapers, Inc. v. Arizona State Senate et*
16 *al*, No. LC2021-000180, at 22]

17 On November 9, 2021, immediately after losing its own special action in the Court of
18 Appeals, Cyber Ninjas’ CEO Douglas Logan declared under penalty of perjury that Cyber
19 Ninjas “has produced to the Senate all of its records with a ‘substantial nexus’ to” the audit
20 report provided to the Senate, other than four limited categories of documents listed on a log
21 from his counsel.² [Exhibit H, 11/09/21 letter from J. Wilenchik and Declaration of D. Logan]
22 In this Declaration, Logan asserted that he had “made an assessment of” Cyber Ninjas’ records
23

24 ² Those four categories were (i) images of actual ballots, (ii) images of
25 voting/tabulation/equipment machines, (iii) ballot-tracking video footage, and (iv) partially
26 redacted names on emails). [Exhibit H, 11/09/21 letter from J. Wilenchik and Decl. of D.
Logan]

1 to determine which had a substantial nexus to the audit, even though his October 28 letter to
2 President Fann stated that “I do not know, or have any way of knowing, how many of” Cyber
3 Ninjas’ tens of thousands of records have “substantial nexus to the Senate’s audit.” [Exhibit G,
4 10/28/21 D. Logan letter to K. Fann, at 1.]

5 Mr. Logan and Cyber Ninjas have not explained which documents—and how many—of
6 the 60,000 documents in Cyber Ninjas possession were purportedly reviewed by Mr. Logan in
7 connection with his Declaration.

8 On November 30, 2021, at a hearing before Judge Hannah in matter No. LC2021-
9 000180, counsel for Cyber Ninjas conceded that notwithstanding Logan’s Declaration, Cyber
10 Ninjas possesses, but has not produced, various audit-related materials, including emails
11 between Cyber Ninjas and its subvendors, invoices, and contracts with the subvendors.
12 [Exhibit I, Tr. at 14-15, 33]. At that same hearing, Cyber Ninjas’ counsel represented that
13 Cyber Ninjas “is insolvent.” [11/30/21 Tr. at 23]

14 At this juncture, it is apparent that the relief ordered by this Court—production of public
15 records in the custody of Cyber Ninjas—can be best effectuated by joining Cyber Ninjas as a
16 party. This joint motion seeks to accomplish just that.

17 **II. Legal Argument**

18 Rule 19 and Rule 20 provides two separate bases for joinder, and Rule 2 of the Rules of
19 Procedure for Special Actions provides yet another. Rule 19(a)(1)(A) requires a party to be
20 joined, where feasible, if “in that person’s absence, the court cannot accord complete relief
21 among existing parties.” The purpose of the Rule is “to ensure the joinder of all interested
22 parties in a single action and avoid a multiplicity of litigation.” 2B Ariz. Prac., Civil Rules
23 Handbook, R. 19 (2021).

24 Rule 20(b)(2) provides:

25 Persons may be joined in one action as defendants if:
26

1 (A) any right to relief is asserted against them jointly, severally, or in the
2 alternative with respect to or arising out of the same transaction, occurrence, or
3 series of transactions or occurrences; and
(B) any question of law or fact common to all defendants will arise in the action.

4 Rule 20 permits the joinder of defendants in a variety of contexts, including agents and
5 their principals. *See, e.g., Atchison v. Woodmen of the World Ins. Soc.*, 982 F. Supp. 835, 840
6 (S.D. Ala. 1997) (finding Rule 20 joinder permissible where the nondiverse defendants against
7 whom claims were asserted were agents of the defendant who committed fraud); *Schuetter v.*
8 *Esker*, No. 19-CV-942-JPG-RJD, 2019 WL 6173822, at *3 (S.D. Ill. Nov. 20, 2019)
9 (defendant was properly joined under Rule 20 where she was an agent and employee of
10 another defendant and the claims against her involved common questions of law and fact).

11 Finally, Rule 2(b) of the Rules of Special Action Procedure provides: “[The court] may
12 allow other persons to intervene subject to the provisions of Rule 24 of the Rules of Civil
13 Procedure; or may order their joinder as parties . . .” Thus, joinder of Cyber Ninjas is
14 appropriate under Rule 2(b): “nothing prevents a party from joining a custodian of records as a
15 party to a statutory special action under the PRL *Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA
16 21-0173, ¶ 16, 2021 WL 5183944 (Ariz. App. Nov. 9, 2021) (citing Ariz. R. P. Spec. Act.
17 2(a)(1), (b)).

18 In short, Cyber Ninjas is properly joined because it is the custodian of certain documents
19 that may constitute public records, and it has not produced them. *Id.* at ¶ 17 (“Cyber Ninjas was
20 properly joined as a necessary party in PNI’s special action because . . . as an agent of the Senate,
21 it is alleged to be the sole custodian of records pertaining to the audit that are subject to disclosure
22 under the PRL. In other words, joinder of Cyber Ninjas is necessary only because the Senate
23 does not have the public records that are in Cyber Ninjas’ custody.”).³

24 Joinder under any of these rules is appropriate here.

25 ³ The Senate Defendants take no position on the legal correctness of Cyber Ninjas’ purported
26 applications of the definition of the term “public record” to audit-related materials.

Exhibit A

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9 **ARIZONA SUPERIOR COURT**
10 **MARICOPA COUNTY**

11 AMERICAN OVERSIGHT,) No. CV2021-008265
12)
13 Plaintiff,)
14 v.) **~~VERIFIED-SECOND~~ AMENDED**
15) **SPECIAL ACTION COMPLAINT**
16 KAREN FANN, in her official capacity as) (Tier 2)
17 President of the Arizona Senate; WARREN)
18 PETERSEN, in his official capacity as Chairman) (Assigned to the Hon. Michael Kemp)
19 of the Arizona Senate Committee on Judiciary;)
20 ARIZONA SENATE, a branch of the State of)
21 Arizona; CYBER NINJAS INC., a foreign)
22 corporation,)
23 Defendants, and)
24 CYBER NINJAS, INC.,)
25 Real Party in Interest.)

23 Plaintiff American Oversight brings this statutory special action against Defendants
24 Karen Fann, Warren Petersen, and the Arizona Senate (collectively, “Senate Defendants”) to
25 require their compliance with Arizona’s Public Records Law. Cyber Ninjas, Inc. (“Cyber
26 Ninjas”) is joined as a Real Party in Interest to this ~~Verified-Second Amended~~ Special Action

1 Complaint for several reasons. First, events that have occurred since the Verified Amended
2 Special Action Complaint was filed on July 30, 2021 indicate that this Court cannot accord
3 complete relief in the absence of Cyber Ninjas. Second, and in the alternative, Plaintiff asserts
4 a right to relief jointly against Cyber Ninjas and the Senate Defendants because Cyber Ninjas is
5 the agent of the Senate Defendants. Cyber Ninjas possesses certain public records that the Senate
6 Defendants are statutorily obligated to maintain and that the Senate Defendants have been
7 ordered to produce in this matter. The Senate Defendants have made demand on Cyber Ninjas
8 for those public records, but Cyber Ninjas has failed to provide them. Accordingly, Cyber Ninjas
9 is properly joined as a Real Party in Interest pursuant to Rule 19(a) and/or Rule 20(b) and Rule
10 21 of the Arizona Rules of Civil Procedure, as well as Rule 2(b) of the Arizona Rules of
11 Procedure for Special Actions.

12 In addition, Cyber Ninjas is properly joined because it is the custodian of certain public
13 records, as was recently held in *Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA 21-0173, ¶ 17, 2021
14 WL 5183944 (Ariz. App. Nov. 9, 2021) (“Cyber Ninjas was properly joined as a necessary party
15 in PNI’s special action because . . . as an agent of the Senate, it is alleged to be the sole custodian
16 of records pertaining to the audit that are subject to disclosure under the PRL. In other words,
17 joinder of Cyber Ninjas is necessary only because the Senate does not have the public records
18 that are in Cyber Ninjas’ custody.”)

19 American Oversight seeks records relating to the Senate Defendants’ audit of the 2020
20 general election results in Maricopa County. Plaintiff’s initial Verified Complaint sought records
21 that were requested in multiple records requests filed as early as April 6, 2021, including records
22 that were created, sent, and received by the Senate Defendants’ agents and were expressly
23 withheld by the Senate Defendants on the basis that they were not in their possession, custody,
24 and control.

25 ~~The~~is Amended Verified Special Action Complaint ~~sought~~teeks the immediate production
26 of public records that were requested on April 6, 2021, and which Defendants promised to

1 produce, but which still have not been produced nearly four months after they were requested.
2 Between April 6 and May 19, when this case was filed, Defendants produced only a few records
3 totaling less than 60 pages in response to the April 6 requests. Beginning on May 20, the day
4 after American Oversight sued, and through July 1, Defendants produced approximately 900
5 pages of records responsive to the April 6, 2021 requests, but the majority of the requests remain
6 unfilled. And since July 1, 2021, the Senate Defendants have produced only a single two-page
7 document responsive to those requests, even though at least thousands of pages—likely many
8 tens of thousands of pages—of responsive documents are in their possession. Adding insult to
9 injury, the Senate Defendants refuse to produce a log of responsive documents that have been
10 withheld, or confirm that their agents are preserving responsive records.

11 As this Court noted in its minute entry issued on July 15, 2021, “[i]t is difficult to conceive
12 of a case with a more compelling public interest demanding public disclosure and public
13 scrutiny.” And the need for prompt production of public records is acute because the Senate
14 Defendants and their agents are issuing interim “updates” about the audit containing
15 misinformation, which are then widely disseminated around the country, in large part by those
16 who are apparently providing millions of dollars to those who are conducting the audit and
17 issuing interim “updates.” All the while, the Senate Defendants refuse prompt access to the
18 public records necessary to allow members of the public to assess basic information about the
19 audit, those who are conducting it, those who are paying for it, and the procedures being
20 employed.

21 The records at issue here will shed light on, among other things: the selection of Cyber
22 Ninjas, Inc. to conduct the audit; the planning, execution and procedures of the audit;
23 communications between and among the Senate Defendants, Cyber Ninjas and the various
24 subcontractors performing work on the audit; funding of the audit; communications relating to
25 the Senate’s audit liaisons (Ken Bennett and Randy Pullen); and the overall integrity of the audit
26 process. The public’s right to see these public records is significant and immediate intervention

1 by this Court is required to enforce compliance with Arizona’s Public Records Law. The joinder
2 of Cyber Ninjas as a party will facilitate the production of the public records at issue here.

3 **Parties, Jurisdiction and Venue**

4 1. Plaintiff American Oversight is a non-partisan, nonprofit organization dedicated
5 to ensuring government transparency at all levels. American Oversight has developed a
6 significant focus on voting rights and election oversight, including in Arizona, and seeks to
7 ensure that the public has access to government records that enable them to monitor the
8 performance and priorities of their public officials.

9 2. As detailed further below, American Oversight has sought public records from the
10 Senate Defendants related to the Arizona Senate’s ongoing audit of Maricopa County’s 2020
11 general election results.

12 3. The Arizona Senate has repeatedly claimed that the audit is being overseen by
13 Senate liaisons Ken Bennett and Randy Pullen and conducted by Cyber Ninjas, Inc. under a
14 contractual agreement with the Arizona Senate. The Arizona Senate has also repeatedly claimed
15 that the audit furthers a governmental function, bestowed on the Senate by the Arizona
16 Constitution, of enacting laws to “secure the purity of elections and guard against abuses of the
17 elective franchise.” Ariz. Const. art. VII, § 12.

18 4. The audit has been financed in part by Arizona tax dollars.

19 5. Because the Arizona Senate has outsourced its public function to an outside entity
20 using public funds, the Senate Defendants have a duty to keep, preserve, and provide access to
21 public records related in any way to the exercise of that function.

22 6. Defendant Karen Fann is named in her official capacity as President of the Arizona
23 Senate and is an “officer” under A.R.S. § 39-121.01(A)(1).

24 7. Defendant Warren Petersen is named in his official capacity as Chairman of the
25 Arizona Senate Committee on Judiciary and is an “officer” under A.R.S. § 39-121.01(A)(1).

26

1 8. Defendant Arizona Senate is a branch of the State of Arizona and a “public body”
2 under A.R.S. § 39-121.01(A)(2). *See* Ariz. Op. Att’y Gen. No. I78-76 (Apr. 18, 1978).

3 9. Defendant Cyber Ninjas is an agent of the Senate Defendants, as this Court held
4 at page 3 of its minute entry entered in this action on July 15, 2021: “CNI [Cyber Ninjas] and
5 the subvendors are clearly agents of the Senate Defendants.”

6 ~~8-10.~~ Cyber Ninjas has custody and control of certain public records that the Senate
7 Defendants are obligated to maintain and preserve pursuant to A.R.S. § 39-121.01(B).

8 9-11. Jurisdiction over this action is proper pursuant to A.R.S. §§ 39-121.02 and 12-123,
9 as well as Rule 4(a) of the Arizona Rules of Procedure for Special Actions.

10 10-12. Venue is proper pursuant to A.R.S. § 12-401 and Rule 4(b) of the Arizona Rules of
11 Procedure for Special Actions because the Senate Defendants work in and took official actions
12 relevant to this dispute in Maricopa County.

13 11-13. Because this is a statutory special action and a show cause procedure is being used,
14 “the court shall set a speedy return date” on Plaintiff’s Second Application for Order to Show
15 Cause. Ariz. R. P. Spec. Action 4(c); *see also* Ariz. R. Civ. P. 7.3(a) (authorizing a superior court
16 judge to “issue an order requiring a party to show cause why the party applying for the order
17 should not have the relief therein requested”).

18 Background

19 **The 2020 Election**

20 12-14. Arizona held a general election on November 3, 2020. During that election, over
21 3.4 million Arizonans cast ballots.

22 13-15. Joe Biden won the presidential election in Arizona.

23 14-16. President Biden won Maricopa County—which accounted for approximately 60%
24 of the total votes cast in Arizona’s general election—with a vote margin of 45,109 votes.

1 ~~15-17.~~ Maricopa County conducted a hand count audit and an independent audit of the
2 tabulation machines and software, both of which confirmed that the reported election results
3 were accurate.

4 ~~16-18.~~ In the post-election period, at least seven cases were filed challenging the results
5 of the presidential election in Arizona, including a formal election contest.

6 ~~17-19.~~ All seven cases concluded that the election was secure, fair, and conducted in full
7 accordance with Arizona law. *See Aguilera v. Fontes*, No. CV2020-014083 (Maricopa County
8 Super. Ct., Nov. 7, 2020) (voluntarily dismissed); *Donald J. Trump v. Hobbs*, No. CV2020-
9 014248 (Maricopa County Super. Ct., Min. Entry Order, Nov. 13, 2020) (dismissing complaint
10 with prejudice after evidentiary hearing); *Arizona Republican Party v. Fontes*, No. CV2020-
11 014553 (Maricopa County Super. Ct., Min. Entry Order, Nov. 18, 2020) (dismissing complaint
12 with prejudice and ordering Secretary of State, who had requested fees, could file a motion
13 pursuant to A.R.S. § 12-349 (frivolous litigation statute)); *Aguilera v. Fontes II*, No. CV2020-
14 014562 (Maricopa County Super. Ct., Min. Entry, Nov. 29, 2020) (after conducting evidentiary
15 hearing, “dismissing with prejudice” the action “for failure to state a claim upon which relief can
16 be granted; or alternatively, denying the relief sought by Plaintiffs given their failure to produce
17 evidence demonstrating entitlement to same”); *Kelli Ward v. Jackson*, No. CV2020-015285
18 (Maricopa County Super. Ct., Min. Entry Ruling, Dec. 4, 2020) (dismissing complaint after
19 evidentiary hearing, and “confirming the election,” because the court found that the evidence did
20 not show fraud, misconduct, illegal votes, or an erroneous vote count), *affirmed*, No. CV-20-
21 0343-AP/EL (Ariz. S. Ct. Dec. 8, 2020); *Bowyer, et al., v. Ducey, et al.*, No. CV-20-02321-PHX-
22 DJH, Doc. 84 (D. Ariz., Dec. 9, 2020) (dismissed and holding that “Plaintiffs failed to provide
23 the Court with factual support for their extraordinary claims[.]”); *see also Burk v. Ducey*, No.
24 S1100CV202001869 (Pinal County Super. Ct., Dec. 15, 2020) (dismissed), *affirmed*, No. CV20-
25 0349-AP/EL (Ariz. S. Ct. Jan. 5, 2021).

1 ~~18-20~~. The Arizona Supreme Court confirmed Arizona’s presidential election result,
2 holding that there was no “evidence of ‘misconduct,’ ‘illegal votes’ or that the Biden Electors
3 ‘did not in fact receive the highest number of votes for office,’ let alone establish any degree of
4 fraud or a sufficient error rate that would undermine the certainty of the election results.” *Ward*
5 *v. Jackson*, CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020), *cert. denied*, 20-
6 809, 2021 WL 666437 (U.S. Feb. 22, 2021).

7 **The Arizona Senate’s “Audit”**

8 ~~19-21~~. Notwithstanding the prior audits and the multiple election challenges, the Arizona
9 Senate announced plans to further probe the outcome of the election. Several prominent Senators
10 publicly stated (without any credible evidence) that they believed the election had been tampered
11 with to ensure a Biden victory.

12 ~~20-22~~. On December 15, 2020, the Senate issued legislative subpoenas to the Maricopa
13 County Board of Supervisors requesting custody of tabulation equipment, software, ballots, and
14 other election data. The County objected that the subpoenas exceeded the scope of the Senate’s
15 statutory power, and three court cases ensued. *Maricopa County I*, CV2020-016840 (Maricopa
16 Cty. Super. Ct., Dec. 18, 2020); *Fann et al. v. Maricopa Cty. Bd. of Supervisors*, No. CV2020-
17 016904 (Maricopa Cty. Super. Ct., Dec. 21, 2020); *Maricopa Cty. v. Fann*, No. CV2021-002092
18 (Maricopa Cty. Super. Ct., Feb. 5, 2021) (“*Maricopa County IP*”).¹

19 ~~21-23~~. On January 12, 2021, President Fann and Senator Petersen, on behalf of the
20 Arizona Senate and the Senate Committee on Judiciary, served legislative subpoenas on the
21 Maricopa County Board of Supervisors, the Maricopa County Recorder, and the Maricopa
22 County Treasurer (the “Subpoenas”). A true and correct copy of the Subpoenas is attached as
23 Exhibit 1.

24
25 _____
26 ¹ Matters CV2020-016840 and CV2021-002092 were subsequently consolidated. *See Maricopa County I*, No. CV 2020-016840, Dkt. Code 053 (Feb. 10, 2021).

1 ~~22-24~~. The Senate asserted in litigation that its audit serves an “important” and “valid
2 legislative purpose.” *Maricopa County I*, Fann & Petersen’s Motion for Judgment on the
3 Pleadings, at pp. 2, 8 (Feb. 22, 2021). A true and correct copy of this Motion is attached as
4 Exhibit 2.

5 ~~23-25~~. The Senate argued that its authority to issue subpoenas related to the audit is
6 incidental to its general lawmaking power and is particularly “salien[t]” in light of the “Arizona
7 Constitution’s express directive that the Legislature must enact ‘laws to secure the purity of
8 elections and guard against abuses of the elective franchise.’” *Id.* at p. 8 (citing the “Purity of
9 Elections Clause,” Ariz. Const. art. VII, § 12).

10 ~~24-26~~. The Senate contends that the audit will allow it to “evaluate the accuracy and
11 efficacy of existing vote tabulation systems and the competence of county officials in performing
12 their statutory duties, with an eye to enacting potential reforms.” *Id.*; *see also* Fann &
13 Farnsworth’s Motion for Preliminary Injunction, at p. 9 (Dec. 29, 2020), a true and correct copy
14 of which is attached as Exhibit 3; Fann & Petersen’s Response to the Maricopa County Parties’
15 Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction, at p. 13
16 (Jan. 11, 2021), a true and correct copy of which is attached as Exhibit 4.

17 ~~25-27~~. In sum, the Senate contends that it is conducting the audit in connection with the
18 exercise of its legislative constitutional powers and has stated that the information and records it
19 obtains from the audit will be relied upon to evaluate whether “reforms” are appropriate.

20 ~~26-28~~. On February 12, 2021, Judge Timothy Thomason found that the Senate’s
21 Subpoenas were valid and enforceable. *Maricopa County I*, No. CV2020-016840, Dkt. Code
22 901 (Feb. 25, 2021). A true and correct copy of Judge Thomason’s order is attached as Exhibit 5.

23 ~~27-29~~. Instead of taking custody of the materials it subpoenaed and conducting the audit
24 that it claimed was part of its “legislative purpose,” the Senate hired others to do its work.

25 ~~28-30~~. On March 31, 2021, President Fann announced that “[a]fter months of
26 interviewing various forensic auditors,” the Senate selected four out-of-state private companies,

1 led by Cyber Ninjas, Inc., to conduct the audit. The press release promised that the audit would
2 “be done in a transparent manner. . . .” Arizona Senate Republicans Press Release, “Arizona
3 Senate hires auditor to review 2020 election in Maricopa County.” (Mar. 31, 2021), attached
4 hereto as Exhibit 6.

5 ~~29-31~~. Before being selected to lead the audit, Cyber Ninjas’ CEO, Doug Logan, made
6 public statements questioning the integrity of the 2020 general election—and the integrity of
7 Maricopa County’s results, specifically.

8 ~~30-32~~. Logan drafted a document for U.S. Senators who planned to object to the
9 certification of the 2020 general election results on Jan. 6, 2021, according to multiple news
10 outlets. That document reportedly promoted various disproven or baseless conspiracy theories
11 about the election, including claims against Dominion Voting Systems—the company whose
12 ballot tabulation machines Cyber Ninjas is tasked with inspecting.

13 ~~31-33~~. In addition, Logan has tweeted or re-tweeted several statements claiming that
14 President Biden’s victory was the product of fraud—including one retweet specifically about the
15 Maricopa County election results.

16 ~~32-34~~. Specifically, on Dec. 14, 2020, Logan retweeted a response to a tweet by Arizona
17 Republican Party Chair Kelli Ward in which she questioned the validity of 200,000 Maricopa
18 County ballots. The re-tweet said “Hint: After auditing the adjudicated ballots and corresponding
19 AuditMarks, you may discover Trump got 200k more votes than previously reported in
20 Arizona.”

21 ~~33-35~~. Despite all this, or perhaps because of it, President Fann retained Cyber Ninjas to
22 conduct the audit on behalf of the Senate.

23 ~~34-36~~. Beyond retaining Cyber Ninjas, President Fann appointed former Arizona
24 Secretary of State Ken Bennett to serve as the Senate’s “liaison” to Cyber Ninjas and the other
25 third-party contractors conducting the audit. Randy Pullen was later appointed to also serve as a
26 spokesperson and/or liaison.

1 ~~35-37.~~ The Senate agreed to compensate Cyber Ninjas \$150,000 for its work. *See* Cyber
2 Ninjas Statement of Work (a true and correct copy of which is attached as Exhibit 7) and Master
3 Services Agreement (a true and correct copy of which is attached as Exhibit 8).

4 ~~36-38.~~ Cyber Ninjas is contractually obligated, in the event of litigation, to “fully
5 cooperate with the [Senate] by providing information or documents requested by the
6 Indemnifying Party that are reasonably necessary to the defense or settlement of the claim.”
7 Exhibit 8, § 12.3.

8 ~~37-39.~~ Cyber Ninjas is also contractually obligated to “comply with all applicable laws,
9 rules and regulations in delivering the Services (including without limitation any privacy, data
10 protection and computer laws).” *Id.* § 15.4.

11 ~~38-40.~~ Because the Senate’s payment of \$150,000 of public funds to Cyber Ninjas will
12 not cover the full cost of the “audit,” unknown third parties are financing various aspects of the
13 audit, including Cyber Ninjas’ work.

14 ~~39-41.~~ For example, on April 7, 2021, attorney Lin Wood—known for his support of the
15 “Stop the Steal” movement and adherence to the “QAnon” conspiracy theory—posted on
16 Telegram pledging a donation to fund the Audit and asked others to donate. He added: “When
17 the fraud is finally revealed in one state, just watch the other states fall like dominoes!” Lin
18 Wood, Telegram (Apr. 7, 2021), <https://t.me/linwoodspeakstruth/1400>.

19 ~~40-42.~~ On April 9, 2021, Christina Bobb, a host on far-right media outlet “One America
20 News,” tweeted about the Audit as follows: “Our goal is to fund \$150,000 to cover expenses of
21 the audit, which will ensure its complete scope of work. We’re \$10K away from our goal.”
22 Christina Bobb, Twitter (Apr. 9, 2021),
23 https://twitter.com/christina_bobb/status/1380562776918200320.

24 ~~41-43.~~ In addition, an entity known as “The American Project” stated its intent to raise
25 \$2.8 million to help finance the audit and claimed in May 2021 to have already raised \$1.5
26 million from unidentified donors. Caitlyn Huey-Burns, *The Arizona GOP’s Maricopa County*

1 *audit: What to know about it*, CBS News (May 9, 2021),
2 <https://www.cbsnews.com/news/arizona-audit-2020-election-recount-gop-maricopa-county/>.

3 42-44. On information and belief, the Senate Defendants’ agents are facilitating and
4 assisting with fundraising efforts to raise money from private donors to fund the audit.

5 43-45. On July 29, 2021, four months after the audit began, Senate Defendants produced
6 a single document—a press release from “The Thomson Group,” an entity with unknown
7 affiliation to Senate Defendants, Cyber Ninjas, or any other subcontractor/agent involved in the
8 audit—disclosing several funders of the audit. The document does not provide any detail about
9 the funders, nor does it state whether any of those entities/individuals expect anything in return
10 for their financial contributions.

11 44-46. The press release issued on July 28, 2021, quotes Cyber Ninjas CEO Doug Logan
12 as stating that “our sponsors have raised and provided over \$5 million.” The document goes on
13 to say that “[i]n addition to their financial support, the America Project, Voices and Votes and
14 the DePerno Team (behind Election Integrity Funds for the American Republic, EIFFTAR) have
15 **also provided operational support and advice pivotal in executing the audit.**” (Emphasis
16 added.) Documents relating to the “operational support and advice” provided by these
17 organizations are just one example of the types of records requested months ago by American
18 Oversight but not provided by the Defendants.

19 45-47. The July 28, 2021 press release stated that \$5,711,514.43 to fund the audit thus far
20 had been raised from five sources: The America Project (\$3,250,000); Americas Future
21 (\$976,514.43); Voices and Votes (an entity whose President is Christina Bobb) (\$605,000);
22 Defending the Republic (\$550,000); and LDFFTAR/EIDDTAR (\$280,000). Whether that
23 information is accurate, the identities of those providing the money funneled through these
24 organizations, how that money was spent, any agreements relating to this funding, the role played
25 by those funding the audit and other important information about the funding sources was
26

1 requested months ago by American Oversight but has not been provided by the Senate
2 Defendants.

3 ~~46-48.~~ The Arizona Senate’s audit began on April 22, 2021 at Veterans Memorial
4 Coliseum in Phoenix.

5 ~~47-49.~~ One day earlier, the Arizona Democratic Party and Maricopa County Supervisor
6 Steve Gallardo sued to enjoin the audit, alleging that the Arizona Senate and its contractors were
7 proceeding in violation of Arizona law and did not have adequate procedures in place to protect
8 ballots, voting equipment, and voters’ personal information. *Arizona Democratic Party, et al. v.*
9 *Fann, et al.*, CV2020-006646 (“ADP”).

10 ~~48-50.~~ In the ADP litigation, President Fann and Senator Petersen repeatedly asserted that
11 the audit—as performed by its contractor—was part of a fundamental legislative (and thus
12 public) function. *See, e.g.*, Senate Defendants’ Combined Response to Dismiss and Response to
13 Plaintiffs’ Motion for Temporary Restraining Order or Preliminary Injunction (Apr. 25, 2021)
14 at 2 (alleging that the Senator-defendants were immune because the case involved “the discharge
15 of their official duties”). A true and correct copy of this filing is attached as Exhibit 9.

16 ~~49-51.~~ President Fann and Senator Petersen told the Court that, through the audit, the
17 Arizona Senate as a “legislative body is conducting an investigation evaluating materials
18 obtained by indisputably valid and lawful legislative subpoena.” *Id.* at 2.

19 ~~50-52.~~ President Fann and Senator Petersen also said that “[a]ny contention that the audit
20 is not in furtherance of a bona fide legislative activity is foreclosed by Judge Thomason’s express
21 finding that the subpoenas through which the audit materials were obtained advanced the valid
22 legislative purpose of ‘evaluat[ing] the accuracy and efficacy of existing vote tabulation systems
23 and competence of county officials in performing election duties, with an eye to introducing
24 possible reform proposals.’”

25 ~~51-53.~~ In that same filing, President Fann and Senator Petersen described Mr. Bennett and
26 Cyber Ninjas as “[t]he Senate’s authorized agents and vendor” who are “engaged in the

1 collection, review and analysis of data and information at the behest and on the behalf of elected
2 Arizona legislators to facilitate the quintessential lawmaking function of crafting legislative
3 proposals.” *Id.* at 17.

4 ~~52-54.~~ The *ADP* litigation resulted in the public release of certain limited public records
5 related to the conduct of the audit and was dismissed with prejudice after the parties entered into
6 a public settlement agreement. A true and correct copy of the settlement agreement is attached
7 as Exhibit 10.

8 ~~53-55.~~ On May 5, 2021, the United States Department of Justice expressed concerns about
9 the conduct of the audit (“DOJ Letter”). Among other things, the DOJ Letter to Senator Fann
10 articulated a concern that the materials obtained in response to the Subpoenas were “no longer
11 under the ultimate control of state and local elections officials.” A true and correct copy of the
12 DOJ Letter is attached as Exhibit 11.

13 ~~54-56.~~ President Fann responded to the DOJ Letter (“Fann Response”) by asserting that
14 the Senate retained ultimate control over the audit. She also stated that she is “in regular
15 communication with Secretary Bennett and remain[s] fully apprised of all material developments
16 in the audit.” A true and correct copy of the Fann Response is attached as Exhibit 12.

17 ~~55-57.~~ The audit has been the subject of intense local and national media coverage and is
18 a matter of significant public interest.

19 ~~56-58.~~ There is a compelling public interest in immediately obtaining information related
20 to the conduct of the audit.

21 **American Oversight’s Public Records Requests About the Audit**

22 ~~57-59.~~ On April 6, 2021, American Oversight sent five public records requests to
23 President Fann seeking various records related to the audit. True and correct copies of the
24 April 6, 2021 records requests are attached as Exhibits 13, 14, 15, 16, and 17. Five identical
25 requests were sent to Senator Petersen and are collected in a single exhibit, attached as Exhibit
26

1 18. The 10 requests to Senators Fann and Peterson are referred to hereafter as “the April 6, 2021
2 Requests.”

3 ~~58-60~~. On April 9, 2021, American Oversight sent a public records request to Cyber
4 Ninjas (“Cyber Ninjas Request”). A true and correct copy of the Cyber Ninjas Request is
5 attached as Exhibit 19.

6 ~~59-61~~. On April 30, 2021, American Oversight sent a public records request to the
7 Arizona Senate—through Mr. Moore—that requested the same documents set forth in the Cyber
8 Ninjas Request (the “Senate Request”). A true and correct copy of the Senate Request is attached
9 as Exhibit 20.

10 ~~60-62~~. On May 4, 2021, Mr. Moore responded to the Senate Request by stating that
11 “[t]here are no more responsive documents to provide at this time because the Senate doesn’t
12 have custody, control or possession of any of the records requested.” A true and correct copy of
13 Mr. Moore’s May 4 email to American Oversight is attached as Exhibit 21.

14 ~~61-63~~. On May 10, 2021, American Oversight sent a letter to President Fann, Senator
15 Petersen, and the Arizona Senate to clarify and supplement its prior public records requests and
16 confirm that Senate Defendants were refusing to produce responsive records in the possession
17 of Cyber Ninjas and Mr. Bennett (“Supplemental Request”). A true and correct copy of the
18 Supplemental Request is attached as Exhibit 22.

19 ~~62-64~~. In the Supplemental Request (at 2), American Oversight noted that “from prior
20 correspondence with the Arizona Senate’s public records attorney, Mr. Norm Moore, we
21 understand that the Arizona Senate takes the position that documents and communications
22 related to the conduct of the audit that are not in your physical possession but are held instead
23 by Cyber Ninjas and/or Mr. Bennett are not public records (or are not within your custody,
24 possession, or control) despite the fact that both Cyber Ninjas and Mr. Bennett are (a) serving as
25 your contractors, (b) performing legislative and public functions, and (c) being paid with public
26 funds.”

1 63-65. The Supplemental Request (at 3–4) went on to clarify the prior requests by
2 expressly requesting the following records (“Withheld Records”) from the Senate Defendants:

3 All communications . . . exchanged between former Secretary of State Ken Bennett
4 and any party engaged in the planning, preparation, or execution of the audit of the
5 November 2020 Maricopa County election results being conducted by Cyber
6 Ninjas and its subcontractors, including but not limited to: Doug Logan or anyone
7 communicating on behalf of Cyber Ninjas, Wake Technology Services, Digital
8 Discovery, CyFIR, former state legislative candidate Liz Harris, or any other
9 individual or entity engaged in work on the audit.

10 Complete copies (including any attachments) of any contract . . . or other written
11 agreement related to the planning, preparation, or execution of the audit of the
12 November 2020 Maricopa County election results being conducted by Cyber
13 Ninjas and its subcontractors. Responsive documents to this portion of this request
14 this request would include, but not be limited to, any leases for space to conduct
15 the audit, including any lease agreement following the expiration of the existing
16 lease agreement with the Veterans Memorial Coliseum on May 14, 2021; any
17 contracts, or other formal or informal agreements, with third-party security,
18 transportation, or lodging vendors or volunteers; any formal or informal
19 agreements with third parties regarding the tabulation and aggregation of audit
20 data; any formal or informal agreements with consultants, advisors, or counsel;
21 and any formal or informal agreements regarding the recruitment and training of
22 employees, contractors, or volunteers to participate in any phase of the audit.

23 All records reflecting the projected or actual costs of the audit, including but not
24 limited to: . . . records reflecting estimated costs or the budget for the audit,
25 including any expenses beyond the specified \$150,000; records reflecting the
26 collection of external funding for the audit, such as agreements with fundraisers,
any policies regarding external revenue collection, and all records of external
financial or in-kind resource contributions; and copies of all invoices, requests for
reimbursement, and payments made relating to the planning, preparation, or
execution of the audit or associated litigation.

 Any project plans or other documents detailing the steps or procedures to be
followed in each phase of the audit, including those following the expiration of the
existing agreement with the Veterans Memorial Coliseum on May 14, 2021.
Responsive documents to this portion of the request would include, but not be
limited to, any projected timelines for the completion of the audit; organizational
charts or other documents memorializing chains of custody; plans for the
accessing, storage, and handling of physical ballots, confidential voter
information, voting equipment, and voting software; explanations or analyses of
investigative techniques, including but not limited to ultraviolet inspection,
kinematic artifact detection, or analysis of paper fibers; and procedures for the
tabulation and aggregation of audit data.

1 Records relating to or referencing the “Registration and Votes Cast Phase” of the
2 audit, including records relating to work planned or completed in the “Registration
3 and Votes Cast Phase,” including but not limited to: records identifying the
4 precincts to be canvassed and any justification for the selection of those precincts;
5 logs or other records identifying those voters canvassed or selected for canvassing;
6 any scripts or other guidelines, procedures, or protocols to be used by the auditors
7 for contacting individual voters by phone, in person, or electronically; or
8 agreements with any party regarding the recruitment and training of individuals to
9 conduct canvassing.

10 *See Exhibit 22.*

11 64.66. In addition, the Supplemental Request (at 5) asked the Senate Defendants to
12 “promptly notify us if you are taking the position that responsive records are either not public
13 records or are not in your possession, custody, or control because they are in the physical
14 possession of Cyber Ninjas and/or Mr. Bennett. Mr. Moore’s prior correspondence implies this,
15 but we wish to be sure of your position.”

16 65.67. On May 14, 2021, Mr. Moore responded to counsel’s email and the parties agreed
17 to speak on the afternoon of May 17, 2021 about the Supplemental Request and the parties’
18 respective positions.

19 66.68. Later that same day, Mr. Moore responded to the Supplemental Request with an
20 email to American Oversight attaching several responsive documents that had already been made
21 public. Mr. Moore further stated that the Senate did not consider itself to have possession,
22 custody or control, and therefore would not be producing: (i) agreements between Cyber Ninjas
23 and its subcontractors; (ii) agreements between those funding the audit and those performing the
24 audit; and (iii) documents detailing the planning, preparation and execution of the audit that were
25 in the hands of Cyber Ninjas and other agents of the Senate. A true and correct copy of
26 Mr. Moore’s May 14, 2021 email to American Oversight is attached as Exhibit 23.

67.69. On the afternoon of May 17, 2021, counsel for American Oversight and a
representative of American Oversight had a telephone call with Mr. Moore. On that telephone
call, Mr. Moore confirmed that President Fann, Senator Petersen, and the Senate would not

1 produce documents in the possession, custody, and control of Mr. Bennett or Cyber Ninjas, or
2 any subcontractor performing work on the Senate’s audit.

3 ~~68-70.~~ Mr. Moore was unable to confirm whether anyone from the Senate had asked for
4 records from Cyber Ninjas or any subcontractor performing work on the Senate’s audit in
5 connection with American Oversight’s records requests. In their Answer filed July 29, 2021, at
6 ¶ 68, the Senate Defendants specified “that the Senate has not asked for records from Cyber
7 Ninjas or any subcontractor performing work on the Senate’s audit in connection with American
8 Oversight’s records requests.”

9 ~~69-71.~~ Mr. Moore was also unable to confirm in the May 17 call whether anyone from
10 the Senate had notified Mr. Bennett, Cyber Ninjas or any subcontractor performing work on the
11 Senate’s audit of the obligation to preserve records under the Public Records Law or for any
12 other reason. In their Answer filed July 29, 2021, at ¶ 69, the Senate Defendants state “that the
13 Senate has in fact advised Mr. Bennett, Mr. Pullen, and Cyber Ninjas to preserve all relevant
14 records.” Notably, the Senate did not state that it had requested that *subcontractors* preserve
15 relevant records. Moreover, the Senate has not indicated whether any of its agents have in fact
16 preserved, or agreed to preserve, relevant records.

17 ~~70-72.~~ Mr. Moore indicated on May 17 that persons other than himself may have
18 requested certain responsive documents from Mr. Bennett, but he was unable to confirm if or
19 when such request was made, and he was unable to identify what, if anything, had been
20 requested, and (significantly) whether any documents possessed by Mr. Bennett would be
21 produced in response to the pending public records requests. In their Answer filed July 29, 2021,
22 at ¶ 70, the Senate asserts that “they have produced to the Plaintiff non-privileged responsive
23 documents collected from Ken Bennett, although [the Senate] takes the position that Mr.
24 Bennett’s documents are not subject to” Arizona’s public records law.

25 ~~71-73.~~ American Oversight notified Mr. Moore in the call on May 17 of its intent to seek
26 relief from the Court and requested that Mr. Moore respond with any new or supplemental

1 information as soon as possible. American Oversight received no further communication from
2 Mr. Moore.

3 72-74. On May 19, 2021, American Oversight filed its Verified Complaint seeking an
4 order compelling the Senate Defendants to comply with A.R.S. § 39-121 and immediately
5 provide access to the Withheld Records.

6 73-75. In a Minute Entry dated July 15, 2021, this Court held [at 4] that “any and all
7 documents with a substantial nexus to the audit activities are public records” and further, that:

8 [a]ll documents and communications relating to the planning and execution of the
9 audit, all policies and procedures being used by the agents of the Senate
10 Defendants, and all records disclosing specifically who is paying for and financing
11 this legislative activity as well as precisely how much is being paid are subject to
12 the PRL. Senate Defendants must demand the records from CNI and the
subvendors or invoke the indemnification clause of the contract now that Senate
Defendants are engaged in litigation.

13 74-76. As of July 30, 2021, Defendants continued to refuse to produce the Withheld
14 Records despite the ruling on July 15, 2021.

15 75-77. As of July 30, 2021 Defendants also refused to provide their communications (if
16 any) with Cyber Ninjas and other agents relating to preservation of the public records sought by
17 American Oversight and which are the subject of the Court’s July 15, 2021 minute entry.

18 76-78. To date, Senate Defendants have not confirmed that Bennett, Pullen, Cyber Ninjas,
19 Doug Logan, and other agents and subcontractors are in fact preserving documents relating to
20 the audit.

21 77-79. As of July 30, 2021, Defendants also refused to provide a privilege log identifying
22 the documents that are responsive to American Oversight’s public records requests but not being
23 produced.

24 **Failure to Promptly Produce Records**

25 78-80. Plaintiff’s initial Verified Complaint sought production of records responsive to
26 the April 6, 2021 Requests and May 10, 2021 requests, among other things. Although Defendants

1 began producing documents responsive to the April 6, 2021 Requests and May 10, 2021 request
2 after this lawsuit was filed, and promised to produce more, they have not done so. Thus, the
3 initial Verified Complaint is being amended to expressly allege that the August 6, 2021 Requests
4 and May 10, 2021 request have been effectively denied because there has been no prompt
5 production.

6 ~~79-81.~~ The April 6, 2021 Requests sought, *inter alia*, the following:

7 All records in possession of Senator Karen Fann’s office pertaining to the selection
8 of auditors, including but not limited to: solicitations for bids; records reflecting
9 criteria for evaluating bids; complete copies of any bids received; or statements of
rejection made to any bidders.

10 See Ex. 13, Request No. AZ-SEN-21-0465.

11 All records . . . sent or received by Senator Karen Fann, . . . regarding the planning
12 or execution of the Arizona State Senate’s audit of Maricopa County’s elections
13 results. This request should be interpreted to include, but not be limited to,
14 communications concerning: the Senate’s decision to subpoena ballots and
15 subsequent litigation; the bidding process for selecting an auditing team; the scope
and conduct of the planned recount, . . . and/or discussion of alleged fraud as
justification for the planned recount.

16 See Ex. 14, Request No. AZ-SEN-21-0468.

17 All electronic communications . . . between (A) Senator Karen Fann, . . . and (B)
18 any of the individuals or entities listed below:

19 Specified Entities:

- 20 1. Kory Langhofer, or anyone communicating from an email address ending in
@statecraftlaw.com
- 21 2. Anyone communicating on behalf of Cyber Ninjas, including Doug Logan, or
22 anyone communicating in an email address ending in @cyberninjas.com
- 23 3. Anyone communicating on behalf of Wake Technology Services, or anyone
24 communicating from an email address ending in waketsi.com
- 25 4. Anyone communicating on behalf of CyFIR, or anyone communicating from an
26 email address ending in @cyfir.com

1 5. Anyone communicating on behalf of Digital Discovery, or anyone
2 communicating from an email address ending in @digitaldiscoveryesi.com

3 6. Former Arizona Secretary of State Ken Bennett

4 7. Bobby Piton

5 8. Jovan Pulitzer

6
7 9. Anyone communicating on behalf of Allied Security Operations Group,
8 including Russell Ramsland, James Keet Lewis III, or Colonel Phil Waldron

9 See Ex. 15, Request No. AZ-SEN-21-0472.

10 All electronic communications . . . between (A) Senator Karen Fann, . . . and (B)
11 any of the individuals or entities listed below:

12 Specified Entities:

13 1. Kelli Ward, Pam Kirby, Ray Ihly, Cyndi Love, or anyone communicating from
14 an email address ending in @azgop.com or @azgop.org

15 2. Ronna McDaniel, Drew Serton, Brian Seitchik, or anyone communicating from
16 an email address ending in @gop.com, @rnchq.com, or @rdpstrategies.com

17 3. Anyone communicating from an email address ending in senate.gov or
18 mail.house.gov

19 4. Representative Paul Gosar, Thomas Van Flein, Leslie Foti, or anyone
20 communicating from an email address ending in @drpaulgosar.com

21 5. Representative Andy Biggs, Kate LaBorde, Caroline Brennan, or anyone
22 communicating from an email address ending in @biggsforcongress.com

23 6. Rudolph Giuliani, or anyone communicating on his behalf (such as Jo Ann
24 Zafonte, Christianne Allen, Beau Wagner, or anyone communicating from an
25 email address ending in @giulianisecurity.com, giulianipartners.com, or
26 gdcillc.com)

7. Joseph diGenova, Victoria Toensing, or anyone communicating from an email
address ending in @digenovatoensing.com

1 8. Sidney Powell, or anyone communicating from an email address ending in
2 @federalappeals.com

3 9. Jenna Ellis, or anyone communicating from an email address ending in
4 @falkirkcenter.com or @thomasmore.org

5 See Ex. 16, Request No. AZ-SEN-21-0476.

6 All electronic communications . . . between (A) Senator Karen Fann, . . . and (B)
7 any of the individuals or entities listed below:

8 Specified Entities:

- 9 1. Maricopa County Board of Supervisors Chairman, Jack Sellers
- 10 2. Board Vice Chairman, Bill Gates
- 11 3. Supervisor Clint Hickman
- 12 4. Supervisor Steve Chucri
- 13 5. Supervisor Steve Gallardo
- 14 6. Tom Liddy
- 15 7. Steve Tully
- 16 8. Maricopa County Elections Director, Scott Jarrett
- 17 9. Maricopa County Elections Director, Reynaldo Venezuela
- 18 10. Anyone communicating from an email address ending in @eac.gov

19 See Ex. 17, Request No. AZ-SEN-21-0480.

20 ~~80-82.~~ On April 23, 2021, having heard nothing from Defendants with respect to the April
21 6, 2021 requests directed to Defendants Fann and Peterson, American Oversight sent a follow
22 up email. Mr. Moore, on behalf of Defendants, responded and acknowledged receipt. A copy of
23 the email exchange spanning April 23–30, 2021 is attached as Exhibit 24.

24 ~~81-83.~~ On May 21, 2021, shortly after the Verified Complaint was filed, counsel for
25 American Oversight sent a letter to counsel for the Senate Defendants advising that American
26 Oversight had not received any records responsive to four of the five requests sent April 6, 2021.
That letter demanded that that production of documents responsive to the April 6 Requests begin
no later than May 24, 2021. The letter also provided additional specific directions—including
search terms—in an effort to facilitate prompt production. A copy of the May 21, 2021 letter is
attached as Exhibit 25.

1 82-84. On May 24, 2021, counsel for the Defendants sent what was promised to “be the
2 first of many emails over the next few weeks” as part of a rolling production of documents
3 responsive to the April 6, 2021 Requests (as narrowed by the May 21, 2021 letter). Fifty-three
4 (53) pages of documents responsive to request -0468 accompanied the May 24, 2021 email. A
5 copy of the May 24, 2021 email (without attachments) is attached as Exhibit 26.

6 83-85. On June 2, 2021, counsel for American Oversight again wrote to ask when the next
7 production would be made, and also asked that a log be provided to the extent any responsive
8 documents were being withheld. On June 3, 2021, counsel for Defendants advised that
9 approximately 500 pages of documents would be produced the following day. That letter also
10 advised that Defendants did not intend to provide an index of responsive records that were
11 withheld, on the ground that the legislature was exempted from the obligation to do so. A copy
12 of the June 2-3, 2021 email exchange is attached as Exhibit 27.

13 84-86. On June 4, 2021, Defendants produced 507 pages of documents responsive to the
14 April 6, 2021 Requests (specifically, requests -0468, -0472 & -0476). Those documents were
15 uploaded to a Dropbox account. A copy of the June 4, 2021 email is attached as Exhibit 28.

16 85-87. Although Defendants uploaded additional documents to the Dropbox account on
17 June 8 and June 9, 2021, none of those documents were responsive to the April 6, 2021 Requests.

18 86-88. On June 14, 2021, Defendants advised that “the Senate is attempting to settle on
19 an agreed-upon set of search parameters that would satisfy the public records requests of both
20 American Oversight and various media outlets . . .” That email also proposed search terms that
21 substantially narrowed the scope of the April 6, 2021 Requests (even more so than they had
22 already been narrowed by American Oversight’s May 21, 2021 letter).

23 87-89. On June 16, 2021, American Oversight responded by accepting most of the
24 parameters and proposing some modifications, with the understanding that doing so would not
25 constitute withdrawal of the any of the pending April 6, 2021 Requests.

26

1 88-90. On June 17, 2021, Defendants sought further revisions, and claimed—not in good
2 faith—that it lacked email addresses for various the well-known individuals (such as Doug
3 Logan, Mark Meadows, etc.) with whom Defendants Fann and Peterson had been corresponding.
4 A copy of the email exchange spanning the period June 14-17, 2021 is attached as Exhibit 29.

5 89-91. Defendants uploaded additional documents to the Dropbox account on June 21,
6 22, 28 and 30, 2021. Of these, only 154 pages (uploaded on June 21) and one page (uploaded on
7 June 30) were responsive to the April 6, 2021 Requests.

8 90-92. On July 1, 2021, Defendants uploaded 119 pages to the Dropbox account, all of
9 which were responsive to the April 6, 2021 Requests (request -0469 and, to a lesser degree,
10 requests -0465 and -0468).

11 91-93. In the period July 1 to July 29, Defendants have produced only one document, a
12 two-page press release produced on July 29, 2021.

13 92-94. Although Defendants produced approximately 1,300 pages of documents
14 responsive to the May 10, 2021 request after the initial Verified Complaint was filed,
15 approximately 700 of those pages were publicly available litigation filings from related
16 litigation.

17 93-95. At the hearing on July 7, 2021, counsel for Defendants told the Court: “We’re
18 currently working on a review of 15,000 additional documents, not pages, documents. So I don’t
19 know the page count, but it will be . . . many thousands more than 15,000.” (Tr. at 17.)

20 94-96. Many additional documents responsive to the April 6, 2021 Requests and the May
21 10, 2021 requests have undoubtedly come into the possession of the Senate Defendants since
22 that statement was made by their counsel on July 7, 2021.

23 95-97. Notwithstanding the promise on May 24, 2021 that there would be numerous
24 rolling productions of documents responsive to the April 6 Requests, Defendants possess, and
25 have failed to produce, voluminous documents responsive to the April 6, 2021 Requests and the
26 May 10, 2021 requests.

1 96-98. Senator Fann tweeted the following statement on July 24, 2021: “Turned over
2 everything we have numerous times. Liberal media asking for record an [sic] not in our
3 possession.” A copy of Senator Fann’s tweet is attached as Exhibit 30.

4 97-99. Senator Fann’s statement that the Senate has “[t]urned over everything we have”
5 in response to the April 6, 2021 Requests is false.

6 98-100. According to multiple media reports and Senate audit representative Randy
7 Pullen, Senate audit liaison Ken Bennett was barred by Defendant Fann and others from entering
8 the Wesley Bolin Building on the state fairgrounds property on July 23, 2021. On July 28, 2021,
9 Bennett stated in a radio interview on KFYI that he was resigning from his Senate liaison
10 position. Later that day, Bennett stated that he had reached an agreement with Defendant Fann
11 in which he would stay on as liaison. See
12 [https://www.azcentral.com/story/news/politics/elections/2021/07/28/ken-bennett-says-he-will-
13 resign-arizona-senate-election-audit-liaison/5402396001/](https://www.azcentral.com/story/news/politics/elections/2021/07/28/ken-bennett-says-he-will-resign-arizona-senate-election-audit-liaison/5402396001/)

14 99-101. Communications relating to Bennett were specifically requested by
15 American Oversight on April 6, May 10 and May 21, 2021. See Exhibit 20 (request -0472),
16 Exhibit 16 and Exhibit 25. The Senate Defendants agreed to produce Bennett’s communications,
17 and even if they had not, those communication were among those they are obligated to produce
18 as a result of this Court’s minute entry entered July 15, 2021. Yet as of July 30, 2021 Defendants
19 had~~ve~~ produced only 54 pages relating to Bennett.

20 102. On information and belief, the Senate Defendants possessed~~ed~~ a substantial volume
21 of highly relevant public records relating to Bennett that were requested on April 6, 2021 but
22 which they had~~ve~~ not produced as of July 30, 2021.

Joinder of Cyber Ninjas

24 103. In its minute entry dated July 15, 2021, this Court ruled, inter alia, that “Cyber
25 Ninjas and the subvendors are clearly agents of the Senate Defendants”; that “any and all
26 documents with a substantial nexus to the audit activities are public records”; that the Senate

1 Defendants “have at least constructive possession” of the records possessed by their agents and
2 that the “Senate Defendants must demand the records from CNI and the subvendors or invoke
3 the indemnification clause of the contract” between Cyber Ninjas and the Senate Defendants.

4 104. On August 2, 2021 this Court “ORDERED that the Senate Defendants comply
5 with A.R.S. § 39-121 et seq., and immediately provide AO with access to (or copies of)” the
6 public records in the custody of Cyber Ninjas.

7 105. The Senate Defendants have not complied with the August 2 Order with respect to
8 certain public records in the custody of Cyber Ninjas because Cyber Ninjas has refused to
9 provide those public records to the Senate for production.

10 106. On August 19, 2021, Cyber Ninjas represented to the Arizona Superior Court that
11 it had “records of around sixty thousand digital communications (emails, text messages, etc.) in
12 its system since November [and its] audit is ongoing; and so ‘communications regarding the
13 performance, funding and/or staffing of the Audit’ continue to occur . . .”. Cyber Ninjas’
14 Response to Appl. for OSC at 3, No. LC2021-000180.

15 107. On August 31, 2021 Cyber Ninjas represented on page 1 of its Petition for Special
16 Action filed with the Arizona Court of Appeals in that it possessed “around sixty thousand
17 (60,000) documents” relating to the audit.

18 108. On September 14, 2021, following their unsuccessful effort to obtain special action
19 relief the Senate Defendants wrote to Cyber Ninjas demanding copies of the public records in its
20 possession and in the possession of its subvendors. [Exhibit 31, 09/14/21 letter from K. Fann to
21 D. Logan]

22 109. On September 15, 2021, during oral argument on Cyber Ninjas’ motion to stay the
23 production order entered in matter No. LC2021-000180, its counsel represented to the Arizona
24 Court of Appeals that Cyber Ninjas could review the approximately 60,000 audit-related
25 documents in its possession and complete production to the Senate within 30 days.

1 110. On information and belief, Cyber Ninjas still has not conducted a review of the
2 electronic and hard copy documents in its possession, including email communications and text
3 messages, to determine which of them bear a substantial nexus to the audit.

4 111. On September 17, 2021, Cyber Ninjas advised the Senate that it would not provide
5 any records in the immediate future, that it had no legal obligation to provide records, and that
6 it “believes the Senate already has” “all records that are reasonably necessary or appropriate to
7 maintain an accurate knowledge of activities concerning the 2020 Maricopa County election
8 audit.” [Exhibit 32, 09/17/21]

9 112. Between September 17 and October 26, Cyber Ninjas provided approximately 300
10 documents to the Senate Defendants, of which approximately 185 were produced to the public
11 reading room by the Senate Defendants.

12 113. On October 26, 2021 the Senate Defendants advised Cyber Ninjas that its
13 inadequate response to the Senate’s September 14 demand letter placed it in breach of the MSA
14 between the parties. The Senate Defendants reiterated their demand for all public records
15 relating to the audit. [Exhibit 33, 10/26/21 letter from K. Fann to D. Logan]

16 114. Even after receiving the Senate’s October 26 letter Cyber Ninjas refused to
17 produce additional public records. Instead, it rejected any responsibility for doing so, stating that
18 this Court’s ruling that Cyber Ninjas possess public records was “transparently erroneous.”
19 [Exhibit 34, 10/28/21 D. Logan letter to K. Fann.] Cyber Ninjas also asserted that “the Senate
20 already has all critical documents related to the audit . . .” [Id. at 2]

21 115. Cyber Ninjas’ CEO Doug Logan stated in his October 28, 2021 letter that “I do
22 not know, or have any way of knowing, how many of” the total number of records possessed by
23 Cyber Ninjas have “a substantial nexus to the Senate’s audit.” [Id. at 1.] But Mr. Logan made
24 clear that Cyber Ninjas had not reviewed its documents to ascertain which had a “substantial
25 nexus” to the audit, and had no intention of doing so: “to determine which documents have a

1 'substantial nexus' to the audit, my company would have to review all ten thousand of those
2 documents." [Id.]

3 116. On October 28, 2021 counsel for Cyber Ninjas represented to Judge Hannah in the
4 Arizona Superior Court that Cyber Ninjas estimated the total number of documents held by the
5 company during the time period relevant to the audit was somewhere in the range of 60,000 to
6 10,000, and that these had not been reviewed to determine which of them had a substantial nexus
7 to the audit. [Exhibit 35, 10/28/21 Hrn'g Transcript in *Phoenix Newspapers, Inc. v. Arizona*
8 *State Senate et al*, No. LC2021-000180, at 22] **Verna, for this exhibit, lets provide pages 18-**
9 **26 of the transcript**

10
11 117. On November 9, 2021 Cyber Ninjas' CEO Douglas Logan declared under penalty
12 of perjury that Cyber Ninjas "has produced to the Senate all of its records with a 'substantial
13 nexus' to" the audit, other than four limited categories of documents listed on a log from his
14 counsel (those categories were (i) images of actual ballots, (ii) images of
15 voting/tabulation/equipment machines, (iii) ballot-tracking video footage, and (iv) partially
16 redacted names on emails). [Exhibit 36, 11/09/21 letter from J. Wilenchik and Declaration of
17 D. Logan]

18 118. Mr. Logan and Cyber Ninjas have not explained which documents—and how
19 many—of the 60,000 documents in Cyber Ninjas' possession were purportedly reviewed by Mr.
20 Logan in connection with his Declaration. On information and belief, Mr. Logan's declaration
21 is not accurate.

22 119. On November 30, 2021, at a hearing before Judge Hannah in matter No. LC2021-
23 000180, counsel for Cyber Ninjas conceded that Cyber Ninjas possesses, but has not yet
24 produced, various audit-related materials, including emails between Cyber Ninjas and its
25 subvendors, invoices, and contracts with the subvendors. [Exhibit 37, 11/30/21 Tr. at 14-15,
26 33].

1 120. At that same hearing, counsel for Cyber Ninjas represented that Cyber Ninjas “is
2 insolvent.” [11/30/21 Tr. at 23]

3 121. Cyber Ninjas continues to possess numerous public records relating to the audit—
4 as that term is defined in the orders of this Court—but refuses to produce them to the Senate
5 Defendants or to Plaintiff.

6 122. Cyber Ninjas, as an agent of the Senate, is the sole custodian of records pertaining
7 to the audit that are subject to disclosure under the PRL.

8 ~~100.123.~~ American Oversight has made other public records requests directed to the
9 Senate Defendants apart from those mentioned here, and reserves the right to seek further relief
10 with respect to those requests.

11 Because the audit is ongoing, and the Senate Defendants and their agents (including
12 particularly Cyber Ninjas, and other subcontractors) are making interim public statements about
13 its progress that cannot be checked for accuracy by the public, it is imperative that this public
14 records dispute be resolved immediately.

15 ~~101.124.~~

16 **Count I**

17 **(Violation of Arizona Public Records Law – Failure to Produce or Provide Access)**

18 ~~102.125.~~ American Oversight re-alleges Paragraphs 1-101 as if fully set forth herein.

19 ~~103.126.~~ Under Arizona’s Public Records Law (“PRL”), “[a]ll officers and public
20 bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate
21 knowledge of their official activities and of any of their activities which are supported by monies
22 from this state or any political subdivision of this state.” A.R.S. § 39-121.01(B).

23 ~~104.127.~~ President Fann and Senator Petersen are “officer[s]” under the PRL.

24 ~~105.128.~~ The Arizona Senate is a “public body” under the PRL.

25 ~~106.129.~~ Public records are to be available for public inspection. *See* A.R.S. § 39-
26 121 (“Public records . . . shall be open to inspection by any person at all times during office

1 hours.”) The PRL presumes that all records are “open to the public for inspection as public
2 records.” *Carlson v. Pima Cty.*, 141 Ariz. 487, 490 (1984).

3 ~~107.130.~~ The PRL exists to “open agency action to the light of public scrutiny” and
4 “allow citizens ‘to be informed about what their government is up to.’” *Scottsdale Unified Sch.*
5 *Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302 ¶ 21 (1998) (citations
6 omitted).

7 ~~108.131.~~ There is thus a “clear policy favoring disclosure” of public records.
8 *Carlson*, 141 Ariz. at 490-91.

9 ~~109.132.~~ President Fann, Senator Petersen, and the Arizona Senate have custody,
10 possession, or control over the Withheld Records because, *inter alia*, Cyber Ninjas is an agent
11 of the Senate, Cyber Ninjas is conducting official functions on behalf of the Senate, Cyber Ninjas
12 is being paid with public funds, Cyber Ninjas has a contractual obligation to provide documents
13 to the Senate in connection with litigation, and Cyber Ninjas has a contractual obligation to
14 follow applicable laws.

15 ~~110.133.~~ The Senate Defendants’ custody, possession, or control over the Withheld
16 Records is actual, indirect, or constructive.

17 ~~111.134.~~ Cyber Ninjas, Mr. Bennett and the subcontractors working on the audit are
18 performing a public function on behalf of the Senate Defendants. Thus, the Withheld Records in
19 the possession of Cyber Ninjas, Mr. Bennett and the subcontractors are “reasonably necessary
20 or appropriate to maintain an accurate knowledge of the[] official activities” of the Senate
21 Defendants *See* A.R.S. § 39-121.01(B). Accordingly, the Withheld Records possessed by Cyber
22 Ninjas, Mr. Bennett, and the subcontractors are public records.

23 ~~112.135.~~ The Withheld Records are public records, irrespective of the fact that they
24 are held by third parties under contract to perform a public function that is “supported by monies
25 from this state.”

26

1 ~~113.136.~~ Officers and public bodies cannot avoid their responsibilities under the PRL
2 to keep, maintain, and produce public records by contracting key public functions (using public
3 funds) to private contractors. A contrary result would “circumvent a citizen’s right of access to
4 records” and “thwart the very purpose” of the PRL. *State ex rel. Toomey v. City of Truth or*
5 *Consequences*, 287 P.3d 364, 371 (N.M. App. 2012); *see also Hackworth v. Bd. of Educ. for*
6 *City of Atlanta*, 447 S.E.2d 78, 80 (Ga. App. 1994) (certain records of private contractor that
7 provided bus drivers to school were “public records” under Georgia’s Open Records Act).

8 ~~114.137.~~ Because the records requested by American Oversight are public records,
9 they are subject to a strong presumption in favor of their disclosure. *Judicial Watch, Inc. v. City*
10 *of Phoenix*, 228 Ariz. 393, 396, ¶ 10 (App. 2011).

11 ~~115.138.~~ Consequently, the Senate Defendants can withhold documents responsive
12 to American Oversight’s requests only if “privacy, confidentiality, or the best interests of the
13 state outweigh the policy in favor of disclosure.” *Griffis v. Pinal Cty.*, 215 Ariz. 1, 6 ¶ 16 (2007).
14 But the Senate Defendants have not articulated any of these reasons as the basis for their failure
15 to produce the requested records.

16 ~~116.139.~~ “The public’s right to know any public document is weighty in itself,” and
17 is particularly strong where “the public documents are of broad and intense interest.” *Phoenix*
18 *Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶¶ 30, 32 (App. 2001) (noting that a controversial
19 state standardized test “has been the subject of significant public debate”).

20 ~~117.140.~~ The contents of the records requested by American Oversight are a matter
21 of broad and intense public interest.

22 ~~118.141.~~ The Senate Defendants and Cyber Ninjas have violated the PRL by refusing
23 to promptly produce the records requested by American Oversight.

24 ~~119.142.~~ Under Arizona’s PRL, “prompt” means ‘quick to act’ or producing the
25 requested records ‘without delay.’” *Phx. New Times, LLC v. Arpaio*, 217 Ariz. 533, 538, ¶ 14
26

1 (App. 2008) (citation omitted). The Senate Defendants bear the burden of showing that their
2 response was prompt. *Id.* at 538-39, ¶ 15.

3 143. The delay of approximately four months (and counting) in this case constitutes a
4 failure to promptly respond. That is especially true given that the April 6, 2021 Requests included
5 specific names and email addresses that should have facilitated immediate production, and given
6 that it is a simple matter for individual custodians such as Mr. Bennett and Mr. Logan to collect
7 their email and text messages relating to the audit. *See, e.g., Am. Civil Liberties Union of Ariz.*
8 *v. Ariz. Dep't of Child Safety*, 248 Ariz. 26, 31 ¶ 18 (App. 2020) (finding a five-month delay was
9 a failure to promptly respond); *Arpaio*, 217 Ariz. at 541, ¶ 27 (holding that a 141-day delay
10 constituted failure to promptly respond).

11 ~~120-144.~~ *Cyber Ninjas possesses public records relating to the audit and refuses to*
12 *provide those records to the Senate Defendants or Plaintiff.*

13 121-145. The Senate Defendants and Cyber Ninjas have violated the PRL by failing
14 to provide a log of the documents responsive to American Oversight's requests but withheld
15 from production by the Senate Defendants. *See* A.R.S. § 39-121.01(D)(2).

16 **Prayer for Relief**

17 WHEREFORE Plaintiff respectfully requests that this Court order the following relief on
18 an expedited basis:

19 A. Enter an order compelling the Senate Defendants, ~~and Cyber Ninjas and the~~
20 subvendors to comply with A.R.S. § 39-121, *et seq.*, and to immediately provide access to (or
21 copies of) the Withheld Records as well as records responsive to the April 6, 2021 Requests and
22 the May 10, 2021 requests;

23 B. Enter an order directing the Senate Defendants to pay Plaintiff's reasonable
24 attorneys' fees and costs pursuant to A.R.S. §§ 39-121.02(B), 12-341, 12-348, 12-2030, the
25 private attorney general doctrine, Rule 4(g) of the Arizona Rules of Procedure for Special
26 Actions, or any other applicable provision of law or equitable principle; and

1 C. Grant Plaintiff such other and further relief as the Court deems just and proper.
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1
2 RESPECTFULLY SUBMITTED this ~~14th9th9th6th~~ day of December, 2021.

3 **COPPERSMITH BROCKELMAN PLC**

4
5 By /s/ Roopali H. Desai

6 Keith Beauchamp

7 Roopali H. Desai

8 D. Andrew Gaona

Attorneys for Plaintiff

9 ORIGINAL of the foregoing efiled and
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Exhibit B

Exhibit B



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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

**PHOENIX NEWSPAPERS, INC., an
Arizona corporation, and KATHY
TULUMELLO,**

Plaintiffs,

vs.

**ARIZONA STATE SENATE, a public body
of the State of Arizona; KAREN FANN, in
her official capacity as President of the
Arizona State Senate; WARREN
PETERSEN, in his official capacity as the
Chairman of the Arizona Senate Committee
on the Judiciary; SUSAN ACEVES, in her
official capacity as Secretary of the Arizona
State Senate; and CYBER NINJAS, INC.;**

Defendants, and

CYBER NINJAS, INC.,

Real Party in Interest.

Case No.: LC2021-00180-001

**RESPONSE TO APPLICATION FOR
ORDER TO SHOW CAUSE**

(Oral Argument Requested)

(Assigned to Judge Hannah)¹

¹ By making this filing, Defendant does not waive its position that this action must be immediately transferred to another division of the Court.

1 Defendant Cyber Ninjas, Inc. hereby files this Response to Plaintiffs’ Application to Show
2 Cause, pursuant to the Court’s Order filed on July 19, 2021.

3 By filing this Response, Defendant does not waive its argument that Plaintiffs’ claim
4 against Defendant must be dismissed because Plaintiff fails to state a claim against Defendant for
5 which relief may be granted. (See Defendant’s Motion to Dismiss filed together herewith, and
6 incorporated as if set forth herein.) In short, Defendant is clearly not a public officer or body that
7 is subject to receiving/responding to a public-records request, much less being named in a
8 statutory lawsuit for wrongful denial of public-records access. As Plaintiff admits, Defendant is a
9 private company. If Plaintiffs were correct that merely having a contract with a public body, and/or
10 acting as its limited “agent,” turned the Defendant into a “public officer or body,” then it would
11 result in every state contractor being forced to have their own “public records” departments and
12 legal counsel to handle such requests and lawsuits, which is clearly not the intent or effect of the
13 public-records statute. The intent of the statute is only that the government – i.e., a public body or
14 officer – be liable for responding to such requests, or being sued in cases of wrongful denial of
15 access.

16 In a good-faith effort to comply with the *sua sponte* Order of this division that defendants
17 “address the substance of the plaintiff’s demand for an order affording access to the records and
18 information at issue, as well as procedural issues and issues of judicial authority if any”; and
19 “directing the defendants to address...the question whether [sic] Application raises any triable
20 issues of fact” and to “specifically identify the issue(s) as to which there is a good faith dispute,
21 with citations to the paragraphs of the Complaint in which the plaintiff alleges the disputed facts,”
22 Defendant responds as follows.

23 Defendant again incorporates its Motion to Dismiss herein. Defendant objects that the
24 Rules of Civil Procedure provide that the Court shall hear a Motion to Dismiss before Defendant
25 must file an Answer; and that the Court is essentially requiring Defendant to file the substance of
26 an Answer (or really, a Controverting Statement of Facts) even though it lacks any authority to
27 exercise jurisdiction over the Defendant because there is no legal claim against it. Without waiving
28

1 these objections, Defendant hereby reserves and raises any and all defenses and objections to
2 Plaintiff's suit, including but not limited to the following:

3 Plaintiffs' requests are vague, overbroad, and overly-burdensome. For example, Plaintiffs
4 ask for "all financial records related to the Audit..."; and "all communications regarding the
5 performance, funding and/or staffing of the Audit," in between a long list of organizations and/or
6 people including Defendant and the Senate, Defendant and its own subcontractors, and Defendant
7 and various politicians or public figures. While it is unclear for what period of time Plaintiffs are
8 seeking such things, Defendant estimates that it has records of around sixty thousand digital
9 communications (emails, text messages, etc.) in its system since November. Further, Defendant's
10 audit is ongoing; and so "communications regarding the performance, funding and/or staffing of
11 the Audit" continue to occur, and "financial records" –whatever that means, exactly—are
12 presumably still being made.

13 "[T]he burden of producing public records can outweigh the public's interest in inspecting
14 those records." *Jud. Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 397, 267 P.3d 1185, 1189 (Ct.
15 App. 2011); *see also Hodai v. City of Tucson*, 239 Ariz. 34, 43, 365 P.3d 959, 968 (Ct. App. 2016);
16 *London v. Broderick*, 206 Ariz. 490, ¶ 9, 80 P.3d 769, 772 (2003); *Arpaio v. Davis*, 221 Ariz.
17 116, ¶¶ 21–22, 210 P.3d 1287, 1292 (App.2009)(denial of " 'all-inclusive, blanket' " records
18 request which would have required " 'unreasonable expenditure of resources and time'" to fulfill
19 was not abuse of discretion); *cf.* Ariz. R. Sup. Ct. 123(c)(1), (f)(4)(A)(i) (regarding judicial-branch
20 records requests). "In determining whether production poses an unreasonable
21 administrative burden, a court considers whether the general presumption of disclosure is
22 overcome by: (1) the resources and time it will take to locate, compile, and redact the requested
23 materials; (2) the volume of materials requested; and, (3) the extent to which compliance with the
24 request will disrupt the agency's ability to perform its core functions." *Hodai*, 239 Ariz. at 43,
25 365 P.3d at 968; *see also London*, 206 Ariz. 490, ¶ 9, 80 P.3d at 772; *Judicial Watch*, 228 Ariz.
26 393, ¶ 18, 267 P.3d at 1189; *Arpaio*, 221 Ariz. 116, ¶ 20–22, 210 P.3d at 1292; *accord* Ariz. R.
27 Sup. Ct. 123(f)(4)(A). "The analysis is, at its core, an inquiry into whether the best interests of the
28 state in carrying out its legitimate activities outweigh the general policy of open access." *Hodai*,

1 239 Ariz. at 43, 365 P.3d at 968 (quotation marks omitted); *see also Carlson*, 141 Ariz. at 491,
2 687 P.2d at 1246.

3 Again, Defendant is clearly not the “government” or the “state”—and so even discussing
4 the application of this caselaw feels peculiar. But insofar as the meaning of these cases is that the
5 Court must weigh Defendant’s interest in performing under its contract – i.e., in conducting an
6 audit of the election – against the burden of these requests, then their volume and the resources
7 that it would take to respond to them far outweigh any policy in favor of disclosure. Further, it
8 would result in serious interference with the ongoing audit—not just because of the time and
9 burden required to go through tens of thousands of communications, but also because it would
10 jeopardize the audit’s ongoing investigation. “[W]here the countervailing interests of
11 confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent
12 inspection, we hold that the officer or custodian may refuse inspection.” *Carlson v. Pima Cty.*,
13 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). The Court looks to the Federal Freedom of
14 Information Act (FOIA) for guidance in interpreting Arizona’s public-records law; and the FOIA
15 specifically exempts the production of “investigatory records” to the extent that production would
16 “constitute an unwarranted invasion of personal privacy” or “disclose investigative techniques
17 and procedures,” *inter alia*. *Church of Scientology v. City of Phoenix Police Dep’t*, 122 Ariz. 338,
18 340, 594 P.2d 1034, 1036 (Ct. App. 1979); *see also* 5 U.S.C. § 552(b)(7). In this case, Plaintiffs’
19 requests are so broad – including for all communications in between the Defendant and its own
20 subcontractors, or the Senate – that they would no doubt lead to the disclosure of the investigative
21 techniques and procedures being used in this ongoing investigation of how the county conducted
22 this election, *inter alia*. For example, based on input and recommendations from Defendant, the
23 Senate is presently in the process of issuing an additional subpoena to the county for further
24 records and documentation. If Defendant were forced to make these kinds of communications and
25 discussions public, then it would serve only to alert potential subpoena recipients of requests well
26 before they are actually made/happen. At the minimum, making these kinds of communications
27 public will create unnecessary confusion and alarm, especially in cases where the
28 Senate/Defendant ultimately choose not to contact or subpoena the potential witness. And of

1 course, at the worst, witnesses who are given advance notice may predict and therefore avoid the
2 Senate's investigation before the Senate/Defendant ever even tries to approach or subpoena them.
3 In either case, it chills/impairs the Senate and Defendant's ability to freely and effectively conduct
4 an investigation. This is no different from the policy concerns that support keeping
5 communications regarding a police investigation confidential, while the investigation is ongoing.
6 To the extent that questions may arise with respect to whether any given communication is of such
7 a nature as to jeopardize the Senate and Defendant's ongoing investigation (or in general, the
8 "confidentiality, privacy or the best interests of the state"), Defendant asks that such
9 communications or documents be submitted to the Court for an *in camera* inspection. And again,
10 because Plaintiffs' requests are overbroad (including e.g. "any" communications between
11 Defendant's "agents" and the Senate's "agents"), Defendant must assert and preserve a general
12 objection to privilege, including attorney-client privilege and the common-interest
13 privilege/doctrine. (Both the Senate and Defendant have been sued together – or threatened with
14 suit – several times, which of course includes this litigation.)

15 Given the broadness of Plaintiff's requests (especially the request for "all financial records"
16 and all communications with subcontractors and the Senate, etc.), Defendant also asserts a privacy
17 interest in its own private records and communications, which are not "public records." Public
18 records do not include documents "of a purely private or personal nature." *Griffis v. Pinal Cty.*,
19 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007). Instead, only those documents having a "substantial
20 nexus" with a government agency's activities qualify as public records. *Id.* "[T]he nature and
21 purpose" of a document determine whether it is a "public record," and "[d]etermining a
22 document's status, therefore, requires a content-driven inquiry." *Id.*

23 Further, to the extent that Defendant's communications with the Senate or other public
24 bodies/public officers could be deemed public records, those communications may be sought from
25 the Senate or those public bodies or officers and ordering Defendant to produce them would be
26 gratuitous/duplicative, *inter alia*.

27 The Court's Order provides that Defendants "shall" identify issues of fact; however,
28 because these issues are "content-driven" and because there are tens of thousands of records at

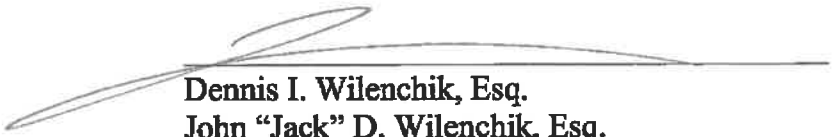
1 issue here—and also because there are serious questions about what the Plaintiffs’ requests are
2 even calling for, and the attendant burden of reviewing them—Defendants can only hope to
3 identify generally the issues of fact at this stage. But they include (1) the actual content of the tens
4 of thousands of documents, including whether any given document is of a purely private or
5 confidential nature, is subject to privilege, and/or its disclosure would jeopardize the Defendant’s
6 ongoing investigation; and (2) the administrative burden of reviewing such documents for
7 production. The Complaint does not appear to contain specific allegations with respect to these
8 subjects (i.e., it does not appear to allege that review or production of the documents would be
9 insufficiently burdensome; that the documents are all of a public nature; or that no privileged
10 documents were requested, etc.). But to the extent that the Complaint may imply such things, they
11 are disputed.

12 **Conclusion**

13 Aside from the (undisputed) fact that Defendant is a private contractor—and so Defendant
14 is not subject to a statutory public-records lawsuit or request, an issue which the Court must hear
15 and decide before exercising further jurisdiction over Defendant – Defendant objects that
16 Plaintiff’s requests must be denied because they are overbroad and overburdensome; they will
17 interfere with Defendant’s ongoing investigation; and they call for privileged and purely private
18 documents.

19 **RESPECTFULLY SUBMITTED** this 27th day of July, 2021.

20 **WILENCHIK & BARTNESS, P.C.**

21
22 
23 Dennis I. Wilenchik, Esq.
24 John “Jack” D. Wilenchik, Esq.
25 Jordan C. Wolff, Esq
26 The Wilenchik & Bartness Building
27 2810 North Third Street
28 Phoenix, Arizona 85004
admin@wb-law.com
Attorneys for Defendant Cyber Ninjas, Inc.

1 ORIGINAL of the foregoing filed on
2 July 27, 2021 with the Clerk of the Maricopa
3 County Superior Court

4 COPY of the foregoing hand-delivered on
5 July 27, 2021 to the Honorable Judge John Hannah.

6 COPY of the foregoing emailed on
7 July 27, 2021 to:

8 Kory Langhofer, Esq.
9 Thomas Basile, Esq.

10 STATECRAFT PLLC
11 649 N. Fourth Ave., 1st Fl.
12 Phoenix, Arizona 85003

13 kory@statecraftlaw.com
14 tom@statecraftlaw.com

15 *Attorneys for Karen Fann, Warren Petersen, and Ken Bennett*

16 David J. Bodney, Esq.

17 Craig C. Hoffman, Esq.

18 **BALLARD SPAHR LLP**

19 1 East Washington Street, Suite 2300
20 Phoenix, Arizona 85004-2555

21 bodneyd@ballardspahr.com

22 hoffmanc@ballardspahr.com

23 *Attorneys for Phoenix Newspapers, Inc. and Kathy Tulumello*

24
25
26
27
28
By: 

Exhibit C

Exhibit C

KAREN FANN
SENATE PRESIDENT
FIFTY-FIFTH LEGISLATURE
1700 WEST WASHINGTON, SENATE
PHOENIX, ARIZONA 85007-2844
PHONE: (602) 926-5874
TOLL FREE: 1-800-352-8404
kfann@azleg.gov
DISTRICT 1



COMMITTEES:
Rules, Chairman

Arizona State Senate

September 14, 2021

Cyber Ninjas Inc.
c/o Doug Logan & Legal Department
5077 Fruitville Road, Suite 109-421
Sarasota, Florida 34232
dlogan@cyberninjas.com
legal@cyberninjas.com

To whom it may concern at Cyber Ninjas Inc.:

Pursuant to the Arizona Public Records Act, Sections 15.4 and 18.5 of our Master Services Agreement dated March 31, 2021, and the orders entered by Judges Kemp and Hannah in *American Oversight v. Fann and Phoenix Newspapers, Inc. v. Arizona State Senate*, please immediately make available to the Arizona State Senate all records within your custody or control, or within the custody or control of your subcontractors or other agents, with a substantial nexus to the audit. For the avoidance of doubt, documents with a substantial nexus to the audit include without limitation all documents and communications relating to the planning and performance or execution of the audit, all policies and procedures used in connection with the audit, all records concerning audit funding or staffing, and all records that are reasonably necessary or appropriate to maintain an accurate knowledge of activities concerning the 2020 Maricopa County election audit.

Respectfully,

A handwritten signature in cursive script that reads "Karen Fann".

Karen Fann, President
Arizona State Senate

Exhibit D

Exhibit D

Subject: Cyber Ninjas, Inc. Response to Senate re Status
Date: Friday, September 17, 2021 at 11:33:14 AM Mountain Standard Time
From: Jack Wilenchik
To: Kory Langhofer, Thomas Basile
CC: Jordan Wolff, Dennis Wilenchik
Priority: High
Attachments: image152104.png, Policies and Procedures.zip

Kory – thank you for communicating to our client that the Court in Maricopa County Superior Court Case No. CV2021-008265 (the “American Oversight” case) has requested a status report from the Senate.

First, I must strongly emphasize that my client Cyber Ninjas, Inc. (CNI) is in the final “throes” of completing its work for the Senate. CNI is finishing its long-awaited written report (consisting of over one hundred pages), which will be produced to the Senate on or by next Friday, September 24th. CNI is a small private company, and the Senate’s request for records is causing CNI to take time away from the completion of its report. Just yesterday, the CEO of CNI spent approximately 12 hours dealing with trying to process the Senate’s request, which was time directly taken away from the duties that CNI has actually contracted to perform for the Senate.

I also emphasize that, while CNI intends to produce documents out of goodwill and its commitment to transparency, by sending this communication CNI does not concede the existence or scope of any involuntary legal obligation to do so.

The Senate requested records with “a substantial nexus to the audit,” including certain enumerated items, from CNI and its subcontractors. At this time, CNI has been able to reach out to most of its subcontractors (all but one) to notify them that it has received this request.

The phrase “a substantial nexus to the audit” is not defined, and it is difficult to define. For example, CNI’s internal company emails re: staffing or performance of the contract are not the kind of items that should be subject to production in a public-records request. If the case were otherwise, then it would set an extremely unsettling precedent for all government contractors in this state and make it impossible for the State to do business. For example, if CNI has private internal emails discussing its own contractual relationship with the Senate or its own performance of its contract with the Senate, then such emails would be subject to not only production to the Senate but also to the public. That is not practical, workable, fair or legal.

Attached hereto are copies of CNI’s current policies and procedures, which is one of the items enumerated in the Senate’s request. CNI acknowledges that these have been previously made public and it confirms that these continue to represent its existing policies and procedures. CNI is endeavoring to determine whether its subcontractors have any new or updated policies or procedures at this time and expects to have answers to that in the near future.

With respect to communications, CNI intends to produce copies of its communications with the Senate and its officials that have a substantial nexus to the contract/audit. CNI is unable to make that production at this moment in time because it needs to focus on completing its contractual duty of producing a written report. Once that report has been finished and the report has been produced (by next Friday Sep. 24), then it will promptly focus on the production of such communications (and of course earlier if and as it is able to do so).

With respect to financial disclosures (another item requested) – CNI intends to release full financial statements on the audit either as part of its report or shortly thereafter. With respect to “records...concerning

staffing” (another requested item): as with CNI’s internal communications (above), CNI’s private records concerning its own staff are not public records.

The Senate also enumerated a request for “all records that are reasonably necessary or appropriate to maintain an accurate knowledge of activities concerning the 2020 Maricopa County election audit.” This is undefined; but CNI believes that the Senate already has such records as may be reasonably necessary or appropriate to main an accurate knowledge of activities concerning the 2020 audit, with the important exception of our final report (whose release date you already know). The Senate had several liaisons who were present to watch audit operations daily and regular reports were made. There was 24/7 public live-streaming of all audit activities. Those records are already in the Senate’s possession and are public records.

If there are any activities that the Senate would like to request more details or specific records on, then please communicate them to us and my client would be glad to sit down with the Senate or its representatives after the final report is released.

Sincerely – Jack Wilenchik, Esq. on behalf of Cyber Ninjas, Inc.

www.wb-law.com

Jack Wilenchik
Attorney at Law
JackW@wb-law.com

The Wilenchik & Bartness Building
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Exhibit E

Exhibit E

KAREN FANN
SENATE PRESIDENT
FIFTY-FIFTH LEGISLATURE
1700 WEST WASHINGTON, SENATE
PHOENIX, ARIZONA 85007-2844
PHONE: (602) 926-5874
kfann@azleg.gov
DISTRICT 1



COMMITTEES:
Rules, Chairman

Arizona State Senate

October 26, 2021

Cyber Ninjas Inc.
c/o Doug Logan & Legal Department
5077 Fruitville Road, Suite 109-421
Sarasota, Florida 34232
dlogan@cyberninjas.com
legal@cyberninjas.com

To Whom It May Concern:

On September 14, 2021 I transmitted a demand for all records within your custody or control, or within the custody or control of your subcontractors or other agents, with a substantial nexus to the Senate's audit of the 2020 general election in Maricopa County (the "Audit"), as required by the court orders issued in *American Oversight v. Fann*, Maricopa County Superior Court No. CV2021-008265, and *Phoenix Newspapers, Inc. v. Arizona State Senate*, Maricopa County Superior Court No. LC2021-000180-001. To date, we have received approximately 300 records from you, which, according to your prior statements, constitute only an insubstantial percentage of all existing responsive records.

As you know, the Senate previously argued that Sections 15.4 and 18.5 of the Master Services Agreement ("MSA") between the Senate and Cyber Ninjas, Inc. by their terms do not require the latter to provide materials in response to third parties' public records requests. Nevertheless, the court has construed the referenced provisions of the MSA as obligating Cyber Ninjas to comply with any demands by the Senate for the production of documents and information relating to the Audit. Accordingly, Cyber Ninjas' inadequate response to my September 14 request places it in material breach of the MSA as construed by the court, and the Senate reserves its rights to pursue any and every applicable claim or remedy to enforce the agreement's provisions.

Thank you for your prompt attention to this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Karen Fann".

Karen Fann
President
Arizona State Senate

Exhibit F

Exhibit F



Cyber Ninjas

Phone: (941) 3-NINJAS

Fax: (941) 364-6527

www.CyberNinjas.com

5077 Fruitville Rd #109-421, Sarasota, FL 34232

Arizona State Senate
1700 West Washington, Senate
Phoenix, Arizona 85007-2844

October 28, 2021

Senator Fann:

Thank you for your letter dated October 26, 2021. First, I would like to correct your statement that “[t]o date, we [the Senate] have received approximately 300 records from you, which, according to your prior statements, constitute only an insubstantial percentage of all existing responsive records.”

By “responsive records,” you are referring to the private records that belong to my company or its subcontractors “with a substantial nexus to the Senate’s audit.” I do not know, or have any way of knowing, how many of such records exist. I have previously estimated the number of *all* of my company’s documents for the relevant time period, whether or not they are related to the audit, at ten thousand; and in order to determine which documents have a “substantial nexus” to the audit, my company would have to review all ten thousand of those documents. As a private company, we are not willing to allow the Senate to review all of our company’s documents nor do we believe that constitutes a request for “reasonable” cooperation in accordance with Section 18.5 of the Master Services Agreement.

We appreciate that you are subject to a ruling that apparently concluded, as between you and a third-party plaintiff (American Oversight), that Section 18.5 of our Agreement somehow renders our company’s documents “public records.” We are not bound by that ruling and believe that it is transparently erroneous. As our lawyer has expressed in court briefs, only documents that the government owns may be considered public records. You do not own our company’s records. A demand for our company’s private records is not only “unreasonable” within the meaning of Section 18.5 but also violative of the Fourth and Fourteenth Amendments as well as Article 2, Section 8 of the Arizona Constitution (“Right to privacy”).¹

As we have previously expressed, the request for all documents with a “substantial nexus to the audit” is also ill-defined, and clearly encompasses our company’s private communications and documents regarding its work. You are not reasonably entitled to our company’s private documents, especially on a “public records” claim.

Further, Section 18.5 provides only for reasonable cooperation in the event that either party to the Agreement is subject to a claim regarding the Agreement or its actions taken pursuant to the Agreement. The Senate’s obligations (*vel non*) under public-records law exist independent of the Agreement and arise under A.R.S. §§ 39-121 *et seq.* Claims regarding the Senate’s obligations to provide public records to members of the public do not implicate Section 18.5.

¹ The idea that our company’s records are “public records” simply because someone sued the Senate claiming that our company’s records are public records – and therefore our records are “needed for the defence of such claims” under Section 18.5, such that the Senate may or must obtain them and *make* them public records – is totally circuitous. This logic could be used to render any of our company’s private records “public,” which is not just patently unfair and “unreasonable” within the meaning of Section 18.5, but also clearly contrary to public-records law. *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 534, 815 P.2d 900, 903 (1991); *see also Forsham v. Harris*, 445 U.S. 169 (1980); *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977).

We further note that Section 18.5 provides that “neither party shall be obligated to incur any expense” in providing “reasonable” cooperation. For our company to review tens of thousands of documents to determine what has a “substantial nexus” to its work – whatever that even means – would clearly cause it to incur substantial expense. Our company has already voluntarily spent considerable time at its own expense in procuring the documents that it has already provided, which is been substantially more than “300 emails.” On Tuesday, we produced over 70,000 images and corresponding tally sheet information. The production of these documents was not required by our Statement of Work or otherwise required under the Master Services Agreement, but we nevertheless produced them in a good-faith effort to try to give you items that might be responsive to your request. If you wish, then we can agree to provide digital images of all ballot images and other items but the Senate must agree to bear the expense of such further production. The Senate will also need to be clear on exactly what it is requesting from us – documents “with a substantial nexus” is problematic for the reasons given above. In our view the Senate already has all critical documents related to the audit, and if the Senate believes otherwise they it must be precise as to what information it is actually requesting.

Finally, we note that in no event does this constitute a breach much less a “material” breach of the contract. This is especially true in light of the 7-day cure period in the Agreement and our open invitation for the Senate to clarify its request. Our company has performed all of its obligations under this contract, and any an alleged issue regarding compliance with Section 18.5 does not go to the heart of the agreement nor would it otherwise justify a suspension of any of the Senate’s material obligations in the performance thereof.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Logan". The signature is fluid and cursive, with the first name "Doug" being more prominent than the last name "Logan".

Doug Logan
Chief Executive Officer
Cyber Ninjas

Exhibit G

Exhibit G

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PHOENIX NEWSPAPERS, INC.,
KATHY TULUMELLO,

Plaintiffs,

vs.

ARIZONA STATE SENATE, CYBER
NINJAS, INC.,

Defendants.

No. LC2021-000180-001

Phoenix, Arizona
October 28, 2021
8:39 a.m.

BEFORE THE HONORABLE JOHN R. HANNAH JR.

TRANSCRIPT OF PROCEEDINGS

Status Conference

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

LOGAN JONES
Transcriptionist



1 because what I just said was wrong. Okay. Stays the deadline
2 for production -- no, I was right -- stays the deadline for
3 production by the Senate, but the Senate is still required to
4 produce documents in the possession of CNI. CNI does not have
5 to produce documents directly to PNI. And then it -- they
6 issue an order, which I agree with you is their order and not
7 mine. But given the limited scope of that stay, it's your
8 position nevertheless that my entire order is stayed?

9 MR. WILENCHIK: Well, Your Honor, I don't know if you
10 (indiscernible) --

11 THE COURT: I have no jurisdiction?

12 MR. WILENCHIK: -- second page. Have you read the
13 second page, Your Honor? It does continue on, and the
14 following paragraph in which they clearly are exercising
15 jurisdiction over this issue which is what is to be produced.
16 It says it is further -- I'll read it -- it is further ordered
17 based on the Senate's September 14th, 2021, request for
18 documents to CNI. CNI will promptly begin processing the
19 Senate's request and will provide responsive documents for the
20 Senate for the Senate's review on an ongoing basis. That's a
21 critical part, but I could read on. Because the Senate's
22 contractive persistence so it can promptly handle the document
23 review for privilege is Senate receives documents where CNI
24 will process the documents and provide them to PNI on an
25 ongoing basis.



1 So our point here is the issue they're raising is
2 whether we produce what we're obligated to produce, and I want
3 to be very clear as I addressed in the brief we filed that this
4 is why it's important for the Court Appeals, not you, to be
5 hearing this issue. They heard our whole argument on this.
6 They understand with intent what this language was. Intent
7 was, as I recall Judge Gass even acknowledging, that this was a
8 stipulation as between my client and the Senate to promptly
9 process the request that we'd received the night prior from the
10 Senate and to provide a number of documents in response. We
11 have done that. We made it very clear during that hearing with
12 the panel, including Judge Gass, that we would not be providing
13 all documents requested by the Senate. That the scope of the
14 request was way beyond anything that's legal, reasonable, or
15 even making it to the definition of common sense.

16 Again, to produce all documents related to audit
17 would include things like our internal communications, our
18 discussions about negotiating the contract, clearly private
19 company documents that have no rational definition of public
20 record are public record. We made it very clear so that --

21 THE COURT: Did you make the argument that about
22 private documents that you made to me for the first time a
23 couple of weeks ago, did you make that argument to the Court of
24 Appeals?

25 MR. WILENCHIK: First of all, I did not make that to



1 you the first time two weeks ago. It was made in our original
2 response to the application for a show cause on the final pages
3 thereof. Second --

4 THE COURT: Well, no, what the --

5 MR. WILENCHIK: -- I guess I made it very clear to
6 the Court of Appeals, yes --

7 THE COURT: I'm not going to argue with you about it.

8 MR. WILENCHIK: Second, Your Honor, yes, we made it
9 very clear to the Court of Appeals --

10 THE COURT: Did you make that argument to the Court
11 of Appeals?

12 MR. WILENCHIK: We made it very clear we're not
13 producing the full scope of what they ask for. We made it very
14 clear that yes, we are not a public agency. We are not a
15 public office or -- we should not be in this case. You have no
16 jurisdiction here. But again, it's not your place. I'm sorry.
17 With all absolute respect, to be trying to judicate an order of
18 the Court of Appeals -- our point is that this shows they have
19 exercised jurisdiction over this issue, and in both as a time
20 saving measure and a matter of jurisdiction, this is the kind
21 of motion that needs to be brought to them and not to this
22 Court.

23 I do want to answer any other questions
24 (indiscernible) point before I talk about this issue, about the
25 numbers, about the number of documents. Should I go ahead,



1 Your Honor?

2 THE COURT: Go ahead.

3 MR. WILENCHIK: Thank you. With respect to the
4 number of documents, again, you know, there was
5 misrepresentation there. We have not said there's 10,000
6 documents related to this audit. It was very clear in the
7 brief we just filed that this number, this number in the order
8 of tens of thousands is for all company documents, whether they
9 relate to this audit or not. And our point is that in order to
10 even determine what in our entire company could be related to
11 this audit, related to the work we did for the Senate, would
12 require us to go through all these tens of thousands of
13 documents, and that's just not something that's legal or
14 practicable.

15 So I do want to be clear in the numbers there. I
16 mean, the actual number of documents related to this audit,
17 both in our possession and our subcontractors' possession is a
18 number we have no way of knowing. You know, I don't think a
19 subcontractor is going to cooperate with us either, because
20 again, there's no legal authority for any of this, have the
21 government compel private companies to produce their private
22 documents. The only document the government owns here is that
23 Senate report, is the audit report. That is a public document.
24 But again, we have cited binding authority to say that the rest
25 of this is private, not owned by the government, cannot



1 possibly be a public order.

2 THE COURT: Where did the 60,000 document number come
3 from?

4 MR. WILENCHIK: Well, Mr. Hoffman has thrown around
5 that number, but I believe we have in the past said it's some
6 order of tens of thousands. I mean, it said 60,000 documents
7 in this entire company for the relevant time period. That this
8 review that they've demanded would require us to look at that
9 number of documents, and that remains the case. And as they
10 say, that's not practical, legal common sense. It makes no
11 sense at all for us to review every document our company --

12 THE COURT: You didn't actually exactly answer my
13 question there. The number 60,000 has been stated by Cyber
14 Ninjas. What does that represent?

15 MR. WILENCHIK: Again, it represents all company
16 documents for the relevant time period, whether or not they're
17 related to the audit. And again, none of which would be public
18 record, but that's the entire universe of documents that we'd
19 have to go through to determine what is related to the audit.
20 Again, that's not the definition of public record, but that's
21 the term that's being thrown around here.

22 THE COURT: Okay. So where does the 10,000 number
23 come from?

24 MR. WILENCHIK: Right. You know, these are obviously
25 estimates of orders of magnitude, whether it's 60 or ten. I



1 mean, we're saying tens of thousands. Our whole point here --

2 THE COURT: You said 10,000. You didn't say tens of
3 thousands.

4 MR. WILENCHIK: Okay, Your Honor. I don't know how
5 else to make this clear. We're saying here there's a lot of
6 documents in this company. Now, the order of tens of
7 thousands -- where we could fairly say ten to sixty.
8 Obviously, this is not something where somebody in staff had
9 counted them. Okay. It's impossible to do that, and that is
10 our point here. To demand of any private company that they,
11 you know, go through their entire database, assemble all
12 documents in the private company under public records law is so
13 far beyond the scope of what's legal, what's sensible, what's
14 common sense, that we are really struggling with this, and I'm
15 sure the subcontractors would too. This is just way beyond
16 what any court jurisdiction allows or what the law allows.

17 THE COURT: Okay. What about my order requiring you
18 to produce a privilege -- requiring Cyber Ninjas to produce a
19 privilege log?

20 MR. WILENCHIK: Our position is that's very much
21 stayed by this order. I mean, if the Court feels otherwise, we
22 will address that immediately with Court of Appeals. Is
23 your --

24 THE COURT: Okay.

25 MR. WILENCHIK: -- question what substantively is our



1 issues to whether the Court is allowed to order such a log?

2 THE COURT: No, I've already ordered it, and we're
3 past that point.

4 MR. WILENCHIK: Right.

5 THE COURT: The question is your client's
6 responsibility to comply with it.

7 MR. WILENCHIK: Our position is that is very much
8 stayed by this Court of Appeals order. The only obligations we
9 have here were established by this order which provided, again,
10 we are to produce what it says to the Court -- to the Senate.
11 If the Court's belief is that we need to be compiling an
12 enormous privilege log, which again, as I've said in our
13 filings, I mean, we will identify every single document. This
14 company is not a public record. I don't know why a productive
15 exercise to identify every document in the company they think
16 is public record, but if the Court's position is that is
17 required to be done right now, I will address that with Court
18 of Appeals as soon as I possibly can because we do not
19 believe -- we believe that has been stayed. Your jurisdiction
20 has been stayed.

21 THE COURT: Could you provide me with a copy of your
22 briefs on the special action in the Court of Appeals, your
23 substantive briefs? I've never seen them, so I'm shooting in
24 the dark a little bit. I understand that the key is the stay
25 order, but that might help me understand the scope of what



1 we're dealing with here. So as a courtesy, could you provide
2 those to me?

3 MR. WILENCHIK: I will absolutely do that as a
4 courtesy, and -- but I do not want the point to be lost that I
5 don't think this Court is going -- has jurisdiction to engage
6 and exercise in interpreting the Court of Appeals' order. I
7 think that needs to be addressed directly with them, but yes,
8 I'm happy to do that.

9 THE COURT: Okay. Yes, I understand your point. Go
10 ahead.

11 MR. WILENCHIK: So again, I've addressed this issue
12 with the documents. And I do want to be clear, I mean, if
13 there is some current, immediate substantive obligation this
14 Court believes we have, we want to be told of that, and we want
15 to take that directly to Court of Appeals. Because again, our
16 position on this case is we are not a public office or public
17 body. We should not be here.

18 And as far as, you know, whatever obligations the
19 Senate has as part of this entirely independent case, the
20 American Oversight case, that I'm not -- we're not a party to,
21 Plaintiff's not a party to, I can't speak to that. I just
22 don't know. We're not participating in that case. But our
23 position as a private company as I'm sure the subcontractors
24 position is, is that we are private companies. We do not have
25 public records. The government does not own our documents, and



1 the documents the government owns are public records.

2 Unless the Court has further questions, I've said my
3 peace. Thank you.

4 THE COURT: Okay. I don't.

5 I'd like to hear from the Senate on this, please.

6 Okay. Mr. Langhofer, you've got an open --

7 (Pause)

8 MR. WILENCHIK: Can anyone hear me?

9 THE COURT: Who is that?

10 MR. WILENCHIK: This is Jack Wilenichik.

11 THE COURT: Yeah, I can hear you. I think Mr.
12 Langhofer has more than one open microphone or source, or he
13 did.

14 (Pause)

15 MR. LANGHOFER: Does this work?

16 THE COURT: That does work, yes. Thank you.

17 MR. LANGHOFER: All right. I'm sorry for the
18 inconvenience, Your Honor.

19 THE COURT: Wait a minute, what just happened? Did
20 you guys just do something?

21 THE CLERK: No.

22 THE COURT: Okay. It stopped.

23 MR. LANGHOFER: And --

24 THE COURT: Okay. That just worked.

25 MR. LANGHOFER: I'm sorry for the inconvenience. It



CERTIFICATE

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I, LOGAN JONES, a court-approved transcriber, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

/s/

LOGAN JONES,
Transcriber

December 2, 2021



Exhibit H



John “Jack” D. Wilenchik, Esq.

WILENCHIK & BARTNESS

jackw@wb-law.com

— A PROFESSIONAL CORPORATION —

ATTORNEYS AT LAW

The Wilenchik & Bartness Building
2810 North Third Street Phoenix Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

November 9, 2021

VIA EMAIL ONLY

Kory Langhofer

kory@statecraftlaw.com**Re: LC2021-000180-001 and 1 CA-SA 21-0173**

Cyber Ninjas, Inc. is in receipt of the unpublished Memorandum Decision in the above-titled case. It remains CNI’s legal position that the definition of a “public record” requires actual government ownership of records, much less possession of them. Compelling private parties to produce privately-owned records to the government, which the government does not own or control, is a violation of the 4th and 14th Amendments and of Arizona’s constitutional right to privacy, *inter alia*, nor is it contemplated by our statutes which provide only for suit against a public officer or public body. Finally, the notion that the validity of a public-records request turns on whether it involves “ordinary goods or services” is legally-baseless, and would make any elections contractor or employee subject to being sued for public records.¹ Accordingly, CNI reserves its right to appeal that decision and to seek a further stay.

Without waiving such rights or contentions, CNI nevertheless sends this correspondence in an effort to “confer about which public records in the possession, custody or control of either party should be withheld based on a purported privilege or for any other legal reason.” By sending this correspondence, CNI does not concede that any of these materials actually constitute “public records” or that it is genuinely subject to the public-records statutes.

The lower court and Court of Appeals have defined “public record” to be “documents with a substantial nexus to government activities.” In this case, the relevant “government activity” was producing an audit report. CNI has already produced to the Senate all of its records with a “substantial nexus” to that report, with the three exceptions listed in the chart at bottom which will be withheld. CNI’s productions include the final report of all audit findings and recommendations; twenty-three (23) appendixes supporting all report findings; copies of the processes and procedures utilized with respect to the

¹ A.R.S. § 39-121.02(A) clearly provides that only a public officer or public body can be sued. It was never the legislature’s intention to render mere “custodians” of records subject to suit, because every government employee is a “custodian” of government records and can therefore all be sued. The Court of Appeals literally inserted the word “custodian” into its quotation of A.R.S. § 39-121.02(A), even though that word does not appear there. And where it is used in the statutes (see A.R.S. § 39-212.01), “custodian” clearly refers only to the “officer in custody,” which is consistent with both the use of that term in A.R.S. § 39-121 and the use of “officer or public body” in A.R.S. § 39-121.02(A).



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investigation conducted for the audit; a copy of the security plan utilized for the investigation conducted for the audit; digital scans of more than seventy thousand (70,000) tally sheets; copies of aggregation database and master tally sheets; copies of over three hundred (300) emails directly related to audit activities; and a copy of a financial statement for all audit funds and expenditures.

Please consider this correspondence to be a “privilege log” in accordance with any applicable court order(s), and please note that counsel for Plaintiff is copied on this correspondence. Finally, attached hereto is a declaration from Douglas Logan attesting that all documents in CNI’s possession with a “substantial nexus” to the report have been produced to the Senate, except for the following:

No.	Description	Objection to Disclosure
1.	Images of actual ballots.	These records are subject to a ruling by Judge Thomason that the ballots contain confidential voter information and “[s]tatutes such as §§ 16-624 and 625, operate as restrictions on access by the general public” to such information. (See Minute Entry filed on March 1, 2021 in Maricopa County Superior Court Case No. 2020-016840.) These materials would also be costly for CNI to assemble and produce. CNI is entitled to a reasonable fee for the cost of the time, equipment and personnel used in producing copies of such records subject to public disclosure. Further, the actual ballots are already in the possession of the government (the county), and therefore CNI is not the “sole custodian” of such records (to quote the Court of Appeals’ Memorandum Decision).



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2.	Full forensic images of voting/tabulation equipment/machines.	The Senate has identified security issues if these records were produced to the public. These records would also be costly for CNI to assemble and produce. CNI is entitled to a reasonable fee for the cost of the time, equipment and personnel used in producing copies of such records subject to public disclosure. CNI also attempted to produce these records to the Senate in the past, and the Senate indicated that it did not want to take possession of them.
3.	Ballot-tracking video footage.	These records are subject to a ruling by Judge Thomason that the ballots contain confidential voter information and “[s]tatutes such as §§ 16-624 and 625, operate as restrictions on access by the general public” to such information. (See Minute Entry filed on March 1, 2021 in Maricopa County Superior Court Case No. 2020-016840.) These records consist of video of the ballots as they are being counted. It is also costly for CNI to assemble and produce these archives. CNI is entitled to a reasonable fee for the cost of the time, equipment and personnel used in producing copies of records subject to public disclosure.
4.	Partially-redacted names on emails.	The names of volunteers and other workers were partially redacted in order to protect personal privacy and the security of such persons.

Sincerely,

John “Jack” D. Wilenchik, Esq.

JDW/cmf

cc: David Bodney, Craig Hoffman



Kory Langhofer
November 9, 2021
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Declaration

I, Douglas Logan, make this Declaration of my own knowledge, and I am competent to testify to the matters contained herein.

1. I am the CEO of Cyber Ninjas, Inc. (“CNI”).
2. CNI has produced to the Senate all of its records with a “substantial nexus” to the report that it produced for the Senate, with the exceptions as noted above.
3. In determining what records have a “substantial nexus,” I made an assessment of those documents or other records that formed a causal link with the audit report and its related investigation, or that were so closely related to the report and related investigation that they can be fairly said to be a part of them.

I declare under penalty of perjury under the laws of the State of Arizona that I have read the above Declaration, am familiar with its contents, and know the same to be true and correct of my own personal knowledge.

Dated: 11/10/2021

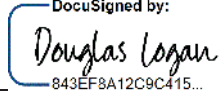
Signature: 
By: Douglas Logan

Exhibit I

Exhibit I

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PHOENIX NEWSPAPERS, INC and)	
KATHY TULUMELLO,)	
)	
Plaintiffs,)	
)	
vs.)	LC2021-000180-001
)	
ARIZONA STATE SENATE,)	
KAREN FANN,)	
WARREN PETERSEN,)	
SUSAN ACEVES, and)	
CYBER NINJAS, INC.)	
)	
Defendants.)	
_____)	

Phoenix, Arizona

November 30, 2021

BEFORE THE HONORABLE JOHN HANNAH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Status Conference

COPY

Reported by: Debra R. Carney, CCR, RPR
 Certified Court Reporter #50903
(Appearing virtually via Microsoft Teams)

A P P E A R A N C E S

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On Behalf of Phoenix Newspapers, Inc:

Craig Hoffman
Matthew Kelley
Attorneys at Law

On Behalf of Cyber Ninjas, Inc.:

Jack Wilenchik
Jordan Wolff
Attorneys at Law

On Behalf of the Senate Defendants:

Kory Langhofer
Attorney at Law

1 P R O C E E D I N G S

2
3 (The following proceedings are held virtually via
4 Microsoft Teams)

5
6 THE COURT: All right. This is Phoenix
7 Newspapers versus Arizona State Senate, LC2021-000180.
8 Appearances, please.

9 MR. HOFFMAN: Good morning, Your Honor.
10 Craig Hoffman from Ballard Spahr on behalf of Phoenix
11 Newspapers, Inc. and Kathy Tulumello.

12 MR. LANGHOFER: Good morning, Your Honor.
13 Kory Langhofer for the Senate Defendants.

14 MR. WILENCHIK: Good morning, Your Honor,
15 John Wilenchik and Jordan Wolff on behalf of Defendant
16 Cyber Ninjas, Inc.

17 THE COURT: Okay. Mr. Langhofer, you're a
18 bit echoey. If you could get closer to your microphone
19 or figure out some way to minimize that, that would be
20 helpful. I do have a court reporter who's present for
21 today's hearing for reasons that will be evident in a few
22 minutes.

23 The -- this is the time set for status
24 conference. The -- I set this status conference in
25 response to the PNI request for it, and I'm looking for

1 the request, and I can't put my hands on it right now.
2 But I can -- I have a fair idea of what it says. The --
3 there are issues with respect to both of the other
4 parties. So I guess I'll let Phoenix Newspapers take the
5 lead. Tell me what you have in mind, and then we'll go
6 from there.

7 MR. HOFFMAN: Sure, Your Honor. There's
8 two major issues that caused us to request a status
9 conference. The first is the status of Cyber Ninjas's
10 production of documents and a privilege log following the
11 decision of the Court of Appeals. The second issue
12 relates to the issue of waiver of the Senate's claim of
13 legislative privilege which has become, I think, a little
14 bit less urgent in light of some recent developments. So
15 unless Your Honor has a different proposal, I suggest we
16 move forward with the Cyber Ninjas issues first and then
17 move on to the Arizona Senate issues.

18 THE COURT: Okay, that's fine.

19 MR. HOFFMAN: So as we noted in our request
20 for the status conference, the Court of Appeals issued a
21 memorandum decision on November 9th of this year
22 concluding that Cyber Ninjas is, in fact, the custodian
23 of records related to the audit, that Cyber Ninjas was
24 properly joined as a party to this litigation because it
25 has sole custody of audit-related records and hasn't

1 turned those over to the Senate. And the Court of
2 Appeals also held that if Cyber Ninjas do not deliver
3 those audit-related records to the Senate, it must
4 promptly furnish those records to my client.

5 And despite the memorandum issue being
6 issued three weeks ago, to my knowledge, Cyber Ninjas has
7 not produced a single record to the Senate, and they
8 certainly have not produced a single record to Phoenix
9 Newspapers, Inc. I do want to pause here for a second,
10 Your Honor, and acknowledge that Cyber Ninjas did seven
11 days ago file a petition for review with the Arizona
12 Supreme Court. They've also filed an application to stay
13 the memorandum decision that was issued by the Court of
14 Appeals. Briefing on the application for the stay is
15 completed, and I expect the Court of -- I'm sorry, the
16 Supreme Court will issue an order on the application for
17 a stay in the next few days.

18 We don't think that the stay should be
19 issued, but that's not before Your Honor. So turning
20 back to the memorandum decision --

21 THE COURT: The -- there's not at stay in
22 place right now, but presumably there will be a decision,
23 as you say on that, one way or the other in the next few
24 days.

25 MR. HOFFMAN: Correct, Your Honor.

1 THE COURT: So I'm -- you have, as I
2 understand it, a -- you've already -- well, not as I
3 understand it. You've already filed a motion renewing
4 your contempt -- your application to have Cyber Ninjas
5 held in contempt. Correct?

6 MR. HOFFMAN: Correct. We filed that last
7 week, Your Honor.

8 THE COURT: Okay. I don't know how much
9 there is to do now other than perhaps set that for
10 further proceedings far enough out to give the Supreme
11 Court an opportunity to make a decision and then we go
12 forward or not based on what the Supreme Court decides.

13 MR. HOFFMAN: Sure. I think that's true
14 with respect to the motion for contempt, Your Honor. I
15 think the more immediate issue -- and if Your Honor is
16 going to issue a ruling following this status conference
17 that compels Cyber Ninjas to begin producing documents,
18 you can always issue that order subject to a stay that
19 the Court of -- I'm sorry, the Supreme Court may or may
20 not issue.

21 THE COURT: Okay. Well, then if -- if you
22 have something else in mind, than -- than what I said, go
23 ahead. I didn't really mean to interrupt you. I just
24 wanted to give you a little bit of my thinking. But you
25 -- you -- you tell me where -- what you think I should do

1 today.

2 MR. HOFFMAN: Your Honor, what we would
3 like is an order that compels Cyber Ninjas to immediately
4 begin producing audit-related records and an order that
5 compels Cyber Ninjas to immediately provide a privilege
6 log that Your Honor has described in multiple court
7 orders. What -- what we're faced with now is a letter
8 that we received -- or that was sent to us from Cyber
9 Ninjas the day that the memorandum decision was issued by
10 the Court of Appeals in which it contends that it has
11 already complied with its obligations under the Public
12 Records Law because my client's records request were
13 limited to documents that have a substantial nexus solely
14 to the final audit report that was issued in September of
15 this year. And that's simply not the scope of the public
16 records request that my client issued.

17 My client asked for all financial records
18 related to the audit, all communications regarding the
19 performance, funding, and/or staffing of the audit. And
20 Cyber Ninjas is now attempting to self-servingly narrow
21 the scope of my client's request in a manner that's
22 frankly totally unrelated to the scope of those requests.
23 And in so doing, Cyber Ninjas is trying to avoid its
24 obligation pursuant to this court's order and the
25 memorandum decision to review and provide audit-related

1 records to the Senate, and if not to the Senate, then
2 directly to my client. So what my client wants and what
3 the Public Records Law requires is that Cyber Ninjas
4 begin producing audit-related records. This is not
5 records solely related to the final audit report.

6 We're talking about audit-related records
7 to the Senate, and if not to the Senate, then to my
8 client that and P -- that Cyber Ninjas provide a
9 privilege log that, among other things, describes or
10 includes descriptions of those audit-related records that
11 Cyber Ninjas contends do not have a substantial nexus to
12 the audits and therefore not public records so that my
13 client can scrutinize those decisions and ultimately, if
14 necessary, bring certain documents before Your Honor so
15 that Your Honor can make the ultimate determination as to
16 whether or not those you audit-related records are, in
17 fact, public records.

18 So that's what we want, Your Honor, as far
19 as Cyber Ninjas. It's an order that they immediately
20 begin producing documents, that they provide a privilege
21 log. And if Your Honor wants to issue that order subject
22 to any stay that's issued by the Arizona Court of
23 Appeals, we would have no problem with that.

24 THE COURT: Okay. Just a second. Is the
25 letter that you referred to that -- where Cyber Ninjas

1 took the -- the position that you just described, is that
2 attached to your -- to your motion?

3 MR. HOFFMAN: It's attached to our request
4 for the status conference, Yes, Your Honor.

5 THE COURT: Okay.

6 Tomy, there's a pile of stuff concerning
7 this case on my desk. Could you grab it, please.

8 Okay. Before I hear from Mr. Wilenchik,
9 let me hear from the Senate. Do you all have input on --
10 on this issue at this time?

11 MR. LANGHOFER: No, Your Honor. As we
12 understand, the motion concerns Cyber Ninjas, and we --
13 we won't take a position on whether they should be held
14 in contempt. The only way in which this impacts us is
15 the direct production to PNI of documents that may be
16 subject to claims of legislative privilege. And I -- I
17 appreciate, of course, that Your Honor has found it not
18 applicable here with -- with limited exception. There's
19 one exception we've established so far.

20 The same issue but from Judge Kemp's case
21 will be subject to oral argument in the Court of Appeals
22 tomorrow in a special action. And so as long as there
23 may be viable legislative privilege claims in Cyber
24 Ninjas's records, we'd like to avoid the waiver of that
25 by the direct production of those records to third

1 parties.

2 THE COURT: Okay. The -- PNI is not -- is
3 directing that their request at Cyber Ninjas only at this
4 time and not at the Senate. So -- so I won't pursue that
5 for right now. I'm looking now at the letter that was
6 just referred to. While I'm doing that, Mr. Wilenchik,
7 go ahead.

8 MR. WILENCHIK: Thank you, Your Honor.
9 First of all, you know, I'll make note we filed a request
10 to order that PNI proceed, you know, rather than go
11 through this constant filing of motions for contempt, to
12 actually have a meet and confer with us with respect to
13 -- to what these productions are that they actually want.
14 And let me explain that.

15 As soon as that memorandum decision came
16 out from the Court of Appeals, I did prepare and send a
17 letter which does, as Mr. Hoffman failed to mention,
18 contain a privilege log. And contrary to what he said,
19 it does, in fact, state that -- I put right in here under
20 declaration on the very last page by -- signed by
21 Mr. Logan, who's the CO of Cyber Ninjas, exactly what
22 kind of search was performed and exactly the way we
23 interpret the scope of -- of what's been ordered here,
24 which is documents not just related to -- I heard that
25 word -- phrase used several times, not just documents

1 related to, documents with a substantial nexus to the,
2 quote, unquote, audit.

3 Now, we've got two points of confusion
4 there. One is, what is substantial nexus? Two is, what
5 is the quote, unquote audit? The quote, unquote audit,
6 as we look at it, was a contract to perform -- to prepare
7 and author an audit report, which was completed. So, you
8 know, again, I don't want to stray too far from what
9 Mr. Logan himself has said in his declaration. But he
10 did perform a search for anything that has, quote, a
11 substantial nexus to the audit report and the related
12 investigation, meaning investigation that went into the
13 report.

14 This is the government activity that's been
15 referred to. It's not his -- which brings me to my
16 second point, which is, you know, I had a good call, I
17 thought, with -- with David Bodney, who is not present
18 today. But he is counsel along with Mr. Hoffman for --

19 THE COURT: Let me stop you for a second.

20 MR. WILENCHIK: Sure.

21 THE COURT: A causal link with the audit
22 report and it's related investigation, what -- what --
23 what exactly is meant by that?

24 MR. WILENCHIK: So these are definitions
25 that, for lack of any further clarity in this Court's

1 order or any other order, that I pulled of Black's Law
2 Dictionary because I do want to make it clear, you know,
3 my client respects court orders. We're trying our best
4 here. We feel that we are in incredibly usual and
5 illegal situation -- transparently illegal situation here
6 where private documents the government does not own are
7 being deemed public records.

8 But to answer your question, I performed my
9 only attempt to define that. I looked at Black's Law,
10 what is the definition of a nexus. I'll tell you it
11 actually comes that Latin, a word for -- for -- for
12 bondage or slavery in Latin, which is a strange thing.
13 But that's the concept here, is that something so close
14 related as to be subservient to, as a part of, to be --
15 to be, you know, the exactly words I used there, so close
16 related and then again to what? Well, to the audit.
17 What's the audit? It's not -- and I need to emphasize
18 this as well.

19 The audit was not some kind of statutorily
20 ordered recount, which seems to be what everybody in the
21 room seems to be treating it as. It was an audit report.
22 And in fairness, an investigation that went into the
23 audit report that was a part of it that we know, things
24 like the underlying data. And frankly, I don't know why
25 anybody would have any genuine interest in anything but

1 those types of things. But, one, that is what has been
2 produced here. We have the underlying --

3 THE COURT: Stop, stop, stop, again,
4 please. So is it your position that the -- the count of
5 ballots that took place is not part of or substantially
6 related to the audit?

7 MR. WILENCHIK: No, not at all, Your Honor.
8 Obviously, it was a part of the audit --

9 THE COURT: Then I'm --

10 MR. WILENCHIK: -- that was a related --

11 THE COURT: -- then I'm having a hard time
12 understanding the -- the scope of what exactly what
13 you're saying is -- is related.

14 MR. WILENCHIK: Well, honestly, Your Honor,
15 it's a question for the Plaintiff here, what it is that
16 they want, what is it they made a request for. And
17 that's where I was -- I was beginning to say. This is
18 why we need confers. I talked to Mr. Bodney. He's
19 identified at least to me a category of three things,
20 primarily e-mails with subcontractors, which in their
21 view, has a substantial nexus to the audit reports and
22 the related investigation.

23 Our view, I don't see how that kind of
24 stuff has a relationship to it. I don't see it as a
25 public record in any way, shape, or form as has a -- so

1 close related to that report as to be a part of it or
2 even the related investigation. But the point that I
3 need to make to you is, you know, on that kind of basis,
4 a meet-confer basis, I don't know that we care about
5 producing those kind of things in general.

6 The particular problem we have there is
7 who's going to pay for the redactions? Who's going to
8 deal with all that? We are not a public agency. We
9 don't have a, you know, taxpayer-funded public records
10 department. We don't have a taxpayer-funded lawyer in
11 the form of the AG. So that's the snag that we've hit as
12 a very practical matter, and I think that if the Court
13 orders further meet and confers between all the parties
14 here, this is something that could be worked out as a
15 practical matter.

16 But what we -- we definitely cannot
17 continue to do, because it's very expensive -- and at
18 this point, I don't even know who's paying for it -- is
19 continue to have these kind of contempt hearings and all
20 this kind of stuff. It's not productive. It's not
21 helpful, and -- and again, at the end of the day, what is
22 the real issue here? Well, they've asked for things like
23 subcontractor e-mails, which I think we don't mind
24 providing at this point. But again, there's redactions
25 need to be done.

1 I can be more specific on that, by the way.
2 Specifically, we need to redact the volunteer names
3 because that's a promise we made to these volunteers. We
4 don't want to see them doxed. You know, we don't want to
5 see their names made public so they get harassed. That's
6 -- that's just no need for that.

7 But it's time and money involved in these
8 things, and again, I don't know who's paying for this.
9 The company can't deal with this. So that's the
10 situation we've got, is again these categories of things
11 we don't think they're part of the substantial nexus.
12 But as a practical matter, we can produce them. It's
13 just who's paying for these redactions? I did try to
14 confer with Mr. Langhofer before the holidays or in the
15 midst of the holidays, I should say, about, you know, can
16 the Senate take that burden on because this company can't
17 do it. Nobody is paying for this. I'm not sure anybody
18 is paying for me to be saying these things at this point.
19 So that's the situation we're in, Your Honor.

20 THE COURT: Okay. Let me hear -- hear your
21 reply, Mr. Hoffman.

22 MR. HOFFMAN: Well, a couple points, Your
23 Honor. I'm now hearing that there are records beyond the
24 300 that were previously provided the Senate that are
25 related to the audit. And so that's an acknowledgment

1 that the scope of my client's public records request is
2 again not limited to those documents that have a
3 substantial nexus to the final audit report. And, in
4 fact, I can turn to the petition for review that Cyber
5 Ninjas filed last week with the Arizona Supreme Court
6 where they describe the scope of our request which is --
7 and they said, quote, PNI has asked for all of CNI's
8 communications regarding this audit including
9 subcontractors specifically.

10 This would include things like CNI's
11 internal e-mails discussing issues with its abilities
12 performed under the contract, discussing its relationship
13 with the Senate and evaluating the performance of its on
14 subcontracts or issues with their performance, et cetera.

15 So Cyber Ninjas knows the scope of our
16 request, and they haven't produced any documents after
17 the memorandum decision was issued either before or after
18 they filed a petition for review with the Arizona Supreme
19 Court. So those documents need to be produced, and they
20 haven't been, and so we need an order that requires that
21 they be produced promptly.

22 And in addition, Your Honor, I'll let you
23 judge for yourself whether or not the four-entry, quote,
24 unquote privilege logs in the letter that Cyber Ninjas
25 lawyer sent meets with the obligations in your Court's

1 prior orders. But I do note that, you know, if there's
2 going to be a dispute over whether or not a record has a
3 substantial nexus to the audit, that's a decision for
4 Your Honor to make. And the requirement that Your Honor
5 imposed on Cyber Ninjas to provide a log that describes
6 all audit-related records including those that Cyber
7 Ninjas contend don't have a substantial nexus to the
8 audit on a privilege log should give us, if it's complied
9 with, enough information to resolve those questionable
10 documents.

11 But, you know, we've been waiting for these
12 records since this summer. It's now almost December.
13 Your Honor, it's come time for Cyber Ninjas to, you know,
14 get these documents produced either to the Senate or us
15 directly to put -- in compliance with the Court of
16 Appeals memorandum decision.

17 THE COURT: All right.

18 MR. WILENCHIK: Your Honor, can I be heard
19 on one issue there?

20 THE COURT: Okay.

21 MR. WILENCHIK: Thank you. You know, what
22 I've heard proposed here is a order requiring this
23 company to identify all documents related to this audit
24 apparently in any way, shape, or form and make a log out
25 of them. I just have to say I don't know who's paying --

1 I don't even know if that's even doable. It's -- that's
2 just, you know, if the Courts make such an order,
3 obviously. We have our pending appeal to the Arizona
4 Supreme Court, but I do have to point out as well that
5 there's an issue here, a very real issue of just
6 impossibility of compliance with the Court's order if
7 that's the kind of order that gets made.

8 There's nobody -- I'll add to that for an
9 actual public records request that's actually made of the
10 government, which is not at all what we're dealing with
11 here, you know, again, you've got taxpayer-funded public
12 records department. You've got taxpayer money that is
13 available to deal with this. My client doesn't have
14 that. This is not what was ever contemplated by the
15 statutes nor -- nor is it in anyway legal. So that's a
16 basic practical problem that we have here. This is why
17 we've got a problem if we end up having one if the Court
18 -- if the Arizona Supreme Court denies this stay and
19 we're back to square one and we're having these
20 arguments.

21 What I'm trying to say is, again, if the
22 Court orders meet and confer rather than having these
23 constant hearings, I think we can get this resolved as a
24 practical matter so long as the Senate pays for that kind
25 of redaction, pays for the records review. I don't know

1 how anybody pays for review of every single private
2 company document in this company related to the audit and
3 makes a log out that. That's just is not something
4 that's economical or makes any sense to me whatsoever.

5 THE COURT: Well, those -- part of the
6 answer to that, I think, is that those issues are before
7 the Arizona Supreme Court, and we'll see what the Arizona
8 Supreme Court says. I will note, as I have before, that
9 many of the issues that seem to be before the Supreme
10 Court were never raised in front of me. But I guess
11 that's up to the Supreme Court to decide whether to
12 address them. But the -- the arguments about the extent
13 of a private company's obligation under these
14 circumstances, for example, that's -- that's what I think
15 we're going to get a decision on, at least I hope so.

16 The ability of Cyber Ninjas to comply is, I
17 think, something that's going to have to be addressed as
18 we go along. I don't see how I can address that without
19 having an order in place that requires compliance, and
20 then if it's not complied with, we deal with that.

21 The -- this is not -- I balked at a -- an
22 order directed to the Senate in the absence of meet and
23 -- a serious meet-and-confer process between the parties
24 because the Senate was demonstrating at least some effort
25 to determine what would be disclosed and what it was

1 going to resist disclosing. And there was a -- I saw the
2 -- at least a possibility that that process would narrow
3 the issues. Frankly, I do not see that with Cyber
4 Ninjas.

5 The log that Cyber Ninjas provided is so
6 far off of what I ordered previously that I do not think
7 that it is -- that the additional delay that would be
8 created by ordering a meet-and-confer process before I
9 enter an order here justifies -- is justified under the
10 circumstances. The -- so -- so let me enter a couple of
11 orders.

12 First of all, the -- it is ordered
13 affirming the Court's previous orders which define the
14 audit -- or if I have not defined it before, let me
15 define it now as the -- as the Senate described it. The
16 process of amassing data relating to the accuracy and
17 efficacy of the existing electoral infrastructure. So it
18 is not -- the public records request is not limited to
19 the report. The -- it includes the investigation, but
20 the investigation includes the entire process from
21 January or early February when the Senate began talking
22 to the Cyber Ninjas about undertaking the -- what's been
23 loosely referred to as the audit. And it does include
24 things like the -- the so-called ballot recount. So
25 that's one thing.

1 The second thing is that it is ordered that
2 the Cyber Ninjas immediately begin complying with the
3 Court's previous order to produce what has been termed a
4 privileged log, but that is a bit of a misnomer because I
5 have ordered specifically that the log enumerate and
6 describe audit-related records that the -- that Cyber
7 Ninjas contends are not public records. And I think that
8 for this purpose, audit-related is the correct
9 formulation. Whether there is some space between what is
10 audit-related and what has a substantial nexus to the
11 audit remains to be determined. However, that is up to
12 me to determine. It is not up to Cyber Ninjas to
13 determine, and it is not up to the Senate.

14 That means that the -- that any limitation
15 of the privilege log, based on what Cyber Ninjas viewed
16 as having a substantial nexus to -- to the audit -- and
17 again, when I say the audit, by that, I do mean the
18 entire process -- that any -- any attempt to limit the
19 privilege -- that the log to only those documents that
20 have a substantial nexus is misplaced, and it is -- and
21 is inconsistent with the Court's order. And it's ordered
22 that the process of creating that log and producing those
23 records that Cyber Ninjas deems to be public records must
24 proceed immediately. The --

25 MR. WILENCHIK: Deems not to be. I'm

1 sorry, Your Honor. You misspoke.

2 THE COURT: Did I misspeak?

3 MR. WILENCHIK: That deems not to be public
4 record.

5 THE COURT: Say it again. I'm sorry.

6 MR. WILENCHIK: It's okay. I'm sorry I
7 interrupted. You said that the documents Cyber Ninjas
8 deem to be public records. We're talking about documents
9 they deem not to be public records. Do want a log of
10 that.

11 THE COURT: Thank you. Thank you for that
12 correction. You're right. And the -- I will say this
13 too, that it does appear from what Phoenix Newspapers has
14 told me today and from what I've seen in other filings by
15 Cyber Ninjas is that Cyber Ninjas is quite -- is -- has
16 some understanding of what is related to the audit, some
17 understanding of what they are being asked for. And
18 today is not the day when I will perhaps make findings on
19 whether Cyber Ninjas is -- is as confused about the
20 meaning of my order as they're making out to be today.

21 MR. WILENCHIK: That's inappropriate, Your
22 Honor. Sorry.

23 THE COURT: But I don't think that in -- in
24 the long run, a -- taking a position that my order is so
25 opaque that there can only -- that a four -- four-item

1 privilege log in response might be sufficient. It's hard
2 for me to -- in the long run, to think that that -- that
3 position will be considered to be in compliance with --
4 with the orders that I have entered before, let alone the
5 ones I have entered today. So --

6 MR. WILENCHIK: Your Honor, one response if
7 I may, please?

8 THE COURT: Yes. Go ahead.

9 MR. WILENCHIK: Are you ordering somebody
10 to pay for that because that is the issue. Sure, we can
11 all understand the concept generally being related to
12 something, and I do appreciate the order, the Court's
13 efforts to clarify that. But the issue that I've tried
14 to describe earlier is that if the task here is to have
15 this private company compile what must be a lengthy
16 privilege log of every single private document that is
17 related to this audit in any way, who's paying for that?
18 Because the Plaintiff is not. The Senate is not. And
19 this company is insolvent. So if the Court wishes to
20 address that, we'd certainly appreciate the clarity. If
21 the Court does not wish to address that, then I'll leave
22 it be.

23 THE COURT: Mr. Hoffman, do you have
24 something to -- to contribute on that?

25 MR. HOFFMAN: Well, Your Honor, frankly,

1 there's not an evidentiary record to establish that Cyber
2 Ninjas is insolvent. The fact that they're not paying
3 their lawyer is candidly -- maybe not paying their
4 lawyers. I'm not sure if I heard that correctly or not.
5 But it's, candidly, not my fault. They have an
6 obligation pursuant to this Court's order and pursuant to
7 the memorandum decision to do what Your Honor ordered,
8 which is to provide that privilege log and to eventually
9 provide public records.

10 And, you know, if they're having financial
11 difficulties, perhaps they can meet and confer with the
12 Senate -- that was an idea that I heard proposed -- to
13 see if the Senate is willing to foot the bill for
14 purposes of, you know, doing redactions and potentially
15 putting together a privilege log. But again, you know,
16 there are court orders that require them to do this, and
17 it ought to happen regardless of their financial
18 position.

19 THE COURT: Mr. Langhofer, do you have
20 anything on this?

21 MR. LANGHOFER: No, Your Honor. We -- we
22 have asked. I guess just a factual observation, no
23 argument. We've been asked by Cyber Ninjas to cover the
24 cost of redactions, and we're trying to get our arms
25 around what those cost might be projected out at. Our

1 understanding is it would not be cheap, and so the Senate
2 hasn't taken a final position on that just yet.

3 THE COURT: Well, it does seem to me that
4 this is the Senate's obligation too. The -- the order
5 runs -- the public records production order runs against
6 both the Senate and Cyber Ninjas, and Cyber Ninjas -- one
7 way for Cyber Ninjas to comply with their obligation, it
8 seems to me, would be to produce the documents to the
9 Senate and then let the Senate -- I won't say let the
10 Senate sort it out, but -- but I don't think -- at least
11 I won't say that yet, but the Senate is not a bystander
12 here.

13 So the -- if Cyber Ninjas does not comply
14 because they say they can't afford it, the -- the Court
15 is, among other things, going to look to the Senate to --
16 to facilitate compliance. So --

17 MR. LANGHOFER: Well --

18 THE COURT: Go ahead.

19 MR. LANGHOFER: -- Your Honor, the Senate,
20 until the very end of your comments there, I was prepared
21 to say that I think we see it the same way. The Senate
22 has taken the position that the documents in its
23 possession, we'll produce with the exception of privilege
24 records, and we'll produce a log for those. And at the
25 moment, the documents we have from Cyber Ninjas have

1 either been unloaded to public reading room or if they're
2 too voluminous for upload, they've been made available so
3 anyone who wants to come to the Senate and get copies
4 there, electronic copies, or we have put them on a
5 privileged log. So the documents we have from Cyber
6 Ninjas have been handled appropriately.

7 I think what we're fighting about are the
8 ones we don't have. If we find ourselves in a situation
9 where the Senate doesn't have access to the records and
10 Cyber Ninjas, you know, pulls its pockets out, show it
11 has no money, I don't think the solution is make the
12 Senate hand over its funds. I don't think there's a
13 basis in law for ordering the Senate to pay a third party
14 to do what could be done quite cheaply by giving those
15 documents to the Senate.

16 THE COURT: Well, the Senate -- the Senate
17 paid, allegedly, for Cyber Ninjas to do this work. It
18 seems to me that following through with the -- with the
19 cost that comes with the -- they're having outsourced the
20 work to fulfill the public records obligation is -- is
21 something that the Senate took on by -- by the decision
22 it made. Now, the -- let me enter one more order because
23 I think it's going to speak to this.

24 The privilege log is necessary. The need
25 for the privilege log assumes that Cyber Ninjas is going

1 to be the party that produces the documents. An
2 alternative is for Cyber Ninjas to give the documents to
3 the Senate and allow the Senate to determine what should
4 be produced and what should be withheld. Now, once the
5 Senate -- I would -- if the -- so it's ordered that --
6 and, Mr. Hoffman, I'm going to -- I'm going to say this,
7 and then I'm going to let you be heard before I make it
8 final. What I'm thinking I'm going to do is say that
9 Cyber Ninjas can fulfill its obligation by providing all
10 of the audit-related records to the Senate and then let
11 the Senate go through the process of sorting through what
12 should be produced and what shouldn't and what need not
13 be.

14 Now, I don't think that -- I don't know
15 whether the -- if that production were to be made, the
16 Court would expect that it would include all
17 audit-related records, that it would -- that the scope of
18 the production would not change. The obligation that
19 would not come with that, however, would be to produce a
20 privilege log. Before I make that an order, I -- tell me
21 what you -- tell me what you think of that and whether
22 you think that's a good idea.

23 MR. HOFFMAN: Well, Your Honor, if Cyber
24 Ninjas does, in fact, turn over all of its audit-related
25 records to the Senate and the Senate is then charged with

1 making calls with respect to whether or not those
2 documents, in fact, have a substantial nexus to the audit
3 itself, I think we would want a privilege log like the
4 one you ordered Cyber Ninjas to provide to be provided by
5 the Senate so that to the extent the Senate contends that
6 an audit-related record does not have a substantial nexus
7 to the audit, my client can review those documents, and
8 to the extent it doesn't agree with that conclusion,
9 bring those documents before Your Honor because as Your
10 Honor has said, you are the one who gets to make the
11 final determination as to whether or not a document has a
12 substantial nexus to the audit.

13 THE COURT: I agree. Mr. Langhofer, yes.

14 MR. LANGHOFER: Your Honor --

15 THE COURT: I will hear from you too before
16 I make that final --

17 MR. LANGHOFER: Thank you. I appreciate
18 that. First, if a document relates to the audit, it
19 concerns the audit, the -- the contracting process, the
20 counting process, the report-writing process, the
21 publication, if it has anything to do with the audit,
22 we're not drawing new ones here, if it concerns the audit
23 and it's not privileged, we're producing it. If it is
24 privileged, it goes in a privilege log. What we're under
25 no obligation to start doing is identifying documents

1 that have nothing to do with the audit, and whether
2 they're privileged or not, we are itemizing those.

3 They're not responsive to the public
4 records request, and it would be literally every document
5 the Senate has. There -- there are millions of records
6 that the Senate has accumulated over time. We can't --
7 we can't produce a log of all those.

8 So our process is really simple. Does it
9 concern the audit, yes or no? If it does, it's going to
10 be produced unless it's privileged, and, obviously, we've
11 got this ongoing appeal about the privilege. And this is
12 -- we have actually -- Your Honor will recall --
13 requested all these records from Cyber Ninjas. We've
14 given you copies of our request. We've given them to
15 opposing counsel. We're happy to get custody of those
16 and produce them except to the extent they are
17 privileged.

18 Now, the idea -- so the conversation we
19 have been having over the last couple minutes is what we
20 do if the Senate gets the documents. I think I've
21 explained that. If the Senate doesn't get the documents
22 though, the Senate has no obligation to pay Cyber Ninjas
23 for that. We -- our relationship with Cyber Ninjas is a
24 contract. We negotiated that contract. There's a price
25 in the contract. There's obligations that flow back and

1 forth including the obligation to transfer documents to
2 us.

3 We had a view on that that the Court
4 rejected. So that -- that ship has sailed, but there is
5 no cause to say that the terms of that contract silently
6 included the obligation to transfer more money to Cyber
7 Ninjas. That's not -- that's not a part of the deal we
8 struck, and we understand that, you know, we may take
9 possession of these documents and produce them, but we
10 can't be forced to cough up more money than the contract
11 contemplates.

12 THE COURT: I think that's right. I mean,
13 whether -- whether the Senate pays more to Cyber -- pays
14 money to Cyber Ninjas, that may be beyond my authority.
15 I don't think, however, that it is beyond my authority to
16 require that the -- to -- to make the Senate responsible
17 for the disclosure of the documents under the Public
18 Records Law. So -- so I am going to go ahead and -- and
19 enter an --

20 MR. WILENCHIK: Your Honor, could I be
21 heard one more time? Thank you. Well, I do want to be
22 clear as to all the Court's orders here. We are not just
23 talking about the entire universe of the audit-related
24 documents. This was a public records request that asked
25 for specific things, particularly communications and

1 financial documents. And again, I appreciate what you've
2 said. You don't think meet and confers are helpful here,
3 but I'll respectfully disagree. The discussion I had
4 with Mr. Bodney was there's a class of, as a practical
5 matter, three things including particularly subcontractor
6 e-mails that we are actually talking about here.

7 And the only issue really with redactions,
8 as we see it -- and by the way, I'm saying this just
9 because, yeah, it's a great idea, frankly, just dump the
10 stuff on the Senate and move on. But here's the issue,
11 we need to have these names redacted to protect the
12 innocent, so to speak, to protect the people who -- who
13 worked on this audit. So I say that just to ensure I
14 think it's important that these orders are clear. We're
15 talking about, you know, those documents that were
16 actually requested as part of this public records request
17 related to the audit in terms of, you know, what is the
18 definition of -- of substantially related or not, the
19 limitations being placed on the actual public records
20 request.

21 And ideally, it would be nice to just
22 identify these three specific things that I discussed
23 with Mr. Bodney so I'm not here again -- if I am going to
24 be ever here again on a contempt hearing because it's --
25 it's believed that we didn't produce everything that we

1 should have produced.

2 So again I do think a meet and confer is
3 helpful here just to narrow down specifically what we're
4 talking about, and also I do think the orders need to be
5 clear. We're not just talking about all documents
6 related to this audit. These are -- this is within the
7 confines of public records request which asked for
8 specific things. Thank you, Your Honor.

9 THE COURT: Okay. Well, you're -- you're
10 saying two very different things at the same time.
11 You're saying that the request is very limited and that
12 you can work out what it covers just by talking among
13 counsel. You're saying at the same time that it is so
14 overwhelmingly voluminous that you can't possibly comply.
15 Both those things are not --

16 MR. WILENCHIK: Your Honor, that's not what
17 I'm saying, please. Thank you.

18 THE COURT: I -- I -- I'm -- you can
19 disagree with my characterization if you like, but that's
20 what I heard.

21 MR. WILENCHIK: Because you're not
22 listening. Let me be very, very clear here. I'm saying
23 if we are just talking about the three narrow classes of
24 documents, that is something that is economically
25 feasible if the Senate will pay for those redactions to

1 names. But I want to be clear we are just talking about
2 the three class of doc -- the three documents, the
3 subcontractor e-mails. I discussed with Mr. Bodney
4 invoices and contracts with subcontractors and then
5 e-mails of the particular person that was identified in
6 there.

7 THE COURT: Okay. The --

8 MR. WILENCHIK: You know, this is the kind
9 of discovery type process that should happen outside of
10 court. Go ahead. I'm sorry.

11 THE COURT: The Phoenix Newspapers is
12 represented here today. They are speaking for
13 themselves. They are -- they are telling me that the --
14 they -- they are asking me to require a -- an enumeration
15 of the documents that we're talking about. If you can --
16 you are free to talk to them and narrow the scope of the
17 request to something that you think is more manageable.
18 I've entered the orders in that respect that I am going
19 to enter. I will -- I agree with you that your client is
20 not required to produce anything that is not within the
21 scope of the public records request that was made. But
22 beyond that, the -- the distance between that and some
23 number of internal e-mails is something that you and
24 Phoenix Newspapers or your client and Phoenix Newspapers
25 are going to have to work out and bridge that gap.

1 It is ordered that, consistent with the
2 Court's prior orders, that Cyber Ninjas may produce the
3 audit-related records to the Arizona State Senate in lieu
4 of providing Phoenix Newspapers with a privilege log. If
5 that is how Cyber Ninjas proceeds, then the log would be
6 -- then the Court would expect that the privilege log
7 would be created by the Senate and that the documents
8 produced to the Senate by Cyber Ninjas would be either
9 produced or disclosed by the Senate to Phoenix Newspapers
10 or listed on a privilege log. For purposes of this
11 order, the scope of the -- what Cyber Ninjas produces to
12 the Senate must be what counsel for the Senate has
13 described as the scope of what it is a public record,
14 that is all audit-related records.

15 As I understood the Senate's counsel, their
16 view is that everything related to the audit to the
17 investigation process that led up to the report and the
18 report itself must be produced unless it's privileged.
19 And if the -- if Cyber Ninjas chooses to proceed as
20 outlined in this order, that's how they are to proceed.

21 Okay. Let's go on to the other issue.

22 MR. HOFFMAN: Sure, Your Honor. Again,
23 this is Craig Hoffman on behalf of Phoenix Newspapers,
24 Inc. The other issue as it relates to the Senate was
25 we have completed the briefing on the factual basis of a

1 potential waiver of the legislative privilege. We
2 originally thought that it would be favorable if Your
3 Honor ruled expeditiously on that because it would
4 potentially allow us to take that matter up on appeal and
5 consolidate with the appeal that's currently pending
6 regarding Judge Kemp's order in the American Oversight
7 case related to the waiver of legislative privilege.

8 The urgency behind that is no longer just
9 in light of the fact that my understanding is that there
10 is oral argument on the Judge Kemp's order and the
11 American Oversight case scheduled before the Court of
12 Appeals tomorrow. So, you know, consolidating is
13 certainly not going to happen. And so we just wanted to
14 bring, I think, at this point to Your Honor's attention
15 that that matter is scheduled for oral arguments
16 tomorrow, and if that has an impact on the timing of Your
17 Honor's ruling on our claim of the waiver of the
18 legislative privilege, then so be it.

19 THE COURT: Okay. Well, what I decided to
20 do is go ahead and put -- just put the ruling on the
21 record today. That's why there's a court reporter here.
22 Either party can request a expedited transcript. The --
23 you can't do that with FTR. So that's -- that's why I
24 wanted to have a court reporter here. Then to the extent
25 that what I say is of any value to the Court of Appeals,

1 they will have the benefit of that.

2 To the extent that that allows them to
3 address the issues in this case along with the issues in
4 the American Oversight case, they can do that. I think
5 that would be helpful to the parties and the Court to
6 have an actual ruling -- an actual review of my ruling as
7 opposed to a -- a decision in another case that all of us
8 then have to interpret and apply. And then some -- then
9 the Court of Appeals has to review our -- my
10 interpretation, which will slow the process down
11 considerably.

12 And I've, after wrestling with this, I've
13 decided that the -- the best way to do is just spit it
14 out on the record. It's not going to be pretty, but at
15 least it will set out my thoughts. So in previous
16 rulings in this case, the Court's recognized that the
17 Senate and/or individual legislature -- legislators hold
18 a legislative privilege that may be asserted to prevent
19 disclosure of records to Plaintiff Phoenix Newspapers
20 pursuant to the public records law.

21 In the ruling that addressed the privilege,
22 generally on October 11th, the Court noted the
23 possibility of waiver, but the waiver issue was not
24 reached at that time because the parties had not created
25 the necessary factual record. The privilege waiver issue

1 is now ripe for resolution. Phoenix Newspapers has
2 submitted their statement of facts in support of the
3 request for finding of waiver of legislative privilege,
4 filed that on November 4th. Senate submitted a response,
5 filed that on November 10th. The parties have also
6 submitted additional briefing on the issue in the form of
7 the response to Plaintiff's request for finding of
8 waiver, a reply in support of the finding of waiver.

9 The Court has read and considered all of
10 the findings -- all the filings, I should say. The Court
11 now finds that the Senate and its leaders have waived the
12 legislative privilege with respect to the Senate's review
13 of the November 3, 2020, Maricopa County general election
14 described by the Senate as the process of amassing data
15 relating to the accuracy and efficacy of the existing
16 electoral infrastructure. Individual legislators
17 continue to hold a privilege with respect to
18 communications that discuss potential policy consequences
19 of the findings of the review process such as
20 contemplated or proposed legislation.

21 The -- it's ordered affirming the finding
22 in the ruling dated October 20th that privilege log Page
23 265, Number 14, a text string between President Fann and
24 Representative Finchem contains a privileged
25 communication. That communication -- that is a

1 communication between legislators that was an integral
2 part of the -- actually, it would be more accurate to say
3 that communication describes a communication between
4 legislators that was an integral part of the deliberative
5 process concerning a matter placed in the legislature's
6 jurisdiction by Arizona law. It is, therefore,
7 privilege.

8 Okay. Here's why, this -- this is not
9 about legislative immunity. The legislature is not
10 immune from the -- from compliance with the Public
11 Records Law. The Court of Appeals explicitly rejected
12 that proposition in Fann versus Kemp. The Public Records
13 Law applies to the legislature notwithstanding the Speech
14 and Debate Clause notwithstanding the -- the immunity
15 that follows from the Speech and Debate Clause. What
16 this is about is the privilege of the legislature and/or
17 individual legislators having received a public records
18 request to hold certain documents in confidence instead
19 of disclosing them. It is a right of nondisclosure of
20 confidentiality.

21 It applies to legislators's communications
22 and deliberations to the extent that those are necessary
23 to prevent indirect impairment of such deliberations.
24 That's Arizona Independent Redistricting Commission
25 versus Fields at Paragraph 18. It extends to written

1 records, according to Independent Redistricting
2 Commission versus Fields, and it does so because
3 disclosure could chill legislators from freely engaging
4 in the deliberative process necessary to the business of
5 legislating. That's Paragraph 32. In other words,
6 confidentiality is necessary to protect the legislative
7 process. The privilege applies when confidentiality is
8 necessary to protect the legislative process so the
9 legislators can speak freely without fear of
10 repercussion.

11 The Senate -- the Court rejects the
12 Senate's arguments because the Senate relies on cases
13 that are about legislative immunity. The Helstocky
14 (phonetic) case, for example, holds that a House member's
15 testimony about legislative acts did not extinguish his
16 ability to assert the legislative privilege at trial.
17 Minpeco versus Conticommodities Services, Inc. says that
18 a -- upheld a Congressperson's assertion of legislative
19 privilege to prevent compelled disclosure of documents
20 relating to a committee report. Those are situations
21 that were about the immunity of the legislator from
22 prosecution and not about the confidentiality aspect of
23 the legislative privilege.

24 The Senate cites those cases for the
25 proposition that the ordinary rules of waiver don't apply

1 to the legislative privilege, but that's not the kind of
2 waiver they are talking about in those cases. Those
3 cases are about -- when those cases talk about waiver,
4 they are talking about foregoing immunity on a
5 going-forward basis once you have opened up the subject
6 by talking about it. It's like a waiver of the Fifth
7 Amendment right against self-incrimination. You can give
8 up your Fifth Amendment right and talk about -- and talk
9 about a subject, then there is a question about whether
10 you have waived your right to testify in a subsequent
11 proceeding.

12 That's not a subject matter-based waiver.
13 That's the kind of waiver that those cases are talking
14 about. That kind of waiver has to be explicit. That's
15 not the kind of waiver that we're talking about. And
16 it's clear that those cases don't apply when you play out
17 how they would apply to this case.

18 What the Senate argues based on those
19 cases, the disclosure of a given document doesn't waive
20 the privilege beyond that document. What that means in
21 effect, is that a document is privileged because they
22 decide it is. And that's the exact argument that the
23 Court of Appeals has already rejected. It's just the
24 same argument in a different form. And it's why they --
25 it's why the Senate can say, well, we have released

1 80,000 nonprivileged document, and, therefore, because
2 they are not privileged, there's no waiver.

3 Well, what they are saying is that the
4 define what's privileged and what's not. They are saying
5 they have the right to define privilege for themselves.
6 They don't. What we have to come back around to what we
7 are talking about here, it's a nondisclosure privilege, a
8 privilege to hold communications in confidence. And like
9 all such privileges, it has to be construed narrowly.
10 That's what Fields says. It can be waived
11 notwithstanding that it has roots in the Constitution.
12 That's what Fields says. Fields holds that a privilege
13 holder waives the privilege concerning a subject by
14 electing to testify about it. That's Paragraph 48 of
15 Fields. It uses the words, waives the privilege
16 concerning a subject.

17 The Senate tries to distinguish Fields on
18 the ground that in that case they were talking about
19 testimony. And if the -- if the individual had
20 testified, then, yes, there would have -- he would have
21 been required to testify to matters relating to the -- to
22 the subject of his testimony, but it does not follow that
23 the waiver would not apply where there had been a
24 disclosure of documents on the same subject matter. That
25 kind of waiver follows from -- logically from the holding

1 in Fields.

2 And that's what Puente Arizona versus
3 Arpaio says. It says that waiver is not -- waiver of
4 this kind of a privilege need not be explicit. This is
5 Page 671. The waiver need not be explicit. It may occur
6 when the holder testifies, which is what the Court of
7 Appeals was discussing in Restrict Commission versus
8 Fields, or when purportedly privileged communications are
9 shared with outsiders. That's a quote from Puente
10 Arizona on Page 671.

11 There is simply no reason for a court to
12 enforce the legislator's interest in confidentiality when
13 the legislature itself has not held communications in
14 confidence. Puente does not stand for what the Senate
15 says it stands for. The -- the Senate quotes Footnote 5
16 of Puente Arizona. Plaintiffs fail to provide persuasive
17 authority that waiver of the legislative privilege with
18 respect to some documents waives the privilege with
19 respect to any other documents. And they put a period
20 there. That's not where the sentence stops. The whole
21 sentence reads, Plaintiff failed to provide persuasive
22 authority that waiver of the legislative privilege with
23 respect to some documents waives the privilege with
24 respect to any other documents.

25 What -- what Judge Campbell is saying there

1 is that a privilege waiver is not unlimited. It doesn't
2 waive the privilege with respect to any other documents
3 that may be requested. It waives the privilege with
4 respect to other documents on the same subject. And it
5 goes on to say, the Court notes that the Congress
6 recently tightened the test for attorney-client privilege
7 waivers arising from documents disclosed in state or
8 federal proceedings, the parties do not discuss this
9 congressionally inactive rule.

10 Well, that's right. The -- there was --
11 there was -- were amendments -- I think they were
12 amendments to the Federal Rules of Evidence that talked
13 about the -- the scope of a waiver arising from a
14 disclosure of privileged documents. But that did not --
15 but no one has ever said that the waiver does not extend
16 at least to all documents or all communications
17 concerning the same subject matter. That is what they
18 said, and they were trying to tighten the test so that it
19 didn't go beyond that. So Puente Arizona is completely
20 consistent with the holding that there's been a privilege
21 waiver in this case.

22 Where I got bogged down in this case is
23 that I tried to enumerate all of the disclosures that the
24 Senate has made that waived the privilege that result in
25 a privilege waiver. And frankly, there are so many that

1 it got out -- that it got out of hand. They've --
2 they've just thoroughly disclosed everything,
3 virtually everything, it appears to me, that is related
4 to the process of amassing data relating to the accuracy
5 and efficacy of the existing electoral infrastructure.
6 They have waived whatever -- they have not even remotely
7 attempted to keep that information confidential, and it's
8 not just the release of the report.

9 The -- I suppose the implication of the way
10 that I'm framing this is that the release of the report
11 itself would waive the privilege as opposed to a
12 situation where the Senate kept the report in confidence,
13 release some kind of a summary. But that's not what
14 happened here. So I don't have to decide it.

15 What happened here is that this whole thing
16 was a public facing process. There were ongoing releases
17 of information. When it ended, there was far more than
18 just a report. There are a couple of other ways you
19 could frame this. You could say that the audit had a
20 political purpose as well as a legislative purpose. The
21 -- Judge Thomason, when he decided that the review
22 process had a proper legislative purpose, did not say
23 that it was the only purpose. And the -- the Senate
24 didn't really even take the position that it was the only
25 purpose.

1 Judge Thomason said in his decision that
2 the -- that -- that Senator Fann had made a number of
3 public statements about the need to audit the election to
4 address the concerns of many voters regarding the
5 accuracy of the reported outcome. That's his ruling on
6 February 25th, 2021, in Maricopa County versus Fann at
7 Page 10. The -- what he's saying there is that the
8 process had more than one purpose.

9 Under those circumstances, I think you --
10 it seems to me that the -- the public facing purpose, the
11 political purpose makes the -- the whole process -- takes
12 the whole process out of scope of what's privileged
13 because it's what the cases characterize as political
14 rather than policy granted. You could also say that a
15 privilege for the audit as such as a factfinding and
16 policy-recommending exercise independent of what the
17 legislators take away from its conclusions and policy
18 terms is not necessary for the protection of the
19 integrity of deliberations or necessary to prevent
20 indirect impairment of such deliberations.

21 We already know what it says. We already
22 know -- the public knows an enormous amount about it. So
23 the -- to say that it's necessary to -- to maintain the
24 confidentiality of some residual number of related
25 communications to protect the integrity of the

1 legislature's deliberations to prevent impairment of the
2 deliberative process to allow the legislators room to
3 confidentially review, discuss policy matters, there's --
4 there's just nothing -- there's nothing there given the
5 scope of the disclosures that have already been made.

6 As I said, the -- both Senator Fann and
7 Senator Petersen said the -- in their -- their statements
8 concerning the process, we want to respond to the
9 concerns of the public by auditing the results and
10 confirming the outcome. Many voters -- this is Senator
11 Fann, many voters questioned the accuracy of the
12 extremely close results in the Presidential election, and
13 we wanted to respond to their concerns by auditing those
14 results and confirming the outcome.

15 My point in saying that is not that the
16 process was partly political, although it was. What that
17 implies is that they wanted to tell the public as much as
18 they could about the audit because that was part of the
19 purpose of conducting it, and the -- and -- and the
20 process was conducted accordingly. They described a
21 bipartisan effort with full transparency and joint
22 cooperation with Maricopa County officials.

23 Again, that's from the Senate Republicans
24 public statement. Of course that's not how it turned
25 out, but -- but they acted on that. To ensure full

1 transparency, they set up a livefeed. They arranged for
2 nonpartisan observers. They appointed a public liaison.
3 The Senate and the liaison described staffing. They
4 described methodological details of the audit.

5 The audit will include, but is not limited
6 to, testing the machines, scanning the ballots,
7 performing a handcount, checking for IT breaches. Then
8 they got crossways with the supervisors. The Democratic
9 party and supervisors -- supervisor -- Supervisor
10 Gallardo sued. That's Arizona Democratic Party versus
11 Fann, Superior Court Number CV2021-6646.

12 The Senate responded, as -- as it has here,
13 by resisting disclosure and claiming legislative
14 privilege for documents and materials prepared in the
15 course of the Senate's authorized legislative functions,
16 and that's right out of the Senate's Defendants motion to
17 dismiss in that case. Judge Martin overruled the
18 privilege claim. He ordered disclosure of the audit
19 policies and procedures. And what the Senate did, they
20 didn't take that up. They didn't ask to review that.
21 They settled the case, and they opened it up further.
22 They agreed to disclose all the policies and procedures
23 the Defendants and their agents are using to conduct the
24 audit including training plans and documents and forms
25 utilized to conduct the audit.

1 And now I'm quoting from the settlement
2 agreement in Arizona Democratic Party versus Fann, which
3 is among the American Oversight documents. The -- it's
4 the June 23rd, 2021, production at Pages 19 to 23. They
5 agreed to allows the news media to reserve and report on
6 the audit on reasonable terms including allowing them to
7 use notepads, to take still and video photographs except
8 ballots where ballot markings can be ascertained by the
9 naked eye or a zoom lens.

10 They agreed to permit observers designated
11 by the Secretary of State not to extend three per shift
12 including processing of ballots and election equipment
13 hardware on reasonable terms including the counting
14 floor. This is not a confidential process. This is a
15 highly, highly public process. After that, the media
16 reported from inside the -- the process every day. They
17 reported the things that have been reported lively about
18 looking for folds in the ballots to gauge the
19 authenticity of the ballots, watermark bamboo fibers, all
20 that stuff.

21 The Secretary of State published a very
22 detailed letter expressing specific concerns about
23 policy, procedures, and practices reported by onsite
24 observers. That's the Hobbs letter to Bennett, May 5th,
25 2021. That, too, is among the American Oversight

1 documents June 23, 2001 -- 2021 production at 75.

2 The -- it was that same production June
3 23rd, 2021, at Page 105, is the response of the County to
4 Senator Fann's accusation that they had -- that Maricopa
5 County had destroyed evidence and that questioned the
6 competency or the honesty of the county election process.
7 And the -- the County responded with a extremely detailed
8 letter that's far over the Court's head, frankly,
9 critiquing the -- the questions that have been asked of
10 the County and expressing their opinion that the
11 questions -- they inferred from the -- from the questions
12 what was happening in the audit, and they concluded that
13 the -- that the people who were conducting it were, at
14 best, incompetent or worse. Their conclusion, not mine.
15 But the point is that, again, it's around extremely
16 scrutinized and public process.

17 Then there were the special -- there were
18 the special hearings after that. The first one on May
19 the 18th. The first one was essentially a point-by-point
20 Defense against the Counties's criticisms. Then there
21 was another public session on July 15th with the same
22 people, Senators Fann and Petersen, Mr. Bennett,
23 Mr. Logan, and Mr. Cotton. This is full -- two months of
24 -- full two months ahead of final report.

25 The video introduction repeatedly uses

1 terms like transparency, accountability, integrity, chain
2 of custody, beyond reproach to describe the Senate-led
3 process, and then they sent -- spent more than two hours
4 comparing the County's election processes with their own
5 methods unfavorably, that describing their own methods
6 and their carefulness and meticulousness, again, in an
7 effort to convince the public, frankly, of the -- that
8 their process should be trusted by opening it, by their
9 likes, to public scrutiny.

10 Two weeks after that, Senator Fann made a
11 public statement where she accused the County of lack of
12 transparency, withholding vital information and
13 documents, and withholding the truth from the voters.
14 The -- my point in quoting that is not so for the truth
15 of what was said. It -- my point is to contrast that
16 with the position the Senate is taking now.

17 Then after -- then some time later, there
18 was the final report, which was not just a report by the
19 Cyber Ninjas, the reports from Mr. Bennett, Mr. Pullin
20 (phonetic), Mr. Cotton, Dr. Sheeba (phonetic). I think
21 I'm forgetting somebody. That were all about the
22 conclusions, the findings and conclusions of the -- of
23 the process, again, with extremely detailed descriptions
24 of the process and what it had found and how and why.
25 And my understanding since then is that the -- the entire

1 work papers of the audit, all the tally sheets,
2 everything that recorded the results has been disclosed.

3 So again, what we're talking about is the
4 residual of a process that was not in any way
5 confidential, that was public, and there's -- there is,
6 to the Court's mind, the -- any need for confidentiality,
7 interest in confidentiality, right of confidentiality
8 that may have applied to any of that was long-since
9 waived by the Senate's own decisions and how this process
10 was conducted, was planned and conducted.

11 Okay. What's left? The -- there's a case
12 that nobody cited to me, but I found very helpful. And
13 it is Times Mirror Company versus Superior Court, 53 Cal
14 3rd 1325813 P 2nd 240. 81 --

15 MR. WILENCHIK: I'm sorry, Your Honor. Can
16 you give that to us again?

17 THE COURT: Sure. Times Mirror Company
18 versus Superior Court 813 Pacific 2nd 240. It's a 1991
19 California Superior Court case.

20 MR. WILENCHIK: Thank you.

21 THE COURT: And it addresses the
22 application of the -- what the -- what the Court refers
23 to as the -- I'm not sure -- as the -- a -- the
24 deliberative process privilege in the context of a
25 newspaper's request for the personal schedules of the

1 government -- personal schedules and calendars of the
2 government -- governor of California. The -- that, of
3 course, is executive material but not -- as opposed to
4 legislative materials. But at paragraph -- at Footnote
5 10 of that decision, it says, the terms executive
6 privilege and deliberative process privilege refer to the
7 same concept and will be used interchangeably in this
8 opinion.

9 And then it goes on to say that the common
10 law privilege protecting the mental process of
11 legislators is also well-settled in California. It goes
12 onto -- to say that the -- that has not been litigated,
13 hadn't even been litigated in California at that time.
14 But it says, a governor in the discharge of official
15 duties is entitled to an executive privilege to protect
16 the governor's internal, mental, or deliberative
17 processes.

18 By analogy, what we have -- what would
19 apply to the legislator -- legislature is a deliberative
20 privilege that would protect the internal, mental, or
21 deliberative processes of the legislators in policy
22 formulation. You'll recall that Redistricting Commission
23 versus Fields left open the question whether there's a
24 deliberative process privilege in Arizona. Didn't decide
25 that because it overlapped with the legislative

1 privilege. Well, it does overlap with the -- with the
2 legislative privilege. And really at the end of the day,
3 that's what we're talking about here.

4 And Cal -- the Times Mirror versus Superior
5 Court holds that the -- a sort of catchall extension to
6 the Public Records Statute in California, they read into
7 it this deliberative privilege. The -- and they said
8 that the holding the -- the holding of the case that the
9 governors calendar was privileged. The rationale is that
10 they analogized Exemption 5 of the Freedom of Information
11 Act, they said, frank discussion of legal or policy
12 matters might be inhibited if the decision maker --
13 decision-making process and decision maker communications
14 were required to be made public. The decision makers
15 need the freedom to think out loud. It distinguishes
16 between deliberative or policy-making processes and
17 purely factual matters. Deliberative or policy-making
18 processes are protected. Purely factual or investigative
19 matters are not.

20 There are -- there is discussion in this
21 case and in a number of federal cases about where to draw
22 that line. And there are cases, including this one, that
23 hold that in some cases, disclosure of factual matters
24 could disclose mental processes. So for example, the
25 governor's calendar, what goes on the calendar gives you

1 an idea of what he thinks is important. That's the basis
2 for holding that the privilege applied to that.

3 The flip side of that though is that when
4 you have a thoroughly public process like we have here,
5 the -- the election review, that does not disclose
6 anybody's mental processes. At most, what is left that
7 is privileged is the communications of individual
8 legislators concerning their policy thoughts about the --
9 about the review process and the results of that process.

10 Field says that the holders are individual
11 legislators. I think that's right to the extent that the
12 Senate held any privilege, that that has, again, been
13 thoroughly waived. I don't know whether -- I think that
14 each -- at the end of the day, each legislator has to
15 decide whether he or she wishes to invoke the privilege,
16 whether any of the individuals like Senator Fann, for
17 example, have waived the -- have waived that narrow
18 privilege by what they have said in public, we can take
19 that up. I don't know the answer to that, but -- but the
20 starting place is that the -- is what I said before, is
21 that the individual legislators continue to hold the
22 privilege with respect to communications that discuss
23 potential policy consequences of the audit and its
24 findings.

25 So conversations between legislators might

1 be privileged. Conversations between legislators and
2 individuals relating to the audit might be privileged. I
3 think it's otherwise been waived. So I just did that in
4 40 minutes instead of spending the next week doing it.
5 So I hope that it's clear enough that it's useful to
6 somebody going forward. The -- I will await further
7 instructions from the Court of Appeals. Anything else
8 today?

9 MR. LANGHOFER: Yes, You're. The -- if --
10 if you're finding that privilege has been waived and
11 there is a standing order that the Senate produce all
12 nonprivileged records, would imply the Senate is required
13 to immediately produce the records which it has asserted
14 privilege. We were in the same procedural posture in the
15 Kemp case. Went to the Court of Appeals as part of the
16 special action that's now pending and requested a stay of
17 -- we started with Judge Kemp and asked him to please
18 stay his ruling requiring the immediate production of
19 documents to which the Senate was claiming privileged.
20 He denied that. We went to the Court of Appeals, filed
21 emergency motion. After oral argument, it was granted
22 pending oral argument that's tomorrow.

23 And so I would move the Court now to stay
24 application of your -- the ruling you just made orally to
25 the extent it will require the immediate production of

1 documents as to which the Senate is claiming privilege
2 pending a completion of the appellate proceedings in
3 Judge Kemp's case, which I trust everyone in this matter
4 will follow once the ruling is made clear there.

5 THE COURT: PNI?

6 MR. HOFFMAN: Your Honor, we have no
7 objection to that being subject to the same stay. I
8 don't think it would be consistent for you to order those
9 same records to be releases at this point in time.

10 THE COURT: No. I think that's what I
11 said. I await for the orders. I think that's what I
12 meant. So the -- the motion to stay this order to the --
13 to the extent that it requires -- that it might require
14 immediate production of records as to which the Senate is
15 taking the position that they are privileged, the request
16 for a stay is granted. And the stay will remain in
17 effect for so long as the appellate courts, either the
18 Court of Appeals or the Arizona Supreme Court on further
19 review, keep that stay -- keep their stay in place and to
20 the same extent as the appellate stay.

21 MR. LANGHOFER: Thank you, Your Honor.
22 Nothing further from the Senate.

23 THE COURT: All right. That's all for
24 today.

25 MR. HOFFMAN: And nothing further.

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THE COURT: Thanks, folks.

MR. HOFFMAN: Thank you, Your Honor.

(WHEREUPON, THE PROCEEDINGS CONCLUDED AT 11:14.)

