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

**AMERICAN OVERSIGHT,**

**Plaintiff,**

**vs.**

**KAREN FANN, et al.,**

**Defendants, and**

**CYBER NINJAS, INC.,**

**Real Party in Interest.**

**Case No. CV2021-008265  
Case No.: LC2021-00180-001**

**CNI'S MOTION FOR  
ENTRY OF JUDGMENT**

**(Assigned to the Honorable Michael Kemp)**

**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.**

1 Cyber Ninjas, Inc. (“CNI”) hereby files this Motion for Entry of Judgment. A proposed  
2 Judgment is attached.

3 As the Court may know, CNI filed a Motion to Disqualify the judicial officer who  
4 previously presided over this “Phoenix Newspapers Inc.” action (“PNI Case”), for cause. (See  
5 Exhibit “A” hereto, hereby incorporated as if set forth herein.) On January 14<sup>th</sup>, the judge to whom  
6 that Motion was assigned ordered that any objection be filed by 9 AM on Tuesday January 18<sup>th</sup>,  
7 and no objection was filed. On January 19<sup>th</sup>, this Court *sua sponte* ordered consolidation. Also on  
8 January 19<sup>th</sup>, the issue of disqualification was decided to be moot.

9 The Motion to Disqualify contained a short summary of the proceedings in this PNI Case  
10 to date, albeit from CNI’s perspective, which the Court may nevertheless find helpful. Otherwise,  
11 the Motion to Disqualify speaks for itself and is incorporated as if set forth herein. What remains  
12 to be decided in this case is whether the former judge’s order(s) should be vacated or reconsidered  
13 based on the reasonable appearance of impropriety, and/or what other orders should or must be  
14 entered in this matter to finally achieve justice for all parties involved. *See Kay S. v. Mark S.*, 213  
15 Ariz. 373, 380, 142 P.3d 249, 256 (Ct. App. 2006), *as amended* (Nov. 9, 2006)(discussing when  
16 a judgment should be vacated or reconsidered due to the reasonable perception of judicial  
17 impropriety); *see also* Ariz. R. Sup.Ct. 81, Canon 2 (Commentary (Canon 2A)(1993)).

18 The question of whether a judicial officer’s order(s) should be reconsidered due to a  
19 reasonable appearance of impropriety depends on “(1) the risk of injustice to the parties; (2) the  
20 risk that denial of relief will result in injustice in other cases; and (3) the risk of undermining  
21 public confidence in the judicial process.” *Kay S.*, 213 Ariz. at 380, 142 P.3d at 256 (citing  
22 *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855  
23 (1988)<sup>1</sup>.) Moreover, undersigned counsel is understanding of the fact that asking a judge to reverse  
24 another judge’s rulings on a case – and especially for reasons such as the appearance of bias and  
25 prejudice – places the Court in an uncomfortable position. By making the instant Motion for Entry  
26 of Judgment in these cases, CNI believes that it allows the Court to avoid having to make this

27 \_\_\_\_\_  
28 <sup>1</sup> Like this case, *Kay S.* and *Liljeberg* were civil cases in which the question arose of whether  
rulings by a judge whose extrajudicial conduct created a reasonable perception of impropriety  
should be reconsidered.

1 decision, while also “cleaning up” these action(s) and achieving a speedy and just determination  
2 for all parties, as well as preserving their rights on appeal.

3 A Brief History of the “PNI” Case, Including Appellate Proceedings

4 Before the former judge made his contempt order(s) on January 6<sup>th</sup>, the Arizona Supreme  
5 Court had issued an *en banc* Order in this action on December 1<sup>st</sup>, which provided in relevant part:

6 CNI contends that “its records are not public as a matter of law because the  
7 government does not own or control them, much less rely on or even have access to  
8 them.” CNI objects to producing “its own internal emails regarding performance of  
9 its contract or related matters.” CNI challenges the Court of Appeals’ finding[:] “To  
10 the extent Cyber Ninjas is in sole possession of audit-related public records because  
11 of its contract with the Senate, cyber Ninjas has become the custodian of those  
12 records under the PRL. And as to those records, Cyber Ninjas has assumed the  
13 obligations the PRL assigns to a ‘custodian’ of public records.”

14 Respondent PNI filed a response to the Application for Stay pointing out that under  
15 the superior court order, CNI is not required to produce documents directly to PNI  
16 but is instead required to produce documents to the Senate and, in conjunction with  
17 the Senate, may confer regarding which public records, if any “should be withheld  
18 based on a purported privilege or for any other legal reason.” CNI may therefore  
19 assert any pertinent objections in the Superior Court and, if necessary, seek  
20 appropriate review in the Court of Appeals.

21 (See Exhibit “B” hereto; internal citations omitted.)

22 The superior court Order in this matter to which the Arizona Supreme Court was referring  
23 was dated August 24, 2021, and it read in relevant part:

24 Senate Defendants and Cyber Ninjas are ORDERED to comply with A.R.S. § 39-  
25 121 *et seq.* immediately by causing copies of the Public Records in the possession,  
26 custody or control of the Senate Defendants and/or Cyber Ninjas to be produced to  
27 Plaintiffs by August 31, 2021 at 5:00 p.m. Cyber Ninjas and the Senate Defendants  
28 may confer regarding which Public Records in the possession, custody or control of  
one Defendant or another should be withheld on the basis of a purported privilege  
or for any other reason. **Any Public Records, whether maintained by Cyber  
Ninjas or the Senate Defendants, or any one of them, that are withheld on the  
basis of a purported privilege or for any other reason shall be listed on a log  
with individual descriptions of each withheld record in sufficient detail to allow  
Plaintiffs to challenge the basis for withholding the record, if necessary.**  
Descriptions of records on the log shall not be so detailed as to undermine the  
alleged basis for withholding any record from public inspection. Defendants may  
produce one privilege log that references the specific Defendant (or Defendants)

1 that calls for a record to be withheld, or Cyber Ninjas and the Senate Defendants  
2 may each produce their own separate logs, as required by this Order. Defendant(s)'  
3 log(s) shall be produced to Plaintiffs by August 31, 2021 at 5:00 p.m. To the extent  
4 that Plaintiffs wish to challenge any of the documents on a log, they shall have  
5 fifteen (15) court days to file a motion challenging the designation(s).

6 (August 24<sup>th</sup> 2021 Order; emphasis added.) The Order also provided under its own terms that it  
7 would be stayed until around September 16<sup>th</sup>. (The definition of “Public Records” was also later  
8 modified on September 23<sup>rd</sup>, please see immediately below.)

9 CNI promptly appealed the August Order, which was subsequently stayed by the Court of  
10 Appeals from September 16, 2021 to November 9, 2021. During the hearing on the stay, CNI and  
11 the Senate advised of a stipulation that CNI would begin producing materials in response to the  
12 Senate’s request on an ongoing basis, but CNI advised that the Senate and CNI disagreed about  
13 the scope of CNI’s productions (because the Senate had asked for documents that do not belong  
14 to the Senate, contractually or otherwise) and that CNI’s productions would be more limited than  
15 the Senate’s request. CNI subsequently made a number of productions not the least of which was  
16 the actual audit report that it had been furiously working to complete while also trying to be  
17 responsive to this unusual “public records” litigation against a private entity. (CNI also produced  
18 copies of the processes and procedures utilized with respect to the investigation conducted for the  
19 audit; a copy of the security plan utilized for the investigation conducted for the audit; digital  
20 scans of more than seventy thousand tally sheets; copies of aggregation database and master tally  
21 sheets; copies of over three hundred emails directly related to audit activities; and a copy of a  
22 financial statement for all audit funds and expenditures, *inter alia*).

23 In the interim (while the appellate stay remained in effect), the former judge in this matter  
24 issued an order on September 23<sup>rd</sup> that “[o]nly documents with a substantial nexus to the 2020  
25 Maricopa County election audit are ‘Public Records’ that must be produced to PNI (Order at 2:1-  
26 15, 4:8-11).” On October 11, 2021 (again while the appellate stay was in effect), the former judge  
27 also issued an Order that “[u]pon dissolution of the pending Court of Appeals stay order, the  
28 Ninjas will be required to comply with the August 24, 2021 Order to Produce Public Records as  
modified by the September 23, 2021 Order, unless the Court of Appeals reverses the denial of the

1 Ninjas’ motion to dismiss. That means, among other things, that the Ninjas will be required to  
2 produce and provide to the other parties a privilege log listing each record within the scope of the  
3 plaintiff’s public records request, the disclosure of which the Ninjas object to for any reason  
4 including a claim of privilege or a claim that the item is not a public record.”

5         On the same day as the ultimate dissolution of the Court of Appeals’ stay (November 9),  
6 CNI promptly sent to the Senate and Plaintiff a log identifying all documents in CNI’s custody or  
7 control with a substantial nexus to the 2020 Maricopa County election audit, per the trial court’s  
8 September 23<sup>rd</sup> Order. However, “substantial nexus to the 2020 Maricopa County election audit”  
9 was undefined by any court, and therefore CNI did its best to interpret the phrase using caselaw  
10 and Black’s Law definitions. (Black’s Law defines “nexus” as a “causal link” and gives the  
11 example: “cigarette packages must inform consumers of the nexus between smoking and lung  
12 cancer.” Moreover, Black’s Law defines the “nexus test” as “[t]he standard by which a private  
13 person’s act is considered a state action...if the conduct is so closely related to the government’s  
14 conduct that the choice to undertake it may fairly be said to be that of the state”). The Arizona  
15 Supreme Court’s seminal decision in *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz.  
16 531, 534, 815 P.2d 900, 903 (1991) also repeatedly discussed and cited with approval *Ciba-Geigy*  
17 *Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977), in which the court drew a critical  
18 distinction in between the report that a private contractor produced for the government (which the  
19 government owned and possessed), and the “underlying” “supporting documentation” or data that  
20 had a direct causal relationship to the report (which the government did not own or possess, but  
21 could access). In that case the court found that even the supporting documentation and data were  
22 *not* public record because the government did not own or control the data. In this “PNI” action,  
23 the Plaintiff seeks private tangential company records regarding negotiation of the company’s  
24 contract or staffing and other related matters – which do not have a direct “causal relationship”  
25 with report and related investigation in CNI’s eyes, and therefore do not have a “substantial nexus”  
26 to government activity. Accordingly, CNI’s log identified any “documents or other records that  
27 formed a causal link with the audit report and its related investigation, or that were so closely  
28 related to the report and related investigation that they can be fairly said to be a part of them”; and

1 it produced a log of all such documents that had not already been produced to the Senate. (*See*  
 2 November 9, 2021 Letter, Exhibit “C” hereto—see in particular the Declaration of Douglas Logan  
 3 on page 4.) This included (millions of) images of actual ballots (which contain confidential voter  
 4 information and could not be publicly produced); forensic images of voting/tabulation  
 5 equipment/machines (whose public disclosure raises security issues *inter alia*); footage from  
 6 cameras that were “tracking” the ballots (which again shows confidential voter information); and  
 7 the full names of private volunteers and other election-audit workers (that had been redacted from  
 8 the emails that CNI already produced to the Senate, due to security/privacy/“doxxing” concerns.)  
 9 CNI also sought to file a Petition for Review and Application for Stay with the Arizona Supreme  
 10 Court, which were filed on November 23<sup>rd</sup>. (The Petition is Exhibit “D” hereto.)

11         On November 30<sup>th</sup>, the previous judge conducted a status hearing during which the parties  
 12 discussed the definition of “substantial nexus”; and on December 3<sup>rd</sup>, the former judge issued  
 13 another order concerning “what has been termed [the] ‘privilege log,’ though that is a bit of a  
 14 misnomer because the log must enumerate and describe not only records for which a privilege is  
 15 claimed but also audit related records that Cyber Ninjas contends are not public records.” The trial  
 16 court ordered that “[f]or this purpose, ‘audit related’ is the correct formulation. Whether there is  
 17 some space between what is ‘audit related’ and what has a ‘substantial nexus’ to the audit remains  
 18 to be determined. However, that is up to the court to determine. It is not up to Cyber Ninjas, and  
 19 it is not up to the Senate. That means that any attempt to limit the log to the requested records that  
 20 the Cyber Ninjas concede have a ‘substantial nexus’ to the audit process but as to which a privilege  
 21 is claimed, to the exclusion of requested records that the Cyber Ninjas contend are not subject to  
 22 the public records law because they are merely ‘related to’ the audit process, is misplaced and  
 23 inconsistent with the court’s order.” At essentially the same time (technically, two days earlier,  
 24 on December 1<sup>st</sup>), the Arizona Supreme Court issued the *en banc* Order that was quoted above in  
 25 this brief, where the Supreme Court ordered that “in conjunction with the Senate, [CNI] may  
 26 confer regarding which public records, if any ‘should be withheld based on a purported privilege  
 27 or for any other legal reason.’ CNI may therefore assert any pertinent objections in the Superior  
 28 Court and, if necessary, seek appropriate review in the Court of Appeals.” (Exhibit “A.”) In

1 response to the trial court’s November 30<sup>th</sup> order that CNI produce a log that “enumerate[s] and  
2 describe[s] not only records for which a privilege is claimed but also audit related records that  
3 Cyber Ninjas contends are not public records,” CNI sent another log to all parties on December  
4 16<sup>th</sup> listing categories of documents that were relevant to the audit and requested by Plaintiffs but  
5 withheld from the Senate, and the reasons therefor—including that none of the documents are  
6 government-owned; but also that it was unreasonably burdensome for CNI to search for, review,  
7 redact and produce them (because the Senate had refused to indemnify CNI or pay CNI on the  
8 \$100K balance of its \$150K contract). (See Exhibit “E” hereto.) The log also identified several  
9 items requested by Plaintiffs that did not exist, as counsel had previously communicated to  
10 Plaintiffs’ local counsel. CNI also provided estimates for the cost of searching, reviewing and  
11 redacting records, based on FOIA rates. The Senate indicated both in open court and in  
12 correspondence that it would not bear these costs, and that if CNI produced any further documents  
13 to the Senate then the Senate would just produce them to the public without further review (except  
14 conducting at most keyword search[es] to identify e.g. attorney emails). Even setting aside the  
15 serious legal issues in this case surrounding the forceful treatment of privately-owned documents  
16 as “public records,” the basic problem here has been and continues to be that Plaintiffs asked CNI  
17 for essentially all emails/electronic communications relating to the audit, and there are around  
18 sixty-thousand emails/electronic communications in CNI’s database (whether related to the audit  
19 or not – the vast majority of them almost certainly are not). Undersigned counsel has been in touch  
20 with Plaintiff’s local counsel several times in the past months in an effort to narrow down the  
21 requests or otherwise work out the logistics of this production, and most recently Plaintiff supplied  
22 key words to CNI for CNI to search (at CNI’s request). However, the list of key words supplied  
23 by Plaintiff limits the records to only around 15,000; and the vast majority of those are still no  
24 doubt records that are not related to the audit in any way, but rather relate to other work that CNI  
25 has performed for unrelated clients. Importantly, CNI’s work for other clients is subject to duties  
26 of confidentiality; and so as much as CNI may wish to do so, it simply cannot give to the  
27 Senate/public all of the emails and other communications in its entire database, without clearly  
28 violating those duties and without adequate judicial protection. CNI’s counsel has also been in

1 contact with Senate counsel for months in an attempt to resolve this issue; but again, the basic  
2 problem is that the Senate does not want to spend any more of its own time/resources in reviewing  
3 CNI’s documents either. Finally, CNI asked the former judge more than once (and in writing) to  
4 order that the parties meet and confer about these matters, as would normally happen in a  
5 discovery dispute; but he refused, preferring instead to conduct multiple contempt hearings. CNI  
6 also raised the issue of who was going to pay for these productions at least twice and in at least  
7 two hearings; the former judge declined to award any relief to assist CNI in this or any other  
8 regard, commenting only that public agencies should not charge for public records. Of course,  
9 CNI is not a public agency and private records are not public records as a matter of law, but this  
10 is where the case stands as a practical matter.

11 On January 5<sup>th</sup>, the Arizona Supreme Court denied CNI’s Petition for Review “without  
12 prejudice to raising these issues on appeal when the case before the superior court is final.” In  
13 other words, CNI was unable to get a decision from the Supreme Court because the former judge  
14 had not issued a final order. As the Supreme Court’s own December 1<sup>st</sup> Order had noted, the  
15 former judge’s orders allowed CNI to produce a log and to withhold documents “based on a  
16 purported privilege or for any other legal<sup>2</sup> reason.” The Judge nevertheless set a contempt hearing  
17 on January 6<sup>th</sup>. At the hearing, CNI expressly pointed to the Supreme Court’s order regarding  
18 CNI’s right to withhold documents and to produce a log, and CNI asked the judge to enter a final  
19 Rule 54(b) judgment ordering CNI to produce the withheld documents so that CNI could appeal.  
20 CNI argued that it was unfair to at once deny CNI the ability to appeal a final order but at the  
21 same time find it in contempt, as if there were a final order that it had violated. The former judge  
22 disregarded the language in the Supreme Court’s *en banc* Orders, mischaracterizing them as just  
23 Order(s) denying a stay/appeal; and he proceeded to hold CNI in contempt. He ordered a \$50,000  
24 a day fine, which was fifty times what the Plaintiff requested and clearly punitive in nature.  
25 Moreover, his order did not remedy – nor was it intended to remedy – the basic problems here,

26 \_\_\_\_\_  
27 <sup>2</sup> The August order actually said “any reason” instead of “legal reason” (the Supreme Court  
28 misquoted it). But of course CNI contends that its reasons were legal (namely that its documents  
are privately-owned and not government-owned, and that the costs of  
searching/reviewing/redacting them are unreasonably burdensome).



1 which is that CNI does not have the resources to make this production and that there was no final  
2 order for CNI to appeal much less be held in contempt of.

3 Despite all of the adversarial media and political influences surrounding this case – which  
4 have regrettably tainted these proceedings to date – CNI just wants to do what is practicable and  
5 legal. The impropriety of the former judge’s conduct served only to inflame these proceedings.  
6 Moreover, it failed to achieve justice for anybody involved. It is hard for an officer of the court  
7 like the undersigned to convince a litigant or member of the public to trust in the courts when the  
8 judge is demonstrably and improperly partial to one side. This has had a direct impact on the  
9 ability to resolve these cases, as the Plaintiffs became rightly convinced of the judge’s partiality  
10 and his willingness to make or entertain accusations of bad faith or sanctions of any kind, and the  
11 defendant rightfully became convinced of the hopelessness of even trying to seek a fair resolution  
12 in that court.

13 Finally, CNI understands and respects this Court’s legal position on these matters to date,  
14 which is that any records relating to the audit are public records irrespective of whether the  
15 government possesses them. It is unclear whether this Court has ruled specifically on the issue of  
16 whether ownership matters (or whether the government actually owns these records). CNI’s  
17 position on this issue is described not only in its recent Motion to Dismiss (that was intended to  
18 be filed in the American Oversight case but is technically also filed in this one, now that they are  
19 consolidated, and is incorporated as if set forth herein); but also in CNI’s September 29, 2021 and  
20 July 27, 2021 briefs in PNI Case, *inter alia*. (CNI’s position was also described in an amicus brief  
21 filed in this Court.) In short, CNI argues that under CNI’s contract with the Senate, as well as  
22 pursuant to United States Supreme Court FOIA caselaw (*Forsham*), Arizona Supreme Court  
23 public-records caselaw (*Salt River*), common-law property rights, and even the federal and state  
24 constitutions, records that the government does not own are not public records as a matter of law.  
25 There appears to be no factual dispute in these matters about the fact that the government does not  
26 own any of the requested records; and this remains a threshold issue that CNI should have the  
27 basic right to take up to the Arizona Supreme Court on appeal. The Arizona Supreme Court is  
28 clearly interested in the issue, judging by its rare *en banc* orders in this matter.

1 Assuming that the Court finds that CNI’s records are public records even though they are  
2 not owned or possessed by the government, then CNI moves for entry of the attached Rule 54(b)  
3 judgment with the express goal of ensuring CNI’s right to appeal, while also protecting the  
4 interests of all parties to this matter and resolving these proceedings in a fair and just way. The  
5 substance of the judgment is to enter a final Rule 54(b) judgment against CNI ordering CNI to  
6 produce the documents withheld in the log and overruling CNI’s objections to the same, which  
7 “includes CNI’s objection on the grounds that the government does not own or possess the  
8 records, a fact which the parties do not dispute.” This resolves the Supreme Court’s issue about  
9 having a clear and clean record on appeal. CNI’s intent is to file a Notice of Appeal on the  
10 judgment and Motion to Transfer to the Arizona Supreme Court as well as Motion to Accelerate,  
11 to promptly and expeditiously obtain a final appellate decision.

12 The judgment also incorporates a definition of substantial nexus that CNI believes is  
13 consistent with the previous judge’s interpretation but excludes certain categories of things that  
14 CNI believes would be, even under the previous judge’s expansive interpretation, nevertheless  
15 exempt: “communications from and to the public at large, to and from family or friends of audit  
16 participants when the family or friends are not audit participants, to and from attorneys related to  
17 legal advice, or to and from media or related to media response.” The judgment also provides that  
18 “personally identifiable information” (other than name), including “date of birth, social security  
19 number, telephone number, home address, or email” will be redacted; and that “the full name of  
20 anyone who is not a public figure may be redacted.” The judgment orders that CNI will produce  
21 these items to the Senate by next Monday and that the Senate will bear the expense of conducting  
22 a full review of the records (“not simply keyword search(es), although keyword search(es) may  
23 assist in the effort”). “Any documents that are deemed not to have a substantial nexus to the audit  
24 shall be returned to CNI, or destroyed at CNI’s direction. The Senate shall not produce CNI’s  
25 records to the public without first meeting and conferring with CNI. In the event of any dispute  
26 between the Senate and CNI over production of records to the public, this Court will either resolve  
27 the dispute or appoint a special master to do so.”

1 Finally, the judgment provides that CNI’s production of records does not prejudice its  
2 rights on appeal, i.e. “CNI is still entitled to contend on appeal that its documents are not public  
3 records because the government does not own, control, possess, rely on, or have access to the  
4 records, even though such records have been produced to the Senate in accordance with this  
5 Judgment.” Finally, the Judgment provides that “[t]he Senate’s production of CNI’s documents  
6 to the public is stayed, conditioned on CNI prosecuting its appeal to effect”; that “[a]ll prior orders  
7 in this matter are hereby rendered moot”; and that the Judgment is effective under Rule 54(b).

8 Finally, CNI notes that it is willing to enter into a similar judgment with respect to the  
9 *American Oversight* case (again, assuming the court does not believe that the government’s lack  
10 of ownership is a valid defense and otherwise intends to deny CNI’s Motion to Dismiss. The list  
11 of items for that case is different; CNI offers to meet and confer with American Oversight to  
12 determine the appropriate list. The judgment in that case should likewise reflect that CNI has set  
13 forth its legal position in its Motion to Dismiss and that the parties do not dispute that CNI’s  
14 records are not in the possession of the Senate and that the government does own them, as well as  
15 any other pertinent stipulations concerning the particular records in that case).

16 **RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of January, 2022.

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

18 /s/ John “Jack” D. Wilenichik

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27 **ELECTRONICALLY FILED** January 24, 2022 via AZTurboCourt

28 **HAND-DELIVERED** January 24, 2022 to:

The Honorable Judge Kemp

**ELECTONICALLY SERVED** January 24, 2022 via AZTurboCourt

**and E-MAILED** this same date upon:

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1 /s/ Hilary Myers

# EXHIBIT A



**COPY**

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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-<sup>0</sup>00180-001

**MOTION TO DISQUALIFY  
JUDICIAL OFFICER FOR CAUSE**

**(Case Assigned to  
Judge John H. Hannah Jr.)**

**(Motion Submitted to  
Presiding Judge Pamela Gates)**

**(Oral Argument Requested)**

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1 Pursuant to Rule 42.2, Cyber Ninjas, Inc. (“CNI”) hereby moves to disqualify judicial officer  
2 John Hannah from this action for cause, based on information discovered during a January 6th, 2022  
3 hearing as well as in public-records searches conducted by undersigned counsel the following day and  
4 the weekend of January 8<sup>th</sup>.

5 Relevant Ethical Rules

6 Rule 2.9(A) and Rule 2.9(C) governing *ex parte* communications and extrajudicial  
7 investigations are implicated, as well as Rules governing political activities by a judge including but  
8 not limited to 1.2, 2.11, 2.3, 2.4, 3.1, and 4.1 of the Arizona Code of Judicial Conduct (referred to  
9 herein as the “ACJC” or “Canon”).

10 General Factual Background

11 What follows is a general factual background. The facts that undersigned counsel recently  
12 discovered, and which directly give rise to the instant Motion, are contained in the next section.

13 CNI is registered as a for-profit Florida corporation.<sup>1</sup> In 2021, the Arizona Senate contracted  
14 CNI to produce an audit report regarding the 2020 election. CNI’s former CEO is named Douglas  
15 Logan. In the instant action, Plaintiff Phoenix Newspapers Inc. dba *The Arizona Republic* sued CNI,  
16 originally contending that CNI was a public agency subject to public records law and seeking various  
17 audit-related documents belonging to CNI. The suit was filed on June 30, 2021.

18 At the beginning of this suit, CNI moved to disqualify Judge John Hannah for cause. The  
19 grounds were that before being assigned to this action, Judge Hannah had made a *sua sponte* negative  
20 comment about the Senate audit in an unrelated case to which CNI was not a party, Case No. CV2020-  
21 014553. In that case, the Arizona Republican Party had asked Judge Hannah to order that Maricopa  
22 County redo its post-election “hand-count” of ballots, based on a violation of the statutory process for  
23 performing the hand-count. In general, the Judge’s orders and conduct in that case showed an  
24 unacceptable degree of intemperance. In a lengthy ruling, he claimed that he was being “gas-lighted,”  
25 called the Republican Party’s arguments “sophistry,” and sanctioned the Republican Party and its

26 <sup>1</sup> This Motion is supported by the Declaration of John D. Wilenchik, Esq. attached hereto (the “Declaration”).  
27  
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1 undersigned counsel in a decision that remains under appeal.<sup>2</sup> At no time did Judge Hannah disclose  
 2 any actual or potential conflict or bias with respect to him serving as the judicial officer on the case.  
 3 CNI’s prior Motion to Disqualify was denied on the grounds that “[t]he matters alleged in the  
 4 Motion—including Judge Hannah’s ruling in prior litigation—do not show bias and prejudice that  
 5 would disqualify Judge Hannah from ruling in this public records matter.” A request to disqualify him  
 6 without cause that was made as part of the same Motion was also denied. CNI chose not to appeal the  
 7 motion to disqualify for cause.

8 Subsequently, Judge Hannah strongly signaled to all parties in the initial hearings on this matter  
 9 that he would be granting the Plaintiff’s claims. He signed a lengthy Order that Plaintiff’s counsel  
 10 wrote and first presented him with immediately before a hearing that he scheduled only weeks after  
 11 service of the suit, granting Plaintiff’s claims. In part, Judge Hannah ruled that CNI is a public  
 12 agency/officer. On appeal, the Court of Appeals declined to adopt Judge Hannah’s reasoning but  
 13 accepted a new argument that was independently raised by the Plaintiff on appeal. CNI appealed the  
 14 decision to the Arizona Supreme Court, which subsequently issued a series of *en banc* orders  
 15 including an order acknowledging that the Order Judge Hannah signed (and from which CNI  
 16 appealed) expressly allowed for CNI to withhold documents; and therefore “CNI may...assert any  
 17 pertinent objections [under which documents are being withheld] in the Superior Court and, if  
 18 necessary, seek appropriate review in the Court of Appeals.” On January 5<sup>th</sup>, the Supreme Court  
 19

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20 <sup>2</sup> The negative comment about the audit was contained in footnote 3 of his final Ruling in the case: “The Court is aware  
 21 that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the  
 22 materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes  
 23 of ‘assessing electoral integrity’ and ‘examining potential reforms to the electoral process’ and apparently also ‘to  
 24 determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election  
 25 outcome.’ *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Order entered  
 26 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note  
 27 that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not  
 28 the courts.” Judge Hannah made this comment *sua sponte*, as no party had raised the Senate audit or Judge Thomason’s  
 ruling(s) in the case. Judge Hannah’s language – including describing the purposes of the audit as “avowed” and  
 “apparent[.]” – expressed skepticism of the audit, and there was no reason to mention the “wisdom” of the “endeavor”  
 other than to express doubt about whether it was wise. The comment also strongly indicated that Judge Hannah felt a  
 personal political interest in these matters and was independently investigating/reading news reports about them, as the  
 Senate audit was not raised by any party and was not involved in the case.



1 denied CNI’s petition for review “without prejudice to raising these issues on appeal when the case  
2 before the superior court is final.”

3 Despite these strong indications that the Supreme Court believed CNI was still entitled to raise  
4 objections to production of documents until Judge Hannah issued a final order, Judge Hannah went  
5 ahead and set an evidentiary hearing on January 6<sup>th</sup> at which he found CNI in contempt and began  
6 fining it \$50,000 a day for alleged noncompliance with his Order(s). He declined to enter a final order  
7 or rule on CNI’s objections before finding it in contempt. The Judge set the hearing for January 6<sup>th</sup>  
8 without consulting anyone’s calendars, suggesting that it was a deliberate choice of date.<sup>3</sup>

9 At the beginning of the January 6<sup>th</sup> hearing, Judge Hannah made a comment that “I do not  
10 believe I’ve had a more important case in 16 years I’ve been on the bench, because this case goes to  
11 the legitimacy of the process that creates the government that I serve.”<sup>4</sup> Given the objectively narrow  
12 public-records issues in this case, counsel interpreted this comment to be of a political nature. The  
13 issues before Judge Hannah are primarily whether CNI’s private records – consisting almost entirely  
14 of the company’s privately-owned emails/communications – are “public records,” and who is going  
15 to pay for the cost of searching/editing/producing them on its behalf. During the hearing, counsel  
16 argued in part that the records were not government-owned but also that the company lacked the  
17 money to pay for records review because the Senate failed to pay the \$100K balance of its \$150K  
18 contract; the review would cost around \$60K; and the company is in debt and laid off all of its  
19 employees. (Unlike an actual public agency that is genuinely subject to public records requests, CNI  
20 is not taxpayer-funded.) Judge Hannah’s response was to sanction CNI \$50K a day for non-  
21 production, which showed no genuine intent to address these issues. The fine was also fifty times  
22 what the Plaintiff requested, and equal to the entire amount of money that CNI had received under its  
23 contract with the Senate.

24 Specific Factual Basis for Motion

25 During the January 6<sup>th</sup> hearing, Judge Hannah asked undersigned counsel *sua sponte* about

26 <sup>3</sup> See Declaration, paragraph 18.

27 <sup>4</sup> See hearing audio at the 6:47 mark (six minutes, 47 seconds in), found at <https://bit.ly/3Fhc9Z1>

1 whether CNI’s former CEO Douglas Logan had appeared for a January 5<sup>th</sup> deposition that was noticed  
2 by the Plaintiff in another action. (*American Oversight v. Senate et al.*, CV2021008265, the “A.O.  
3 case.”) That Notice of Deposition, including the date of the deposition, was not part of the record in  
4 this case, and had not been mentioned by any party to this case. (Normally in state court, a Notice of  
5 Deposition is not a part of the record at all.) However, on December 16<sup>th</sup>, the Plaintiff in that case  
6 (“American Oversight”) issued a press release about the date of the deposition,<sup>5</sup> which was reported  
7 on by news media including the Plaintiff in this case (*The Arizona Republic*).<sup>6</sup> Undersigned counsel  
8 asked Judge Hannah how he knew about the deposition, and whether he had been reading news about  
9 the case. This was an important and proper question, because the canon of judicial ethics provides that  
10 judicial officers are to promptly notify parties of *ex parte* communications and “shall not investigate  
11 facts in a matter independently”; and in the event that a judge receives or considers factual information  
12 that is outside of the record and/or *ex parte*, then the judge must also identify the source and substance  
13 of the information and give the parties an opportunity to respond. ACJC 2.9(A)(1)(b); 2.9(A)(3);  
14 2.9(B), (C). Judge Hannah hesitated for some time before responding: “Um...the uh, record in another  
15 case is, uh, subject to judicial notice.” A link to the audio of this exchange is at <https://bit.ly/3fcLpyr>.  
16 (The exchange occurs at one hour, twenty-four minutes and twenty-five seconds [1:24:25] into the  
17 full audio of the hearing.) Later in the same hearing, Judge Hannah also stated:

18           The Court is aware from the record in this case that Cyber Ninjas agreed to  
19           undertake this work for \$150,000. The Court is also aware from the record that  
20           Cyber Ninjas took in several million dollars from various sources that it says  
                  helped pay for this task.

21           (See audio recording starting at 1:52:30; in particular 1:52:43 – 1:53:35 quoted above.) Judge  
22 Hannah then stated that he was awarding sanctions of \$50,000 based on this information, because he  
23 felt that Cyber Ninjas had received “several million dollars” and therefore anything less than \$50,000  
24 would be “grossly insufficient.”

25           Undersigned counsel and his staff have diligently searched the record in this case for any

26 \_\_\_\_\_  
27 <sup>5</sup><https://bit.ly/3K15uG2>

28 <sup>6</sup><https://bit.ly/3r7amRb>

1 allegation that “Cyber Ninjas took in several million dollars from various sources” and have been  
2 unable to find it. This was however also reported on by *The Arizona Republic*, in a news story dated  
3 November 2, 2021.<sup>7</sup> Judge Hannah did not identify the source or substance of this information before  
4 using it to make his findings in direct support of contempt, nor did he give CNI an opportunity to  
5 respond before doing so.

6 Out of candor to the Court—and after an intense and costly search of the record not just in this  
7 matter, but also the *American Oversight* case—it appears that the Plaintiff in the *American Oversight*  
8 case filed a lengthy (41 page) Objection to undersigned counsel’s motion for withdrawal in that matter  
9 on December 27<sup>th</sup>; and in a footnote, it mentioned the allegation that CNI had received millions of  
10 dollars. American Oversight also attached a copy of its Notice of Deposition to the Objection, all of  
11 which was filed with Judge Kemp but not Judge Hannah. If this was Judge Hannah’s source of the  
12 information—a footnote/exhibit to an objection to a motion to withdraw filed in another case over the  
13 holidays—then at the minimum he needed to disclose this and give the parties an opportunity to  
14 respond before using it as a basis to rule. Instead, he refused to identify the source or substance of the  
15 information, even when questioned about it.

16 Earlier during the same hearing,<sup>8</sup> Judge Hannah also openly commented on CNI’s prior motion  
17 to disqualify him.<sup>9</sup> Judge Hannah made comments indicating he thought CNI’s defenses (which are  
18 essentially that CNI is not a public “officer” or “public agency” under public records law; that private  
19 records in a private company are not public records; and that CNI lacks the money to review and  
20 produce them) were in bad faith and groundless, and he broadly signaled that he intends to sanction it

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22 <sup>7</sup> <https://bit.ly/3FkY4cW>

23 <sup>8</sup> Undersigned counsel promptly requested a transcript of the January 6<sup>th</sup> hearing but was informed on Monday January  
24 10<sup>th</sup> that an expedited transcript will not be available for another 10 (ten) days, i.e. until January 24<sup>th</sup>. (The transcript  
25 order has been placed.) In the meantime, Judge Hannah set another hearing for Friday January 21<sup>st</sup> at which he indicated  
26 that he intends to consider issuing additional “personal” sanctions of some kind. In the interests of justice, CNI must  
27 therefore file this Motion without an official transcript. Relevant portions have been excerpted from the audio and are  
28 linked herein, and a recording of the entire hearing is available through this link: <https://bit.ly/3fcLpyr>.

<sup>9</sup> Judge Hannah’s decision to *sua sponte* comment on the Motion to Disqualify filed six months earlier is troubling for a  
number of reasons. Among them is that A.R.S. § 12-410 provides that a judge may not retaliate against a party for  
filing a motion to disqualify through a finding of contempt.

1 and its counsel for even raising them. Undersigned counsel noted for the record that Judge Hannah  
2 was smiling during counsel’s argument. In response, Judge Hannah stated that he was smiling because  
3 “I’m thinking of the accusations against me that you made in the motion to recuse me for cause that  
4 you did not appeal, which you did not appeal the denial [of], where you said that I’m biased against  
5 conservatives and on information and belief a Democrat. I smile every time I think about it because  
6 I’m not a Democrat.” (A link to this audio is at <https://bit.ly/3KdTfWO>. It occurs 12 minutes, thirty-  
7 one seconds into the full hearing audio.) Undersigned counsel pointed out that Judge Hannah did not  
8 deny having a bias against conservatives and the hearing moved on.

9 On the following day (January 7<sup>th</sup>), undersigned counsel first received information<sup>10</sup> that Judge  
10 Hannah has made 18 separate contributions to political candidates and PAC’s at the federal level alone  
11 in between October 2017 and September 2020. This is an unusual level of political activity for most  
12 people, much less a superior court judge. In fact out of the one hundred sixty-one (161) sitting  
13 Maricopa County Superior Court judges and commissioners, only six (excluding Judge Hannah) have  
14 made any reported federal political contributions since 2011. He was also one of only four  
15 judges/commissioners to contribute to a presidential campaign in 2020. (To the best of undersigned  
16 counsel’s knowledge, none of the four judges who contributed to a presidential campaign presided  
17 over a case concerning the 2020 election other than Judge Hannah.) Since 2011, Judge Hannah has  
18 made more than three times the number of federal political contributions as the rest of the entire sitting  
19 superior court bench combined, eighteen (18) times more on average than any judge who did  
20 contribute (with the exception of one judge who has been assigned only to the criminal bench in her  
21 entire tenure on the court). This is both in terms of frequency and total amount.<sup>11</sup> His contributions  
22 averaged around \$100.00 each and were made through “ActBlue,” which describes itself as “a  
23 powerful online fundraising platform for Democratic candidates up and down the ballot, progressive

24 \_\_\_\_\_  
25 <sup>10</sup> See Exhibit 1 to Exhibit “A” hereto, Declaration of John D. Wilenchik, Esq. The information is federal public record  
and can also be downloaded/accessed through: <https://bit.ly/3qkxfSg>.

26 <sup>11</sup> See Exhibit A hereto, Declaration. Except for the one criminal-court judge (and Judge Hannah), there are only four  
27 judges since 2011 who have contributed to federal political campaigns or organizations as reported by the FEC. They  
28 contributed a total of only 5 times and in the total combined amount of \$502.50. Hannah has contributed eighteen (18)  
times in the total amount of either \$1,680 or \$3,930 (the \$2,250 discrepancy is explained below).

1 organizations, and nonprofits.”<sup>12</sup> All of the contributions were to Democratic candidates/candidate  
2 committees or to Democratic/progressive Political Actions Committees. Several of the contributions  
3 are cause for very serious concern in this case, including because of the Judge’s lack of disclosure.

4 On October 15, 2018, Judge Hannah contributed \$50.00 to a group called “One Nation  
5 United,” whose website still shows a count-down to the 2020 election that says at the top: “We must  
6 stop Donald Trump and the GOP. They are hellbent on transforming this country into a place none of  
7 us would want to live.”<sup>13</sup> Undersigned counsel has confirmed that, as of October 15, 2018, the website  
8 contained the same language at the top of the website, just below the “Make a Contribution” button.  
9 (See Exhibit 2 to Declaration for screenshot.)<sup>14</sup> Since the 2016 election,<sup>15</sup> the “Our Mission” portion  
10 of the website has stated:

11 The flood of money into ad campaigns and right wing media groups like FOX News  
12 has shifted views of Americans so far to the right, that a candidate like Donald Trump  
13 was acceptable to a wide group of voters due to the near constant exposure to ads and  
14 pseudo-news reports that present a false narrative to the public... Their only advantage  
15 is the sheer amount of dollars they can throw at advertising and paid media pundits.  
16 Unfortunately this was a winning strategy and Trump won the election. Republican-  
aligned PAC advertising and opinion positioning strategies are outdated. We will bring  
the fight to them on their own block, city or state to hold back the onslaught of massive  
Republican-aligned ad spending.

17 (See Exhibit 3 to Declaration, screenshot.) In other words, aside from being aggressively anti-Trump  
18 and anti-GOP, the group’s specific “mission” is to promote media and news reports/advertising that  
19 are also anti-Trump and anti-GOP.

20 On September 28, 2019, Judge Hannah contributed \$100 to a group named “Fair Fight, Inc.  
21 PAC” founded by Georgia Democrat Stacey Abrams. The website for “Fair Fight” states that

22  
23 <sup>12</sup> <https://secure.actblue.com/about>

24 <sup>13</sup> <https://onenationunited.com/>

25 <sup>14</sup> See Declaration. The “Internet Archive Wayback Machine” reflects that the website has not changed in that respect  
26 since at least August 15, 2018. <https://bit.ly/3qgaHlt>

27 <sup>15</sup> A copy of the “Mission” statement before the 2016 election is Exhibit 9 to the Declaration; and a copy of the “Mission”  
28 statement as of 2019 (after the election) is Exhibit 3. As of October 2018 (when Judge Hannah contributed), it is likely  
that the website showed the post-election statement; but the Wayback Machine can confirm only that the post-election  
statement was there as of September 2019. In any event, the content of the two statements is substantively the same.  
(Compare Exhibit 3 to Exhibit 9.)

1 “insidious efforts to make voting more difficult” are “undermin[ing] our democracy” (“Fair Fight,  
 2 Inc. PAC”).<sup>16</sup> As of August 13, 2019, the group’s website claimed that the 2018 elections were  
 3 “rife...were irregularities”; and an August 7, 2019 press release read in part: “[n]ow, as elections draw  
 4 closer, Republicans are running scared because they know as well as we do just how out of touch they  
 5 are with the voters they represent.”<sup>17</sup> On May 14, 2021 (a month and a half before this suit was filed),  
 6 “Fair Fight” issued a lengthy press release calling CNI’s audit “dangerous” and “discredited,” and  
 7 claiming that the audit was “being led by conspiracy theorists and insurrectionists.”<sup>18</sup> (After the audit  
 8 reached its conclusion in September of last year, the same group published an update to their website  
 9 which simply stated without comment, “Republican Review of Arizona Fails to Show Stolen  
 10 Election.”<sup>19</sup>) The last press release from the group’s CEO prior to Judge Hannah’s contribution (dated  
 11 July 29, 2019, three months prior to his contribution) claimed that as the result of the group’s  
 12 “litigation, activism, and advocacy,” it had defeated a voting-machine company which it characterized  
 13 as having “shielded itself from public records requests.” (July 29, 2019 Press Release.)<sup>20</sup> Of note, in  
 14 the same release the group also praised the government for selecting Dominion voting machines,  
 15 which it claimed were selected due to the group’s “litigation, activism and advocacy.” The instant suit  
 16 is also a public-records action against a private elections vendor (CNI); and CNI’s audit was intended  
 17 in part to assess the integrity of Dominion voting machines (as reflected by the exhibits to the  
 18 Complaint, *inter alia*; this was also heavily reported by news media).<sup>21</sup>

19 On September 19, 2020 – less than two months before being assigned to the Republican Party  
 20 case – Judge Hannah made another \$100 contribution to “Movement Voter PAC.” Since at least  
 21 September 18, 2020, this group’s website has stated: “We were deeply dismayed by the broader  
 22 outcome of the 2016 election... We organize for the long game... We are only getting started... [W]e  
 23

24 <sup>16</sup> September 28, 2019 contribution; <https://fairfight.com/>.

25 <sup>17</sup> <https://bit.ly/34xspZ8>; see also Exhibit 7 to Declaration, page 2.

26 <sup>18</sup> <https://bit.ly/3HTca7a>; see also Exhibit 8 to Declaration (screenshot of same).

27 <sup>19</sup> <https://bit.ly/3qgddrW>; see also Declaration.

28 <sup>20</sup> <https://fairfight.com/statement-from-fair-fight-ceo-lauren-groh-wargo/>; see also Exhibit 4 to Declaration.

<sup>21</sup> CNI’s Statement of Work mentions the review of Dominion machines in several places; it was attached to the Complaint in this matter and made public/reported on as early as April 1, 2021.

1 can build lasting power and make the 2020s a progressive decade.”<sup>22</sup> Since February 27, 2021 – weeks  
2 before Judge Hannah’s final ruling awarding sanctions in the Republican Party case against the  
3 Republican Party (dated March 15, 2021), and just four months before he was assigned to this case  
4 (on June 30, 2021) – the group’s website has shown a “report” on the 2020 election entitled “What  
5 the Movement [Voter Project] Won in 2020,” which thanks the group’s “partners” in Arizona for  
6 “Biden’s margin of victory in Arizona” and for “flipping the Presidential race by 10,457 votes.” The  
7 report also generally calls the 2020 election “a game-changing victory, giving Democrats a narrow  
8 trifecta to pass legislation and appoint judges but it was also a near-death experience. We defeated  
9 Trump by a hair. While the Biden-Harris ticket won the popular vote by more than 6 million votes,  
10 we won the electoral college by less than 43,000 votes across three states: Arizona, Georgia, and  
11 Wisconsin. That’s an even narrower margin than the 77,000 votes Trump won by in 2016. MVP’s  
12 local grassroots partners won this election....Biden’s margin of victory in Arizona was 10,457  
13 votes..... Make no mistake — without MVP’s partners in these three states, Trump would be president  
14 for the next four years.” “Winning Arizona in 2020 was a battle more than a decade in the making.  
15 MVP is going to double down on this crucial sunbelt battleground.” “The Presidential race and the  
16 electoral college in 2024 are likely to be tough... [We may be] exposed to Republican trifectas  
17 controlling elections in advance of 2024 — a terrifying prospect. It looks the GOP is going to run a  
18 permanent smear campaign for the next four years and use every dirty trick possible to get revenge in  
19 2022 and 2024. In short, we have our work cut out for us... We have to assume that Trump and the  
20 other side are going to upgrade their tactics. MVP is already making early investments to strengthen  
21 our local grassroots partners for the battles to come... There’s a lot of analysis and evaluation still to  
22 do on the 2020 election.... We are doubling down and going even bigger over the next four years.”<sup>23</sup>

23 Over the course of 2019 and leading up to the 2020 election, Judge Hannah made at least three  
24 contributions totaling \$250 to Warren for President, Inc. (on May 15, 2019; June 7, 2019; and \$100  
25 in December 2019). In the two months before the November 2020 election, he contributed to

26 \_\_\_\_\_  
27 <sup>22</sup> See <https://bit.ly/33k99Oh>; see also Exhibit 5 to Declaration for screenshot as of September 18, 2020.

28 <sup>23</sup> <https://bit.ly/3qeYjSK>; see also Exhibit 6 to Declaration.

1 Democratic Senate candidates in Alabama, Montana, Maine, South Carolina, and Iowa. (See  
2 contributions to Steve Bullock, Sara Gideon, Jaime Harrison, Doug Jones, and Theresa Greenfield on  
3 September 19, 2020.) Finally, the FEC website reports a \$2,500 contribution to “Sinema for Arizona”  
4 in 2017 for the primary election. This would have been in excess of half the federal limit for the  
5 primary, and therefore a direct violation of Canon 4.1. But in candor to the Court, this amount could  
6 have been a typo because the link to the associated “pdf” record indicates only a \$250 contribution.

7 Legal Analysis and Argument

8 Judge Hannah made no disclosures with respect to any of these matters during the case with  
9 the Republican Party or in this one. In his own words, this case involves a Republican Senate-led audit  
10 “for the avowed purposes of ‘assessing electoral integrity’ and ‘examining potential reforms to the  
11 electoral process’ and apparently also ‘to determine if the result of the Arizona election was correct  
12 and to see if there was a further basis to challenge the election outcome.’”<sup>24</sup> The instant suit was also  
13 filed by a newspaper, *The Arizona Republic*. Judge Hannah actively contributed to a group whose  
14 primary message is that “Donald Trump and the GOP” “are hellbent on transforming this country into  
15 a place none of us would want to live” and whose avowed purpose is to “stop them” by promoting  
16 anti-Trump and anti-GOP news media and advertising; another group whose purpose is to oppose  
17 Republican elections-integrity efforts including the audit that is the subject of this case, and which  
18 promotes litigation against election vendors that “shield” themselves against public record requests;  
19 and another group that was “deeply dismayed” by Trump’s victory in 2016 and called the 2020  
20 election a “near death experience” because “[w]e defeated Trump by a hair” in Arizona, vowing to  
21 “double down” on efforts to defeat what it characterizes as GOP “smear campaigns” and “dirty  
22 trick[s].”

23 While this goes a long way toward explaining Judge Hannah’s intemperate behavior in these  
24 cases, it also creates an inexcusable appearance of impropriety as well as an apparent cause for  
25 disclosure and recusal in these matters, which Judge Hannah has neglected and/or improperly  
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27 <sup>24</sup> See Exhibit to earlier Motion, 12-21-20 Ruling by John Hannah in Case No. CV2020-014553.



1 disregarded. “Any circumstances that objectively lead to the conclusion that the judge’s impartiality  
2 might reasonably be questioned calls for disqualification.” *Kay S. v. Mark S.*, 213 Ariz. 373, 379-380,  
3 142 P.3d 249, 255-256 (Ct. App. 2006), *as amended* (Nov. 9, 2006); *see also McElhanon v. Hing*, 151  
4 Ariz. 403, 411, 728 P.2d 273, 281 (1986), *cert. denied*, 481 U.S. 1030 (1987)(“Although we do not  
5 conclude that the judge was actually biased against defendant or defense counsel, that is immaterial.  
6 The judge should have been disqualified based on the appearance of partiality”). Even when there is  
7 no actual bias, justice must appear fair. *McElhanon*, 151 Ariz. at 411, 728 P.2d at 281(citing *inter alia*  
8 *In re Murchison*, 349 U.S. 133 (1955)). “This objective standard extends beyond the judge’s personal  
9 belief that his impartiality is not impaired.” *Id.* “The test for appearance of impropriety is whether the  
10 conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial  
11 responsibilities with impartiality is impaired.” *Id.*, quoting Ariz. R. Sup.Ct. 81, Canon 2 (Commentary  
12 (Canon 2A) (1993)(internal quotation marks and ellipses omitted). To avoid appearances of  
13 impropriety, judges have obligations of disclosure and candor, including disclosing any reason why  
14 they might be perceived as biased on the case (or that they actually are), and any sources of  
15 information outside the evidence that has been presented to them, as well as giving parties the  
16 opportunity to rebut such evidence.

17 Judge Hannah’s undisclosed history of heavily-activist political contributions clearly warrants  
18 recusal in this case, due to at the minimum the objective appearance of impropriety. Canon 1.2  
19 provides that “[a] judge shall act at all times in a manner that promotes public confidence in the  
20 independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the  
21 appearance of impropriety.” Canon 2.11 provides that “[a] judge shall disqualify himself or herself in  
22 any proceeding in which the judge’s impartiality might reasonably be questioned, including but not  
23 limited to the following circumstances: [t]he judge has a personal bias or prejudice concerning a party  
24 or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.” Every other  
25 member of the superior-court bench that undersigned counsel has ever encountered is extremely  
26 cautious about this, and in general about avoiding the appearance of impropriety on cases – not just  
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1 in “political” cases like this, but certainly including them. For example, when a case filed by the  
2 Republican Party last year was assigned to Judge Coury, he made prompt disclosure of the fact that  
3 he was subject to a political campaign by the Democratic Party and he offered to recuse. In general,  
4 our superior court bench is replete with judges of honor, integrity and temperance. There is no reason  
5 why CNI or any other litigant must continue to face a judge whose partiality and fairness can and  
6 should be reasonably questioned.

7 Canon 3.1 provides that “when engaging in extrajudicial activities, a judge shall not: (A)  
8 participate in activities that will interfere with the proper performance of the judge’s judicial duties;  
9 (B) participate in activities that will lead to frequent disqualification of the judge; (C) participate in  
10 activities that would appear to a reasonable person to undermine the judge’s independence, integrity,  
11 or impartiality or demean the judicial office...” Judicial Ethics Advisory Committee Advisory  
12 Opinion (“Advisory Opinion” or “A.O.”) 96-04 <sup>25</sup> notes that extrajudicial involvement with  
13 organizations “dedicated to particular causes” or that are “active in promoting specific points of view”  
14 “may give the appearance of favoritism and raise a question as to the judge’s ability to preside fairly  
15 over certain cases.” “As we noted in Opinion 95-02, [o]ne of the central themes of the Code of Judicial  
16 Conduct is that judges must perform their duties independently and impartially and cannot participate  
17 in any activity that might suggest the appearance of favoritism or call into question the integrity of the  
18 judiciary. See Canons 1A, 2A, 2B, 4A(1), 4C(4), 4C(4)(a), 4C(4)(b) and 5.” (Internal quotation marks  
19 omitted.) Advisory Opinion 18-06 (issued on December 14, 2018)<sup>26</sup> relatedly states that while “[t]he  
20 Judicial Code and the Employee Code encourage judges and judicial employees to participate in  
21 appropriate extrajudicial activities,” both codes contain “restrictions on such activities. They also  
22 make clear that judges and judicial employees should expect to be the subject of public scrutiny that  
23 might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed  
24 by their respective codes of conduct.” (Internal quotation marks omitted.) Advisory Opinion 18-06  
25 specifically addressed whether it is appropriate for judges or judicial employees to participate in

26 \_\_\_\_\_  
27 <sup>25</sup> [https://www.azcourts.gov/portals/137/ethics\\_opinions/1996/96-04.pdf](https://www.azcourts.gov/portals/137/ethics_opinions/1996/96-04.pdf)

28 <sup>26</sup> <https://www.azcourts.gov/Portals/137/ethics%20opinion%202018-06.pdf?ver=2018-12-14-123701-727>

1 “marches, rallies or protests”: “by way of example...the ‘Women’s Marches’...and a recent ‘March  
2 for Science.’” Even for seemingly apolitical activities like a “March for Science,” the Advisory  
3 Opinion warns that the propriety of a judge’s involvement “is a fact-intensive inquiry that ultimately  
4 must be decided on a case-by-case basis.” Of “particular relevance” to the inquiry is whether  
5 participation “would appear to a reasonable person to undermine the judge’s independence, integrity,  
6 or impartiality,” to which “[a]n objective standard applies. It is not sufficient that the judge personally  
7 is convinced of his or her abiding independence and impartiality. In making this assessment, judges  
8 should assume their participation will be scrutinized and publicized, and they must consider the public  
9 perception should they be depicted in reports of the event, including in press coverage or on social  
10 media.” “In assessing the propriety of participation, judges should examine not only the official title  
11 of an event, but also its stated mission, as well as its sponsors and organizers.” For example, the  
12 Massachusetts Supreme Court issued an Advisory Opinion against judges participating in the 2017  
13 “Women’s March on Washington,” because of the “unmistakable political overtones of the event, as  
14 well as public statements by organizers of the march suggesting the event’s purpose was to send a  
15 bold message to the new administration on their first day in office.” (A.O. 18-06, internal quotation  
16 marks omitted; quoting Massachusetts Supreme Court CJE Opinion No. 2016-10.) A.O. 18-06 also  
17 discusses a New York Advisory Opinion which concluded that judges should not attend a “March for  
18 Science” if “its organizers become involved in or suggest they will become involved in litigation  
19 related to the March’s agenda, advocate for or against the election or appointment of specific  
20 individuals to public office, or become the subject of public controversy.” In general, A.O. 18-06 notes  
21 that judges have more leeway when engaging in extrajudicial activities that are not overtly political  
22 or that are “related to the law, the legal system, or the administration of justice”; but that for political  
23 activities, “more rigorous restrictions apply.” As another example, A.O. 18-06 suggests that a judge  
24 attending an “Immigration March” is problematic for a number of reasons including if “one of the  
25 organizers frequently appears in litigation”; and a judge must consider questions such as whether “a  
26 judge’s participation in such a march [could] lead a reasonable person to question that judge’s  
27  
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1 impartiality when presiding over a state court proceeding involving an individual’s immigration status  
2 or other immigration-related issues? And how would the independence of the judicial branch be  
3 perceived should a photograph of a participating judge appear in the newspaper alongside protesters  
4 carrying signs supporting or opposing political candidates or organizations?” Finally, A.O. 18-06  
5 addresses the propriety of a judge participating in extrajudicial activities at all; but once a judge  
6 decides to engage in such activities—and especially activities of an overtly political nature—then  
7 whether he should preside over overtly political cases is another question entirely. In other words,  
8 even if it is proper for a judge to engage in a given extrajudicial activity, then this does not mean that  
9 it proper for a judge to actually preside over a case in which his partiality could be reasonably  
10 questioned as the result of the activity, much less to neglect or disregard his obligations of disclosure  
11 in the matter. The Comment to Canon 4.1 provides that judges “must, to the greatest extent possible,  
12 be free and appear to be free from political influence and political pressure.” (Emphasis added.) While  
13 Judge Hannah’s apparent decision to exploit Canon 4.1(A)(4) to the fullest – including contributing  
14 18 times more often than any other judicial officer (bar one), and three times more than 159 combined  
15 – might not raise issues in other kinds of litigation, his decision to contribute to the particular groups  
16 discussed above – not to mention the frequency/volume of his contributions — create a clear  
17 appearance of impropriety in matters such as this and the Republican Party matter. If the conduct of  
18 every single other judge and commissioner in Maricopa County over the last ten years is a “bar” for  
19 what constitutes proper judicial conduct, or for the level of political activity that is acceptable for any  
20 judge much less one who chooses to preside over political cases, then the answer to whether there is  
21 an unacceptable appearance of impropriety in this case is clear. This is even without considering Judge  
22 Hannah’s history of intemperance in these matters, or at the minimum the appearance of improper  
23 conduct with respect to extrajudicial investigations/reading the news. But the problem is certainly  
24 compounded by those things, as well as the fact that the media are parties to this litigation and that the  
25 case is overtly political in nature. The Comment to Canon 3 provides that “[a]n independent judiciary  
26 requires that judges decide cases according to the law and facts, without regard to whether particular  
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1 laws or litigants are popular or unpopular with the public, the media...Confidence in the judiciary is  
2 eroded if judicial decision making is perceived to be subject to inappropriate outside influences.”  
3 Canon 2.4 provides that “[a] judge shall not be swayed by partisan interests, public clamor...A judge  
4 shall not permit...political...or other interests or relationships to influence the judge’s judicial conduct  
5 or judgment. A judge shall not convey or permit others to convey the impression that any person or  
6 organization is in a position to influence the judge.” Canon 2.3 provides that “[a] judge shall not, in  
7 the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in  
8 harassment, including but not limited to bias, prejudice, or harassment based upon...political  
9 affiliation.” This includes “verbal or physical conduct that denigrates or shows hostility or aversion  
10 toward a person on bases such as...political affiliation.” (Comment 3 to Canon 2.3.) Comments 1 and  
11 2 to Canon 2.3 provide that “[a] judge who manifests bias or prejudice in a proceeding impairs the  
12 fairness of the proceeding and brings the judiciary into disrepute. Examples of manifestations of bias  
13 or prejudice include but are not limited to epithets; slurs; demeaning nicknames...threatening,  
14 intimidating, or hostile acts.... Facial expressions and body language may convey to parties and  
15 lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge  
16 must avoid conduct that may reasonably be perceived as prejudiced or biased.” Judge Hannah’s  
17 history of intemperance and slurs (“sophistry,” “gas-lighting”), and even improper facial  
18 expressions/body language (“smiling” about the prior motion to disqualify him), objectively and  
19 improperly convey bias and prejudice, which in this case is clearly on the basis of political affiliation.  
20 This is to say nothing of Judge Hannah’s more substantive conduct in these matters, including his  
21 decision to hold a contempt hearing on January 6<sup>th</sup>, to make political statement(s) in the hearing, and  
22 willingness to threaten and issue personal sanctions and punitive contempt without due process.

23         There is a reasonable appearance that Judge Hannah has been going out of his way to search  
24 for information that has not been presented to him and using it against the Defendant, without either  
25 disclosing or giving the parties an opportunity to respond to it; and/or he is reading the news about  
26 CNI. This is of particularly serious concern because the Plaintiff in this case is a media organization  
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1 (Phoenix Newspapers Inc. dba *The Arizona Republic*); and the newspaper’s sources of information  
 2 included the American Oversight group, which sued CNI in a separate lawsuit that is pending before  
 3 Judge Kemp. Under these singular circumstances, reading any news or extrajudicial statements about  
 4 CNI constitutes not only an improper independent investigation of facts and evidence under Canon  
 5 2.9(C) but also an improper consideration of *ex parte* communications in the more traditional sense  
 6 under Canon 2.9(A). In A.O. 97-11, the Supreme Court Judicial Ethics Advisory Committee  
 7 considered the propriety of a court looking at a police report in a pending case, where the report had  
 8 not been introduced into evidence or otherwise placed into the record by any party before the court.  
 9 The Committee concluded that it was ethically improper, citing the Canon against extrajudicial  
 10 investigations and *ex parte* communications, *inter alia* (Canon 3). “[F]acts are to be determined on  
 11 the basis of evidence presented in court within the adversary process so that each side can present its  
 12 version of the facts. Moreover, even where a judge is not sitting as a fact-finder, he or she should not  
 13 obtain extrajudicial knowledge of facts, because that knowledge could unfairly influence the judge’s  
 14 rulings and other actions in the case.” (Quoted from A.O. 97-11, internal quotation marks omitted.)  
 15 The fact that police reports are “public records which are available for inspection and copying by any  
 16 person” does not change this result. *Id.* Finally, even when judges are allowed to consider police  
 17 reports because the law expressly provides for it (e.g. in presentencing hearings), A.O. 97-11 notes  
 18 that the defendant must ethically still be furnished with a copy of the report, and given a reasonable  
 19 time and opportunity to respond to it, before the judge uses it to rule. In this case, news reports are  
 20 generally similar to police reports in that they are both widely available to the public—but as A.O.  
 21 97-11 notes, this does not change the result. And if the source of Judge Hannah’s information was not  
 22 the news but rather the footnote/exhibit(s) to the Objection to Withdrawal in the *American Oversight*  
 23 case, then his conduct remains improper because that evidence was not presented to him.<sup>27</sup> Canon

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24 <sup>27</sup>At best, the “evidence” was presented to another judicial officer (Judge Kemp) by the plaintiff in another case, in  
 25 a very obscure way (as a footnote to an objection to counsel’s withdrawal). Of note: the filings in the *American*  
 26 *Oversight* are clearly *ex parte* as to the Plaintiff here. But there are also issues about whether the Objection filed  
 27 in that case was *ex parte* as to CNI, since the it was not served on CNI but rather on undersigned counsel; and  
 28 undersigned counsel has never made/intended to make a general appearance in the *American Oversight* case.  
 (Counsel appeared some time ago in the case only to request leave to file an amicus brief on behalf of CNI, which

1 2.9(C) provides that a judge “shall not investigate facts in a matter independently, and shall consider  
2 only the evidence presented and any facts that may properly be judicially noticed.” (Emphasis added.)  
3 The “judicial notice” exception does not apply because “[t]he rules of evidence allow the court to take  
4 judicial notice of the contents and disposition of a file, that the case exists and that allegations were  
5 made, but the court may not take notice of the truth or falsity of specific allegations except as  
6 established by final judgment.” *Matter of Pima Cty. Mental Health No. MH-959-10-85*, 149 Ariz. 7,  
7 9, 716 P.2d 68, 70 (Ct. App. 1986). The evidence in question was not established by a final judgment,  
8 but Judge Hannah nevertheless used it for its truth or falsity (and he did not claim to be taking judicial  
9 notice in any event). Finally, regardless of whether or how severely Judge Hannah violated the  
10 prohibition on extrajudicial investigations, he still held an obligation to disclose the source and  
11 substance of the information and to give the parties an opportunity to rebut it before making it the  
12 basis for his ruling, which he failed and refused to do even when asked. The obvious problem is that  
13 in failing to abide by these duties, Judge Hannah has furthered the reasonable impression that he is  
14 biased and going out of his way to find evidence against the Defendant(s) on these matters, and  
15 considering facts and information that Defendant(s) will never know of or have any opportunity to  
16 rebut.

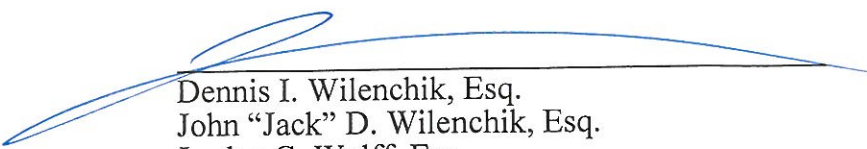
### 17 Conclusion

18 Judges who behave according to the Canon and with integrity will typically recuse at the  
19 slightest notion of improper conduct or actual bias, and at the minimum they will disclose issues of  
20 ethical concern. When judges fail to do so, they risk stepping outside their anticipated roles as neutral  
21 and respected decision-makers and into the role of opposing counsel which imperils our entire system  
22 of justice. They become adversaries who serve to inflame disputes rather than help to resolve them.  
23 And the public’s worst fears about judges are encouraged if not proven right. For the foregoing  
24 reasons, CNI respectfully moves the Court to re-assign this action to another judicial officer.

25 \_\_\_\_\_  
26 was denied. Months ago, there were also hearing[s] on motion[s] to consolidate that were denied, in which counsel  
27 briefly appeared. CNI was very recently joined as a party to the case but has not filed an Answer or any made any  
28 other filings since being joined.)

1                   **RESPECTFULLY SUBMITTED** on January 12, 2022.

2   **WILENCHIK & BARTNESS, P.C.**

3  
4     
5   Dennis I. Wilenchik, Esq.  
6   John "Jack" D. Wilenchik, Esq.  
7   Jordan C. Wolff, Esq.  
8   The Wilenchik & Bartness Building  
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12    Attorneys for Cyber Ninjas, Inc.

13                   **ORIGINAL** of the foregoing filed on  
14                   January 12, 2022 with the Clerk of the  
15                   Maricopa County Superior Court.

16                   **COPY** of the foregoing hand-delivered on  
17                   January 12, 2022 to Presiding Judge Pamela Gates

18                   **COPY** of the foregoing hand-delivered on  
19                   January 12, 2022 to the Judge John Hannah

20                   **COPY** of the foregoing emailed and mailed on  
21                   January 12, 2022 to:

22                   Kory Langhofer, Esq.  
23                   Thomas Basile, Esq.  
24                   **STATECRAFT PLLC**  
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30                   David J. Bodney, Esq.  
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37                   Attorneys for Phoenix Newspapers, Inc. and Kathy Tulumello

38                   By: 



# EXHIBIT A





ATTORNEYS AT LAW

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*Attorneys for Defendant Cyber Ninjas, Inc.*

**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**

**DECLARATION OF  
JOHN D. WILENCHIK, ESQ.**

I, John D. Wilenchik, hereby make this declaration based on my own personal knowledge:

1 1. The Motion to Disqualify (“Motion”), filed concurrently herewith and incorporated as  
2 if set forth herein, is true and correct to the best of my knowledge, information and  
3 belief.

4 2. I have reviewed audio of January 6<sup>th</sup> hearing and typed up the following accurate  
5 transcription of an exchange in between myself and Judge Hannah:

6 Q. [Hannah] Was he [Douglas Logan] deposed yesterday in the A.O. [American  
7 Oversight] case?

8 A. [Wilenchik] Um, he was not, no.

9 Q. Did he appear?

10 A. How are you are aware of that case your Honor – how are you aware of the fact  
11 that there was that deposition? Have you been reading the news on this?

12 Q. Um...the uh, record in another case is, uh, subject to judicial notice.

13 A. That’s not part of the record your Honor, that was a notice of Deposition. That  
14 was publicly reported on, so I take it you’ve read the news.

15 Q. OK. Go ahead, Mr. Hoffman.

16 The exchange occurs at 1:24:25 (one hour, twenty-four minutes and twenty-five  
17 seconds) into the audio of the hearing, which can be found at: <https://bit.ly/3fcLpyr>

18 3. I have reviewed audio of January 6<sup>th</sup> hearing and typed up the following accurate  
19 transcription of a statement made by Judge Hannah:

20 The Court is aware from the record in this case that Cyber Ninjas agreed to  
21 undertake this work for \$150,000. The Court is also aware from the record  
22 that Cyber Ninjas took in several million dollars from various sources that it  
23 says helped pay for this task.

24 The statements occur at 1:52:43 – 1:53:35 of the audio.

25 4. On November 7, 2022, I first learned of the Federal Elections Commission political-  
26 contribution information for John Hannah as described in the Motion. A true and  
27 accurate summary of the information, which is public record, is attached as Exhibit “1”  
28 hereto and also accessible through [https://www.fec.gov/data/receipts/individual-  
contributions/?contributor\\_name=john+hannah&contributor\\_state=AZ](https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=john+hannah&contributor_state=AZ).

5. On January 8, 2022, I conducted a search of Maricopa County Superior Court judges  
and commissioners for whom federal political contributions were reported to the FEC  
as far back as 2011. I conducted the search through the “FEC.gov” website by inputting

1 the names of all one hundred sixty-one (161) Maricopa County Judges and  
2 Commissioners as listed on the Maricopa County Superior Court website,  
3 <http://www.superiorcourt.maricopa.gov/JudicialBiographies/index.asp>. I searched for  
4 “Judge” in the occupation title; and for “Report Time Period” I selected 2011 – 2022.  
5 For “Receipt Date Range” I selected 01/01/2007 to 12/31/2022.

- 6 6. The results showed seven Maricopa County Superior Court judges or commissioners  
7 with reported contributions to federal political campaigns or organizations since 2011.
- 8 7. By far the most frequent contributions were by John Hannah, and another judge who  
9 has been assigned only to the criminal bench since 2015.
- 10 8. On October 15, 2018 Judge Hannah contributed \$50.00 to a group called “One Nation  
11 United,” whose website still shows a count-down to the 2020 election and says: “We  
12 must stop Donald Trump and the GOP. They are hellbent on transforming this country  
13 into a place none of us would want to live.” I looked up this site on the Internet Archive  
14 Wayback Machine website, and this statement has been prominently displayed on the  
15 website since at least August 15, 2018:  
16 <https://web.archive.org/web/20180815220336/https://onenationunited.com/>. I also  
17 confirmed that the “Mission” language on the website quoted in the Motion to  
18 Disqualify has appeared on the website since the at least the dates stated in the Motion,  
19 by using the Internet Archive Wayback Machine. True and accurate screenshots of the  
20 donation page and Mission page (as archived by the Wayback Machine) are attached  
21 as Exhibits 2, 3 and 9 hereto.
- 22 9. On September 28, 2019, Judge Hannah contributed \$100 to a group named “Fair Fight,  
23 Inc. PAC.” Its website (and other online sources) reflect that it was founded by Georgia  
24 Democrat Stacey Abrams. Its website claims that “insidious efforts to make voting  
25 more difficult” are “undermin[ing] our democracy” (“Fair Fight, Inc. PAC”). On May  
26 14, 2021 (a month and a half before this suit was filed), “Fair Fight” issued a lengthy  
27 press release calling CNI’s audit “dangerous” and “discredited,” and claiming that the  
28 audit was “being led by conspiracy theorists and insurrectionists.” Exhibit 8 hereto is a

1 true and accurate screenshot that I took on January 10, 2021.<sup>1</sup> After the audit reached  
2 its conclusion, the same group apparently published a one-line update to its website  
3 which says “Republican Review of Arizona Fails to Show Stolen Election” but contains  
4 no further comment.

5 10. As of August 13, 2019, the website claimed that 2018 elections were “rife...were  
6 irregularities”; and an August 7, 2019 press release read in part: “[n]ow, as elections  
7 draw closer, Republicans are running scared because they know as well as we do just  
8 how out of touch they are with the voters they represent.” A true and accurate copy of  
9 the website as of that date, which I obtained from the Internet Archive Wayback  
10 Machine,<sup>2</sup> is attached as Exhibit 7 hereto.

11 11. According to the group’s online press release archives, the last press release from the  
12 group’s CEO before Judge Hannah’s contribution (dated July 29, 2019, three months  
13 prior) read:

14 Make no mistake that it was a result of the hard work of litigation, activism, and  
15 advocacy that the state has chosen Dominion over ES&S for the largest purchase of  
16 voting machines in American history. ES&S has infiltrated Georgia government,  
17 bribed politicians, shielded itself from public records requests, and failed in state  
18 after state, and, because of our and our allies’ months-long efforts to expose this  
19 corruption, the choice by the state is not as bad as it could have been....

20 It is currently located at <https://fairfight.com/statement-from-fair-fight-ceo-lauren-groh-wargo/>. A true and accurate screenshot is attached as Exhibit 4 hereto.

21 12. It was widely reported that CNI’s audit included assessing the integrity of Dominion  
22 machines. CNI’s Statement of Work included references to Dominion machines in  
23 several places and was made public/reported on as early as April 1, 2021.

24 13. The instant suit is also a public-records action against a private elections vendor (CNI).

25  
26  
27 <sup>1</sup> <https://fairfight.com/icymi-startling-on-the-ground-report-exposes-dangerous-and-discredited-maricopa-county-arizona-audit/>

28 <sup>2</sup> <https://web.archive.org/web/20190813235908/https://fairfight.com/press-releases/>

1 14. On September 19, 2020 – less than two months before being assigned to the Republican  
2 Party case – Judge Hannah made another \$100 contribution to “Movement Voter PAC.”  
3 Since at least September 18, 2020 (one day before he contributed), that group’s website  
4 has stated: “We were deeply dismayed by the broader outcome of the 2016  
5 election...We organize for the long game....We are only getting started...[W]e can  
6 build lasting power and make the 2020s a progressive decade.” (See Exhibit 5 hereto,  
7 a true and accurate screenshot of the “Wayback Machine” archive for the website as of  
8 September 18, 2020.)<sup>3</sup> Since February 27, 2021 – weeks before Judge Hannah’s final  
9 ruling awarding sanctions in the Republican Party case (dated March 15, 2021) and four  
10 months before he was assigned to the instant action (June 30, 2021) – the group’s  
11 website has shown a “report” on the 2020 election entitled “What the Movement [Voter  
12 Project] Won in 2020” which specifically thanks its “partners” in Arizona for “Biden’s  
13 margin of victory in Arizona” and “flipping the Presidential race by 10,457 votes.” It  
14 also generally called the 2020 election “a game-changing victory, giving Democrats a  
15 narrow trifecta to pass legislation and appoint judges but it was also a near-death  
16 experience. We defeated Trump by a hair. While the Biden-Harris ticket won the  
17 popular vote by more than 6 million votes, we won the electoral college by less than  
18 43,000 votes across three states: Arizona, Georgia, and Wisconsin. That’s an even  
19 narrower margin than the 77,000 votes Trump won by in 2016. MVP’s local grassroots  
20 partners won this election. ...Biden’s margin of victory in Arizona was 10,457 votes.  
21 Our partners in Georgia and Wisconsin contacted voters on a comparable scale.... Make  
22 no mistake — without MVP’s partners in these three states, Trump would be president  
23 for the next four years.” “Winning Arizona in 2020 was a battle more than a decade in  
24 the making. MVP is going to double down on this crucial sunbelt battleground.” “The  
25 Presidential race and the electoral college in 2024 are likely to be tough... [We may be]  
26 exposed to Republican trifectas controlling elections in advance of 2024 — a terrifying  
27

28 <sup>3</sup> <https://web.archive.org/web/20200918175423/https://movement.vote/about/>

1 prospect. It looks the GOP is going to run a permanent smear campaign for the next  
2 four years and use every dirty trick possible to get revenge in 2022 and 2024. In short,  
3 we have our work cut out for us... We have to assume that Trump and the other side are  
4 going to upgrade their tactics. MVP is already making early investments to strengthen  
5 our local grassroots partners for the battles to come... There's a lot of analysis and  
6 evaluation still to do on the 2020 election.... We are doubling down and going even  
7 bigger over the next four years." A true and accurate screenshot of this website as it  
8 was on February 27, 2021 is attached as Exhibit 6 hereto (from the "Wayback  
9 Machine").<sup>4</sup>

10 15. In the two months before the November 2020 election, John Hannah contributed to  
11 Democratic Senate candidates in Alabama, Montana, Maine, South Carolina, and Iowa.  
12 (See contributions to Steve Bullock, Sara Gideon, Jaime Harrison, Doug Jones, and  
13 Theresa Greenfield on September 19, 2020.) The FEC website also reports a \$2,500  
14 contribution to "Sinema for Arizona" in 2017 for the primary election, which would  
15 have been in excess of the limits permitted by Canon 4.1. However, I believe that  
16 amount could have been a typo because the associated "pdf" record indicates only a  
17 \$250 contribution.

18 16. There were only four Judges who contributed to a candidate or candidate committee for  
19 President of the United States in the 2020 cycle, and one of them was John Hannah. To  
20 my knowledge, none of the others presided over a case related to the 2020 presidential  
21 election.

22 17. Judge Hannah made no disclosures with respect to any of these matters during any  
23 litigation in which he and I have been involved, or any other litigation to my knowledge.

24 18. With the exception of a judge who has sat only in criminal court, Judge Hannah has  
25 made three times as much in political contributions, and more than three times as  
26 frequently, as the entire superior court bench combined since at least 2011. His  
27

28 <sup>4</sup> <https://web.archive.org/web/20210227163706/https://movement.vote/2020-report/>

1 contributions were around eighteen times higher and more frequent than the average  
2 contribution (by all judges and commissioners other than him and the criminal-court  
3 judge).

4 19. My staff promptly requested a transcript of the January 6<sup>th</sup> hearing (on January 7<sup>th</sup>). On  
5 January 10<sup>th</sup>, we were informed that a transcript is not available (even on an expedited  
6 basis) until January 24<sup>th</sup>. The order has been placed.

7 20. I believe that Judge Hannah set a hearing on January 6<sup>th</sup> for an improper political  
8 purpose. Namely, he intended to issue a contempt finding on the same day as the  
9 protests that occurred on January 6, 2021. This belief is based on several things  
10 including that he did not consult anyone's calendar for the date of the hearing; he made  
11 what I interpreted to be *sua sponte* political statements at the beginning of the hearing;  
12 and he ruled from the bench finding my client in contempt without ruling on its  
13 objections and issuing a final order, per the *en banc* orders of the Arizona Supreme  
14 Court. The nature of his sanction was also punitive; my client had effectively asked for  
15 around \$60K to review, search and edit the records being requested since my client was  
16 never paid by the Senate for the \$100K balance of their contract; CNI is in debt; and it  
17 does not receive taxpayer funding to handle public records requests (as is normal for an  
18 actual public agency). The judge responded by sanctioning them \$50K a day, which  
19 was clearly not even intended to remedy the problem. The fine was also fifty times what  
20 the Plaintiff requested and equal to the entire amount of money that CNI received from  
21 its contract with the Senate.

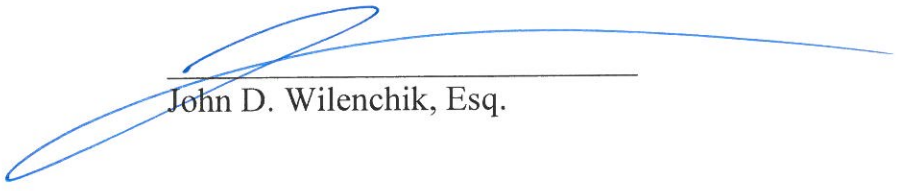
22 21. In general, I have experienced the most transparent and aggressive bias and prejudice  
23 in Judge Hannah's court that I have ever experienced in any court in my entire career.  
24 Had Judge Hannah chosen to disclose his clear personal bias and interest in these  
25 matters, or the nature and frequency of his political contributions or extrajudicial  
26 investigations, then I would have promptly moved to disqualify him due to at the  
27 minimum an objective appearance of impropriety, not to mention his actual bias and  
28 prejudice on the case.



1 22. The public needs confidence in these or any other proceedings. Judge Hannah's  
2 behavior is exactly what everyone fears about the judicial system. I am proud to say  
3 that I have not personally experienced this kind of behavior from any other judge on  
4 this bench. Our superior court judges otherwise act with restraint and integrity.

5 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
6 knowledge and belief.

7 DATED: January 11, 2022.

8  
9   
10 \_\_\_\_\_  
11 John D. Wilenchik, Esq.



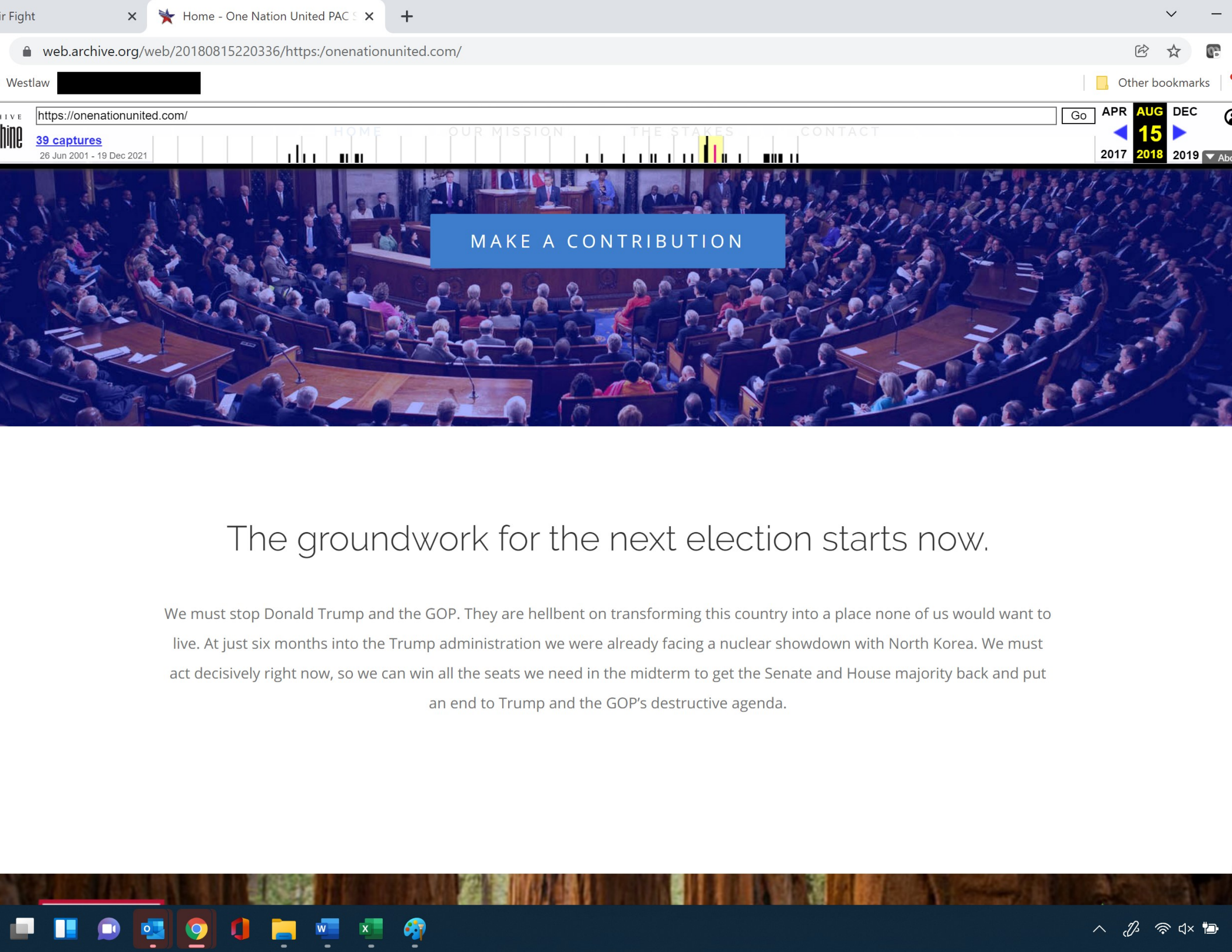
# EXHIBIT 1

Committee ID	Committee Name	Contribution Receipt Date	Memo Text	Contribution Receipt Amount	Contributor Name	Contributor City	Contributor State	Contributor Employer	Contributor Occupation	Contributor Aggregate Y.T.D.	FEC Election Type Description
C00508804	SINEMA FOR ARIZONA	10/15/2017 0:00	EARMARKED THROUGH ACTBLUE CONDUIT COMMITTEE 10-08-2017 \$56904.49-SEE MEMO ON SCH A FOR LINE 11C	\$2,500.00	HANNAH, JOHN	PHOENIX	AZ	AZ SUPERIOR COURT	JUDGE	\$250.00	PRIMARY
C00657304	STANTON FOR CONGRESS	9/20/2018 0:00	* EARMARKED CONTRIBUTION: SEE BELOW	\$300.00	HANNAH, JOHN	PHOENIX	AZ	AZ SUPERIOR COURT	JUDGE	\$300.00	GENERAL
C00401224	ACTBLUE	10/15/2018 0:00	EARMARKED FOR ONE NATION UNITED (C00624718)	\$50.00	HANNAH, JOHN	PHOENIX	AZ	AZ SUPERIOR COURT	JUDGE	\$50.00	
C00401224	ACTBLUE	5/15/2019 0:00	CONTRIBUTION TO ACTBLUE	\$20.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$25.00	
C00401224	ACTBLUE	5/15/2019 0:00	EARMARKED FOR WARREN FOR PRESIDENT, INC. (C00693234)	\$100.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$150.00	
C00401224	ACTBLUE	6/7/2019 0:00	CONTRIBUTION TO ACTBLUE	\$5.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$25.00	
C00401224	ACTBLUE	6/7/2019 0:00	EARMARKED FOR WARREN FOR PRESIDENT, INC. (C00693234)	\$50.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$150.00	
C00401224	ACTBLUE	9/28/2019 0:00	EARMARKED FOR HIRAL FOR CONGRESS (C00649897)	\$50.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$50.00	
C00401224	ACTBLUE	9/28/2019 0:00	EARMARKED FOR FAIR FIGHT, INC. PAC - FEDERAL (C00693515)	\$100.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$100.00	
C00693234	WARREN FOR PRESIDENT, INC.	12/28/2019 0:00	* EARMARKED CONTRIBUTION: SEE BELOW	\$100.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$250.00	PRIMARY
C00401224	ACTBLUE	12/28/2019 0:00	EARMARKED FOR WARREN FOR PRESIDENT, INC. (C00693234)	\$100.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$250.00	
C00401224	ACTBLUE	9/19/2020 0:00	CONTRIBUTION TO ACTBLUE	\$20.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$20.00	

C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR DOUG JONES FOR US SENATE (C00640623)	\$87.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$87.00
C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR THERESA GREENFIELD FOR IOWA (C00708164)	\$87.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$87.00
C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR SARA GIDEON FOR MAINE (C00709899)	\$87.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$87.00
C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR MONTANANS FOR BULLOCK (C00741611)	\$87.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$87.00
C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR JAIME HARRISON FOR US SENATE (C00696153)	\$87.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$87.00
C00401224	ACTBLUE	9/19/2020 0:00	EARMARKED FOR MOVEMENT VOTER PAC (C00728360)	\$100.00	HANNAH, JOHN	PHOENIX	AZ	SUPERIOR COURT OF ARIZONA IN MARICOPA	JUDGE	\$100.00



# EXHIBIT 2



MAKE A CONTRIBUTION

# The groundwork for the next election starts now.

We must stop Donald Trump and the GOP. They are hellbent on transforming this country into a place none of us would want to live. At just six months into the Trump administration we were already facing a nuclear showdown with North Korea. We must act decisively right now, so we can win all the seats we need in the midterm to get the Senate and House majority back and put an end to Trump and the GOP's destructive agenda.



# EXHIBIT 3

# Our Mission

One Nation United was founded to win back seats in congress so we can get America back on-track to creating laws and policies that benefit the people.

Since the 2010 Citizen United decision, republican-aligned Super PACs have raised hundreds of millions of dollars to fund false and negative campaigns against Democratic House and Senate candidates along with an unprecedented campaign to dishonor and malign President Obama. The overwhelming amount of republican-aligned TV advertising in 2010 was devastating to many House and Senate candidates.

This flood of money into ad campaigns and right wing media groups like FOX News has shifted views of Americans so far to the right, that a candidate like Donald Trump was acceptable to a wide group of voters due to the near constant exposure to ads and pseudo-news reports that present a false narrative to the public. Unfortunately this was a winning strategy and Trump won the election.

Republican-aligned PAC advertising and opinion positioning strategies are outdated. Their only advantage is the sheer amount of dollars they can throw at advertising and paid media pundits. One Nation United uses only the most impactful methods to engage voters and get the message and strategy out to defend the most vulnerable Democratic House and Senate candidates. We will bring the fight to them on their own block, city or state to hold back the onslaught of massive Republican-aligned ad spending.





# EXHIBIT 4



# Statement from Fair Fight CEO Lauren Groh-Wargo

July 29, 2019

ATLANTA – Today, Fair Fight CEO Lauren Groh-Wargo issued the following statement:

“Make no mistake that it was a result of the hard work of litigation, activism, and advocacy that the state has chosen Dominion over ES&S for the largest purchase of voting machines in American history. ES&S has infiltrated Georgia government, bribed politicians, shielded itself from public records requests, and failed in state after state, and, because of our and our allies’ months-long efforts to expose this corruption, the choice by the state is not as bad as it could have been. Today’s announcement, however, does nothing to change the fact that hand-marked paper ballots are more secure than elections by machines. Team Kemp cannot be trusted to protect the integrity of Georgia’s election system after his office repeatedly compromised Georgians’ personal information and failed for a decade to provide necessary support and training to Georgia counties. Frighteningly, court hearings last

### PRESS RELEASES

**Fair Fight Celebrates One-Year Anniversary of Historic Victories in Georgia’s U.S. Senate Runoff Election as Group Gears Up to Win Again in 2022**  
JANUARY 5, 2022 / 0 COMMENTS

**Fair Fight Responds to Senator Warnock’s Floor Remarks Calling on Colleagues to Pass the Freedom to Vote Act and John Lewis Voting Rights Advancement Act by Any Means**



# EXHIBIT 5

Internet Archive Wayback Machine interface showing the URL <https://movement.vote/about/> and a calendar for September 18, 2020. The page title is "About Us - Movement Voter Proj".

## History & Success

In early 2016, we spent six months consulting with more than fifty experts to develop an initial list of local movement groups organizing in communities across the country. During 2016, we invested in four small New Hampshire organizations who contacted 85,000 voters in communities being overlooked by national groups because they didn't historically vote at as high a rate. This led to increased voter turnout, especially among communities who aren't as likely to show up to the polls, in an election that was won by Democratic Senator Maggie Hassan by just 1,027 votes.

We were deeply dismayed by the broader outcome of the 2016 election, but we did not stop organizing. In Alabama's special Senate election in 2017, MVP played an especially unique role in seeding, helping to incubate, and funding two major locally-driven, Black-led GOTV efforts: Woke Vote and Black Voters Matter Fund (which in turn supported 35 groups in 17 counties). These groups drove historic black turnout in Alabama.

We organize for the long game. MVP-supported groups like New Virginia Majority have been building power in Virginia for years – and in 2019 they helped Virginia Democrats win state elections across the board. Democrats now have trifecta control in a state that was controlled by Republicans just six years ago. This has already translated to key policy victories including automatic voter registration, same-day voter registration, a 30% increase in the VA minimum wage, in-state tuition for undocumented and refugee college students, prohibitions on discrimination by public health insurance providers based on gender identity or transgender status, ban the box legislation, and several new laws strengthening environmental protections.

These are just some of our successes. In addition to driving electoral victories, MVP has been the first funder to seed or incubate more than 30 gap-filling organizations in key states. This includes groups like North Dakota Native Vote, Lancaster Stands Up (Pennsylvania), Florida Student Power Network, and Faith Organizers Alliance (the major African-American voter engagement group in Nevada).

We are only getting started. By making long-term investments in groups organizing their communities and turning out voters, we can build lasting power and make the 2020s a progressive decade.



# EXHIBIT 6



Donate

Learn More

Volunteer

# What The Movement Won In 2020

The 2020 election was a game-changing victory, giving Democrats a narrow trifecta to pass legislation and appoint judges, but it was also a near-death experience. We defeated Trump by a hair. While the Biden-Harris ticket won the popular vote by more than 6 million votes, we won the electoral college by less than 43,000 votes across three states: Arizona, Georgia, and Wisconsin. That's an even narrower margin than the 77,000 votes Trump won by in 2016.

MVP's local grassroots partners won this election. Our partners in Arizona alone made more than 30 million voter contact attempts. Biden's margin of victory in Arizona was 10,457 votes. Our partners in Georgia and Wisconsin contacted voters on a comparable scale, with winning margins of 12,670 and 20,565 respectively. Make no mistake — without MVP's partners in these three states, Trump would be president for the next four years. And without the extraordinary double Senate win in Georgia thanks to the heroic work of Black organizers, governing would be next to impossible.

There is nothing small about these achievements. We are eternally grateful to MVP's local partners, who delivered more than the margin of victory. And we should all be proud of ourselves for helping. For the rest of our lives. We saved our country.

On the other hand, we almost lost. We underperformed down ballot. And we have a tough road ahead in 2022 and 2024, more than most people realize. But despite the painful losses, we had so many local victories worth celebrating. On this page, you can find some of our favorite highlights, photos, videos, and takeaways from our grassroots partners.

But first, some stats about our work:



## ARIZONA

Our partners in Arizona made more than 30 million voter contacts (1.6 million doors, 20 million calls, and 7 million texts yielding 1.2 million commitments on the C4 side alone). In addition to flipping the Presidential race by 10,457 votes, and helping flip a Senate race, they also flipped a State House and a State Senate seat, coming three seats shy of flipping both chambers! Arizona also elected the first Latina to win a statewide office, who will now be serving on the AZ Corporation Commission, which regulates utilities including fossil fuels and renewable energy.

We supported our partners to expand beyond their core Latinx voting base in Maricopa County. MVP helped seed several new organizations led by Black, Native, APIA, and rural organizers across the state and helped drive these communities to record turnout. The Navajo Nation saw a voter turnout increase of 25%, even as they were devastated by COVID. Their work has made Arizona one of our most amazing success stories.

Winning Arizona in 2020 was a battle more than a decade in the making. MVP is going to double down on this crucial sunbelt battleground, which will feature a competitive Governor's race and a Senate rematch in 2022.

# Looking Ahead

Having analyzed the landscape, we anticipate the next two election cycles will be tougher than most people seem to realize. The House is an uphill battle for the next decade and we're likely to lose about five seats with reapportionment and redistricting alone. That's not even factoring in the likely headwinds of the 2022 midterms. The President's party has lost House seats in 37 of the past 40 midterms, losing 33 seats on average. The Senate map is even worse — by far our biggest problem. It will be hard for Democrats to even hold the 50 seats we have for the next decade and 2021 gerrymandering will be almost as bad as before. The Presidential race and the electoral college in 2024 are likely to be tough. And if the 2022 midterms wipe away Democratic Governors and Secretaries of State in key swing states, it will leave us exposed to Republican trifectas controlling elections in advance of 2024 — a terrifying prospect. It looks the GOP is going to run a permanent smear campaign for the next four years and use every dirty trick possible to get revenge in 2022 and 2024. In short, we have our work cut out for us.

MVP is hitting the ground running in 2021. We are making four-year commitments to invest big and early in all of the critical 2022 and 2024 battlegrounds — House, Senate, Presidential, and strategic down ballot races. We have to assume that Trump and the other side are going to upgrade their tactics. MVP is already making early investments to strengthen our local grassroots partners for the battles to come, from South Florida to South Texas, from North Philly to Northern Wisconsin, from East Detroit to Eastern North Carolina, from Orange County to the Navajo Nation.

There's a lot of analysis and evaluation still to do on the 2020 election. But we do know this — when we invest early and deeply and holistically enough in community-led power building, we can move the needle over time. MVP talent scouts emerging local partners who know their communities. And we support them to grow and succeed against all odds. MVP's model works. Thank you so much for being our partner in this work. We are doubling down and going even bigger over the next four years. Please think big and let us know how you want to be involved!





# EXHIBIT 7



## ABOUT FAIR FIGHT



Like decades of past elections, the 2018 elections in Georgia were rife with mismanagement and irregularities, but Georgians are fighting back. Fair Fight advocates for election reform, engages in voter education, and encourages turnout in order to secure the voting rights of all Georgians. The 501(c)(4) arm of the organization, Fair Fight Action, engages in activities such as conducting a vote-by-mail program; educating voters about elections, voting procedures, and voting rights; and facilitating a get-out-the-vote program to mobilize voters to cast their ballots during early voting and on election day.

This year, Fair Fight is working to expand democracy and ensure all voters have access to the polls. We promote fair elections in Georgia and around the country, encourage voter participation in elections, and educate voters about elections and their voting rights. Fair Fight brings awareness to the public on election reform, advocates for election reform at all levels, and engages in targeted voter registration and other voter outreach programs and communications.



INTERNET ARCHIVE  
**WayBackMachine**  
<https://fairfight.com/press-releases/>  
 99 captures  
 12 Jul 2019 - 14 Dec 2021

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 2018 **13** 2019 2020  
 About this capture

# Fair Fight PAC, Democratic Party of Georgia Launch Legislative Victory Fund

August 7, 2019

ATLANTA – Today, Fair Fight PAC, founded by former Georgia House Democratic Leader Stacey Abrams, and the Democratic Party of Georgia announced the launch of the Legislative Victory Fund, a multi-million dollar effort to capture the majority in the Georgia House of Representatives and win additional seats in the Georgia Senate. “Georgia Democrats’ ability to fight for a vibrant economy and quality health care depends on the number of seats we control in the General Assembly,” said Abrams. “It was an honor to work with 2018 legislative candidates across Georgia to engage and inspire voters in record numbers, with success across the state. The Legislative Victory Fund will work to protect these incumbents and continue to expand the Democratic caucus in both the House and Senate, with an eye on a House majority.” The Legislative Victory Fund will be a dedicated campaign arm of the Democratic Party of Georgia focused on legislative races. “Republicans under the Gold Dome showed their true colors this past legislative session by passing a forced pregnancy bill, jeopardizing Georgia’s economy and ignoring job creators, and wasting taxpayer dollars while failing to expand health care coverage,” said Democratic Party of Georgia Chair Nikema Williams, a state senator. “Now, as elections draw closer, Republicans are running scared because they know as well as we do just how out of touch they are with the voters they represent.” Leading the Legislative Victory Fund will be Craig Walters, the former Field and Targeting Director of the House Democratic Caucus and a leader in the field effort of Abrams’ historic 2018 gubernatorial campaign. A lifelong Georgian, Walters is a native of McDonough, Georgia and a graduate of Berry College. During Abrams’ seven years as House Democratic Leader, Democrats prevented a Republican supermajority and steadily gained seats. With Abrams at the top of the Democrats’ ticket in 2018 and a slate of tremendous candidates running across the state, Georgia Democrats captured fourteen House seats and two Senate seats that were previously under Republican

**PRESS RELEASES**

## Fair Fight PAC, Democratic Party of Georgia Launch Legislative Victory Fund

AUGUST 7, 2019 / 0 COMMENTS

## Joint Statement on Randolph County’s Renewed Attempts to Close Polling Locations — This Time in Predominantly White Precincts

AUGUST 6, 2019 / 0 COMMENTS

## Statement from Fair Fight CEO Lauren Groh-Wargo

JULY 29, 2019 / 0 COMMENTS

## UPDATED RELEASE: Fair Fight Re-Releases Website, Updated 40 Page Research Report Showing Corruption and Failures of Election Systems & Software

JULY 22, 2019 / 0 COMMENTS

## FLASHBACK: 3 in 4 Georgians are “Concerned” About Secretary of State Brad Raffensperger’s Expected Award of Contract to Failed, Corrupt Voting Machine Company Election Systems &





# EXHIBIT 8

# ICYMI: Startling On-The-Ground Report Exposes “Dangerous” and Discredited Maricopa County, Arizona “Audit”

May 14, 2021

*Voting rights experts “raising alarms” over the process, saying “there’s no audit or even recount process that looks like this”*

A new on-the-ground report from The Guardian lays out the “dangerous” so-called “audit” underway in Maricopa County, Arizona being led by conspiracy theorists and insurrectionists as part of their attempts to overturn the certified results of the last election and continue pushing the Big Lie. This GOP-backed “audit” singling out a heavily Democratic county with large numbers of voters of color already has elections experts “raising alarms” over inconsistencies and a process that “wouldn’t tell the auditors anything.”

As the Washington Post previously reported, “More than five months after the 2020 presidential election, and after numerous failed attempts to overturn the results, former president Donald Trump has seized on a new avenue to try to call the outcome into question: a hand recount of 2.1 million ballots cast in Arizona’s largest county.” This “audit” is not supported by or conducted by state or county election officials, who have already done their job to fairly count, audit, and certify the election results. Arizona’s Electoral Votes were properly cast for Joe Biden and Kamala Harris more than four months ago — and nothing under Arizona law at the time authorized this so-

## PRESS RELEASES

**Fair Fight Action Releases Statement on Anniversary of The January 6 Attack on the U.S. Capitol Highlighting Urgency of Passing Federal Legislation Protecting the Freedom to Vote**

JANUARY 6, 2022 / 0 COMMENTS

**Fair Fight Celebrates One-Year Anniversary of Historic Victories in Georgia’s U.S. Senate Runoff Election as Group Gears Up to Win Again in 2022**

JANUARY 5, 2022 / 0 COMMENTS

**Fair Fight Responds to Senator Warnock’s Floor Remarks Calling on Colleagues to Pass the Freedom to Vote**



# EXHIBIT 9

# Our Mission

Our Nation United was founded by experienced marketing, psychology, and advertising strategists to win, House and Senate races for Democratic candidates.

Since the 2010 Citizen United decision, republican-aligned Super PACs have raised hundreds of millions of dollars to fund false and negative campaigns against Democratic House and Senate candidates along with an unprecedented campaign to dishonor and malign President Obama. The overwhelming amount of republican-aligned TV advertising in 2010 was devastating to many House and Senate candidates.

This flood of money into ad campaigns has shifted views of Americans so far to the right, that a candidate like Donald Trump is now acceptable to a wide group of voters due to the near constant exposure of ads the present a false narrative to the public.

Luckily, (like their outdated policies) Republican-aligned PAC advertising and opinion positioning strategies are just as outdated. Their only advantage is the sheer amount of dollars they can throw at advertising and paid media pundits. Our Nation United uses only the most impactful methods to engage voters and get the message and strategy out to defend the most vulnerable Democratic House and Senate candidates. We will bring the fight to them on their own block, city or state to hold back the onslaught of massive Republican-aligned ad spending.

# EXHIBIT B





SUPREME COURT OF ARIZONA

CYBER NINJAS, INC., )  
 ) Arizona Supreme Court  
 ) No. CV-21-0281-PR  
 )  
 ) Petitioner, )  
 ) Court of Appeals  
 )  
 ) v. )  
 ) Division One  
 ) No. 1 CA-SA 21-0173  
 )  
 ) THE HONORABLE JOHN HANNAH, JUDGE )  
 ) OF THE SUPERIOR COURT OF THE )  
 ) STATE OF ARIZONA, in and for the )  
 ) County of Maricopa, )  
 ) No. LC2021-000180-001  
 )  
 ) Respondent Judge, )  
 )  
 )  
 ) PHOENIX NEWSPAPERS, INC., an )  
 ) Arizona corporation, and KATHY )  
 ) TULUMELLO; 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, )  
 )  
 ) Real Parties in Interest. )  
 )  
 )

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**FILED 12/01/2021**

**O R D E R**

Petitioner Cyber Ninjas Inc., ("CNI") has filed a "Petition for Special Action or in the Alternative Petition for Review" which the Court is treating as a petition for review. It has also filed an "Application for Stay" seeking a Court order staying the August 24, 2021 superior court order directing CNI to produce to respondent Phoenix Newspapers, Inc., et al ("PNI") "Public Records" under A.R.S. § 39-121.01(A)(the "Public Records Law" or "PRL").

CNI filed a request for stay which the Court denied on November

30, 2021 observing that a Motion for Reconsideration was pending in the Court of Appeals. Having been advised that CNI has withdrawn its Motion for Reconsideration, the Court en banc addresses the Application for Stay.

PNI's Public Records request requested documents that were identified in a June 2, 2021 email to include:

1. all financial records related to the Audit, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts and records of all payments or donations for such Audit-related work;
2. all communications regarding the performance, funding and/or staffing of the Audit between or involving any officer, director, employee or agent of Cyber Ninjas and:
  - a. any member of the Arizona Senate or any employee or agent communicating on behalf of any Senator;
  - b. any "liaison" for the Arizona Senate or any Senator, including Ken Bennett and Randy Pullen, or anyone communicating on their behalf any member of the Maricopa County Board of Supervisors, Maricopa County Recorder Steven Richer, Maricopa County Sheriff Paul Penzone or anyone communicating on their behalf;
  - c. member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives

- Anthony Kern, or anyone communicating on their behalf;
- d. any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;
  - e. former U.S. President Donald Trump or anyone communicating on his behalf; and
  - f. Christina Bobb of One America News Network, or anyone communicating on her behalf.

CNI contends that "its records are not public as a matter of law because the government does not own or control them, much less rely on or even have access to them." CNI objects to producing "its own internal emails regarding performance of its contract or related matters." CNI challenges the Court of Appeals' finding, "To the extent Cyber Ninjas is in sole possession of audit-related public records because of its contract with the Senate, Cyber Ninjas has become the custodian of those records under the PRL. And as to those records, Cyber Ninjas has assumed the obligations the PRL assigns to a 'custodian' of public records." *Cyber Ninjas, Inc., v. Hannah*, 1 CA-SA 21-0173, 2021 WL 5183944, at \*3 (App. Nov. 9, 2021).

Respondent PNI filed a response to the Application for Stay pointing out that under the superior court order, CNI is not required to produce documents directly to PNI but is instead required to produce documents to the Senate and, in conjunction with the Senate, may confer regarding which public records, if any "should be withheld

based on a purported privilege or for any other legal reason." See Order page 4, lines 11-17. CNI may therefore assert any pertinent objections in the Superior Court and, if necessary, seek appropriate review in the Court of Appeals.

Upon consideration,

**IT IS ORDERED** denying the Application for Stay without prejudice.

**IT IS FURTHER ORDERED** denying CNI's request for oral argument. The Court will consider the Petition for Review in due course. Any response to the Petition for Review is due no later than December 22, 2021. If PNI wishes the matter to be considered at the January 4, 2022 agenda date, it may file its response to the Petition for Review no later than December 15, 2021. If its response is filed after that date, the matter will be considered at the February 1, 2022 agenda.

DATED this 1st day of December, 2021.

\_\_\_\_\_/s/\_\_\_\_\_  
WILLIAM G. MONTGOMERY  
Duty Justice

TO:

Dennis I Wilenchik  
John D Wilenchik  
Jordan C Wolff  
David Jeremy Bodney  
Craig C Hoffman  
Kory A Langhofer  
Thomas J Basile  
Amy M Wood  
Hon. Jeff Fine  
Hon. John Hannah  
nm

# EXHIBIT C





John “Jack” D. Wilenchik, Esq.

WILENCHIK &amp; BARTNESS

— A PROFESSIONAL CORPORATION —

ATTORNEYS AT LAW

The Wilenchik & Bartness Building  
2810 North Third Street Phoenix Arizona 85004[jackw@wb-law.com](mailto:jackw@wb-law.com)

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

November 9, 2021

**VIA EMAIL ONLY**

Kory Langhofer

[kory@statecraftlaw.com](mailto: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 4<sup>th</sup> and 14<sup>th</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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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Kory Langhofer  
November 9, 2021  
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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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Kory Langhofer  
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Page 3 of 4

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  
Page 4 of 4

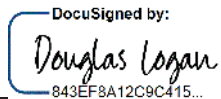
**Declaration**

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 D



**ARIZONA SUPREME COURT**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**JUDGE JOHN HANNAH, Judge of  
the Superior Court of the State of  
Arizona, in and for the County of  
Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Arizona Supreme Court**

**Case No. \_\_\_\_\_**

**Court of Appeals**

**Division One**

**Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court**

**Case No.: LC2021-00180-001**

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**PETITION FOR SPECIAL ACTION,  
OR IN THE ALTERNATIVE PETITION FOR REVIEW**

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Dennis I. Wilenchik, Esq. (SBN # 005350)

John D. Wilenchik, Esq. (SBN # 029353)

Jordan C. Wolff, Esq. (SBN # 034110)

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[jackw@wb-law.com](mailto:jackw@wb-law.com)

*Attorneys for Petitioner/Defendant*

Petitioner Cyber Ninjas, Inc. (“CNI”) hereby files this Petition for Special Action, or in the alternative Petition for Review of the Court of Appeals’ Decision filed on November 9, 2021.

**1. The issues that were decided by the Court of Appeals that the petitioner is presenting for Supreme Court review.**

- A. Can a non-public body or officer be sued under A.R.S. § 39-121.02, which provides only for “special actions against the officer or a public body,” after a person is denied access to “public records and other matters in the custody of any officer”? (And where A.R.S. § 39-121.01(A)(1) defines an “officer” as “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body”?)
- B. Can documents that a public body or officer does not own, create, and or have custody over, such as emails on a private server, be considered “public records and other matters in the custody of any officer” under Arizona Public Records Law, A.R.S. § 39-101, *et seq.*?
- C. Does “public record” mean any record with a “substantial nexus” to government activity, regardless of whether the government actually owns or has custody of it?
- D. Can any “custodian” of records, including a government employee or private contractor, be subject to a lawsuit under A.R.S. § 39-121.02? Or is just the “officer in custody” of records, meaning the

chief “officer” of a public body pursuant to A.R.S. §§ 39-121, 39-121.01(A), and 39-121.02?

E. Can attorneys’ fees be awarded against a private body under A.R.S. § 39-121.02(B)?

**2. Additional issues presented to, but not decided by, the Court of Appeals that the Supreme Court may need to decide if it grants review.**

A. None.

**3. The facts material to consideration of the issues presented to the Supreme Court for review, with appropriate references to the record on appeal.**

The Arizona Senate (the “**Senate**”) hired CNI, a private corporation formed under the laws of Florida, to prepare an audit report regarding voting equipment used and ballots cast in Maricopa County in the 2020 general election. (App. at 21, ¶ 2). Respondent Phoenix Newspapers, Inc. (“**PNI**”) sent a request to CNI to inspect documents relating to the audit under public records law. (*Id.*, ¶ 3). Because CNI is not a public officer or a public body, it declined the request. PNI then filed a statutory special action against CNI, the Senate, and Senate officials. CNI moved to dismiss the Complaint on the grounds that CNI is not a public officer or a public body, *inter alia*, (the “**Motion**”). (*Id.*, App. at 22, ¶ 4). The trial court denied the Motion, finding that CNI holds public office. CNI filed a special action appealing from that decision, and the Court of Appeals accepted jurisdiction because “the issues raised in the petition are pure questions of law and are of statewide

importance.” (*Id.*, App. at 22, ¶ 6).

On appeal, CNI again argued that it is not a public officer or a public body. (App. at 28). PNI argued that CNI is a public officer or a public body; and in the alternative that CNI is a “custodian” and that “custodians” are subject to suit. (*See* App. at 211). PNI also claimed for the first time on appeal that CNI had “admitted” that CNI had public records, which CNI denied; and CNI pointedly argued in its Reply that its records are not public as a matter of law because the government does not own or control them, much less rely on or even have access to them. (*See* App. at 258). To deem CNI’s records, such as its own internal emails regarding performance of its contract or related matters, or its emails/contracts with its own subcontractors, to be “public records” defies common sense and the plain language of the statute.

First, the Court of Appeals erroneously determined that “custodians” of records are subject to being sued. This decision not only contradicts the plain wording of the statute, but it opens up every state employee or contractor to being sued under public-records statutes, which was clearly never the intent of these statutes. Second, the Court of Appeals erroneously decided that all “documents relating to the audit are public records,” irrespective of whether the government actually owns them, much less possesses them. (App. at 23 ¶ 17). Even though the Court of Appeals accepted jurisdiction because this case presents issues of

“statewide importance” and “pure questions of law,” the Court of Appeals incongruously decided that CNI was a proper party only “under the unusual facts of this case” – without even specifying what those “unusual facts” might be. (App. at 25, ¶ 17). And in a transparent effort to avoid review by this Court, the Court of Appeals declared that its ruling would not apply to “businesses that contract with the government to provide ordinary goods or services” – just CNI, apparently – even though that distinction has neither a legal nor factual basis. Further, it would subject any contractor or government employee who works in elections to being sued for their private records, since none of them provide “ordinary goods or services” and they are “custodians” of records that “relate” to their government work.

The Court of Appeals’ decision that a private company can be sued for private documents simply because those documents relate to government work, is far beyond the realm of what is statutorily permitted under the public-records statute. It also defies common sense: private company’s documents are not and cannot be public documents. The Court of Appeals’ definition of “public record” captures documents that the government clearly has no right or reason to have or see, like private documents regarding a company’s costs of performance, financing, thoughts on its government contract or other matters. As things stand, the Court of Appeals’ order is so outrageous that it violates the Fourth and Fourteenth

Amendments and Arizona constitutional privacy clause, because it effectively compels a private company to produce documents to the government which the government does not own and has no right to see. No government employee or contractor expects this when they sign up for government work, and it is utterly without a genuine basis in law.

Further, the practical consequence of the Court of Appeals' decision is that CNI is now receiving records requests from members of the public and the Maricopa County Attorney, who are expressly citing the Court of Appeals' decision. (Appendix at 272, 275). It is axiomatic that CNI does not have a taxpayer-funded public records department, and it does not have a taxpayer-funded lawyer in the form of the Attorney General's Office. It is a private company that simply cannot deal with this logistically and financially. The award of fees and costs against it just adds to the burden and impossibility of dealing with future public records requests and suits like this. (It also lacks any genuine statutory support, as discussed below.) The Court of Appeals' decision is clearly erroneous but also has far-reaching and chilling consequences for state contractors and employees. Thus, this Court should accept review.

#### **4. The reasons the petition should be granted**

No Arizona law decision controls the point of law in question, and important issues of law have been incorrectly decided. These issues are also of statewide



importance and pure questions of law. Further, CNI has no other adequate and equally speedy relief. It is being compelled to produce private documents that are not “public records” by any statutory or even rational definition, which is of a constitutional dimension because these are private records being produced to the government. This infringes on persons’ right to privacy under the Arizona Constitution and the Fourth and Fourteenth Amendment rights to be free from unreasonable search-and-seizure.

The plain language of the public records statutes unambiguously provides that an action for denial of access to public records can *only* be filed against an “*officer or a public body*” who has “denied access” to public records in the “*custody of any officer*”. A.R.S. §§ 39-121.02(A), 39-121 (emphasis added). The Court of Appeals’ answer to this was to insert a word into A.R.S. § 39-121.02(A) that is not there. The A.R.S. § 39-121.02(A) actually states:

Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions *against the officer or public body*.

(Emphasis added). The Court of Appeals’ decision misquoted the statute by stating that the person denied access “may appeal the [*custodian’s*] denial through a special action in the superior court...” (See App. at 24, ¶16.) The Court of Appeals capriciously inserted the word “custodian” into the statute..

The Court of Appeals’ fallacious argument that any “custodian” of public records can be sued, and that “custodian” means any person, public or private, who purportedly has records relating to government work is contrary to the plain language of the statutes. The word “custodian,” which is used only in A.R.S. §§ 39-121.01 and 39-121.03, distinctly refers to the “officer in custody” of records under A.R.S. § 39-121, to whom record requests are made. This is consistent with the language in the public records statutes, which provide that only public officers or public bodies may be sued, and “[p]ublic records and other matters in the custody of any *officer*” shall be open to inspection. A.R.S. §§ 39-121.02(A), 39-131 (emphasis added). Under the Court of Appeals’ interpretation, members of the public can now sue any government employee or contractor under public and to being hold them personally responsible for their fees as well, as the Court of Appeals did here.

The Court of Appeals’ citation to the Rules of Special Action and Rule 19 of the Rules of Civil Procedure (governing joinder) does not provide a substantive basis for a lawsuit by a member of the public against CNI, and certainly no basis for an award of fees against CNI. The Court of Appeals also provided no explanation for why “in [CNI]’s absence, the court cannot accord complete relief among existing parties.” CNI’s documents are clearly not in the “custody of any public officer” and its participation is not needed. Further, the Court of Appeals’

reasoning here is so terrifyingly broad that any member of the public could sue any government employee or contractor for purportedly having public records and sue them under this interpretation of the statutes and Ariz. R. Civ. P. 19, rendering the “against the officer or public body” language in A.R.S. § 39-121.02(A) completely nugatory.

The Court of Appeals’ argument that CNI must be treated differently because it allegedly does not provide “ordinary goods or services” is legally and factually baseless.<sup>1</sup> There is no authority which supports holding a private company liable under the public records statutes (including for fees) turns on whether they provide “ordinary services.” It is obvious that the Court of Appeals was trying to arbitrarily justify applying a different rule of law to CNI – in contravention to the basic idea that justice is blind, and that laws are supposed to be neutrally applied regardless of who is in front of the court. Such a “rule” is also dangerous, confusing, and unpredictable – what is “unusual” about CNI’s services as an auditor? Is it because CNI audited an election, which is not “ordinary” and is “an important” government function? In which case, isn’t the contractor who makes the vote-tabulation machines now subject to public records requests and suits (and fee awards), because

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<sup>1</sup> The Court of Appeals also seems to say that this case is somehow unique because the Senate is acting in an “oversight” capacity. This is strictly inaccurate, since the ballot investigation was conducted by the judiciary (not oversight) committee; but it also totally legally irrelevant, for the reasons below.

the government has “entirely outsourced” the “important” government function of counting ballots? Or the election auditor that the county hired? And all election auditors in the future?

The Court of Appeals argues that the government “entirely outsourced” a government function. It is apodictic that whenever the government hires a private contractor, it is “entirely outsourcing” something – that is the definition of a private contractor. And whether something is “important” or “unique” is at once arbitrary and true of every government function—they are all important and unique because the government itself is important and unique. Even the examples that the Court of Appeals gives of “entirely outsourced” – construction companies and office-supply vendors—could be characterized as important and unique in the same way that CNI has been here. The construction company that built the Court of Appeals’ building engaged in an “important” undertaking that was “unique,” since there is only one. Or the office-supply vendor who provides the legal notepads for jurors – surely that is an “important” and “unique” undertaking. The Court of Appeals made its rule up out of whole cloth in a thinly veiled effort to stop this Court from reviewing its decision, by trying to make it seem as if this case turns on unique or unusual facts which it clearly does not. What we are dealing with here is an obvious but nevertheless far-reaching misapplication of a basic law, the law of public records, which threatens every contractor and employee in this state.

This Court has previously held that documents which the State does not own must not be produced in response to a public records request—even in cases where the State is in possession of the records, which is not the case here. In the seminal case of *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 534, 815 P.2d 900, 903 (1991), this Court addressed whether records that belong to non-governmental or private bodies may be considered “public records,” relying heavily on federal FOIA law. *See also Church of Scientology v. Phoenix Police Dep’t*, 122 Ariz. 338, 340, 594 P.2d 1034, 1036 (App. 1979) (FOIA offers guidance to Arizona courts in construing Arizona public records statute). This Court noted that federal courts have “uniformly held that an agency must control a record before it is subject to disclosure”; and “[t]he control test is helpful in analyzing our statute, which also exempts private information from disclosure even when it is held by a government agency.” *Id.*, 168 Ariz. at 541, 815 P.2d at 910. “An agency has control over the documents when they have come into the agency’s possession in the legitimate conduct of its official duties.” *Id.*, 168 Ariz. at 541-42, 815 P.2d at 910-11 (*quoting U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 145 (1989))(quotation marks omitted). Where documents are not in control of the government, they were not generated by the government, they never entered the government’s files, and they were not used by the government for any purpose, then they are not “public

records.” *Id.*, 168 Ariz. at 542, 815 P.2d at 911 (citing *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980)).

The Respondent newspaper failed to allege that CNI has exclusive possession of *any* document that the Senate controls, generates, or that even entered the Senate’s files, much less that the Senate used for any purpose. What we are talking about are emails and contract that CNI has with its own private contractors, its own private subcontracts, and the like. Under CNI’s contract with the Senate, the only document that the Senate was entitled to have and control is the final audit report that CNI agreed to prepare, which has now been completed and produced to the Senate and undisputedly a public record because the Senate owns and possess it. But CNI’s own records are not public records simply because they may relate to that audit report, which is what the Court of Appeals erroneously found here. Further, in *Salt River*, the Arizona Supreme Court cited with approval (several times) two FOIA decisions that squarely address the kind of issues at bar: *Forsham v. Harris*, 445 U.S. 169 (1980) and *Ciba–Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977) (discussed immediately below).

In *Forsham v. Harris*, 445 U.S. 169 (1980), the United States Supreme Court considered a FOIA request for the raw data underlying a study conducted by a private medical research organization. Although a federal agency funded the study, the data was generated and possessed by the private company, and it never passed

into the hands of the federal agency. The United States Supreme Court found the fact that the study was financially supported by a FOIA-covered government agency did not transform the data into “agency records”; nor did the agency’s right of access to the materials under federal regulations change the result. The United States Supreme Court explained that “FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.” *Id.*, 445 U.S. at 186 (emphasis in original). In denying the FOIA claim, the United States Supreme Court explained that federal funds do not convert a private organization into an “agency” for purposes of the FOIA without “extensive, detailed, and virtually day-to-day supervision” by the agency of the private organization. *Id.*, 445 U.S. at 180. Of course, nothing of the sort has been alleged here; and in general, the notion that “Cyber Ninjas Inc.” is so intertwined with the government as to be a “government agency” is meritless. Ultimately, the Supreme Court held that “[w]ith due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency ... but which data has not at any time been obtained by the agency, are not ‘agency records’ accessible under the FOIA. Without first establishing that the agency has created or obtained the document, the agency’s reliance on or use of the document is similarly irrelevant.” *Id.*, 445 U.S. at 170. Again, the case at bar contains no allegation that CNI holds any records that were generated by the Senate,

or that CNI exclusively holds any records created by the Senate; and while there has also been no allegation that the Senate “relied on” CNI’s records, such an allegation would be “irrelevant” anyway. *Id.*

The other closely-related FOIA decision discussed by this Court in *Salt River (Ciba–Geigy Corp. v. Matthews)* is very much on-point. It concerned a private group of researchers (called the “UGDP”) who applied for and received federal grants to conduct diabetes studies. *Ciba*, 428 F.Supp. at 532. Under federal regulations, the UGDP was required to submit interim and final reports to the government and to allow the government “access” to their raw data; but the *Ciba* court noted that the government customarily relied on the UGDP’s reports rather than accessing the underlying data. The plaintiff questioned “the manner in which the UGDP [handled its own] raw data,” as well as “the accuracy of the results reported,” so the plaintiff made a FOIA request for the UGDP’s underlying data and claimed that the data was a public record (or “agency record,” in FOIA parlance). *Id.*, 428 F. Supp. at 526. On a familiar note, the plaintiff made three arguments: first, that the UGDP was a “de facto federal agency and that its records are therefore agency records”; second, that “even if the UGDP is not a federal agency in itself, it nevertheless served as an extension of a federal agency” (essentially an “agent” argument); and third, that even if those arguments failed then



the “disclosure of [UGDP’s] records may still be compelled if those records can be characterized as Government agency records.” *Id.*, 428 F. Supp. at 526.

The *Ciba* court rejected all three arguments. First the court held that even though the UGDP received public funding, it was not an “agency.” *Id.* To reach this decision the court looked at obvious factors like “whether the organization has the authority in law to perform the decision-making functions of a federal agency and whether its organizational structure and daily operations are subject to substantial federal control.” *Id.*, 428 F. Supp. at 527. With respect to the plaintiff’s other two arguments, the court disposed of them by finding that the plaintiff had not proven that “the records were either Government-owned or subject to substantial Government control or use. In other words, it must appear that there was significant Government involvement with the records themselves in order to deem them agency records.” *Id.*, 428 F. Supp. at 529. The *Ciba* court held “that federal funding, regardless of amount, [was] not sufficient to vest the underlying raw data of the UGDP research with a public character. To hold otherwise at a time when public monies flow to numerous private endeavors would surely have a chilling effect on [them]...” *Id.*, 428 F. Supp. at 530. The *Ciba* court also found that “Government access to and reliance upon” the data did not mean that the government owned or “controlled” it. *Id.* The *Ciba* court logically explained that “[a]lthough the federal defendants have access to the underlying data, there is no evidence that they have

used it to exercise regular dominion and control over the raw data.” *Id.*, 428 F. Supp. at 530–31. “Mere access without ownership and mere reliance without control will not suffice to convert the UGDP data into agency data.” *Id.* “Just as the Government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written, it should not be compelled to acquire data it neither referred to directly nor relied upon in making decisions.” *Id.*, 428 F. Supp. at 531. “The distinction between direct reliance, in whole or in part, upon a summary report and direct reliance (via usage or control) on supporting documentation is necessary to preserve a salutary balance between the public’s right to be informed of the grounds for Government decisionmaking and the protection of private interests.” *Id.*, 428 F. Supp. at 532.

In other words, while the Senate has received CNI’s report—which is undisputedly a public record—the Senate does not own or control CNI’s company records even though its records may relate to the final audit report (and even if, in some sense, the Senate has “relied” on CNI’s records because the records support the final audit report. According to the United States Supreme Court, this is “irrelevant.”) For example, PNI has asked for all of CNI’s communications regarding this audit, including subcontractors specifically. This would include things like CNI’s internal emails discussing issues with its ability to perform under the contract, discussing its relationship with the Senate, and evaluating the

performance of its own subcontractors or issues with their performance, etc. In PNI's universe, CNI must not only produce such emails to the Senate but must make them public. Not only is this patently unfair, but it runs against common sense and is legally baseless. The foregoing are not "public records" by any stretch of the imagination, nor do they meet any intellectually honest legal definition.

Finally, the award of attorneys' fees against CNI not only demonstrates how unfair and impossible it will be for CNI to deal with these kinds of requests and suits in the future, but it also lacks a genuine statutory basis. The Court of Appeals' reasoning on this point (as expressed in the case of *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130, 211 P.3d 8 (App. 2008)) seems to be that although the statute expressly says that only public officers and public bodies can be sued (A.R.S. § 39-121.02(A)), the statute does not repeat the same language in the subsection that immediately follows it regarding attorneys' fees (A.R.S. § 39-121.02(B)). The subsection regarding attorneys' fees (A.R.S. § 39-121.02(B)) must be read in conjunction with the previous subsection regarding who can be sued (A.R.S. § 39-121.02(A)) to say that fees awards are authorized only against the public body or public officer. This is consistent with the general rule that fees may only be awarded where expressly authorized by statute and the general public policy here of not overburdening government employees and especially contractors who do not have "free" lawyers in the Attorney General's Office or taxpayer-funded public-

records/legal budgets. Also, whereas the *Arpaio* case involved claims for declaratory judgment that were asserted against a public officer (Arpaio), this case involves only unfounded public-records claims against a private entity—CNI.

The bottom line here is that CNI is clearly not a proper party to be sued under the public records statute; none of the records at issue are public records *because the Government does not own much less possess them*, and the Court of Appeals’ decision opens up every single contractor and employee of the government to being sued. None of this makes any legal or practical sense and there is no way that any state contractor could reasonably deal with any of this. The Court must grant review because of the obvious and far-reaching issues involved in this case, *inter alia*.

**5. If the party claims attorneys' fees on appeal or in connection with a petition or cross-petition for review, the party must include the information required by Rule 21(a).**

None.

**RESPECTFULLY SUBMITTED** November 23, 2021.

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**ARIZONA SUPREME COURT**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**JUDGE JOHN HANNAH, Judge of the  
Superior Court of the State of Arizona,  
in and for the County of Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Arizona Supreme Court**

**Case No. \_\_\_\_\_**

**Court of Appeals**

**Division One**

**Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court**

**Case No.: LC2021-00180-001**

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**APPENDIX TO PETITION FOR SPECIAL ACTION,  
OR IN THE ALTERNATIVE PETITION FOR REVIEW**

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NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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CYBER NINJAS, INC., *Petitioner,*

*v.*

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT  
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,  
*Respondent Judge,*

PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY  
TULUMELLO; 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,  
*Real Parties in Interest.*

No. 1 CA-SA 21-0173  
FILED 11-9-2021

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Petition for Special Action from the Superior Court in Maricopa County  
No. LC2021-000180-001  
The Honorable John Hannah, Judge

**JURISDICTION ACCEPTED; RELIEF DENIED**

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**MEMORANDUM DECISION**

Judge Maria Elena Cruz delivered the decision of the Court, in which  
Acting Presiding Judge David B. Gass and Judge Randall M. Howe joined.

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**C R U Z**, Judge:

¶1 Petitioner Cyber Ninjas, Inc. (“Cyber Ninjas”) seeks relief from the superior court’s order denying its motion to dismiss the special action complaint filed against it by Phoenix Newspapers, Inc. and Kathy Tulumello (collectively “PNI”). For the following reasons, we accept jurisdiction but deny relief.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 The Arizona Senate initiated an audit of voting equipment used and ballots cast in Maricopa County in the 2020 general election, and it retained Cyber Ninjas, a private corporation, to serve as its primary vendor for that audit. Cyber Ninjas then hired multiple private companies to assist it in the audit.

¶3 In June 2021, the Arizona Republic, published by Phoenix Newspapers, Inc., served a request on Cyber Ninjas to inspect documents relating to the audit. The newspaper asserted the documents were public records subject to inspection under Arizona’s Public Records Law (“PRL”), Chapter 1 of Title 39, Arizona Revised Statutes (“A.R.S”). Cyber Ninjas did not produce any records to the Arizona Republic in response to its request.

¶4 PNI then filed a statutory special action under the PRL against Cyber Ninjas, the Senate, Senate President Karen Fann and other Senate



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officials. Cyber Ninjas moved to dismiss the complaint, which the superior court denied. Citing A.R.S. § 39-121.02, the court ordered Cyber Ninjas to produce copies of public records related to the audit in its possession, custody, or control. Cyber Ninjas then petitioned for special action seeking relief from: (1) the superior court’s denial of its motion to dismiss and (2) the order to produce any public records directly to PNI. At Cyber Ninjas’ request, we temporarily stayed the superior court’s order that it produce all documents directly to PNI.<sup>1</sup>

**SPECIAL ACTION JURISDICTION**

¶5 Special action review is generally appropriate if a party has no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R.P. Spec. Act. 1(a); *see generally Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, 201, ¶¶ 5-7 (App. 2012). Our decision to accept special action jurisdiction is discretionary and is “appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again.” *State v. Superior Court (Landeros)*, 203 Ariz. 46, 47, ¶ 4 (App. 2002).

¶6 Here, the issues raised in the petition are pure questions of law and are of statewide importance. Accordingly, we accept special action jurisdiction.

**DISCUSSION**

¶7 This case presents a question of statutory interpretation, which we review de novo. *McHale v. McHale*, 210 Ariz. 194, 196, ¶ 7 (App. 2005).

¶8 The PRL requires “[a]ll officers and public bodies” to “maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of

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<sup>1</sup> The Senate is not a party to this special action proceeding from the superior court’s ruling against Cyber Ninjas. We note that, as a consequence of our ruling in *Fann v. Kemp*, 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. App. Aug. 19, 2021) (mem. decision), the Senate has formally asked Cyber Ninjas to produce to the Senate certain documents relating to the audit that remain in Cyber Ninjas’ possession. Per the parties’ agreement, we ordered Cyber Ninjas to promptly begin processing the Senate’s request to disclose those documents to the Senate for it to review on an ongoing basis.

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this state.” A.R.S. § 39-121.01(B). Arizona law imposes additional duties on those responsible for public records. For example, “[e]ach public body shall be responsible for the preservation, maintenance and care of that body’s public records, and each officer shall be responsible for the preservation, maintenance and care of that officer’s public records.” Each public body also has a duty “to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction . . . .” A.R.S. § 39-121.01(C).

¶9 We recently addressed a request for audit documents made to the Arizona Senate under the PRL. *Fann*, 1 CA-SA 21-0141, at \*4-5, ¶¶ 23-25. In that case, we rejected the Senate’s contention that records relating to the audit that remain in Cyber Ninjas’ possession are not subject to the PRL and we ruled the Senate must obtain from Cyber Ninjas any records that were requested under the PRL. *Id.* at ¶¶ 21-25 (holding Cyber Ninjas was the Senate’s agent in performing an “important legislative function”). To be clear, and because Cyber Ninjas continues to argue to the contrary, we reiterate our holding in *Fann* that documents relating to the audit are public records subject to the PRL even if they are in the possession of Cyber Ninjas rather than the Senate. *Id.* at \*4, ¶ 23.

¶10 Cyber Ninjas also argues it cannot be subject to suit under the PRL because it is not a public entity, an issue that, as PNI acknowledges, was not before this court in *Fann*. In support of the superior court’s ruling, PNI first argues Cyber Ninjas is subject to suit under the PRL because it is an “officer” of the Senate or a “public body.” We disagree.

¶11 Section 39-121.01(A) defines “Officer” and “Public body” as follows:

A. In this article, unless the context otherwise requires:

1. “Officer” means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.
2. “Public body” means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state

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or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

A.R.S. § 39-121.01(A)(1), (2).

¶12 Cyber Ninjas has performed a public function in undertaking the audit and was paid with public funds to do so. Nevertheless, although the Senate delegated its legislative responsibilities with respect to the audit to Cyber Ninjas, Cyber Ninjas is not a “public body” or “officer” as the PRL defines those terms. Neither definition in A.R.S. § 39-121.01 encompasses a private contractor, and Cyber Ninjas cannot fairly be characterized as either. *See supra* ¶ 11.

¶13 PNI also argues it may obtain relief against Cyber Ninjas under the PRL because Cyber Ninjas is the sole “custodian” of documents that are public records subject to disclosure under the PRL. We agree.

¶14 As PNI contends, the PRL requires a “custodian” of public records to “promptly furnish” requested records. A.R.S. § 39-121.01(D)(1). Although the PRL does not define “custodian,” that word commonly means “[a] person or institution that has charge or custody (of a child, property, papers, or other valuables),” or “[s]omeone who carries, maintains, processes, receives, or stores a digital asset.” *Black’s Law Dictionary* 483 (11th ed. 2019). “Custody” means “[t]he care and control of a thing or person for inspection, preservation, or security.” *Id.*; *W. Valley View Inc. v. Maricopa Cnty. Sheriff’s Office*, 216 Ariz. 225, 229, ¶ 16 (App. 2007).

¶15 To the extent Cyber Ninjas is in sole possession of audit-related public records because of its contract with the Senate, Cyber Ninjas has become the custodian of those records under the PRL. And as to those records, Cyber Ninjas has assumed the obligations the PRL assigns to a “custodian” of public records. Under the PRL, a person seeking public records must make its request to the “custodian” of the records. A.R.S. § 39-121.01(D)(1). “Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record.” A.R.S. § 39-121.01(E).

¶16 In the event a custodian of public records refuses a request for those records, the person denied access “may appeal the [custodian’s] denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body.” A.R.S. § 39-121.02(A). As noted, PNI’s special action complaint also properly named the Senate and various Senate officials. Although the PRL does not

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specify that a suit for damages may be brought against a custodian of public records, *see* A.R.S. § 39-121.02(C), in these circumstances, nothing prevents a party from joining a custodian of records as a party to a statutory special action under the PRL. *See* Ariz. R.P. Spec. Act. 2(a)(1), (b) (court may order joinder of persons<sup>2</sup> other than the “body, officer or person against whom relief is sought.”). *See also* *Arpaio v. Citizen Publ’g Co.*, 221 Ariz. 130, 133, ¶ 10 n.4 (App. 2008); *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 21 (App. 1998) (citing Ariz. R. Civ. P. 19(a)(1)(A) (where feasible, joinder may be required of a person “if, in that person’s absence, the court cannot accord complete relief among existing parties.”)).

¶17 Here, Cyber Ninjas was properly joined as a necessary party in PNI’s special action because, even though it is a private company, as a contractor and agent of the Senate, it is alleged to be the sole custodian of records pertaining to the audit that are subject to disclosure under the PRL. In other words, joinder of Cyber Ninjas is necessary only because the Senate does not have the public records that are in Cyber Ninjas’ custody. Under the unusual facts of this case, the custodian necessarily must be joined. Cyber Ninjas would not be a necessary party if it had turned over the public records requested by the Senate – it is a necessary party by its own actions.

¶18 To hold otherwise would circumvent the PRL’s purpose, which “exists to allow citizens to be informed about what their government is up to.” *Scottsdale Unified Sch. Dist. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302-03, ¶ 21 (1998) (citation and internal quotation marks omitted). We noted in *Fann* that “[t]he requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas.” 1 CA-SA 21-0141, at \*4, ¶ 23. In *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986), the city of Fargo contracted a consulting firm to assist in the search of a new city chief of police. *Id.* at 170. A publishing company obtained a writ of mandamus from the District Court ordering the city to deliver applications and records disclosing the names and qualifications of applicants. *Id.* The city appealed. *Id.* In affirming the issuance of the writ of mandamus the North Dakota Supreme Court aptly observed:

We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in possession of PDI. . . . [The] purpose of the open-

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<sup>2</sup> Section 1-215(29) defines “person” as “a corporation, company, partnership, firm, association or society, as well as a natural person.”

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record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.

*Id.* at 172.

¶19 Cyber Ninjas argues that the logic of the superior court's order would open the files of all government contractors to public inspection. We need not decide the extent to which the PRL applies to businesses that contract with the government to provide ordinary goods or services that government regularly purchases for the public. Contrary to Cyber Ninjas' contention, our ruling does not mean that construction companies and office-supply vendors will have to rush to establish new "public records" departments. "Only documents with a substantial nexus to government activities qualify as public records." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009) (citation and internal quotation marks omitted). Here, the Senate's decision to undertake the audit was premised on its oversight authority, an important legislative function, which it then entirely outsourced to Cyber Ninjas and its subvendors. Nothing in the superior court's order or in this decision imposes obligations under the PRL on contractors that provide ordinary goods or services to the government.

¶20 In sum, the superior court did not err in determining that PNI properly joined Cyber Ninjas, the custodian of audit records subject to the PRL, when it filed a statutory special action to compel disclosure of those records. As noted above, we understand the Senate has asked Cyber Ninjas to turn over to the Senate certain documents related to the audit. To the extent Cyber Ninjas fails to deliver to the Senate any audit documents requested by PNI, it must "promptly furnish" those records directly to PNI. See A.R.S. § 39-121.01(D)(1). As the superior court ordered, the Senate and Cyber Ninjas may 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.

¶21 PNI requests attorneys' fees and costs incurred in responding to the petition under A.R.S. §§ 39-121.02(B), 12-341, -342, and Ariz. R.P. Spec. Act. 4(g). Because PNI has substantially prevailed, we award it its reasonable costs and attorneys' fees upon compliance with ARCAP 21 and Ariz. R.P. Spec. Act. 4(g).

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**CONCLUSION**

¶22 For the foregoing reasons we accept jurisdiction, deny relief and lift the stay of proceedings previously issued regarding the superior court's August 24, 2021 order.



AMY M. WOOD • Clerk of the Court  
FILED: AA

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Court of Appeals Case No.**

**Maricopa County Superior Court  
Case No.: LC2021-00180-001**

**(Oral Argument Requested)**

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**PETITION FOR SPECIAL ACTION**

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## INTRODUCTION

Defendant Cyber Ninjas, Inc. (“Petitioner,” “Defendant,” or “CNI”), by and through undersigned counsel, hereby files this Petition for Special Action appealing from the lower court’s order filed on August 24, 2021 (hereinafter referred to as the “Order,” **Exhibit 1** hereto), requiring CNI to produce around sixty thousand (60,000) documents by today (technically – the Order has been stayed, as explained immediately below).

The Arizona Supreme Court has effectively stayed enforcement of the Order;<sup>1</sup> but that stay may terminate as soon as September 14, 2021. Cyber Ninjas therefore reserves the right to file a “backup” Motion to Stay as part of this proceeding, to the extent necessary (i.e., in the event that this proceeding is not concluded before September 14).

Because of the immediacy of the lower court’s orders—and also because the issue of whether a mere private contractor can be deemed a “public officer or public body,” with the responsibility to receive and respond to public records requests, is clearly of statewide importance—Cyber Ninjas asks the Court to take jurisdiction over this special action.

### 1. **Background**

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<sup>1</sup> The Order itself provides that it is stayed with respect to CNI, so long as the Arizona Supreme Court’s stay (of another order, in another matter) remains in effect (Arizona Supreme Court Case No. CV-21-0197-PR. The order in that case required the Senate to request/obtain documents from CNI and is presently on appeal.) On August 24, the Arizona Supreme Court extended that stay through at least September 14, 2021. (See Appendix, hereinafter “App.,” at 171)

By the admission of all parties, Cyber Ninjas, Inc. is a private corporation that was contracted by the Senate. (See paragraph 8 of the Complaint: “Defendant/Real Party in Interest Cyber Ninjas, Inc., a corporation organized under the laws of the state of Florida, was engaged by the Arizona Senate to conduct the Senate’s audit of ballots in Maricopa County in the 2020 election.”) (App. 22)

On June 2, 2021, CNI received a demand from the Arizona Republic for an “inspection of public records,” which alleged without basis that CNI was a “public officer[]” or “public bod[y]” and therefore responsible for receiving/responding to a public records request made under A.R.S. §§ 39-121 *et seq.* By the admission of all parties, CNI is a private contractor for the Senate (and it owes contractual duties of confidentiality to the Senate). Accordingly, CNI did not produce any records to the Arizona Republic in response to the request.

The publisher of the Republic (Phoenix Newspapers, Inc., or “PNI”) then sued CNI under the public records law, again alleging that CNI is a public officer or public body. CNI filed a Motion to Dismiss, which was fully briefed. (App. at 119, 126, and 162)

The case was assigned to Judge John Hannah—who, in another case that was unrelated to CNI or the Senate’s audit, made a snide comment on the record about the “wisdom” of the audit. As soon as the case was assigned to Hannah, CNI promptly moved to disqualify and remove him (both for cause and without cause), which remains on appeal with the Arizona Supreme Court (and is set for conference on Sep. 14<sup>th</sup>, CV-21-0185-PR). In the meantime, Hannah summarily denied CNI’s Motion to Dismiss and signed a proposed order that PNI submitted to him

immediately before an August 23<sup>rd</sup> hearing, ordering CNI to produce around 60,000 records to PNI within less than a week (by August 31<sup>st</sup>). (Exhibit 1.) While Hannah’s order contained no reasoning, Hannah made comments during the August 23<sup>rd</sup> hearing indicating that he believed that CNI was in some kind of “joint venture” with the Senate. Finally, the only claim that PNI brought against CNI in the case was for wrongful denial of access to public records pursuant to A.R.S. §§ 39-121 *et seq.*, in which PNI alleged that: “In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendant Cyber Ninjas Inc., as a ‘public officer’ and/or ‘public body’ by virtue of its performing a core governmental function funded in part by state taxpayer dollars, was required to maintain these Public Records and make them available for inspection and copying promptly upon request by PNI and its journalists. Yet, Cyber Ninjas refused to do so. For all these reasons, Defendant Cyber Ninjas, Inc. has failed to perform its duties required under the Arizona Public Records Law, and it therefore has wrongfully denied PNI access to inspect and copy the Records as a matter of law.” (Complaint, paragraphs 66-67, App. at 35-36)

## **2. Argument**

The trial judge has not yet given his reasoning – but given the immediacy of his Order, *inter alia*, CNI has no time or reason to delay in this appeal. The denial of CNI’s Motion to Dismiss is also a pure issue of law, which is subject to *de novo* review.

The only claim against CNI in this case is clearly subject to dismissal. And that claim – for wrongful withholding of public records against a public “officer or public body” under A.R.S. § 39-121.02—is the only claim that could possibly

entitle PNI to the relief that was granted here. In other words, it is the only claim that could entitle PNI to an order directing CNI to produce documents directly to PNI, *i.e.*, to produce records to “any person” who has requested to inspect CNI’s records. This is, for example, materially different from requiring CNI to produce any Senate public records to the *Senate* or requiring Senate to obtain them from CNI. This was an order for CNI to produce its own records, whether private or public, directly to a member of the public (PNI).

This distinction is critical, for a number of apparent reasons. Pursuant to the public records statutes, it is clear that only the chief “officer” of a public body is responsible for receiving and responding to records requests. But the trial court’s ruling would subject every private contractor, as well as every state employee – including the members of this court and their staff – to a legal responsibility to receive and respond to records requests from literally any member of the public, under the penalty of being sued and subject to court order if they refuse. The trial court’s order would result in every private contractor for the government having to operate and fund their own public-records departments, in order to receive and respond to public-records requests from literally any member of the public—not to mention new protocols, responsibilities and liabilities for state employees, who are now subject to the responsibility of receiving public records requests, even though they are clearly not the chief administrator of the public body or authorized by the chief administrator to receive such requests on their behalf. Further, if the statute required anyone other than the “officer” of a “public body” to receive and respond to records requests made directly by members of the public, then the actual

officer/public body to whom the records belong – in this case, the Arizona Senate – would have no say over how or what/when their own records are produced.

In a nutshell, the trial court completely ignored everything about the public-records statutes – including the plain wording; the public policy inherent in not subjecting every private contractor/state employee to receiving, responding to, and being sued over public-records requests; the public policy of allowing public bodies to exercise control over their own records; and even the statute’s application to the basic undisputed facts of this case, such as that CNI is a private contractor with narrow (and nearly finished) contractual duties to the State—in order to reach a pre-ordained conclusion and simply grant PNI all of the that relief it wanted. The trial-court judge’s order requiring CNI to produce documents directly to PNI must be reversed, and the claim against CNI under the public-records statutes dismissed with prejudice.

Finally – to date, the Senate (to whom any “public records” would belong) has not requested any records from CNI or authorized/directed CNI to make productions to the Senate. All that CNI has received is an illegal public-records request from PNI, which groundlessly alleged that CNI was an officer of a public body and which demanded that CNI produce records directly to PNI—a request that CNI properly denied. What follows is a short memorandum of legal points and authorities in support of this special action.<sup>2</sup>

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<sup>2</sup> Due to time constraints imposed by the immediacy of the lower court’s order, this memorandum is largely repetitive of CNI’s briefs in support of its Motion to Dismiss and Reply, which were previously filed with the trial court on July 27 and August 17. (App. at 119 and 162, respectively)

a. **Only a public body, by and through its chief officer, is responsible for receiving and responding to public-records requests**

PNI brought only one claim against CNI, which was under A.R.S. § 39-121.02—claiming wrongful denial of access to public records by a public officer or public body. However, CNI is neither of those things; it is a private contractor that was hired by the President of the Arizona State Senate. PNI’s Complaint alleged that CNI was subject to being sued for public records because it is an “agent” of the Senate (“performing a core government function”), and because it is being paid by the Senate (see Complaint at paragraphs 8, 10, and 50, App. at 21 and 32); but this argument has absolutely no legal or statutory basis whatsoever. Moreover, if PNI were correct then it would subject every single employee or contractor of the State – including hard-working people like the staff of this Court, peace officers, firefighters, etc. – to having to respond to public records requests and being sued for denial of access. This is plainly not how the statutes read. The statutes clearly define the persons or entities subject to a records request – i.e. a “officer” and “public body” – as consisting only of elected or appointed officials or chief administrative officers, chairmen, “head[s],” “director[s],” and “supervisors[s]” of a “public body” (and “public bod[ies]” consist of the State and “public organization[s] or agenc[ies]” that receive taxpayer funds). See A.R.S. § 39-121.01(A)(1), (A)(2), discussed *infra*. A private contractor like CNI is clearly none of these things; to hold otherwise would be to subject every government contractor to having to form their own public records departments, and/or suffer liability for

not “promptly” responding to intensive records requests from literally any member of the public. This is plainly not allowed by the statutes.

The public records statutes are contained at A.R.S. §§ 39-121 *et seq.* First, A.R.S. § 39-121 provides that “[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.” (Emphasis added.) Second, A.R.S. § 39-121.01(A)(1) defines “officer” as: “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.” Again, CNI is none of these things, as PNI admits. PNI merely alleges that CNI is an “agent” of a public body – which is to say, CNI is not even an employee of a public body, and certainly far less than an “officer”/administrator. To quote the Arizona Supreme Court: “[a]n ‘office’ is defined as ‘an employment on behalf of the government in any station of public trust not merely transient, occasional, or incidental.’ It is a ‘special trust or charge created by competent authority.’ The officer is distinguished from the employee in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of being called to account as a public offender for misfeasance or nonfeasance in office and usually, though not necessarily, in the tenure of his position.” *Winsor v. Hunt*, 29 Ariz. 504, 519, 243 P. 407, 412 (1926). CNI – which again is merely a private contractor, as PNI admits – is not even an employee of the State, much less a tenured, oath-taking “officer.” The public-records request statute clearly does not



apply to CNI, and PNI's claim that CNI must respond directly to any member of the public on a request for its records is groundless.

Because A.R.S. § 39-121 only provides that an "officer" must respond to a public records request, and CNI is clearly not an "officer" of a public body within the meaning of the statute, then that ends the analysis. But if for no reason other than academic interest: the definition of "public body" is also contained at A.R.S. § 39 121.01(A)(2), which provides that "public body" means: "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." Part of PNI's argument – specifically, its argument that CNI must honor a public records request because it is getting paid by the State – sort of apes the last phrase in this definition of a "public body" (i.e., the part which says "supported in whole or in part...or expending moneys provided by this state..."). But that phrase plainly applies only to "any public organization or agency" – which again, CNI is not. And public records requests must be directed to an "officer" within the meaning of A.R.S. §§ 39-121, 39-121.01(A)(1), which we have already established that CNI is not. If merely getting paid by the State caused someone to be subject to a public-records request, then literally any employee of the State – not to mention other private contractors, like the Arizona Republic even (which occasionally prints

government notices, see below) – would be subject to responding to public records requests and being sued on them.

Finally, A.R.S. § 39-121.02(A),(C) state that “[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions *against the officer or public body.*” (Emphasis added.) And “[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action *against the officer or public body* for any damages resulting from the denial.” (Emphasis added.) But again, CNI is not an officer or public body within the meaning of these statutes; nor was PNI’s public-records request to CNI made “pursuant to this article,” since the request was not directed to a public officer within the meaning of these statutes.

PNI has sort of argued that CNI was appointed to be the Senate’s “custodian of records.” PNI does not actually allege anywhere in this record facts to support that CNI has somehow become the Senate’s official custodian of Senate records. But moreover, PNI fails to point to any legal authority which supports the notion that even an official “custodian of records” for a public body may be directly named and sued in a statutory public-records claim. In other words, the statute under which PNI sued –A.R.S. § 39-121.02 – is clear that it only creates a cause of action against an “officer or public body,” and not even against a mere custodian who may be under their supervision. *See* A.R.S. § 39-121.02(A),(C). And again, CNI is not a public officer or body. In fact, a substantial piece of CNI’s contract work for the

Senate is nearly finished. This is a far cry from CNI being a sworn officer of the state, with serious administrative duties and long-term obligations. CNI isn't even one of the state's employees, who may have substantial and/or long-term – but not necessarily administrative – duties. CNI is a private contractor, with short-term and narrowly defined contractual duties, period.

In its briefs, PNI has offered a reading of the statutory definition of “officer” that (1) stretches the definition of a public “office” past any reasonable breaking point (such that it would include, again, literally any government contractor or employee); and (2) shockingly ignores most of the statute’s actual language, namely: “...and any chief administrative officer, head, director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(A)(1). This language is highly significant in demonstrating the meaning of “officer” under A.R.S. § 39-121.01(A)(1), owing to several fundamental canons of statutory interpretation. “The rule of statutory construction, *noscitur a sociis*, directs our attention to the accompanying words as we undertake to learn the meaning to be given” to particular statutory language. *Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa Cty.*, 92 Ariz. 231, 235, 375 P.2d 719, 722 (1962); *see also Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, 266 P.3d 349, 352 (2011)(“*noscitur a sociis*—a canon closely related to *ejusdem generis*—dictates that a statutory term is interpreted in context of the accompanying words”). The “chief administrative officer, head, director” etc. language clearly demonstrates the kind of “elective or appointed office of any public body” that the statute is talking about. Further, if the phrase “elective or appointed office of any public body” could

be applied to any state employee or contractor, irrespective of their non-administrative and/or temporary role, then it would render superfluous the “chief administrative officer” (etc.) language that is found in the same sentence. This violates another basic rule of statutory interpretation, which is that “[i]nterpreting statutory language requires that we give meaning to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or insignificant.” *Champlin v. Sargeant In & For Cty. of Maricopa*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998). Finally, it also violates the doctrine of *expressio unius est exclusio alterius* — which is that “the expression of one or more items of a class indicates an intent to exclude omitted items of the same class.” *Id.* By enumerating only the “chief administrative officer, head, director, superintendent,” etc. of a public body, the legislature indicated an obvious intent to exclude lesser roles. Finally, PNI’s argument that the language “any person elected or appointed to hold any elective or appointive office of any public body” was intended to apply to private fictional entities/non-natural persons like CNI is groundless. Suffice to say, Arizona statutes clearly define the requirements for public office, “whether elective or appointive,” as including that a person must be “not less than eighteen years of age, [and must be] a citizen of the United States and a resident of this state,” *inter alia*. A.R.S. § 38-201.

To further highlight the unreasonableness of PNI’s position on this case: if PNI were correct in its interpretation of the public-records statutes, then it could be argued with equal force that PNI itself – namely, the publisher of the Arizona Republic (and one of its editors) – are subject to public records statutes. The Arizona

Republic has received over four hundred thousand dollars in government funds since 2003,<sup>3</sup> on behalf of organizations like the VA, the HHS, DHS, and the DOD. In all cases, PNI was performing “core government functions” (to borrow Plaintiffs’ phraseology) by helping the government to find employees (through want ads) or publishing important government public notices—“core” government functions that the government “lacks the ability to perform...itself” and that are “initiated and funded with public dollars.” (to quote from PNI’s briefs below, pages 10-11 of its Response to the Motion to Dismiss *inter alia*). PNI argues that CNI’s contract is somehow special because it allegedly offers a service that is “exclusive” to government; but there is nothing more “exclusive” about CNI’s ability to conduct an audit for the government, than about PNI’s ability to write and publish things for the government. (Both entities are capable of providing the “same goods and services to a governmental entity that [they] could provide to a nongovernmental customer,” to quote Plaintiffs—not that any legal authority supports this as being a test anyway.) And eighteen years is certainly a longer period of time (and four hundred grand is a lot more in public funding) than CNI has or ever will receive from the government (especially since CNI is nearly done with a substantial part of its audit, after far less than one year). By PNI’s logic, PNI is an “agent” and “officer” of the government that is performing “government functions”; and therefore it is subject to being named by any citizen, at any time, in a public-records suit (and at risk of paying attorneys’ fees on the claim).

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<sup>3</sup> See e.g. “usaspending.gov” or “govtribe.com.”

PNI cites a case which it believes supports its position in this case, but which actually supports exactly what CNI is arguing here (if anything): *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130, 133, 211 P.3d 8, 11 (App. 2008). The case merely addressed whether attorneys’ fees under the public-records statute could be awarded against a public officer (Arpaio) where the underlying public records request was actually sent to another officer (the Pima County Attorney). Arpaio had allegedly “caused” the Pima County Attorney to refuse to honor the records request, by invoking his attorney-client privilege with the county attorney. The Court of Appeals found that because the language in the attorneys’ fees provision of the public-records statute was uniquely *not* limited to just the public officer or public body responsible for providing records – in contrast to “most of the provisions of Arizona’s public records law,” including the section which “creates the cause of action” – then an award of fees was accordingly not limited to being against just the party to whom the records request was actually sent. “[U]nlike most of the provisions of Arizona’s public records law, § 39–121.02(B) [the fees provision] does not refer to the officer or public body having custody of the requested records. In further contrast, the other subsections of § 39–121.02 *specifically refer to that officer or public body*. Subsection (C) of § 39–121.02 *creates a cause of action by the person requesting the records against ‘the officer or public body’ who ‘wrongfully denied access to [the requested] public records’ for any damages ‘resulting from the denial.’* Subsection (A) permits the person requesting the records to appeal the denial of his or her request by special action ‘against the officer or public body.’” *Arpaio*, 221 Ariz. at 133, 211 P.3d at 11. (Emphasis added.) In other

words, the *Arpaio* case – while mostly inapposite—actually supports CNI’s contention in this case, by acknowledging that a cause of action under the statute only exists against the “officer or public body” to whom a valid records request was sent.

Finally, PNI points to the Rules of Special Action for the idea that it can simply name CNI as a “Real Party in Interest” and force CNI to pay for attorneys’ fees and costs in defending this suit, when there is no actual legally-cognizable claim asserted against CNI. The Rules of Special Action were not intended to justify naming any person with any kind of articulable connection to a lawsuit as a defendant in it by calling them a “Real Party in Interest”<sup>4</sup>—or else Rule 12(b)(6), which requires that an actual cognizable claim be asserted against every defendant, would be meaningless in such suits. Rule 12(b)(6) means what it says. PNI must assert a legally-cognizable claim against Defendant CNI; and because it does not, then the Complaint against CNI must be dismissed for failure to state a claim for which relief can be granted. Because CNI is clearly not an officer or public body under A.R.S. § 39–121.02, and PNI has only named CNI in a claim under that statute for denial of records access, then PNI’s Complaint fails to state a claim against CNI and it must be dismissed with prejudice. CNI reserves its right to seek attorneys’ fees and costs under ARCAP 21, A.R.S. §§ 12-349, 12-341 *inter alia*.

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<sup>4</sup> In actuality, the special action rule to which PNI points – which acknowledges that Real Parties in Interest may be named in certain special actions – was intended to address the common legal fiction of naming the judge as the “defendant” or “respondent” in a special-action of a judicial ruling (like this one). The actual defendants are instead named as the “real parties in interest.” The first comment to the Rule makes this abundantly clear.

**RESPECTFULLY SUBMITTED** August 31, 2021.

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

*/s/ John D. Wilenchik*

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Court of Appeals Case No.**

**Maricopa County Superior Court  
Case No.: LC2021-00180-001**

**(Oral Argument Requested)**

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**APPENDIX TO PETITION FOR SPECIAL ACTION**

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# APPENDIX 1



JEFF FINE  
Clerk of the Superior Court  
By Christopher O'Neill, Deputy  
Date 06/30/2021 Time 10:59:47

Description	Amount
SPACT PET RV / STADM	\$ 333.00

TOTAL AMOUNT 333.00

Receipt# 28327504

# 28328818

1 David J. Bodney (006065)  
2 bodneyd@ballardspahr.com  
3 Craig C. Hoffman (026017)  
4 hoffmanc@ballardspahr.com  
5 BALLARD SPAHR LLP  
6 1 East Washington Street, Suite 2300  
7 Phoenix, AZ 85004-2555  
8 Telephone: 602.798.5400  
9 Facsimile: 602.798.5595  
10 *Attorneys for Phoenix Newspapers, Inc.*  
11 *and Kathy Tulumello*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

12 PHOENIX NEWSPAPERS, INC., an  
13 Arizona corporation, and KATHY  
14 TULUMELLO,

15 Plaintiffs,

16 vs.

17 ARIZONA STATE SENATE, a public  
18 body of the State of Arizona; KAREN  
19 FANN, in her official capacity as President  
20 of the Arizona State Senate; WARREN  
21 PETERSEN, in his official capacity as  
22 Chairman of the Arizona Senate Committee  
23 on the Judiciary; SUSAN ACEVES, in her  
24 official capacity as Secretary of the Arizona  
25 State Senate; and CYBER NINJAS, INC.,

26 Defendants, and

27 CYBER NINJAS, INC.,

28 Real Party in Interest

NO. LC 2021-000180-001

**COMPLAINT FOR STATUTORY  
SPECIAL ACTION TO SECURE  
ACCESS TO PUBLIC RECORDS**

(Assigned to the Honorable \_\_\_\_\_)

1 Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and  
2 azcentral.com, and its News Director, Kathy Tulumello (together, “PNI”), submit this  
3 Complaint for Statutory Special Action to Secure Access to Public Records pursuant to  
4 A.R.S. § 39-121, *et seq.* (the “Arizona Public Records Law”) and Ariz. R. Special  
5 Actions 1-6, and allege as follows:

6  
7 **PARTIES, JURISDICTION AND VENUE**

8 1. Plaintiff Phoenix Newspapers, Inc. publishes *The Arizona Republic*, a  
9 newspaper of general circulation in Maricopa County, Arizona, and operates the website  
10 azcentral.com. Phoenix Newspapers, Inc. is an Arizona corporation with its principal  
11 place of business in Phoenix, Arizona.

12 2. Plaintiff Kathy Tulumello is the News Director for *The Arizona Republic*  
13 and azcentral.com. She oversees PNI’s news coverage of the Arizona Senate’s audit of  
14 the Maricopa County ballots cast in the 2020 election, including PNI’s public records  
15 requests for information concerning the Senate audit.

16 3. By statute and case law, PNI may request to examine or be furnished copies  
17 of any public record, and public officers and public bodies are required to furnish copies  
18 of such records “promptly.” *See* A.R.S. §§ 39-121.01(D)(1) and (E).

19 4. Defendant Arizona State Senate (Defendant “Arizona Senate”) and the  
20 Arizona House of Representatives comprise the Legislative Department of the State of  
21 Arizona pursuant to Article IV, Part 2, Section 1 of the Arizona Constitution, and as such  
22 the Arizona Senate is a “[p]ublic body” within the meaning of A.R.S. § 39-121.01(A)(2).

23 5. Defendant Karen Fann is the President of the Arizona Senate, and is named  
24 in her official capacity only. President Fann is an “[o]fficer” within the meaning of  
25 A.R.S. § 39-121.01(A)(1).

26 6. Defendant Warren Petersen is the Chairman of the Arizona Senate  
27 Judiciary Committee, and is named in his official capacity only. Chairman Petersen is an  
28 “[o]fficer” within the meaning of A.R.S. § 39-121.01(A)(1).

1           7. Defendant Susan Aceves is the Secretary of the Arizona State Senate, and  
2 is named in her official capacity only as custodian of records for the Arizona State  
3 Senate. Secretary Aceves is an “[o]fficer” within the meaning of A.R.S. § 39-  
4 121.01(A)(1).

5           8. Defendant/Real Party in Interest Cyber Ninjas, Inc. (“Cyber Ninjas”), a  
6 corporation organized under the laws of the state of Florida, was engaged by the Arizona  
7 Senate to conduct the Senate’s audit of ballots cast in Maricopa County in the 2020  
8 election. Cyber Ninjas is an “[o]fficer” and/or a “[p]ublic body” within the meaning of  
9 A.R.S. § 39-121.01(A), acting as, or as an agent of, the Arizona Senate and/or Defendant  
10 President Fann, supported by and/or expending monies provided by the state, to conduct  
11 the audit.

12           9. By law, Defendants Arizona Senate, President Karen Fann, Judiciary  
13 Committee Chairman Warren Petersen, Secretary Susan Aceves and Cyber Ninjas  
14 (together, “Defendants”) “shall maintain all records . . . reasonably necessary or  
15 appropriate to maintain an accurate knowledge of their official activities and of any of  
16 their activities which are supported by monies from the state or any political subdivision  
17 of the state.” A.R.S. § 39-121.01(B).

18           10. Cyber Ninjas, acting as, or as the agent of, the Arizona Senate, has custody  
19 and control of certain public records required to be maintained and provided to the public  
20 by Defendants. A.R.S. § 39-121.01(B).

21           11. The Court has personal jurisdiction over the parties in this action, and  
22 venue is proper in Maricopa County, Arizona.

23           12. This petition seeks inspection and copying of public records in accordance  
24 with A.R.S. § 39-121.02(A), which provides that “[a]ny person who has requested to  
25 examine or copy public records pursuant to this article, and who has been denied access  
26 to or the right to copy such records, may appeal the denial through a special action in the  
27 superior court, pursuant to the rules of procedure for special actions against the officer or  
28

1 public body.” By law, “[a]ccess to public records is deemed denied if a custodian [of  
2 such records] fails to promptly respond to a request for production of a public record.”  
3 A.R.S. § 39-121.01(E).

#### 4 FACTS

5 13. On November 3, 2020, Arizona held a general election, including for  
6 federal offices that include President and members of Congress. More than 3.3 million  
7 Arizonans cast ballots, including 2 million voters in Maricopa County, who accounted for  
8 approximately 60 percent of the statewide total.

9 14. Democrat Joe Biden won a narrow victory over Republican incumbent  
10 President Donald Trump in Arizona, with Biden’s slate of electors garnering 10,457 more  
11 votes than Trump’s slate. *Ward v. Jackson*, --- Ariz. --, 2020 Ariz. LEXIS 313, at \*1  
12 (Ariz. Dec. 8, 2020), *cert. denied*, 141 S. Ct. 1381 (2021). Although the margin was  
13 more than the one-tenth of one percent required for an automatic recount, *id.*, the close  
14 vote prompted several recounts and more than a half-dozen lawsuits challenging the  
15 results.

16 15. None of those lawsuits was successful. In a suit brought by the head of the  
17 state Republican Party challenging the Maricopa County vote count, the Arizona  
18 Supreme Court held that the County’s “November 9, 2020 hand count audit revealed no  
19 discrepancies in the tabulation of votes,” and an examination of more than 1,600  
20 questioned ballots found only a “statistically negligible error” (a net gain of five votes for  
21 Trump electors) that would not change the outcome. *Id.* at \*6. Accordingly, the Arizona  
22 Supreme Court affirmed dismissal of the lawsuit and “confirm[ed] the election of the  
23 Biden Electors.” *Id.* at \*7.

24 16. On December 15, 2020, the Arizona Senate Judiciary Committee served  
25 two subpoenas on the Maricopa County Board of Supervisors, seeking access to the  
26 County’s election tabulation equipment and all ballots and related records from the 2020  
27  
28

1 general election.<sup>1</sup> The Board of Supervisors and the Senate filed suit in this Court  
2 seeking to quash and enforce the subpoenas, respectively.

3 17. On January 12, 2021, President Fann and Chairman Petersen served another  
4 set of subpoenas seeking access to the ballots, tabulating equipment and related materials  
5 from the 2020 general election on Maricopa County's Board of Supervisors, Recorder  
6 and Treasurer.<sup>2</sup> The Maricopa County officials also challenged this second set of  
7 subpoenas in this Court in an action eventually consolidated with their first one seeking  
8 to quash the original subpoenas.

9 18. In a news release responding to the second Maricopa County lawsuit, the  
10 Arizona Senate Republican Caucus, which President Fann leads, stated that "[a]ny firm  
11 hired by the Senate will perform everything we have required in the subpoenas." News  
12 release, "Statement from Senate Republicans on court filing by Maricopa County Board  
13 of Supervisors," Arizona Senate Republican Caucus (Feb. 8, 2021);  
14 [https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-](https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-filing-by-maricopa-county-board-of-supervisors)  
15 [filing-by-maricopa-county-board-of-supervisors.](https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-filing-by-maricopa-county-board-of-supervisors)

16 19. President Fann and Chairman Petersen asserted in that litigation that their  
17 subpoenas sought the ballots and materials for a "manifestly . . . valid legislative  
18 purpose" in accordance with "the Arizona Constitution's express directive that the  
19 Legislature must enact 'laws to secure the purity of elections and guard against abuses of  
20 the elective franchise.' Ariz. Const. art. VII, § 12." Fann & Petersen Mot. for Judgment  
21 on the Pleadings at 8, *Maricopa Cty. v. Fann*, Nos. CV2020-016840, CV2021-002092  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Copies of these subpoenas are available at  
25 [https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1992/637441427](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1992/637441427303430000)  
26 [303430000](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1994/637441427310130000) and  
[https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1994/637441427](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1994/637441427310130000)  
27 [310130000.](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1994/637441427310130000)

28 <sup>2</sup> Copies of the second set of subpoenas are available at  
[https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2187/637483674](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2187/637483674854430000)  
[854430000.](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2187/637483674854430000)



1 (Super. Ct. Maricopa Cty. Feb. 22, 2021).<sup>3</sup> The senators continued: “The Senate intends  
2 to use data and information gleaned through the Subpoenas to evaluate the accuracy and  
3 efficacy of existing vote tabulation systems and the competence of county officials in  
4 performing their statutory duties, with an eye to enacting potential reforms.” *Id.* The  
5 senators also stated that “[h]ow the Senate chooses to use materials obtained by the  
6 Subpoenas and to whom it permits access are, simply put, far above the County’s pay  
7 grade,” suggesting that whatever they chose to do with the subpoenaed materials would  
8 be “privileged legislative activity.” *Id.* at 11 (citation omitted).

9       20. On February 25, 2021, Judge Timothy Thomason of this Court ruled that  
10 the subpoenas were lawful and valid. The Senate and Maricopa County officials  
11 eventually agreed on a protocol to transfer the ballots and other requested materials.

12       21. Rather than performing this “legislative activity” itself, the Senate instead  
13 chose to hire a contractor to do the job. Thus, on March 31, 2021, President Fann and the  
14 Republican leadership of the Arizona Senate announced that they had “hired a team of  
15 independent auditors to complete a comprehensive, full forensic audit of the 2020  
16 election in Maricopa County, including a hand recount of all ballots.”<sup>4</sup> President Fann’s  
17 statement said that Defendant Cyber Ninjas would lead that team. The statement said  
18 that “[t]he audit will validate every area of the voting process to ensure the integrity of  
19 the vote.”

20       22. Although the subpoenas were issued by President Fann and Chairman  
21 Petersen in their individual capacities as Senate President and Judiciary Committee  
22 Chairman, respectively, Cyber Ninjas’ Master Services Agreement (“MSA”) and  
23

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24 <sup>3</sup> Available at  
25 <https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2393/637498369159700000>.

26 <sup>4</sup> News Release, “Arizona Senate hires auditor to review 2020 election in Maricopa  
27 County,” Arizona Senate Republican Caucus (Mar. 31, 2021),  
28 <https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county>.

1 Statement of Work (“SOW”; together, the “Contract”) state that the Contract is between  
2 Cyber Ninjas and the Arizona State Senate. A true and correct copy of the MSA is  
3 attached hereto as Exhibit 1. A true and correct copy of the SOW is attached hereto as  
4 Exhibit 2.

5 23. President Fann signed the MSA and SOW on behalf of the Arizona Senate.  
6 MSA at 18; SOW at 11.

7 24. The SOW describes Cyber Ninjas’ duties as overseeing “a full and  
8 complete audit of 100% of the votes cast within the 2020 November General Election  
9 within Maricopa County, Arizona. This audit will attempt to validate every area of the  
10 voting process to ensure the integrity of the vote.” SOW at 2.

11 25. The MSA states that the Senate “shall retain continuous and uninterrupted  
12 custody of the ballots being tallied.” MSA at 8.

13 26. The MSA also includes a provision stating that its agreement with Cyber  
14 Ninjas shall not “result in the breach of any term or provision of . . . any . . . law to  
15 which [the Senate] is a Party or which otherwise is applicable to [the Senate].” MSA at  
16 10.

17 27. The MSA requires the Senate to indemnify Cyber Ninjas from claims  
18 asserting that Cyber Ninjas violated any law “or the rights of any third party” while  
19 performing its duties under the agreement. MSA at 13. Further, in the event of such  
20 legal action, the agreement requires Cyber Ninjas to “fully cooperate with the [Senate] by  
21 providing information or documents requested by the [Senate] that are reasonably  
22 necessary to the defense or settlement of the claim.” *Id.* at 14.

23 28. The Contract obligates the Arizona Senate to pay Cyber Ninjas \$150,000,  
24 with \$50,000 to be paid at the Contract’s execution and the remaining \$100,000 due  
25 within 30 days of completion of the audit. SOW at 11.

26 29. The MSA states that the ballots and other materials subpoenaed by  
27 President Fann and Chairman Petersen “are the sole and exclusive property of the  
28

1 [Senate] or of the applicable political subdivision or governmental entity.” MSA at 7.

2 30. President Fann’s statement announcing Cyber Ninjas’ leadership of the  
3 audit said the “Senate leadership expects this audit to be done in a transparent manner.”

4 31. That transparency has been lacking, however, as Defendants have refused  
5 to provide public records responsive to PNI’s requests that are in the custody or control  
6 of Cyber Ninjas.

7 32. The audit began on April 22, 2021, with the ballots’ delivery to the Arizona  
8 Veterans Memorial Coliseum, the venue for the by-hand recount. On that day, reporter  
9 Andrew Oxford emailed a public records request to President Fann pursuant to A.R.S. §§  
10 39-121, *et seq.* (“Senate Request A”). A true and correct copy of Senate Request A,  
11 along with an initial response, is attached hereto as Exhibit 3.

12 33. As pertinent here, Senate Request A sought all emails and text messages  
13 between Ken Bennett, the Senate-appointed “liaison” for the audit, and Doug Logan,<sup>5</sup> the  
14 CEO of Cyber Ninjas, during 2021.

15 34. Senate Request A also requested audit-related emails and text messages  
16 between President Fann and Mr. Bennett or Christina Bobb<sup>6</sup> and all emails and text  
17 messages between Mr. Bennett and Ms. Bobb or Sen. Sonny Borrelli.

18 35. On May 19, PNI wrote to President Fann and Norm Moore, then the  
19 Senate’s public records counsel, noting that PNI had *not* received *any* response to Senate  
20 Request A and that PNI considered that failure to amount to a constructive denial of the  
21 request. A true and correct copy of that correspondence is attached hereto as Exhibit 4.

22 36. Later that day, President Fann and the Senate provided 27 pages of records  
23

24 <sup>5</sup> Senate Request A erroneously refers to Mr. Logan as “Doug Jones,” an error counsel  
25 for PNI have corrected in response to questions from counsel for President Fann and the  
Arizona Senate.

26 <sup>6</sup> Ms. Bobb is a reporter for One America News Network (“OANN”), the entity which  
27 owned and operated the video cameras providing a live feed from inside the coliseum  
28 during the ballot count. Ms. Bobb also has solicited donations for a private entity she  
heads that she said was assisting with funding the audit.

1 in partial response to Senate Request A.

2 37. On May 24, 2021, undersigned counsel for PNI wrote to President Fann  
3 and Mr. Moore seeking “prompt and full compliance” with Senate Request A, noting that  
4 PNI had *not* received *any* additional responsive records. A true and correct copy of that  
5 correspondence is attached hereto as Exhibit 5.

6 38. Three days later, on May 27, 2021, President Fann and the Senate provided  
7 another nine pages of records in partial response to Senate Request A.

8 39. In an email accompanying that production, Mr. Moore explained that the  
9 nine pages had been inadvertently left out of the May 19 production. He stated that the  
10 Senate did not have a system in place to capture public records stored on senators’  
11 personal mobile phones, but that President Fann had agreed to collect and provide all  
12 “non-privileged,” responsive public records from her phone. Mr. Moore said that the  
13 Senate’s position was that it is not “legally obligated” to maintain or produce records  
14 from Mr. Bennett, but that the Senate had agreed to collect and provide responsive public  
15 records from him. A true and correct copy of that email is attached hereto as Exhibit 6.

16 40. That afternoon, counsel for PNI spoke with Mr. Moore and Kory  
17 Langhofer, counsel for President Fann.

18 41. Messrs. Langhofer and Moore stated that neither the Senate nor President  
19 Fann would produce any records in the possession of Cyber Ninjas because they took the  
20 position that such documents were not public records. Noting that the Senate and  
21 President Fann were in litigation with another requester regarding records in Cyber  
22 Ninjas’ possession – and that the Maricopa County Board of Supervisors had sent the  
23 Senate a litigation hold notice – Mr. Langhofer said that he had provided the supervisors’  
24 notice to Cyber Ninjas and assumed that it would preserve any potentially responsive  
25 records.

26 42. Messrs. Langhofer and Moore stated that the Senate would provide  
27 responsive, non-privileged records from Mr. Bennett but did not waive their position that  
28

1 Mr. Bennett was not subject to the public records statute.

2 43. Also on May 27, 2021, four PNI journalists, including Ms. Tulumello, sent  
3 a follow-up public records request to President Fann and Mr. Moore (“Senate Request  
4 B”). A true and correct copy of Senate Request B is attached hereto as Exhibit 7.

5 44. Senate Request B sought the following records:

- 6 a. All invoices involving Cyber Ninjas, Wake Technology Services,  
7 CyFIR, LLC., and any other unnamed contractors/subcontractors  
8 from Jan. 1, 2021 to present;
- 9 b. All audit related invoices in the possession of Cyber Ninjas, Wake  
10 Technology Services, CyFIR, LLC and any other unnamed  
11 contractors/subcontractors from Jan. 1, 2021 to present;
- 12 c. All financial documents involving Cyber Ninjas, Wake Technology  
13 Services and CyFIR, LLC, and any other unnamed  
14 contractors/subcontractors from Jan. 1, 2021 to present;
- 15 d. All audit-related correspondence (texts, emails, other) to/from Cyber  
16 Ninjas, Wake Technology Services, CyFIR, LLC and any other  
17 unnamed contractors/subcontractors and:
- 18 i. Ken Bennett
  - 19 ii. Randy Pullen
  - 20 iii. Warren Petersen
  - 21 iv. Karen Fann
  - 22 v. Doug Logan
  - 23 vi. Eugene Kern
  - 24 vii. Anthony Kern
  - 25 viii. Mark Finchem
  - 26 ix. Andy Biggs
  - 27 x. Paul Gosar
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- xi. Kelli Ward
- xii. Sonny Borrelli
- xiii. Leo Biasiucci
- xiv. Wendy Rogers
- xv. Jack Sellers
- xvi. Bill Gates
- xvii. Clint Hickman
- xviii. Steve Chucri
- xix. Steve Gallardo
- xx. Stephen Richer
- xxi. Sidney Powell
- xxii. Patrick Byrne
- xxiii. Lin Wood
- xxiv. Donald Trump
- xxv. Sen. Sonny Borrelli
- xxvi. Leo Biasiucci
- xxvii. Wendy Rogers

- e. All audit-related correspondence (texts, emails, other) to/from [the same individuals listed in part (d) above];
- f. A full list of ballot counters who participated in the Arizona Audit from April 23, 2021 to present and any records of payments to them;
- g. A full list of organizations and individuals who participated in recruiting efforts for the Arizona Audit from Jan. 1, 2021 to present and any records of payments to them;
- h. Any body camera or head camera footage (Go Pro, etc.) recorded by audit employees, contractors and agents at Veteran's Memorial Stadium [sic];

- 1 i. A full list of observers of the Arizona Audit from April 23, 2021 to
- 2 present;
- 3 j. All sign in/ sign out logs to the Veterans Memorial Coliseum from
- 4 April 23, 2021 to present, including: visitors, volunteers, contracted
- 5 employees, counters, observers, vendors and anyone else who gained
- 6 admittance to the coliseum during the audit;
- 7 k. Any records of payments to the Arizona Rangers for security during
- 8 the audit from April 23, 2021 to present;
- 9 l. Any audit-related correspondence (texts, messages, email, posts,
- 10 other) on third-party messaging systems and apps such as Telegram,
- 11 Twitter, WhatsApp, SnapChat and Signal from Jan. 1, 2021 to
- 12 present. Those would include all to/from/by:
  - 13 i. Any agent or member of the Arizona Senate
  - 14 ii. Any agent or member of Cyber Ninjas
  - 15 iii. Any agent or member of Wake Technology Services
  - 16 iv. Any agent or member of CyFIR, LLC and any other unnamed
  - 17 contractors/subcontractors
- 18 m. All resumes and CVs for employees/ agents of Cyber Ninjas, Wake
- 19 Technology Services, CyFIR, LLC and any other unnamed
- 20 contractors/subcontractors.

21 45. On June 2, 2021, counsel for PNI transmitted to Mr. Bennett and Randy  
22 Pullen, a Senate-appointed spokesman regarding the audit, requests for public records  
23 pursuant to A.R.S. §§ 39-121, *et seq.* (the “Bennett Request” and “Pullen Request,”  
24 respectively). True and correct copies of the Bennett Request and Pullen Request are  
25 attached hereto as Exhibits 8 and 9, respectively.

26 46. Each of the Bennett and Pullen Requests sought from its recipient audit-  
27 related communications, invoices and financial documents, and all other records  
28

1 regarding the performance of any audit-related duties.

2 47. Counsel for the Senate has represented to undersigned counsel for PNI that,  
3 although the Senate has not waived its argument that Messrs. Bennett and Pullen are not  
4 subject to the Arizona Public Records Law, each has provided all responsive records to  
5 the Senate, which has posted all responsive, non-privileged records to its online “reading  
6 room” collection of audit-related public records.

7 48. Also on June 2, 2021, counsel for PNI transmitted to Cyber Ninjas a  
8 request for public records pursuant to A.R.S. §§ 39-121, *et seq.* (the “Cyber Ninjas  
9 Request”). A true and correct copy of the Cyber Ninjas Request is attached hereto as  
10 Exhibit 10.

11 49. The Cyber Ninjas Request sought the following records:

12 a. all financial records related to the Audit, including without limitation  
13 all bids, requests for bids or requests for proposals, contracts,  
14 amendments to contracts, invoices, bills, receipts and records of all  
15 payments or donations for such Audit-related work;

16 b. all communications regarding the performance, funding and/or  
17 staffing of the Audit between or involving any officer, director,  
18 employee or agent of Cyber Ninjas and:

19 1. any member of the Arizona Senate or any employee or  
20 agent communicating on behalf of any Senator;

21 2. any “liaison” for the Arizona Senate or any Senator,  
22 including Ken Bennett and Randy Pullen, or anyone  
23 communicating on their behalf;

24 3. any member of the Maricopa County Board of  
25 Supervisors, Maricopa County Recorder Steven  
26 Richer, Maricopa County Sheriff Paul Penzone or  
27 anyone communicating on their behalf;

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4. member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives Anthony Kern, or anyone communicating on their behalf;
5. any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;
6. former U.S. President Donald Trump or anyone communicating on his behalf; and
7. Christina Bobb of One America News Network, or anyone communicating on her behalf.<sup>7</sup>

c. all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any subcontractor, including without limitation Wake Technology Services, Inc., CyFir LLC and Strat Tech Solutions LLC; and

d. all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any contractor engaged by Maricopa County, including without limitation Pro V&V and SLI Compliance.

50. The Cyber Ninjas Request explained that the Arizona Public Records Law applied in this circumstance because Cyber Ninjas “is operating as an instrumentality of the Arizona Senate in performing a core governmental function” partially paid for with

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<sup>7</sup> The Cyber Ninjas Request further stated: “As used here, “communications” should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

1 taxpayer funds, and therefore is a public officer and/or public body for purposes of the  
2 statute. Exhibit 10 at 3.

3 51. On June 11, 2021, counsel for Cyber Ninjas, John D. Wilenchik, responded  
4 to PNI's counsel. A true and correct copy of that correspondence is attached hereto as  
5 Exhibit 11.

6 52. Mr. Wilenchik refused to produce any records and stated Cyber Ninjas'  
7 position that it is neither a public officer nor a public body, and that the public records  
8 statute does not apply to it because it is a "private contractor." Exhibit 11 at 1. Mr.  
9 Wilenchik also stated, "[i]n the event that your client files such an action against CNI,  
10 then please consider this letter to be my client's advance notice that it deems such an  
11 action to be groundless under the statute and will demand that it be withdrawn under Rule  
12 11, as well as seek its attorneys' fees and costs as appropriate." *Id.* at 2.

13 53. Counsel for PNI had further discussions with Messrs. Langhofer and Moore  
14 during June 2021. During those discussions, counsel for PNI agreed that PNI would  
15 narrow its requests for audit-related communications, and counsel for the Senate agreed  
16 that the Senate would process and post to the reading room all responsive, non-privileged  
17 communications.

18 54. Upon information and belief, the Senate's processing of responsive emails  
19 is ongoing. PNI hereby expressly reserves its right to seek redress from this Court should  
20 that process prove to be incomplete or not prompt within the meaning of the Arizona  
21 Public Records Law. Assuming the Senate complies with its counsel's commitment to  
22 produce the requested emails, this special action is limited to the Senate's, President  
23 Fann's and Cyber Ninjas' duty to make available for inspection and copying those  
24 records responsive to Senate Requests A and B in the custody or control of Cyber Ninjas,  
25 as well as records responsive to the Cyber Ninjas Request (collectively, the "Public  
26 Records").

27 55. When counsel for PNI expressed concern regarding whether Cyber Ninjas  
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1 and its subcontractors for the audit were preserving potential public records, Mr.  
2 Langhofer requested that PNI provide the suggested text of a records retention request.  
3 Counsel for PNI provided such proposed language the next day, and Mr. Langhofer later  
4 stated that he had provided the suggested language to Cyber Ninjas and its  
5 subcontractors. Correspondence including the suggested language from counsel for PNI  
6 to Messrs. Langhofer and Moore is attached hereto as Exhibit 12.

7 56. By their failure to provide access to or copies of all of the requested records  
8 promptly, Defendants have “denied” PNI’s public records requests, and they have done  
9 so “wrongfully.” *See* A.R.S. § 39-121.01(E) and §39-121.02(C).

10 **COUNT ONE: Violation of A.R.S. §§ 39-121 *et seq.***  
11 **by Defendants Arizona Senate, Karen Fann, Warren Petersen and Susan Aceves**

12 57. PNI realleges and incorporates by reference the allegations set forth in  
13 paragraphs 1 through 56 of this Complaint.

14 58. The Arizona Public Records Law provides that “[p]ublic records and other  
15 matters in the custody of any officer shall be open to inspection by any person at all times  
16 during office hours.” A.R.S. § 39-121.

17 59. The Records requested by PNI in Senate Requests A and B are indeed  
18 “public records” within the meaning of the Arizona Public Records Law. *See* A.R.S.  
19 § 39-121.01(B); *Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009)  
20 (“Arizona law defines ‘public records’ broadly and creates a presumption requiring the  
21 disclosure of public information.”).

22 60. The Arizona Senate’s audit of Maricopa County ballots is a matter of the  
23 most urgent public concern. Nothing is more fundamental to our democracy than the  
24 administration of our elections. Defendants themselves have stressed the importance of  
25 public confidence in voting and elections as justifications for the audit, and have pledged  
26 transparency in performing the audit. But the public cannot properly evaluate the  
27 conduct of and findings of the audit without prompt and full access to the very public  
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1 records that Defendants are unlawfully withholding.

2 61. In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendants Arizona  
3 Senate, President Fann, Chairman Petersen and Secretary Aceves were required to  
4 maintain and make available records responsive to Senate Requests A and B that are in  
5 the custody or control of Defendant/Real Party in Interest Cyber Ninjas, but have refused  
6 to do so.

7 62. There is a strong public benefit in honoring the public's statutory right to  
8 inspect these Public Records, and Defendants Arizona Senate, President Fann, Chairman  
9 Petersen and Secretary Aceves have failed to articulate any specific harm that would arise  
10 from the release of any portion of the Public Records. There is no such harm, and PNI  
11 has given them ample and repeated opportunities to assert any.

12 63. For all these reasons, Defendants Arizona Senate, President Fann,  
13 Chairman Petersen and Secretary Aceves have failed to perform their duties required  
14 under the Arizona Public Records Law regarding requested records in the custody or  
15 control of Cyber Ninjas, and they have wrongfully denied PNI access to inspect and copy  
16 these records as a matter of law. *See* Ariz. R. Special Actions 3.

17  
18 **COUNT TWO: Violation of A.R.S. §§ 39-121 et seq.  
by Defendant/Real Party in Interest Cyber Ninjas, Inc.**

19 64. PNI realleges and incorporates by reference the allegations set forth in  
20 paragraphs 1 through 63 of this Complaint.

21 65. The Records requested by PNI in the Cyber Ninjas Request are "public  
22 records" within the meaning of the Arizona Public Records Law. *See* A.R.S. § 39-  
23 121.01(B); *Lake*, 222 Ariz. at 549, 218 P.3d at 1006.

24 66. In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendant Cyber  
25 Ninjas Inc., as a "public officer" and/or "public body" by virtue of its performing a core  
26 governmental function funded in part by state taxpayer dollars, was required to maintain  
27 these Public Records and make them available for inspection and copying promptly upon  
28

1 request by PNI and its journalists. Yet, Cyber Ninjas has refused to do so.

2 67. For all these reasons, Defendant Cyber Ninjas, Inc. has failed to perform its  
3 duties required under the Arizona Public Records Law, and it therefore has wrongfully  
4 denied PNI access to inspect and copy the Records as a matter of law. *See* Ariz. R.  
5 Special Actions 3.

6 **PRAYER FOR RELIEF**

7 Wherefore, PNI prays for relief from this Court as follows:

8 A. For an order setting an expeditious time for Defendants to produce all of  
9 the Public Records to PNI for inspection and copying;

10 B. For an award of PNI's reasonable attorneys' fees and other legal costs  
11 pursuant to A.R.S. § 39-121.02(B); and

12 C. For such other and further relief as the Court deems just and proper.

13  
14 DATED this 30th day of June, 2021.

15 BALLARD SPAHR LLP

16  
17 By: /s/ David J. Bodney

18 David J. Bodney

19 Craig C. Hoffman

20 1 East Washington Street, Suite 2300

Phoenix, AZ 85004-2555

21 Matthew E. Kelley (application for  
22 admission *pro hac vice* forthcoming)  
23 1909 K Street, NW, 12<sup>th</sup> Floor  
Washington, DC 20006

24 *Attorneys for Phoenix Newspapers, Inc. and*  
25 *Kathy Tulumello*

26  
27  
28

Ballard Spahr LLP  
1 East Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
Telephone: 602.798.5400

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 30th day of June, 2021, the foregoing document was  
3 filed with the Office of the Clerk of the Superior Court, Maricopa County.

4 I further certify that a complete copy of the foregoing was emailed and sent for  
5 hand-delivery via process server this same date upon the following:

6  
7 Kory Langhofer  
8 kory@statecraftlaw.com  
9 STATECRAFT PLLC  
10 649 North Fourth Avenue, First Floor  
11 Phoenix, AZ 85003  
12 *Attorneys for Arizona State Senate,  
13 Sen. Pres. Karen Fann, Sen. Judiciary Committee  
14 Chairman Warren Petersen and  
15 Secretary of the Arizona State Senate Susan Aceves*

13 Norm Moore  
14 NMoore@azleg.gov  
15 Arizona State Senate  
16 Public Records Attorney  
17 1700 W. Washington  
18 Phoenix, AZ 85007

17 Chris Kleminich  
18 ckleminich@azleg.gov  
19 Arizona State Senate  
20 Rules Attorney  
21 1700 W. Washington St.  
22 Room 202 C  
23 Phoenix, AZ 85007

22 *Attorneys for Arizona State Senate,  
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1 John D. Wilenchik  
2 jackw@wb-law.com  
3 The Wilenchik & Bartness Building  
4 2810 North Third Street  
5 Phoenix, Arizona 85004  
6 *Attorneys for CyberNinjas, Inc.*

7 /s/ Catherine Weber

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**1**



# Cyber Ninjas, Inc. Master Services Agreement

This Master Services Agreement (the "Master Agreement") is entered into as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"). Contractor and Client are referred to herein individually as a "Party" and collectively as the "Parties".

WHEREAS, Client desires to retain Contractor, and Contractor desires to provide to Client the consulting and/or professional services described herein; and

WHEREAS, Client and Contractor desire to establish the terms and conditions that will regulate all relationships between Client and Contractor.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

## 1 SCOPE OF AGREEMENT

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This Master Agreement establishes a contractual framework for Contractor's consulting and/or professional services as described herein. The Parties agree to the terms and conditions set forth in this Master Agreement and in any Statement of Work executed by the Parties referencing this Master Agreement. Each Statement of Work is incorporated into this Master Agreement, and the applicable portions of this Master Agreement are incorporated into each Statement of Work. The Statement(s) of Work and this Master Agreement are herein collectively referred to as the "Agreement."

## 2 STRUCTURE OF AGREEMENT.

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- 2.1 Components of the Agreement. The Agreement consists of:
- (a) The provisions set forth in this Master Agreement and the Exhibits referenced herein;
  - (b) The Statement(s) of Work attached hereto, and any Schedules referenced therein; and
  - (c) Any additional Statements of Work executed by the Parties pursuant to this Agreement, including the Schedules referenced in each such Statement of Work.
- 2.2 Statement(s) of Work. The Services (as defined in Article 4) that Contractor will provide for Client will be described in and be the subject of (i) one or more Statements of Work executed by the Parties pursuant to this Agreement, and (ii) this Agreement. Each Statement of Work shall be substantially in the form of, and shall include the set of Schedules described in, "Exhibit 1-Form of Statement of Work", with such additions, deletions and modifications as the Parties may agree.
- 2.3 Deviations from Agreement, Priority. In the event of a conflict, the terms of the Statements of Work shall be governed by the terms of this Master Agreement, unless an applicable Statement of Work expressly and specifically notes the deviations from the terms of this Master Agreement for the purposes of such Statement of Work.

### 3 TERM AND TERMINATION.

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- 3.1 **Term of Master Agreement.** The Term of the Master Agreement will begin as of the Effective Date and shall continue until terminated as provided in Section 3.3 (the "Term").
- 3.2 **Term of Statements of Work.** Each Statement of Work will have its own term and will continue for the period identified therein unless terminated earlier in accordance with Section 3.4 (the "Service Term"). In the event that the Service Term on any applicable Statement of Work expires and Services continue to be provided by Contractor and received and used by Client, the terms and conditions of the Master Agreement shall apply until the Services have been terminated.
- 3.3 **Termination of Master Agreement.** Either Party may terminate this Agreement immediately upon written notice to the other Party if there is no Statement of Work in effect.
- 3.4 **Termination of Statement of Work by Client.** A Statement of Work may be terminated by Client, for any reason other than Contractor's breach, upon fourteen (14) days prior written notice to Contractor. In such event, (i) Contractor shall cease its activities under the terminated Statement of Work on the effective date of termination; and (ii) Client agrees to pay to Contractor all amounts for any amounts due for Services performed through the effective termination date. (iii) In the case of fixed price work whereby the effective date of termination is after Contractor has or will commence the Services, Client agrees to pay Contractor an amount that will be determined on a pro-rata basis computed by dividing the total fee for the Service by the number of days required for completion of the Services and multiplying the result by the number of working days completed at the effective date of termination. (iv) Client agrees to pay to Contractor all costs in full associated with equipment or other non-Service related costs that were incurred before the effective termination date.
- 3.5 **Termination for Breach.** Either party may terminate the Agreement in the event that the other party materially defaults in performing any obligation under this Agreement (including any Statement of Work) and such default continues un-remedied for a period of seven (7) days following written notice of default. If Client terminates the Agreement and/or any Statement of Work as a result of Contractor's breach, then to the extent that Client has prepaid any fees for Services, Contractor shall refund to Client any prepaid fees on a pro-rata basis to the extent such fees are attributable to the period after such termination date.
- 3.6 **Effect of Termination.** Upon termination or expiration of this Agreement and/or a Statement of Work: (i) the parties will work together to establish an orderly phase-out of the Services; (ii) Client will pay Contractor for any amounts due under the Agreement, including all Services rendered under the terminated Statement of Work up to the effective date of the termination; and (iii) each Party will promptly cease all use of and destroy or return, as directed by the other Party, all Confidential Information of the other Party except for all audit records (including but not limited to work papers, videotapes, images, tally sheets, draft reports and other documents generated during the audit) which will be held in escrow in a safe approved by the GSA for TS/SCI material for a period of three years and available to the Contractor and Client solely for purposes of addressing any claims, actions or allegations regarding the audit (the "Escrow"), provided that, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party claims arising out of or related to the subject matter of this Agreement.

## 4 SERVICES.

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### 4.1 Definitions.

4.1.1 "Services" shall mean consulting, training or any other professional services to be provided by Contractor to Client, as more particularly described in a Statement of Work, including any Work Product provided in connection therewith.

4.1.2 "Work Product" shall mean any deliverables which are created, developed or provided by Contractor in connection with the Services pursuant to a Statement of Work, excluding any Contractor's Intellectual Property.

4.1.3 "Contractor's Intellectual Property" shall mean all right, title and interest in and to the Services, including, but not limited to, all inventions, skills, know-how, expertise, ideas, methods, processes, notations, documentation, strategies, policies, reports (with the exception of the data within the reports, as such data is the Client's proprietary data) and computer programs including any source code or object code, (and any enhancements and modifications made thereto), developed by Contractor in connection with the performance of the Services hereunder and of general applicability across Contractor's customer base. For the avoidance of doubt, the term shall not include (1) the reports prepared by Contractor for Client (other than any standard text used by Contractor in such reports) pursuant to this Agreement or any Statement of Work, which shall be the exclusive property of Client and shall be considered "works made for hire" within the meaning of the Copyright Act of 1976, as amended; and (2) any data or process discovered on or obtained from the Dominion devices that will be the subject of the forensic review.

4.2 Obligation to Provide Services. Starting on the Commencement Date of each Statement of Work and continuing during each Statement of Work Term, Contractor shall provide the Services described in each such Statement of Work to, and perform the Services for, Client in accordance with the applicable Statement of Work and the Agreement.

4.3 Contractor's Performance. Contractor will perform the Services set forth in each Statement of Work using personnel that have the necessary knowledge, training, skills, experience, qualifications and resources to provide and perform the Services in accordance with the Agreement. Contractor shall render such Services in a prompt, professional, diligent, and workmanlike manner, consistent with industry standards applicable to the performance of such Services.

4.4 Client's Obligations. Client acknowledges that Contractor's performance and delivery of the Services are contingent upon: (i) Client providing full access to such information as may be reasonably necessary for Contractor to complete the Services as described in the Statement(s) of Work including access to its personnel, facilities, equipment, hardware, network and information, as applicable; and (ii) Client promptly obtaining and providing to Contractor any required licenses, approvals or consents necessary for Contractor's performance of the Services. Contractor will be excused from its failure to perform its obligations under this Agreement to the extent such failure is caused by Client's delay in performing or failure to perform its responsibilities under this Agreement and/or any Statement of Work.

4.5 Location of Services. Contractor shall provide the Services at the site designated in the applicable Statement of Work.

- 4.6 **Status Reports.** Contractor shall keep Client informed of the status of the Services and provide Client with such status reports and other reports and information regarding the Services as reasonably requested by Client.
- 4.7 **New Services.** During the Term, Client may request that Contractor provide New Services for Client. New Services may be activities that are performed on a continuous basis for the remainder of the Term or activities that are performed on a project basis. Any agreement of the Parties with respect to New Services will be in writing and shall also become a "Service" and be reflected in an additional Statement of Work hereto or in an amendment to an existing Statement of Work hereunder.
- 4.8 **Change of Services.** "Change of Services" means any change to the Services as set forth in the Statement of Work that (i) would modify or alter the delivery of the Services or the composition of the Services, (ii) would alter the cost to Client for the Services, or (iii) is agreed by Client and Contractor in writing to be a Change. From time to time during the Term, Client or Contractor may propose Changes to the Services.
- The following process is required to effectuate a Change of Services by either Party:
- 4.9 A Project Change Request ("PCR") will be the vehicle for communicating change. The PCR must describe the change, the rationale for the change, and the effect the change will have on the Services.
- 4.10 The designated project manager of the requesting Party will review any proposed change prior to submitting the PCR to the other Party.
- 4.11 Contractor and Client will mutually agree upon any additional fees for such investigation, if any. If the investigation is authorized, the Client project manager will sign the PCR, which will constitute approval for the investigation charges. Contractor will invoice Client for any such charges. The investigation will determine the effect that the implementation of the PCR will have on Statement of Work terms and conditions.
- 4.12 Upon completion of the investigation, both parties will review the impact of the proposed change and, if mutually agreed, a written addendum to the Statement of Work must be signed by both Parties to authorize implementation of the investigated changes that specifically identifies the portion of the Statement of Work that is the subject of the modification or amendment and the changed or new provision(s) to the Statement of Work.
- 4.13 **End Client Requirements.** If Contractor is providing Services for Client that is intended to be for the benefit of a customer of Client ("End Client"), the End Client should be identified in an applicable Statement of Work. The Parties shall mutually agree upon any additional terms related to such End Client which terms shall be set forth in a Schedule to the applicable Statement of Work.
- 4.14 **Client Reports; No Reliance by Third Parties.** Contractor will provide those reports identified in the applicable Statement of Work ("Client Report"). The Client Report is prepared uniquely and exclusively for Client's sole use. The provision by Client of any Client Report or any information therein to any third party shall not entitle such third party to rely on the Client Report or the contents thereof in any manner or for any purpose whatsoever, and Contractor specifically disclaims all liability for any damages whatsoever (whether foreseen or unforeseen, direct, indirect, consequential, incidental, special, exemplary or punitive) to such third party arising from or related to reliance by such third party on any Client Report or any contents thereof.

4.15 **Acceptance Testing.** Unless otherwise specified in an Statement of Work, Client shall have a period of fourteen (14) days to perform Acceptance Testing on each deliverable provided by Contractor to determine whether it conforms to the Specifications and any other Acceptance criteria (collectively as the "Acceptance Criteria") stated in the Statement of Work. If Client rejects the deliverable as non-conforming, unless otherwise agreed to by the parties, Contractor shall, at its expense, within fourteen (14) days from the date of notice of rejection, correct the deliverable to cause it to conform to the Acceptance Criteria and resubmit the deliverable for further Acceptance testing in accordance with the process specified in this Section 4.15. In the event that the deliverable does not conform to the Acceptance Criteria after being resubmitted a second time, Client, may at its option, (i) provide Contractor with another fourteen (14) days to correct and resubmit the deliverable or (ii) immediately terminate the Statement of Work and obtain a refund of any amounts paid for the non-conforming Services pursuant to the applicable Statement of Work.

## 5 FEES AND PAYMENT TERMS.

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- 5.1 **Fees.** Client agrees to pay to Contractor the fees for the Services in the amount as specified in the applicable Statement of Work.
- 5.2 **Invoices.** Contractor shall render, by means of an electronic file, an invoice or invoices in a form containing reasonable detail of the fees incurred in each month. Upon completion of the Services as provided in the Statement of Work, Contractor shall provide a final invoice to Client. Contractor shall identify all taxes and material costs incurred for the month in each such invoice. All invoices shall be stated in US dollars, unless otherwise specified in the Statement of Work.
- 5.3 **Payment Terms.** All invoices are due upon receipt. Payment not received within 30 days of the date of the invoice is past due. Contractor reserves the right to suspend any existing or future Services when invoice becomes thirty (30) days past due. Client shall pay 1.5% per month non-prorated interest on any outstanding balances in excess of thirty days past due. If it becomes necessary to collect past due payments, Client shall be responsible for reasonable attorney fees required in order to collect upon the past-due invoice(s).
- 5.4 **Taxes.** The applicable Statement of Work shall prescribe the parties' respective responsibilities with respect to the invoicing and payment of state sales, use, gross receipts, or similar taxes, if any, applicable to the Services and deliverables to be provided by Contractor to Client. Client shall have no responsibility with respect to federal, state, or local laws arising out of Contractor's performance of any Statement of Work, including any interest or penalties.

## 6 PERSONNEL.

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- 6.1 **Designated Personnel.** Contractor shall assign employees that are critical to the provision and delivery of the Services provided (referred to herein as "Designated Personnel") and except as provided in this Article 6, shall not be removed or replaced at any time during the performance of Services in a Statement of Work, except with Client's prior written consent.
- 6.2 **Replacement of Designated Personnel by Contractor.** Notwithstanding the foregoing, if any Designated Personnel becomes unavailable for reasons beyond Contractor's reasonable control or Designated Personnel's professional relationship with Contractor terminates for any reason,

Contractor may replace the Designated Personnel with a similarly experienced and skilled employee. In such event, Contractor shall provide immediate notification to Client of a change in a Designated Personnel's status.

- 6.3 **Replacement of Designated Personnel by Client.** In the event that Client is dissatisfied for any reason with any Designated Personnel, Client may request that Contractor replace the Designated Personnel by providing written notice to Contractor. Contractor shall ensure that all Designated Personnel are bound by the terms and conditions of this Agreement applicable to their performance of the Services and shall be responsible for their compliance therewith.
- 6.4 **Background Screening.** Contractor shall have performed the background screening described in Exhibit 2 (Background Screening Measures) on all of its agents and personnel who will have access to Client Confidential Information prior to assigning such individuals or entities to provide Services under this Agreement.

## **7 PROPRIETARY RIGHTS.**

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- 7.1 **Client's Proprietary Rights.** Client represents and warrants that it has the necessary rights, power and authority to transmit Client Data (as defined below) to Contractor under this Agreement and that Client has and shall continue to fulfil all obligations with respect to individuals as required to permit Contractor to carry out the terms hereof, including with respect to all applicable laws, regulations and other constraints applicable to Client Data. As between Client and Contractor, Client or a political subdivision or government entity in the State of Arizona owns all right, title and interest in and to (i) any data provided by Client (and/or the End Client, if applicable) to Contractor; (ii) any of Client's (and/or the End Client, if applicable) data accessed or used by Contractor or transmitted by Client to Contractor in connection with Contractor's provision of the Services (Client's data and Client's End User's data, collectively, the "Client Data"); (iii) all intellectual property of Client ("Client's Intellectual Property") that may be made available to Contractor in the course of providing Services under this Agreement.
- 7.2 **License to Contractor.** This Agreement does not transfer or convey to Contractor any right, title or interest in or to the Client Data or any associated Client's Intellectual Property. Client grants to Contractor a limited, non-exclusive, worldwide, revocable license to use and otherwise process the Client Data and any associated Client's Intellectual Property to perform the Services during the Term hereof. Contractor's permitted license to use the Client Data and Client's Intellectual Property is subject to the confidentiality obligations and requirements for as long as Contractor has possession of such Client Data and Intellectual Property.

**7.3 Contractor's Proprietary Rights.** As between Client and Contractor, Contractor owns all right, title and interest in and to the Services, including, Contractor's Intellectual Property. Except to the extent specifically provided in the applicable Statement of Work, this Agreement does not transfer or convey to Client or any third party any right, title or interest in or to the Services or any associated Contractor's Intellectual Property rights, but only grants to Client a limited, non-exclusive right and license to use as granted in accordance with the Agreement. Contractor shall retain all proprietary rights to Contractor's Intellectual Property and Client will take no actions which adversely affect Contractor's Intellectual Property rights. **For the avoidance of doubt and notwithstanding any other provision in this Section or elsewhere in the Agreement, all documents, information, materials, devices, media, and data relating to or arising out of the administration of the November 3, 2020 general election in Arizona, including but not limited to voted ballots, images of voted ballots, and any other materials prepared by, provided by, or originating from the Client or any political subdivision or governmental entity in the State of Arizona, are the sole and exclusive property of the Client or of the applicable political subdivision or governmental entity, and Contractor shall have no right or interest whatsoever in such documents, information, materials, or data.**

## **8 NONDISCLOSURE.**

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**8.1 Confidential Information.** "Confidential Information" refers to any information one party to the Agreement discloses (the "Disclosing Party") to the other (the "Receiving Party"). The confidential, proprietary or trade secret information in the context of the Agreement may include, but is not limited to, business information and concepts, marketing information and concepts, financial statements and other financial information, customer information and records, corporate information and records, sales and operational information and records, and certain other information, papers, documents, studies and/or other materials, technical information, and certain other information, papers, documents, digital files, studies, compilations, forecasts, strategic and marketing plans, budgets, specifications, research information, software, source code, discoveries, ideas, know-how, designs, drawings, flow charts, data, computer programs, market data; digital information, digital media, and any and all electronic data, information, and processes stored on Maricopa County servers, portable storage media and/or cloud storage (remote servers) technologies, and/or other materials, both written and oral. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the Receiving Party's possession at the time of disclosure; (ii) is independently developed by the Receiving Party without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the Receiving Party's improper action or inaction; or (iv) is approved for release in writing by the Disclosing Party.

- 8.2 Nondisclosure Obligations.** The Receiving Party will not use Confidential Information for any purpose other than to facilitate performance of Services pursuant to the Agreement and any applicable Statement of Work. The Receiving Party: (i) will not disclose Confidential Information to any employee or contractor or other agent of the Receiving Party unless such person needs access in order to facilitate the Services and executes a nondisclosure agreement with the Receiving Party, substantially in the form provided in Exhibit 3; and (ii) will not disclose Confidential Information to any other third party without the Disclosing Party's prior written consent. Without limiting the generality of the foregoing, the Receiving Party will protect Confidential Information with the same degree of care it uses to protect its own Confidential Information of similar nature and importance, but with no less than reasonable care. The Receiving Party will promptly notify the Disclosing Party of any misuse or misappropriation of Confidential Information that comes to the Receiving Party's attention. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority; however, the Receiving Party will give the Disclosing Party prompt notice of any such legal or governmental demand and will reasonably cooperate with the Disclosing Party in any effort to seek a protective order or otherwise to contest such required disclosure, at the Disclosing Party's expense. For the avoidance of doubt, this provision prohibits the Contractor and its agents from providing data, information, reports, or drafts to anyone without the prior written approval of the Client. The Client will determine in its sole and unlimited discretion whether to grant such approval.
- 8.3 Injunction.** The Receiving Party agrees that breach of this Article 8 might cause the Disclosing Party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, the Disclosing Party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.
- 8.4 Return.** Upon the Disclosing Party's written request and after the termination of the Escrow, the Receiving Party will return all copies of Confidential Information to the Disclosing Party or upon authorization of Disclosing Party, certify in writing the destruction thereof.
- 8.5 Third Party Hack.** Contractor shall not be liable for any breach of this Section 8 resulting from a hack or intrusion by a third party into Client's network or information technology systems unless the hack or intrusion was through endpoints or devices monitored by Contractor and was caused directly by Contractor's gross negligence or wilful misconduct. For avoidance of doubt, Contractor shall not be liable for any breach of this Section 8 resulting from a third-party hack or intrusion into any part of Client's network, or any environment, software, hardware or operational technology, that Contractor is not obligated to monitor pursuant to a Statement of Work executed under this Agreement.
- 8.6 Retained Custody of Ballots.** The Client shall retain continuous and uninterrupted custody of the ballots being tallied. For the avoidance of doubt, this provision requires Contractor and each of its agents to leave all ballots at the counting facility at the conclusion of every shift.



8.7 **Survival.** This Section 8 shall survive for three (3) years following any termination or expiration of this Agreement; provided that with respect to any Confidential Information remaining in the Receiving Party's possession following any termination or expiration of this Agreement, the obligations under this Section 8 shall survive for as long as such Confidential Information remains in such party's possession.

## 9 NO SOLICITATION.

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Contractor and Client agree that neither party will, at any time within twelve (24) months after the termination of the Agreement, solicit, attempt to solicit or employ any of the personnel who were employed or otherwise engaged by the other party at any time during which the Agreement was in effect, except with the express written permission of the other party. The Parties agree that the damages for any breach of this Article 9 will be substantial, but difficult to ascertain. Accordingly, the party that breaches this Article 9, shall pay to other party an amount equal to two times (2x) the annual compensation of the employee solicited or hired, which amount shall be paid as liquidated damages, as a good faith effort to estimate the fair, reasonable and actual damages to the aggrieved party and not as a penalty. Nothing in the Agreement shall be construed to prohibit either party from pursuing any other available rights or remedies it may have against the respective employee(s).

## 10 DATA PROTECTION

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10.1 **Applicability.** This Article 10 shall apply when Contractor is providing Services to Client which involves the processing of Personal Data which is subject to Privacy Laws.

10.2 **Definitions.** For purposes of this Article 10:

- (a) "Personal Data" means any information relating to an identified or identifiable natural person which is processed by Contractor, acting as a processor on behalf of the Client, in connection with the provision of the Services and which is subject to Privacy Laws.
- (b) "Privacy Laws" means any United States and/or European Union data protection and/or privacy related laws, statutes, directives, judicial orders, or regulations (and any amendments or successors thereto) to which a party to the Agreement is subject and which are applicable to the Services.

10.3 **Contractor's Obligations.** Contractor will maintain industry-standard administrative, physical, and technical safeguards for protection of the security, confidentiality, and integrity of Personal Data. Contractor shall process Personal Data only in accordance with Client's reasonable and lawful instructions (unless otherwise required to do so by applicable law). Client hereby instructs Contractor to process any Personal Data to provide the Services and comply with Contractor's rights and obligations under the Agreement and any applicable Statement of Work. The Agreement and any applicable Statement of Work comprise Client's complete instructions to Contractor regarding the processing of Personal Data. Any additional or alternate instructions must be agreed between the parties in writing, including the costs (if any) associated with complying with such instructions. Contractor is not responsible for determining if Client's instructions are compliant with applicable law, however, if Contractor is of the opinion that a Client instruction infringes applicable Privacy Laws, Contractor shall notify Client as soon as reasonably practicable and shall not be required to comply with such infringing instruction.

- 10.4 **Disclosures.** Contractor may only disclose the Personal Data to third parties for the purpose of: (i) complying with Client's reasonable and lawful instructions; (ii) as required in connection with the Services and as permitted by the Agreement and any applicable Statement of Work; and/or (iii) as required to comply with Privacy Laws, or an order of any court, tribunal, regulator or government agency with competent jurisdiction to which Contractor is subject, provided that Contractor will (to the extent permitted by law) inform the Client in advance of any disclosure of Personal Data and will reasonably co-operate with Client to limit the scope of such disclosure to what is legally required.
- 10.5 **Demonstrating Compliance.** Contractor shall, upon reasonable prior written request from Client (such request not to be made more frequently than once in any twelve-month period), provide to Client such information as may be reasonably necessary to demonstrate Contractor's compliance with its obligations under this Agreement.
- 10.6 **Liability and Costs.** Contractor shall not be liable for any claim brought by Client or any third party arising from any action or omission by Contractor or Contractor's agents to the extent such action or omission was directed by Client or expressly and affirmatively approved or ratified by Client.

## 11 DATA RETENTION

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- 11.1 **Client's Intellectual Property and Confidential Information.** All Client Intellectual Property and Client Confidential Information (to include Client Intellectual Property or Client Confidential Information that is contained or embedded within other documents, files, materials, data, or media) shall be removed from all Contractor controlled systems as soon as it is no longer required to perform Services under this Agreement and held in the Escrow. In addition, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party's claims arising out of or related to the subject matter of this Agreement.

## 12 REPRESENTATIONS AND WARRANTIES.

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- 12.1 **Representations and Warranties of Client.** Client represents and warrants to Contractor as follows:
- (a) **Organization; Power.** As of the Effective Date, Client (i) is a government entity in the State of Arizona, duly organized, validly existing and in good standing under the Laws of the State of Arizona, and (ii) has full corporate power to conduct its business as currently conducted and to enter into the Agreement.
  - (b) **Authorized Agreement.** This Agreement has been, and each Statement of Work will be, duly authorized, executed and delivered by Client and constitutes or will constitute, as applicable, a valid and binding agreement of Client, enforceable against Client in accordance with its terms.
  - (c) **No Default.** Neither the execution and delivery of this Agreement or any Statement of Work by Client, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order, or law to which Client is a Party or which is otherwise applicable to Client.

**12.2 Representations and Warranties of Contractor.** Contractor represents and warrants to Client as follows:

- (a) **Organization; Power.** As of the Effective Date, Contractor (i) is a corporation, duly organized, validly existing and in good standing under the Laws of the State of Florida, and (ii) has full corporate power to own, lease, license and operate its assets and to conduct its business as currently conducted and to enter into the Agreement.
- (b) **Authorized Agreement.** This Agreement has been, and each Statement of Work will be duly authorized, executed and delivered by Contractor and constitutes or will constitute, as applicable, a valid and binding agreement of Contractor, enforceable against Contractor in accordance with its terms.
- (c) **No Default.** Neither the execution and delivery of this Agreement or any Statement of Work by Contractor, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order or law to which Contractor is a Party or that is otherwise applicable to Contractor.

**12.3 Additional Warranties of Contractor.** Contractor warrants that:

- (a) The Services shall conform to the terms of the Agreement (including the Statement of Work);
- (b) Contractor will comply with all applicable laws, rules and regulations in delivering the Services (including without limitation any privacy, data protection and computer laws);
- (c) The Services shall be performed in a diligent and professional manner consistent with industry best standards;
- (d) Contractor and its agents possess the necessary qualifications, expertise and skills to perform the Services;
- (e) Contractor and all individuals handling Client Confidential Information are either U.S. citizens, or U.S. entities that are owned, controlled, and funded entirely by U.S. citizens.
- (f) Services requiring code review will be sufficiently detailed, comprehensive and sophisticated so as to detect security vulnerabilities in software that should reasonably be discovered given the state of software security at the time the Services are provided;
- (g) Contractor shall ensure that the Services (including any deliverables) do not contain, introduce or cause any program routine, device, or other undisclosed feature, including, without limitation, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, trojan horse, or trap door, that may delete, disable, deactivate, interfere with or otherwise harm software, data, hardware, equipment or systems, or that is intended to provide access to or produce modifications not authorized by Client or any known and exploitable material security vulnerabilities to affect Client's systems (collectively, "Disabling Procedures");

- (h) If, as a result of Contractor's services, a Disabling Procedure is discovered by Contractor, Contractor will promptly notify Client and Contractor shall use commercially reasonable efforts and diligently work to eliminate the effects of the Disabling Procedure at Contractor's expense. Contractor shall not modify or otherwise take corrective action with respect to the Client's systems except at Client's request. In all cases, Contractor shall take immediate action to eliminate and remediate the proliferation of the Disabling Procedure and its effects on the Services, the client's systems, and operating environments. At Client's request, Contractor will report to Client the nature and status of the Disabling Procedure elimination and remediation efforts; and
- (i) Contractor shall correct any breach of the above warranties, at its expense, within fourteen (14) days of its receipt of such notice. In the event that Contractor fails to correct the breach within the specified cure period, in addition to any other rights or remedies that may be available to Client at law or in equity, Contractor shall refund all amounts paid by Client pursuant to the applicable Statement of Work for the affected Services.

### **13 LIMITATION OF LIABILITY.**

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IN NO EVENT SHALL CONTRACTOR BE HELD LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL CONSEQUENTIAL, OR PUNITIVE DAMAGES ARISING OUT OF SERVICES PROVIDED HEREUNDER INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, BUSINESS INTERRUPTION, LOSS OF USE OF EQUIPMENT, LOSS OF GOODWILL, LOSS OF DATA, LOSS OF BUSINESS OPPORTUNITY, WHETHER CAUSED BY TORT (INCLUDING NEGLIGENCE), COSTS OF SUBSTITUTE EQUIPMENT, OR OTHER COSTS. If applicable law limits the application of the provisions of this Article 13, Contractor's liability will be limited to the least extent permissible.

EXCEPT FOR EACH PARTY'S INDEMNIFICATION OBLIGATIONS UNDER ARTICLE 15 AND NON-SOLICITATION OBLIGATIONS UNDER ARTICLE 9, LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE TOTAL OF THE AMOUNTS PAID AND PAYABLE TO CONTRACTOR UNDER THE STATEMENT OF WORK(S) TO WHICH THE CLAIM RELATES. THE ABOVE LIMITATIONS WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY.

### **14 DISCLAIMER OF WARRANTIES.**

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EXCEPT AS EXPRESSLY SET FORTH HEREIN, CONTRACTOR MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO ANY OF THE SERVICES PROVIDED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, OR SUITABILITY OR RESULTS TO BE DERIVED FROM THE USE OF ANY SERVICE, SOFTWARE, HARDWARE, DELIVERABLES, WORK PRODUCT OR OTHER MATERIALS PROVIDED UNDER THIS AGREEMENT. CLIENT UNDERSTANDS THAT CONTRACTOR'S SERVICES DO NOT CONSTITUTE ANY GUARANTEE OR ASSURANCE THAT THE SECURITY OF CLIENT'S SYSTEMS, NETWORKS AND ASSETS CANNOT BE BREACHED OR ARE NOT AT RISK. CONTRACTOR MAKES NO WARRANTY THAT EACH AND EVERY VULNERABILITY WILL BE DISCOVERED AS PART OF THE SERVICES AND CONTRACTOR SHALL NOT BE LIABLE TO CLIENT SHOULD VULNERABILITIES LATER BE DISCOVERED.

## 15 INDEMNIFICATION.

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“Indemnified Parties” shall mean, (i) in the case of Contractor, Contractor, and each of Contractor’s respective owners, directors, officers, employees, contractors and agents; and (ii) in the case of Client, Client, and each of Client’s respective members, officers, employees, contractors and agents.

- 15.1 **Mutual General Indemnity.** Each party agrees to indemnify and hold harmless the other party from (i) any third-party claim or action for personal bodily injuries, including death, or tangible property damage resulting from the indemnifying party’s gross negligence or wilful misconduct; and (ii) breach of this Agreement or the applicable Statement of Work by the indemnifying Party, its respective owners, directors, officers, employees, agents, or contractors.
- 15.2 **Contractor Indemnity.** Contractor shall defend, indemnify and hold harmless the Client Indemnified Parties from any damages, costs and liabilities, expenses (including reasonable and actual attorney’s fees) (“Damages”) actually incurred or finally adjudicated as to any third-party claim or action alleging that the Services performed or provided by Contractor and delivered pursuant to the Agreement infringe or misappropriate any third party’s patent, copyright, trade secret, or other intellectual property rights enforceable in the country(ies) in which the Services performed or provided by Contractor for Client or third-party claims resulting from Contractor’s gross negligence or wilful misconduct (“Indemnified Claims”). If an Indemnified Claim under this Section 15.2 occurs, or if Contractor determines that an Indemnified Claim is likely to occur, Contractor shall, at its option: (i) obtain a right for Client to continue using such Services; (ii) modify such Services to make them non-infringing; or (iii) replace such Services with a non-infringing equivalent. If (i), (ii) or (iii) above are not reasonably available, either party may, at its option, terminate the Agreement will refund any pre-paid fees on a pro-rata basis for the allegedly infringing Services that have not been performed or provided. Notwithstanding the foregoing, Contractor shall have no obligation under this Section 15.2 for any claim resulting or arising from: (i) modifications made to the Services that were not performed or performed or provided by or on behalf of Contractor; or (ii) the combination, operation or use by Client, or anyone acting on Client’s behalf, of the Services in connection with a third-party product or service (the combination of which causes the infringement).
- 15.3 **Client Indemnity.** Client shall defend, indemnify and hold harmless the Contractor Indemnified Parties from any Damages actually incurred or finally adjudicated as to any third-party claim, action or allegation: (i) that the Client’s data infringes a copyright or misappropriates any trade secrets enforceable in the country(ies) where the Client’s data is accessed, provided to or received by Contractor or was improperly provided to Contractor in violation of Client’s privacy policies or applicable laws (or regulations promulgated thereunder); (ii) asserting that any action undertaken by Contractor in connection with Contractor’ performance under this Agreement violates law or the rights of a third party under any theory of law, including without limitation claims or allegations related to the analysis of any third party’s systems or processes or to the decryption, analysis of, collection or transfer of data to Contractor; (iii) the use by Client or any of the Client Indemnified Parties of Contractor’s reports and deliverables under this agreement; and (iv) arising from a third party’s reliance on a Client Report, any information therein or any other results or output of the Services. Notwithstanding the foregoing or any other provision of this Agreement, Client shall have (i) no indemnification obligations other than defense costs in connection with any third-party claim, action or allegation arising out of or relating to Contractor

Indemnified Parties' statements or communications to the media or other third-parties; and (ii) no indemnification obligations in connection with any third-party claim, action or allegation arising out of or relating to Contractor Indemnified Parties' material breach of this Agreement.

- 15.4 Indemnification Procedures.** The Indemnified Party will (i) promptly notify the indemnifying party in writing of any claim, suit or proceeding for which indemnity is claimed, provided that failure to so notify will not remove the indemnifying party's obligation except to the extent it is prejudiced thereby, (ii) allow the indemnifying party to solely control the defence of any claim, suit or proceeding and all negotiations for settlement, and (iii) fully cooperate with the Indemnifying Party by providing information or documents requested by the Indemnifying Party that are reasonably necessary to the defense or settlement of the claim, and, at the Indemnifying Party's request and expense, assistance in the defense or settlement of the claim. In no event may either party enter into any third-party agreement which would in any manner whatsoever affect the rights of the other party or bind the other party in any manner to such third party, without the prior written consent of the other party. If and to the extent that any documents or information provided to the Indemnified Party would constitute Confidential Information within the meaning of this Agreement, the Indemnified Party agrees that it will take all actions reasonably necessary to maintain the confidentiality of such documents or information, including but not limited to seeking a judicial protective order.

This Article 15 states each party's exclusive remedies for any third-party claim or action, and nothing in the Agreement or elsewhere will obligate either party to provide any greater indemnity to the other. This Article 15 shall survive any expiration or termination of the Agreement.

## **16 FORCE MAJEURE**

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- 16.1** Neither party shall be liable to the other for failure to perform or delay in performance of its obligations under any Statement of Work if and to the extent that such failure or delay is caused by or results from causes beyond its control, including, without limitation, any act (including delay, failure to act, or priority) of the other party or any governmental authority, civil disturbances, fire, acts of God, acts of public enemy, compliance with any regulation, order, or requirement of any governmental body or agency, or inability to obtain transportation or necessary materials in the open market.
- 16.2** As a condition precedent to any extension of time to perform the Services under this Agreement, the party seeking an extension of time shall, not later than ten (10) days following the occurrence of the event giving rise to such delay, provide the other party written notice of the occurrence and nature of such event.

## 17 INSURANCE

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During the of the Agreement Term, Contractor shall, at its own cost and expense, obtain and maintain in full force and effect, the following minimum insurance coverage: (a) commercial general liability insurance on an occurrence basis with minimum single limit coverage of \$2,000,000 per occurrence and \$4,000,000 aggregate combined single limit; (b) professional errors and omissions liability insurance with a limit of \$2,000,000 per event and \$2,000,000 aggregate; Contractor shall name Client as an additional insured to Contractor's commercial general liability and excess/umbrella insurance and as a loss payee on Contractor's professional errors and omissions liability insurance and Contractor's employee fidelity bond/crime insurance, and, if required, shall also name Client's End Customer. Contractor shall furnish to Client a certificate showing compliance with these insurance requirements within two (5) days of Client's written request. The certificate will provide that Client will receive ten (10) days' prior written notice from the insurer of any termination of coverage.

## 18 GENERAL

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- 18.1 **Independent Contractors-No Joint Venture.** The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other nor may neither bind the other in any way, unless authorized in writing. The Agreement (including the Statements of Work) shall not be construed as constituting either Party as partner, joint venture or fiduciary of the other Party or to create any other form of legal association that would impose liability upon one Party for the act or failure to act of the other Party, or as providing either Party with the right, power or authority (express or implied) to create any duty or obligation of the other Party.
- 18.2 **Entire Agreement, Updates, Amendments and Modifications.** The Agreement (including the Statements of Work) constitutes the entire agreement of the Parties with regard to the Services and matters addressed therein, and all prior agreements, letters, proposals, discussions and other documents regarding the Services and the matters addressed in the Agreement (including the Statements of Work) are superseded and merged into the Agreement (including the Statements of Work). Updates, amendments, corrections and modifications to the Agreement including the Statements of Work may not be made orally but shall only be made by a written document signed by both Parties.
- 18.3 **Waiver.** No waiver of any breach of any provision of the Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof.
- 18.4 **Severability.** If any provision of the Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, and such provision shall be deemed to be restated to reflect the Parties' original intentions as nearly as possible in accordance with applicable Law(s).
- 18.5 **Cooperation in Defense of Claims.** The parties agree to provide reasonable cooperation to each other in the event that either party is the subject of a claim, action or allegation regarding this Agreement or a party's actions taken pursuant to this agreement, including, but not limited to, providing information or documents needed for the defence of such claims, actions or allegation; provided that neither party shall be obligated to incur any expense thereby.

- 18.6 **Counterparts.** The Agreement and each Statement of Work may be executed in counterparts. Each such counterpart shall be an original and together shall constitute but one and the same document. The Parties agree that electronic signatures, whether digital or encrypted, a photographic or facsimile copy of the signature evidencing a Party's execution of the Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.
- 18.7 **Binding Nature and Assignment.** The Agreement will be binding on the Parties and their respective successors and permitted assigns. Neither Party may, or will have the power to, assign the Agreement (or any rights thereunder) by operation of law or otherwise without the prior written consent of the other Party.
- 18.8 **Notices.** Notices pursuant to the Agreement will be sent to the addresses below, or to such others as either party may provide in writing. Such notices will be deemed received at such addresses upon the earlier of (i) actual receipt or (ii) delivery in person, by fax with written confirmation of receipt, or by certified mail return receipt requested. A notice or other communication delivered by email under this Agreement will be deemed to have been received when the recipient, by an email sent to the email address for the sender stated in this Section 19.7 acknowledges having received that email, with an automatic "read receipt" not constituting acknowledgment of an email for purposes of this section 19.7.

**Notice to Contractor:**

Cyber Ninjas Inc  
ATTN: Legal Department  
5077 Fruitville Rd  
Suite 109-421  
Sarasota, FL 34232

Email: [legal@cyberninjas.com](mailto:legal@cyberninjas.com)

**Notice to Client:**

Arizona State Senate  
Attn: Greg Jernigan  
1700 W. Washington St.  
Phoenix, AZ 85007  
[gjernigan@azleg.gov](mailto:gjernigan@azleg.gov)

- 18.9 **No Third-Party Beneficiaries.** The Parties do not intend, nor will any Section hereof be interpreted, to create for any third-party beneficiary, rights with respect to either of the Parties, except as otherwise set forth in an applicable Statement of Work.



**18.10 Dispute Resolution.** The parties shall make good faith efforts to resolve any dispute which may arise under this Agreement in an expedient manner (individually, "Dispute" and collectively "Disputes"). In the event, however, that any Dispute arises, either party may notify the other party of its intent to invoke the Dispute resolution procedure herein set forth by delivering written notice to the other party. In such event, if the parties' respective representatives are unable to reach agreement on the subject Dispute within five (5) calendar days after delivery of such notice, then each party shall, within five (5) calendar days thereafter, designate a representative and meet at a mutually agreed location to resolve the dispute ("Five-Day Meeting").

**18.10.1** Disputes that are not resolved at the Five-Day Meeting shall be submitted to non-binding mediation, by delivering written notice to the other party. In such event, the subject Dispute shall be resolved by mediation to be conducted in accordance with the rules and procedures of the American Arbitration Association, and mediator and administrative fees shall be shared equally between the parties.

**18.10.2** If the dispute is not resolved by mediation, then either party may bring an action in a state or federal court in Maricopa County, Arizona which shall be the exclusive forum for the resolution of any claim or defense arising out of this Agreement. The prevailing party shall be entitled to an award of its reasonable attorneys' fees and costs incurred in any such action.

**18.10.3 Governing Law.** All rights and obligations of the Parties relating to the Agreement shall be governed by and construed in accordance with the Laws of the State of Arizona without giving effect to any choice-of-law provision or rule (whether of the State of Arizona or any other jurisdiction) that would cause the application of the Laws of any other jurisdiction.

**18.11 Rules of Construction.** Interpretation of the Agreement shall be governed by the following rules of construction: (a) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires, (b) the word "including" and words of similar import shall mean "including, without limitation," (c) the headings contained herein are for reference purposes only and shall not affect in any way the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Master Service Agreement to be effective as of the day, month and year written above.

Accepted by:

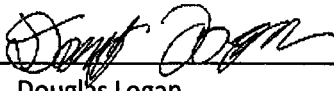
Client

By: <sup>DocuSigned by:</sup> Karen Fann, President  
748DEF61BCE340B

Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By:   
Douglas Logan

Title: CEO & Principal Consultant

## EXHIBIT 1. FORM OF STATEMENT OF WORK

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This Statement of Work (the "Statement of Work") is effective as of as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"), and is deemed to be incorporated into that certain Master Service Agreement dated the 31 day of March, 2021 (the "Master Agreement") by and between Contractor and Client (collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement").

### 1 GENERAL PROVISIONS

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- 1.1 Introduction. The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.4 of the Master Agreement shall control such conflict.
- 1.2 Services. Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, [and any Schedules attached hereto].

### 2 SCOPE & SERVICES DESCRIPTION

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### 3 TECHNICAL METHODOLOGY

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### 4 DELIVERABLE MATERIALS

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### 5 COMPLETION CRITERIA

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### 6 FEES / TERMS OF PAYMENT

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The charges for the Services are: \$\_\_\_\_\_ to be paid as follows:

[\$\_\_\_\_\_ upon execution of the Agreement and \$\_\_\_\_\_ upon completion of the Services]. Invoicing and terms of payment shall be as provided in Article 5 of the Agreement.

## 7 TERM/PROJECT SCHEDULE

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## 8 SIGNATURE & ACKNOWLEDGEMENT

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THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client:

By: \_\_\_\_\_

Title: \_\_\_\_\_

Accepted by:

Contractor: Cyber Ninjas, Inc.

By: \_\_\_\_\_

Douglas Logan

Title: CEO & Principal Consultant

## EXHIBIT 2. BACKGROUND SCREENING MEASURES

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The pre-employment background investigations include the following search components for U.S. employees and the equivalent if international employees:

- 10-Year Criminal History Search – Statewide and/or County Level
- 10-Year Criminal History Search – U.S. Federal Level
- Social Security Number Validation
- Restricted Parties List

### **Criminal History – State-wide or County:**

Criminal records are researched in the applicant's residential jurisdictions for the past seven years. records are researched through State-wide repositories, county/superior courts and/or lower/district/municipal courts. Generally, a State-wide criminal record search will be made in states where a central repository is accessible. Alternately, a county criminal record search will be conducted and may be supplemented by an additional search of lower, district or municipal court records. These searches generally reveal warrants, pending cases, and felony and misdemeanor convictions. If investigation and/or information provided by the applicant indicate use of an aka/alias, additional searches by that name must be conducted.

### **Criminal History – Federal:**

Federal criminal records are researched through the U.S. District Court in the applicant's federal jurisdiction for the past seven years. This search generally reveals warrants, pending cases and convictions based on federal law, which are distinct from state and county violations. The search will include any AKAs/aliases provided or developed through investigation.

### **Social Security Trace:**

This search reveals all names and addresses historically associated with the applicant's provided number, along with the date and state of issue. The search also verifies if the number is currently valid and logical or associated with a deceased entity. This search may also reveal the use of multiple social security numbers, AKAs/aliases, and additional employment information that can then be used to determine the parameters of other aspects of the background investigation.

**Compliance Database or Blacklist Check:**

This search shall include all of the specified major sanctioning bodies (UN, OFAC, European Union, Bank of England), law enforcement agencies, regulatory enforcement agencies, non-regulatory agencies, and high-profile persons (to include wanted persons, and persons who have previously breached US export regulation or violated World Bank procurement procedures including without limitation the lists specified below:

A search shall be made of multiple National and International restriction lists, including the Office of Foreign Asset Control (OFAC) Specially Designated Nationals (SDN), Palestinian Legislative Council (PLC), Defense Trade Controls (DTC) Debarred Parties, U.S. Bureau of Industry and Security Denied Persons List, U.S. Bureau of Industry and Security Denied Entities List, U.S. Bureau of Industry and Security Unverified Entities List, FBI Most Wanted Terrorists List, FBI Top Ten Most Wanted Lists, FBI Seeking Information, FBI Seeking Information on Terrorism, FBI Parental Kidnappings, FBI Crime Alerts, FBI Kidnappings and Missing Persons, FBI Televised Sexual Predators, FBI Fugitives – Crimes Against Children, FBI Fugitives – Cyber Crimes, FBI Fugitives – Violent Crimes: Murders, FBI Fugitives – Additional Violent Crimes, FBI Fugitives – Criminal Enterprise Investigations, FBI Fugitives – Domestic Terrorism, FBI Fugitives – White Collar Crimes, DEA Most Wanted Fugitives, DEA Major International Fugitives, U.S. Marshals Service 15 Most Wanted, U.S. Secret Service Most Wanted Fugitives, U.S. Air Force Office of Special Investigations Most Wanted Fugitives, U.S. Naval Criminal Investigative Services (NCIS) Most Wanted Fugitives, U.S. Immigration and Customs Enforcement (ICE) Most Wanted Fugitives, U.S. Immigration & Customs Enforcement Wanted Fugitive Criminal Aliens, U.S. Immigration & Customs Enforcement Most Wanted Human Smugglers, U.S. Postal Inspection Service Most Wanted, Bureau of Alcohol, Tobacco, and Firearms (ATF) Most Wanted, Politically Exposed Persons List, Foreign Agent Registrations List, United Nations Consolidation Sanctions List, Bank of England Financial Sanctions List, World Bank List of Ineligible Firms, Interpol Most Wanted List, European Union Terrorist List, OSFI Canada List of Financial Sanctions, Royal Canadian Mounted Police Most Wanted, Australia Department of Foreign Affairs and Trade List, Russian Federal Fugitives, Scotland Yard’s Most Wanted, and the World’s Most Wanted Fugitives.

## EXHIBIT 3. FORM OF NONDISCLOSURE SUBCONTRACT

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### Nondisclosure Agreement

1. I am participating in one or more projects for Cyber Ninjas, Inc., as part of its audit of the 2020 general election in Maricopa County, performed as a contractor for the Arizona State Senate (the "Audit").
2. In connection with the foregoing, I have or will be receiving information concerning the Audit, including but not limited to ballots or images of ballots (whether in their original, duplicated, spoiled, or another form), tally sheets, audit plans and strategies, reports, software, data (including without limitation data obtained from voting machines or other election equipment), trade secrets, operational plans, know how, lists, or information derived therefrom (collectively, the "Confidential Information").
3. In consideration for receiving the Confidential Information and my participation in the project(s), I agree that unless I am authorized in writing by Cyber Ninjas, Inc. and the Arizona State Senate, I will not disclose any Confidential Information to any person who is not conducting the Audit. If I am required by law or court order to disclose any Confidential Information to any third party, I will immediately notify Cyber Ninjas, Inc. and the Arizona State Senate.
4. Furthermore, I agree that during the course of the audit to refrain from making any public statements, social media posts, or similar public disclosures about the audit or its findings until such a time as the results from the audit are made public or unless those statements are approved in writing from Cyber Ninjas, Inc and the Arizona Senate.
5. I agree never to remove and never to transmit any Confidential Information from the secure site that the Arizona State Senate provides for the Audit; except as required for my official audit duties and approved by both Cyber Ninjas, Inc and the Arizona Senate.
6. I further understand that all materials or information I view, read, examine, or assemble during the course of my work on the Audit, whether or not I participate in the construction of such materials or information, have never been and shall never be my own intellectual property.
7. I agree that the obligations provided herein are necessary and reasonable in order to protect the Audit and its agents and affiliates. I understand that an actual or imminent failure to abide by these policies could result in the immediate termination of my work on the Audit, injunctive relief against me, and other legal consequences (including claims for consequential and punitive damages) where appropriate.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

2





**Cyber Ninjas**

Phone: (941) 3-NINJAS

Fax: (941) 364-6527

www.CyberNinjas.com

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

# Statement of Work

This Statement of Work (the "Statement of Work") is effective as of as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas Inc., a Florida Corporation, ("Contractor"), and Arizona State Senate ("Client"), and is deemed to be incorporated into that certain Master Service Agreement dated March 31, 2021 (the "Master Agreement") by and between Contractor and Client (collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement").

## 1 WHY CYBER NINJAS

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Cyber Ninjas is a cyber security company with a focus on application security and ethical hacking. We perform work across the financial services and government sectors. Our expertise allows us to both understand complex technology systems, as well as understand how a malicious attacker could potentially abuse those systems to meet his or her own agenda. This allows us to effectively enumerate the ways a system could be exploited, and with our partners to fully review if that scenario did in fact occur. This is very different from the compliance focused way that election systems are typically evaluated.

Both our company and our partners have extensive experience working specifically with Dominion Voting Systems. In addition, our subcontractors and partners are adept at digital forensic acquisition, and on implementing ballot hand-counting procedures. Two of our team members authored a hand-count ballot process that has been utilized in audits in two states; and has further been perfected for transparency and consistency. This combination of skills, abilities, and experience is what uniquely qualifies our team for the outlined work.

## 2 OUR TEAM

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Cyber Ninjas will serve as the central point-of-contact and organizer of all work conducted over the course of this agreement. However, there are different teams involved in each phase of the outlined work. Each of these teams have specialities and experience within the outlined areas of their coverage. This expertise is highlighted below.

### 2.1 Registration and Votes Cast Team

The Registration and Votes Cast Team has worked together with a number of individuals to perform non-partisan canvassing within Arizona related to the 2020 General election in order to statistically identify voter registrations that did not make sense, and then knock on doors to confirm if valid voters actually lived at the stated address. This brought forth a number of significant anomalies suggesting significant problems in the voter rolls.

They will be continuing this work as part of this effort to validate that individuals that show as having voted in the 2020 General election match those individuals who believe they have cast a vote.

## 2.2 Vote Count & Tally Team - Wake Technology Services

Members of the Wake Technology Services group have performed hand-count audits in Fulton County, PA and in New Mexico as part of the 2020 General Election cycle. In addition, team members have been involved in investigating election fraud issues, dating back to 1994. In that particular case in 1994, this team member worked closely with the FBI during the investigation.

As part of these audits in 2020, the Wake Technology Services team has developed an in-depth counting process that reduces opportunities for errors. This counting process has been expanded to make it more robust, and more transparent. As a result, they will be leading all ballot hand-counting processes.

## 2.3 Electronic Voting System Team – CyFIR, Digital Discovery & Cyber Ninjas, Analysts

Digital Forensic Acquisition will be performed either by CyFIR or Digital Forensics, and the analysis work will be performed by Cyber Ninjas, CyFIR and a number of additional analysts, the identities and qualifications of whom shall be made available to Client upon request.

CyFIR is a digital security and forensics company and a subcontractor on the contract for DHS's Hunt and Incident Response Team (HIRT). As specialists for DHS, they are familiar with responding to nation-state cyber activity including Advanced Persistent Threats (APT).

# 3 GENERAL PROVISIONS

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- 3.1 **Introduction.** The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.34 of the Master Agreement shall control such conflict.
- 3.2 **Services.** Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, and any Schedules attached hereto.

# 4 SCOPE & SERVICES DESCRIPTION

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This Statement of Work outlines the proposed methodology and scope for a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona. This audit will attempt to validate every area of the voting process to ensure the integrity of the vote. This includes auditing the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results. The final report will attempt to outline all the facts found throughout the investigation and attempt to represent those facts in an unbiased and non-partisan way. The final report will not include factual statements unless the statements can be readily substantiated with evidence, and such substantiation is cited, described, or appended to the report as appropriate.

The following sub-sections provide additional details of what will be conducted at each stage of the audit.

## 4.1 Registration and Votes Cast Phase

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During the Registration and Votes Cast Phase, it will be validated that Maricopa County properly registers who voted during an election, and that this system properly prevents duplicate voting. This will be performed on a minimum of three precincts.

Proposed scope of work:

- Review of Arizona's SiteBook system for checking in and tracking voters;
- Complete audit of a minimum of 3 precincts, based on statistical anomalies and precinct size;
- Analysis of existing research and data validating the legitimacy of voter rolls; and/or
- Comparing results against known lists of invalid voters (e.g. deceased voters, non-citizens, etc.).

This phase may help detect:

- Problems that could result in voters being able to vote more than once;
- Voters that voted but do not show in the list of those who voted;
- Voters who likely did not vote but showed as having voted;
- Potential invalid voters who cast a vote in the 2020 general election; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Individual ballots that are either wrong and/or invalid.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results; and/or
- Redacted spreadsheet of a list of those who voted in the target precincts.

## 4.2 Vote Count & Tally Phase

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During the Vote Count & Tally Phase, the counts and tallies for votes and the voting machines will be validated. This will include a hand-tally and examination of every paper ballot.

Proposed scope of work:

- Physically inspecting and hand-counting of ballots in Maricopa County;
- Counting of the total number of provisional ballots;
- Capture of video footage of the hand-counting of ballots; and/or
- Scanning of ballots in Maricopa County
  - NOTE: Provisional ballots which still have signatures attached to them will be counted to be sure they match the expected numbers but will not be scanned nor will the contents be visible in video.

This phase may help detect:

- Counts that do not match the expected results;
- Ballots that are visually different and possibly fraudulent; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Destroyed or otherwise missing ballots

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Unedited camera footage of the counting of every ballot, provided that, absent express judicial approval, any such footage cannot be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot is visible or discernible; and/or
- Ballot images of every scanned ballot, provided that, absent express judicial approval, any such images cannot be released or published to any third party.

### **4.3 Electronic Voting System Phase**

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During the Electronic Voting System Phase the results from the electronic voting machines will be validated to confirm they were not tampered with. This will be done on all systems related to SiteBook with Maricopa data, as well as all Election Management System related machines besides the Ballot Marking Devices (BMD)'s utilized for accessibility.

Proposed scope of work:

- Forensic Images of Arizona's SiteBook System including the database server, as well as any client machines associated with Maricopa County;
- Forensic images captured of the Election Management System main server, adjudication machines, and other systems related to the Election Management System;
- Forensic images of all Compact Flash, USB drives, and related media;
- Inspection to identify usage of cellular modems, Wi-Fi cards, or other technologies that could be utilized to connect systems to the internet or wider-area-network;
- Review of the Tabulator Paper Tally print-outs;
- Reviewing the exports from the EMS for "Audit File", "Audit Images" and "CVR";
- Reviewing ballot images captured by the tabulators
- Reviewing forensic images for possible altering of results or other issues; and/or
- Reviewing of tabulator and other logs.

This phase may help detect:

- Problems where the tabulator incorrectly tabulated results;
- Problems where the tabulator rejected results;
- Issues where results may have been manipulated in the software;
- Issues with the improper adjudication of ballots; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Ballot images and AuditMark images showing how the tabulator interpreted the ballot for counting, provided that, absent express judicial approval, such images cannot be released or published to any third party;
- CVR Report as generated from the software; and/or
- Log Files from the Tabulators (Redacted if Dominion Desires).

## 4.4 Reported Results Phase

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During the Reported Results Phase, results from all phases are compared against those expected results and those results which were publicly totalled as the official results to identify any inconsistencies.

Proposed scope of work:

- Results from various phases will be reviewed and tallied; and
- Results will be compared against the official, certified results.

This phase may help detect:

- Issues where result tallies were not properly transmitted to the official results; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results

## 5 METHODOLOGY

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The following section outlines the proposed methodology utilized in the various phases of the audit. When appropriate, these sections may reference more detailed procedures. Such procedures are considered proprietary and the intellectual property of Cyber Ninjas, our subcontractors or our Partners and can be made available for review but are not explicitly part of this agreement.

### 5.1 Registration and Votes Cast Phase

---

During the "Registration and Votes Cast Phase", Contractor may utilize precincts that have a high number of anomalies based on publicly available voting data and data from prior canvassing efforts to select a minimum of three precincts to conduct an audit of voting history related to all members of the voter rolls. A combination of phone calls and physical canvassing may be utilized to collect information of whether the individual voted in the election. No voters will be asked to identify any candidate(s) for whom s/he voted. This data will then be compared with data provided from Maricopa County Board of Elections.

### 5.2 Vote Count & Tally Phase

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The goal of the "Vote Count & Tally Phase" is to attempt to, in a transparent and consistent manner, count all ballots to determine the accuracy of all federal races, and to identify any ballots that are suspicious and potentially counterfeit. Ballots will be counted in a manner designed to be accurate, all actions are transparent, and the chain of custody is maintained.

#### 5.2.1 Counting Personnel

Non-partisan counters will be utilized that are drawn from a pool of primarily former law enforcement, veterans, and retired individuals. These individuals will undergo background checks and will be validated to not have worked for any political campaigns nor having worked for any vendor involved in the voting process. These individuals will also be prevented from bringing any objects other than clothing items worn on their persons into the counting area or taking any objects out of the counting area.

### 5.2.2 Accurate Counting

Counting will be done in groups with three individuals independently counting each batch of ballots, and an individual supervising the table. All counts will be marked on a sheet of paper as they are tallied. If, at the end of the hand count, the discrepancies between counting personnel aggregate to a number that is greater than the margin separating the first and second place candidates for any audited office, the ballots with discrepant total from the Contractor's counting personnel will be re-reviewed until the aggregate discrepancies within the hand count are less than the margin separating the first and second place candidates.

### 5.2.3 Transparent Counting

All activity in the counting facility will be videotaped 24 hours a day, from the time that Maricopa County delivers ballots and other materials until the time that the hand count is complete and all materials have been returned to the custody of Maricopa County. Such videotaping shall include 24-hour video monitoring of all entrances and exits, as well as activity at the counting tables.

### 5.2.4 Chain of Custody

All movement with ballots, cutting of seals, application of seals, and similar actions will be appropriately documented and logged, as well as captured under video to be sure the custody of ballots is maintained at all times. Access to the counting area will be restricted to duly authorized and credentialed individuals who have passed a comprehensive background check, with mandatory security searches and ingress/egress logs whenever entering or exiting the counting area.

## 5.3 Electronic Voting System Phase

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The proposed scope of the "Electronic Voting System Phase" is to confirm that the system accurately tallied and reported the votes as they were entered into the system and that remote access was not possible. All systems related to the voting will be forensically imaged, these machines will be booted up and checked for wireless signal usage, and the images will be reviewed to determine the accuracy of results and any indication of tampering.

### 5.3.1 Forensic Images

A digital forensics capture team will forensically capture all data on in-scope systems, utilizing industry best practices. This will create a digital copy of every single machine, Compact Flash Card, and USB drive in scope without altering the contents of the machines. Chain-of-custody documentation will be created to preserve these images in a manner sufficient to be utilized in a court-of-law.

### 5.3.2 Physical Analysis

The Election Management System equipment will be turned on and scanned with a wireless spectrum analysis tool to determine if the device is emitting any signals consistent with a known wireless frequency such as cellular, Bluetooth, WiFi or similar. Devices that show signs of emitting signals will be flagged and documented, and when possible without damaging the equipment; they will be physically inspected to determine the source of any detected signals.

### 5.3.3 Digital Analysis

The forensic images will be reviewed to validate reported totals from the tabulators, results stored within the Election Management System (EMS) Results Tally and Reporting software. These will be compared against the tabulator print-outs; and the machine will be checked for physical or digital tampering and any known ways of remote access to the machines.

#### 5.3.4 Opportunity for Observation

Before commencing the imaging or analysis steps described above (except for the Digital Analysis process), the Contractor will work with Maricopa County to provide at least five (5) days advance notice to any vendors of Maricopa County whose products will be the subject of imaging, inspection, or analysis. Such vendors will be permitted the opportunity to attend and observe the Contractor's imaging or inspection of the vendors' products. The vendor will not be allowed to be present for the analysis of the captured images. Such vendors are third party beneficiaries of this provision and will have standing to challenge and secure injunctive relief against any denial of their right to observe the inspection of their products.

### 5.4 Reported Results Phase

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During the Reported Results phase, results from all phases are compared to find differences between tallies or other anomalies. These results are then compared against data at the Secretary of State and Maricopa Board of Elections layers. Any inconsistencies will be reported and highlighted.

## 6 RESPONSIBILITIES

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The following section outlines the key responsibilities for the proper execution of the Agreement between the Contractor and the Client for all outlined work within the scope.

### 6.1 Registration and Votes Cast Phase

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#### Contractor Responsibilities

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

#### Client Responsibilities

- Arrange for a database export of SiteBook to be provided to the Client which includes all fields normally found in a publicly requested copy of the voter rolls, in addition to any other non-sensitive fields related to the data such as modifications or other time-stamps, voter history, last user edited, IP address of edit; or anything similar.

### 6.2 Vote Count & Tally Phase

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#### Contractor Responsibilities

- Provide the proper personnel and equipment to execute all aspects of the phase including scanning, counting, the setup of equipment for recording of the counting, and the supervision of activities.
- Ensure that all onsite personnel follow any in-place COVID requirements.

#### Client Responsibilities

- Provide security of the building during the course of the engagement. This includes having sufficient security to prevent access to the building 24/7 during the entire time, including ensuring that safe working conditions can exist during the entirety of the audit;
- Provide electricity and access to the facilities and tables necessary for up to 120 people at a time following any current COVID requirements. This is estimated to be about 7,200 square feet;
- Provide access to all paper ballots from the November 2020 General Election within Maricopa County. This includes early voting, election day ballots, provisional ballots, spoiled ballots, printed unused ballots and any other ballot categories that are part of the 2020 General Election. For all ballots this should include the original hard copies of the ballots that were electronically adjudicated ballots.
- Provide a mechanism to allow for the proper equipment to be brought into the facility where the counting will take place.

- Full chain of custody documentation for all ballots from the point they were cast to the point where we gain access to the ballots, to the extent such documentation is in Client's possession.
- Purchase orders for all purchased ballots, or ballot paper, including counts of each, as well as delivery receipts of the quantity of ballots received, to the extent such documentation is in Client's possession.
- Full counts from any ballots printed on demand, as well as the location for which they were printed, to the extent such documentation is in Client's possession.
- Provide wired access to internet to be able to stream the counting video capture, provided that any such video footage must be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot shall not be visible or discernible.

## **6.3 Electronic Voting System Phase**

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### **Contractor Responsibilities**

- Provide the proper personnel to execute all aspects of the phase including the capture of forensic digital images of all systems related to the Election Management System; and
- Ensure that all onsite personnel during the forensic capture follow any in-place COVID requirements.

### **Client Responsibilities**

- Provide physical access to the EMS Server, Adjudication machines, ImageCast Central, ImageCast Precinct, ImageCast Ballot Marking Devices, SiteBook, NOVUS systems, and any other Election Management System equipment or systems utilized in the November 2020 General Election to the forensic capture team;
- Provide access to Compact Flash Cards, USB Drives, and any other media utilized in the November 2020 General Election for the forensic capture team to image;
- Provide electricity and sufficient access to the machines in scope in order to provide a team of up to 15 forensic capture individuals to work and boot up the systems;
- Provide any needed credentials for decrypting media, decrypting computer hard drives, the EMS machines, or other systems that may be required for a proper forensic capture of the machines;
- Provide the output of the "Audit File," "Audit Images," and CVR exports from the Dominion machines which includes all ballot images and AuditMark images of every ballot processed by the machines; and
  - NOTE: The above may be able to be captured from the forensic images; but Maricopa County assistance could be needed in identifying where the AuditMark files are located.
- Provide any needed technical assistance allowing all the above to be successfully captured.

## **6.4 Reported Results Phase**

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### **Contractor Responsibilities**

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

### **Client Responsibilities**

- Provide the official results per precinct for all counts associated with the November 2020 General Election.



## **7 DELIVERABLE MATERIALS**

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The primary deliverable for the Election Audit will be a report detailing all findings discovered during the assessment. The parties agree that the report is provided AS IS, without any promise for any expected results. Additional artifacts as collected during the work will also be provided, as outlined within the scoping details.

This final report will include:

- An executive summary outlining the overall results of the audit from the various phases;
- A methodology section outlining in detail the methodology and techniques utilized to capture and validate the results;
- Tables, charts, and other data representing the findings of the data;
- Appendices or attached files demonstrating all evidence utilized to come to the outlined conclusions (if applicable); and
- Recommendations on how to prevent any detected weaknesses from being a problem in future elections (if applicable).

In addition to the report, various anticipated artifacts for public consumption will be generated over the course of this work, as outlined under the "Scope of Work." Client will determine in its sole and unlimited discretion whether, when, and how the Contractor should release those resources to the public. This will include all videos, ballot images, and other data.

## **8 COMPLETION CRITERIA**

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Contractor shall have fulfilled its obligations when any one of the following first occurs:

- Contractor accomplishes the Contractor activities described within this Statement of Work, including delivery to Client of the materials listed in the Section entitled "Deliverable Materials," and Client accepts such activities and materials without unreasonable objections; or
- If Client does not object or does not respond to Contractor within seven (7) business days from the date that the deliverables have been delivered by Contractor to Client, such failure to respond shall be deemed acceptance by Client.

## 9 TERM / PROJECT SCHEDULE / LOCATION

The following table outlines the expected duration of the various proposed work outlined within the Agreement. Work will commence on a date mutually agreeable to both Contractor and Client according to a schedule which is outlined via email.

Each phase outlined below can be conducted simultaneously, with the exception of the Reported Results phase which must be completed at the end. Roughly an additional week of time at the conclusion of all phases is needed to complete and finalize reporting. Lead times before a phase can start as well as their duration can be found below. Faster lead times can potentially be accommodated on a case-by-case basis.

Service Name	Required Notice / Lead Time	Est. Duration in Days	Additional Details / Location
Registration and Votes Cast Phase	1 Week	20	This work will be done remotely.
Vote Count & Tally Phase	2-3 Weeks	20*	The entire time will be onsite at the location designated by the Client.  Access will be required 4 days before the start to setup the space.  *Race recounts as outlined in 5.2.2 may require the timeline to be extended beyond the listed days.
Electronic Voting System Phase	1-2 Weeks	35	It is estimated that 15 will be onsite. The remainder of the time will be remote.  Review of location setup is requested the week prior to ensure proper workspace.
Reported Results Phase	Completion of Other Phases	5	This phase will be completed offsite.  Final Report Delivered 1 Week After Completion

## 10 FEES / TERMS OF PAYMENT

The following table outlines the costs associated with the proposed work. A third of the fees will be due at the execution of the contract. The remaining balance will be payable within 30 days from the completion of the audit.

Selected	Name	Price Each	Total
1	Maricopa County – Full Audit	\$150,000	\$150,000.00
	<b>Total:</b>		<b>\$150,000.00</b>

## 11 SIGNATURE & ACKNOWLEDGEMENT

THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client: Arizona State Senate

By: DocuSigned by:  
Karen Fann, President

Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By: 

Douglas Logan

Title: CEO & Principal Consultant

3

## **Tulumello, Kathy**

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**From:** Buchanan, Wyatt  
**Sent:** Thursday, May 20, 2021 1:13 PM  
**To:** Tulumello, Kathy  
**Subject:** FW: PRR for emails and text messages re: President Fann, Ken Bennett and others  
**Attachments:** Oxford\_A - AZRepublic - PRR42221 - Responsive documents - 27 pages - KFann.pdf

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**From:** Oxford, Andrew <Andrew.Oxford@gannett.com>  
**Sent:** Thursday, May 20, 2021 1:12 PM  
**To:** Buchanan, Wyatt <Wyatt.Buchanan@gannett.com>  
**Subject:** FW: PRR for emails and text messages re: President Fann, Ken Bennett and others

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**From:** Norm Moore <NMoore@azleg.gov>  
**Sent:** Wednesday, May 19, 2021 4:30 PM  
**To:** Oxford, Andrew <Andrew.Oxford@gannett.com>  
**Cc:** Anglen, Robert <robert.anglen@arizonarepublic.com>  
**Subject:** RE: PRR for emails and text messages re: President Fann, Ken Bennett and others

Andrew,

I apologize for the delay in sending you these responsive documents. I thought I had already sent this to you on Monday but that obviously was not the case.

The attached pdf file contains 27 pages of responsive documents regarding your request.

If you have any questions or need further clarification please contact me at your earliest convenience.

Sincerely,

Norm Moore  
Arizona State Senate  
Public Records Attorney  
[nmoore@azleg.gov](mailto:nmoore@azleg.gov)

Sincerely,

Norm Moore  
Arizona State Senate  
Public Records Attorney  
[nmoore@azleg.gov](mailto:nmoore@azleg.gov)

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**From:** Oxford, Andrew <Andrew.Oxford@gannett.com>  
**Sent:** Thursday, April 22, 2021 10:23 AM

**To:** Norm Moore <[NMoore@azleg.gov](mailto:NMoore@azleg.gov)>

**Subject:** PRR for emails and text messages re: President Fann, Ken Bennett and others

Good morning,

Pursuant to A.R.S. §§ 39-121 through 39-121.03 (the "Arizona Public Records Law"), as a reporter for The Arizona Republic, I request that you make available to me for examination the following documents:

- 1) All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate's liaison for the audit during, CY 2021;
- 2) All emails and text messages between Senate President Karen Fann and Christina Bobb during CY 2021;
- 3) All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate's liaison for the audit, during CY 2021;
- 4) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Doug Jones, of Cyber Ninjas during CY 2021;
- 5) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb during CY 2021.

As you know, state law provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. While I expect that you will send me all non-exempt portions of the records I have requested, I respectfully reserve the right to challenge your decision to withhold any materials.

Since some of the documents listed above may be more readily available than others, please provide the documents that are available as soon as possible without waiting to provide access to all the documents.

The foregoing request is for the noncommercial purpose of gathering the news, and copies of the foregoing documents will not be used for a commercial purpose.

If you can provide copies of the records electronically, please send them to me at this email address. If they can be made available by disk, I would be happy to make arrangements to pick up a copy.

I would appreciate your communicating with me by email ([andrew.oxford@arizonarepublic.com](mailto:andrew.oxford@arizonarepublic.com)), rather than by mail, if you have any questions regarding this request.

Thank you for your attention to this request.

All the best,

Andrew Oxford  
The Arizona Republic  
480-417-8946

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05/19/21

Norm Moore  
Arizona State Senate  
Public Records Attorney  
1700 W Washington  
Phoenix, AZ 85007

Karen Fann  
Arizona Senate President  
1700 W Washington  
Phoenix, AZ 85007

Re; Arizona audit/ denial of records

Mr. Moore/ Ms. Fann:

This notice is to advise you that you have improperly denied *The Arizona Republic* (PNI) access to public records requested under the provisions of the Arizona Public Records Law (ARS. Sec. 39-121 through 39-121.03).

On April 22, Arizona Republic reporter Andrew Oxford requested records from the Arizona Senate involving the Arizona audit.

Specifically, Oxford asked for:

- 1) All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate's liaison for the audit from Jan. 1, 2021 to current
- 2) All emails and text messages between Senate President Karen Fann and Christina Bobb from Jan. 1, 2021 to current
- 3) All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate's liaison for the audit from Jan. 1, 2021 to current
- 4) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Doug Logan of Cyber Ninjas from Jan. 1, 2021 to current
- 5) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb from Jan. 1, 2021 to current

To date you have not responded to any of these records requests.

We believe your refusal to release the requested records – or even acknowledge PNI's request – is a breach of duty and constitutes a statutory denial.

The failure to turn over these records violates the Arizona Public Records Law, which provides a broad right of public inspection and copying of public records. That statute



commands that “[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*” A.R.S. § 39-121 (emphasis added).

The statute “evinces a clear policy favoring disclosure.” *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). Indeed, “access and disclosure is the strong policy of the law . . .” *Id.* at 491, 687 P.2d at 1246. Furthermore, “[a]ccess to a public record is deemed denied if a custodian fails to *promptly* respond to a request for production of a public record.” A.R.S. § 39-121.01(E) (emphasis added).

In view of this strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are *presumed* open to the public for inspection as public records.” *Id.* (emphasis added). In applying the statute, “[d]oubts should be resolved in favor of disclosure.” Ariz. Op. Att’y Gen. No. R75-781 at 145 (1975-76).

To overcome the heavy presumption in favor of disclosure, the records custodian must produce facts to “specifically demonstrate” that release of the requested records “would violate rights of privacy or confidentiality” or harm the “best interests of the state.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

The custodian cannot meet this burden by speculating or “argu[ing] in global generalities of the possible harm that might result from the release.” *Cox*, 175 Ariz. at 14, 852 P.2d at 1198; *Star Publ’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (Ct. App. 1993) (party opposing disclosure must “demonstrate a *factual basis* why a particular record ought not be disclosed”) (emphasis added). The custodian also must demonstrate that any such harm outweighs the public’s right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (Ct. App. 2001) (“[t]he public’s right to know any public document is weighty in itself”).

Arizona law subjects government entities to awards of attorneys’ fees and costs where a legal challenge is necessary to combat the wrongful denial of public record requests. *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; A.R.S. § 39-121.02(B) (“The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.”).

You have advanced no lawful reason for withholding the requested records and PNI is entitled to prompt compliance with its request. A.R.S. § 39-121.01(D)(1) (public officers “shall promptly furnish” public records upon request).

It makes no difference whether the records are kept on public or personal devices. We maintain the law requires you to make these records regarding this public business available to us.

As you are no doubt aware, Arizona courts have ruled that records on a public official’s private device can be considered a public record if those records involve public business.

Arizona Attorney General Mark Brnovich has also advised that “public officials cannot use private devices and accounts for the purpose of concealing official conduct.” (No. I17-004 (R15-026) Re: Whether Arizona’s Public Records Law Extends Beyond its Terms and Applies to Privately Sent Messages, July 7, 2017).

Arizona law provides specific exemptions under which records can be withheld. But simply declining to acknowledge a request does not meet even the minimum threshold requirements under the Arizona Open Records Law.

Exemptions are spelled out in ARS Sec. 39-123 through Sec. 139-128. In general, the only itemized prohibitions pertain to those of law enforcement officers, court officials, certain people involved in criminal justice proceedings, and certain current and former elected officials.

Even in cases where there is a valid state interest, absent any express prohibition, the state may exercise its discretion and choose to release records.

Failure to immediately release the requested records constitute a continued violation of ARS. Sec. 39-121 through 39-121.03 and would leave no alternative but to seek relief from court.

We ask that you respond to this request within the next seven days. Should you have any questions, please feel free to call Robert Anglen at 602-316-8395 or Andrew Oxford at 480-417-8946.

Sincerely,

Robert Anglen  
Consumer Investigations  
The Arizona Republic | azcentral | The USA Today Network  
602-316-8395  
[Robert.anglen@arizonarepublic.com](mailto:Robert.anglen@arizonarepublic.com)

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Jen Fifield  
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**Kathy Tulumello**  
**News Director**  
**The Arizona Republic | azcentral | The USA Today Network**  
**602-509-9503**  
**[Kathy.Tulumello@arizonarepublic.com](mailto:Kathy.Tulumello@arizonarepublic.com)**

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David J. Bodney  
Tel: 602.798.5454  
Fax: 602.798.5595  
bodneyd@ballardspahr.com

May 24, 2021

*Via E-Mail (kfann@azleg.gov, nmoore@azleg.gov,) and U.S. Mail*

Karen Fann, Senate President  
Norm Moore, Public Records Attorney  
Arizona State Senate  
1700 West Washington Street  
Phoenix, Arizona 85007-2809

Re: Phoenix Newspapers, Inc./Access: Right to Inspect Public Records Relating to  
Maricopa County Ballot Audit

Dear Mr. Moore and Sen. Fann:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com (“PNI”). On PNI’s behalf, I write to secure your prompt and full compliance with PNI’s request to inspect certain public records – specifically, records related to the Arizona Senate’s audit of Maricopa County ballots. This time-sensitive demand to inspect public records is made for a non-commercial, newsgathering purpose pursuant to A.R.S. § 39-121, *et seq.* (the “Arizona Public Records Law”).

#### Factual Background

On April 22, 2021, *Arizona Republic* reporter Andrew Oxford requested the following records (the “Request”):

1. All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate’s liaison for the audit, during CY 2021;
2. All emails and text messages between Senate President Karen Fann and Christina Bobb during CY 2021;
3. All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate’s liaison for the audit, during CY 2021;
4. All emails and text messages between Ken Bennett, the Senate’s liaison for the audit, and Doug Jones, of Cyber Ninjas during CY 2021; and

Karen Fann, Senate President  
May 24, 2021  
Page 2

5. All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb during CY 2021.

On May 19, 2021, you provided 27 pages of responsive documents consisting of six emails between Senator Fann and Ken Bennett. It is not clear if there are additional records responsive to section 1 of the Request, although both the content of the released records and the context of the events surrounding the audit strongly suggest that more records exist. Even more concerning is the fact that to date, you have not provided *any* records in response to sections 2-5 of the Request.

PNI is particularly concerned that you have not provided a copy of a March 8, 2021 email exchange between Sen. Fann and Ms. Bobb – which is responsive to section 2 of the Request – that you disclosed to another requester, Carrie Levine of the Center for Public Integrity. The content and tone of that email exchange also indicates that there are likely other responsive emails between Sen. Fann and Ms. Bobb that have not been produced. This discrepancy raises serious questions regarding the thoroughness of the search for responsive records and compliance with the law.

PNI has not received any explanation for why the Senate has failed to respond fully to these requests or made copies of all of the records available for inspection. By this letter, we renew PNI's request for *prompt* and *full* access to inspect and secure copies of the Records from the Senate pursuant to A.R.S. §39-121 et seq. (the "Arizona Public Records Law"). We trust you will take this opportunity to comply with PNI's request promptly and fully for the reasons explained more fully below.

#### The Arizona Public Records Law

The Senate's refusal to provide all of the requested Records violates the Arizona Public Records Law, which provides a broad right of public inspection and copying of public records. The statute commands that "[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*" A.R.S. § 39-121 (emphasis added). The statute "evinces a clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 490 (1984). Indeed, "access and disclosure is the strong policy of the law . . . ." *Id.* at 491. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007). In view of this strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that "*all* records required to be kept under A.R.S. § 39-121.01(B) are *presumed open to the public* for inspections as public records." *Carlson*, 141 Ariz. at 491 (emphasis added). In applying the statute, "[d]oubts should be resolved in favor of disclosure." Ariz. Op. Att'y Gen. No. R75-781 at 145 (1975-76).

To overcome the presumption in favor of disclosure, the Senate must produce facts to "specifically demonstrate" that release of the requested records "would violate rights of

privacy or confidentiality” or harm the “best interests of the state.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). See also *Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The Senate cannot meet this burden by speculating or “argu[ing] in global generalities of the possible harm that might result from release.” *Cox*, 175 Ariz. at 14. Rather, the Senate must provide a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. See, e.g., *Star Pub’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). The Senate also must demonstrate that any such harm outweighs the public’s strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) (“[t]he public’s right to know any public document is weighty in itself.”).

The requested materials – emails about the audit of Maricopa County ballots involving Senators and the Senate’s liaison to the audit – are unquestionably public records. These records directly involve the official duties of state legislators and the conduct of Senate business, and are therefore subject to disclosure. See *Carlson*, 141 Ariz. at 490 (noting that Arizona Public Records Law covers those records “reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties”); A.R.S. § 39-121.01(B) (“All officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from the state or any political subdivision of the state.”).

The Senate has failed to specifically demonstrate *any* ground for not providing copies of *all* of the requested materials promptly. It has provided no justification for withholding the Records, let alone one that would outweigh the public’s “weighty” interest in access. *Keegan*, 201 Ariz. at 351. While the Senate may try to justify certain redactions on privacy grounds, it has not done so here. In these circumstances, the requested materials should be released forthwith in accordance with A.R.S. §39-121 *et seq.*

#### The Requested Materials Should Be Released Without Further Delay

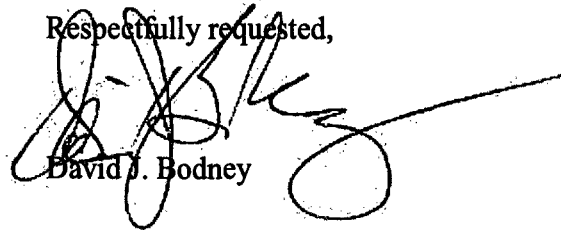
Arizona law subjects the Senate to an award of attorneys’ fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; A.R.S. § 39-121.02(B) (“The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.”). The Senate has not advanced a lawful reason for withholding the requested materials, and PNI is entitled to prompt compliance with its requests. A.R.S. § 39-121.01(E) (access deemed denied where custodian failed to “promptly” respond); *Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 538-39 (App. 2008) (finding that the burden is on the agency to demonstrate that a response to a public records request is timely).

Karen Fann, Senate President  
May 24, 2021  
Page 4

This letter is intended to give the Senate one further opportunity to release the requested materials as Arizona law requires – promptly. Accordingly, PNI requests that you provide copies of the requested materials by 5:00 p.m. on Friday, May 28, 2021. PNI reserves the right to take any and all further steps it deems appropriate to secure access to the requested materials under the Arizona Public Records Law, including the filing of a special action to secure judicial enforcement of its rights. Of course, we would prefer to resolve this matter amicably and constructively, without resort to litigation.

I look forward to hearing from you.

Respectfully requested,

A handwritten signature in black ink, appearing to read "David J. Bodney", with a long horizontal flourish extending to the right.

David J. Bodney

DJB



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**From:** Norm Moore <[NMoore@azleg.gov](mailto:NMoore@azleg.gov)>  
**Sent:** Thursday, May 27, 2021 12:29 PM  
**To:** Bodney, David J. (PHX) <[BodneyD@ballardspahr.com](mailto:BodneyD@ballardspahr.com)>  
**Cc:** Kory Langhofer <[kory@statecraftlaw.com](mailto:kory@statecraftlaw.com)>; Thomas Basile <[tom@statecraftlaw.com](mailto:tom@statecraftlaw.com)>  
**Subject:** Response to letter of 5/24/21 regarding production of records

 **EXTERNAL**

Mr. Bodney,

I am writing in response to your letter that was forwarded to me by President Fann of May 24, 2021 regarding the right to inspect public records relating to the Maricopa County ballot audit.

On May 19, 2021, as you stated in your letter I did provide 27 pages of responsive documents consisting of emails between President Fann and Ken Bennett. Those emails are the responsive email records regarding paragraph 1.

As you may be aware, the Arizona State Senate (Senate) does not pay for nor provide members of the Senate a cellular phone for use in connection with the transaction of public business as a Senator nor does the Senate reimburse

members for the cost of their own private personal cellular phone or the monthly cost charged by the service provider to the member for the use of their private cellular phone. Since the Senate doesn't pay for or provide cellular phones to the members, the Senate has no government managed system in place to search for and produce any records from a member's personal private cellular phone. However, it is my understanding that President Fann has agreed to produce any responsive nonprivileged text messages between herself and Ken Bennett in paragraph 1 and Christina Bobb in paragraph 2.

There was in fact an inadvertent mistake that was made by not including responsive emails between President Fann and Christina Bobb in paragraph #2. The mistake was not an attempt to fail to produce records or to not comply with the law. The mistake was a clerical one for which I apologize and take full responsibility. The attached pdf contains 9 pages of responsive documents concerning emails between President Fann and Christina Bobb during calendar year 2021 as specified in paragraph 2.

In regards to paragraph 3, the only email between Senator Borrelli and Ken Bennett is the very first email that was included in the responsive documents sent to Mr. Oxford on May 19, 2021. That particular email from Ken Bennett was sent to a number of people including both President Fann and Sonny Borrelli. Since that document was already included as a responsive document regarding paragraph #1 it was not produced again and included in the responsive documents in paragraph #3 as it was a duplicative responsive document. Senator Borrelli has indicated he has no responsive text messages to Ken Bennett.

Although the Senate's position is that it is not legally obligated to provide records as requested in paragraphs 4 and 5, the Senate is agreeing to search and produce documents as requested in paragraphs 4 and 5. I do want to ask for a clarification regarding paragraph #4. The request for email and text messages between Ken Bennett specifies "Doug Jones" but I am speculating that it is really intended to specify "Doug Logan", the CEO of Cyber Ninjas. Please advise.

It is my understanding that you and Mr. Langhofer are supposed to communicate in the near future regarding this matter. I would welcome an opportunity to participate in those discussions.

Again, I do apologize for my clerical error made for not originally including the responsive nonprivileged emails between President Fann and Christina Bobb to Andrew Oxford.

Sincerely,

Norm Moore  
Arizona State Senate  
Public Records Attorney  
[nmoore@azleg.gov](mailto:nmoore@azleg.gov)

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May 27, 2021

Norm Moore  
Arizona State Senate  
Public Records Attorney  
1700 W Washington  
Phoenix, AZ 85007

Karen Fann  
Arizona Senate President  
1700 W Washington  
Phoenix, AZ 85007

Re; Arizona audit/new records request

Under the provisions of the Arizona Public Records Law (ARS. Sec. 39-121 through 39-121.03), we are sending this request for prompt inspection of public records held by your office.

Specifically, we are requesting a range of records related to the ongoing audit of 2.1 million ballots cast in Maricopa County 2020 general election.

This request not only seeks records in the possession of the Arizona Senate, the Senate president and the Senate's audit liaison. It also seeks records in the possession of contractors authorized to conduct public's business (ie; the audit) by public officials. *See discussion below re; ARS Sec. 35-149, responsibility of public bodies receiving private monies.*

The requested records include:

- All invoices involving Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present
- All audit related invoices in the possession of Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present

- All financial documents involving Cyber Ninjas Wake Technology Services and CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present
- All audit-related correspondence (texts, emails, other) to/from Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors and:
  - Ken Bennett
  - Randy Pullen
  - Warren Petersen
  - Karen Fann
  - Doug Logan
  - Eugene Kern
  - Anthony Kern
  - Mark Finchem
  - Andy Biggs
  - Paul Gosar
  - Kelli Ward
  - Sonny Borrelli
  - Leo Biasiucci
  - Wendy Rogers
  - Jack Sellers
  - Bill Gates
  - Clint Hickman
  - Steve Church
  - Steve Gallardo
  - Stephen Richer
  - Sidney Powell
  - Patrick Byrne
  - Lin Wood
  - Donald Trump
  - Sen. Sonny Borrelli
  - Leo Biasiucci
  - Wendy Rogers
- All audit-related correspondence (texts, emails, other) to/from:
  - Ken Bennett

- Randy Pullen
  - Warren Petersen
  - Karen Fann
  - Doug Logan
  - Eugene Kern
  - Anthony Kern
  - Mark Finchem
  - Andy Biggs
  - Paul Gosar
  - Kelli Ward
  - Sonny Borrelli
  - Leo Biasiucci
  - Wendy Rogers
  - Jack Sellers
  - Bill Gates
  - Clint Hickman
  - Steve Church
  - Steve Gallardo
  - Stephen Richer
  - Sidney Powell
  - Patrick Byrne
  - Lin Wood
  - Donald Trump
- 
- A full list of ballot counters who participated in the Arizona Audit from April 23, 2021 to present and any records of payments to them
  - A full list of organizations and individuals who participated in recruiting efforts for the Arizona Audit from Jan. 1, 2021 to present and any records of payments to them
  - Any body camera or head camera footage (Go Pro, etc.) recorded by audit employees, contractors and agents at Veteran’s Memorial Stadium
  - A full list of observers of the Arizona Audit from April 23, 2021 to present
  - All sign in/ sign out logs to the Veterans Memorial Coliseum from April 23, 2021 to present, including: visitors, volunteers, contracted employees, counters, observers, vendors and anyone else who gained admittance to the coliseum during the audit.

- Any records of payments to the Arizona Rangers for security during the audit from April 23, 2021 to present
- Any audit-related correspondence (texts, messages, email, posts, other) on third party messaging systems and apps such as Telegram, Twitter, WhatsApp, SnapChat, and Signal from Jan. 1, 2021 to present. Those would include all to/from/by:
  - Any agent or member of the Arizona Senate
  - Any agent or member of Cyber Ninjas
  - Any agent or member of Wake Technology Services
  - Any agent or member of CyFIR, LLC., and any other unnamed contractors/subcontractors
- All resumes and CVs for employees/ agents of Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors.

Recognizing this is a lengthy list, we are asking you to provide information as soon as it is available rather than waiting until you have collected all of the documents requested.

We do, however, look forward to your complete response within 10 days, a time frame we believe adequately suffices under the “reasonable” requirement evinced by statute.

Should you need to more time, we will happily work with you to create a mutually agreeable timetable for the continued release of documents.

We want to make clear that we believe you are the proper custodian for these records, whether or not you have them in your immediate possession or if they are in the possession of one of your agents, contractors or subcontractors.

The fact is, the Arizona Audit – the so called “people’s audit” as described by Arizona GOP Chair Kelli Ward in livestream interviews with Arizona Senate Audit Liaison Ken Bennett – is a public undertaking using public funds.

Any argument that you are not the proper custodian, or that you simply don’t have the records in your possession, flies in the face of Arizona statutes and previous court rulings.



Arizona laws covering the disposition of private monies make clear that a public entity can only accept such fun for activities it is statutorily authorized to perform.

The statute commands that “Every department, institution, board or commission receiving private monies or contributions available for its support or for the purpose of defraying expenses or work done under its direction, other receipts that are subject to refund or return to the sender or receipts that have not yet accrued to the state shall ... shall keep an accounting of each such fund or contribution.” A.R.S. § 35-149.

The law requires public entities to keep records of: The sources of private monies; the terms and conditions under which and the purpose for which the monies were received; the names of the trustees or administrators of the monies or contributions.

There can be no argument that all the records pertaining to the Arizona Audit are covered here. And the Arizona Public Records makes explicit that any such records are de facto public records.

Arizona’s Public Records Law requires public bodies to maintain records of expenditures, and makes those records open to public inspection.

In view of the strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are *presumed* open to the public for inspection as public records.” *Id.* (emphasis added). In applying the statute, “[d]oubts should be resolved in favor of disclosure.” Ariz. Op. Att’y Gen. No. R75-781 at 145 (1975-76).

If any part of this request is denied, please cite the specific exemptions under the law that you think justifies your refusal to release the information and inform us of your administrative appeal process.

While the law allows you to charge for the actual cost of copying these documents, we request that you waive any such fee since we are reporters working for a newspaper, which is not considered a commercial enterprise under the law.

**azcentral. | THE ARIZONA REPUBLIC**

Should you feel the need to charge for this request, we would ask that you inform us of any charge prior to making copies.

Be advised that we are prepared to pursue whatever legal remedy necessary to obtain the requested records.

We again ask that you respond to this request within the next 10 days. Should you have any questions, please call Robert Anglen at 602-316-8395.

Sincerely,

Robert Anglen  
Consumer Investigations  
The Arizona Republic | azcentral | The USA Today Network  
602-316-8395  
[Robert.anglen@arizonarepublic.com](mailto:Robert.anglen@arizonarepublic.com)

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Jen Fifield  
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bodneyd@ballardspahr.com

June 2, 2021

*Via E-Mail (kbazos@gmail.com)*

Ken Bennett  
kbazos@gmail.com

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Bennett:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and *azcentral.com* ("PNI"). On PNI's behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") to inspect public records you have received or generated while performing your duties as an appointed public officer in connection with the Arizona Senate's audit of Maricopa County ballots from the 2020 election. This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- All communications that you received or sent while performing your Senate-appointed duties regarding the audit from January 1, 2021, to the present, including all communications regarding the audit involving you and any member, officer, employee or agent of the Arizona Senate or any person involved in the performance of the audit, including any officer, employee or agent of Cyber Ninjas, Wake Technology Services, CyFIR or any other corporate entity involved. As used here, "communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.
- All invoices and financial documents reflecting work performed, services rendered or goods delivered, rented or used in connection with the audit and all records of any payments to any person or corporate entity in connection with the audit.

- All other documents regarding the performance of your duties, or the duties of others, in connection with the audit.

PNI recognizes that this may involve a substantial amount of information. However, I understand that counsel for the Arizona Senate and President Fann have indicated that you have agreed to preserve and produce such records in connection with public records requests to the Senate from PNI and other parties. Accordingly, I look forward to your response to this request within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law commands that “[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*” A.R.S. § 39-121 (emphasis added). The statute “evinces a clear policy favoring disclosure.” *Carlson*, 141 Ariz. at 490. The statute “defines ‘public records’ broadly and creates a presumption requiring the disclosure of public documents.” *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies in this instance because you are a “public officer” within the meaning of A.R.S. § 39-121.01 as the liaison appointed by the Arizona Senate in connection with the audit. The statute requires public officers to maintain “all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state.” *Id.* § 39-121.10(B); *see also Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law “requires the keeping of records sufficient to provide the public with ‘knowledge’ of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty”). In view of the strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are *presumed open to the public* for inspections as public records.” *Carlson*, 141 Ariz. at 491 (emphasis added).

The audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity you undertook pursuant to your appointment by the Arizona Senate was, therefore, a governmental duty that must have the greatest possible transparency to the public. If one purpose of the audit is to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfil the purpose of the entire exercise.

Overcoming the presumption in favor of disclosure requires the production of facts to “specifically demonstrate” that release of the requested records “would violate rights of privacy or confidentiality” or harm the “best interests of the state.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or “argu[ing] in global generalities of

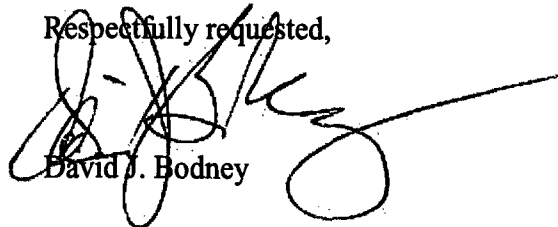
Ken Bennett  
June 2, 2021  
Page 3

the possible harm that might result from release.” *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm also must outweigh the public’s strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) (“[t]he public’s right to know any public document is weighty in itself.”).

Because of the urgent need to inform the public about the operations of the audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys’ fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; A.R.S. § 39-121.02(B) (“The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.”). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the audit.

I look forward to hearing from you or your counsel.

Respectfully requested,

A handwritten signature in black ink, appearing to read "David J. Bodney", with a long horizontal flourish extending to the right.

David J. Bodney

DJB/MEK

9

1 East Washington Street, Suite 2300  
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David J. Bodney  
Tel: 602.798.5454  
Fax: 602.798.5595  
bodneyd@ballardspahr.com

June 2, 2021

*Via E-Mail (rpullen@gmail.com)*

Randy Pullen  
rpullen@gmail.com

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Pullen:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com (“PNI”). On PNI’s behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the “Arizona Public Records Law”) to inspect public records you have received or generated while performing your duties as a public officer in connection with the Arizona Senate’s audit of Maricopa County ballots from the 2020 election. This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- All communications that you received or sent while performing your Senate-appointed duties regarding the audit from January 1, 2021, to the present, including all communications regarding the audit involving you and any member, officer, employee or agent of the Arizona Senate or any person involved in the performance of the audit, including any officer, employee or agent of Cyber Ninjas, Wake Technology Services, CyFIR or any other corporate entity involved. As used here, “communications” should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.
- All invoices and financial documents reflecting work performed, services rendered or goods delivered, rented or used in connection with the audit and all records of any payments to any person or corporate entity in connection with the audit.



- All other documents regarding the performance of your duties, or the duties of others, in connection with the audit.

I look forward to your response within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law commands that “[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*” A.R.S. § 39-121 (emphasis added). The statute “evinces a clear policy favoring disclosure.” *Carlson*, 141 Ariz. at 490. The statute “defines ‘public records’ broadly and creates a presumption requiring the disclosure of public documents.” *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies in this instance because you are a “public officer” within the meaning of A.R.S. § 39-121.01 as the liaison appointed by the Arizona Senate in connection with the audit. The statute requires public officers to maintain “all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state.” *Id.* § 39-121.10(B); *see also Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law “requires the keeping of records sufficient to provide the public with ‘knowledge’ of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty”). In view of the strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are *presumed open to the public* for inspections as public records.” *Carlson*, 141 Ariz. at 491 (emphasis added).

The audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity you undertook pursuant to your appointment by the Arizona Senate was, therefore, a governmental duty that must have the greatest possible transparency to the public. If one purpose of the audit is to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfill the purpose of the entire exercise.

Overcoming the presumption in favor of disclosure requires the production of facts to “specifically demonstrate” that release of the requested records “would violate rights of privacy or confidentiality” or harm the “best interests of the state.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or “argu[ing] in global generalities of the possible harm that might result from release.” *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub’g Co. v. Pima County*

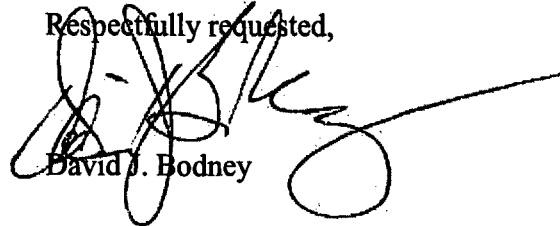
Randy Pullen  
June 2, 2021  
Page 3

*Attorney's Office*. 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm also must outweigh the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) ("[t]he public's right to know any public document is weighty in itself.").

Because of the urgent need to inform the public about the operations of the audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys' fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; A.R.S. § 39-121.02(B) ("The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed."). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the audit.

I look forward to hearing from you or your counsel.

Respectfully requested,



David J. Bodney

DJB/MEK

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bodneyd@ballardspahr.com

June 2, 2021

*Via E-Mail (dlogan@cyberninjas.com) and U.S. Mail*

Cyber Ninjas Inc.  
Doug Logan, CEO  
5077 Fruitville Road  
Ste. 109-421  
Sarasota, FL 34232

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Logan:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and *azcentral.com* ("PNI"). On PNI's behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") to inspect public records Cyber Ninjas Inc. has received or generated while performing its duties in connection with the Arizona Senate's audit of Maricopa County ballots from the 2020 election (the "Audit"). This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- all financial records related to the Audit, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts and records of all payments or donations for such Audit-related work;
- all communications regarding the performance, funding and/or staffing of the Audit between or involving any officer, director, employee or agent of Cyber Ninjas and:
  - any member of the Arizona Senate or any employee or agent communicating on behalf of any Senator;
  - any "liaison" for the Arizona Senate or any Senator, including Ken Bennett and Randy Pullen, or anyone communicating on their behalf;

- any member of the Maricopa County Board of Supervisors, Maricopa County Recorder Steven Richer, Maricopa County Sheriff Paul Penzone or anyone communicating on their behalf;
- member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives Anthony Kern, or anyone communicating on their behalf;
- any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;
- former U.S. President Donald Trump or anyone communicating on his behalf; and
- Christina Bobb of One America News Network, or anyone communicating on her behalf.

As used here, “communications” should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

- all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any subcontractor, including without limitation Wake Technology Services, Inc., CyFir LLC and Strat Tech Solutions LLC; and
- all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any contractor engaged by Maricopa County, including without limitation Pro V&V and SLI Compliance.

I look forward to your response within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law commands that “[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*” A.R.S. § 39-121 (emphasis added). The statute “evinces a clear policy favoring disclosure.” *Carlson*, 141 Ariz. at 490. The statute “defines ‘public records’ broadly

and creates a presumption requiring the disclosure of public documents.” *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies to this particular request because Cyber Ninjas is operating as an instrumentality of the Arizona Senate in performing a core governmental function: namely, a review of the ballots cast in Maricopa County for the 2020 election. *See* A.R.S. § 39-121.01(A). The stated intent by the Senate leaders who commissioned the Audit was that the contractor they hired would “perform everything we have required in the subpoenas.” *See* <https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-filing-by-maricopa-county-board-of-supervisors>.

The Audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity Cyber Ninjas has taken pursuant to its contract with the Arizona Senate is, therefore, a governmental duty that must have the greatest possible transparency to the public. If the Audit is meant to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfil the Audit’s purpose. Simply put, Cyber Ninjas is subject to this particular request under the Arizona Public Records Law because it is doing *government* work, directed by *government* officials, and paid for, at least in substantial part, with *government* funds.

The Arizona Public Records Law requires public officers and public bodies to maintain “all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state.” *Id.* § 39-121.10(B); *see also* *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law “requires the keeping of records sufficient to provide the public with ‘knowledge’ of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty”). In view of the strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that “all records required to be kept under A.R.S. § 39-121.01(B) are *presumed open to the public* for inspections as public records.” *Carlson*, 141 Ariz. at 491 (emphasis added).

Overcoming the presumption in favor of disclosure requires the production of facts to “specifically demonstrate” that release of the requested records “would violate rights of privacy or confidentiality” or harm the “best interests of the state.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). *See also* *Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or “argu[ing] in global generalities of the possible harm that might result from release.” *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub’g Co. v. Pima County Attorney’s Office*. 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm

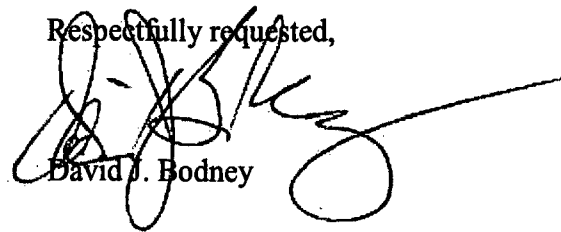
Cyber Ninjas Inc.  
June 2, 2021  
Page 4

also must outweigh the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) (“[t]he public’s right to know any public document is weighty in itself.”).

Because of the urgent need to inform the public about the operations of the Audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys’ fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; A.R.S. § 39-121.02(B) (“The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.”). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the Audit, including their agents.

I look forward to hearing from you or your counsel.

Respectfully requested,



David J. Bodney

DJB/MEK

Cc: Kory Langhofer  
Norman Moore  
Rod Thomson  
Dennis Wilenchik

**11**





John "Jack" D. Wilenchik, Esq.

[jackw@wb-law.com](mailto:jackw@wb-law.com)

**WILENCHIK & BARTNESS**

— 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

June 11, 2021

**VIA EMAIL ONLY**

David Bodney  
[bodneyd@ballardspahr.com](mailto:bodneyd@ballardspahr.com)

Re: Cyber Ninjas

David:

Thank you for your letter dated June 2<sup>nd</sup>. As you know, this law firm represents Cyber Ninjas, Inc. (hereinafter referred to as "CNI").

Your letter, which was directed to CNI, purports to be a request for inspection of public records under A.R.S. § 39-121 (the "Public Records Law").

However, it is apparent from a reading of A.R.S. §§ 39-121 *et seq.* that requests for inspection of public records should be directed to an "officer or public body" – and/or, that any action for wrongful denial of access to public records may only be filed against an "officer or public body." A.R.S. § 39.121.02(C)("[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action *against the officer or public body* for any damages resulting from the denial")(emphasis added); *see also e.g.* A.R.S. § 39-121 ("[p]ublic records and other matters *in the custody of any officer* shall be open to inspection...")(emphasis added); A.R.S. § 39-121.01(B)("[a]ll officers and public bodies shall maintain all records...")

CNI is not an "officer" within the definition of A.R.S. § 39-121.01(A)(1), nor is it a "public body" within the definition of A.R.S. § 39-121.01(A)(2). The foregoing statute provides that "officer" means "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." CNI is not a person elected or appointed to hold any elective or appointive office of a public body, etc. "Public body" is defined as "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." CNI is clearly not the "state" or a "political subdivision," etc.; nor is it a "public organization or agency..." It is a private contractor.



**WILENCHIK & BARTNESS**  
— A PROFESSIONAL CORPORATION —

David Bodney  
June 11, 2021  
Page 2 of 2

Therefore, your letter was not properly directed to CNI. Moreover, your client may not file an action against my client under A.R.S. § 39.121.02. In the event that your client files such an action against CNI, then please consider this letter to be my client's advance notice that it deems such an action to be groundless under the statute and will demand that it be withdrawn under Rule 11, as well as seek its attorneys' fees and costs as appropriate.

Finally, in accordance with the above analysis, CNI will not be producing any records in response to the letter. Please feel free to contact my office with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Wilenchik'.

John "Jack" D. Wilenchik, Esq.

12

-----  
1 East Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
TEL 602.798.5400  
FAX 602.798.5595  
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David J. Bodney  
Tel: 602.798.5454  
Fax: 602.798.5595  
bodneyd@ballardspahr.com

June 4, 2021

*Via E-Mail (kory@statecraft.com; nmoore@azleg.gov.) and U.S. Mail*

Kory Langhofer  
Statecraft PLLC  
649 North Fourth Avenue, First Floor  
Phoenix, AZ 85003

Norm Moore, Public Records Attorney  
Arizona State Senate  
1700 West Washington Street  
Phoenix, Arizona 85007-2809

Re: Phoenix Newspapers, Inc./Access (Arizona Senate): Right to Inspect Public Records  
Relating to Maricopa County Ballot Audit

Dear Kory and Norm:

I write to follow up on our telephone conversation yesterday afternoon regarding the April 22, May 27 and June 2 public records requests by Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). Again, thank you both for taking the time to talk with my colleague, Matt Kelley, and me about these issues.

This letter addresses three main topics of our discussion.

*First*, you had asked me to provide suggested language for a records retention request from the Arizona Senate and Pres. Fann to the audit "vendor" and "sub-vendors" that would encompass what, in our view, are public records. Here is that language:

Please preserve all documents and communications related to the funding, performance, and staffing of the audit, including without limitation all contracts, agreements, invoices, receipts, and other records of payments or donations made or received in connection with the audit; all communications with any current or former elected officials regarding the audit; all records regarding all persons involved in performing any task related to the audit, whether a volunteer, employee, agent or independent contractor, including their

tasks assigned or performed; and any documents reflecting performance standards and reviews.

We believe the foregoing document retention directive would provide clear guidance to the vendor and sub-vendors and enable them to maintain and preserve documents that the Senate would be obliged to preserve as part of this governmental activity. We believe such a directive is essential, especially in light of the Senate's current position: namely, its decision *not* to make responsive records in the possession of its vendor and sub-vendors available for inspection and copying absent a court order.

*Second*, in our discussion regarding the volume of emails responsive to PNI's records requests, you said that the vast majority of emails to members of the Senate, perhaps numbering in the hundreds of thousands, are from constituents voicing their varying opinions regarding the election audit. You asked if PNI wanted copies of all of those emails, or whether PNI would agree to narrow its requests in some fashion. I appreciate your candor and willingness to assist PNI in prioritizing the records that may be the most newsworthy. To that end, PNI has a few alternative proposals to consider. One, we could prioritize production of audit-related Senate emails to or from any current or former elected officials (or their agents), and to or from any other persons with direct roles in the audit (*e.g.*, Cyber Ninjas employees). Two, as an alternative, the Senate could provide a list of the senders and recipients of each email, so we could identify which emails our client most urgently wants to review. Three – and this could be done regardless of which other options are chosen – you could start processing and producing the outgoing messages from the Senators and circle back to the incoming ones next. All of these proposals come with the caveat that PNI reserves its right to secure access to all responsive records as promptly as possible. Please let us know which of these proposals would be an acceptable way to prioritize the Senate's response to PNI's requests.

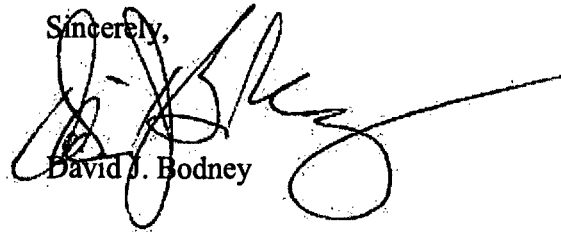
*Third*, to avoid any confusion down the road, I want to set forth my understanding of the key points of our discussion yesterday. You said that because of the large number of both public records and requests for them, the Senate plans not to respond specifically to those requests but instead to create an online "reading room" where it will post public records regarding the vote audit. You indicated that you would make records available on a rolling basis as they have been reviewed for responsiveness and privilege. You also said that, although you do not concede they are subject to the public records law, you have asked Ken Bennett and Randy Pullen to provide audit-related communications for your review, and you will provide all such responsive, non-privileged records to the reading room. You stated that Mr. Bennett provided two sets of documents, and that you had reviewed the first set but had not had the opportunity to review the second; you said you hoped to have the review of the full complement of Mr. Bennett's documents completed by the end of next week (*i.e.*, June 11). I assume they would then be posted in the reading room, with other records, for inspection and copying.

Kory Langhofer & Norm Moore  
June 4, 2021  
Page 3

I also confirmed with my client that their journalists have received a copy of the lease agreement between the Senate and the State Fairgrounds for use of the Coliseum, the contract between the Senate and Cyber Ninjas and a screenshot evidencing the Senate's payment of the first \$50,000 owed to Cyber Ninjas. Thank you for bringing those facts to our attention. You also agreed that you would produce to us – or at least post in the reading room – those documents that the Senate and Cyber Ninjas provided to the Arizona Democrats, Secretary of State Hobbs and other parties in that litigation (e.g., policies and procedures, including a counting policy and, if available, an HR policy). Please let me know when copies of those records will be available to PNI.

I look forward to hearing from you and continuing our dialogue.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Bodney", with a long horizontal flourish extending to the right.

David J. Bodney

DJB/MEK

# APPENDIX 2



CLERK OF THE  
SUPERIOR COURT  
RECEIVED CCC #3  
NIGHT DEPOSITORY

21 JUL 27 PM 2:50

FILED  
BY T. Stephens-Robinson, DEP



ATTORNEYS AT LAW

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

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John "Jack" D. Wilenchik, #029353  
Jordan C. Wolff, #034110  
[admin@wb-law.com](mailto:admin@wb-law.com)  
*Attorneys for Defendant Cyber Ninjas, Inc.*

**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**

**MOTION TO DISMISS**

**(Oral Argument Requested)**

**(Assigned to Judge Hannah<sup>1</sup>)**

<sup>1</sup> Defendant has filed a Notice of Change of Judge and Affidavit of Bias and Prejudice to remove Judge Hannah from this case, which is presently on appeal. By filing this Motion, Defendant does not waive its position that this action must be immediately transferred to another division.



1 Defendant Cyber Ninjas, Inc. (“Defendant,” or “CNI”), by and through undersigned  
2 counsel, hereby files this Motion to Dismiss with prejudice the Complaint filed against it by  
3 Plaintiffs Phoenix Newspapers, Inc. and Kathy Tulumello (“Plaintiffs,” “PNI” or “The Arizona  
4 Republic”).

5 This is an action that The Arizona Republic filed under A.R.S. § 39-121.02, claiming  
6 wrongful denial of access to public records by a public officer or public body. However,  
7 Defendant is neither of those things; it is a private contractor that was hired by the President of  
8 the Arizona State Senate. (See paragraph 8 of the Complaint: “Defendant/Real Party in Interest  
9 Cyber Ninjas, Inc., a corporation organized under the laws of the state of Florida, was engaged by  
10 the Arizona Senate to conduct the Senate’s audit of ballots in Maricopa County in the 2020  
11 election.”) As explained below, there is no good-faith argument under the plain wording of the  
12 statutes that Cyber Ninjas is a public “officer” or “public body” that can be sued for wrongful  
13 denial of access to public records under A.R.S. § 39-121.02. Plaintiff’s Complaint vaguely argues  
14 that Defendant is subject to being sued for public records because it is an “agent” of the Senate  
15 (“performing a core government function”) and because it is being paid by the Senate (see  
16 Complaint at paragraphs 8, 10, and 50); but this argument has absolutely no legal or statutory  
17 basis whatsoever. Further, if Plaintiffs were correct, then it would subject every single employee  
18 or contractor of the State – including hard-working people like the staff of this Court, peace  
19 officers, firefighters, etc. – to having to respond to public records requests and being sued for  
20 denial of access. This is plainly not how the statutes read. As discussed below, the statutes clearly  
21 define the persons or entities subject to a records request – i.e. a “officer” and “public body” – as  
22 consisting only of elected or appointed officials or chief administrative officers, chairmen,  
23 “head[s],” “director[s],” and “supervisors[s]” of a “public body” (and “public bod[ies]” consist of  
24 the State and “public organization[s] or agenc[ies]” that receive taxpayer funds). See  
25 A.R.S. § 39-121.01(A)(1), (A)(2), discussed *infra*. A private contractor like Defendant is clearly  
26 none of these things; and to hold otherwise would be to subject every government contractor to  
27 having to form their own public records departments, and/or suffer liability for not “promptly”  
28

1 responding to intensive records requests from literally any member of the public. This is plainly  
2 not allowed by the statutes, and Plaintiffs' argument is groundless.

3 As Plaintiffs acknowledge, Defendant expressly warned Plaintiffs about this issue in a  
4 letter dated June 11<sup>th</sup> (to which Plaintiffs did not respond) and told Plaintiffs that if they named  
5 Defendant in an action for wrongful denial of access to public records (and did not promptly  
6 withdraw the claims), then Defendant would seek its fees and costs. Defendant therefore seeks  
7 not only dismissal with prejudice of the claims against it but also reserves the right to seek its  
8 attorneys' fees and costs pursuant to Rule 11, A.R.S. §§ 12-349, 12-341, or any other applicable  
9 authority, pursuant to Rule 54(g). A short memorandum follows, concerning the legal authorities  
10 at issue.

11 *The Public Records Statues*

12 The public records laws are contained at A.R.S. §§ 39-121 *et seq.*

13 First, A.R.S. § 39-121 provides that “[p]ublic records and other matters in the custody of  
14 any officer shall be open to inspection by any person at all times during office hours.”

15 Second, A.R.S. § 39-121.01(A)(1) defines “officer” as: “any person elected or appointed  
16 to hold any elective or appointive office of any public body and any chief administrative officer,  
17 head, director, superintendent or chairman of any public body.” Defendant is clearly none of these  
18 things, as Plaintiffs admit. Plaintiffs merely allege that Defendant is an “agent” of a public body  
19 – which is to say, Defendant is not even an employee of a public body, and certainly far less than  
20 an “officer”/administrator. To quote the Arizona Supreme Court: “[a]n ‘office’ is defined as ‘an  
21 employment on behalf of the government in any station of public trust not merely transient,  
22 occasional, or incidental.’ It is a ‘special trust or charge created by competent authority.’ The  
23 officer is distinguished from the employee in the greater importance, dignity, and independence  
24 of his position, in being required to take an official oath, and perhaps to give an official bond, in  
25 the liability of being called to account as a public offender for misfeasance or nonfeasance in  
26 office and usually, though not necessarily, in the tenure of his position.” *Winsor v. Hunt*, 29 Ariz.  
27 504, 519, 243 P. 407, 412 (1926). Defendant – which again is merely a private contractor, as  
28 Plaintiffs admit – is not even an employee of the State, much less a tenured, oath-taking “officer.”

1 The public-records request statute therefore clearly does not apply to Defendant, and Plaintiffs'  
2 demand that Defendant respond to a public records request is frivolous.

3 Since A.R.S. § 39-121 only provides that an “officer” must respond to a public records  
4 request, and Defendant is clearly not an “officer” of a public body within the meaning of the  
5 statute, then that ends the analysis. But if for no reason other than academic interest: the definition  
6 of “public body” is also contained at A.R.S. § 39-121.01(A)(2), which provides that “public body”  
7 means: “this state, any county, city, town, school district, political subdivision or tax-supported  
8 district in this state, any branch, department, board, bureau, commission, council or committee of  
9 the foregoing, and any public organization or agency, supported in whole or in part by monies  
10 from this state or any political subdivision of this state, or expending monies provided by this state  
11 or any political subdivision of this state.” Part of the Plaintiffs’ argument – specifically, their  
12 argument that Defendant must honor a public records request because it is getting paid by the  
13 State – sort of recalls the last phrase in this definition of a “public body” –i.e., the part which says  
14 “supported in whole or in part....or expending moneys provided by this state...” But that phrase  
15 plainly applies only to “any public organization or agency” – which again, Defendant is not.<sup>2</sup> And  
16 again, public-records requests must be directed to an “officer” within the meaning of  
17 A.R.S. §§ 39-121, 39-121.01(A)(1), which we have already established that Defendant is not.

18 Finally, A.R.S. § 39-121.02(A),(C) state that “[a]ny person who has requested to examine  
19 or copy public records pursuant to this article, and who has been denied access to or the right to  
20 copy such records, may appeal the denial through a special action in the superior court, pursuant  
21 to the rules of procedure for special actions against the officer or public body.” And “[a]ny person  
22 who is wrongfully denied access to public records pursuant to this article has a cause of action  
23 against the officer or public body for any damages resulting from the denial.” But again,  
24 Defendant is not an officer or public body within the meaning of these statutes; nor was Plaintiff’s  
25

26  
27 <sup>2</sup> The relevant definition for “agency” in Black’s Law is “[a] governmental body with the authority  
28 to implement and administer particular legislation. Also termed *government agency*;  
*administrative agency*; *public agency*; *regulatory agency*.”

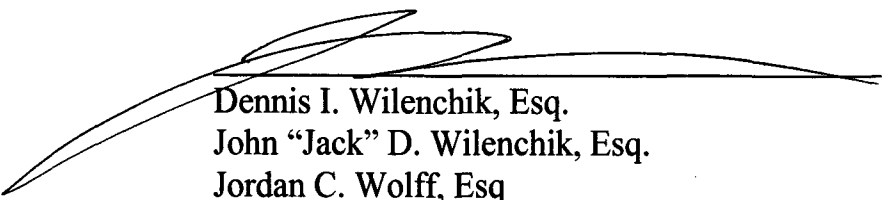
1 public-records request to Defendant made “pursuant to this article,” since the request was not  
2 directed to a public officer within the meaning of these statutes.

3 **Conclusion**

4 For the foregoing reasons, Defendant asks the Court to dismiss the claims against it with  
5 prejudice. Pursuant to Rule 54(g)(1), Defendant expressly reserves the right to seek its attorneys’  
6 fees and costs against Plaintiffs.

7 **RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of July, 2021.

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19 **ORIGINAL** of the foregoing filed on  
20 July 27, 2021 with the Clerk of the Maricopa  
21 County Superior Court

22 **COPY** of the foregoing hand-delivered on  
23 July 27, 2021 to the Honorable Judge John Hannah.

24 **COPY** of the foregoing emailed on  
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# APPENDIX 3



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7 ARIZONA SUPERIOR COURT

8 MARICOPA COUNTY

9 PHOENIX NEWSPAPERS, INC., an  
Arizona corporation, and KATHY  
10 TULUMELLO,

11 Plaintiffs,

12 vs.

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

18 Defendants, and

19 CYBER NINJAS, INC.,

20 Real Party in Interest.

NO. LC2021-000180-001

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO (1) SENATE  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS  
AND (2) CYBER NINJAS' MOTION  
TO DISMISS, AND PLAINTIFFS'  
REPLY IN SUPPORT OF THEIR  
APPLICATION FOR ORDER TO  
SHOW CAUSE**

(Oral Argument Set: August 23, 2021, at  
9:30 a.m.)

(Assigned to the Honorable John Hannah)

21 Preliminary Statement

22 When the Arizona Senate launched its recount of the nearly 2.1 million ballots cast  
23 in Maricopa County last November and hired Cyber Ninjas, Inc. to run the audit, Senate  
24 President Karen Fann promised a "transparent" audit that would boost public confidence  
25 in the electoral process. But when asked to keep that promise – and comply with the  
26 Arizona Public Records Law, A.R.S. § 39-121, *et seq.* – the response from Senate leaders  
27 and Cyber Ninjas has been to deflect, delay and deny. They deflect, saying the records  
28 sought by Plaintiffs (the "Records") are in the hands of a "private" company, and therefore

1 are nobody's business but Cyber Ninjas'. They delay, arguing the Senate Defendants have  
2 no duty to ask Cyber Ninjas for the Records. They deny, rejecting the public's right to  
3 inspect and copy *any* records held by Cyber Ninjas of (a) communications between Cyber  
4 Ninjas and government officials relating to the audit, or (b) financial records about who  
5 besides Arizona taxpayers is footing the bill for, or assisting with, this exercise of  
6 legislative power. Indeed, these Defendants deny the authority of this Court to adjudicate  
7 whether the public is entitled to see these Records under the law.

8 Since Plaintiffs filed this special action, Defendants' briefs and events outside this  
9 litigation have clarified the issues before this Court. As for Defendants' briefs, Cyber  
10 Ninjas and the Senate Defendants have told this Court:

- 11 • Cyber Ninjas "estimates" it has "around" 60,000 "digital communications" in its  
12 "system" that are potentially responsive to Plaintiffs' public records requests, and  
13 to the requests of other, unrelated requestors, *see* Cyber Ninjas' Response to  
14 Application for Order to Show Cause ("Cyber Ninjas' Resp.") at 3;
- 15 • Despite requests from Plaintiffs and other parties under the Public Records Law, the  
16 four named Senate Defendants ("Senate Defendants") have affirmatively chosen *not*  
17 to ask Cyber Ninjas to turn over potentially responsive records to the Senate – and  
18 President Fann, as "steward" of the Senate's interests, will *not* do so unless ordered  
19 by a court, *see* Senate Defendants' Motion for Judgment on the Pleadings ("Senate  
20 Defs.' Mot.") at 9; and
- 21 • Senate Defendants consider Cyber Ninjas and its subcontractors to be their  
22 "authorized agents" for the "collection, review and analysis of data and information  
23 at the behest and on the behalf of elected Arizona legislators to facilitate the  
24 quintessential lawmaking function of crafting legislative proposals," *id.* at 17.

25 Further, Superior Court Judge Michael Kemp has issued two rulings in a separate  
26 case brought by another requestor seeking access to similar audit records. *See* Minute  
27 Entries, *American Oversight v. Fann*, No. CV 2021-008265 (Ariz. Super. Ct. Maricopa  
28 Cty., dated July 14, 2021) (the "July 14 *AO* Order," attached hereto as Exhibit A); *Id.* dated  
Aug. 2, 2021 (the "August 2 *AO* Order," attached hereto as Exhibit B). While those rulings  
are not binding, PNI submits that Judge Kemp's reasoning regarding some of the  
overlapping issues in favor of public access is persuasive. *See* Sections I, II and VI, *infra*.

Defendants' admissions and these other recent developments put into sharp relief  
one important issue here: namely, whether Cyber Ninjas, which is *not* a party to the  
*American Oversight* litigation, may be compelled by *this Court* to preserve, protect and



1 ultimately produce public records in its custody for prompt public inspection and copying,  
2 as required by the Arizona Public Records Law, where Senate Defendants have abdicated,  
3 if not scorned, their legal obligations to do so.

4 All Defendants assert that the Public Records Law does not apply to Cyber Ninjas,  
5 which they characterize as “merely a private contractor.” *See, e.g.*, Cyber Ninjas’ Motion  
6 to Dismiss (“Cyber Ninjas’ Mot.”) at 2-3. Cyber Ninjas’ arguments begin and end there.  
7 Senate Defendants go much further, arguing, first, that no documents in Cyber Ninjas’  
8 hands could possibly be public records because the Senate does not have them and will not  
9 ask for them. *See* Senate Mot. at 3-11. Next, Senate Defendants take the remarkable  
10 position that they and Cyber Ninjas are “immune” from this special action altogether under  
11 the Arizona Constitution’s Speech or Debate clause. *See id.* at 11-17.

12 Senate Defendants’ Motion should be denied because regardless of whether Cyber  
13 Ninjas has *physical* custody of public records concerning the audit, the Senate has a *legal*  
14 duty under the Public Records Law to maintain, preserve and provide those records for  
15 public inspection and copying. *See, e.g.*, A.R.S. §39-121.01(B); *Lake v. City of Phoenix*,  
16 222 Ariz. 547, 550 (2009). Their Motion also fails because “legislative immunity” is  
17 inapplicable to this statutory special action, which seeks to hold Senate Defendants to their  
18 ministerial, statutory duties to comply with the Arizona Public Records Law. Likewise,  
19 Cyber Ninjas’ Motion to Dismiss should be denied because it too is subject to the Public  
20 Records law, whether it is seen as the “custodian” of these Records, or as a “public  
21 official,” appointed to head up the Senate’s tax-supported audit, or both, according to the  
22 statute’s terms. Finally, because none of these Defendants has identified any triable issues  
23 of fact, as required by this Court’s July 16, 2021 Order, this Court should grant PNI’s  
24 Application and order them to produce the Records<sup>1</sup> forthwith.

25 \_\_\_\_\_  
26 <sup>1</sup> In their Complaint, Plaintiffs focused on those records in Cyber Ninjas’ possession that  
27 are responsive to Senate Requests A and B and the request to Cyber Ninjas. *See* Compl. ¶  
28 54. However, Plaintiffs expressly reserved the right to secure records in the Senate  
Defendants’ physical possession responsive to Requests A and B *if* the Senate Defendants  
did *not* honor their counsel’s estimate that those records would be disclosed publicly by  
July 15. *Id.* Although Senate Defendants have posted some records to their online “reading  
room,” the number of records provided is a small fraction of the number of documents  
Senate Defendants’ said were being reviewed. *See id.* ¶¶ 53-54. (cont.) Accordingly, the

1           **I. SENATE DEFENDANTS HAVE A LEGAL DUTY TO MAINTAIN,  
2           PRESERVE AND PRODUCE THE PUBLIC RECORDS AT ISSUE.**

3           Senate Defendants attempt to wash their hands of any statutory duty to maintain,  
4 preserve and provide access to public records regarding the vote audit. They argue: Cyber  
5 Ninjas has physical possession of the Records; the Records are not in the Senate's  
6 "custody"; and, therefore, Records of their audit exist beyond the reach of the Public  
7 Records Law. Their argument fails for many reasons.

8           **a. Legal Custody of Public Records Is Not Limited to Physical Custody.**

9           Senate Defendants cite no authority that limits Arizona's Public Records Law to  
10 only those records in the physical possession of a government entity or official. To the  
11 contrary, the Arizona Supreme Court has repeatedly held that "documents with a  
12 'substantial nexus' to government activities qualify as public records," and the "nature and  
13 purpose" of the documents, *not* the place where they are kept, determines their status. *Lake*,  
14 222 Ariz. at 549 (internal citations omitted). For example, keeping government records in  
15 a database comingled with third-party data does not shield those documents from the Public  
16 Records Law. *Lake v. City of Phx.*, 220 Ariz. 472, 481, 207 P.3d 725, 734 (Ct. App. 2009),  
17 *vacated in part on other grounds*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009) (a public  
18 record "does not become immune from production simply by virtue of the method the  
19 [government] employs to catalogue the document"). Plainly, the Records bear a  
20 *substantial nexus* to government activities, and their *nature and purpose, being a publicly*  
21 *funded audit of the 2020 election*, support public disclosure.

22           Further illustrating that physical possession by the government is not necessary for  
23 a document to be a public record, the Arizona Court of Appeals held that police officers'  
24 *personal* cell phone records may be public records if they reflect the use of the phone for  
25 government purposes. *Lunney v. State*, 244 Ariz. 170, 179, 418 P.3d 943, 952 (Ct. App.  
26 2017). The fact that the individual employees, not the government, would have had  
27 physical custody of those records did not factor into the Court of Appeals' analysis. *Id.*  
28 Court should order Senate Defendants to provide all public records responsive to Requests  
A and B in their possession as well as all those in Cyber Ninjas' possession that are  
responsive to Plaintiffs' requests.

1 Senate Defendants try to distinguish *Lunney* by asserting it means only that government  
2 employees, as “officers” under the Public Records Law, “can have their work-related  
3 documents commandeered for production by their public body employer” pursuant to the  
4 statute. Senate Defs.’ Mot. at 4. But if the Public Records Law applies only to records in  
5 the government’s physical possession, as Senate Defendants argue, then an officer’s work-  
6 related records cease to be public records once they are removed from government  
7 premises. That is *not* what the Arizona Court of Appeals held in *Lunney*, and that is *not*  
8 the law. See *Griffis v. Pinal Cnty*, 215 Ariz. 1, 4 ¶ 10 (2007) (“mere possession” of a  
9 document does not determine its public records status). Senate Defendants give no good  
10 reason why a government contractor performing an essential government function using  
11 public dollars should be treated differently from a government employee performing the  
12 same governmental function.

13 Embracing Senate Defendants’ crabbed, illogical view of the Public Records Law  
14 would render it a nullity. They contend this law applies only when the government has  
15 *physical* possession of public records. If so, then public bodies could contract with vendors  
16 to store all of their electronic documents in the cloud, and all of their hard-copy records in  
17 off-site warehouses, and then deny every public records request they get because they lack  
18 “physical custody” of the records. Their view of the law would violate both clear statutory  
19 commands and the policy behind them. *E.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91,  
20 687 P.2d 1242, 1245-46 (1984) (“access and disclosure is the strong policy of the law”).

21 Judge Kemp previously rejected the identical argument made by three of these four  
22 Senate Defendants. See Ex. A at 3-4. Noting Senate Defendants’ legal duty to maintain  
23 records related to the audit, Judge Kemp held that “actual physical possession of those  
24 records is not relevant for purposes of” the Public Records Law. *Id.* at 3. He continued:

25 Nothing in the statute absolves Senate Defendants’ responsibilities to keep  
26 and maintain records for authorities by public monies by merely retaining a  
27 third-party contractor who in turn hires subvendors. The plain text makes no  
28 such exception to exclude records maintained by these third-party service  
providers. Allowing the Senate Defendants to circumvent the PRL by  
retaining private companies to perform valid legislative and/or constitutional  
functions would be an absurd result and undermine Arizona’s strong policy  
in favor of permitting access to records reflecting governmental activity.

1 *Id.* at 3-4. Judge Kemp held that these Senate Defendants “have at least constructive  
2 possession of the documents in question.” *Id.* at 4. PNI respectfully submits that this  
3 holding is correct as a matter of law, and this Court should hold the same in this case.

4 **b. The Senate’s View of its Contract with Cyber Ninjas Is Plainly Erroneous.**

5 Senate Defendants claim that the only way they can be deemed to have custody of  
6 the Records is if the Senate is compelled to exercise its *indemnity* rights under its Master  
7 Services Agreement (“MSA”) with Cyber Ninjas and demand that its contractor provide  
8 the records to the Senate. *See* Senate Defs.’ Mot. at 9. This argument, too, fails. Months  
9 ago, the Senate could have compelled Cyber Ninjas to provide the Records, but it declined  
10 to do so. Instead, working hand in glove with Cyber Ninjas, the Senate has chosen to  
11 conceal these public records, making this action against *all* Defendants necessary.

12 To obfuscate the issue, Senate Defendants falsely argue that the only possible  
13 provision in the MSA that PNI could invoke is the indemnification clause in Section 15.4.  
14 *See* Senate Defs.’ Mot. at 9. Senate Defendants claim that provision is not applicable here,  
15 because requiring Cyber Ninjas to share the requested records with the Senate for possible  
16 public disclosure is not “reasonably necessary to the defense or settlement of the claim[s].”  
17 *Id.* Senate Defendants assert that because Defendant Fann purportedly believes this  
18 indemnification provision has not been triggered, she “cannot and will not invoke any  
19 discretionary prerogative under Section 15.4 of the MSA.” *Id.*

20 Senate Defendants, however, ignore a separate provision of the MSA – Section 18.5  
21 – that *requires* Cyber Ninjas to “provide reasonable cooperation . . . in the event that either  
22 party is the subject of a claim, action or allegation regarding this Agreement or a party’s  
23 actions taken pursuant to this agreement, including, but not limited to providing . . .  
24 documents needed for the defense of such claims.” *See* Compl. Ex. 1 (MSA) § 18.5. This  
25 provision is *automatically* triggered here, because Senate Defendants (and Cyber Ninjas)  
26 have been subject to a claim and the requested Records are the very thing that caused this  
27 special action to be filed. As such, the Senate can demand that Cyber Ninjas provide the  
28 requested records to Plaintiffs, the Senate or this Court, for review and disclosure pursuant

1 to the Arizona Public Records Law. *See, e.g., Carlson*, 141 Ariz. at 491 (approving  
2 redaction and *in camera* inspection as practical alternatives to wholesale denial).

3 Indeed, Senate Defendants take the remarkable position that they cannot be  
4 compelled to invoke Cyber Ninjas' contractual obligation to comply with their duties under  
5 the Public Records Law. *See Senate Defs.' Mot.* at 9-10. This argument is absurd.  
6 Compliance with the Public Records Law does not depend on the exercise of discretion to  
7 invoke a contractual option: rather, it is a mandatory, "ministerial" act, as Senate  
8 Defendants elsewhere admit. *See Senate Defs.' Mot.* at 10-11. The Senate cannot evade  
9 its legal obligations simply by signing a contract with a third party. *Cf. Moorehead v.*  
10 *Arnold*, 130 Ariz. 503, 505, 637 P.2d 305 (App. 1981) ("The promise of confidentiality  
11 standing alone is not sufficient to preclude disclosure. If the promise of confidentiality  
12 were to end our inquiry, we would be allowing a [government] official to eliminate the  
13 public's rights under A.R.S. [§] 39-121.") (citation omitted).

14 **c. Senate Defendants Have an Independent Duty to Maintain and Make**  
15 **Available Their Public Records.**

16 Even if Senate Defendants were correct that Records are not public unless they are  
17 in the physical custody of an officer or public body (they are not), they still must maintain  
18 and release the public records at issue in this special action. The plain language of the  
19 Public Records Law states that public officers such as Defendants Fann, Petersen and  
20 Aceves, and public bodies such as the State Senate, "*shall maintain all records . . .*  
21 *reasonably necessary or appropriate to maintain an accurate knowledge of their official*  
22 *activities and of any of their activities that are supported by monies from this state[.]*"  
23 A.R.S. § 39-121.01(B) (emphasis added).<sup>2</sup>

24 Moreover, the Arizona Public Records Law mandates an exacting duty of care:

25 Each public body shall be responsible for the *preservation, maintenance and*  
26 *care of that body's public records*, and each officer shall be responsible for  
the *preservation, maintenance and care of that officer's public records*. It

27 <sup>2</sup> In *Lake*, quoting *Carlson*, the Arizona Supreme Court reiterated: "For purposes of  
28 inspection and access, all records required to be maintained by § 39-121.01(B) and  
preserved by (C) are to be available for inspection under § 39-121 and copying under § 39-  
121.01(D), subject to [overriding interests of "privacy, confidentiality, or the best interests  
of the state . . ."]. 222 Ariz. at 550.

1 shall be the duty of each such body to *carefully secure, protect and preserve*  
2 *public records from deterioration, mutilation, loss or destruction*, unless  
disposed of pursuant to [statute].

3 *Id.* § 39-121.01(C) (emphasis added). If Senate Defendants cannot themselves produce for  
4 inspection and copying the Records, their decision to allow Cyber Ninjas to keep and  
5 conceal such records violates their statutory duty to “carefully secure, protect and preserve”  
6 them, and to make them available to the public. *Id.* Thus, as one form of relief, Senate  
7 Defendants should be ordered to comply with their statutory duties and secure for public  
8 disclosure the Records they outsourced to Cyber Ninjas.<sup>3</sup> Because Senate Defendants have  
9 a clear legal duty to maintain, preserve and provide the public records at issue, their Motion  
10 for Judgment on the Pleadings must be denied.

11 **II. CYBER NINJAS IS SUBJECT TO THE PUBLIC RECORDS LAW**  
12 **BECAUSE IT IS AN OFFICIAL OF THE SENATE FOR PURPOSES OF**  
13 **THE AUDIT.**

14 Both Cyber Ninjas and Senate Defendants assert that the Public Records Law does  
15 not apply to Cyber Ninjas because it is not an officer or public body pursuant to statute.  
16 *See* Senate Defs.’ Mot. at 3-6; Cyber Ninjas’ Mot. at 3-5. They are mistaken.

17 The Arizona Public Records Law defines an “officer” as “*any person . . . appointed*  
18 *to hold any . . . appointive office of any public body and any chief administrative officer,*  
19 *head, director, superintendent or chairman of any public body.*” A.R.S. § 39-121.01(A)(1)  
20 (emphasis added). In other words, “officers” are those vested by a public body such as the  
21 Senate with supervisory authority over the performance of governmental functions.<sup>4</sup> The  
22 statute does *not* limit the definition of “officer” to natural persons, meaning that corporate  
23 persons such as Cyber Ninjas can be officers subject to the Public Records Law. *See* A.R.S.

24 <sup>3</sup> Even if Cyber Ninjas were not directly responsible for compliance with the Public  
25 Records Law (and it is), this Court has the power to order Cyber Ninjas to provide records  
to Plaintiffs, and to this Court for *in camera* review if necessary, because Cyber Ninjas is  
named as both defendant and real party in interest in this action. *See infra* Section IV.

26 <sup>4</sup> Struggling to remove itself from the law’s command, Cyber Ninjas relies on a nearly  
27 century-old Arizona Supreme Court opinion. Cyber Ninjas’ Mot. at 3 (quoting *Winsor v.*  
*Hunt*, 29 Ariz. 504, 519, 243 P. 407, 412 (1926)). But *Winsor* is inapposite because it was  
28 not interpreting the specific definition of “officer” the Legislature enacted many decades  
later in the Arizona Public Records Law. As the Supreme Court more recently noted,  
*Winsor* “construed a since-replaced constitutional provision and did not purport to adopt a  
general definition of ‘public office.’” *Adams v. Comm’n on Appellate Court Appointments*,  
227 Ariz. 129, 136, 254 P.3d 367, 375 (2011).

1 § 1-215(28) (a statutory reference to a “person” “includes a corporation, company,  
2 partnership, firm, association or society, as well as a natural person”).

3 Here, the Senate has hired Cyber Ninjas to lead the vote audit, and Defendant Fann  
4 publicly announced that Cyber Ninjas would be paid with *public* funds to head up this  
5 government activity. *See* Compl. ¶ 21; Answer ¶ 21. Its contract with the Senate states  
6 that Cyber Ninjas “will serve as the central point-of-contact and organizer of all work  
7 conducted over the course of” the agreement, which it describes as conducting “a full and  
8 complete audit of 100% of the votes cast within the 2020 November General Election  
9 within Maricopa County, Arizona.” Compl. Ex. 2 at 1-2 (Statement of Work). Senate  
10 Defendants *admit* that Cyber Ninjas is their “authorized agent[.]” for the “collection, review  
11 and analysis of data and information at the behest and on the behalf of elected Arizona  
12 legislators to facilitate the quintessential lawmaking function of crafting legislative  
13 proposals.” Senate Defs.’ Mot. at 17. In short, the Senate appointed Cyber Ninjas to  
14 perform the vote audit on the Senate’s behalf. By definition, it is an “official” under the  
15 Public Records Law and therefore has a duty to maintain and provide public records  
16 regarding the audit. For this reason alone, Cyber Ninjas’ Motion should be denied.

17 **III. CYBER NINJAS IS THE SENATE’S *DE FACTO* CUSTODIAN OF**  
18 **AUDIT RECORDS.**

19 Regardless of whether Cyber Ninjas meets the definition of public body or officer,  
20 it is subject to the Arizona Public Records Law, and the jurisdiction of this Court, because  
21 it is acting as the Senate’s custodian of public records for the vote audit.

22 By its terms, the Public Records Law applies not only to public bodies and officers  
23 but also to “custodians” of public records. *See* A.R.S. §§ 39-121.01 (D)-(E); 39-121.03(A)-  
24 (C). By referring separately to officers, public bodies and custodians, the statute anticipates  
25 the possibility that, as a practical matter, the custodian of public records may be either a  
26 subordinate government employee, contractor or other person who is not an “officer” as  
27 defined by the statute. *See Carlson*, 141 Ariz. at 491, 687 P.2d at 1246 (an “officer or  
28 custodian” may invoke the “countervailing interests of confidentiality, privacy or the best

1 interests of the state” to withhold records) (emphasis added). As mentioned *supra*, Senate  
2 Defendants call Cyber Ninjas their “authorized agent[.]” for conducting the vote audit,  
3 Senate Defs.’ Mot. at 17, and they disavow Defendant Aceves’ role as a records custodian,  
4 saying she has “no legal authority or control over the records at issue.”<sup>5</sup> Senate Defendants’  
5 Motion to Transfer and Consolidate at 3, fn. 1. By allowing *Cyber Ninjas* to have physical  
6 custody of these essential public records, Senate Defendants have made Cyber Ninjas the  
7 *de facto* custodian of these records. As such, Cyber Ninjas must provide these records in  
8 response to PNI’s request. A.R.S. § 39-121.01(D)-(E). Again, Cyber Ninjas’ Motion to  
9 Dismiss should be denied.

#### 10 IV. CYBER NINJAS IS A PROPER PARTY TO THIS SPECIAL ACTION.

11 Cyber Ninjas asserts it is not a proper defendant because it is not a public body or  
12 official subject to the Public Records Law. Cyber Ninjas’ Mot. at 4-5. Cyber Ninjas is  
13 properly before this Court, and subject to its jurisdiction, even apart from its status as an  
14 officer, records custodian, or both, as reasonably defined by the Public Records Law.

15 Parties who are not officials, public bodies or custodians may be joined as  
16 defendants in special actions pursuant to the Public Records Law. *Arpaio v. Citizen Publ’g*  
17 *Co.*, 221 Ariz. 130, 133 n.4, 211 P.3d 8, 11 n.4 (Ct. App. 2008) (in drafting the statute,  
18 “our legislature was aware that persons or organizations other than the requestor and  
19 custodian could be parties to an action under our public records law”). Indeed, not only  
20 may Cyber Ninjas be joined as a party regardless of its status as an officer or custodian, it  
21 can be held liable to pay Plaintiffs’ legal fees should Plaintiffs prevail. The Court of  
22 Appeals held in *Arpaio* that a third party may be subject to the fee-shifting provision “when  
23 the third party engendered the dispute over access and is a party to the action.” *Id.* 221  
24 Ariz. at 134, 211 P.3d at 12. Such is the case with Cyber Ninjas here.<sup>6</sup>

25  
26 <sup>5</sup> Yet Defendant Aceves, as Senate Secretary, “shall have custody of all . . .  
27 “communications, or other measures, instruments and [Senate] papers, and shall be held  
strictly accountable for the safekeeping of same.” (Senate Rule 3.B, Ex. C. hereto).

28 <sup>6</sup> Likewise, private parties may intervene in special actions under the Public Record Law  
to assert confidentiality. See *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351-52  
(App. 2001) (developer of AIMS test intervened to raise “trade secrets” argument against  
disclosure, unsuccessfully).



1 Further, naming Cyber Ninjas as a defendant and real party in interest was necessary  
2 to ensure Plaintiffs could obtain complete relief (and to ensure due process to Cyber Ninjas)  
3 in this special action. Because Senate Defendants refuse to exercise dominion over public  
4 records in Cyber Ninjas' physical possession, and because Cyber Ninjas disavows any duty  
5 to follow the Public Records Law, it is necessary to "secure, protect and preserve public  
6 records," A.R.S. §39-121.01.C, and to safeguard the public's right to inspect and copy  
7 them, A.R.S. §39-121.01.D. As such, this Court must order Cyber Ninjas to preserve,  
8 protect and produce these public records, whether to Plaintiffs directly or to this Court for  
9 immediate in camera review. The Court has the power to issue such an order – to require  
10 Cyber Ninjas to review the records, create a privilege log, if one be needed, and produce  
11 them – because Cyber Ninjas is rightly named as a defendant and real party in interest. For  
12 this reason as well, Cyber Ninjas' Motion to Dismiss should be denied.

13 **V. THE CLAIM THAT DISCLOSURE WOULD SUBJECT "EVERY"**  
14 **CONTRACTOR TO THE PUBLIC RECORDS LAW IS SPECIOUS.**

15 Cyber Ninjas and Senate Defendants spin apocalyptic predictions of what would  
16 happen should Plaintiffs prevail. "[E]very single employee or contractor of the State,"  
17 Cyber Ninjas says, "including hard-working people like the staff of this Court, peace  
18 officers, firefighters, etc.," would be required "to respond to public records requests and  
19 be[] sued for denial of access." Cyber Ninjas' Mot. at 2. Every government contractor,  
20 Cyber Ninjas continues, would have "to form their own public records departments, and/or  
21 suffer liability for not 'promptly' responding to intensive records requests from literally  
22 any member of the public." *Id.* at 2-3. Senate Defendants similarly assert that every  
23 "vendor of any state, county or local government agency or unit in Arizona will be swept  
24 under the auspices of the" Public Records Law, such that all of their documents with a  
25 substantial nexus to government activity "will be presumptively subject to indefinite  
26 preservation and ultimately disclosure as a public record." Senate Defs.' Mot. at 7.

27 Nonsense. The implications of Plaintiffs' arguments are nowhere near that broad.  
28 PNI's position is only that the Public Records Law applies in *this* circumstance, where

1 Cyber Ninjas is performing an essential and exclusive government function, initiated and  
2 funded with public dollars, where the Senate lacks the ability to perform this core  
3 government activity itself. Cyber Ninjas is unlike any typical government contractor that  
4 provides the same goods or services to a governmental entity that it could provide to a  
5 nongovernmental customer. PNI is not contending that the Public Records Law would  
6 directly apply to such run-of-the-mill government contractors.

7 On the other hand, accepting Senate Defendants' contentions would permit them to  
8 continue to keep Arizonans in the dark about how and by whom the vote audit is being  
9 funded and performed, despite their pledges of transparency. And accepting Cyber Ninjas'  
10 contentions would allow it and any other corporation to exercise the powers of government  
11 without bothering with the statutory responsibilities that come with those powers, such as  
12 compliance with the Public Records Law. They cannot have it both ways.

13 **VI. NONE OF THE DEFENDANTS HAS LEGISLATIVE IMMUNITY.**

14 Senate Defendants make the remarkable assertion that they and Cyber Ninjas have  
15 an all-encompassing, constitutional immunity from this (and presumably any other) special  
16 action. Senate Defs.' Mot. at 11-17. Whether legislative immunity applies is a question  
17 of law for the Court. *Mesnard v. Campagnolo*, No. CV-20-0209-PR, 2021 Ariz. LEXIS  
18 238, at \*8 (June 30, 2021). Here, it is clear that legislative immunity does *not* extend to  
19 shield every legislator and legislative body from compliance with non-discretionary,  
20 statutory mandates. The immunity claimed by Senate Defendants does not extend to this  
21 action, and the Senate's actions in refusing to comply with the Public Records Law are not  
22 discretionary legislative activities. Further, because the individual Defendant Senators are  
23 not immune, neither are the Senate, its Secretary, nor Cyber Ninjas.

24 **a. Legislative Immunity Is Inapplicable in Special Actions.**

25 PNI agrees with Senate Defendants that special actions such as this one seeking  
26 compliance with the Public Records Law are a contemporary form of what in the past  
27 would have been a writ of mandamus. Senate Mot. at 10-11; *see also, e.g., Stagecoach*  
28 *Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 ¶ 19, 295 P.3d 943 (2013) ("An

1 action is in the nature of mandamus if it seeks to compel a public official to perform a non-  
2 discretionary duty imposed by law.”). Because a public records special action like this one  
3 seeks a court order requiring the performance of a non-discretionary duty required by  
4 statute, legislative immunity is inapplicable.

5 Plaintiffs are unaware of any case in which the Arizona Supreme Court has applied  
6 legislative privilege in a mandamus case or its special action equivalent. To the contrary,  
7 the Court just last year forcefully rejected the argument Senate Defendants make here.  
8 Addressing the Arizona Board of Regents’ claim that legislative immunity barred the  
9 Attorney General’s special action against it, the Arizona Supreme Court said:

10 This argument fundamentally misperceives the concept of legislative  
11 immunity, which is extended to shield individual officials from personal  
12 liability for their legislative acts. *It has nothing to do with shielding  
governmental entities from challenges to claimed illegal actions.*

13 *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 314 (Ariz. 2020) (emphasis  
14 added). That ruling could not have been clearer, and it forecloses Senate Defendants’  
15 legislative immunity argument in this special action.

16 By footnote, Senate Defendants strain to distinguish this binding authority, asserting  
17 the holding in *Brnovich* is inapplicable because no individual members of the Board of  
18 Regents were defendants in that case. Senate Mot. at 12 n.7. All that means, however, is  
19 that the Supreme Court did not address the issue of whether an individual legislator would  
20 have immunity from a challenge to an allegedly illegal action. Even if individual  
21 legislators would be immune from a special action under the Public Records Law (and  
22 there is no reason to believe that is so), that has no practical relevance here. The Arizona  
23 Senate *is* a defendant in this case, and thus under the clear holding of *Brnovich* is *not*  
24 immune from this challenge to its failure to comply with the Public Records Law.

25 Attempting to dodge this fatal flaw, Senate Defendants misconstrue the Arizona  
26 Supreme Court’s holding. *Brnovich* cannot apply here, they argue, because “confining all  
27 claims of legislative immunity or privilege to only disputes involving claims of monetary  
28 damages” would contravene “decades of federal and Arizona jurisprudence holding that

1 the immunity encompasses all claims against legislators acting in the course of their  
2 duties.” Senate Mot. at 12 n.7. But that is *not* what the Supreme Court did. Rather, the  
3 court held that legislative immunity does not apply in special actions challenging alleged  
4 failures to follow the law, not in all actions other than those seeking monetary damages.  
5 *Brnovich*, 476 P.3d at 314.<sup>7</sup>

6 Senate Defendants belatedly made a similar immunity argument in the *American*  
7 *Oversight* action in opposing entry of an order requiring production of the records at issue  
8 there. *See* Ex. B at 3-5. Judge Kemp rejected Senate Defendants’ claim of blanket  
9 immunity, holding that the Speech or Debate clause in the Arizona Constitution did not  
10 apply. *Id.* at 5. He further ruled that Senate Defendants’ “broad interpretation” of the  
11 immunity “would render the [Public Records Law] meaningless and unenforceable as to  
12 any legislator at any time under any circumstances,” which “is surely not within the  
13 legislative intent of” the statute. *Id.*

14 **b. Plaintiffs Do Not Seek to Hold Defendants Liable for Any Legislative Act.**

15 The *Brnovich* holding is no anomaly. It simply reflects the well-defined limits of  
16 legislative immunity. As the Arizona Supreme Court recently reiterated, “[n]ot everything  
17 done by a legislator ‘in any way related to the legislative process’ is afforded absolute  
18 immunity as a legislative function.” *Mesnard*, 2021 Ariz. LEXIS 238, at \*9 (citation  
19 omitted). Legislative immunity applies to statements made in committee hearings and floor  
20 debate, as well as “to acts that are ‘an integral part of the deliberative and communicative  
21 processes’ by which the legislative body carries out its constitutionally authorized  
22 functions, “but ‘only when necessary to prevent indirect impairment of such  
23 deliberations.’” *Id.* (citations omitted); *see also* *Ariz. Indep. Redistricting Comm’n v.*  
24 *Fields*, 206 Ariz. 130, 137, 75 P.3d 1088, 1095 (Ct. App. 2003) (same). The immunity  
25 does *not* attach to “administrative matters” or “other activities incidentally related to  
26 legislative affairs but not a part of the legislative process itself.” *Mesnard*, 2021 Ariz.

27  
28 <sup>7</sup> The Arizona Supreme Court’s ruling in *Brnovich* interpreted Arizona law, and thus controls even if it contradicts earlier precedents. Senate Defendants may disagree with *Brnovich*, but they cannot escape the fact that it is binding and dispositive precedent.

1 LEXIS 238, at \*11 (citations omitted); *see also State ex rel. Montgomery v. Mathis*, 231  
2 Ariz. 103, 122-23, 290 P.3d 1226, 1245-46 (Ct. App. 2012).

3 Here, Senate Defendants themselves acknowledge that producing documents in  
4 response to a public records request is a “ministerial” act. Senate Defs.’ Mot. at 11. But  
5 they sidestep any discussion of the limitations on legislative immunity, instead declaring  
6 that “whether and to what extent to release audit-related documents” is a legislative  
7 function for which they are immune. *Id.* at 13. Not so. The Public Records Law, not the  
8 whims of the Senate, individual senators or their agents, controls whether and to what  
9 extent these Defendants must release audit-related documents.

10 Plaintiffs agree that the vote audit is a legislative function, as Senate Defendants  
11 acknowledge. *See* Senate Defs.’ Mot. at 13. But Plaintiffs are not challenging Defendants’  
12 *conduct* of the audit. Rather, the issue here is whether Senate Defendants complied with  
13 their non-discretionary, statutorily mandated duties to maintain and provide access to  
14 public records involving the audit. Legislative immunity plays no role here.

15 *Mesnard* does not compel a different result. There, an expelled former state  
16 representative sued the Speaker of the House for, among other things, allegedly defaming  
17 him in an investigative report the Speaker provided to lawmakers and the public. *Mesnard*,  
18 2021 Ariz. LEXIS 238, at \*11. The Arizona Supreme Court held that the Speaker’s public  
19 release of the report was a legislative act because it was part of the constitutionally  
20 authorized expulsion process and because the Public Records Law authorized the report’s  
21 release. *Id.* at \*14-15. The Supreme Court noted that it was unclear from the record  
22 whether anyone actually requested access to the report under the Public Records Law. *Id.*  
23 at \*15. *Mesnard* is inapposite because it involved a tort claim premised on the allegedly  
24 defamatory content of a House report released by the Speaker. It did not involve any claim  
25 that the Speaker had unlawfully withheld any records after receiving a public records  
26 request or otherwise failed to comply with any statutory obligation. This case involves no  
27 tort claim; it is a special action that seeks to compel Senate Defendants to fulfill their  
28 mandatory duties under the Public Records Law. *Mesnard* does not overrule the principle

1 in *Brnovich* that legislative immunity does not shield governmental entities from  
2 challenges, such as this one, to allegedly illegal actions. *See Brnovich*, 476 P.3d at 314;  
3 *see also* August 2 AO Order at 5 (holding *Mesnard* inapposite because it involved a tort  
4 claim, not a special action).

5 Moreover, adopting Senate Defendants' boundless interpretation of legislative  
6 immunity would render legislators and legislatures "super-citizens," immune from  
7 responsibility" – a result that legislative immunity does not and was never intended to  
8 create. *Mesnard*, 2021 Ariz. LEXIS 238, at \*9 (citation omitted). Senate Defendants'  
9 Motion should be denied because they are not "immune" from this special action.

10 **C. DEFENDANTS FAILED TO IDENTIFY ANY TRIABLE ISSUE OF**  
11 **FACT.**

12 In its July 16, 2021 Minute Entry, this Court ordered:

13 defendants to address, *in their responses to the Application*, the question  
14 whether Application [for Order to Show Cause] raises *any triable issues of*  
15 *fact*. If a defendant takes the position that the Court will have to resolve  
16 factual issues in order to adjudicate this matter fully, that defendant's  
17 response *shall specifically identify the issue(s)* as to which there is a good  
18 faith dispute, *with citations to the paragraphs of the Complaint* in which the  
19 plaintiff alleges the disputed facts.

20 Minute Entry at 2 (emphasis added).

21 *No Defendant has identified any triable issues of fact.* Rather, the Responses of  
22 both Cyber Ninjas and Senate Defendants speculate about what objections they *might* raise  
23 if the Court orders them to produce public records, but *they do not "specifically identify"*  
24 *the issues as to which there is a good faith dispute, nor do they provide "citations to the*  
25 *paragraphs of the Complaint" for any alleged factual dispute.* *See* Senate Defs.' Resp. at  
26 3-4; Cyber Ninjas' Resp. at 3-6. It is too late for them to comply with the Order now.

27 Accordingly, there are no material facts in dispute and the question now before the  
28 Court is one of law. *See, e.g., Griffis v. Pinal Cty.*, 215 Ariz. 1, 3, 156 P.3d 418, 420 (2007)  
("Whether a document is a public record under Arizona's public records law presents a  
question of law."). Any disputes premised on the content of the records, including whether  
any privileges apply or whether any records may be properly withheld, can be resolved in  
the event the Court enters an order requiring production of public records.

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1 Conclusion

2 For all of the foregoing reasons, and for all of the reasons set forth in Plaintiffs'  
3 Application for Order to Show Cause, this Court should (a) deny Senate Defendants'  
4 Motion for Judgment on the Pleadings and Cyber Ninjas' Motion to Dismiss; (b) grant  
5 Plaintiffs' Application for Order to Show Cause; (c) order Defendants to produce copies  
6 of these public records forthwith; and (d) permit Plaintiffs' to file an application for award  
7 of its reasonable attorneys' fees incurred for having to file this action against Defendants  
8 to safeguard public records and enforce its statutory rights.

9 DATED this 10th day of August, 2021.

10 BALLARD SPAHR LLP

11 By: /s/ David J. Bodney

12 David J. Bodney  
13 Craig C. Hoffman  
14 1 East Washington Street, Suite 2300  
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16 Matthew E. Kelley (application for  
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19 Washington, DC 20006  
20 *Attorneys for Phoenix Newspapers, Inc. and*  
21 *Kathy Tulumello*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 10th day of August, 2021, the foregoing document was  
3 filed with the Office of the Clerk of the Superior Court, Maricopa County.

4 I further certify that a complete copy of the foregoing was sent for hand-delivery  
5 this same date upon the following:

6 The Honorable John Hannah  
7 Maricopa County Superior Court  
8 East Court Building 811  
9 101 West Jefferson Street  
10 Phoenix, Arizona 85003

11 I further certify that a complete copy of the foregoing was emailed and sent for  
12 hand-delivery this same date upon the following:

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**A**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-008265

07/14/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
K. Ballard  
Deputy

AMERICAN OVERSIGHT

ROOPALI HARDIN DESAI

v.

KAREN FANN, et al.

THOMAS J. BASILE

DAVID JEREMY BODNEY  
KEITH BEAUCHAMP  
DAVID ANDREW GAONA  
KORY A LANGHOFER  
COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE KEMP

MINUTE ENTRY

The Court has reviewed Defendants' Motion to Dismiss, Plaintiff's Response and Reply in Support of Application for Order to Show Cause, and Defendants' Reply. The Court has also reviewed Plaintiff American Oversight's Complaint. The Court heard oral argument on July 7, 2021.

Plaintiff seeks to obtain access to records relating to an audit of the Maricopa County 2020 elections for the office of the President of the United States and a United States Senate race. No other election results are being audited. Defendants Karen Fann, President of the Arizona Senate, Warren Petersen, Chairman of the Senate Judiciary Committee, and the Arizona Senate ("Senate Defendants") take the position that records in the physical possession or custody of third-party vendors hired by the Senate to perform the audit (Cyber Ninjas, Inc. ("CNI") and CNI's subvendors) are not subject to disclosure under Arizona's Public Records Law, A.R.S. § 39-121, et seq. ("PRL") since they are private vendors and not "public bodies" within the

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meaning of the statute. Defendants have agreed to produce any documents in the physical custody of any of the Defendants or of former Secretary of State Ken Bennett that are responsive to the public records requests and not protected by any constitutional, statutory or common law privilege or confidentiality. Defendants also take the position that the question of whether these records are subject to disclosure is a nonjusticiable question and beyond the scope of this Court's power.

**Factual Background**

The Arizona Senate is conducting an audit of voting equipment used and ballots cast in the November 3, 2020 general election in Maricopa County for the office of President of the United States and a United States Senate seat. The Arizona Senate issued legislative subpoenas to the Maricopa Board of Supervisors requesting custody of tabulation equipment, software, ballots, and other election data. The Senate declared that the audit is the exercise of its legislative constitutional powers and has an important and valid legislative purpose to evaluate whether reforms or changes are needed in the voting laws and voting procedures for the State of Arizona.

The Senate then hired a private company, CNI, to conduct the audit. The Senate also retained Ken Bennett to serve as the Senate's liaison to CNI. CNI in turn hired a number of subvendors. The Senate agreed to pay \$150,000 to CNI which appears to be far short of paying for the full cost of the audit. The public does not know who is financing the remaining costs or what compensation is being made to subvendors or any other entity involved in the audit.

Prior to the filing of this Complaint, Plaintiff and Senate Defendants engaged in negotiations regarding the records being sought. Senate Defendants refused to disclose any documents or records related to the audit in the physical possession or physical control of Mr. Bennett, CNI, or CNI's subvendors. Although some records were produced from Mr. Bennett, no privilege log or listing of documents withheld has been offered.

**Legal Analysis**

Senate Defendants seek to dismiss the Complaint for failure to state a claim upon which relief may be granted. Ariz. R. Civ. P. 12(b)(6). In considering such a motion, all material allegations of the complaint are taken as true and read in the light most favorable to the plaintiff. *Logan v. Forever Living Products Intern., Inc.*, 203 Ariz. 191 (2002). A motion to dismiss at the initial pleading stage is not favored. *Acker v. CSO Chevira*, 188 Ariz. 252 (1997).

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**A. PRL and the Records of Private Vendors**

There is no dispute that Defendants Fann and Peterson are “officers” who hold an elective office of a public body (the Arizona Senate) under the PRL. A.R.S. § 39-121.01(A)(1). Defendant Arizona Senate is clearly a “public body” under the PRL. As officers of a public body, Senate Defendants must maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state. A.R.S. § 39-121.01(B). As publicly stated by Defendant Fann, the audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution.

The Court agrees with Senate Defendants that CNI and its subvendors are not officers or public bodies but rather private companies. Plaintiff does not argue that they are officers or public bodies or *de facto* public officers or public bodies. However, the Court does not agree with Senate Defendants that this ends the inquiry as to whether the PRL applies to records kept by third-party vendors. CNI and the subvendors are clearly agents of the Senate Defendants. CNI and the subvendors’ records would not be subject to disclosure under the PRL if they had not been hired to conduct the audit on behalf of the Senate Defendants.

Whether a document is a public record under Arizona’s public records law presents a question of law which is reviewed *de novo*. *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11 (1993). Arizona law defines public records broadly and creates a presumption requiring the disclosure of public documents. *Carlson v. Pima County*, 141 Ariz. 487 (1984). A.R.S. § 39-121 affirms the presumption of openness.

The broad definition of public records is not unlimited, but the law requires public officials to make and maintain records “reasonably necessary to provide knowledge of all activities they undertake *in the furtherance of their duties*.” *Id.* at 490 (emphasis added). Only those documents having a “substantial nexus” with a government agency’s activities qualify as public records. *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531 (1991).

The audit is clearly an official activity, an “important” public function. The Senate financed the audit, at least partially, by compensating CNI \$150,000 in public funds. One definition of a public record includes records “required to be kept, or necessary to be kept in the discharge of a duty imposed by law to serve as a memorial and evidence of something written, said or done.” *Griftis v. Pinal Cty.*, 215 Ariz. 1 (2007).

Senate Defendants have a duty to keep and maintain all records relating to this audit. The actual physical possession of those records is not relevant for purposes of the PRL. Nothing in the statute absolves Senate Defendants’ responsibilities to keep and maintain records for

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authorities supported by public monies by merely retaining a third-party contractor who in turn hires subvendors. The plain text makes no such exception to exclude records maintained by these third-party service providers. Allowing the Senate Defendants to circumvent the PRL by retaining private companies to perform valid legislative and/or constitutional functions would be an absurd result and undermine Arizona's strong policy in favor of permitting access to records reflecting governmental activity. Such a result would set an unsound precedent, chilling future requests from the public to gain access to public records. It would also erode any sense of transparency for conduct on the part of government officials. These documents are no less public records simply because they are in the possession of a third-party. The statute does not require the government body to have physical possession and control of the records.

The Court completely rejects Senate Defendants' argument that since CNI and the subvendors are not "public bodies" they are exempt from the PRL. The "substantial nexus" requirement also narrows the scope of what has to be disclosed which undermines Senate Defendants' concern that requiring the disclosure of these records would result in an overbroad and unduly burdensome public policy to comply with public record requests. The core purpose of the public records law is to allow public access to official records and other government information so that the public may monitor the performance of government officials and their employees. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344 (2001). Arizona Courts have consistently interpreted the PRL as being broadly construed to encourage access to public records and clearly favors the policy of disclosure. *Carlson*, 141 Ariz. at 490-91.

The Court finds that any and all documents with a *substantial nexus* to the audit activities are public records. This does not mean that all internal files of all government vendors constitute public records of the officer or public body with whom they contracted their services. The Court further finds that CNI and the subvendors are agents for the Senate Defendants who have at least constructive possession of the documents in question. In Court filings in a related case, *Arizona Democratic Party, et al. v. Fann, et al.*, CV2020-006646, Defendant Fann admitted that CNI and Mr. Bennett were the Senate's authorized agents. All documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid are subject to 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. CNI is contractually obligated, in the event of litigation, to fully cooperate with the Senate by providing information or documents requested by the indemnifying party that are reasonably necessary to the defense or settlement of the claim. The records are, at a minimum, in the constructive possession of Senate Defendants who now find themselves in litigation over records maintained by third-party vendors.

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Nor can the Senate Defendants hide behind the notion that records which could have been obtained need not be disclosed if the Senate Defendants have not in fact obtained the records. It is unknown if the Senate Defendants already have these documents in their actual control. It is also irrelevant since the PRL does not give the Senate Defendants cover to not disclose relevant public documents merely because they were generated by a third-party vendor.

The unpublished Superior Court ruling in *Stuart v. City of Scottsdale*, 1 CA-CV 18-0154, 2020 WL 7230239 (App. Dec. 8, 2020) is clearly distinguishable. That case involved a vendor of a city-owned golf course who prepared annual financial statements. The citizen plaintiff sought the records based upon the argument that the contract between the vendor and the City obligated the City to keep and maintain those documents. *Id.* at \*9. The Court of Appeals held that the contract established the City's *right* to receive the records but did not create an *obligation* for the City to keep and hold those records. *Id.* (Emphasis in original). The issues of whether the financial statements were necessary to maintain an accurate knowledge of official activities or whether those records related to activities supported by monies from a government entity were not addressed in *Stuart*.

The 1980 United States Supreme Court case, *Forsham v. Harris*, 445 U.S. 169 (1980), is also distinguishable. The Court held that the records of a private company, who received federal study grants for medical research, were not agency records within the meaning of FOIA where the granting agency had not received the data. Hiring a private company to perform an important legislative function, an election audit, is substantially different than a grant to do scientific research. The other federal cases cited by the Senate Defendants are likewise distinguishable. One case concerned FOIA's legislative history on the definition of agency records which requires an agency to acquire records to trigger FOIA's requirements, *Rocky Mountain Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258 (10<sup>th</sup> Cir. 2018), and the other held that a non-profit organization did not become a federal agency by performing certain services for the Forest Service. *State of Missouri ex. rel. Garstang v. U.S. Dep't of Interior*, 297 F.3d 745 (8<sup>th</sup> Cir. 2002). None of the cases cited in the pleadings are on point with this case. This case involves records relating to a county election audit under the Arizona Public Records Law, a statute specific to Arizona and distinct from the requirements of FOIA. This unprecedented audit of voting machines and ballots for only two elective offices in one county is a matter of first impression for this Court, the State of Arizona and the United States of America.

## **2. The Political Question Doctrine**

The Arizona Constitution entrusts some matters solely to the political branches of government, not the judiciary. *Ariz. Indep. Comm'n v. Brewer*, 229 Ariz. 347 (2012). Based upon the basic principle of separation of powers, a nonjusticiable political question is presented when there is a textually demonstrable constitutional commitment of the issue to a coordinate

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political department or a lack of judicially discoverable and manageable standards for resolving it. *Kromko v. Ariz. Bd. Of Regents*, 216 Ariz. 190 (2007). Political questions are decisions that the Constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards. *Forty-seventh Legislature v. Napolitano*, 213 Ariz. 482 (2008).

The Senate Defendants cite *Mecham v. Gordon*, 156 Ariz. 297 (1988) as authority. In *Mecham*, the political doctrine applied when former governor Evan Mecham challenged the schedule and procedures used in impeachment proceedings against him. The Arizona Supreme Court upheld the separation of powers doctrine and stated that the courts will not tell the Legislature when to meet, what its agenda should be, what bills it may draft or consider, or how to conduct an impeachment inquiry. *Id.* at 302. Neither the Constitution nor any body of law provided the judiciary with standards it could enforce and judicial management was specifically excluded from the process. *Id.* at 301.

Such is not the case here. The PRL has specific mandates that public bodies and public officers are compelled to follow. Impeachment inquiries have no such mandates. The case of *Chavez v. Brewer*, 222 Ariz. 309 (2009) is instructive. In *Chavez*, the Court of Appeals rejected the Secretary of State's argument that certification of voting machines for use in Arizona was a nonjusticiable political question. *Id.* at 316. There is a statutory scheme for complying with the PRL in A.R.S. § 39-121.01. The United States Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. *Cf. El-Shifa Phamm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

The PRL does not in any way proscribe how the audit or any other business is to be conducted by the Legislature but merely requires the preservation and disclosure of public records subject to public scrutiny. As a practical matter, the Court cannot dictate how the Legislature is to conduct an audit that is near completion. There is no Arizona precedent to preclude the application and enforcement of a statutory scheme designed and drafted by the Legislature itself that applies to legislative functions. Plaintiff is not seeking judicial oversight that infringes on legislative authority but rather the enforcement of a statute drafted by the Legislature. In fact, the Legislature recently amended A.R.S. § 39-121.01 and chose not to exempt itself from the PRL which supports the conclusion that the Legislature intended to bind itself to comply with the PRL.

The out-of-state cases cited by the Senate Defendants, persuasive authority at best, are not on point. Records sought from the Iowa Senate involved a nonjusticiable issue because the Iowa legislature had specific rules of its own creation for telephone call records which were in conflict with Iowa's public records law. *Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W. 2d 491 (Iowa 1996). An Indiana Appeals Court did find that a public records law issue was

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justiciable but did not order disclosure because of a specific exemption adopted by the Indiana legislature. *Citizens Action Coal. Of Indiana v. Koch*, 51 N.E. 3d 236 (Ind. 2016). There is no conflict with the Arizona Public Records Law or any written exemption or specified rules adopted by the Arizona Legislature inconsistent with the PRL. Some of the other cases involve open meeting laws which are clearly distinguishable since open meeting laws have specific legal requirements about notice and procedures which are clearly within the purview of legislative and executive powers.

Finally, there is not a lack of judicially discoverable and manageable standards for resolving this issue. Plaintiff does not seek every record maintained by the third-party vendors and financial backers paying for the audit. The “substantial nexus” standard narrows the scope of the inquiry. Records concerning how the audit was planned and conducted, the identity of third-parties subsidizing the audit, and the source and specifics of the audit procedures are matters of public record subject to disclosure under the PRL.

It is difficult to conceive of a case with a more compelling public interest demanding public disclosure and public scrutiny. The Motion to Dismiss is denied.



**B**

Clerk of the Superior Court  
\*\*\* Filed \*\*\*  
08-02-2021 3:31 PM  
P. McKinley  
Deputy Clerk

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08/02/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
P. McKinley  
Deputy

AMERICAN OVERSIGHT

ROOPALI HARDIN DESAI

v.

KAREN FANN, ET AL.

THOMAS J. BASILE

DAVID JEREMY BODNEY  
JOHN DOUGLAS WILENCHIK  
KORY A LANGHOFER  
KEITH BEAUCHAMP  
DAVID ANDREW GAONA  
CRAIG CARSON HOFFMAN  
DENNIS I WILENCHIK  
JORDAN C WOLFF

COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE KEMP

**MINUTE ENTRY**

The Court has reviewed a Notice of Filing Proposed Form of Order Compelling Production of Public Records by Plaintiff American Oversight ("AO"), Senate Defendants' Response to Notice of Filing Proposed Form of Order, and AO's Reply in Support of Notice of Filing Proposed Form of Order Compelling Production of Public Records.

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AO seeks an Order to produce public records consistent with the Court's Findings and Ruling in a July 15, 2021, Minute Entry. Senate Defendants (Karen Fann, Warren Peterson and the Arizona Senate, collectively "Senate Defendants") object on procedural grounds, that such an order would operate as a final judgment on the merits when the Court denied Senate Defendants' Motion to Dismiss; that the case requires further discovery and pleadings on the merits; and that Senate Defendants have legislative immunity which shields them from disclosing records relative to this audit, an affirmative defense that was not raised in the Motion to Dismiss.

Rule 4(c) of the Arizona Special Actions Rules of Procedure provides that if a show cause procedure is used, the court should set a speedy return date. If that procedure is not used, the usual time periods established by the Rules of Civil Procedure shall apply, but all times may be specially modified by court order to achieve expeditious determination of the cause. The State Bar Committee Note goes on to explain that the object of this Rule is "to retain that potential for speedy justice by establishing what are in effect two tracks for special actions. Special actions which require urgent disposition may be expedited under the show cause procedure established by the Rule, with complete flexibility in the Court to control timing."

Here, AO's Verified Complaint clearly states its reliance on Rule 4(c) by alleging this is a statutory special action and a show cause procedure is being used. (See ¶ 11, Verified Complaint). The Verified Complaint was filed on May 20 and a return hearing conducted on May 27, which set a briefing schedule for the briefing of Senate Defendants' Motion to Dismiss. Oral Argument was heard on July 7 and the Court issued its Findings and a Ruling on July 15. AO then filed a Proposed Order on July 19 and the above referenced Response and Reply were expeditiously filed.

In the July 15 Minute Entry, this Court made a number of significant legal findings outlined as follows:

- (1) Defendants Fann and Peterson are "officers" who hold a public office of a public body (the Arizona Senate) under the Arizona Public Records Law ("PRL") pursuant to A.R.S. § 39-121.01(A)(1).
- (2) Defendant Arizona Senate is a "public body" under the PRL.
- (3) As officers of a public body, Senate Defendants must maintain all records reasonably necessary or appropriate to maintain all accurate knowledge of their official activities or any activities supported by public monies.
- (4) The audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution and is an official legislative activity.
- (5) Cyber Ninjas, Inc. ("CNI") and its subvendors are not officers or public bodies but rather private companies.
- (6) CNI and its subvendors are clearly agents of the Senate Defendants.

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- (7) CNI and its subvendors are subject to the disclosure requirements of the PRL.
- (8) Senate Defendants have a duty to keep and maintain all records relating to this audit including all records of CNI and any subvendors.
- (9) Whether these public documents are in the actual physical control or possession of Senate Defendants is irrelevant to their duties and obligations under the PRL.
- (10) All records and documents with a "substantial nexus" to the audit activities are subject to disclosure under the PRL.
- (11) CNI and the subvendors are agents for the Senate Defendants who have at least constructive possession of the records.
- (12) CNI and Ken Bennett are authorized agents on behalf of the Senate. Defendant Fann conceded this fact in related litigation, *Arizona Democratic Party, et al. v. Fann, et al.*, CV2020-006646.
- (13) All documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid are subject to the PRL.
- (14) CNI is contractually obligated to fully cooperate with Senate Defendants when Senate Defendants are engaged in litigation by providing information or documents relating to that litigation.
- (15) The PRL has specific statutory mandates that public bodies and public officers are compelled to follow.
- (16) This case does not present a nonjusticiable political question since the request to preserve and disclose records under the PRL does not in any way interfere with or dictate how the Senate Defendants conduct this audit.
- (17) This case presents a compelling public interest demanding public disclosure and public scrutiny.

After the filing of the Verified Complaint, the parties agreed to a briefing schedule for the Motion to Dismiss. The parties also agreed that the Motion to Dismiss would serve as Senate Defendants response to the Application for Order to Show Cause and in turn resolve AO's request for relief. Legislative immunity was not raised as an issue or asserted as an affirmative defense in the Motion to Dismiss. This was done pursuant to Ariz. R.P. Spec. Action 4(c) with a clear intent to resolve this case in an expedited manner. The need for an expedited ruling may be even more apparent since Senate Defendants have failed to provide assurances that the public records at issue are in fact being preserved. The parties have clearly chosen to use the fast track provisions of Rule 4(c), Ariz. R.P. Spec. Action.

Senate Defendants' concern that the Proposed Order would serve as a final disposition on the merits with Rule 56(c) language is misplaced. No such language is in the Proposed Order

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and claims of constitutional or common law privileges, or valid non-disclosure claims, may still be asserted. There is likewise no Rule 54(b) or (c), Ariz. R. Civ. P. language in the Proposed Order that would result in finality or resolve the case in its entirety. The Proposed Order merely compels Senate Defendants to comply with the legal findings made by this Court on July 15. The Court agrees with Senate Defendants that the denial of a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., does not dispose of any claims. Nor does the denial of a motion to dismiss provide an appealable order. *Sisemore v. Farmers Ins. Co. of Arizona*, 161 Ariz. 564 (1989). The Court's adoption of the Proposed Order does not preclude Senate Defendants from challenging the disclosure of any document or communication based upon privilege or any other valid legal objection. Senate Defendants can also seek Special Action relief from the Court of Appeals based upon the Court adopting the Proposed Order.

Nor does the Court accept Senate Defendants' position that further discovery is warranted. The findings outlined above involve undisputed issues of fact. There are no material issues of fact in dispute and the Court fails to see how further discovery, pleading practice or development of the record could change the findings already made by this Court. Both Rule 4(c) and the PRL demand prompt resolution.

The issue raised in the Verified Complaint, whether the records relating to this audit are subject to the PRL and Senate Defendants' response objecting to the application of the PRL as outlined in the Motion to Dismiss, constitutes purely legal argument. The Courts, rather than government officials, are the final arbiter of what qualifies as a public record. *Griffis v. Pinal County*, 215 Ariz. 15 (2007). Whether a document is a public record under Arizona's public records law presents a question of law. *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). Further discovery or more legal briefing will not alter, enhance or diminish the court's findings on this narrow legal issue.

Although the affirmative defense of Legislative Immunity may not have been waived in the context of specific actions, statements, communications, or documents, the Court categorically rejects Senate Defendants' blanket assertion that Legislative Immunity protects Senate Defendants from the mandates of the PRL. None of the cases cited by Senate Defendants supports their legislative immunity position since they are all clearly distinguishable, nor does the case law cited support the broad and sweeping proposition that legislative immunity can be raised "at any time, in any context, and at any procedural juncture."

Legislators are protected from liability for their "words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. This protection of immunity is much narrower than that contemplated by Senate Defendants. Legislative immunity is extended to shield individual officials from personal liability for their legislative acts and is not applicable when officials are not being sued for personal liability in their individual capacities. *State ex rel. Brnovich v. Ariz. Bd. Of Regents*,

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250 Ariz. 127 (2020). The Proposed Order is akin to a Writ of Mandamus compelling Senate Defendants to comply with their duties and obligations under the PRL. The Verified Complaint is in no way a tort claim against any member of the Senate for personal liability in their individual capacities. The Proposed Order and the Court's findings do not, in any way, interfere with or dictate how the legislature conducts its business or its deliberative processes. The Court is not dictating how the audit is conducted nor interfering in the audit process in any way.

Whether legislative immunity applies is a legal question for the court. *Green Acres Trust v. London*, 141 Ariz. 609(1984). *Mesnard v. Campagnolo in and for County of Maricopa*, 2021 WL 2678473, does not support Senate Defendants. In that case, a legislator was sued for defamation, a well established claim in tort. The legislature was not protected from maintaining an investigative report about sexual harassment by another legislator under the PRL. The Arizona Supreme Court in *Mesnard* found that Mesnard performed a legislative function when he released the report. *Id.* at ¶ 23. Legislative immunity protected Mesnard from the tort claim of defamation but he was required to keep and maintain records of the investigation, which was subject to the PRL.

Here, Senate Defendants are refusing to disclose public records and claim legislative immunity. Again, this is not a tort action for damages sought against legislators engaged in legislative functions. The Verified Complaint merely seeks the preservation and disclosure or records subject to a PRL request.

The audit is being conducted pursuant to the Senate's legislative functions as outlined in the Arizona Constitution. This was confirmed by Defendant Fann herself. The documents in question are clearly subject to the PRL. The preservation and disclosure of these public records pursuant to the PRL are definitely not subsumed within the Speech and Debate immunity clause of the Arizona Constitution. Such a broad interpretation would render the PRL meaningless and unenforceable as to any legislator at any time under any circumstances. This is surely not within the legislative intent of the PRL.

Defendant Fann has the authority, and statutory obligation under the PRL, to compel CNI and its subvendors to produce all internal emails and correspondence outlined in the Proposed Order. Senate Defendants' claim that they have not even seen the documents of CNI and its subvendors does nothing to advance their position. Willful blindness does not relieve Senate Defendants from their duties and obligations under the PRL.

The relief requested by AO is granted. The language in the Proposed Order quotes specific findings from the July 15 Minute Entry. The Court will sign the Proposed Order simultaneously with this Minute Entry. This Order will be effective immediately given the

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demands of expediency under Rule 4(c) Ariz. R.L. Spec. Action and the PRL, as well as the demands for public scrutiny and substantial public interest.

C



**SENATE RULES**

**FIFTY-FOURTH  
LEGISLATURE**

**STATE OF ARIZONA**



**2019-2020**

J. The President shall refer all proposed measures or other legislative matters to the appropriate committees. Every bill, resolution and memorial shall be referred by the President to one or more standing committees, except resolutions or memorials to be adopted by unanimous consent and House bills to be substituted on third reading pursuant to Rule 11-H. All proposed measures or other legislative matters shall automatically be assigned to the Rules Committee without action upon the part of the President. If three-fifths or more of the members of the Senate petition the President to discharge committees from further consideration of a bill, resolution or memorial, the measure shall be withdrawn by the President from assigned committees which have not reported the measure. If a committee hearing has not been held on the measure, the President shall direct that a hearing be held by a committee within seven days and upon withdrawal or hearing, the matter shall be placed by the President on the active calendar of the Committee of the Whole. If the measure is reported favorably by the Committee of the Whole, it shall be placed by the President on the third reading calendar. If a discharge petition is presented to the President less than seven days before the Senate adjourns sine die, the President shall not be required to act upon the petition.

K. All debts incurred by the Senate, either during session or between sessions of the legislature, shall be subject to approval by the President and if so approved shall be paid by claims drawn on the Finance Division of the Department of Administration.

L. The office of the President shall keep the accounts for the pay, mileage and subsistence of members and attaches, and shall maintain these records for inspection by the membership.

M. The President is authorized to call meetings of standing committees of the Senate during periods when the Senate is not in session, and to approve claims for travel and subsistence incurred by members of such committees in attendance.

### RULE 3 The Secretary

The Secretary shall have the following powers and duties:

A. It shall be the duty of the Secretary to keep a Journal of each day's proceedings, and to provide a typewritten copy of the same for examination by the President. The Secretary shall each day prepare a calendar of the Orders and Business of the Day and a like calendar for the Committee of the Whole, and such other dockets and calendars as may be ordered, and shall cause a copy to be placed on the desk of each member, at or before the hour of convening.

B. The Secretary shall have the custody of all bills, resolutions, memorials, petitions, communications, or other measures, instruments and papers introduced in or submitted to the Senate, subject to such disposition thereof as may be provided by the rules of the Senate or the order of the President, and shall be held strictly accountable for the safekeeping of the same. The Secretary shall keep a record of all such measures or instruments, showing at all times the exact standing of each.

C. The Secretary shall perform such other duties as may be required of the Secretary by the Senate or by the President.

D. The Assistant Secretary shall act under the direction of the Secretary and in the absence of the Secretary shall perform the duties of the Secretary.

### RULE 4 Sergeant at Arms

The Sergeant at Arms shall have the following powers and duties:

A. It shall be the duty of the Sergeant at Arms to attend the Senate and the Committee of the Whole during their sittings, to maintain order under the direction of the President or Chairman, to execute the commands of the Senate, and all processes issued by authority thereof, directed to the Sergeant at Arms by the Presiding Officer.

# APPENDIX 4



21 AUG 17 PM 3:00

FILED  
BY L. Farr, DEP



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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

REPLY IN SUPPORT OF  
MOTION TO DISMISS

(Assigned to  
Judge John H. Hannah Jr.)<sup>1</sup>

(Oral Argument Set: August 23, 2021  
at 9:30 a.m.)

<sup>1</sup> By filing this Reply, Defendant does not waive its argument that this action must be immediately transferred to another division of this Court, which remains on appeal.

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First – Defendant Cyber Ninjas, Inc. (“CNI”) actually agrees with Plaintiff (Phoenix Newspapers Inc., or “PNI”) that at least part of Judge Kemp’s ruling in the related matter (CV2021-008265) should be persuasive here. “[C]ourts take judicial notice of other actions involving similar parties and issues and of the pleadings therein, and...in passing upon the pleadings in one action they may and should consider the record in the other.” *Regan v. First Nat. Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940)(citation omitted).

Judge Kemp ruled: “The Court agrees with Senate Defendants that CNI and its subvendors are not officers or public bodies but rather private companies.” (See p. 3 of the Ruling filed on July 15, 2021 in CV2021-008265.) The public-records statute only provides for claims against public officers or public bodies. Not only would construing the statute in order to allow public-records claims against a private contractor like CNI be utterly groundless, but it would be devastating to the State’s ability to find and hire contractors, much less employees. It would expose all government employee and contractors – including this Court and its staff – to the responsibility of responding to public-records requests, and of being sued under the public records statute, with the associated fees and costs and risk of the court even awarding fees and costs against them.

Contrary to PNI’s argument, CNI has never been appointed the Senate’s official “custodian of records.” Nor does PNI actually allege that CNI has mysteriously become the Senate’s official custodian. But moreover, PNI fails to point to any legal authority which supports the notion that even an official “custodian of records” for a public body may be directly named and sued in a statutory public-records claim. In other words, the statute under which Plaintiffs sued – A.R.S. § 39-121.02 – is clear that it only creates a cause of action against an “officer or public body,” and not even against a mere custodian who may be under their supervision. See A.R.S. § 39-121.02(A),(C). And again, CNI is not a public officer or body. In fact, a substantial piece of CNI’s contract work for the Senate is nearly finished. This is a far cry from CNI being a sworn officer of the state, with serious administrative duties and long-term obligations. CNI isn’t even one of the state’s employees, who may have substantial and/or long-term – but non-

1 administrative – duties. CNI is a private contractor, with short-term and narrowly-defined  
 2 contractual duties—period.

3 On page 8 of its brief, PNI offers a reading of the statutory definition of “officer” (1) that  
 4 stretches the definition of a public “office” past any reasonable breaking point (such that it would  
 5 include, again, literally any government contractor or employee); and (2) that shockingly omits  
 6 the rest of the actual statutory language, which is: “...and any chief administrative officer, head,  
 7 director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(A)(1). This  
 8 language is highly significant in demonstrating the true meaning of “officer” under  
 9 A.R.S. § 39-121.01(A)(1), owing to several fundamental canons of statutory interpretation. “The  
 10 rule of statutory construction, *noscitur a sociis*, directs our attention to the accompanying words  
 11 as we undertake to learn the meaning to be given” to particular statutory language. *Planned*  
 12 *Parenthood Comm. of Phoenix, Inc. v. Maricopa Cty.*, 92 Ariz. 231, 235, 375 P.2d 719, 722  
 13 (1962); *see also Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, 266 P.3d 349, 352  
 14 (2011)(“*noscitur a sociis*—a canon closely related to *eiusdem generis*—dictates that a statutory  
 15 term is interpreted in context of the accompanying words”). The “chief administrative officer,  
 16 head, director” etc. language clearly demonstrates the kind of “elective or appointed office of any  
 17 public body” that the statute is talking about. Further, if the phrase “elective or appointed office  
 18 of any public body” could be applied to any state employee or contractor, irrespective of their  
 19 non-administrative and/or temporary role, then it would render superfluous the “chief  
 20 administrative officer” (etc.) language that is found in the same sentence. This violates another  
 21 basic rule of statutory interpretation, which is that “[i]nterpreting statutory language requires that  
 22 we give meaning to each word, phrase, clause, and sentence within a statute so that no part will  
 23 be superfluous, void, contradictory, or insignificant.” *Champlin v. Sargeant In & For Cty. of*  
 24 *Maricopa*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998). Finally, it also violates the doctrine of  
 25 *expressio unius est exclusio alterius* — which is that “the expression of one or more items of a  
 26 class indicates an intent to exclude omitted items of the same class.” *Id.* By enumerating only the  
 27 “chief administrative officer, head, director, superintendent,” etc. of a public body, the legislature  
 28 indicated an obvious intent to exclude lesser roles. Finally, PNI’s argument that the language “any

1 person elected or appointed to hold any elective or appointive office of any public body” was  
2 intended to apply to private fictional entities/non-natural persons is hardly deserving of a response.  
3 But it should suffice to say that Arizona statutes clearly define the requirements for public office,  
4 “whether elective or appointive,” as including that a person must be “not less than eighteen years  
5 of age, [must be] a citizen of the United States and a resident of this state.” A.R.S. § 38-201.

6 To further highlight the unreasonableness of the Plaintiffs’ position on this case: if  
7 Plaintiffs were correct in their interpretation of the public-records statutes, then it could be argued  
8 with equal force that the Plaintiffs themselves – consisting of the owner of the Arizona Republic,  
9 and one of its editors– are subject to public records statutes. The Arizona Republic has received  
10 over four hundred thousand dollars in government funds since 2003,<sup>2</sup> on behalf of organizations  
11 like the VA, the HHS, DHS, and the DOD. In all cases, PNI was performing “core government  
12 functions” (to borrow Plaintiffs’ phraseology) by helping the government find employees  
13 (through want ads) or publishing important government public notices—“core” government  
14 functions that the government “lacks the ability to perform...itself” and that are “initiated and  
15 funded with public dollars.” (Plaintiffs’ brief, pages 10-11 *inter alia*.) And there is nothing more  
16 “exclusive” about CNI’s ability to conduct an audit, than PNI’s ability to write and publish things.  
17 (Both entities are capable of providing the “same goods and services to a governmental entity that  
18 [they] could provide to a nongovernmental customer,” to quote Plaintiffs—not that any legal  
19 authority supports this test anyway.) And eighteen years is certainly a longer period of time (and  
20 four hundred grand is a lot more in public funding) than CNI has or ever will receive from the  
21 government (especially since CNI is nearly done with a substantial part of its audit, after far less  
22 than one year). By Plaintiffs’ logic, the Plaintiffs are “agents” and “officers” of the government  
23 who are performing “government functions” and therefore subject to being named by any citizen,  
24 at any time, in a public-records suit (and who are further at risk of paying attorneys’ fees on the  
25 claim).

26  
27  
28 <sup>2</sup> See e.g. “usaspending.gov” or “govtribe.com.”

1 The *Arpaio* case cited by Plaintiffs actually supports exactly what CNI is arguing here.  
2 *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130, 133, 211 P.3d 8, 11 (Ct. App. 2008). The case addressed  
3 whether attorneys’ fees under the public-records statute could be awarded against a public officer  
4 (*Arpaio*), where the underlying public records request was actually sent to another officer (the  
5 Pima County Attorney). *Arpaio* had allegedly “caused” the Pima County Attorney to refuse to  
6 honor the records request, by invoking his attorney-client privilege with the county attorney. The  
7 Court of Appeals found that because the language in the attorneys’ fees provision of the public-  
8 records statute was uniquely *not* limited to just the public officer or public body responsible for  
9 providing records – in contrast to “most of the provisions of Arizona’s public records law,”  
10 including the section which “creates the cause of action” – then an award of fees was accordingly  
11 not limited to being against the party responsible for providing records. “[U]nlike most of the  
12 provisions of Arizona’s public records law, § 39–121.02(B) [the fees provision] does not refer to  
13 the officer or public body having custody of the requested records. In further contrast, the other  
14 subsections of § 39–121.02 *specifically refer to that officer or public body*. Subsection (C) of  
15 § 39–121.02 *creates a cause of action by the person requesting the records against ‘the officer or*  
16 *public body’ who ‘wrongfully denied access to [the requested] public records’ for any damages*  
17 *‘resulting from the denial.’* Subsection (A) permits the person requesting the records to appeal the  
18 denial of his or her request by special action ‘against the officer or public body.’” *Arpaio*, 221  
19 Ariz. at 133, 211 P.3d at 11. (Emphasis added.) In other words, the *Arpaio* case actually supports  
20 that only the “officer or public body” that is responsible for public records can properly be sued  
21 in a special action for wrongful denial of a public records request.

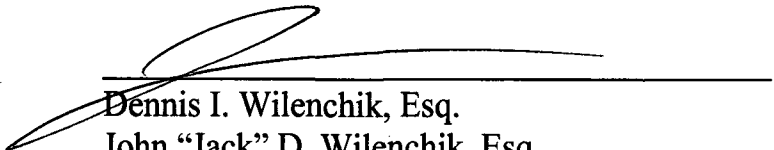
22 Finally, Plaintiffs cannot simply invent the idea that CNI is a “Real Party in Interest” that  
23 must spend attorneys’ fees and costs defending this suit, when there is no actual legally-cognizable  
24 claim asserted against it. The language in the Rules of Special Action regarding allowing “Real  
25 Parties in Interest” was not intended to justify naming any person with any kind of articulable  
26  
27  
28



1 connection to a lawsuit as a defendant in it<sup>3</sup>—or else Rule 12(b)(6), which requires that an actual  
2 cognizable claim be asserted against every defendant, would be meaningless. Rule 12(b)(6) means  
3 what it says. Plaintiffs must assert a legally-cognizable claim against Defendant CNI; and because  
4 they do not, then the Complaint against CNI must be dismissed for failure to state a claim for  
5 which relief can be granted. Because CNI is clearly not an officer or public body under  
6 A.R.S. § 39-121.02, and Plaintiffs have only named CNI in a claim under that statute for denial  
7 of records access, then Plaintiffs' Complaint fails to state a claim against CNI and it must be  
8 dismissed with prejudice. CNI reserves its right to seek attorneys' fees and costs under  
9 A.R.S. §§ 12-349, 12-341 *inter alia*.

10 **RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of August, 2021.

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

12   
13 \_\_\_\_\_  
14 Dennis I. Wilenchik, Esq.  
15 John "Jack" D. Wilenchik, Esq.  
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21 *Attorneys for Defendant Cyber Ninjas, Inc.*

18 **ORIGINAL** of the foregoing filed on  
19 August 17, 2021 with the Clerk of the Maricopa  
20 County Superior Court

21 **COPY** of the foregoing hand-delivered on  
22 August 17, 2021 to the Judge John Hannah

23 ...

24 ...

25 ...

26 \_\_\_\_\_  
27 <sup>3</sup> In actuality, the special action rule was intended to address the common legal fiction of naming  
28 the judge as the "defendant," or "respondent," in a special-action of a judicial ruling. The actual  
defendants are instead named as the "real parties in interest."

1 **COPY** of the foregoing emailed and mailed on  
2 August 17, 2021 to:

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

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
By: 

# APPENDIX 5



SUPREME COURT OF ARIZONA

KAREN FANN, in her official ) Arizona Supreme Court  
capacity as President of the ) No. CV-21-0197-PR  
Arizona Senate; WARREN PETERSEN, )  
in his official capacity as ) Court of Appeals  
Chairman of the Senate Judiciary ) Division One  
Committee; the ARIZONA SENATE, a ) No. 1 CA-SA 21-0141  
house of the Arizona Legislature, )  
 ) Maricopa County  
 ) Superior Court  
Petitioner, ) No. CV2021-008265  
 )  
v. )  
 )  
THE HONORABLE MICHAEL KEMP, )  
Judge of the SUPERIOR COURT OF )  
THE STATE OF ARIZONA, in and for ) **FILED 08/24/2021**  
the County of MARICOPA, )  
 )  
Respondent Judge, )  
 )  
AMERICAN OVERSIGHT, )  
 )  
Real Party in Interest. )  
\_\_\_\_\_ )

O R D E R

The Court en banc<sup>1</sup> has considered "Petitioners' Emergency Motion for Stay" filed by Petitioners Fann, *et al.* and "American Oversight's Opposition to Petitioners' Emergency Motion for Stay" filed by real party in interest American Oversight. On August 20, 2021, the Court entered an order temporarily staying the superior court's order to produce public records entered on August 2, 2021 to allow the Court to consider the stay pleadings.

---

<sup>1</sup>Chief Justice Brutinel has recused himself from participating in this matter.

Upon consideration,

**IT IS ORDERED** extending the stay to enable the Court to fully consider the issues raised in the petition for review. However, this order does not relieve the Petitioners from continuing to review and produce documents Petitioners have already agreed to produce, as noted on pages 2-3 of Petitioners' Petition for Review ("The Senate has produced, or will produce, to American Oversight any documents in the physical possession or physical custody of any of the Senate or of Secretary Bennett that are (1) responsive to American Oversight's public records requests; and (2) not protected from disclosure by any constitutional, statutory or common law privilege or confidentiality.").

**IT IS FURTHER ORDERED** that any amicus briefs are due no later than 4:00 p.m. on Tuesday, August 31, 2021. Any responses to the amicus briefs are due no later than 4:00 p.m. on Tuesday, September 7, 2021.

The Court will conference this matter on the September 14, 2021 regular agenda.

DATED this 24<sup>th</sup> day of August, 2021.

\_\_\_\_\_/s/\_\_\_\_\_  
KATHRYN H. KING  
Duty Justice

TO:

Kory A Langhofer  
Thomas J Basile  
L Keith Beauchamp  
Roopali H Desai  
D Andrew Gaona  
Hon. Michael W Kemp  
Hon. Jeff Fine  
Amy M Wood

# EXHIBIT 1



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11 *and Kathy Tulumello*

ARIZONA SUPERIOR COURT  
MARICOPA COUNTY

12 PHOENIX NEWSPAPERS, INC., an  
13 Arizona corporation, and KATHY  
14 TULUMELLO,

15 Plaintiffs,

16 vs.

17 ARIZONA STATE SENATE, a public  
18 body of the State of Arizona; KAREN  
19 FANN, in her official capacity as President  
20 of the Arizona State Senate; WARREN  
21 PETERSEN, in his official capacity as  
22 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.,

23 Defendants, and

24 CYBER NINJAS, INC.,

25 Real Party in Interest.  
26

CLERK OF THE SUPERIOR COURT  
FILED

AUG 24 2021 4:10 pm

M. Gervreau, Deputy

NO. LC2021-000180-001

**ORDER TO PRODUCE  
PUBLIC RECORDS**



1 On June 30, 2021, Plaintiffs Phoenix Newspapers, Inc. and Kathy Tulumello  
2 (collectively, "Plaintiffs") filed an Application for Order to Show Cause (the  
3 "Application") and a Complaint for Statutory Special Action to Secure Access to Public  
4 Records (the "Complaint") against Defendants Arizona State Senate, Karen Fann, Warren  
5 Peterson and Susan Aceves (collectively, the "Senate Defendants") and Cyber Ninjas, Inc.,  
6 as a Defendant and Real Party in Interest ("Cyber Ninjas"), seeking inspection and copying  
7 of the following records from the Senate Defendants and Cyber Ninjas, as described  
8 particularly in the following Exhibits to the Complaint:

- 9 (a) **Exhibit 3** (requested by email dated April 22, 2021 from Mr. Oxford to Mr  
10 Moore) (Senate Request A);  
11 (b) **Exhibit 7** (requested by letter dated May 27, 2021 from Mr. Oxford, et al. to  
12 Mr. Moore and Sen. Pres. Fann) (Senate Request B); and  
13 (c) **Exhibit 10** (requested by letter dated June 2, 2021 from Mr. Bodney to Mr.  
14 Logan) (Cyber Ninjas Request) (collectively, **Exhibits 3, 7 and 10**, the "Public  
15 Records").

16 Plaintiffs also expressly reserved the right by this special action to secure copies of  
17 any and all email records listed in **Exhibits 3, 7 and 10** to the Complaint that had not been  
18 completely or promptly produced by the Senate Defendants (collectively, the "Remaining  
19 Emails"). Plaintiffs contend that the Senate Defendants still have not produced copies of  
20 all of the Remaining Emails.

21 After the Plaintiffs' Complaint was filed, Senate Defendants filed an Answer and  
22 subsequently filed a July 27, 2021 Response to Plaintiffs' Application for Order to Show  
23 Cause (the "Senate Response") and a Motion for Judgment on the Pleadings (the "Senate  
24 Motion"). On July 27, 2021, Cyber Ninjas filed a Response to Application for Order to  
25 Show Cause (the "Cyber Ninjas Response") and a Motion to Dismiss (the "Cyber Ninjas'  
26 Motion").

1 On August 10, 2021, Plaintiffs filed their Response in Opposition to (1) Senate  
2 Defendants' Motion for Judgment on the Pleadings and (2) Cyber Ninjas' Motion to  
3 Dismiss, and (3) Reply in Support of Plaintiffs' Application for Order to Show Cause. On  
4 August 17, 2021, Senate Defendants filed their Reply in Support of Motion for Judgment  
5 on the Pleadings and Cyber Ninjas filed its Reply in Support of its Motion to Dismiss.

6 This Court also acknowledges a separate case pending in Maricopa County Superior  
7 Court in Case No. CV2021-008265, *American Oversight v. Karen Fann et al.* in which the  
8 Honorable Michael W. Kemp issued an August 2, 2021 order (the "First AO Order") that  
9 required the Arizona Senate to produce documents responsive to public records requests  
10 issued to the Arizona Senate by American Oversight related to the Maricopa County 2020  
11 election audit (the "Audit") either directly in the possession of the Arizona Senate or in the  
12 possession or control of the privately owned contractors and subcontractors performing the  
13 Audit for the Senate. The portion of the First AO Order related to the production of  
14 documents in the possession or control of the Arizona Senate's privately owned contractors  
15 and subcontractors was temporarily stayed on August 11, 2021 ("the Stay") in the course  
16 of a Special Action before the Arizona Court of Appeals. On August 19, 2021, the Arizona  
17 Court of Appeals, by Memorandum Decision, accepted jurisdiction over the Senate  
18 Defendants' special action, denied relief and lifted the Stay. Then, on August 20, 2021,  
19 Justice Kathryn King of the Arizona Supreme Court re-imposed the Stay. On August 24,  
20 2021, the full Supreme Court ordered the Stay extended and announced that the Senate  
21 Defendants' Petition for Review of the Special Action Decision of the Court of Appeals  
22 will be conferenced on September 14, 2021. Meanwhile, on August 18, 2021, Judge Kemp  
23 issued another order ("the Second AO Order") directing the Arizona Senate to produce or  
24 identify in a privilege log those documents responsive to American Oversight's public  
25 records requests that were in the physical possession or custody of the Senate or Secretary  
26 Bennett (and therefore *not* subject to the Stay) by 5:00 p.m. on August 31, 2021. The  
27 Second AO order remains in effect.

28

1 After consideration of the aforementioned pleadings, memoranda and orders, and  
2 after oral argument on August 23, 2021 before this Court on Plaintiffs' Application for  
3 Order to Show Cause, Senate Defendants' Motion for Judgment on the Pleadings and  
4 Cyber Ninjas' Motion to Dismiss,

5 IT IS HEREBY ORDERED AS FOLLOWS:

6 Defendants have failed to show cause why the relief requested by Plaintiffs in this  
7 special action should not be granted. ACCORDINGLY:

8 Senate Defendants and Cyber Ninjas are ORDERED to comply with A.R.S. § 39-  
9 121 *et seq.* immediately by causing copies of the Public Records in the possession, custody  
10 or control of the Senate Defendants and/or Cyber Ninjas to be produced to Plaintiffs by  
11 **August 31, 2021 at 5:00 p.m.** Cyber Ninjas and the Senate Defendants may confer  
12 regarding which Public Records in the possession, custody or control of one Defendant or  
13 another should be withheld on the basis of a purported privilege or for any other reason.  
14 Any Public Records, whether maintained by Cyber Ninjas or the Senate Defendants, or any  
15 one of them, that are withheld on the basis of a purported privilege or for any other reason  
16 shall be listed on a log with individual descriptions of each withheld record in sufficient  
17 detail to allow Plaintiffs to challenge the basis for withholding the record, if necessary.  
18 Descriptions of records on the log shall not be so detailed as to undermine the alleged basis  
19 for withholding any record from public inspection. Defendants may produce one privilege  
20 log that references the specific Defendant (or Defendants) that calls for a record to be  
21 withheld, or Cyber Ninjas and the Senate Defendants may each produce their own separate  
22 logs, as required by this Order. Defendant(s)' log(s) shall be produced to Plaintiffs by  
23 **August 31, 2021 at 5:00 p.m.** To the extent that Plaintiffs wish to challenge any of the  
24 documents on a log, they shall have fifteen (15) court days to file a motion challenging the  
25 designation(s). Documents subject to such a motion shall be turned over to the Court for  
26 an *in camera* inspection and determination of the validity of the designation within two (2)  
27 court days of such a motion being filed. The Court will make a final determination as to  
28

1 whether the assertion of privilege or any other exemption from disclosure is justified and,  
2 to the extent the Court determines there is no such justification for the record(s) being  
3 withheld, the Public Records shall be produced to Plaintiffs within two (2) court days.

4 Senate Defendants are further ORDERED to comply with A.R.S. § 39-121 *et seq.*  
5 immediately by causing copies of any and all Remaining Emails to be produced to  
6 Plaintiffs by **August 31, 2021 at 5:00 p.m.** Any Remaining Emails that are withheld on  
7 the basis of a purported privilege or for any other reason shall be listed on a log with  
8 individual descriptions of each withheld record in sufficient detail to allow Plaintiffs to  
9 challenge the basis for withholding the record, if necessary. Descriptions of records on the  
10 log shall not be so detailed as to undermine the alleged basis for withholding any record  
11 from public inspection. This log shall be produced to Plaintiffs by **August 31, 2021 at**  
12 **5:00 p.m.** To the extent that Plaintiffs wish to challenge any of the documents on the log,  
13 they shall have fifteen (15) court days to file a motion challenging the designation(s).  
14 Documents subject to such a motion shall be turned over to the Court for an *in camera*  
15 inspection and determination of the validity of the designation within two (2) court days of  
16 such a motion being filed. The Court shall make a final determination as to whether the  
17 assertion of privilege or any other exemption from disclosure is justified and, to the extent  
18 the Court determines there is no such justification for the record(s) being withheld, the  
19 record(s) shall be produced to Plaintiffs within two (2) court days.

20 It is further ORDERED the orders entered herein are stayed to the extent they direct  
21 the Senate or the Cyber Ninjas to produce records (or a privilege log describing records)  
22 that are subject to the Stay of the First AO Order, but not otherwise. This partial stay will  
23 remain in effect until the Arizona Supreme Court lifts the Stay of the First AO Order or the  
24 Stay otherwise expires. Defendants shall have 5:00 p.m. on the third business day after the  
25 Stay is lifted or expires to comply with all orders previously subject to this partial stay,  
26 except to the extent that the Arizona Supreme Court relieves the Senate of the duty to  
27 comply in a ruling on the merits of the pending Petition for Review.

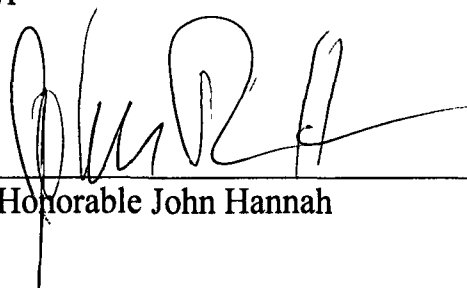
28

1 Notwithstanding the foregoing paragraph, all Defendants, including Cyber Ninjas,  
2 are ORDERED to carefully secure, protect and preserve from deterioration, mutilation,  
3 loss or destruction any and all records in their custody, possession or control that are  
4 reasonably necessary or appropriate to maintain an accurate knowledge of their official  
5 activities concerning the 2020 Maricopa County election audit, including records of the  
6 performance, funding and staffing of said audit.

7 It is further ORDERED that the Senate Defendants' Motion for Judgment on the  
8 Pleadings and Cyber Ninjas' Motion to Dismiss are DENIED.

9 LET THE RECORD REFLECT the Court will issue a separate minute entry  
10 explaining the reasoning underlying this order.

11 Dated this 24th day of August, 2021

12   
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14 \_\_\_\_\_  
15 Honorable John Hannah  
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**ARIZONA COURT OF APPEALS  
DIVISION ONE**

CYBER NINJAS, INC.,

Petitioner/Defendant,

v.

THE HONORABLE JOHN HANNAH,  
Judge of the SUPERIOR COURT OF  
THE STATE OF ARIZONA, in and for  
the County of MARICOPA,

Respondent Judge, and

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

Real Parties in Interest.

Case No. 1 CA-SA 21-0173

Case No. 1 CA-SA 21-0176

Maricopa County Superior Court  
Case No. LC2021-00180-001

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,

Petitioners,

v.

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge, and

PHOENIX NEWSPAPERS, INC., KATHY TULUMELLO, CYBER NINJAS, INC.

Real Parties in Interest.

---

**RESPONSE OF PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO TO CYBER NINJAS, INC.'S PETITION FOR SPECIAL ACTION**

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*Attorneys for Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello*

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## Introduction

The Arizona Senate’s recount of millions of Maricopa County voter ballots from the November 2020 elections (the “Audit”) was supposed to be both swift and transparent. It has been neither. To shed light on the Audit, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, “PNI”) issued public records requests pursuant to A.R.S. § 39-121, *et seq.* (the “Arizona Public Records Law”), to (1) the Arizona Senate and certain of its members (the “Senate”) and (2) Petitioner Cyber Ninjas, Inc. (“Cyber Ninjas”), the Florida corporation that the Senate hired to conduct the Audit for \$150,000.00 in public funds.

In June 2021, after months of the Senate and Cyber Ninjas refusing to review, much less produce, public records concerning the Audit, PNI commenced a statutory special action in the Maricopa County Superior Court, naming the Senate as a defendant and Cyber Ninjas as a defendant and real party in interest. Following motion practice and multiple hearings, the Hon. Judge John Hannah issued an Order to Produce Public Records on August 24, 2021 (the “Superior Court Order”) that called for Cyber Ninjas and the Senate to preserve, review and

produce certain public records that PNI had requested and the Senate and Cyber Ninjas had concealed.

The Superior Court Order that is the subject of Cyber Ninja's Petition for Special Action (the "Petition") followed extensive briefing and a lengthy hearing on August 23, 2021. The Superior Court Order contains the trial court's detailed procedures for *in camera* review of records that are withheld due to a purported privilege or any other basis. At a hearing on September 17, 2021, Judge Hannah and counsel for PNI and the Senate developed a plan for the orderly review of the Senate's privilege log and a select set of 25 records as to which the Senate has asserted privilege. At that hearing, the Senate agreed to dismiss its appellate special action (Case No. 1 CA-SA 21-176) voluntarily. Cyber Ninjas' counsel elected not to participate in the September 17 hearing.

Also on September 17, after the hearing referenced above, the Hon. Judge Hannah issued a five-page Minute Entry (the "Minute Entry") explaining the legal reasoning behind the issuance of the Superior Court Order. A copy of the Minute Entry is attached hereto as Exhibit A (App.

28).<sup>1</sup> The Minute Entry acknowledges the parallel litigation pending between American Oversight and the Senate (the “American Oversight Case”) over access to public records concerning the Audit. The Minute Entry also recognizes the critical facts that Cyber Ninjas is a party to this matter, and not the American Oversight Case, and *only* in this litigation can Cyber Ninjas be compelled to comply with the Arizona Public Records Law rather than, at best, belatedly coaxed to comply through the Senate.<sup>2</sup> See Ex. A (App. 33) (“Even if the Senate were to change course, by aggressively demanding compliance from [Cyber Ninjas], the Senate

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<sup>1</sup> References to “App” are to the Appendix to this Response.

<sup>2</sup> The Senate has *not* been cooperative in securing records from Cyber Ninjas to disclose to the public. In fact, Senate *refused* to request that Cyber Ninjas provide the Senate access to Audit-related records in Cyber Ninjas’ physical custody for review and disclosure until the denial of the Senate’s Petition for Review on September 14, 2021 (*see* Pet. at 5; 9/14/2021 Letter from K. Fann attached hereto as Exhibit B (App. 34)). Indeed, it has now become clear, based on emails exchanged just days ago between counsel for Cyber Ninjas and the Senate, that Cyber Ninjas only intends to produce documents to the Senate “out of goodwill” but “does not concede the existence or scope of any involuntary legal obligation to do so.” See 9/17/2021 email exchange attached hereto as Exhibit C (App. 36). In fact, as of the date of this filing, and despite Cyber Ninjas’ assertion that it has approximately 60,000 records that are potentially responsive to PNI’s requests, Cyber Ninjas has provided *only four records* to the Senate, which placed them in its online “reading room” for Audit records. See <https://statecraftlaw.app.box.com/v/senateauditpublicreadingroom>.

would have no way to enforce its demands without doing what PNI has already done: making [Cyber Ninjas] a party to the litigation. The same goes for any order that the courts might direct to the Senate attempting to secure [Cyber Ninjas'] compliance.”).

The Minute Entry concludes that Cyber Ninjas was subject to suit under the Arizona Public Records Law because “under the unique circumstances of this case, [Cyber Ninjas is] a ‘public officer’ within the meaning of the Public Records Law” and because it has “the obligations that the Public Records Law assigns to a ‘custodian’ of public records.” Ex. A (App. 30-31). As this Response will show, the Superior Court Order and the Minute Entry that explains its reasoning are legally sound, and jurisdiction over Cyber Ninjas’ Special Action should be denied.

However, if this Court does grant jurisdiction, the relief sought by Cyber Ninjas in its Petition should be denied. Cyber Ninjas’ primary argument – that it is a “private” company and therefore any records in its possession are beyond the scope of Arizona’s Public Records Law – was considered and rejected by this Court just a few weeks ago. *See Fann et al. v. Hon. Kemp*, 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 No. 1. CA-SA 21-0141 at \*8 (Aug. 19, 2021) (“The requested records are

no less public records simply because they are in the possession of a third party, Cyber Ninjas.”).<sup>3</sup>

The logic of this Court’s Memorandum Decision, as well as the analysis expressed in the Superior Court’s Minute Entry, are solid and dispositive of the relief sought in the Petition. In PNI’s statutory special action in Superior Court, Cyber Ninjas is rightly joined as a party with duties under the Arizona Public Records Law for no less than three reasons: by acting as (1) an “agent” of the Senate, (2) a “public official” as that term is used in the Public Records Law, and (3) a “custodian” of public records within the meaning of that statute, all in performing and overseeing the Audit. Plainly, the Audit represents the performance of a core government function that Cyber Ninjas was contracted to carry out by the Senate using public monies.

In fact, Cyber Ninjas concedes in its Petition that it *does* have custody of certain public records that are “owned” by the Senate.<sup>4</sup> *See*

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<sup>3</sup> This decision has persuasive value and can be cited under Arizona Supreme Court Rule 111(c)(1). Moreover, the decision will not be overturned by the Arizona Supreme Court, which denied the Petition for Review filed by the Senate on September 14, 2021.

<sup>4</sup> The fact that Cyber Ninjas concedes it holds documents “owned” by the Senate but simultaneously claims it has no “legal” obligation to

Pet. at 4-5. Thus, by its own admission, Cyber Ninjas is a custodian of those records, which must be disclosed in response to PNI's requests under the plain terms of the Arizona Public Records Law, especially on these facts, where the Senate affirmatively chose not to review, take physical custody of or disclose them itself. *See, e.g.,* A.R.S. §§39-121.01(D)(1) and (3).

To rule otherwise would allow Arizona's Public Records Law to be circumvented by a public body's offloading of public records into private hands, thereby violating the right of public inspection and copying. *Id.* This result would undermine the purpose of the Arizona Public Records Law – namely, to ensure that Arizona's government is conducted openly and subject to review by the public that it serves. *See, e.g., Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 7 (2009) (“Arizona's Public Records Law serves to ‘open *government* activity to public scrutiny.’”) (citing *Griffis v.*

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share those records with the Senate (*see* Ex. C (App. 37-38)), despite the Superior Court Order and Minute Entry, is troubling. However, by virtue of its status as a party to this litigation and the language of the Superior Court Order, Cyber Ninjas is bound to “carefully secure, protect and preserve” those records (*see* Superior Court Order at 6), and if Cyber Ninjas' Petition is denied, it will be directly obligated under the Superior Court Order to produce those public records under the review process the trial court is developing with PNI and the Senate.



*Pinal County*, 215 Ariz. 1, 4 (2007). For ample good reasons, the relief sought in Cyber Ninjas’ Petition – which would slam the door on public scrutiny of *government* activity – should be denied.

### **Jurisdictional Statement**

Special action jurisdiction is discretionary, “reserved for ‘extraordinary circumstances,’” and unavailable “where there is an equally plain, speedy, and adequate remedy by appeal.” *Stapert v. Arizona Bd. of Psych. Examiners*, 210 Ariz. 177, 182 ¶ 7 (App. 2005). In deciding whether jurisdiction is proper, courts consider whether a case raises “issues of statewide importance, issues of first impression, pure legal questions, or issues that are likely to arise again.” *AEA Fed. Credit Union v. Yuma Funding, Inc.*, 237 Ariz. 105, 111, ¶ 21 (App. 2015) (citations omitted).

The issue raised in Cyber Ninjas’ Petition – whether Cyber Ninjas is immune from Arizona’s Public Records law because it is a government contractor, even though it is performing a core governmental activity on behalf of the Senate – does *not* justify special action jurisdiction. This Court has already provided appropriate guidance in its Memorandum Decision issued on August 19, 2021 in the American Oversight Case over

public records requests concerning this same Audit. For this reason alone, Cyber Ninjas should never have commenced this special action, and jurisdiction should be denied.

### **Discussion**

#### **I. CYBER NINJAS IS ACTING AS AN AGENT OF THE SENATE FOR PURPOSES OF THE AUDIT AND IS THEREFORE SUBJECT TO THE ARIZONA PUBLIC RECORDS LAW.**

Cyber Ninjas' Petition hinges on the assertion that the Public Records Law cannot apply to a government contractor because it is not an "officer" or "public body" within the meaning of the statute. *See* Pet. at 3-5. This argument fails for many reasons, not the least of which is that, by undertaking the Audit at the direction of the Senate, Cyber Ninjas is acting as an *agent* of the Senate.

The Senate hired Cyber Ninjas to lead the Audit, and Defendant Fann publicly announced that Cyber Ninjas would be paid with public funds to manage this government activity. *See* Compl. ¶ 21; Pet. App. p. 24.<sup>5</sup> Its contract with the Senate states that Cyber Ninjas "will serve as the central point-of-contact and organizer of all work conducted over the

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<sup>5</sup> References to the "Pet. App." are to the appendices that accompanied Cyber Ninjas' Petition.

course of” the agreement, which it describes as conducting “a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona.” Compl. Ex. 2 at 1-2; Pet. App. pp. 64-65 (Statement of Work).

Even Cyber Ninjas concedes that it was contracted by the Senate to conduct the Senate’s audit of ballots in Maricopa County in the 2020 election. *See* Pet. at 2. In short, the Senate appointed Cyber Ninjas to perform the Audit on the Senate’s behalf. Therefore, by definition, Cyber Ninjas is an agent of the Senate and has a duty under the Public Records Law to maintain, preserve and disclose public records regarding the Audit. Unfortunately, the Senate refused to demand that Cyber Ninjas make available *any* of the requested records in Cyber Ninjas’ physical custody for inspection by the Senate until *September 14, 2021*, after the Arizona Supreme Court dissolved its temporary stay of Judge Kemp’s disclosure order in the American Oversight case.

If the Senate had conducted the Audit directly, its Audit-related records would unquestionably be subject to the Arizona Public Records Law. The Senate cannot thwart the public’s right to monitor a core government activity by outsourcing that activity to companies that may

not themselves be “public” entities. *See Forum Pub. Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986) (“We do not believe the open record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [an independent contractor] . . . [The] purpose of the open-records law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.”) (cited with approval in *Fann et al. v. Hon. Kemp*, 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at \*8); *see also Carlson v. Pima Cnty.*, 141 Ariz. 487, 490 (1984) (Arizona’s Public Records law evinces “a clear policy favoring disclosure.”). Because Cyber Ninjas has been engaged in a core governmental activity, “supported in whole or part by monies from this state,” A.R.S. § 39-121.01(A)(2), Cyber Ninjas is an agent of the Senate and is obligated to maintain records related to the Audit, which are subject to the Arizona Public Records Law.<sup>6</sup>

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<sup>6</sup> While Cyber Ninjas was found to be an “agent” of the Senate for purposes of this Court’s decision in the American Oversight case, it is important to note that Cyber Ninjas was not named as a party in that case, so whether Cyber Ninjas was subject to direct suit by virtue of its status as a “public official” or “custodian” of public records was not at

In fact, this Court has already reached the conclusion that Cyber Ninjas is functioning as an agent of the Senate. In ruling on a Petition for Special Action filed by the Senate related to the Audit, this Court concluded:

Here, the Senate defendants, as officers and a public body under the [Public Records Law], have a duty to maintain and produce public records related to their official duties. This includes the public records created in connection with the audit of a separate governmental agency, authorized by the legislative branch of state government **and performed by the Senate's agents**. See A.R.S. § 39-121.01(B). The requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas.

See *Fann et al. v. Hon. Kemp*, Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at \*8 (emphasis added). This Court further observed that “[t]here is no dispute that the audit is being conducted with public funds, and Cyber Ninjas and its sub vendors are agents of the Senate.”<sup>7</sup> *Id.* at \*7.

The same conclusion is appropriate here. Cyber Ninjas is the Senate’s agent for purposes of the Audit, having undertaken at the

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issue.

<sup>7</sup> As this Court observed, the Senate admitted in its answer in the public records-related lawsuit brought by American Oversight that Cyber Ninjas is the Senate’s “authorized agent.” *Id.* at 7 n. 1.

Senate’s direction what is an official duty of the Senate – an audit of a separate governmental entity – utilizing public dollars. As such, any public records in Cyber Ninjas’ possession are subject to disclosure under the Public Records Law. *See Griffis*, 215 Ariz. at 4 (recognizing that a document’s content is a *content-driven* inquiry); *Salt River Pima-Maricopa Indian Cmty v. Rogers*, 168 Ariz. 531, 538 (1991) (“It is the nature and purpose of the document, not the place where it is kept, which determines its status”).

## **II. CYBER NINJAS IS SUBJECT TO THE PUBLIC RECORDS LAW BECAUSE IT FUNCTIONS AS AN “OFFICER” OF THE SENATE FOR PURPOSES OF THE AUDIT.**

Even if it were not an agent of the Senate, Cyber Ninjas is functioning as a public officer for purposes of the Audit. The Arizona Public Records Law defines an “officer” as “*any person . . . appointed to hold any . . . appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.*” A.R.S. § 39-121.01(A)(1) (emphases added). In other words, “officers” are those persons vested by a public body such as the Senate with supervisory authority over the performance of governmental functions.

The statute does *not* limit the definition of “officer” to natural persons, as Cyber Ninjas contends (*see* Pet. at 11), which means that corporate persons such as Cyber Ninjas can indeed function as officers subject to the Public Records Law. *See* A.R.S. § 1-215(28) (a statutory reference to a “person” “includes a corporation, company, partnership, firm, association or society, as well as a natural person”); *cf. Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 266 (1991) (leaving undisturbed trial court’s conclusion that each member selected to serve as an Arizona State University presidential search committee consisting entirely of private individuals was “a ‘public officer’ as defined in A.R.S. § 39-121.01(A)(1).”).

The Minute Entry identifies Cyber Ninjas as a public officer because it was appointed by the Senate to perform the Audit, which is being enabled by subpoenas issued by the Senate, and the Senate is paying Cyber Ninjas to perform the Audit using public dollars. *See* Ex. A (App. 31).

To be sure, officers and public bodies are obligated by law to maintain all records reasonably necessary to maintain an accurate knowledge of their official activities and of any of their activities which

are supported by monies from the state.<sup>8</sup> *See* A.R.S. § 39-121.01(B). Though it is admittedly a private corporation, Cyber Ninjas agreed to perform a core governmental function in connection with the Audit – a function it could only perform in a management capacity – as an officer at the behest of the Senate.

Cyber Ninjas argues in its Petition that public bodies can only have a single chief officer that is responsible for receiving and responding to public records requests. *See* Pet. at 6. Because Cyber Ninjas is not the chief officer of the Senate, it claims, it cannot be subject to the Public Records Law. *Id.* This argument, however, ignores the plain definition of “[o]fficer” in the Public Records Law, which extends to “*any* person elected or appointed to hold any elective or appointive office of any public body and *any* chief administrative officer, head, director, superintendent or chairman of any public body.” *See* A.R.S. § 39-121.01(A)(1) (emphases

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<sup>8</sup> Cyber Ninjas also meets the definition of “public body” under A.R.S. § 39-121.01(A)(2) because it is “expending monies provided by this state” to conduct the Audit. A.R.S. §39-121.01(A)(2). Like officers, public bodies “shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and any of their activities which are supported by monies from this state . . .” A.R.S. § 39-121.01(B).



added). The plain language of this statute makes clear that there can be more than one officer for a public body subject to the Public Records Law.<sup>9</sup>

### **III. CYBER NINJAS IS SUBJECT TO THE ARIZONA PUBLIC RECORDS LAW AS THE SENATE’S *DE FACTO* CUSTODIAN OF AUDIT RECORDS.**

Regardless of whether Cyber Ninjas meets the definition of an “agent” or “officer” of the Senate, it is subject to the Arizona Public Records Law, and the jurisdiction of this Court, because it is acting as the Senate’s *custodian* of public records for the vote audit. As the record indisputably shows, the Senate *never* deigned to request access to inspect any public records relating to the Audit *in Cyber Ninjas’ custody* for purposes of complying with its duties under the Public Records Law – that is, not until Sen. Fann finally requested their production “immediately” by letter dated September 14, 2021, some *five months after* PNI first requested copies of them. *See* Ex. B (App. 34). And, in tandem

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<sup>9</sup> Cyber Ninjas cites to nearly century-old Arizona case law distinguishing between officers and employees. *See* Pet. at 7 (citing *Windsor v. Hunt*, 29 Ariz. 504, 519 (1926)). This case law cannot displace the statutory definition of “officer” as set forth in Arizona’s Public Records Law. Nor did the *Windsor* case have anything to do with Arizona’s Public Records Law. Instead, nearly 100 years ago, it addressed a distinction between public employees and “public officers” for *compensation* purposes. *Id.*

with the Senate’s position, Cyber Ninjas refused to share *any* records relating to the Audit in its custody with the Senate or PNI until its counsel agreed to do so during this Court’s telephonic hearing on Cyber Ninjas’ stay motion on September 15.

By Senate Rule, the Secretary of the Senate is the person who “shall have custody of all communications, or other measures, instruments and papers . . . introduced in or submitted by the Senate . . . and shall be held strictly accountable for the safekeeping of the same.” Rule 3, Senate Rules. For that reason, Secretary Aceves was named as a Defendant, in her official capacity, in this action, too. But the Senate has represented in this litigation that “she has no authority or control over the records at issue.” *See* Exhibit D (App. 42 n.1.).

Therefore, the *only* party exercising *any* custodial control over the *public records* in Cyber Ninjas’ sole custody – from the Senate’s appointment of Cyber Ninjas to oversee the Audit on March 31, 2021 until Sen. Fann’s September 14, 2021 letter requesting access to such records – has been *Cyber Ninjas*. In fact, the only arguable exception to that statement is the Superior Court Order, by which Judge Hannah ordered Cyber Ninjas on August 24, 2021 to “carefully secure, protect and

preserve” such public records from loss or destruction. Superior Court Order at 6.

In brief, Cyber Ninjas is a proper party in this action in its capacity as the sole “custodian” of these public records before, during and after copies were requested. *See, e.g.*, A.R.S. §39-121.01(D) (1) (“The *custodian* of such records shall promptly furnish such copies [of public records] . . . .” (emphasis added). Similarly, “access to a public record is deemed denied if a *custodian* fails to promptly respond to a request for production of a public record . . . .” A.R.S. §39-121.01(E) (emphasis added); *see also* Minute Entry at 3 (recognizing Cyber Ninjas is a “custodian” of the requested records and a proper party under Arizona’s Rules of Procedure for Special Actions).

By its terms, the Public Records Law applies not only to public bodies and officers but also to “custodians” of public records. *See* A.R.S. §§ 39-121.01 (D)-(E); §§ 39-121.03(A)-(C). By referring separately to officers, public bodies and custodians, the statute anticipates the possibility that, as a practical matter, the custodian of public records may be either a subordinate government employee, contractor or other person who is not an “officer” as defined by the statute. *See Carlson*, 141 Ariz.

at 491 (an “officer *or* custodian” may invoke the “countervailing interests of confidentiality, privacy or the best interests of the state” to withhold records) (emphasis added). By allowing (if not enabling) Cyber Ninjas to have sole physical custody of these essential public records, the Senate has made Cyber Ninjas the *de facto* custodian of these records. As such, Cyber Ninjas must provide these records in response to PNI’s request. A.R.S. § 39-121.01(D)-(E). Indeed, the Superior Court Order allows Cyber Ninjas to “confer” with the Senate about the documents produced or withheld, and to produce one joint privilege log or “their own separate logs.” *See* Superior Court Order at 4.

Cyber Ninjas openly concedes that it has custody of certain public records that are, according to Cyber Ninjas, “owned” by the Senate. *See* Pet. at 4-5 (if the Public Records Law “required anyone other than the ‘officer’ of a ‘public body’ to receive and respond to records requests made directly by members of the public, then the actual officer/public body to whom the records belong – *in this case, the Senate* – would have no say over how or what/when their own records are produced.”) (emphasis added); *id.* at 5 (“[T]o date, the Senate (to whom any “public records” would belong) has not requested any records from [Cyber Ninjas] or

authorized/directed [Cyber Ninjas] to make productions to the Senate.”).<sup>10</sup>

These remarkable concessions demonstrate Cyber Ninjas possesses records of the Senate and that those records indeed qualify as public records. However, according to Cyber Ninjas, by virtue of the fact that those public records are in its sole custody (in no small part because the Senate refused to request that they be turned over until the denial of the Senate’s Petition for Review on September 14, 2021 (*see* Pet. at 5; Ex. B (App. 34)), they are beyond the reach of the Public Records Law. This “shell game” of technical custody was previously rejected by this Court and should be rejected again in this case.<sup>11</sup> *See Fann et al. v. Hon. Kemp,*

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<sup>10</sup> The Master Services Agreement between the Senate and Cyber Ninjas provides that all Client Confidential Information that is contained or embedded within other documents, files, materials data, or media shall be removed from Cyber Ninjas’ controlled systems as soon as it is no longer required to perform Services under the Master Services Agreement. *See* Master Services Agreement § 11 (Pet. App. 49). This underscores the importance of Cyber Ninjas being a named party subject to the Superior Court Order to prevent the potential destruction of critical public records.

<sup>11</sup> The Superior Court Order does allow Cyber Ninjas and the Senate to coordinate regarding what documents they claim are subject to any privilege or otherwise protected from disclosure. *See* Superior Court Order at 4 (“Cyber Ninjas and the Senate Defendants may confer regarding which Public Records in the possession, custody or control of

2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at \*8; *Arpaio v. Citizens Publ'g Co.*, 221 Ariz. 130, 134 (App. 2008) (finding public records of Maricopa County Sheriff held by Pima County Attorney, as custodian, were public records subject to disclosure and awarding attorneys' fees against Sheriff's office for improperly attempting to prevent their disclosure).

The fact that records responsive to PNI's requests are in the physical custody of Cyber Ninjas is of no import – they still must be disclosed. Indeed, the Arizona Supreme Court has repeatedly held that “documents with a ‘substantial nexus’ to government activities qualify as public records,” and the “nature and purpose” of the documents, not the place where they are kept, determines their status. *Lake* 222 Ariz. at 549 (internal citations omitted); *see also Lunney v. State*, 244 Ariz. 170, 179 (App. 2017) (holding that police officers' personal cell phone records may be public records if they reflect the use of the phone for government

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one Defendant or another should be withheld on the basis of a purported privilege or any other reason.”) (the Superior Court Order is Exhibit 1 to Appendix 2 to the Petition). Thus, Cyber Ninjas' argument that the Superior Court Order excludes the Senate from weighing in on what should be disclosed by Cyber Ninjas in response to PNI's public records requests (*see* Pet. at 5) is demonstrably false.

purposes, even though the individual employees or their cellular provider had physical custody); *Griffis* 215 Ariz. at 4 ¶ 10 (“mere possession” of a document does not determine its public records status).

#### **IV. THE CLAIM THAT DISCLOSURE WOULD SUBJECT “EVERY” GOVERNMENT CONTRACTOR TO THE PUBLIC RECORDS LAW IS SPECIOUS.**

Cyber Ninjas spins apocalyptic predictions of what would happen should the Superior Court Order be permitted to stand. “[E]very single employee or contractor of the State,” Cyber Ninjas says, “including hard-working people like the staff of this Court, peace officers, firefighters, etc.,” would be required “to respond to public records requests and be[] sued for denial of access.” Pet. at 6. Every government contractor, Cyber Ninjas continues, would have “to form their own public records departments, and/or suffer liability for not ‘promptly’ responding to intensive records requests from literally any member of the public.” *Id.* at 6-7.

The implications of the Superior Court Order are nowhere near that broad. The Superior Court Order merely found that the Public Records Law applies in *this* circumstance and under *this* set of facts, where Cyber Ninjas is performing an essential and exclusive government function,

initiated and funded with public dollars, and where the Senate declined to perform this core government activity itself or exercise dominion over these public records. Cyber Ninjas is unlike any typical government contractor that provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer, such as landscapers that maintain the capitol grounds and vendors that supply coffee that is consumed by government employees. The “parade of horrors” that Cyber Ninjas cites are simply not implicated by the plain terms of the Superior Court Order.

To be sure, a similar argument was raised by the Senate in the previous Audit-related public records case that this Court heard. *See Fann et al. v. Hon. Kemp*, 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at \*9 (“The senate argues that the superior court’s order would open the files of all government vendors to public inspection.”). This Court correctly rejected this argument in light of the unique set of circumstances at issue. *Id.* at 9-10 (“In this case, the Senate outsourced its important legislative function to Cyber Ninjas and its sub-vendors. However, as noted *supra* in Paragraph 18, only documents with a substantial nexus to government activities qualify as public records.



There is no reason why vendors providing ordinary services rather than performing core government functions would be subject to the [Public Records Law].”).

An identical conclusion is warranted here. Those documents held by Cyber Ninjas related to the Audit that are the subject of PNI’s requests have a substantial nexus to government activities and should be disclosed “promptly.” *See* A.R.S. §39-121.01(D)(1) and (E). By requiring these parties to produce these Audit records, the Superior Court Order did not somehow subject every government vendor to disclosure duties under the Public Records Law. To accept Cyber Ninjas’ argument, however, would be tantamount to inviting government to outsource its duties to private parties whose work would be forever hidden from public view.

### **Rule 21(a) Notice**

Under Rule 21(a), Ariz. R. Civ. App. P. and Rule 4(g), Ariz. R. P. Spec. A., PNI requests an award of its attorneys’ fees and costs incurred in responding to the Petition under A.R.S. § 39-121.02(B), A.R.S. § 12-341, A.R.S. § 12-342, the private attorney general doctrine, or any other applicable statute or equitable doctrine.

## Conclusion

For the reasons stated above, the Court should decline jurisdiction over this Special Action, which is unwarranted. In the alternative, if this Court accepts special action jurisdiction, it should promptly deny the relief sought by Cyber Ninja because the Superior Court Order and Minute Entry are based on sound legal principles and precedent, which are essential to the enforcement of a person's rights under Arizona's Public Records Law.

Respectfully submitted this 20th day of September, 2021.

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**ARIZONA COURT OF APPEALS  
DIVISION ONE**

CYBER NINJAS, INC.,

Petitioner/Defendant,

v.

THE HONORABLE JOHN HANNAH,  
Judge of the SUPERIOR COURT OF  
THE STATE OF ARIZONA, in and for  
the County of MARICOPA,

Respondent Judge, and

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

Real Parties in Interest.

Case No. 1 CA-SA 21-0173

Case No. 1 CA-SA 21-0176

Maricopa County Superior Court  
Case No. LC2021-00180-001

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,

Petitioners,

v.

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge, and

PHOENIX NEWSPAPERS, INC., KATHY TULUMELLO, CYBER NINJAS, INC.

Real Parties in Interest.

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**APPENDIX TO RESPONSE OF PHOENIX NEWSPAPERS, INC.  
AND KATHY TULUMELLO TO CYBER NINJAS, INC.'S  
PETITION FOR SPECIAL ACTION**

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# Exhibit A

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2021-000180-001 DT

09/17/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT  
A. Walker  
Deputy

PHOENIX NEWSPAPERS INC  
KATHY TULUMELLO

DAVID JEREMY BODNEY

v.

ARIZONA STATE SENATE (001)  
KAREN FANN (001)  
WARREN PETERSEN (001)  
SUSAN ACEVES (001)  
CYBER NINJAS INC (001)

THOMAS J. BASILE  
JOHN DOUGLAS WILENCHIK

KORY A LANGHOFER  
COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE HANNAH  
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Order to Produce Public Records filed August 24, 2021 (the “Order”) directed the parties to move forward in this case, a special action pursuant to A.R.S. section 39-121 *et seq.* (the “Public Records Law”) in which petitioner Phoenix Newspapers, Inc., *et al.* (PNI) seeks access to records in the possession of the Arizona State Senate and its officials (the Senate) and Cyber Ninjas, Inc. (the Ninjas). The Order promised an explanation of the Court’s reasoning. That explanation follows. Because the decision in *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. App. August 19, 2021) has become final since the issuance of the Order, the explanation will focus on the reasons that the Ninjas are a proper party to the case.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

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The Order was not entirely clear about what has been decided and what may be raised in future proceedings. Though both defendants have special action petitions pending in the Court of Appeals, in *Cyber Ninjas v. Hannah*, Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), the superior court retains jurisdiction absent an active stay order. *Coffee v. Ryan-Touhill*, 247 Ariz. 68 ¶¶14-15, 445 P.3d 666 (App. 2019). The only stay that this Court is aware of, at this writing, applies to the provisions of the Order that (1) set deadlines for disclosure of records not in the Senate’s physical possession and (2) require the Cyber Ninjas to produce records directly to PNI. Order Granting Stay in Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), filed Sept. 16, 2021. The Court is willing to entertain requests to modify other provisions of the Order, including provisions that the defendant have challenged for the first time in the Court of Appeals (concerning, for example, *in camera* review of records).

On the other hand, the Court welcomes guidance from the Court of Appeals that might avert additional delays caused by piecemeal litigation. Though the Court respects the need for careful consideration of the legal rights of all parties, the Court also submits that the “prompt compliance” requirement of A.R.S. section 39-121.01(E) militates against allowing a public records holder to play out its legal arguments and then, if unsuccessful, to begin the process of responding to the substance of a disclosure request. The impending release of the audit report makes prompt compliance even more urgent that it was when the Order was issued. Time is now truly of the essence.

**THE LAW ALLOWS PNI TO JOIN THE NINJAS AS A PARTY**

Asking to be dismissed from the case, the Ninjas argue that the Public Records Law does not permit a cause of action against them. To the extent that their argument mirrors the Senate’s argument that the Public Records Law does not apply to records not in the Senate’s physical possession, the Court of Appeals has rejected it. The question here is whether PNI has the right to ask the courts to compel the Ninjas to disclose public records in their possession, as opposed to asking for an order that directs the Senate to obtain the records from the Ninjas and then to disclose them. The Court holds, for two separate and independent reasons, that PNI does have that right.

First, under the unique circumstances of this case the Ninjas are a “public officer” within the plain meaning of the Public Records Law. “Officer” means any person . . . appointed to hold any office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(A)(1). “Person” includes a corporation, company, partnership, firm, association or society, as well as a natural person.” A.R.S. § 1-215(29). “Public body” means . . . any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.” § 39-121.01(A)(2).



SUPERIOR COURT OF ARIZONA  
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The Ninjas have been “appointed” by the Senate as the “head” of the “public organization” conducting what the Ninjas describe as an “ongoing investigation of how [Maricopa County] conducted [the 2020] election.” Response to Application for Order to Show Cause at 4. The Senate is exercising its official powers in support of the audit organization by (among other things) issuing subpoenas to the County. *Id.* The Senate is also partly funding the audit with public monies, which makes the audit organization a “public body” for purposes of the statute. The Ninjas are a “person” because they are a corporation. The Ninjas are therefore an “officer” with responsibility (alongside the Senate) for maintaining and disclosing public records relating to the audit. It follows that PNI may file an action against the Ninjas, under section 39-121.02(A), appealing the denial of PNI’s request for audit-related public records.

Second, the Ninjas have the obligations that the Public Records Law assigns to a “custodian” of public records. The relevant provision expressly commands persons seeking public records to direct their requests to the “custodian” of the records. A.R.S. § 39-121.02(D). The “custodian” is responsible for collecting the required fees from the requestor, and for screening out requests made for commercial purposes. A.R.S. § 39-121.03. A request is deemed denied if the “custodian” fails to respond promptly. A.R.S. § 39-121.02(E). In the event of a denial, the requesting party has a judicial remedy through a special action like this one. A.R.S. § 39-121.02(A). This Court holds that section 39-121.02(A) permits the requestor -- here, PNI -- to name the custodian -- the Ninjas -- as a defendant in the action.

Section 39-121.02(A) says that a person whose public records request has been denied “may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body.” The Ninjas argue that the quoted language authorizes a special action against “the officer or public body” only. That reading violates Arizona’s statutory construction rules.

Arizona recognizes the “last antecedent” rule of statutory construction. The “last antecedent” rule requires a court interpreting a statute to apply a qualifying phrase to the word or phrase immediately preceding as long as there is no contrary intent indicated. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147 (App. 2013). Applying the last antecedent rule here, the phrase “against the officer or public body” must be read to modify “rules of procedure for special actions,” not (as the Ninjas would have it) “special action in the superior court.” Thus the statute requires the requestor to pursue the appeal “pursuant to the rules of procedure for special actions against [an] officer or public body.”

PNI has framed this case in accordance with the rules of procedure for special actions. The special action rules permit the addition of parties as necessary for the plaintiff to obtain complete relief. *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130 ¶ 10 n. 4, 211 P.3d 8 (App. 2008); *see* Ariz. R. Special Action Proc, 2(b) (court may order joinder as parties of persons other than the body,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

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officer, or person against whom relief is sought). PNI's complaint alleges that the Ninjas are *both* "an officer or public body" with a statutory responsibility for maintaining and disclosing public records, *and* a "custodian" that has effectively denied PNI's request for disclosure of the records at issue. That framing is consistent with the special action rules and, therefore, with section 39-121.02(A).

*Arpaio v. Citizen Pub. Co.* supports PNI's position. In *Arpaio*, as here, the issue was the application of section 39-121.02 to a "third party" to a public records dispute. 221 Ariz. 130 ¶ 12. As here, the "third party" (an intervenor who had objected to the release of the records) argued that the legislature intended to limit the application of section 39-121.02's relevant provision (subsection (B), authorizing an award of attorneys' fees to a prevailing requestor) to "the officer or public body responsible for providing access to the public records." *Id.*, ¶ 10. Based on the text and history of the Public Records Law, the Court of Appeals refused to read that limitation into the statute, and upheld the fee award against the third party intervenor. This Court likewise rejects the Ninjas' attempt to avoid involvement by reading a non-existent limitation into section 39-121.02.

Subsection (C) of section 39-121.02, which creates an action for damages, also supports PNI's interpretation of subsection (A). Subsection (C) says, "[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial." In that provision, unlike in subsection (A), the phrase "against the officer or public body" modifies "cause of action." Thus subsection (C) authorizes a cause of action for damages only against the "officer or public body" responsible for deciding whether to allow access to the records, not against a custodian that may simply be following the officer's directions.

Disallowing damages lawsuits against the records custodian makes perfect sense as a matter of policy -- just as it makes sense as a matter of policy, when the action seeks only access to the records, to allow the custodian to be made a party to the action. The Ninjas vehemently argue the other side of this policy question, but nothing in the statute suggests that the policymakers who wrote the statute saw it their way. To put it in terms of the "last antecedent" statutory construction rule, "there is no contrary intent indicated" anywhere in the statute. *Pawn Ist, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147. The statute therefore must be interpreted, by its terms, to permit PNI to make the Ninjas a party to this action.

Viewed through the public interest end of the policy lens, a construction of the Public Records Law that disallows direct enforcement against a records custodian contradicts the purpose of the law and the Court of Appeals holding in *Fann v. Kemp*. *Fann v. Kemp* forecloses the Senate's argument that it has no obligation to ask the Ninjas to cooperate with PNI's public records request, but it may leave open the question whether the Senate can compel the Ninjas to cooperate.

SUPERIOR COURT OF ARIZONA  
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The Senate's contractual right to obtain records from the Ninjas has been a subject of debate throughout this case. The Ninjas, in turn, may think they lack authority to obtain records from audit subcontractors. In addition, the Ninjas are likely to disagree with the Senate on questions whether specific documents are public records, since whether a particular document has "a substantial nexus" to the audit depends on "the nature and purpose" of that document. *Fann v. Kemp*, 2021 WL 3674157 ¶ 18. If the Ninjas are not a party to the litigation, PNI will have no reliable way even to know about issues like those, let alone to bring them to court for resolution in a way that complies with the Public Records Law, unless the Senate chooses to take a position adverse to the Ninjas and asks for judicial intervention.

This will not do. *Fann v. Kemp* makes clear that the Public Records Law makes the courts, not the legislature, the final arbiters of this public records disclosure dispute. If the Ninjas are beyond the courts' authority, the Senate will effectively remain in a position to decide which of the records in the Ninjas' possession are public records – precisely where *Fann v. Kemp* says the Senate should not be. Thus far the Senate has not been inclined to disclose audit-related records to the public on any terms other than its own. Even if the Senate were to change course, by aggressively demanding compliance from the Ninjas, the Senate would have no way to enforce its demands without doing what PNI has already done: making the Ninjas a party to the litigation. The same goes for any order that the courts might direct to the Senate attempting to secure the Ninjas' compliance.

The Ninjas' participation as a party does not derogate the Senate's right to oppose disclosure of specific records based on exceptions to the statutory disclosure obligation or privileges like attorney-client privilege. The existing Order to Produce Public Records invites the Senate and the Ninjas to "confer regarding which Public Records in the possession, custody or control of one Defendant or another should be withheld on the basis of a purported privilege or for any other reason." Order at 4. If the parties have a better plan for facilitating cooperation to ensure that all parties are heard, the Court remains open to suggestions. But procedural problems created by multiple record holders are not a reason to compromise the public's right to know what its government is up to.

For all of those reasons, the Order affirms PNI's right to insist on keeping the Ninjas a party to this case.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

# Exhibit B

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](mailto:dlogan@cyberninjas.com)  
[legal@cyberninjas.com](mailto: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 C

**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 24<sup>th</sup>. 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](http://www.wb-law.com)

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## ATTORNEY/CLIENT COMMUNICATION

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# Exhibit D



649 North Fourth Avenue, First Floor  
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[kory@statecraftlaw.com](mailto:kory@statecraftlaw.com)

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*Attorneys for the Senate Defendants*

**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

AMERICAN OVERSIGHT,  
Plaintiff,

v.

KAREN FANN, *et al.*,  
Defendants.

PHOENIX NEWSPAPERS, *et al.*  
Plaintiffs,

v.

ARIZONA STATE SENATE, *et al.*,  
Defendants,

and

CYBER NINJAS, INC.,  
Real Party in Interest.

No. CV2021-008265  
Assigned to the Hon. Katherine Cooper

No. LC2021-000180-001  
Assigned to the Hon. Daniel Kiley

**SENATE DEFENDANTS' MOTION  
TO TRANSFER AND  
CONSOLIDATE**

Pursuant to Arizona Rule of Civil Procedure 42(a)(2) and Local Rule 3.1(c)(1) and (c)(2), Defendants Karen Fann, in her official capacity as President of the Arizona Senate; Warren Petersen, in his official capacity as the Chairman of the Arizona Senate Judiciary Committee; Susan Aceves, in her official capacity as the Secretary of the Arizona State

1 Senate, and the Arizona Senate (collectively, the “Senate Defendants”) respectfully move  
2 that the Court transfer the proceeding captioned *Phoenix Newspapers, Inc. v. Arizona State*  
3 *Senate*, LC2021-000180-001 and consolidate it with the proceeding captioned *American*  
4 *Oversight v. Fann*, CV2021-008265.

#### 5 **FACTUAL BACKGROUND**

6 American Oversight initiated this litigation on May 19, 2021. As set forth in  
7 American Oversight’s Complaint and in the parties’ briefing on the Senate Defendants’  
8 pending Motion to Dismiss, the question in dispute is whether the Arizona Public Records  
9 Act, A.R.S. § 39-121, *et seq.*, entitles American Oversight to a court order requiring the  
10 Senate Defendants to obtain and produce the internal records of Cyber Ninjas, a contractor  
11 retained by the Senate to assist in its audit of the November 2020 election in Maricopa  
12 County. A hearing on the Motion to Dismiss has been set for July 7, 2021.

13 Concomitant with the commencement of the American Oversight proceedings,  
14 Phoenix Newspapers sought from the Senate the same universe of records—*i.e.*, the  
15 contractor’s internal documents relating to the audit. Counsel for the Senate Defendants  
16 apprised counsel for Phoenix Newspapers of the existence of American Oversight’s lawsuit,  
17 updated him on the briefing schedule, provided a copy of the Motion to Dismiss, and  
18 advised him that the status of the disputed records would be imminently resolved by this  
19 Court. Counsel for the Senate Defendants further informed counsel for Phoenix  
20 Newspapers that if American Oversight ultimately obtained a final judgment (inclusive of  
21 all appeals) in its favor, the Senate would make available to Phoenix Newspapers (and any  
22 other third party that requested them) the same records produced to American Oversight.

23 Nevertheless, on June 30, 2021—some six weeks after the initiation of American  
24 Oversight’s lawsuit and two days after briefing on the Senate Defendants’ Motion to  
25 Dismiss closed—Phoenix Newspapers filed its own action raising substantively identical  
26 claims and seeking production of the same documents. A copy of Phoenix Newspapers’  
27 Complaint is attached hereto as Exhibit A.

28

1 **ARGUMENT**

2 The parallel proceedings do not merely “involve a common question of law or fact.”  
3 Ariz. R. Civ. P. 42(a). Phoenix Newspapers’ lawsuit is wholly duplicative of American  
4 Oversight’s action. It features the same claims against the same parties,<sup>1</sup> is premised on the  
5 same legal theories, and demands the production of the same corpus of disputed records.  
6 While Phoenix Newspapers certainly may expend its resources on redundant lawsuits if it  
7 so chooses, it is not entitled to inflict on the Senate Defendants the inefficiency, delay,  
8 expense, and risk of inconsistent judgments that inevitably ensue from litigating the same  
9 claims twice in the two different fora. *See* Local Rule 3.2(c)(1) (transfer is proper when  
10 two cases involve “substantially the same” parties or legal questions, and would “would  
11 entail substantial duplication of labor if heard by different judges”).

12 Counsel for Cyber Ninjas has represented to the undersigned that Cyber Ninjas does  
13 not object to the relief requested by this Motion.

14 **CONCLUSION**

15 For the foregoing reasons, the Court should order the transfer of the LC2021-  
16 000180-001 action and its consolidation with the CV2021-008265 action.

17  
18 RESPECTFULLY SUBMITTED this 1st day of July, 2021.

19 STATECRAFT PLLC

20  
21 By:  /s/Thomas Basile  
22 Kory Langhofer  
23 Thomas Basile  
24 649 North Fourth Avenue, First Floor  
25 Phoenix, Arizona 85003  
26 *Attorneys for the Senate Defendants*

---

27 <sup>1</sup> In addition to Cyber Ninjas, Phoenix Newspapers’ Complaint also names as a  
28 defendant the Secretary of the Senate, although she has no legal authority or control over  
the records at issue.

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Court of Appeals  
Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court  
Case No.: LC2021-00180-001**

**(Oral Argument Requested)**

---

**REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

---

Dennis I. Wilenchik, Esq. (SBN # 005350)  
John "Jack" D. Wilenchik, Esq. (SBN #029353)  
Jordan C. Wolff, (SBN # #034110)  
**WILENCHIK & BARTNESS, P.C.**  
The Wilenchik & Bartness Building  
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(602) 606-2810  
[admin@wb-law.com](mailto:admin@wb-law.com)  
*Attorneys for Petitioner Cyber Ninjas, Inc.*

Petitioner Cyber Ninjas Inc. (“CNI”) wants to make one thing very clear: it does *not* concede that it has custody of any “public records” of any kind, nor does it have any “public records.” (See Response to Petition for Special Action, bottom of page 5; pages 18-19.) Phoenix Newspaper Inc.’s (“PNI”) claim that CNI has “conceded” that it has “essential” records is just something that PNI is very familiar with – “fake news.” The Court need look no further than what PNI claims to be the basis for this contention, at pages 18-19 of its Response, in which PNI merely quotes CNI’s legal arguments in support of the Motion to Dismiss. And this appears to be the biggest point in PNI’s Response: it groundlessly argues that the Court is somehow allowing PNI to hide “essential” “public records,” while at the same time failing to even identify what exactly these “public records” are or why they are “public” under Arizona law. As discussed below, PNI has failed to allege any factual or legal basis for determining that CNI has custody of any “public records,” as that term is actually defined by the caselaw—even if resolving the issue were necessary to dispose of PNI’s claim against CNI, which it is not.

CNI’s case here is very simple: PNI has failed to bring a claim against CNI for which relief can be granted, under the plain wording of the public-records law. It is not for courts to decide what public-records statutes or policy “should be,” or to create special rules for defendants like CNI in derogation of the law, simply because of who that defendant is. Courts are the one forum that parties can turn to and expect a fair and “blind” treatment in accordance with the plain wording of the law, without respect to politics or publicity – but this is clearly not what CNI received from the trial court in hits this case. CNI is a private auditor that is not capable of being sued under the public-records statutes, period; and its Motion to Dismiss must be granted. The Court should accept jurisdiction of this Special Action because there is clearly no equally speed means of relief.

PNI argues that CNI is an “agent” of the Senate, without commenting on the scope of that agency—an agency that was narrowly defined by contract and that consisted only of investigating and preparing an audit report for the Senate. All government employees and contractors are by definition “agents” of the government, in some capacity or another; but the public-records statutes do not provide that mere “agents” have the responsibility to respond to public records requests or to be sued on them, only officers of public bodies. *See* A.R.S. §§ 39-121 *et. seq.*

PNI further argues that CNI is an “officer” of the Senate, which is groundless. The only facts that PNI points to are that the Senate hired CNI and paid CNI. Again, these facts apply to every employee or contractor of the Senate. Toward the end of its brief, PNI tries to claim that CNI should be treated differently and that the Court should create special rules just for CNI—in contradiction to the basic idea that justice is blind and that courts serve to neutrally apply laws, not change them based on who is before the court. PNI argues that “Cyber Ninjas is unlike any typical government contractor that provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer, such as landscapers that maintain the capitol grounds and vendors that supply coffee that is consumed by government employees.” (Response, page 22.) While this distinction has no basis in law, it is not even true – CNI provides auditing services which it can do for any governmental or non-governmental entity and merits no fundamentally different treatment under the public-records statutes. It makes no sense to create special rules just for auditors, or even election auditors, where there is zero basis in law. If the legislature wishes to create such special duties for auditors, or even election contractors/employees, then it may do so by passing a law; but the courts cannot make one up. Otherwise, PNI seems to be arguing that every contractor or employee relating to an election must be subject to public records requests (because such

persons can only provide their official “election” services to the government). This would mean that every employee or contract involved in an election, from government poll workers on down to the company that makes the ballot-tabulation machines, are suddenly subject to public-records requests and lawsuits, without any basis in law.

PNI asserts that CNI is “performing an essential and exclusive government function, initiated and funded with public dollars, and where the Senate declined to perform this core government activity itself” (and declined to “exercise dominion” over CNI’s records) – but to the extent that this is true, it is true of literally every government contractor. The company that erects light poles on the freeway is “performing an essential and exclusive government function, initiated and funded with public dollars”; and the government “declined to perform this core government activity itself” (or to “exercise dominion over [the company’s records]”), which is precisely why it hired a private contractor. This is perfectly normal and well within the contemplation of the public-records statutes. Simply because PNI – or even other members of the public – have an intense interest in CNI’s company records (which, in PNI’s case, is simply because it believes that it can write more stories and profit off of them) does not render the company’s records any more “public,” or make CNI any more of an “officer” of a “public body” under Arizona law.

Finally, and even though this issue is not strictly needed to dispose of the case: PNI fails to allege or show that CNI actually has “public records” of any kind. In the seminal case of *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 534, 815 P.2d 900, 903 (1991), the Arizona Supreme Court addressed when records that belong to non-governmental or private bodies may be considered “public records,” relying heavily on federal FOIA law. *See also Church of Scientology v. Phoenix Police Dep’t*, 122 Ariz. 338, 340, 594 P.2d 1034,1036 (App. 1979)(FOIA offers guidance to Arizona courts in construing Arizona public records



statute). The Supreme Court first noted that federal courts have “uniformly held that an agency must control a record before it is subject to disclosure”; and “[t]he control test is helpful in analyzing our statute, which also exempts private information from disclosure even when it is held by a government agency.” *Id.*, 168 Ariz. at 541, 815 P.2d at 910. “An agency has control over the documents when they have come into the agency’s possession in the legitimate conduct of its official duties.” *Id.*, 168 Ariz. at 541-42, 815 P.2d at 910-11 (*quoting U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 145 (1989))(quotation marks omitted). Where documents are not in control of the government, they were not generated by the government, they never entered the government’s files, and they were not used by the government for any purpose, then they are not “public records.” *Id.*, 168 Ariz. at 542, 815 P.2d at 911 (*citing Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980)).

PNI failed to allege that CNI has exclusive possession of *any* document that the Senate controls, that the Senate generated, that ever entered the Senate’s files, or that was used by the Senate for any purpose. Under CNI’s contract with the Senate, the only document that the Senate was entitled to have and control is the final audit report that CNI agreed to prepare, which has now been completed and produced to the Senate and is now clearly a public record. But CNI’s own records are not public records simply because they may relate to that audit report, which seems to be PNI’s contention here. Further, in *Salt River*, the Arizona Supreme Court cited with approval (several times) two FOIA decisions that squarely address the kind of issues at bar: *Forsham v. Harris*, 445 U.S. 169 (1980) and *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977)(discussed immediately below).

**ARIZONA SUPREME COURT**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

**Respondent,**

**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;**

**Real Parties in Interest.**

**Arizona Supreme Court**

**Case No. \_\_\_\_\_**

**Court of Appeals**

**Division One**

**Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court**

**Case No.: LC2021-00180-001**

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**APPENDIX TO PETITION FOR SPECIAL ACTION,  
OR IN THE ALTERNATIVE PETITION FOR REVIEW**

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John "Jack" D. Wilenchik, Esq. (SBN # 029353)  
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In *Forsham v. Harris*, 445 U.S. 169 (1980), the United States Supreme Court considered a FOIA request for the raw data underlying a study conducted by a private medical research organization. Although a federal agency funded the study, the data was generated and possessed by the private company and it never passed into the hands of the agency. The Supreme Court found the fact that the study was financially supported by a FOIA-covered government agency did not transform the data into “agency records”; nor did the agency’s right of access to the materials under federal regulations change the result. The Supreme Court explained that “FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.” *Id.*, 445 U.S. at 186 (emphasis in original). In denying the FOIA claim, the Supreme Court explained that federal funds do not convert a private organization into an “agency” for purposes of the FOIA without “extensive, detailed, and virtually day-to-day supervision” by the agency of the private organization. *Id.*, 445 U.S. at 180. Of course, nothing of the sort has been alleged here; and in general the notion that “Cyber Ninjas Inc.” is so intertwined with the government as to be a “government agency” is meritless. Ultimately, the Supreme Court held that “[w]ith due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency ... but which data has not at any time been obtained by the agency, are not ‘agency records’ accessible under the FOIA. Without first establishing that the agency has created or obtained the document, the agency’s reliance on or use of the document is similarly irrelevant.” *Id.*, 445 U.S. at 170. Again, in the case at bar there is no allegation that CNI holds any records that were generated by the Senate, or that CNI exclusively holds any records created by the Senate; and while there has also been no allegation that the Senate “relied on” CNI’s records, such an allegation would be “irrelevant” anyway. *Id.*

The other closely-related FOIA decision discussed by the Arizona Supreme Court in *Salt River (Ciba–Geigy Corp. v. Matthews)* concerned a private group of researchers (called the “UGDP”) who applied for and received federal grants to conduct diabetes studies. *Ciba*, 428 F.Supp. at 532. Under federal regulations, the UGDP was required to submit interim and final reports to the government and to allow the government “access” to their raw data; but the *Ciba* court noted that the government customarily relied on the UGDP’s reports rather than accessing the underlying data. The plaintiff questioned “the manner in which the UGDP [handled its own] raw data,” as well as “the accuracy of the results reported,” so the plaintiff made a FOIA request for the UGDP’s underlying data and claimed that the data was a public record (or “agency record,” in FOIA parlance). *Id.*, 428 F. Supp. at 526. On a familiar note, the plaintiff made three arguments: first, that the UGDP was a “de facto federal agency and that its records are therefore agency records”; second, that “even if the UGDP is not a federal agency in itself, it nevertheless served as an extension of a federal agency” (essentially an “agent” argument); and third, that even if those arguments failed then the “disclosure of [UGDP’s] records may still be compelled if those records can be characterized as Government agency records.” *Id.*, 428 F. Supp. at 526.

The *Ciba* court rejected all three arguments. First the court held that even though the UGDP received public funding, it was not an “agency.” *Id.* To reach this decision the court looked at obvious factors like “whether the organization has the authority in law to perform the decisionmaking functions of a federal agency and whether its organizational structure and daily operations are subject to substantial federal control.” *Id.*, 428 F. Supp. at 527. With respect to the plaintiff’s other two arguments, the court disposed of them by finding that the plaintiff had not proven that “the records were either Government-owned or subject to substantial Government control or use. In other words, it must appear that there was significant

Government involvement with the records themselves in order to deem them agency records.” *Id.*, 428 F. Supp. at 529. The *Ciba* court held “that federal funding, regardless of amount, [was] not sufficient to vest the underlying raw data of the UGDP research with a public character. To hold otherwise at a time when public monies flow to numerous private endeavors would surely have a chilling effect on [them]...” *Id.*, 428 F. Supp. at 530. The *Ciba* court also found that “Government access to and reliance upon” the data did not mean that the government owned or “controlled” it. *Id.* The *Ciba* court logically explained that “[a]lthough the federal defendants have access to the underlying data, there is no evidence that they have used it to exercise regular dominion and control over the raw data.” *Id.*, 428 F. Supp. at 530–31. “Mere access without ownership and mere reliance without control will not suffice to convert the UGDP data into agency data.” *Id.* “Just as the Government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written, it should not be compelled to acquire data it neither referred to directly nor relied upon in making decisions.” *Id.*, 428 F. Supp. at 531. “The distinction between direct reliance, in whole or in part, upon a summary report and direct reliance (via usage or control) on supporting documentation is necessary to preserve a salutary balance between the public’s right to be informed of the grounds for Government decisionmaking and the protection of private interests.” *Id.*, 428 F. Supp. at 532.

In other words, while the Senate has received CNI’s report—which is undisputedly a public record—the Senate does not own or control CNI’s company records even though they may relate to the final audit report (and even if, in some sense, the Senate has “relied” on CNI’s records because its records support the final audit report. According to the United States Supreme Court, this is “irrelevant.”) For example, PNI has asked for all of CNI’s internal company records concerning communications about its audit. This would include things like CNI’s internal

emails discussing issues with its ability to perform under the contract, discussing its relationship with the Senate, and evaluating the performance of its own subcontractors or issues with their performance, etc. In PNI’s universe, CNI must not only produce such emails to the Senate but must make them public. Not only is this patently unfair, but it runs against common sense and is legally-baseless. The foregoing are not “public records” by any stretch of the imagination, nor do they meet any intellectually-honest legal definition.

The bottom line here is that (even though it is not necessary to dispose of the case), PNI has failed to articulate or allege how CNI has *anything* that meets the actual definition of a “public record.” PNI failed to allege, much less prove, that CNI has records that were generated or controlled by the Senate, or even that – despite it being “irrelevant,” according to the United States Supreme Court – the Senate has directly relied on CNI’s records. The only thing that CNI agreed for the Senate to own or control is CNI’s final audit report, which has been produced to the Senate and is now public. The Senate did not generate, and does not own/control or even use CNI’s own company records, period, and PNI failed to make allegations to support/prove the contrary.

**CONCLUSION**

For the foregoing reasons, the Court should accept jurisdiction over this special action and grant CNI’s requested relief. The only claim that has PNI asserted against CNI must be dismissed for failure to state a claim, and the trial court’s order for CNI produce to produce records must be reversed.

...  
...

**RESPECTFULLY SUBMITTED** September 27, 2021.

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

*/s/ John D. Wilenchik* \_\_\_\_\_

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

**Respondent,**

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

**Real Parties in Interest.**

**Court of Appeals  
Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court  
Case No.: LC2021-00180-001**

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**CERTIFICATE OF COMPLIANCE REGARDING  
REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

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The undersigned certified that the accompanying Reply in Support of Petition for Special Action complies with Rule 7 (e), Arizona Rules of Procedure for Special Actions. The Petitions for Special Action uses proportionately spaced Times New Roman typeface, with a point size 14, is double-spaced and contains 2,705 words.

**RESPECTFULLY SUBMITTED** September 27, 2021.

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

*/s/ John D. Wilenchik*

\_\_\_\_\_

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**

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

**Real Parties in Interest.**

**Court of Appeals  
Case No. 1 CA-SA 21-0173**

**Maricopa County Superior Court  
Case No.: LC2021-00180-001**

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**CERTIFICATE OF SERVICE OF  
REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

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Pursuant to ARCAP 4(g) and in compliance with Rule 5(c) of the Arizona Rules of Civil Procedure, I certify that on September 27, 2021, I filed

Petitioner/Defendant's Reply in Support Petition for Special Action and Appendix  
via AZTurboCourt.com.

I certify that on September 27, 2021, I served the same by e-mail to all  
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**RESPECTFULLY SUBMITTED** September 27, 2021.

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/s/ John D. Wilenchik  
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*Attorneys for Petitioner Cyber Ninjas, Inc.*

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**From:** Jeremy Duda <jduda@azmirror.com>  
**Sent:** Wednesday, November 10, 2021 12:25 PM  
**To:** Douglas Logan <dlogan@cyberninjas.com>; Rod Thomson <rod@thomsonpr.com>  
**Subject:** Public records request

Please acknowledge receipt of this public records request, which I'm filing pursuant to the Arizona Court of Appeals' Nov. 10, 2021, decision in *Cyber Ninjas v Hannah*.

--

**Jeremy Duda**  
Arizona Mirror  
Associate editor  
Cell: (602) 315-3108  
<Records request-Cyber Ninjas 11-10-21.pdf>

Nov. 10, 2021

Jeremy Duda  
Arizona Mirror  
1820 W. Washington Street Room 105  
Phoenix, AZ 85007

## **RECORDS REQUEST**

Dear Mr. Logan,

Pursuant to the provisions of the Arizona Public Records Law, A.R.S. 39-121, as well as to the Arizona Court of Appeals' Nov. 9, 2021, opinion in *Cyber Ninjas v. Hannah*, I am requesting an electronic copy of the following public records, or other matters<sup>1</sup>:

1. All records of payments to Cyber Ninjas or any of its employees, subcontractors or other people or entities for work performed in relation to the recount and audit of the 2020 general election in Maricopa County, including payments from the Arizona Senate, as well as payments from private individuals, nonprofit organizations or other private entities, and including money that is paid directly from private individuals or entities to the Cyber Ninjas, Doug Logan, or any affiliated entities, and its subcontractors, that doesn't use the Senate as a pass-through.
2. All invoices, bills or other requests for payment submitted to Cyber Ninjas, the Arizona Senate or other individuals or entities for work performed in relation to the recount and audit of the 2020 general election in Maricopa County.
3. Any budgets, cost projections or other documents created by Cyber Ninjas or other entities or individuals related to the audit and recount of the 2020 general election in Maricopa County.
4. All documents, notes, written or electronic communications and other data or materials generated by volunteers or audit team members, or provided by volunteers to the audit team, relating to "voter registrations that did not make sense," as referenced in Section 2.1 of the Cyber Ninjas Statement of Work signed by Karen Fann and Douglas Logan. This request includes the report titled "Summary of 2020 General Election Initial Findings: Maricopa & Pima Counties," dated March 1, 2021 and signed by Elizabeth Harris on March 2, 2021, as well as any related affidavits or other supporting documents.
5. All contracts, subcontracts, memoranda of understanding or other written agreements that Cyber Ninjas has with subcontractors or other entities that have performed work related to the recount and audit of the election in Maricopa County, including, but not limited to, contracts with Wake Technology Services, Inc. (Wake TSI), StratTech Solutions, CyFIR, Digital Discovery, Bobby Pitton, and Jovan Hutton Pulitzer, AKA Jeffrey Jovan Philyaw.
6. All written or electronic communications between employees of Cyber Ninjas and any other individuals or entities that are providing paid or volunteer services for the Arizona Senate's audit of the 2020 general election in Maricopa County. This request excludes communications regarding subjects that are not pertinent to the audit.
7. Copies of any and all visitor logs and sign in sheets to the audit of the Maricopa County 2020 election results.
8. All written or electronic communications pertaining to the audit, including, but not limited to, emails, text messages and social media messages, between contractors, subcontractors or audit employees.

9. Any reports, status updates or other written or electronic communications created by employees or Cyber Ninjas or other audit contractors or subcontractors detailing the findings or progress of the audit.
10. Any other audit-related records provided to other parties in response to public records requests.

This request includes any pertinent records that are in the possession of Cyber Ninjas or other audit contractors, subcontractors or employees, regardless of whether they are in the possession of the Arizona Senate. I submit this request in accordance with the Court of Appeals' decision that "Cyber Ninjas has become the custodian" of various audit-related records under Arizona's public records law.

If challenges arise with this please contact me, as I will likely be able to help find ways to mitigate these perceived barriers to providing access to public records.

If there are ever fees associated with compiling or transmitting these records, please contact me so I can make appropriate arrangements.

If there are any segregable portions of the records responsive to this request available before the entirety, please provide those as they become available.

If you choose to deny this request, 1) please provide a written explanation for the denial, including a reference to the specific statutory exemption(s) upon which you rely. 2) Also please provide all segregable portions of otherwise exempt material. 3) Also please provide a written, itemized log of all records or other matters being denied.

If you are not the person, office or agency who has the authority or ability to comply with this records request, inform me as soon as possible who the proper person, office or agency is.

This request is separate from and in no way nullifies any other outstanding records request.

The Arizona Public Records Law requires that public bodies provide access to public records "promptly." Accordingly, I request that you provide the requested records as soon as possible.

I appreciate your cooperation in this matter.

Sincerely,

Jeremy Duda

(602) 315-3108

[jduda@azmirror.com](mailto:jduda@azmirror.com)

<sup>1</sup> Please see Carlson v Pima County, 1984; Griffis v. Pinal County, 2007; Lake v City of Phoenix, 2009; Ariz Atty Gen. Op. 70-1, Lake v. City of Phoenix, 2009



## Maricopa County Attorney

ALLISTER ADEL

November 19, 2021

### VIA EMAIL AND U.S. MAIL

Mr. Doug Logan  
Founder  
Cyber Ninjas  
5077 Fruitville Rd #109-421  
Sarasota, Florida 34232  
[dlogan@cyberninjas.com](mailto:dlogan@cyberninjas.com)

Re: Public Records Request

Mr. Logan,

This is a public records request. The Arizona Public Records Law, A.R.S. § 39-121 *et seq.* (hereafter, the "PRL") applies to custodians of records that are reasonably necessary or important to obtain an accurate knowledge of official governmental activities that are supported with public money. A.R.S. § 39-121.01(B). The PRL allows "any person" to request copies of these public records that are within the custodian's custody. A.R.S. § 39-121.01(D)(1). Upon receiving such a request, the custodian must "promptly respond." A.R.S. § 39-121.01(E).

The Arizona Court of Appeals ruled that Cyber Ninjas is subject to the PRL for records related to its examination of Maricopa County's ballots, tabulation equipment, and other election-related materials. *Cyber Ninjas, Inc. v. The Honorable John Hannah et al.*, No. 1CA-SA 21-0173 (Ariz. Ct. App. Nov. 9, 2021) (hereafter "*Cyber Ninjas*"). A copy of that decision is included with this request. The Court of Appeals expressly ruled that "documents relating to the audit are public records subject to the PRL even if they are in the possession of Cyber Ninjas rather than the Senate." *Id.* at 4 ¶9. It also ruled that Cyber Ninjas is the custodian of those records, and anyone wishing to obtain them under the PRL must make their requests to Cyber Ninjas. *Id.* at 5 ¶15.

The Maricopa County Attorney represents the Maricopa County Board of Supervisors. On behalf of our Client and pursuant to the PRL and the *Cyber Ninjas* decision, I make the following public records request for the records identified in **Appendix A, attached**. This request is not made for



commercial purposes, but rather to benefit the public by allowing the public to better understand the relevant facts related to Cyber Ninjas' examination of Maricopa County's ballots, tabulation equipment, and other election-related materials. The requested records are also necessary for the Board of Supervisors to fully respond to numerous questions posed to it by the Arizona Attorney General. The Board of Supervisors agrees to pay up to \$100 for copying and related charges, if applicable. If the fees will exceed \$100, please notify me before incurring any such costs.

If you have already provided any of the requested records to the Arizona Senate and prefer that the Board of Supervisors direct its request to the Senate, please let me know. Otherwise, please promptly provide the records identified in Appendix A. Should you refuse to promptly respond as required by the PRL, the Board of Supervisors may instigate litigation against you to obtain the records. If such litigation ensues, Arizona law provides for an award of attorneys fees and costs where litigation is necessary to obtain records pursuant to the PRL. A.R.S. § 39-121.01(B). Of course, the Board of Supervisors hopes that litigation can be avoided by Cyber Ninjas' prompt and complete compliance with the PRL.

Sincerely,

ALLISTER ADEL  
MARICOPA COUNTY ATTORNEY



Thomas P. Liddy  
Division Chief, Civil Services Division

Cc: Jack Wilenchik, Esq.  
The Wilenchik & Bartness Building  
2810 North Third Street  
Phoenix, AZ 85004  
[jackw@wb-law.com](mailto:jackw@wb-law.com)

## APPENDIX A

Pursuant to the Arizona Public Records Law, A.R.S. § 39-121 *et seq.*, and the Arizona Court of Appeals' decision *Cyber Ninjas, Inc. v. The Honorable John Hannah et al.*, No. 1CA-SA 21-0173 (Ariz. Ct. App. Nov. 9, 2021), please provide copies of the following records:

- All documents, communications of any type, and other records created by Cyber Ninjas or any of its subcontractors, upon which Cyber Ninjas or its subcontractors relied when preparing Cyber Ninjas "Maricopa County Forensic Election Audit" Report, Volumes I – III, dated September 24, 2021, copies of which are available on the Arizona State Senate's Republican Caucus's website, at <https://www.azsenaterepublicans.com/cyber-ninjas-report>.
- To the extent not already produced, all documents, communications of any type, and other records related to Cyber Ninjas' hand count of Maricopa County's ballots, irrespective of whether those records were relied upon for preparing the Cyber Ninjas' Report. This request includes, without limitation:
  - All records related to, concerning, supporting, or disagreeing with Cyber Ninjas' conclusion, reported in the Cyber Ninjas' Report, that Cyber Ninjas' hand count resulted in President Biden gained 99 votes and Mr. Trump lost 261 votes as compared with the official Maricopa County canvass;
  - All versions of instructions provided to individuals who participated in the hand count of Maricopa County's ballots, whether those individuals were Cyber Ninjas' employees, Cyber Ninjas' subcontractors' employees, or volunteers;
  - The names of all those who participated in conducting the hand count audit of Maricopa County's ballots, whether those were Cyber Ninjas' employees, Cyber Ninjas' subcontractors' employees, or volunteers;
- All documents, communications of any type, and other records concerning or related to Ben Cotton's statement on or about May 12, 2021, alleging that databases and/or files had been deleted from the materials provided by Maricopa County to the Senate.
- All documents, communications of any type, and other records concerning or related to Ben Cotton's statement that he had been able to locate the data that he had alleged had been deleted. Mr. Cotton made this statement on or about May 18, 2021, at the Senate's hearing concerning Cyber Ninjas' examination of Maricopa County's election materials.
- All financial records related to Cyber Ninjas' examination of Maricopa County's election materials, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts, and records of all payments or donations.
- All communications of any type, between October 1, 2020 and November 15, 2021, regarding the proposal, planning, performance, funding, staffing, conducting, or

otherwise concerning Cyber Ninjas' and its subcontractors' examination of Maricopa County's election materials, between or involving any officer, director, employee, or agent of Cyber Ninjas and any officer, director, employee, or agent of any subcontractor, including without limitation:

- Wake Technology Services, Inc;
- CyFir LLC, including without limitation:
  - Ben Cotton, or anyone communicating on his behalf; and,
- Strat Tech Solutions LLC.
- All communications of any type, between October 1, 2020 and November 15, 2021, regarding the proposal, planning, performance, funding, staffing, or otherwise concerning Cyber Ninjas' and its subcontractors' examination of Maricopa County's election materials, between or involving any officer, director, employee, or agent of Cyber Ninjas and:
  - Any member of the Arizona Senate or any employee or agent communicating on behalf of any Arizona State Senator, including without limitation:
    - Senate President Karen Fann, or anyone communicating on her behalf;
    - Senator Warren Petersen, or anyone communicating on his behalf;
    - Senator Kelly Townsend, or anyone communicating on her behalf;
    - Senator Wendy Rogers, or anyone communicating on her behalf;
    - Senator Sonny Borelli, or anyone communicating on his behalf.
  - Any member of the Arizona House or any employee or agent communicating on behalf of any Arizona State Representative, including without limitation:
    - Rep. Mark Finchem, or anyone communicating on his behalf.
  - Ken Bennett, or anyone communicating on his behalf;
  - John Brakey, or anyone communicating on his behalf;
  - Randy Pullen, or anyone communicating on his behalf;
  - Any member of the United States Congress, or anyone communicating on their behalf, including without limitation:
    - Rep. Paul Gosar, or anyone communicating on his behalf;
    - Rep. Andy Biggs, or anyone communicating on his behalf;

- Rep. Louie Gohmert, or anyone communicating on his behalf;
  - Rep. Marjorie Taylor Greene, or anyone communicating on her behalf;
  - Rep. Lauren Boebert, or anyone communicating on her behalf;
  - Rep. Matt Gaetz, or anyone communicating on his behalf.
- Former President Donald Trump, or anyone communicating on his behalf, including without limitation:
    - Mark Meadows, or anyone communicating on his behalf;
    - Jenna Ellis, or anyone communicating on her behalf.
  - Rudy Giuliani, or anyone communicating on his behalf;
  - Michael Flynn, or anyone communicating on his behalf;
  - Steve Bannon, or anyone communicating on his behalf;
  - Mike Lindell, or anyone communicating on his behalf;
  - Patrick Byrne, or anyone communicating on his behalf;
  - Sidney Powell, or anyone communicating on her behalf;
  - Alexander Kolodin, or anyone communicating on his behalf;
  - Christopher Viskovic, or anyone communicating on his behalf;
  - Howard Kleinhendler, or anyone communicating on his behalf;
  - Kory Langhofer, or anyone communicating on his behalf;
  - Tom Basille, or anyone communicating on his behalf;
  - Kelli Ward, or anyone communicating on her behalf;
  - Jordan Conradson of Gateway Pundit, or anyone communicating on his behalf, regardless of whether the communication relates to Mr. Conradson's role as a reporter for Gateway Pundit;
  - Christina Bobb of One America News Network, or anyone communicating on her behalf, regardless of whether the communication relates to Ms. Bobb's work as a reporter for One America News Network;
  - Jovan Pulitzer, or anyone communicating on his behalf;

- Anthony Kern, or anyone communicating on his behalf;
- Staci Burk, or anyone communicating on her behalf.

**DEFINITIONS:**

As used in the above public records requests:

“Communications” should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Twitter, Facebook, SnapChat, Wickr, Parler, or Telegram.

“Records” should be interpreted in its broadest possible terms to include, without limitation, both drafts and final versions of documents, papers, charts, spreadsheets, notes, and communications, whether electronic or on paper.

# **EXHIBIT E**





John “Jack” D. Wilenchik, Esq.

WILENCHIK & BARTNESS

[jackw@wb-law.com](mailto:jackw@wb-law.com)

— A PROFESSIONAL CORPORATION —

ATTORNEYS AT LAW

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

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

December 16, 2021

**VIA EMAIL ONLY**

Kory Langhofer

[kory@statecraftlaw.com](mailto:kory@statecraftlaw.com)

**Re: Superior Court Case No. LC2021-000180-001; Court of Appeals Case No. 1  
CA-SA 21-0173; Arizona Supreme Court Case No. CV-21-0281-PR**

Cyber Ninjas, Inc. (“CNI”) is in receipt of the Order dated December 1, 2021 by the Arizona Supreme Court in the above-numbered Petition. The Order states in relevant part: “...under the [August 24, 2021] superior court order, CNI is not required to produce documents directly to PNI but is instead required to produce documents to the Senate and, in conjunction with the Senate, may confer regarding which public records, if any ‘should be withheld based on a purported privilege or for any other legal [sic] reason.’ CNI may therefore assert any pertinent objections in the Superior Court and, if necessary, seek appropriate review in the Court of Appeals.” The Supreme Court’s Order does not address the requirement *vel non* for CNI to produce a “privilege log.”

CNI is also in receipt of Judge Hannah’s Minute Entry dated November 30, 2021 which ordered “that the Cyber Ninjas immediately begin complying with the court’s previous order to produce what has been termed a ‘privilege log,’ though that is a bit of a misnomer because the log must enumerate and describe not only records for which a privilege is claimed but also audit related records that Cyber Ninjas contends are not public records...” Judge Hannah’s Order also stated that “the process of disclosing to PNI those records that Cyber Ninjas deems to be public records must proceed immediately, along with the process of creating the privilege log.”

CNI believes that any order for it to produce documents directly to PNI has been effectively stayed/overruled by the Arizona Supreme Court. However, this issue is presently moot, because CNI has no documents to produce to either the Senate or to PNI. In a good-faith effort to weave together these competing orders from the superior court and Supreme Court, and to comply with all of them as best it can, CNI hereby produces a “privilege log” which enumerates and describes the records that it is withholding. The records described were (1) requested by the Plaintiff in its public records request; and (2) are related to the audit. Since the Plaintiff’s requests appear to have been limited to documents related to the audit, these two categories are simply merged into documents that the Plaintiff has requested. For each subcategory of records that Plaintiff has requested, CNI describes why it is withholding the records.



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December 16, 2021  
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Finally, CNI acknowledges that this log contains general subcategories of documents and does not list each and every document within the category. CNI simply does not have the money to make a more detailed log. The Senate has failed and refused to pay CNI for the balance of CNI’s contract, which came due and amounted to \$100,000. And as the Senate indicated during the last hearing, the Senate has no intention of paying CNI anything further – including reimbursing CNI’s legal costs in this matter, CNI’s costs to produce records, or CNI’s costs related to producing detailed logs. CNI receives no taxpayer funding to comply with records requests, nor does CNI have a “free” lawyer in the form of the Arizona Attorney General’s Office to provide counsel on such requests. CNI is an insolvent private company and the requested records are all clearly private records. The idea that CNI has a legal obligation to respond to public records requests from the public – seeking what are clearly private documents that the government does not even own – continues to be transparently erroneous not just as a legal matter but as a practical and economic one. If someone wants to pay CNI to do more work on this then that certainly helps but presently all parties are refusing to do so and the Court is indicating no genuine intent to make anyone do so. The Court has no right to compel CNI to work for the government or for others for free, in violation of the Thirteenth Amendment, much less to compel CNI to produce private documents to a public body without probable cause in violation of the 4<sup>th</sup> and 14<sup>th</sup> Amendments and the privacy clause of the Arizona Constitution, *inter alia*.

Please note below the anticipated cost of production for each requested item, which is based on typical rates for FOIA production costs. Even if the public records statutes applied to CNI, then CNI is entitled to such costs because it is not a public officer or body and therefore entitled to decide its own rates. The government and the courts have no right to force any particular rate on CNI, much less to force it do work for free. In addition all of the following items are subject to the general objection that the names of volunteers and other staff is private and must be kept private because CNI promised this to them, as well as because of the security risk in “doxxing” them and the fact that there is zero legitimate public interest in that information (much less any of the private documents and information listed below) that would outweigh these concerns or other including the burden of production. Because CNI is not being paid to review these items in even more detail, it reserves the right to assert more particular objections to each specific item if and when it is ever paid to compile such a list. All previous objections including those asserted in its July 27, 2021 filing are re-asserted herein.

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REQUESTED ITEM	OBJECTION
“all financial records related to the Audit, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts and records of all payments or donations for such Audit related work;”	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>The estimated costs for searching, editing and reviewing this item are \$5,776. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>
“all communications regarding the performance, funding and/or staffing of the Audit between or involving any officer, director, employee or agent of Cyber Ninjas and;”	See objections below
“any member of the Arizona Senate or any employee or agent communicating on behalf of any Senator;”	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$7,449. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>



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<p>“any ‘liaison’ for the Arizona Senate or any Senator, including Ken Bennett and Randy Pullen, or anyone communicating on their behalf;”</p>	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$7,881. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>
<p>“any member of the Maricopa County Board of Supervisors, Maricopa County Recorder Steven Richer, Maricopa County Sheriff Paul Penzone or anyone communicating on their behalf;”</p>	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$298. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>
<p>“member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives Anthony Kern, or anyone communicating on their behalf;”</p>	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$596. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>



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<p>“any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;”</p>	<p>Not a public record. In any event, there are none.</p>
<p>“former U.S. President Donald Trump or anyone communicating on his behalf; and”</p>	<p>Not a public record. In any event, there are none.</p>
<p>“Christina Bobb of One America News Network, or anyone communicating on her behalf.”</p>	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$6,703. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>
<p>“all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any subcontractor, including without limitation Wake Technology Services, Inc., CyFir LLC and Strat Tech Solutions LLC;”</p>	<p>Not public records. (These are private documents that are not owned by, created by, or even relied on by the government.)</p> <p>Estimated costs for searching, editing and reviewing this item are \$ 38,570. CNI is not a public agency that receives taxpayer funds and is entitled to payment of these costs.</p> <p>CNI re-asserts all objections from its July 27, 2021 filing.</p>
<p>“all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any contractor engaged by Maricopa County, including without limitation Pro V&amp;V and SLI Compliance.”</p>	<p>Not a public record. In any event, there are none.</p>



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Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Wilenchik', with a stylized flourish at the end.

John "Jack" D. Wilenchik, Esq.

cc: David Bodney, Craig Hoffman



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*Attorneys for Defendant Cyber Ninjas, Inc.*

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

**AMERICAN OVERSIGHT,  
Plaintiff,**

**vs.**

**KAREN FANN, et al.,  
Defendants, and  
CYBER NINJAS, INC.,  
Real Party in Interest.**

**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. CV2021-008265  
Case No.: LC2021-00180-001**

**PROPOSED JUDGMENT**

**(Assigned to the Honorable Michael Kemp)**

1 Cyber Ninjas Inc. having filed a Motion for Entry of Judgment, and good cause appearing,  
2 IT IS HEREBY ORDERED:

3 1. CNI will produce the items listed on its log dated December 16, 2021 to the Senate  
4 by Monday, January 31st. The covered period will include from March 3rd, 2021,  
5 a date which CNI believes is on or before their first conversations with the Arizona  
6 Senate, through September 24, 2021, when the hearing with the final results of the  
7 audit were delivered. CNI's grounds for withholding the items listed in the log are  
8 denied. This includes CNI's objection on the grounds that the government does not  
9 own or possess the records, a fact which the parties do not dispute. For the sake of  
10 the production:

11 i. "substantial nexus" is defined as anything related to the audit, regardless of  
12 whether it had any material impact on the final deliverable of the audit, an audit  
13 report. For the avoidance of doubt, communications and documents with  
14 substantial nexus would include those items within CNI's control related to the  
15 Maricopa County forensic audit from and between the Arizona Senate, Arizona  
16 Senate liaisons, audit financers, and audit participants whether paid or unpaid,  
17 as well as video or documents produced during the execution of the audit for the  
18 purpose of generating the final report. This would not include communications  
19 from and to the public at large, to and from family or friends of audit participants  
20 when the family or friends are not audit participants, to and from attorneys  
21 related to legal advice, or to and from media or related to media response. These  
22 communications do not have a substantial nexus or are otherwise not subject to  
23 production.

24 ii. All documents and communications produced can be redacted of any and all  
25 personally identifiable information ("PII") other than their name. "PII" includes  
26 date of birth, social security number, telephone number, home address, or email.

27 In addition, the full name of anyone who is not a public figure may be redacted.

28 b. For the avoidance of doubt, the items to be produced are:

- 1 i. all financial records related to the Audit, including without limitation all bids,  
2 requests for bids or requests for proposals, contracts, amendments to contracts,  
3 invoices, bills, receipts and records of all payments or donations for such Audit-  
4 related work;
- 5 ii. all communications regarding the performance, funding and/or staffing of the  
6 Audit between or involving any officer, director, employee or agent of Cyber  
7 Ninjas and:
  - 8 1. any member of the Arizona Senate or any employee or agent  
9 communicating on behalf of any Senator;
  - 10 2. any “liaison” for the Arizona Senate or any Senator, including Ken  
11 Bennett and Randy Pullen, or anyone communicating on their  
12 behalf any member of the Maricopa County Board of Supervisors,  
13 Maricopa County Recorder Steven Richer, Maricopa County  
14 Sheriff Paul Penzone or anyone communicating on their behalf;
  - 15 3. any member of the Arizona House of Representatives Mark  
16 Finchem and former member of the Arizona House of  
17 Representatives Anthony Kern, or anyone communicating on their  
18 behalf;
  - 19 4. any member of the United States Congress who represents an  
20 Arizona congressional district, or anyone communicating on their  
21 behalf;
  - 22 5. former U.S. President Donald Trump or anyone communicating  
23 on his behalf; and
  - 24 6. Christina Bobb of One America News Network, or anyone  
25 communicating on her behalf.
- 26 2. The Senate shall conduct a full review of the records that CNI produces to the  
27 Senate, to determine whether those records have a substantial nexus to the audit.  
28 The Senate shall conduct a manual review and not simply keyword search(es),

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although keyword search(es) may assist in the effort. Any documents that are deemed not to have a substantial nexus to the audit shall be returned to CNI, or destroyed at CNI’s direction. The Senate shall not produce CNI’s records to the public without first meeting and conferring with CNI. In the event of any dispute between the Senate and CNI over production of records to the public, this Court will either resolve the dispute or appoint a special master to do so. The Senate shall bear the expense of this review.

- 3. The entry of this Judgment, and the production of documents by CNI to the Senate in compliance with this Judgment, does not prejudice CNI’s rights on appeal. In other words, CNI is still entitled to contend on appeal that its documents are not public records because the government does not own, control, possess, rely on, or have access to the records, even though such records have been produced to the Senate in accordance with this Judgment. This Judgment is also without prejudice to CNI’s right to seek a stay of the Senate’s production of documents to the public from the appellate courts. In the event that this Judgment is reversed on appeal, then the Senate shall return CNI’s documents to CNI or destroy them at CNI’s direction. The Senate’s production of CNI’s documents to the public is stayed, conditioned on CNI prosecuting its appeal to effect.
- 4. All prior orders in this matter are hereby rendered moot.
- 5. The Court expressly determines there is no just reason for delay and enters a final judgment under Ariz.R.Civ.P. 54(b).

DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable Michael Kemp