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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.

PHOENIX NEWSPAPERS, INC., ET AL,

Plaintiffs,

vs.

ARIZONA STATE SENATE, ET AL.,

Defendants, and

CYBER NINJAS, INC.,

Real Party in Interest.

**Case No.: CV2021-008265
LC2021-000180-001
(Consolidated)**

**REPLY IN SUPPORT OF CYBER
NINJAS INC.’S MOTION TO DISMISS**

(Assigned to the Hon. Michael W. Kemp)

Defendant Cyber Ninjas, Inc. (“CNI”) submits its reply to American Oversight’s (“AO”) and Phoenix Newspaper, Inc.’s and Kathy Tulumello’s (collectively, “PNI”) responses to CNI’s Motion to Dismiss.

1 Both opposing parties attempt to misconstrue and over-broaden the appellate courts' prior
2 decision(s). In the *PNI* case (which has since been consolidated into this case), CNI originally
3 filed a Motion to Dismiss it from the case on the grounds that it was not a public agency or public
4 officer, which are the only two entities that may subject to public-records claims under law. The
5 prior judge at once denied that Motion to Dismiss and entered an order requiring CNI to either
6 produce to the Senate its "public records" or to produce a log listing "any reason" for which any
7 "public records" were being withheld. CNI filed a special action from these orders in which it
8 merely appealed from its Motion to Dismiss (arguing that as a private contractor, it was not subject
9 to suit under the public records statutes). Whether or not CNI actually had "public records"—
10 much less whether its privately-owned records can deemed "public records" simply because they
11 may relate to government work—was clearly not decided in the special action. Nor, as the
12 Supreme Court noted, should it have been, since the court's actual order provided that CNI could
13 withhold records "for any reason," and therefore this obvious issue remained to be determined
14 through further proceedings and a final appealable judgment. Given that the Court of Appeals
15 clearly did not decide (or even purport to decide) the issue of whether documents that the
16 government does not own, there is no res judicata or claim preclusion here of any kind.

17 Most important is what is missing from AO and PNI's responses: any allegation supporting
18 that the government owns, possesses, controls or even has access to CNI's records. That is
19 absolutely dispositive in these cases. This Court cannot order that CNI produce such things to the
20 government (much less without compensation) without violating its Fourth and Fourteenth
21 Amendment rights against search-and-seizure, the constitutional right to just compensation for
22 government seizure, common-law property rights and basic contractual rights, etc. There is
23 literally nothing to support this case other than intense political and media bias, and to date judicial
24 bias as well. Government contractors do not forfeit their rights simply because they undertake
25 government work, or even elections work. Or do work that inspires intense media and political
26 interest or animus of some kind.

27 A.O. points to a clause in the CNI-Senate contract which provided that CNI would retain
28 certain of its documents for a number of years (Section 3.6). This clause does not provide that the

1 government owns (much less controls or possesses) CNI’s records. In fact, the intent of this clause
2 was merely to ensure that CNI maintained documents which might be needed for the defense of
3 litigation under Section 18.5. The Motion to Dismiss already addressed how Section 18.5 does
4 not give the Senate ownership of CNI’s records, much less the possession or control required by
5 both the Arizona and United States Supreme Courts; and that the clause is not even applicable
6 anyway.

7 **CONCLUSION**

8 It would violate literally every manner of legal authority imaginable – including the
9 Arizona Constitution, United States Constitution, United States Supreme Court caselaw, Arizona
10 Supreme Court caselaw, plain statutory meaning, common-law property rights, contract rights –
11 to conclude that CNI’s private personal records are public records that it must produce to the
12 government and the public. Media and political bias – i.e., the fact that people find its records
13 “interesting” because they pertain to elections or political matters – is not law. Because no party
14 in this case – not PNI, not the Senate, not A.O.—even claims that they are seeking records that
15 the government owns (much less possesses, controls, or has access to), CNI asks that the claims
16 against it be finally dismissed.

17 **RESPECTFULLY SUBMITTED** February 22, 2022.

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

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1 **ELECTRONICALLY** filed February 22, 2022,
via AZTurboCourt.com

2 **COPY** electronically transmitted by the Clerk
3 of the Court via AZTurboCourt.com
4 to the Honorable Michael Kemp

5 **ELECTRONICALLY** served February 22, 2022 via
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