IN THE SUPREME COURT
STATE OF ARIZONA

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

Petitioners,

v.

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

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. CV-22-0018-PR

Court of Appeals No.
1 CA-SA 21-0216

Maricopa County Superior Court No.
CV2021-008265

SUPPLEMENTAL BRIEF OF PETITIONERS

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The Petitioners (hereafter, the "Senate") respectfully submit this Supplemental Brief, pursuant to the Court's order of February 15, 2022.

As set forth below, the Senate has asserted valid *prima facie* claims of legislative privilege with respect to internal legislative documents and communications relating to the planning, execution, or results of its audit of the November 3, 2020 general election in Maricopa County (the "Audit"), as itemized in its privilege log.

I. Legislative Communications Concerning the Audit Are Privileged Because They Relate to a Subject Upon Which Legislation "Could Be Had" and to the Legislature's More General Oversight Responsibilities

A communication between and among legislators or their agents is protected by the Speech or Debate Clause, *see* ARIZ. CONST. art. IV, pt. 2, § 7, from compelled disclosure if it concerns "an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶ 18 (App. 2003) (quoting *Gravel v. United States*, 408 U.S. 606 (1972)).[1]

[1] It bears noting that courts have sustained legislative privilege claims over communications with third parties who have no affiliation with the legislative branch, including constituents and lobbyists. *See, e.g.*, *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016). In the interests of transparency, however, the Senate has confined its claims of legislative privilege in this matter only to

The Court of Appeals erred, however, in misapprehending this axiom as demanding a tangible nexus between a given communication and a specific item of "pending legislation," as reified in a specific prospective or introduced bill. *See* COA Op. ¶ 30. An internal legislative communication bears the requisite relationship to legislative business if it **either** "concern[s] a subject on which legislation could be had," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975) (internal citation omitted), **or** is integral to "some other matter[] placed within the jurisdiction of the legislature," *Fields*, 206 Ariz. at 137, ¶ 18, to include the body's constitutional responsibility to "secure the purity of elections and guard against abuses of the elective franchise," ARIZ. CONST. art. VII, § 12, and oversight of county officials, *id*. art. XII, § 4. Further, an investigation's inclusion of mechanical or technical tasks does not detract from its character as a legislative endeavor, and its entwinement with partisan fault lines does not render it a "political" undertaking. Each point is addressed in more detail below.

A. The Drafting or Introduction of Specific Legislation Is Not a Condition Precedent to a Valid Legislative Privilege Claim

1. The Audit Is Integral to the Lawmaking Process Because It Concerns a Subject Upon Which Legislation "Could Be Had"

Factfinding inquiries are innately integral to the act of legislating, as long as

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communications between or among legislators, legislative staff, and/or persons who acted as consultants or vendors.

they relate to a "subject on which legislation could be had." *Eastland*, 421 U.S. at 506 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)).[2] To discern the error afflicting the Court of Appeals conclusion that "the connection between the audit and any future legislation is too tenuous to conclude that the audit could reasonably qualify as a legitimate legislative act," COA Op. ¶ 30, it is useful to first illuminate the purpose and contours of the legislative investigative power. As the U.S. Supreme Court recently recounted:

> [E]ach House has power to secure needed information in order to legislate . . . The [legislative] power to obtain information is broad and indispensable. It encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the [legislature] to remedy them.

Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (cleaned up).

This point is largely the fulcrum of the parties' dispute. Investigatory activities are almost always antecedent to the tasks of formulating, drafting and debating particular items of legislation. Legislative bodies must first understand the operation and efficacy of existing laws (in this case, those governing the casting, submission and tabulation of ballots) before they can determine what, if any, policy ministrations are necessary to improve them.

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[2] By contrast, investigations into the affairs of private citizens merely "for the sake of exposure" lie outside the legitimate legislative domain. *Watkins v. United States*, 354 U.S. 178, 200 (1957).

For this reason, no court has ever conditioned application of the legislative privilege on the presence of, or citation to, some specific bill. It is sufficient that the inquiry "concern[s] a subject on which legislation could be had." *See Mazars*, 140 S. Ct. at 2027, 2031 (recognizing legitimacy of congressional investigation of potential foreign interference in U.S. elections and "loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system"); *McGrain*, 273 U.S. at 177 (inquiry into conduct of Department of Justice was a *bona fide* legislative investigation, even though "the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation"); *Eastland*, 421 U.S. at 493, 503–04 (committee's "continuing study and investigation of . . . the administration, operation, and enforcement of the Internal Security Act of 1950" fell within the "legitimate legislative sphere"); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 43 (D.D.C. 2018) (holding that subpoena "was a valid part of the Committee's legitimate legislative investigation" into "the intelligence community's response to Russian active measures directed against the United States"); *Buell v. Superior Court*, 96 Ariz. 62, 66 (1964) (enforcing legislative subpoena in connection with investigation into potential unlawful practices within the Corporation Commission, holding that "[i]t is within the powers of legislative committees to conduct investigations such as the one here involved").

The protections of the Speech or Debate Clause are congruent with the parameters of a *bona fide* legislative investigation. *See Eastland*, 421 U.S. at 504 ("The power to investigate . . . plainly falls within" the *Gravel* standard). In other words, an internal legislative communication concerning an investigation into a subject upon which legislation "could be had," *id.* at 506, is privileged. *See Trump v. Comm. on Ways & Means*, 415 F. Supp. 3d 38, 46 (D.D.C. 2019) (observing that the Speech or Debate Clause applies "in the context of an investigation *if* the investigation 'concerned a subject on which legislation could be had'") (citations omitted)); *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1203 (D.C. Cir. 2009) (acknowledging that the Speech or Debate Clause encompasses the "official power of legislative fact-finding"); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 11 (D.C. Cir. 2006) (reaffirming that "making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and 'introducing material at Committee hearings'" are all protected legislative functions under the Speech or Debate Clause).

The durability of the privilege is not correlated with the formality of the inquiry; to the contrary, "[t]he acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit

of the privilege." *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976).[3] And even materials that do not have a legislative provenance can nevertheless become immune from compulsory disclosure if they are obtained in the course of a legislative investigation. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (extending privilege to corporate documents transmitted to Congress by a whistleblower).

With these principles in mind, it is (or certainly should be) undisputed that the Audit is a *bona fide* investigation imbued with the constitutional imprimatur of the legislative branch. In sustaining the subpoenas to Maricopa County underpinning the Audit, the Superior Court agreed that its findings could serve as a vehicle for future electoral reforms. *Maricopa County v. Fann*, Maricopa County Superior Court CV2020-016840, Minute Entry filed Feb. 25, 2021, at p. 9. The Court of Appeals itself later ratified the same conclusion in more trenchant terms, emphasizing that the Audit is "an official legislative activity" and indeed an "important legislative function." *Fann v. Kemp*, 2021 WL 3674157, at *4, ¶¶ 19, 24 (Ariz. App. Aug. 19, 2021) ["*Fann I*"]. Because the Audit is an "important legislative function"—a designation that derives from its relationship to a subject

[3] To the extent it held otherwise in construing the federal Speech or Debate privilege residing in Article I of the U.S. Constitution, this Court's opinion in *Steiger v. Superior Court*, 112 Ariz. 1 (1975), has been superseded by the same evolving federal precedents to which it claimed fidelity.

upon which legislation "could be had"—it follows ineluctably that internal legislative communications concerning its planning, execution and findings are within the ambit of the Speech or Debate Clause.

2. The Audit Also Is Integral to "Other Matters" Within the Legislative Purview

Even if *arguendo* the Audit lacked a sufficient nexus to potential legislation, *Fields*, 206 Ariz. at 137, ¶ 18, the Speech or Debate Clause—as encapsulated in the *Fields*/*Gravel* standard—also embraces activities that are integral to "other matters placed within the jurisdiction of the legislature." *Id.* This Court and others accordingly have sustained invocations of immunity or privilege in connection with legislative projects that are wholly divorced from the formulation of statutory measures. *See, e.g.*, *Mesnard v. Campagnolo*, 251 Ariz. 244, ¶ 25 (2021) (House Speaker's modification and release of investigative report concerning alleged misconduct by legislator were "legislative functions"); *In re Grand Jury Subpoenas*, 571 F.3d at 1203 (Speech or Debate Clause reached ethics investigation into congressman's travel expenses); *McCarthy v. Pelosi*, 5 F.4th 34, 40 (D.C. Cir. 2021) (administration of House rules governing proxy voting were within scope of Speech or Debate Clause); *Judicial Watch, Inc. v. Schiff*, 474 F. Supp. 3d 305, 317 (D.D.C. 2020) ("Though the aim of an impeachment inquiry is not to enact legislation, such

inquiry is undoubtedly a 'matter which the Constitution places within the jurisdiction of either House.'").[4]

As refracted through the "other matters" facet of the *Fields*/*Gravel* test, Arizona's legislative privilege arguably is more expansive than its federal analogue. Unlike the activities of Congress, which must find at least an indirect premise in one of the body's enumerated powers, "the power of the [Arizona] legislature is plenary . . . unless that power is limited by express or inferential provisions of the Constitution," *Whitney v. Bolin*, 85 Ariz. 44, 47 (1958). A corollary is that *any* investigation or activity by the Arizona Senate or the Arizona House of Representatives arguably is—unless it infringes some other provision of the Arizona Constitution—integral to "matters placed within the jurisdiction of the legislature." *Fields*, 206 Ariz. at 137, ¶ 18.

The Court need not, however, probe the outer perimeter of the privilege in this case. In addition to bearing a nexus to potential future legislation, the Audit also is intertwined with at least two other constitutionally assigned legislative functions.

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[4] The Court of Appeals' insistence that "[o]nly activities 'done in the course of the process of enacting legislation' receive protection," COA Op. ¶ 31, renders the "other matters" prong of the *Fields*/*Gravel* test nugatory. Further, the court's reasoning that "[n]ot everything a legislator does, even if related to his or her official duties, can be classified as a legislative act under the framework," *id.* is something of a *non sequitur*. The notion that not "everything" a legislator says or does is privileged is not mutually exclusive of the truism that the sphere of legitimate legislative activities transcends the delimited functions of writing, debating and passing specific bills.

First, the Constitution instructs the Legislature to "enact[] registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." ARIZ. CONST. art. VII, § 12. The exiguous case law indicates that the clause denotes legislative authority to "prescribe such qualifications [for voting] as it thinks wise." *Ahrens v. Kerby*, 44 Ariz. 337, 341 (1934). Cultivating a factual understanding of the structure and mechanics of voting processes in the state's largest county (to include potential security vulnerabilities) is obviously integral to the discharge of that constitutional responsibility.

Second, it is the Legislature's sole prerogative to determine whether and to what extent election administration should be entrusted to county officials at all. *See* ARIZ. CONST. art. XII, § 4 ("The duties, powers, and qualifications of [county] officers shall be as prescribed by law."); *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 384 (1959) ("The Board of Supervisors can exercise only those powers specifically ceded to it by the legislature."). By marshaling data on the security and accuracy of voting and ballot tabulation procedures in Maricopa County, the Audit has informed the Legislature's appraisal of how best to disperse election administration responsibilities among state and county officers.

In sum, because the Audit concerns a subject upon which legislation "could be had," *Eastland*, 421 U.S. at 506, it is necessarily within the realm of legislative activities that are insulated by the Speech or Debate Clause. In addition, the Audit

is integral to "other matters placed within the jurisdiction of the legislature," *Fields*, 206 Ariz. at 137, ¶ 18, including the body's obligation to preserve the "purity of elections," ARIZ. CONST. art. VII, § 12, and its authority to oversee and allocate statutory duties concerning the administration of elections, *see id.* art. XII, § 4.

B. As an "Important Legislative Function," the Audit Is Neither "Administrative" Nor "Political"

The curious notion that the Audit is not a "legitimate legislative act," COA Op. ¶ 30, finds its most apt refutation from none other than the Court of Appeals, which previously held—at the behest of none other than American Oversight—that the Audit is in fact an "important legislative function." *Fann I*, 2021 WL 3674157, at *5, ¶ 24. A "legislative" function is, *ipso facto*, neither "administrative" nor "political." *See Mesnard*, 251 Ariz. 244, ¶ 16 (discussing the trichotomy of "legislative," "political" and "administrative" acts).

1. The Audit Is Not "Administrative"

Law of the case principles aside, American Oversight's belated pivot reflects a misguided struggle to engraft colloquial meanings onto legal terms of art. That the Audit entails some mundane and rote aspects (such as manually recounting ballots) does not make it "administrative."

Although it eludes a crystallized, self-contained definition, the term "administrative" generally connotes, in this context, (a) executive actions "to administer the law in a particular way," *id.*, ¶ 16, and (b) actions of the legislative

branch or its members in a discrete capacity that is decoupled from their constitutionally assigned functions, such as personnel management or employee discipline. *See Office of Eddie Bernice Johnson*, 459 F.3d at 11 ("Firing an aide for falsifying expense reports, or disciplining an assistant for harassing others in the office is 'not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.'" (citation omitted)); *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 123, ¶ 80 (App. 2012) (selection of mapping consultants was administrative);[5] *but see Consumers Union of U. S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350 (D.C. Cir. 1975) (administration of House rules governing seating in the galleries was a "legislative" act, even though it did not involve "consideration and passage or rejection of proposed legislation"). Documents concerning the planning, conduct and results of the Audit—a study of the efficacy and reliability of the state's election law regime conducted by legislators *qua* legislators—fall far outside that narrow rubric.

In this respect, American Oversight appears to confound the legislative privilege with the doctrinally distinct deliberative process privilege. Unlike the latter, legislative privilege extends to even purely factual, non-analytical communications that are in furtherance of a legislative function. *See Citizens Union*

[5] For this reason, the Senate has not asserted legislative privilege over internal communications relating to the procurement of Audit services.

of the City of New York v. Att'y Gen. of N.Y., 269 F. Supp. 3d 124, 151 (S.D.N.Y. 2017) ("[I]t is not just the motives of lawmakers that are protected by the privilege, but factual information as well (so long as it was collected and summarized in connection with a legislative activity)"); *Fields*, 206 Ariz. at 141, ¶ 33 (explaining the deliberative process privilege, which it declined to recognize). That is as it must be; fact-finding investigations often include ministerial, even tedious tasks that have no immediate attachment to substantive public policy prescriptions, but they nevertheless retain their legislative character. *See Mesnard*, 251 Ariz. 244, ¶ 21 ("[p]reparation of the [investigative] report" was "a legislative function").

2. The Audit Is Not "Political"

Next, American Oversight (with the lower courts' approbation, *see* COA Op. ¶ 27) lobs the term "political" as an epithet to deride an undertaking that it disdains as 'partisan.' But in the parlance of legislative privilege, "political" carries a much different meaning. It encompasses a delimited set of activities that are lawful and permissible, yet disassociated from the constitutionally ordained functions of the legislative branch, such as "[m]aking speeches outside the legislative body, performing tasks for constituents, sending newsletters, issuing news releases, and the like." *Mesnard*, 251 Ariz. 244, ¶ 16.[6]

[6] For this reason, the Senate has not asserted privilege over, for example, legislators' communications with political party leaders or internal discussions concerning press releases or media strategy, even if they pertained to the Audit.

A hearing convened by a house's presiding officer in the confines of the Capitol to elicit information from witnesses in the course of a legislative investigation is—intrinsically and inescapably—a legislative act. Bipartisanship is not a constitutive element of the legislative power embodied in Article IV; one political party's disapproval does not transmute a quintessentially legislative act into a political project. The Speech or Debate Clause's protections are not conditioned upon a litigant's (or, for that matter, a judge's) subjective appraisal of the partisan valence of a legislative hearing, or the relative participation of each political party caucus. *Cf.* ARIZ. CONST. art. IV, pt. 2, § 8 (each legislative house may "determine its own rules of procedure").

In its determination to inject a "political" cast onto the Audit, American Oversight attempts to conscript constitutional doctrine into the service of its own ideological ends. The Court should not oblige it. The Speech or Debate Clause is impervious to the political sensibilities of the moment, and to the predispositions of litigants and judges. "The wisdom of [legislative] approach or methodology is not open to judicial veto. Nor is the legitimacy of a [legislative] inquiry to be defined by what it produces." *Eastland*, 421 U.S. at 509. The hearing on the Audit report, convoked by the Senate President in the body's chamber, was a legislative act.

II. A Factual Showing of Legislative "Impairment" Is Not an Element of a *Prima Facie* Privilege Claim

Every legal privilege is undergirded by a practical purpose or normative objective. "The purpose of the attorney-client privilege is to encourage a client to confide in his or her attorney all the information necessary in order that the attorney may provide effective legal representation." *Granger v. Wisner*, 134 Ariz. 377, 379 (1982). The inviolability of the confessional recognizes "the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized." *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 31 (App. 1988) (citation omitted). And legislative privilege serves "to prevent indirect impairment of [legislative] deliberations." *Fields*, 206 Ariz. at 137, ¶ 18.

A party who has otherwise asserted a *prima facie* privilege claim, however, is not required to show that application of the privilege will, in any given instance, ***actually*** vindicate the doctrine's animating purpose—for example, that a client would not have consulted her attorney but for the assurance of confidentiality. The Court of Appeals' conclusion to the contrary, *see* COA Op. ¶ 32, was not only fundamental error, but has the perverse effect of undermining the Speech or Debate Clause as a bulwark of legislative independence. The notion that affirmative proof of some tangible legislative "impairment" is a precondition to the invocation of legislative privilege implies that each time the privilege is invoked, "an initial

judicial inquiry would be required to calibrate the degree to which its enforcement would burden the [legislative body's] work." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859–60 (D.C. Cir. 1988). The argument is facially "absurd," *id.*, because it would enervate the legislative privilege in the name of protecting it. After all, the legislative privilege "would be virtually worthless if courts judging its applicability had to scrutinize very closely the acts ostensibly shielded." *In re Grand Jury Subpoenas*, 571 F.3d at 1206 (Kavanaugh, J., concurring) (internal quotation omitted).

American Oversight's exertions to contrive some kind of circuit split on this question relies on a profound—and bizarre—misunderstanding of *In re Fattah*, 802 F.3d 516 (3d Cir. 2015), and *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011). Diverging from the D.C. Circuit's approach, these cases held that the federal Speech or Debate Clause contains only a privilege against the evidentiary "use" of legislative documents, rather than a broader defense against their compelled disclosure in the course of, *e.g.*, discovery or an investigation. Even if this question were relevant here (and it is not), Arizona has aligned with the D.C. Circuit, holding that privileged materials retain that status "[e]ven though such documents will not be used in any evidentiary proceeding." *Fields*, 206 Ariz. at 140, ¶ 32.

Fattah and *Renzi* had nothing to do with the issue of whether "impairment" is a freestanding element of the privilege. To the contrary, *Renzi* actually suggested

something closer to the ***opposite***, rejecting the notion that the alleged "distraction" of a legislator could constitute an independent predicate for invoking legislative privilege or immunity when the underlying substantive activity (in that case, a congressman's offer of a criminal *quid pro quo*) was unprotected. *See* 651 F.3d at 1035 ("Where we differ with *MINPECO* is in our belief that legislative distraction is not the primary ill the Clause seeks to cure."). Indeed, the Ninth Circuit has concluded that legislative privilege attaches even to former lawmakers in connection with their erstwhile legislative acts, despite agreeing that "the rationale of preventing distraction from legislative duties is not applicable." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527–28 (9th Cir. 1983) (excluding any mention of "impairment" from its distillation of the privilege as a "two-part test").

While a generalized concern with preventing legislative "impairment" certainly propels the legislative privilege and informs its basic contours, it is not an independent prerequisite to a privilege claim.

III. To Obtain *In Camera* Review, American Oversight Must Affirmatively Show a Good Faith Factual Basis for Contesting Each Privilege Claim

As catalogued in its privilege log, each communication over which the Senate has asserted legislative privilege is (1) between and among legislators, legislative staff and/or Audit vendors or consultants, and (2) relates to the planning, conduct or results of a legitimate legislative investigation that relates to a subject upon which

legislation could be had and/or "other matters placed within the jurisdiction of the legislature." *Fields*, 206 Ariz. at 137, ¶ 18. Accordingly, if American Oversight wishes to obtain *in camera* review of any such materials, it must affirmatively rebut the Senate's *prima facie* claim by "mak[ing] a factual showing to support a reasonable, good faith belief that the document is not privileged." *Lund v. Myers*, 232 Ariz. 309, 312, ¶ 15 (2013).

A. Claims of Legislative Privilege Are Entitled to Deference

In contrast to common law privileges—which serve primarily as defenses against compelled disclosures to adverse parties—the legislative privilege is, as a manifestation of the separation of powers, partly a firewall against a "hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 179 (1966). Hence, any judicial effort to probe a putatively privileged legislative communication inevitably strains the interbranch equilibrium. For this reason, at least one court has held that legislative communications need not be identified even in a privilege log. *See Edwards v. Vesilind*, 790 S.E.2d 469, 478–79 (Va. 2016). For present purposes, the Senate does not contest that it bears an initial burden of adducing *prima facie* claims of privilege via its privilege log, although "the sensitive constitutional interests at stake" warrant "entrust[ing] the [legislators] with the initial—and perhaps the ultimate—responsibility of applying" the privilege. *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 62 (D.D.C. 2007).

B. The Privilege Log Is Sufficient to Establish a *Prima Facie* Privilege Claim as to Each Withheld Document, Thereby Shifting the Burden to American Oversight

As an initial matter, the Senate's privilege log is not governed by the Arizona Rules of Civil Procedure. The parties are not undertaking any discovery in pursuit of some extrinsic legal claim. Rather, American Oversight seeks the records for their own sake under the Public Records Act. Thus, the Rules do not control the sufficiency of a log produced pursuant solely to A.R.S. § 39-121.01(D)(2), which provides for simply an "index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld."

That said, a facially sufficient privilege log entry generally consists of "(a) the [parties] involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated." *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (citation omitted).

Virtually every log entry conforms to these criteria. Importantly, communications "shar[ing] a common nature or purpose" may be grouped together, and the trial court should not "scrutinize each communication, line-by-line, where the privilege may be established for a class of communications based on appropriate circumstances." *State ex rel. Adel v. Adleman*, -- Ariz. --, 2022 WL 388543, ¶ 14

(Feb. 9, 2022). Here, the general subject matter at issue—*i.e.*, the planning, conduct and results of the Audit—is generally enveloped by the legislative privilege. *See supra* Section I. It follows that a privilege log entry is sufficient if it (1) identifies each communication or class of communications and its relation to this subject matter, and (2) establishes that the parties to the communication are entitled to the protections of the privilege (*i.e.*, legislative members, staff and consultants/advisors), *but see Jewish War Veterans*, 506 F. Supp. 2d at 59 (noting that "the Speech or Debate Clause's application turns on the activity at issue, not the identity of the party with which the Member comes in contact"). Further, although no process is perfect, the Senate's review team has made a good faith effort to locate and exclude from the privilege log particular communications that relate to the Audit but that nevertheless are not privileged because they are "political" (per *Mesnard*) or concern only vendor selection or personnel issues (per *Mathis*).

Suspicion, hunches or curiosity cannot defeat a *prima facie* privilege claim. To obtain *in camera* review, American Oversight must supply—individually, for ***each*** document in dispute—"'a factual basis adequate to support a good faith belief by a reasonable person' that in camera review of the materials may reveal evidence" that the document in fact is not privileged. *Clements v. Bernini in & for Cty. of Pima*, 249 Ariz. 434, 441, ¶ 18 (2020); *see also Lund*, 232 Ariz. at 312, ¶ 18 (finding error when trial court "review[ed] all the documents" without a threshold showing).

C. The Senate is Entitled to a Change of Judge on Remand

Finally, the Court should confirm that the Senate may obtain a change of judge as of right in any further trial court proceedings, pursuant to Ariz. R. Civ. P. 42.1(e). *See Coffee v. Ryan-Touhill*, 247 Ariz. 68, 72, 74, ¶¶ 19, 27 (App. 2019) (holding that special action relief can be the "functional equivalent of a remand," and that Rule 42.1(e) is triggered by any "decision direct[s] the superior court to reexamine issues it already decided based on evidence it never heard"). Notwithstanding the Court of Appeals' prior partial vacatur of its rulings and remand for additional proceedings, the Superior Court refused the Senate's request for a change of judge; the Court of Appeals declined to accept jurisdiction in the Senate's subsequent special action, citing these pending proceedings. *See* Order, *Fann v. Hon. Kemp*, No. 1 CA-SA 22-0020 (Feb. 17, 2022). Rule 42.1(e) "guards against the 'possibility of judicial bias' where trial judges might begrudge the parties who successfully seek review of their rulings." *Coffee*, 247 Ariz. at 72, ¶ 18. This Court should vindicate that imperative, and sustain the Senate's right to a change of judge in any subsequent trial court proceedings.

CONCLUSION

For the foregoing reasons, the Court should reverse or vacate the judgment of the Court of Appeals with respect to the issues presented for review.

RESPECTFULLY SUBMITTED this 7th day of March, 2022.

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