

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**JUDGE MICHAEL KEMP, 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. \_\_\_\_\_**

**Maricopa County Superior Court**

**Case No.: CV2021-008265**

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

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**PETITION FOR SPECIAL ACTION**

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Pursuant to Arizona Special Action Rules of Procedure 3(c) and 7, Petitioner Cyber Ninjas, Inc. (“**CNI**”) hereby files this Petition for Special Action from the trial court’s January 6, 2022, Order, entered January 11, 2022 (the “**January Order**”), which it sanctioned CNI \$50,000 a day alleged non-compliance with its August 24, 2021 Order (the “**August Order**”) [Appendix “**App.**” at 52, 60].

## **INTRODUCTION**

CNI previously filed a special action in this matter on August 31, 2021 (the “**August Special Action**”), which arose from the trial court’s August Order for it to produce CNI’s records to Plaintiffs Phoenix Newspaper Inc. and Kathy Tulumello (collectively “**Plaintiffs**” or “**PNI**”), subject to “confer[ring]” with its co-Defendant (the Senate) about which records should be withheld “on the basis of a purported privilege or for any other reason,” and listing such documents “on a log” to be produced to Plaintiffs. [App. at 132]. The August Special Action argued that CNI was improperly sued under public-records statutes, which expressly provide that only a “public body” or its “officer” are subject to public-records inspections and suits. This Court disagreed, finding that a reference to the word “custodian” in the statutes allows for members of the public to make inspection requests of, and sue, any person or entity that is in the alleged possession of public records – which it broadly defines as any record relating to government activity, whether or not they are actually owned or possessed by the government. *Cyber Ninjas, Inc. v. Hannah*, 2021 WL 5183944, at \*3 (App. Nov. 9, 2021), *review denied* (Jan. 4, 2022). Subsequently, CNI was deluged with public records requests for its private emails and filed a Petition for Review with the Arizona Supreme

Court. [App. at 316, 322]. The Supreme Court, on January 6, 2022, ordered that, because the August Order strictly only required CNI to produce a log of documents withheld “for any reason,” then “CNI may therefore assert any pertinent objections in the Superior Court and, if necessary, seek appropriate review in the Court of Appeals.” [App. at 56].

CNI produced a log identifying documents being withheld/not produced and the reasons therefor, which included that it could not afford to process certain of the Plaintiffs’ voluminous requests, and/or that no responsive documents existed; and that none of the documents requested are owned much less possessed by the government, as they are all private things like company emails. On January 6, 2021 the Arizona Supreme Court denied CNI’s Petition for Review “*without prejudice to raising these issues on appeal when the case before the superior court is final.*” However, the trial court proceeded to hold an evidentiary hearing on January 6, 2021 (the “**Hearing**”). At the beginning of the hearing, the trial court made comments of a political nature. [App. at 337]. The trial court mischaracterized the Supreme Court’s order as merely an “Order denying review,” and declined to rule on CNI’s objections in its log or to enter a final order, as was clearly contemplated by the Arizona Supreme Court, before finding CNI in contempt. Furthermore, PNI had sought a fine of only \$1,000 to \$2,000 a day, but the trial court unilaterally and arbitrarily chose to sanction CNI \$50,000 a day without providing notice to CNI of that *sua sponte* number. [App. at 345]. The trial court also based the number entirely on extrajudicial evidence that was not introduced in this case by any party, which the trial court failed to disclose to any party before making. The \$50,000 per day

sanction was apparently based on an unproven allegation that CNI had taken “millions of dollars.” [App. at 388]. The trial court was reviewing other extrajudicial sources in the news as well, which is deeply disturbing because the PNI here is a media outlet. Doing so constituted not only improper *ex parte* investigation but also an improper media influence over the court—not to mention a violation of due process.

Additionally, CNI discovered that the trial judge had been making recent contributions to political activist groups, including one that was active in publicly criticizing the audit—a fact that the judge never disclosed and that was obviously disqualifying, as detailed in the Motion to Disqualify that was filed days later (and incorporated as if set forth herein). [App. at 81]. This alone warrants vacating the trial court’s order. *See Kay S. v. Mark S.*, 213 Ariz. 373, 380, 142 P.3d 249, 256 (App. 2006), *as amended* (Nov. 9, 2006) (discussing when a judgment should be vacated or reconsidered due to the reasonable perception of judicial impropriety. Moreover, the trial court’s decision to find CNI in contempt to the amount of \$50,000 a day was clearly punitive in nature, rendering it a criminal sanction; and CNI was denied due process because he failed to disclose the sole basis for that number – a news article that was not in the record before him – before making it the basis for his ruling. In doing so, the trial court denied CNI an opportunity to rebut the allegation.<sup>1</sup> The trial court also failed to put CNI on notice of the amount of the sanction before unilaterally ordering it. *See e.g. Riley v. Superior Ct. In &*

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<sup>1</sup> If the trial court disclosed it, then at a minimum CNI would have argued/presented evidence that its work also *cost* millions of dollars, *i.e.*, it did not profit and has ceased operations.

*For Cochise Cty.*, 124 Ariz. 498, 500, 605 P.2d 900, 902 (App. 1979) (discussing constitutional due process requirements and standard of proof for criminal contempt); *Stoddard v. Donahoe*, 224 Ariz. 152, 155, 228 P.3d 144, 147 (App. 2010) (discussing that criminal contempt is distinguished by the nature of the sanctions imposed in light of the totality of the surrounding circumstances and nature of the proceedings). The trial court’s other conduct during the Hearing (he was “smiling” about a previous motion to disqualify him, by his own admission, [App. at 337]) also raised grave concerns about whether the contempt order was in fact based on a prior motion to disqualify him, in direct violation of A.R.S. § 12-410 (providing that a judge may not retaliate against a party for filing a motion to disqualify by finding them in contempt).

CNI also appeals on the grounds that CNI did not engage in contemptuous conduct. CNI has asserted multiple objections, including that the records at issue are not public records. The Arizona Supreme Court specifically stated the CNI can raise this issue on appeal upon a final order. [App. at 57]. This Court’s prior decisions have elided over these 103 by merely finding that any records related to government work, whether or not they are even owned or possessed by the government, are public records. *Cyber Ninjas, Inc.*, 2021 WL 5183944, at \*2. This is clearly false – for example, it would render CNI’s internal emails about whether it is able to perform its contract with the Senate (or whether the Senate is in breach) into “public records” because they were related to government work.

Pursuant the Supreme Court’s Order, CNI requested a final judgment under Rule 54(b), but it was denied. [App. at 40]. Without a final order, CNI cannot



appeal its defenses to the appellate court, and is subject to a \$50,000 a day sanction based on those defenses. Accordingly, CNI has no other equally plain, speedy, and adequate remedy to seek review of the trial court's sanction of "\$50,000 a day."

### **STATEMENT OF THE ISSUES**

- 1) Whether the trial court's contempt order violated CNI's due process rights.
- 2) Whether CNI engaged in contemptuous conduct for not producing documents based on objections that the Arizona Supreme Court stated can be appealed on a final order that has yet to be issued.
- 3) Whether the trial court abused its discretion by using evidence outside record and without disclosures as the trial court's basis not that presented during the January 6, 2022, Hearing as the basis for its \$50,000 a day sanction.
- 4) Whether the trial court abused its discretion by treating CNI's alleged contempt as a civil rather than criminal contempt.
- 5) Whether the trial court erred by not satisfying the due process standard for criminal contempt because the order was effectively an order for criminal contempt.
- 6) Whether the \$50,000 a day sanction was in violation of A.R.S. § 12-410.
- 7) Whether the trial court was biased and prejudiced by issuing a \$50,000 a day contempt order.

### **STATEMENT OF ISSUES TO PRESERVE FOR THE ARIZONA SUPREME COURT**

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

- 1) 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”?)

- 2) 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.*?
- 3) 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?
- 4) 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?
- 5) Can attorneys’ fees be awarded against a private body under A.R.S. § 39-121.02(B)?

### **STATEMENT OF JURISDICTION**

In determining whether to accept special action jurisdiction, this Court considers several factors, including whether (1) the issues presented are of statewide significance; (2) the petition proffers pure questions of law; and (3) the petitioner lacks an equally plain, speedy, and adequate remedy by appeal. *See Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206 (2013). All three considerations warrant the acceptance of special action jurisdiction in this case. “A special action petition is the appropriate method to challenge a civil contempt order because the finding of contempt and civil sanctions are not appealable.” *Stoddard*, 224 Ariz. at 154, ¶ 7, 228 P.3d at 146 (citations omitted).

## **LEGAL STANDARD**

“[M]ixed questions of law and fact contained within the analysis of a civil contempt proceeding” are reviewed *de novo*. *In re M.H.*, 648 F.3d 1067, 1070–71 (9th Cir. 2011). The trial court’s “underlying factual findings are reviewed for clear error.” *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004); *Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App.1986). Any sanction that is imposed for civil contempt must be designed to coerce the person to do or to refrain from doing some act. *See Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544, 547 (1982). Coercive civil contempt requires that the contemnor be given an opportunity to avoid punishment through compliance. *Trombi v. Donahoe*, 223 Ariz. 261, 267, ¶ 26, 222 P.3d 284, 290 (App. 2009) (citing *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829, 114 S. Ct. 2552, 2558 (1994)). By contrast, a contempt sanction is considered criminal if it is imposed solely to punish a past act and vindicate the authority of the court and cannot be avoided through compliance. *Id.* 223 Ariz. 261, 267, ¶ 26, 222 P.3d 284, 290 (citing *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492 (1911)). Accordingly, the criminal contempt sanction operates not to coerce a future act from the defendant for the benefit of the complainant, but to uphold the dignity of the law, by punishing the contemnor’s disobedience. *Gompers*, 221 U.S. at 442–443, 31 S.Ct., at 498.

## **STATEMENT OF FACTS**

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 (the “**Audit**”). *Cyber Ninjas, Inc*, 2021 WL 5183944, at \*1. PNI sent a request to CNI to inspect certain documents relating to the Audit under Arizona’s public records law (“PRL”). *Id.* Because CNI is not a public officer or a public body as define under the PRL – and the documents sought clearly belong to CNI – it declined the request. PNI then filed a statutory special action against CNI, the Senate, and Senate officials (the “**Complaint**”). *Id.*

At the beginning of the matter, CNI moved to disqualify the trial judge for cause because before being assigned to this action, the trial judge had made a *sua sponte* negative comment about the Audit in an unrelated case that CNI was not a party, *Arizona Republican Party v. Fontes, et al*, case No. CV2020-014553. [App. at 70]. There, the plaintiff had asked the same judge to order that Maricopa County redo its post-election “hand-count,” based on a violation of the statutory process. [*Id.* at 72]. In general, the trial court’s orders and conduct in that case showed an unacceptable degree of intemperance. In a lengthy minute entry, he claimed that he was being “gas-lighted,” and he called the plaintiff’s arguments “sophistry.” [*Id.* at 73]. He also sanctioned the plaintiff and its undersigned counsel. [*Id.* at 79]. That order was appealed, and it is currently pending before this Court. At no time did the judge disclose any actual or potential conflict or perception of impropriety in him serving as the judicial officer on the case.

That case was strictly unrelated to this case, other than sharing broad themes of politics and elections (and the fact that undersigned counsel participated in both

cases). However, at footnote 3 of its final Ruling in *Arizona Republican Party v. Fontes*, the trial court made the following comment:

The Court is aware that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes of ‘assessing electoral integrity’ and ‘examining potential reforms to the electoral process’ and apparently also ‘to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome.’ *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Order entered 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not the courts.”

[*Id.* at 74].

This comment was *sua sponte*, as no party had raised the audit or Judge Thomason’s ruling(s) in that case. The trial court’s language – including describing the purposes of the audit as “avowed” and “apparent[]” – expressed skepticism of the audit; and of course, there was no reason to mention the “wisdom of that endeavor” other than to express doubt as to whether it was wise. The comment also strongly indicated that the judge felt a personal political interest in these matters and was independently investigating/reading news reports about them, since the Senate audit was not raised by any party and not involved in the case.

CNI’s first Motion to Disqualify was denied on the grounds that “[t]he matters alleged in the Motion—including [the judge’s] ruling in prior litigation—do not show bias and prejudice that would disqualify [the judge] from ruling in this public records matter.” [App. at 66].

Subsequently, the trial court strongly signaled to all parties in the initial hearings on this matter that he would be granting the PNI's claims. The trial court issued a lengthy Order that PNI's counsel wrote and presented to the Court with for the first time immediately before a hearing that he scheduled only weeks after service of the suit, granting PNI's claims. In part, the trial court ruled that CNI is a public agency. On appeal, this Court declined to adopt the trial court's reasoning but accepted a new argument that PNI independently on appeal. CNI appealed this Court's decision to the Arizona Supreme Court, which subsequently issued a series of *en banc* orders including that "CNI may...assert any pertinent objections in the Superior Court and, if necessary, seek appropriate review in the Court of Appeals." [App. at 56]. On January 6, 2022, the Supreme Court denied CNI's petition for review "*without prejudice* to raising these issues on appeal when the case before the superior court is final." [App. at 57 (emphasis added)].

Despite these strong indications that the Supreme Court believed CNI was still entitled to raise objections to production of documents until the trial court issued a final order, the Hearing was set without consulting with anyone's calendars, suggesting that it was a deliberate choice of date. [App. at 107, ¶ 20]. At the Hearing, the trial court, found CNI in contempt and issued a \$50,000 a day sanction against CNI for an alleged noncompliance with the trial court's Order(s). The trial court declined to enter a final order or rule on CNI's objections before finding it in contempt.

At the beginning of the Hearing, the trial court made a comment that "I do not believe I've had a more important case in 16 years I've been on the bench, because this case goes to the legitimacy of the process that creates the government that I serve."

[App. at 334]. Given the objectively narrow public-records issues in this case, counsel interpreted this comment to be of a political nature. The issues before the trial court were of course primarily whether CNI’s private records – consisting entirely of the company’s privately-owned emails/communications and financial records – are “public records,” and who was responsible pay for the cost of searching/editing/producing them on its behalf.

During the Hearing, CNI argued, in part, that the records were not government-owned and that CNI lacked the money to pay for records review because the Senate failed to pay CNI the \$100,000 balance of its \$150,000 contract, and PNI is in debt and laid off all of its employees. [App. at 336, 371] (Unlike an actual public agency that is genuinely subject to public records requests, CNI is not taxpayer funded.) The trial court’s response was to sanction CNI \$50,000 a day for non-production, which showed no genuine intent to address these issues. The sanction was also fifty (50) times higher than what the PNI had requested.

During the Hearing, the trial court asked undersigned counsel *sua sponte* about whether CNI’s former CEO Douglas Logan had appeared for a January 5, 2022 deposition that was noticed by a non-party in a separate action.<sup>2</sup> (*American Oversight v. Senate et al.*, CV2021008265, the “**A.O. Case**”). [App. at 378-378]. That Notice of Deposition, including the date of the deposition, was not part of the record in the case, and had not been mentioned by any party to the case. (Normally in state court, a Notice of Deposition is not a part of the record at all.) However, on December 16, 2021, the

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<sup>2</sup> The deposition was noticed prior to the consolidation of this case and the A.O. Case.

plaintiff (American Oversight) in the A.O. Case issued a press release about the date of the deposition,<sup>3</sup> which was reported on by news media including *The Arizona Republic*, which is published by PNI.<sup>4</sup> *Cyber Ninjas, Inc.*, 2021 WL 5183944, at \*1.

Undersigned counsel asked the trial court how he knew about the deposition, and whether he had been reading news about the case. [App. at 380]. This was an important and proper question because the canon of judicial ethics provides that judicial officers are to promptly notify parties of *ex parte* communications and “shall not investigate facts in a matter independently”; and in the event that a judge receives or considers factual information that is outside of the record and/or *ex parte*, then the judge must also identify the source and substance of the information and give the parties an opportunity to respond. ACJC 2.9(A)(1)(b); 2.9(A)(3); 2.9(B), (C). The judge hesitated for some time before responding: “The record in another case is subject to judicial notice.” [*Id.*] Later in the same hearing, the judge also stated:

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

[App. at 388]. The judge then stated that he was awarding sanctions of \$50,000 per day based on this information, because he felt that Cyber Ninjas had received “several million dollars” and therefore anything less than \$50,000 per day would be “grossly insufficient.” [*Id.*].

Undersigned counsel and his staff diligently searched the record for any allegation that “Cyber Ninjas took in several million dollars from various sources” and

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<sup>3</sup><https://bit.ly/3K15uG2>

<sup>4</sup><https://bit.ly/3r7amRb>



have been unable to find it. However, on November 2, 2021, *The Arizona Republic* reported a news story on the matter.<sup>5</sup> The trial court did not identify the source or substance of this information before using it to make his findings in direct support of contempt, nor did he give CNI an opportunity to respond before doing so.

Out of candor to this Court—and after an intense and costly search of the record not just in this matter, but also the A.O. Case—it appears that on December 27, 2021, the plaintiff in the A.O case filed a lengthy (41 page) objection to undersigned counsel’s motion for withdrawal in that matter. In a footnote, mentioned the allegation that CNI had received millions of dollars. American Oversight also attached a copy of its Notice of Deposition to the objection, all of which was filed with Judge Kemp, but not Judge Hannah. If this was Judge Hannah’s source of the information—a footnote/exhibit to an objection to a motion to withdraw filed in another case over the holidays—then at the minimum he needed to disclose this and give the parties an opportunity to respond before using it as a basis to rule. Instead, he refused to identify the specific source or substance of the information, even when questioned about it.

During the Hearing, Judge Hannah also openly commented on CNI’s prior motion to disqualify him. Judge Hannah made comments indicating he thought CNI’s defenses were in bad faith and groundless, and he broadly signaled that he intends to sanction it and its counsel for even raising them. [App. at 333]. Undersigned counsel noted for the record that Judge Hannah was smiling during counsel’s argument. In response, Judge Hannah stated that he was smiling because “I’m thinking of the accusations against me that you made in the motion to recuse me for cause that you

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<sup>5</sup> <https://bit.ly/3FkY4cW>

did not appeal, which you did not appeal the denial [of], where you said that I'm biased against conservatives and on information and belief a Democrat. I smile every time I think about it because I'm not a Democrat." [App. at 337]. Undersigned counsel pointed out that Judge Hannah did not deny having a bias against conservatives and the Hearing moved on. [App at 338].

On the following day, January 7, 2022, undersigned counsel first received information<sup>6</sup> that Judge Hannah has made 18 separate contributions to political candidates and political action committees at the federal level alone in between October 2017 and September 2020. [App. at 110, 111]. This is an unusual level of political activity for most people, much less a superior court judge. In fact, out of the one hundred sixty-one (161) sitting Maricopa County Superior Court judges and commissioners, only six (excluding Judge Hannah) have made any reported federal political contributions since 2011. He was also one of only four judges/commissioners to contribute to a presidential campaign in 2020. (To the best of undersigned counsel's knowledge, none of the four judges who contributed to a presidential campaign presided over a case concerning the 2020 election other than Judge Hannah.) Since 2011, Judge Hannah has made more than *three times* the number of federal political contributions as the rest of the entire sitting superior court bench *combined*, eighteen (18) times more on average than any judge who did contribute (with the exception of one judge who has been assigned only to the criminal bench in her entire tenure on the

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<sup>6</sup> The information is federal public record and can also be downloaded/accessed through: <https://bit.ly/3qkxfSg>.

court). This is both in terms of frequency and total amount. [App. at 106].<sup>7</sup> His contributions averaged around \$100.00 each and were made through “ActBlue,” which describes itself as “a powerful online fundraising platform for Democratic candidates up and down the ballot, progressive organizations, and nonprofits.”<sup>8</sup> All of the contributions were to Democratic candidates/candidate committees or to Democratic/progressive Political Actions Committees. Several of the contributions are cause for very serious concern in this case, including because of the Judge’s lack of disclosure.

On October 15, 2018, Judge Hannah contributed \$50.00 to a group called “One Nation United,” whose website still shows a count-down to the 2020 election that says at the top: “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.”<sup>9</sup> Undersigned counsel has confirmed that, as of October 15, 2018, the website contained the same language at the top of the website, just below the “Make a Contribution” button. [App. at 113.]<sup>10</sup> Since the 2016 election, the “Our Mission” portion of the website has stated:

The 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

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<sup>7</sup> Except for the one criminal-court judge (and Judge Hannah), there are only four judges since 2011 who have contributed to federal political campaigns or organizations as reported by the FEC. They contributed a total of only 5 times and in the total combined amount of \$502.50. Judge Hannah has contributed eighteen (18) times in the total amount of either \$1,680 or \$3,930 (the \$2,250 discrepancy is explained below).

<sup>8</sup> <https://secure.actblue.com/about>

<sup>9</sup> <https://onenationunited.com/>

<sup>10</sup> The “Internet Archive Wayback Machine” reflects that the website has not changed in that respect since at least August 15, 2018. <https://bit.ly/3qgaHlt>

present a false narrative to the public... Their only advantage is the sheer amount of dollars they can throw at advertising and paid media pundits. 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.

[App. at 115]. In other words, aside from being aggressively anti-Trump and anti-GOP, the group's specific "mission" is to promote media and news reports/advertising that are also anti-Trump and anti-GOP.

On September 28, 2019, Judge Hannah contributed \$100 to a group named "Fair Fight, Inc. PAC" founded by Georgia Democrat Stacey Abrams. The website for "Fair Fight" states that "insidious efforts to make voting more difficult" are "undermin[ing] our democracy" ("Fair Fight, Inc. PAC"). [App. at 103].<sup>11</sup> As of August 13, 2019, the group's website claimed that the 2018 elections were "rife...were irregularities"; and an August 7, 2019, press release read in part: "[n]ow, 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." [App. at 121].<sup>12</sup> On May 14, 2021 (a month and a half before this suit was filed), "Fair Fight" issued a lengthy press release calling CNI's audit "dangerous" and "discredited," and claiming that the audit was "being led by conspiracy theorists and insurrectionists." [App. at 125].<sup>13</sup> (After the audit reached its conclusion in September of last year, the same group published an update to their website which simply stated without comment, "Republican Review of

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<sup>11</sup> September 28, 2019, contribution; <https://fairfight.com/>.

<sup>12</sup> <https://bit.ly/34xspZ8>.

<sup>13</sup> <https://bit.ly/3HTca7a>.

Arizona Fails to Show Stolen Election.”<sup>14</sup>) The last press release from the group’s CEO prior to Judge Hannah’s contribution (dated July 29, 2019, three months prior to his contribution) claimed that as the result of the group’s “litigation, activism, and advocacy,” it had defeated a voting-machine company which it characterized as having “shielded itself from public records requests.” (Press Release, July 29, 2019.) [App. at 117].<sup>15</sup> Of note, in the same release the group also praised the government for selecting Dominion voting machines, which it claimed were selected due to the group’s “litigation, activism and advocacy.” The instant suit is also a public-records action against a private elections vendor (CNI); and CNI’s audit was intended in part to assess the integrity of Dominion voting machines (as reflected by the exhibits to the Complaint, *inter alia*; this was also heavily reported by news media).

On September 19, 2020 – less than two months before being assigned to the Republican Party case – Judge Hannah made another \$100 contribution to “Movement Voter PAC.” Since at least September 18, 2020, this group’s website has stated: “We were deeply dismayed by the broader outcome of the 2016 election... We organize for the long game... We are only getting started... [W]e can build lasting power and make the 2020s a progressive decade.”[App. at 119].<sup>16</sup> Since February 27, 2021 – weeks before Judge Hannah’s final ruling awarding sanctions in the Republican Party case against the Republican Party (dated March 15, 2021), and just four months before he was assigned to this case (on June 30, 2021) – the group’s website has shown a “report” on the 2020 election entitled “What the Movement [Voter Project] Won in 2020,”

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<sup>14</sup><https://bit.ly/3qgddrW>.

<sup>15</sup><https://fairfight.com/statement-from-fair-fight-ceo-lauren-groh-wargo/>.

<sup>16</sup> See <https://bit.ly/33k99Oh>.

which thanks the group’s “partners” in Arizona for “Biden’s margin of victory in Arizona” and for “flipping the Presidential race by 10,457 votes.” The report also generally calls the 2020 election “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.... Biden’s margin of victory in Arizona was 10,457 votes..... Make no mistake — without MVP’s partners in these three states, Trump would be president for the next four years.” “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.” “The Presidential race and the electoral college in 2024 are likely to be tough... [We may be] 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... 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... There’s a lot of analysis and evaluation still to do on the 2020 election.... We are doubling down and going even bigger over the next four years.” [App. at 121 ].<sup>17</sup>

Over the course of 2019 and leading up to the 2020 election, Judge Hannah

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<sup>17</sup><https://bit.ly/3qeYjSK>.

made at least three contributions totaling \$250 to Warren for President, Inc. (on May 15, 2019; June 7, 2019; and \$100 in December 2019). In the two months before the November 2020 election, he contributed to Democratic Senate candidates in Alabama, Montana, Maine, South Carolina, and Iowa. (See contributions to Steve Bullock, Sara Gideon, Jaime Harrison, Doug Jones, and Theresa Greenfield on September 19, 2020.) Finally, the FEC website reports a \$2,500 contribution to “Sinema for Arizona” in 2017 for the primary election. This would have been in excess of half the federal limit for the primary, and therefore a direct violation of Canon 4.1. But in candor to the Court, this amount could have been a typo because the link to the associated “pdf” record indicates only a \$250 contribution.

CNI filed a Motion to Disqualify Judge Hannah following the Hearing. [App. at 81]. Shortly thereafter, another judge *sua sponte* consolidated the cases (reversing his own prior rulings denying consolidation), which purportedly made the Motion to Disqualify moot.

## **LEGAL ARGUMENT**

### **I. The Contempt Order Must be Reversed**

The trial court’s sanction of \$50,000 a day was clearly punitive in nature and therefore improper in a civil contempt proceeding. *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831, 114 S. Ct. 2552, 2559, 129 L. Ed. 2d 642 (1994) (“To the extent that such contempts take on a punitive character, however, and are not justified by other considerations central to the contempt power, criminal procedural protections may be in order.”) PNI had asked for sanctions of only \$1,000 to \$2,000 a day; the \$50,000 number was equal to the

entire amount of money that the Senate paid CNI for under its contract—Master Service Agreement (“MSA”). CNI had also objected that document review and production would cost over \$60,000 and that CNI was insolvent; and that the Senate refused to either cover the cost of review or do the review itself. (CNI is a private company that performed work for other private clients under non-disclosure agreements (“NDAs”), and it could not simply produce its private entire files over to a government body either, which would simply produce them to the public.)

The trial court also ordered the sanction *sua sponte* with zero advance warning to CNI of the basis for his order or of the amount. The amount was clearly intended to be punitive and not remedial; and in awarding it, the trial court violated basic guarantees of due process much less the level of due process and burden of proof required for a punitive criminal sanction. Further, the judge decided on the sanction amount based on news reports claiming that CNI had taken in “millions of dollars,” which he failed to disclose to the parties – much less disclose that he had read – or to give the parties any opportunity to rebut the report(s) before basing his contempt decision on them.<sup>18</sup> See e.g. *Riley*, 124 Ariz. at 500, 605 P.2d at 902; *Stoddard*, 224 Ariz. at 155, 228 P.3d at 147 . The judge’s other conduct during the hearing (“smiling” about a previous motion to disqualify him) also raised grave concerns about whether the contempt order was in fact based on a prior motion to disqualify him, in direct violation of A.R.S. § 12-410. Finally, the fact that the judge

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<sup>18</sup> If the judge had disclosed that, then CNI would have responded at the minimum with an explanation of how “profit” works – i.e. that simply because CNI collected and then paid out millions in dollars for the cost an audit does not mean that CNI made money.



had been reading the news/conducting extrajudicial investigations, and made extensive and improper political contributions that were not disclosed to the parties – including to group(s) that are active in opposing the audit – alone warrants vacating his order *See Kay S.*, 213 Ariz. at 380, 142 P.3d at 256 (discussing when a judgment should be vacated or reconsidered due to the reasonable perception of judicial impropriety); *see also* Ariz. R. Sup.Ct. 81, Canon 2 (Commentary (Canon 2A)(1993)) (“The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with ... impartiality ... is impaired.”)

By ordering sanctions, the judge not only summarily ignored/denied CNI’s arguments that its private records are not “public records” because the government not own, possess, or even use them, as well as CNI’s argument that it cannot process the PNI records request due to its volume and that the Senate must bear that expense. Even if CNI was subject to public-records law and its company records actually were public records, the government (i.e. the Senate) should be compelled to bear the substantial expense of document review and production. As it stands, CNI is in a legal “purgatory” that was never contemplated by the drafters of the public-records law, where a private company is being treated as a taxpayer-funded public agency even though it has no funds at all, and its records are being treated as public records even though the government never owned/possessed/used them.

Finally, in Orders dated March 2 and March 3, 2022, the judge who *sua sponte* consolidated the cases below (mooting out the Motion to Disqualify) declined to disturb the prior judge’s rulings. On March 2, 2022, the trial court

specifically found “the issue of ownership or actual possession irrelevant” and that CNI’s contract with the Senate – which specifically provided that CNI’s own records were its own – “carries no weight.” [App. at 50]. The judge reinforced this Court’s decision that any documents “with a substantial nexus to the audit” are “public records,” even if not owned or possessed by the Senate. The trial court judge further noted that MSA contains clauses related to “data retention” and the duty to provide “reasonable cooperation” to the other party in the event that they are subject to a claim regarding the MSA (or actions taken pursuant to the agreement), and that as part of those clauses CNI agreed to make documents available to the Senate if and as “reasonably necessary” for the defense of third-party claims.

Of course, it is circuitous (and therefore “unreasonable”) for a court to apply this clause to render all of CNI’s records public, simply because someone sued alleging that they are public—much less to order the Senate to obtain them and *make* them public records—but that appears to be exactly the trial court’s intent. Moreover, even if applicable, these provisions of the MSA would at most grant the Senate a right to *access* CNI’s records – not ownership or possession of them. *Ciba-Geigy Corp.*, 428 F. Supp. at 530 (“Government access to and reliance upon information” do “not signify Government ownership or control of such information.”) “Mere *access without ownership* and mere reliance without control will *not suffice to convert [private] data into agency data.*” *Id.* (emphasis added). The public records statute simply does not grant any member of the public the right to sue government agencies (much less private companies) and force them to obtain ownership or possession of records (much less private records) that they do not

already have or own. The public record statute merely grants members of the public the right to “walk into” a government office and inspect what is already there – and even then, members of the public cannot inspect things that the government does not own (but happens to possess), as this Court already decided in *Salt River*.

Not only is this far beyond the scope of the public-records statute, but it also implicates a clear separation-of-powers problem when the court orders the executive or legislative branch to obtain possession or ownership of something, as well as Fourth and Fourteenth Amendment concerns since the “something” happens to belong to a private entity. In *Nichols v. United States*, 325 F. Supp. 130, 135 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972), the court found that it lacked the authority to even command one branch of the government to obtain documents from another branch under public records law, much less to command the government to obtain private records. This is in accord with decisions like *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504 (1975), holding that the government cannot be required to produce or create documents in response to a FOIA request; because in the same way that public-records law does not grant members of the public a right to force the government to create records, it does not grant them a right to compel ownership or possession either. This is especially true when such ownership or possession is not grounded in any genuine or reasonable interpretation of contract or property law, as is the case here.<sup>19</sup>

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<sup>19</sup> So as not to waive other issues under the MSA: the “sharing of defense materials” clause in Section 18.5 of the MSA also only applies to claims regarding the Agreement or a party’s actions taken pursuant to the MSA; but the Senate’s obligations (*vel non*) under public-records law exist independent of the Agreement and arise under A.R.S. § 39-121, *et seq.*

## **II. The Trial Court Failed to Rule on CNI's Objections**

The contempt order was also improper because the trial court failed to clearly rule on CNI's objections, as the Arizona Supreme Court clearly expected, and its own orders actually contemplated, and ordered CNI to produce records over those objections, before finding CNI in contempt. In short, the trial court only ordered CNI to produce a log of documents that it was withholding, and it never ordered CNI to actually produce the documents on the log, such that it could appeal that order or be held in contempt of it. During the hearing, CNI repeatedly requested the trial court to identify exactly what provision of what order it has violated – and repeatedly argued to the trial court that its orders merely required a log, as the Supreme Court had ruled. However, the trial court ignored those arguments and even threatened counsel with contempt for making them. [App. at 387]. The trial court could not have it both ways; it could not order CNI to withhold documents and produce a log of withheld documents, which it did, then find it in contempt of not producing the withheld documents without actually ordering it to produce the withheld documents. The trial court was obviously just dead set on finding CNI in contempt on January 6, 2022, and deliberately overlooked both the Arizona Supreme Court's order as well as the actual wording of his its own order.

## **III. CNI Reiterates and Preserves its Prior Arguments**

The notion that a private company can be sued under public records statutes, much less for private documents, remains without legal foundation. CNI hereby reiterates these arguments, partly to preserve them for appeal to the Arizona Supreme Court.

This Court erroneously determined that any “custodian” of records – and not just the chief “officer in custody,” as the statutes clearly provide – are subject to receiving and responding to public records requests, as well as being sued. *Cyber Ninjas, Inc.*, 2021 WL 5183944, at \*3. This clearly exposed *every* government employee and contractor to receiving and being sued on public records requests, in obvious violation of plain statutory intent.

Moreover, this Court included an erroneous comment that all “documents relating to the audit are public records,” irrespective of whether the government actually owns much less possesses them. *Id.*, at \*2 (citation omitted). Not only does this misstate the actual “substantial nexus” standard for public records, but it flies in the face of well-established United States Supreme Court (FOIA) and Arizona Supreme Court caselaw which provides that only records in the possession of the government are open to inspection. Even then, only records that the government both possesses *and owns*. (*See Salt River, infra*).

Even though this Court previously accepted jurisdiction on the grounds that this case presents issues of “statewide importance” and “pure questions of law,” this Court incongruously decided that CNI was subject to public records statutes only “under the unusual facts of this case” – without specifying what those “unusual facts” might actually be. *Id.*, at \*3. In reality, this case is legally indistinct from any other – the only “unique” thing has been the intense and improper media and political influence surrounding it. As a direct result of this Court’s decision, CNI started receiving requests to inspect private records which are neither possessed nor owned by the government, like the requests at issue here. [App. at 316, 323].

Public records statutes are by their nature extremely limited statutes that merely allow members of the public to inspect records in the government's. They do not allow members of the public to cause the government to create records that do not exist or obtain records that it does not already have, much less own. Nor must anyone but public agencies and officers respond to requests for inspection or be sued on them. The statutes have been illegally "stretched" and broken in this case, by requiring a private company to respond to requests for private records on penalty of being sued, paying fees, and sanctioned. This case presents an obvious and otherwise inconceivable misapplication of law, which can only be explained by the aggressive and improper media and political influences that surround it.

**A. Plain Statutory Language and Intent**

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 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" is used only in A.R.S. §§ 39-121.01 and 39-121.03, where it clearly 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 entirety of the public records statutes, which expressly provide that only public officers or public bodies may be sued, and that "[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 this Court’s interpretation, any government employee or contractor is subject to responding to public records requests from any member of the public and to being sued and held personally responsible for their fees, as this Court did here.

The Court’s citation to the Ariz. R. P. Spec. Act. 2(a)(1), (b) and Ariz. R. Civ. P. 19 (governing joinder), *Cyber Ninjas, Inc*, 2021 WL 5183944, at \*3, 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. This Court also provided no explanation for why “in [CNI]’s absence, the court cannot accord complete relief among existing parties.” *See id.* It cannot be reasonably argued that CNI’s private business documents and records are in the “custody of any public officer,” and therefore, CNI’s participation in this matter is not required.

Further, this Court’s reasoning here is so terrifyingly broad that any member of the public could sue any government employee or contractor for purportedly having public records 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) meaningless.

The Court’s argument that CNI must be treated differently because it allegedly does not provide “ordinary goods or services,” *Cyber Ninjas, Inc*, 3, 2021 WL 5183944, at \*4, is legally and factually unfounded.<sup>20</sup> There is no authority

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<sup>20</sup> This Court also seemed to say that this case is 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 not legally relevant, for the reasons below.

which supports that holding a private company liable under the public records statutes (including for fees) turns on whether they provide “ordinary services.” Such a “rule” is also dangerous, confusing, and unpredictable – because what exactly is “unusual” about CNI’s services? Is it because CNI audited an election, which is not “ordinary” and “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 the government has “entirely outsourced” the “important” government function of counting ballots? And all election contractors and employees in the future, much less election auditors?

This Court’s argued 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. 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 this Court gave of things being “entirely outsourced” – e.g., 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. This “rule” is supported by no outside legal authority and appears to be an effort to cast the case as turning on legally-unique facts when there are none. 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 person and entity that provides any sort of service, whether contract or employment, to any government agency within this state.

**B. Binding Arizona Supreme Court Precedent**

The Arizona Supreme 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.” *Salt River*, 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 (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. Repts. 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, 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. That report 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 this Court 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).

**C. On-Point SCOTUS Precedent (under FOIA)**

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 audit 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 claims asserted under the public-records statute 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 issues here are of obvious and far-reaching importance.

### **CONCLUSION**

The “\$50,000 a day” order was punitive, biased, illegal, and must be reversed. Partly to preserve the issues for review by the Supreme Court, CNI also reiterates its arguments that only a public officer or a public agency can be sued under the public statutes, and that CNI is neither. Further, the records sought by Plaintiffs – private company emails and financial documents—are not public records because the

government does not own, possess, use, or even rely on them. CNI requests its attorneys' fees and costs pursuant to Ariz. R. P. Spec. Act. 4(g).

**RESPECTFULLY SUBMITTED** April 15, 2022.

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

*/s/ John D. Wilenchik*

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*Attorneys for Petitioner/Defendant*



**ARIZONA COURT OF APPEALS  
DIVISION ONE**

**CYBER NINJAS, INC.,**

**Petitioner/Defendant,**

**JUDGE MICHAEL KEMP, 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.**

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

**Maricopa County Superior Court**

**Case No.: CV2021-008265**

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

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**APPENDIX TO PETITION FOR SPECIAL ACTION**

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*Attorneys for Petitioner / Defendant*

Appendix No.	Description	Page No.
<b>Orders and Minute Entries</b>		
1.	2022-03-03 Judge Kemp Minute Entry re Motion for Entry of Rule 54(b) Denied	
2.	2022-03-03 Judge Kemp Minute Entry Denying Motion for Entry of Judgment	
3.	2022-03-02 Judge Kemp Trial Court Order Denying Motion to Dismiss	
4.	2022-01-11 Judge Hannah Minute Entry re Motion to Withdraw and Contempt Fee	
5.	2022-01-06 Arizona Supreme Court Order Denying Stay	
6.	2021-08-24 PNI Order to Produce Public Records	
7.	2021-07-13 Judge Warner ME Denying Notice of Change of Judge and Disqualify	
8.	2021- 03-15 Judge Hannah Ruling re Attorneys Fees	
<b>Motions and Appellate Court Filings</b>		
9.	2022-01-12 Cyber Ninja Motion to Disqualify	
10.	2021-08-31 Cyber Ninja Petition for Special Action	
<b>Public Records Requests</b>		
11.	2021-11-19 Letter Adel to Logan re Public Records Request	
12.	2021-11-10 Records Request	
<b></b>		
13.	2022-01-16 Hearing Transcript	

# APPENDIX 1



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
A. Walker  
Deputy

AMERICAN OVERSIGHT

ROOPALI HARDIN DESAI  
DAVID JEREMY BODNEY

v.

KAREN FANN, ET AL.

THOMAS J. BASILE  
KORY A LANGHOFER  
JOHN DOUGLAS WILENCHIK  
KEITH BEAUCHAMP  
JORDAN C WOLFF  
DAVID ANDREW GAONA  
CRAIG CARSON HOFFMAN  
DENNIS I WILENCHIK

---

PHOENIX NEWSPAPERS, INC., ET AL.

v.

ARIZONA STATE SENATE (001), ET AL.

COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE KEMP  
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has reviewed Cyber Ninjas, Inc.'s ("CNI") Motion for Entry of Judgment, Senate Defendants' Objection, Phoenix Newspapers, Inc.'s ("PNI") and Kathy Tulumello's Opposition and CNI's Reply.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

First, CNI asserts that motions ruled on by the Honorable John Hannah should be vacated or reconsidered based upon alleged improprieties as outlined in CNI's Motion to Disqualify Judge Hannah. This motion was denied as moot and has no bearing on this Court's ruling on this issue.

Second, the proposed order regarding CNI and Senate Defendants meet and confer as to which records are to be disclosed is inconsistent with the Arizona Public Records Law's ("PRL") requirement for prompt action by a custodian of records to the entity requesting the records. CNI's records are the Senate's records since CNI is the agent and custodian of those records and the Senate is obligated to disclose the records to PNI if they are not otherwise privileged. *Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA 21-0173, 2021 Ariz. App. Unpub. LEXIS 1107, at ¶ 17 (Nov. 9, 2021). CNI is a custodian of the Senate's public records and properly joined as a party in PNI's special action. The records in question are no less public records and CNI is properly joined as a party in PNI's special action. The records in question are no less public records simply because they are in the possession of a third party, CNI. *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, ¶ 23 (Aug. 19, 2021).

Third, CNI states it seeks this Judgment for appellate review of the issue of whether the public records are subject to the PRL even if they are in the sole possession of CNI. This issue has been thoroughly litigated and the Court of Appeals has rejected the argument that CNI's records are not public records because the government does not possess or own them. *Hannah*, at ¶ 9. CNI's position that there is no dispute that the government does not own these records is clearly misplaced. These records are by law public records to be disclosed pursuant to the PRL. The issues raised by CNI in the motion have been clearly and unequivocally ruled upon.

Fourth, prior orders by Judge Hannah are not considered moot as contemplated by the Proposed Judgment. Nor would the Proposed Judgment apply to the American Oversight ("AO") action. The same issues outlined above and clearly litigated through higher courts would again be raised by CNI. The Proposed Order would not be final.

The Proposed Judgment also effectively prohibits Senate Defendants from disclosing certain records that may come into its possession which is not consistent with the mandates of the PRL. The Court, however, is not overly concerned with Senate Defendants' and CNI's complaints that review of these records is time consuming and an economic burden. Senate Defendants hired CNI to perform this audit and both must live with the consequences of this endeavor. Senate Defendants and CNI, on their own, created this situation and the public should not be deprived of the right to see what their government has done in reviewing the 2020 Maricopa County elections. The public has a right to know regardless of the burden on these two entities.

This Court has substantial discretion under Rule 54(b), Ariz. R. Civ. P. to decline to certify a judgment under Rule 54(b). Cont'l Cas v. Superior Court, 130 Ariz. 189, 191 (1981). The

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

purposes and rationale for entering a Rule 54(b) Judgment would not be satisfied by the Proposed Judgment. The Motion for Entry of Judgment is denied.

# APPENDIX 2



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
A. Walker  
Deputy

AMERICAN OVERSIGHT

ROOPALI HARDIN DESAI  
DAVID JEREMY BODNEY

v.

KAREN FANN, ET AL.

THOMAS J. BASILE  
KORY A LANGHOFER  
JOHN DOUGLAS WILENCHIK  
KEITH BEAUCHAMP  
JORDAN C WOLFF  
DAVID ANDREW GAONA  
CRAIG CARSON HOFFMAN  
DENNIS I WILENCHIK

---

PHOENIX NEWSPAPERS, INC., ET AL.

v.

ARIZONA STATE SENATE (001), ET AL.

COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE KEMP  
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has reviewed Cyber Ninjas, Inc.'s ("CNI") Motion for Entry of Judgment, Senate Defendants' Objection, Phoenix Newspapers, Inc.'s ("PNI") and Kathy Tulumello's Opposition and CNI's Reply.



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

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Second, the proposed order regarding CNI and Senate Defendants meet and confer as to which records are to be disclosed is inconsistent with the Arizona Public Records Law's ("PRL") requirement for prompt action by a custodian of records to the entity requesting the records. CNI's records are the Senate's records since CNI is the agent and custodian of those records and the Senate is obligated to disclose the records to PNI if they are not otherwise privileged. *Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA 21-0173, 2021 Ariz. App. Unpub. LEXIS 1107, at ¶ 17 (Nov. 9, 2021). CNI is a custodian of the Senate's public records and properly joined as a party in PNI's special action. The records in question are no less public records and CNI is properly joined as a party in PNI's special action. The records in question are no less public records simply because they are in the possession of a third party, CNI. *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, ¶ 23 (Aug. 19, 2021).

Third, CNI states it seeks this Judgment for appellate review of the issue of whether the public records are subject to the PRL even if they are in the sole possession of CNI. This issue has been thoroughly litigated and the Court of Appeals has rejected the argument that CNI's records are not public records because the government does not possess or own them. *Hannah*, at ¶ 9. CNI's position that there is no dispute that the government does not own these records is clearly misplaced. These records are by law public records to be disclosed pursuant to the PRL. The issues raised by CNI in the motion have been clearly and unequivocally ruled upon.

Fourth, prior orders by Judge Hannah are not considered moot as contemplated by the Proposed Judgment. Nor would the Proposed Judgment apply to the American Oversight ("AO") action. The same issues outlined above and clearly litigated through higher courts would again be raised by CNI. The Proposed Order would not be final.

The Proposed Judgment also effectively prohibits Senate Defendants from disclosing certain records that may come into its possession which is not consistent with the mandates of the PRL. The Court, however, is not overly concerned with Senate Defendants' and CNI's complaints that review of these records is time consuming and an economic burden. Senate Defendants hired CNI to perform this audit and both must live with the consequences of this endeavor. Senate Defendants and CNI, on their own, created this situation and the public should not be deprived of the right to see what their government has done in reviewing the 2020 Maricopa County elections. The public has a right to know regardless of the burden on these two entities.

This Court has substantial discretion under Rule 54(b), Ariz. R. Civ. P. to decline to certify a judgment under Rule 54(b). Cont'l Cas v. Superior Court, 130 Ariz. 189, 191 (1981). The

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021-008265  
LC2021-000180-001

03/03/2022

purposes and rationale for entering a Rule 54(b) Judgment would not be satisfied by the Proposed Judgment. The Motion for Entry of Judgment is denied.

# APPENDIX 3



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-008265  
LC 2021-000180-001

03/02/2022

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
A. Walker  
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  
JORDAN C WOLFF  
DAVID ANDREW GAONA  
CRAIG CARSON HOFFMAN  
DENNIS I WILENCHIK

\_\_\_\_\_  
PHOENIX NEWSPAPERS, INC., ET AL.

v.

ARIZONA STATE SENATE (001), ET AL.

COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE KEMP  
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has reviewed Cyber Ninjas, Inc.'s ("CNI") Motion to Dismiss American Oversight's ("AO") action pursuant to Ariz. R. Civ. P. 12(b)(6) for failure to state a claim, AO's

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-008265  
LC 2021-000180-001

03/02/2022

Response and Phoenix Newspapers, Inc. and Kathy Tulumello's ("PNI") Response, and CNI's Reply.

PNI filed its Response to safeguard the interests of PNI. CNI previously moved to dismiss PNI's claims in July of 2021 which was denied by the Honorable Judge John Hannah, (*See*, Minute Entry dated September 17, 2021). Judge Hannah found that CNI was a proper party as the custodian of records related to Senate Defendants' audit of the 2020 Maricopa County election. The denial of the Motion to Dismiss was affirmed by the Court of Appeals, Case No. CA-SA21-0173, and the Arizona Supreme Court declined jurisdiction on January 5, 2022. To the extent the Motion to Dismiss pertains to any of PNI's claims, it is denied.

CNI's argument regarding whether CNI's records are public records under Arizona and FOIA case law has been summarily rejected. As previously found by this Court and affirmed on appeal, *Forsham v. Harris*, 445 U.S. 169 (1980) and *Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523 (S.D.N.Y. 1977) are clearly distinguishable. The issue of whether the Arizona Public Records law ("PRL") applies to documents in CNI's possession was ruled upon by this Court and the Court of Appeals. This Court found that the records are subject to the PRL and rejected the argument that such a ruling would result in every government contractor being subject to expansive public records requests. The Court of Appeals affirmed this finding, *Fann v. Kemp*, 2021 WL 3674157 (Aug. 19, 2021 Ariz. App.), and the Arizona Supreme Court declined jurisdiction. AO and the Senate Defendants then agreed to add CNI as a party, and AO subsequently filed a Second Amended Complaint. This Court then consolidated these two cases.

In its Motion, CNI makes the same argument previously rejected by the Court of Appeals. The Superior Court and the Court of Appeals unequivocally held that the documents related to the audit are public records regardless of whether the Senate Defendants or CNI has actual, physical possession. *Cyber Ninjas, Inc. v. Hannah*, 2021 WL 5183944 at \*2, ¶ 9. The Supreme Court of Arizona again declined jurisdiction.

The Second Amended Complaint clearly states a claim against CNI who is properly joined. CNI was clearly the Senate Defendants' agent in performing the audit; CNI is the custodian of the records pursuant to the PRL and therefore joined as a necessary party to a statutory agent under the PRL; and PNI properly joined CNI as the custodian of records subject to the PRL. *Cyber Ninjas v. Hannah*, 2021 WL 5183944 at \*2-4, ¶ 9, 13-18.

CNI also disregards the Court of Appeals affirming the Superior Court on two occasions that records with a substantial nexus to the audit possessed by CNI are public records that must be produced.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2021-008265  
LC 2021-000180-001

03/02/2022

CNI's argument regarding its contract with Senate Defendants carries no weight. Not only is the issue of ownership or actual possession irrelevant, the contract specifically requires that all documents generated during the audit be available to Senate Defendants for 3 years.

Finally, the standing argument is rejected since CNI has been joined as an indispensable party in the AO case.

The Motion to Dismiss is denied in its entirety.

# APPENDIX 4



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2021-000180-001 DT

01/06/2022

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  
CRAIG CARSON HOFFMAN  
COURT ADMIN-CIVIL-ARB DESK  
DOCKET-CIVIL-CCC  
JUDGE HANNAH  
REMAND DESK-LCA-CCC

MINUTE ENTRY

East Court Building – Courtroom 811

9:34 a.m. This is the time set for a virtual Status Conference and Evidentiary Hearing. Plaintiff, Phoenix Newspaper, Inc. and Kathy Tulumello, are represented by counsel, Craig C. Hoffman for David J. Bodney. Defendants, Arizona State Senate, Karen Fann (in her official capacity as President of the Arizona State Senate), and Susan Aceves (in her official capacity as Secretary of the Arizona State Senate), are represented by counsel, Kory A. Langhofer for Thomas J. Basile. Defendant, Cyber Ninjas, Inc., is represented by counsel, John D. Wilenchik. Jonathan Miller and Mike Smith, out-of-state counsel for Douglas Logan, former CEO of Cyber Ninjas, Inc., are also present. All parties appear via the Court Connect platform.



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2021-000180-001 DT

01/06/2022

A record of the proceedings is made digitally in lieu of a court reporter.

Argument is presented regarding John D. Wilenchik's Ex Parte Motion to Withdraw, filed December 22, 2021.

**IT IS ORDERED** John D. Wilenchik's Ex Parte Motion to Withdraw is denied.

Discussion is held regarding admitting Mike Smith and Jonathan Miller as Pro Hac Vice counsel for Cyber Ninjas, Inc. Proposed counsel request a continuance of today's hearing.

The court declines to continue today's hearing, but will assist counsel with being admitted Pro Hac Vice if necessary.

Argument is presented regarding plaintiffs' Renewed Motion to Hold Cyber Ninjas in Contempt for its Failure to Comply with Court Orders to Produce Public Records, filed November 24, 2021.

For the reasons as stated on the record,

**IT IS ORDERED** plaintiffs' Renewed Motion to Hold Cyber Ninjas in Contempt for its Failure to Comply with Court Orders to Produce Public Records, filed November 24, 2021 is granted.

**IT IS FURTHER ORDERED** that Cyber Ninjas, Inc. shall pay \$50,000.00 per day, beginning on January 7, 2022, and continuing each business day for so long as Cyber Ninjas, Inc. continues to be non-compliant with the court's Order.

**IT IS FURTHTER ORDERED** setting a virtual Status Conference on **January 21, 2022 at 11:30 a.m.** in this division.

Please note that the Court is utilizing a virtual platform called Court Connect. An auto-generated e-mail has been sent to local counsel of record. If for some reason you did not receive the e-mail, please advise the Court. You may join the hearing using the following link: <https://tinyurl.com/jbazmc-cvj07>, or you may appear via telephone by calling 1-917-781-4590, conference ID# 75956374#. For further information, please visit: <https://superiorcourt.maricopa.gov/court-connect/>

This is a **15 minute proceeding**. The Court will determine if more time is needed. If there is a failure to appear, the Court may make such orders as are just, including granting the relief requested by the party who does appear.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2021-000180-001 DT

01/06/2022

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

11:33 a.m. Matter concludes.

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.

# APPENDIX 5





CNI's request to stay the production of documents to the Senate and, in conjunction with the Senate, to produce privilege logs and present documents for in camera review in the ongoing proceedings.

The Court's January 5, 2022 denial of CNI's Petition for Review was without prejudice to raising these issues on appeal when the case before the superior court is final.

The Court takes no position on any pending contempt proceedings that are not before the Court. However, this Court's orders should not be interpreted to prohibit CNI from seeking appropriate relief in the Court of Appeals from any trial court order. Therefore, upon consideration of the Court en banc,

**IT IS ORDERED** denying the Emergency Application for Stay without prejudice to seeking relief in the Court of Appeals from any superior court order as appropriate under the Rules of Procedure for Special Actions or as a proper appeal.

DATED this 6<sup>th</sup> day of January, 2022.

\_\_\_\_\_  
/s/  
JOHN R. LOPEZ IV  
Duty Justice

TO:

Dennis I Wilenchik  
John D Wilenchik  
Jordan C Wolff  
Hon. John R Hannah Jr  
David Jeremy Bodney  
Craig C Hoffman  
Matthew E Kelley  
Kory A Langhofer  
Thomas J Basile  
Amy M Wood  
Hon. Jeff Fine  
jn

# APPENDIX 6



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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  
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.

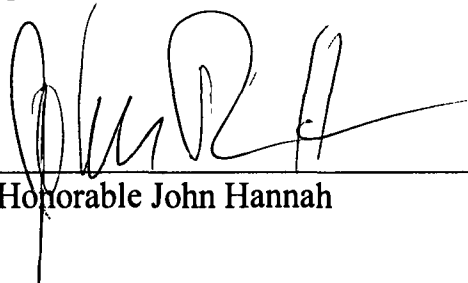
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1 Notwithstanding the foregoing paragraph, all Defendants, including Cyber Ninjas,  
2 are ORDERED to carefully secure, protect and preserve from deterioration, mutilation,  
3 loss or destruction any and all records in their custody, possession or 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

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15 Honorable John Hannah  
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# APPENDIX 7



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2021-000180-001 DT

07/13/2021

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT  
S. Brown  
Deputy

PHOENIX NEWSPAPERS, INC, AN ARIZONA  
CORPORATION AND KATHY TULUMELLO

DAVID JEREMY BODNEY

v.

ARIZONA STATE SENATE; KAREN FANN,  
WARREN PETERSEN, SUSAN ACEVES  
CYBER NINJAS, INC

DENNIS I WILENCHIK

REMAND DESK-LCA-CCC

MINUTE ENTRY

Defendant Cyber Ninjas, Inc.'s Notice of Change of Judge as a Matter of Right Pursuant to A.R.S. § 12-409 and alternative Motion to Disqualify John Hannah have been referred to this division for accelerated ruling as the designee of the Civil Presiding Judge. Civil Presiding Judge Gates has recused and Associate Presiding Judge Thomason is unavailable.

The Supreme Court has, by administrative order, suspended the notice of change of judge as of right under Rule 42.1. Defendant argues that A.R.S. § 12-409 grants a statutory right to a change of judge, a right that the Supreme Court lacks the power to suspend. A.R.S. § 12-409 provides for a change of judge for the causes specified in Subsection B. It does not provide for a peremptory change of judge. The Supreme Court's administrative order is within its authority.

**IT IS ORDERED** denying the Notice of Change of Judge as a Matter of Right.

Defendant next argues bias and prejudice. The matters alleged in the Motion—including Judge Hannah's rulings in prior litigation—do not show bias and prejudice that would disqualify Judge Hannah from ruling in this public records matter.

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MARICOPA COUNTY

LC2021-001800-001 DT

07/13/2021

**IT IS ORDERED** denying Defendant's Motion to Disqualify John Hannah.

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.



# APPENDIX 8



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-014553

03/12/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT  
R. Sheppard  
Deputy

ARIZONA REPUBLICAN PARTY

JOHN DOUGLAS WILENCHIK

v.

ADRIAN FONTES, et al.

THOMAS PURCELL LIDDY

JOSEPH J BRANCO  
EMILY M CRAIGER  
ROOPALI HARDIN DESAI  
SARAH R GONSKI  
JOSEPH EUGENE LA RUE  
JOSEPH I VIGIL  
JUDGE HANNAH

**RULING**

The Court has read and considered Arizona Secretary of State Katie Hobbs' Application for Attorneys' Fees under A.R.S. section 12-349, the response on behalf of the Arizona Republican Party ("the Republican Party") and the applicant's reply, in the context of the record in this case. The application is granted, and fees are awarded against the Arizona Republican Party and its attorneys, jointly and severally.<sup>1</sup> This order sets forth the specific reasons for the fee award, as required by A.R.S. section 12-350.

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<sup>1</sup> The Republican Party and its attorneys are referred to collectively in this order as "the plaintiff." For the most part, the attorneys do not try to distinguish their actions and motives from those of their client. Conversely, the Chairwoman of the State Committee of the Arizona Republican Party unambiguously endorses the position taken by counsel. Plaintiff's Response to Motion for Sanctions filed 12/28/2020, Exhibit B (Declaration of Ward). They are identified separately, however, as necessary to address specific statements or actions of one or the other.

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**DUE PROCESS**

The Court has considered only those facts and circumstances that both the Republican Party and its attorneys have had a fair opportunity to address, either during the litigation on the merits or in response to the Secretary of State's fee application. The Court has not relied on any information source outside the record. In light of those considerations, and the type and severity of the sanction, both the Republican Party and the attorneys have been afforded due process in connection with the fee award. *See Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555-557, 880 P.2d 1098 (App. 1993). The requests for oral argument and evidentiary hearing are denied in the Court's discretion.

**SECTION 12-349 AS LEGAL BASIS FOR FEE AWARD**

A.R.S. section 12-349 requires the court to assess reasonable attorney's fees and expenses against an attorney or party that brings or defends a claim without substantial justification or solely or primarily for delay or harassment. *See Phoenix Newspapers, Inc. v. Department of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801 (App. 1997) (section 12-349 fee award is "mandatory"). A claim lacks substantial justification when it is groundless and not made in good faith. A.R.S. § 12-349(F). A claim is groundless "if the proponent can present no rational argument based upon the evidence or law in support of that claim." *Rogone v. Correia*, 236 Ariz. 43, 335 P.3d 1122 ¶ 22 (App. 2014), quoting *Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App.1991). An objective standard is utilized to determine groundlessness, but a subjective standard determines bad faith. *Goldman v. Sahl*, 248 Ariz. 512, 462 P.3d 1017 ¶ 66 (App. 2020).

**"WITHOUT SUBSTANTIAL JUSTIFICATION": GROUNDLESSNESS**

The plaintiff's lawsuit was groundless because the relief sought was not legally available from the parties that were sued at the time the suit was filed. The other parties pointed out these procedural defects in their motions to dismiss, but the plaintiff's response to the motions barely addressed them. The response to the fee application mostly continues to brush them aside even though they were the basis of the dismissal order. The plaintiff focuses instead on what section 16-602 says about hand count audit procedures, on the reasons for the hasty filing of the complaint, and on perceived public concerns about the election's "integrity" or "legitimacy." None of that addresses the viability of the actual claims.

The plaintiff's defense of the lawsuit's timing conflates the equitable principle of laches with the election-law rules that unambiguously barred the claim after the election. Those were two separate grounds for dismissal. The delay in filing theoretically could have been overlooked as a matter of equity. But there was no avoiding the legal rule: "If parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may

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not, after the people have voted, then question the procedure.” *Kerby v. Griffin*, 48 Ariz. 434, 444, 62 P.2d 1131 (1936). After the election,

general statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.

*Findley v. Sorenson*, 35 Ariz. 265, 269, 276 P. 843, 844 (1929). The plaintiff has never even acknowledged this rule, let alone tried to explain why it doesn’t control this case.

The plaintiff also asserts that “every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity” after the fact, through an election contest pursuant to A.R.S. section 16-673. Plaintiff’s Response to Motion for Sanctions at 12-13. That statement shows the groundlessness of the plaintiff’s legal position, because it is flat wrong as a matter of law. A demand for “strict legal compliance” with statutory election procedures is not cognizable after the election under *any* circumstances, including an election contest pursuant to A.R.S. section 16-673. *See, e.g., Moore v. City of Page*, 148 Ariz. 151, 159, 713 P.2d 812, 821 (App. 1986). An election challenge based on a procedural statute states a cause of action only if the plaintiff alleges that fraud has occurred or that the result would have been different had proper procedures been followed. *See id., citing Findley v. Sorenson, supra*. To say as the plaintiff does that this case was “about auditing results, which by definition is simply checking them to ensure voter confidence and integrity,” Plaintiff’s Response to Motion for Sanctions at 11, and that fraud was “not germane to the case,” *id.* at 13, is to say that there was no colorable cause of action in the first place.

On the other major procedural defect that led to the dismissal, concerning available remedies, the plaintiff again fails to offer a rational argument in support of its position in the litigation. The relief sought, according to the plaintiff, was “simply to have Maricopa County perform a quick hand-count in compliance with the law (by precinct) . . . .” *Id.* at 6. But the plaintiff cites no statute or case that says the Court had authority to issue an order directing election officials to do (or redo) the hand count in a specific way. The plaintiff points to “the Court’s own power to decide what the law is,” *id.* at 7, but that power is not a roving commission to declare the law and order people to follow it. Remedies can be ordered only as the law permits.

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The plaintiff entirely fails to address the law concerning mandamus, specifically the longstanding rule that a writ of mandamus cannot issue to public officials who have no legal discretion concerning the matter at issue. *Adams v. Bolin*, 77 Ariz. 316, 322-323, 271 P.2d 472 (1954). That rule applied squarely in this case. Maricopa County election officials were legally required to follow the Election Procedures Manual's instructions, *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶16 (2020), on pain of criminal sanctions if they disobeyed. See A.R.S. § 16-452(C). A writ of mandamus compelling them to "perform a quick hand count" of precincts therefore was not an available remedy.

The plaintiff's request for a declaratory judgment was equally misdirected. A declaratory judgment action must name as a defendant the entity or official responsible for implementing the law at issue. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216 ¶ 36 (App. 2007). The Arizona state official responsible for implementing election law is the secretary of state. The plaintiff claimed that the secretary of state misstated the law in the Election Procedures Manual. But the plaintiff did not name the secretary of state as a defendant in the suit, not even after she appeared voluntarily as an intervenor. Instead the plaintiff pressed its claim against county election officials acting as the Election Procedures Manual directed. Framed that way, the claim was groundless.

The plaintiff refuses to admit having sued the wrong party. Instead the plaintiff offers a specious argument that the secretary of state "was not a necessary or indispensable party to this case simply because of the fact that its 'laws' (its manual) were at issue (as the Court's ruling suggested) -- any more than when a litigant's case rests on the interpretation of a statute, the litigant has some obligation to sue the legislature or join it as a party because the legislature's 'laws' are involved in the suit." Plaintiff's Response to Motion for Sanctions at 11. When a litigant resorts to that kind of sophistry, instead of simply admitting it made a mistake, it invites inquiry into its motives. The Court now turns to that inquiry.

**"WITHOUT SUBSTANTIAL JUSTIFICATION": LACK OF GOOD FAITH**

On the second element of liability under section 12-349(A), whether the claim was brought in good faith, the Court agrees with the plaintiff that the standard resembles the "ulterior purpose" element of the tort of abuse of process. Plaintiff's Response to Motion for Sanctions at 8-9. By that measure, a litigant fails to act in good faith when "improper purpose was the primary motivation for its actions, not merely an incidental motivation," such that the action "could not logically be explained without reference to the defendant's improper motives." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 92 P.3d 882 ¶¶ 18-19 (App. 2004). Though the inquiry is subjective, a lack of good faith may be shown by circumstantial evidence that reveals a litigant's state of mind. See *Phoenix Newspapers, Inc. v. Dep't. of Corrections*, 188 Ariz. at 245, 934 P.2d at 809.

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The purpose of laws that prescribe election procedures is “to insure the conduct of the election so that the true number of legal votes and their effect can be ascertained with certainty.” *Findley v. Sorenson*, 35 Ariz. 265, 269-270, 276 P. 843, 844 (1929). Accordingly, “a fair election and an honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end.” *Id.* The hand count audit statute similarly prioritizes honest outcomes over technical details. Under the statute, the audit ends with the hand count of the sampled ballots, and the electronic tabulation becomes the official count, unless difference between the hand count and the machine count of those same ballots exceeds a “designated margin” determined in advance by experts. A.R.S. § 16-602(C).<sup>2</sup> Anything discrepancy less than the “designated margin” is treated as a minor irregularity that does not justify further official scrutiny of an otherwise fair election.<sup>3</sup>

The plaintiff tried to justify its case at the outset by portraying the manner of sampling ballots for the hand count as a critical component of a fair election. The plaintiff argued, “there were only around 175 polling centers (or ‘vote centers’) this election, but there were 748 precincts, potentially resulting in a more precise (or larger) sampling if precincts are used.” Application for Order to Show Cause at 3 (footnote omitted). The plaintiff also argued that a precinct-focused

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<sup>2</sup> The “designated margin” is determined at least once every two years by the “vote count verification committee,” a seven-member body appointed by the secretary of state and consisting of individuals with expertise in “any two or more of the areas of advanced mathematics, statistics, random selection methods, systems operations or voting systems,” not more than three of whom may be members of the same political party. A.R.S. § 16-602(K)(1)-(3). The designated margin must be provided to the secretary of state, who in turn must make the information available to the public, before each election. A.R.S. § 16-602(K)(4). The current “designated margin” for precinct and voting center (“polling place”) locations -- in other words, the threshold below which a discrepancy between the electronic count and the hand count casts is deemed too statistically insignificant to cast doubt on the election result -- is one percent. *See* Arizona Secretary of State Website, <https://www.azsos.gov/elections/voting-election/voting-equipment> (last visited February 25, 2021).

<sup>3</sup> The Court is aware that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes of “assessing electoral integrity” and “examining potential reforms to the electoral process” and apparently also “to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome.” *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Order entered 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not the courts.

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hand count would make it “much easier for Plaintiff and/or members of the public to cross-reference or cross-check with other voter registration data, since voter registration data is already ‘sortable’ by precinct (but not by ‘vote center’).” *Id.* The idea, as best the Court could figure it out, was that that precinct-by-precinct hand counts would reveal precincts where the number of votes exceeded the number of registered voters.

These were flimsy excuses for a lawsuit. The hand count is not meant to create data points for political parties to “cross-check with other voter registration data.” “The purpose of the hand count audit is to compare the results of the machine count to the hand count to assure that the machines are working properly and accurately counting votes.” Arizona Secretary of State, State of Arizona Elections Procedures Manual (December 2019) (“Election Procedures Manual”), available at <https://azsos.gov/about-office/media-center/documents> (last visited March 11, 2021). An audit of voting centers almost certainly was going to recount far *more* ballots than an audit of precincts, since there were more than four times as many precincts as voting centers. And, of course, there was no evidence at all of phantom voters or manipulated vote totals or any other wrongdoing that might show up in a “cross-check” against voter rolls.

The plaintiff has retreated from the position that a fair election requires a hand count audit based on a sample of precincts. The plaintiff now professes to have wanted nothing more than a hand count audit conducted “completely by the book and in strict accordance with the law, even to the point of conducting another quick sampling in strict legal compliance as was requested in this suit.” Plaintiff’s Response to Motion for Sanctions at 13. The plaintiff goes on to say that “[p]ublic mistrust following this election motivated this lawsuit. *Id.* at 14.

The plaintiff is effectively admitting that the suit was brought primarily for an improper purpose. It is conceding that the method of sampling ballots for the hand count audit is a minor procedural requirement, not a necessary step toward a fair election. It is saying that it filed this lawsuit for political reasons. “Public mistrust” is a political issue, not a legal or factual basis for litigation.

The plaintiff tries to cover by distancing itself from its own arguments. What the plaintiff once described as advantages of a precinct-focused audit that “vastly outweighed” countervailing considerations like cost, delay and disruption, Application for Order to Show Cause at 3, are now characterized as “hypotheticals” offered to appease the Court’s demand for evidence of “actual fraud.” Plaintiff’s Response to Motion for Sanctions at 14. The plaintiff suggests that counsel was asked unfairly to explain the “public policy” behind the hand count audit statute. “It is the legislature’s prerogative to write the law the way it did (leaving the public policy behind it a matter for legislators and not the courts).” *Id.*

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The plaintiff is not characterizing either its litigation posture or the Court's inquiry honestly. *The Court's questions addressed the plaintiff's own arguments.* For the plaintiff to suggest otherwise is gaslighting. It evinces a lack of good faith.

It is not even true that the audit procedure advocated by the plaintiff would have been "completely by the book and in strict accordance with the law." The plaintiff's interpretation of the key section of the election statute, section 16-602(B), is barely colorable. That alone would not put the plaintiff on the wrong side of section 12-349, because "barely colorable" is different from "groundless." But the plaintiff's insistence that the audit procedure was so clearly illegal as to "compel" action in defense of election "integrity" is disingenuous. It is additional circumstantial evidence of lack of good faith.

Section 16-602(B) says, in pertinent part (with emphasis added), "The hand count shall be conducted as prescribed by this section *and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.*" The highlighted passage expressly delegates to the secretary of state the authority to devise hand count audit procedures for voting center elections. The plaintiff has never even acknowledged that. Instead the plaintiff has repeatedly suggested that the statute does not authorize the secretary of state to prescribe audit procedures, using quoted language from a case that arose in a different legal context. *See, e.g.* Plaintiff's Response to Motion for Sanctions at 2, *quoting Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991) ("our statutes do not authorize, nor would our constitution permit' the Secretary of State's office to pass judgment on the law, because that is a 'judicial function' . . . )<sup>4</sup> On its face the statute here *does* authorize the secretary of state to "pass judgment on" what the law requires.

Perhaps more to the point, the ballot sampling method chosen by the secretary of state is consistent with section 16-602(B), not in conflict with it. The history of the statute, described in the ruling on the motions to dismiss, makes that clear. Ruling filed 12/21/2020 at 3-4. Before 2011, the pertinent part of section 16-602(B) said simply, "The hand count shall be conducted as prescribed by this section." The statute prescribed sampling of "polling places" for presidential preference elections, A.R.S. section 16-602(B)(3), and "precincts" for all other elections, reflecting the manner in which Arizona conducted elections at that time. In the 2011 enactment that authorized the use of voting centers instead of precincts for Arizona's primary and general elections, the legislature added the language that directs the secretary of state to establish hand count audit procedures but left the provisions for sampling of "polling places and "precincts" intact. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) § 8. That shows the legislature decided

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<sup>4</sup> *Western Devcor* dealt with the sufficiency of referendum petitions. Unlike election procedures challenged after an election, the process leading up to a referendum must strictly comply with all legal requirements. 168 Ariz. at 428-429, 814 P.2d at 769-770.



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to let the secretary of state decide how election officials would sample ballots for hand count audit after a voting center election, instead of mandating hand counts of either “precincts” or “polling places.” Exercising that delegated authority, the secretary of state chose to adopt the “polling place” sampling method for voting center elections.

Again, the plaintiff has ignored the issue. The parties walked through the legislative history and its implications in their respective motions to dismiss. *E.g.* Arizona Secretary of State Katie Hobbs’ Motion to Dismiss filed 11/16/2020 at 2-4. The plaintiff’s response barely addressed it, Plaintiff’s Response to Defendant/Intervenors’ Motions to Dismiss filed 11/17/2020 at 2, and the response to the fee application does not mention it at all. Instead the plaintiff simply repeats the same argument, relying on a statutory construction tenet concerning interpretation of terms that does not apply when the statute’s history makes clear what the legislature intended. The tactic bespeaks a lack of good faith.

Additional facts about the plaintiff’s conduct before and during the litigation circumstantially demonstrate state of mind, and, therefore, the litigant’s good faith or lack of it. Relevant factors may include (among others) the extent of any effort to determine the validity of a claim before the claim was asserted; the availability of facts to assist in determining the validity of a claim or defense; the extent of any post-filing effort to eliminate invalid claims; and the outcome of the claims in controversy. A.R.S. § 12-350.

By their own admission, the responsible individuals here made no serious pre-filing effort to determine the validity of the claims. They say the complaint was drafted on the day the hand count audit issue came to their attention, after business hours, and filed the next day. Plaintiff’s Response to Motion for Sanctions, Exhibits A (Declaration of Wilenchik) and B (Declaration of Ward). Their haste is not an excuse for filing a groundless lawsuit.

The legal issues were easily accessible. The legislative history of the hand count audit statute can be found in a few minutes using standard on-line legal research tools. One of the plaintiff’s attorneys was especially well equipped to give advice about the details of election procedure, having served as Deputy Secretary of State and worked on such matters. Application for Preliminary Injunction filed 11/16/2020 (affidavit of Miller). The Attorney General issued a letter, on the day that the suit was filed (and presumably in response to the same questions being asked of Republican Party officials), concluding that the Election Procedures Manual appropriately implemented the statute and explaining his reasoning. Arizona Secretary of State Katie Hobbs’ Motion to Dismiss, Exhibit D (Kanefield letter of 11/12/2020).

The facts concerning the status of the hand count at the time of filing were likewise available. The Maricopa County Elections Department had publicly announced the completion of the hand count three days before the plaintiff filed suit, and issued the report the day before.

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Arizona Secretary of State Katie Hobbs' Reply in Support of Application for Attorneys' Fees filed 1/12/2021, Exhibits A and B. The Republican Party state chair and the attorneys both deny knowing that, but they certainly had constructive knowledge, since the party's own representatives had participated in the audit. Ruling filed 12/21/2020 at 2, 5-6. And surely the plaintiff had a duty of inquiry. The statute itself includes information that gives notice of the need to inquire. *See* A.R.S. §16-602 (I) ("The hand counts prescribed by this section shall begin within twenty-four hours after the closing of the polls . . ."). That the plaintiff did not do so suggests that it did not consider the information important -- another marker of lack of good faith.

The secretary of state points out yet another telling fact: that several Arizona counties used voting centers for the 2020 general election, and presumably sampled voting centers for their audits, but Maricopa County was the only one that got sued. Arizona Secretary of State Katie Hobbs' Application for Attorneys' Fees at 4. It would have been simple to file suit against the Secretary of State and each of those counties. That the plaintiff did not proceed that way suggest that its concern was something other than "strict compliance and "election integrity."

Perhaps the most telling fact of all is what the plaintiff did after the other parties disclosed, in response to the complaint, that the Maricopa County hand count was complete and that it showed the electronic tabulation was flawless. At that point the plaintiff could have quietly walked away from the lawsuit and publicized the audit results to reassure the public. Instead it filed its petition to enjoin the election canvass. Application for Preliminary Injunction filed 11/16/2020. In the petition the plaintiff said this:

Given the importance of this election, and of doing everything with respect to this election "by the book," there are also powerful public-policy reasons to grant this injunction. If an injunction is not granted, then there will be lingering questions about the legitimacy of these results which could otherwise be answered through a proper hand count. This is also the basic prejudice that Plaintiff and the voting public will suffer if the Court declines to grant an injunction – it will create a cloud over the legitimacy of this election and its results.

*Id.* at 3. *This* is why the Court raised the question whether the plaintiff brought suit in order to "cast false shadows on the election's legitimacy." Undercutting the election's legitimacy by raising "questions" *is exactly what the plaintiff did in this passage*. It is what the plaintiff does again when it suggests that an adverse ruling on the secretary of state's fee application will cause the public to question the Court's impartiality and undermine respect for the courts. Plaintiff's Response to Motion for Sanctions at 14. It is a threat to the rule of law posing as an expression of concern. It is direct evidence of bad faith.

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Last but not least is the plaintiff's "First Amendment" argument. No citation is needed for the proposition that the First Amendment does not give a litigant the right to file and maintain a groundless lawsuit.

Arizona law gives political parties a privileged position in the electoral process on which our self-government depends. The public has a right to expect the Arizona Republican Party to conduct itself respectfully when it participates in that process. It has failed to do so in this case.

**THE COURT FINDS** that the amount of attorneys' fees requested by Arizona Secretary of State Katie Hobbs, \$18,237.59, is reasonable and appropriate.

**IT IS ORDERED** awarding attorneys' fees and costs to the Arizona Secretary of State in the amount of \$18,237.59. The fees are awarded against the Arizona Republican Party, John D. Wilenchik, Lee Miller, and Wilenchik & Bartness, P.C., jointly and severally.

This is a final order. No matters remain pending in this case. Ariz. R. Civ. P. 54(c).

DATED this 12th day of March, 2021.

/ s / HON. JOHN R HANNAH, JR

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HON. JOHN R. HANNAH, JR  
JUDGE OF THE SUPERIOR COURT

# APPENDIX 9



22 JAN 12 AM 10:50



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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**

**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)**

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

27 <sup>1</sup> This Motion is supported by the Declaration of John D. Wilenchik, Esq. attached hereto (the “Declaration”).

1 undersigned counsel in a decision that remains under appeal.<sup>3</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>3</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>4</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>5</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>4</sup> See Declaration, paragraph 18.

27 <sup>5</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>8</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>9</sup> Judge Hannah also openly commented on CNI’s prior motion  
17 to disqualify him.<sup>10</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

21  
22 <sup>8</sup> <https://bit.ly/3FkY4cW>

23 <sup>9</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>.

29 <sup>10</sup> Judge Hannah’s decision to *sua sponte* comment on the Motion to Disqualify filed six months earlier is troubling for  
30 a number of reasons. Among them is that A.R.S. § 12-410 provides that a judge may not retaliate against a party for  
31 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>11</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>12</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>11</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>12</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  
contributed a total of only 5 times and in the total combined amount of \$502.50. Hannah has contributed eighteen (18)  
28 times in the total amount of either \$1,680 or \$3,930 (the \$2,250 discrepancy is explained below).

1 organizations, and nonprofits.”<sup>13</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>14</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>15</sup> Since the 2016 election,<sup>16</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>13</sup> <https://secure.actblue.com/about>

24 <sup>14</sup> <https://onenationunited.com/>

25 <sup>15</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>16</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>17</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>18</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>19</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>20</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>21</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>22</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>17</sup> September 28, 2019 contribution; <https://fairfight.com/>.

25 <sup>18</sup> <https://bit.ly/34xspZ8>; see also Exhibit 7 to Declaration, page 2.

26 <sup>19</sup> <https://bit.ly/3HTca7a>; see also Exhibit 8 to Declaration (screenshot of same).

27 <sup>20</sup> <https://bit.ly/3qgddrW>; see also Declaration.

28 <sup>21</sup> <https://fairfight.com/statement-from-fair-fight-ceo-lauren-groh-wargo/>; see also Exhibit 4 to Declaration.

<sup>22</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>23</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.” The report 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>24</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>23</sup> See <https://bit.ly/33k99Oh>; see also Exhibit 5 to Declaration for screenshot as of September 18, 2020.

28 <sup>24</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>25</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  
26

27 <sup>25</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  
27



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>26</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>27</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>26</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>27</sup> <https://www.azcourts.gov/Portals/137/ethics%20opinion%2018-06.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  
28

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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28

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  
27  
28

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>28</sup> Canon

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



# EXHIBIT A







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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**

**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).

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.

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9   
10 John D. Wilenchik, Esq.  
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# EXHIBIT 1

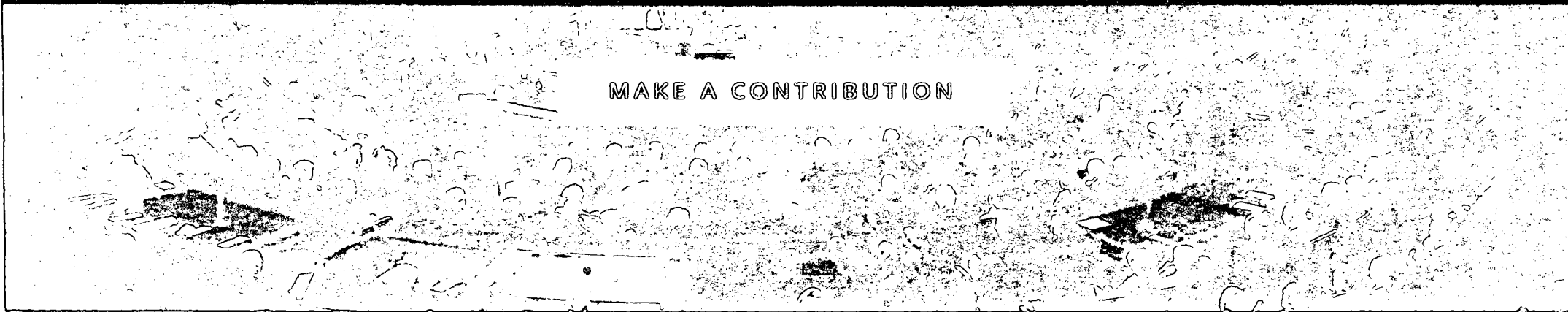


Committee ID	Committee Name	Contribution Receipt Date	Memo Text	Contribution Receipt Amount	Contributor Name	Contributor City	Contributor State	Contributor Employer	Contributor Occupation	Contributor Aggregate Y.T.D.	FEC Election Type Description
C00508804	SINEMA FOR ARIZONA	10/15/2017 0:00	EARMARKED 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





# 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



Westlaw

https://onenationunited.com/the-mission/

Go OCT FEB AUG  
 05  
 2016 2019 2020

10 captures  
27 Oct 2016 - 6 May 2021

# 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

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## 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





## 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

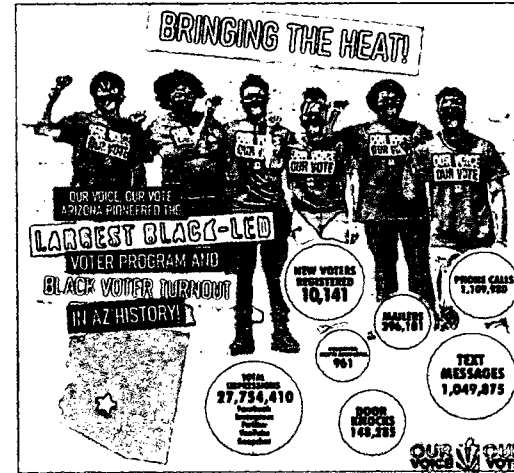
The 2020 election was a game-changing victory, giving Democrats a narrow trifecta to pass legislation and appoint judges, but it was also a near-death experience. We defeated Trump by a hair. While the Biden-Harris ticket won the popular vote by more than 6 million votes, we won the electoral college 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.



# 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

Search

## 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 23, 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-

Search

## 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 that 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.

# APPENDIX 10



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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Dennis I. Wilenchik, Esq. (SBN # 005350)  
John "Jack" D. Wilenchik, Esq. (SBN #029353)  
Jordan C. Wolff, (SBN # #034110)  
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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**

---

<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

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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  
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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  
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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  
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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  
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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  
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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  
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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  
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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*

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  
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19 Arizona State Senate  
20 Rules Attorney  
21 1700 W. Washington St.  
22 Room 202 C  
23 Phoenix, AZ 85007

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1 John D. Wilenchik  
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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.

---

- 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: \_\_\_\_\_



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**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 tallied 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

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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:

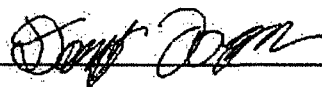
Client: Arizona State Senate

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

---

**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

4



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)

Andrew Oxford  
State Capitol Reporter  
The Arizona Republic | azcentral | The USA Today Network  
480-417-8946  
[Andrew.oxford@arizonarepublic.com](mailto:Andrew.oxford@arizonarepublic.com)

Jen Fifield  
Phoenix/ Maricopa County Reporter  
The Arizona Republic | azcentral | The USA Today Network  
602-444-8763  
[Jen.Fifield@azcentral.com](mailto:Jen.Fifield@azcentral.com)

**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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Phoenix, AZ 85004-2555  
TEL 602.798.5400  
FAX 602.798.5595  
www.ballardspahr.com

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).

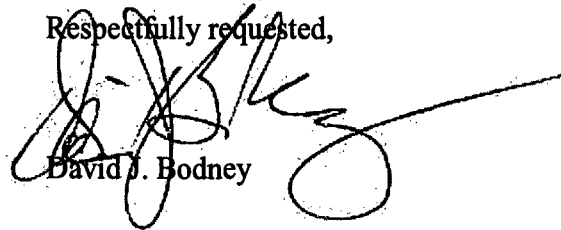


Karen Fann, Senate President  
May 24, 2021  
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This letter is intended to give the Senate one further opportunity to release the requested materials as Arizona law requires – promptly. Accordingly, PNI requests that you provide copies of the requested 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  
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Andrew Oxford  
State Capitol Reporter  
The Arizona Republic | azcentral | The USA Today Network  
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Phoenix/ Maricopa County Reporter  
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[Jen.Fifield@azcentral.com](mailto:Jen.Fifield@azcentral.com)

Kathy Tulumello  
News Director  
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[Kathy.Tulumello@arizonarepublic.com](mailto:Kathy.Tulumello@arizonarepublic.com)

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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

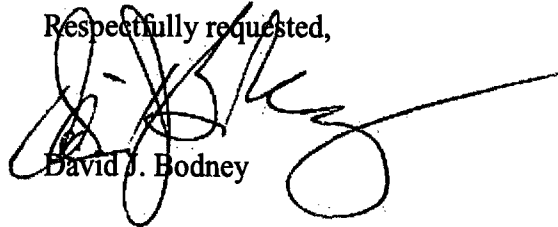
Ken Bennett  
June 2, 2021  
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the possible harm that might result from release.” *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure 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,



David J. Bodney

DJB/MEK

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Tel: 602.798.5454  
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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.

Randy Pullen  
June 2, 2021  
Page 2

- 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 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 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*

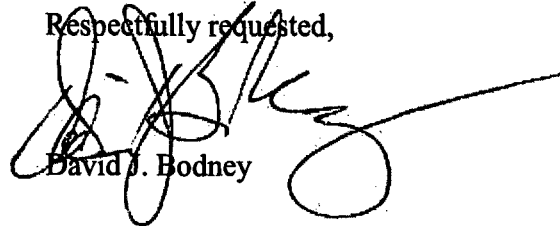
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June 2, 2021  
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*Attorney's Office*. 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm also 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

10

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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

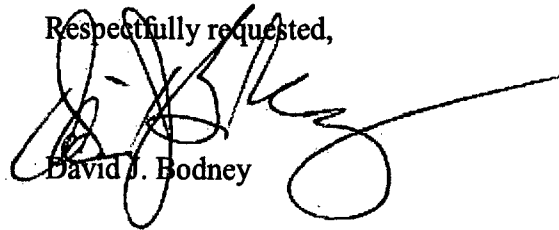
Cyber Ninjas Inc.  
June 2, 2021  
Page 4

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**

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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

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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.

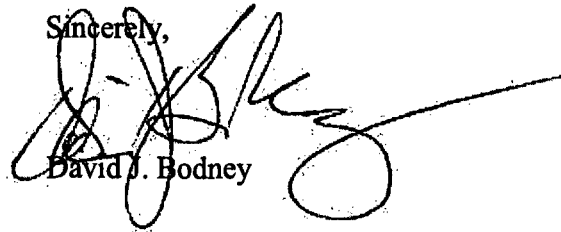
*Third*, to avoid any confusion down the road, I want to set forth my understanding of the key points of our discussion yesterday. You said that because of the large number of both public records and requests for them, the Senate plans not to respond specifically to those requests but instead to create 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



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[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*.”

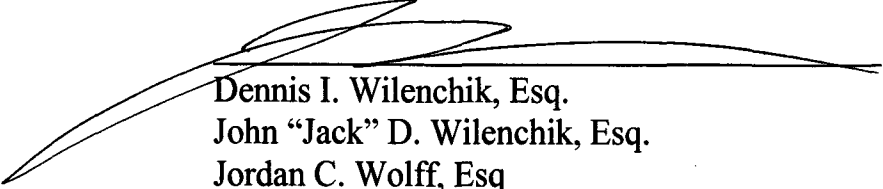
1 public-records request to Defendant made “pursuant to this article,” since the request was not  
2 directed to a public officer within the meaning of these statutes.

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.

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

9  
10   
11 Dennis I. Wilenchik, Esq.  
12 John “Jack” D. Wilenchik, Esq.  
13 Jordan C. Wolff, Esq  
14 The Wilenchik & Bartness Building  
15 2810 North Third Street  
16 Phoenix, Arizona 85004  
17 [admin@wb-law.com](mailto:admin@wb-law.com)  
18 *Attorneys for Defendant Cyber Ninjas, Inc.*

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  
25 July 27, 2021 to:

26 Kory Langhofer, Esq.  
27 Thomas Basile, Esq.  
28 **STATECRAFT PLLC**  
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*Attorneys for Karen Fann, Warren Petersen, and Ken Bennett*

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Craig C. Hoffman, Esq.

2 **BALLARD SPAHR LLP**

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4 bodneyd@ballardspahr.com

hoffmanc@ballardspahr.com

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

6  
7 By: 

# APPENDIX 3



2021 AUG 10 PM 12: 24

1 David J. Bodney (006065)  
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2 Craig C. Hoffman (026017)  
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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  
15 Phoenix, AZ 85004-2555

16 Matthew E. Kelley (application for  
17 admission *pro hac vice* forthcoming)  
18 1909 K Street, NW, 12<sup>th</sup> Floor  
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

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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**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2021008265

08/02/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
P. McKinley  
Deputy

AMERICAN OVERSIGHT

ROOPALI HARDIN DESAI

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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).

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28 <sup>2</sup> See e.g. “usaspending.gov” or “govtribe.com.”



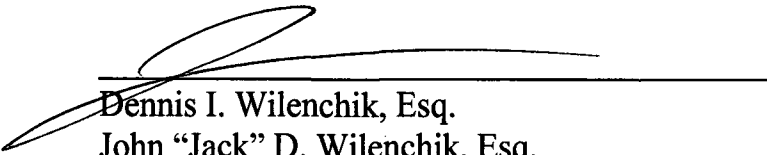
1 The *Arpaio* case cited by Plaintiffs actually supports exactly what CNI is arguing here.  
2 *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130, 133, 211 P.3d 8, 11 (Ct. App. 2008). The case addressed  
3 whether attorneys’ fees under the public-records statute could be awarded against a public officer  
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  
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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.**

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13 \_\_\_\_\_  
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15 John "Jack" D. Wilenchik, Esq.  
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20 [admin@wb-law.com](mailto:admin@wb-law.com)  
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

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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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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





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*

CLERK OF THE SUPERIOR COURT  
FILED  
AUG 24 2021 4:10 pm  
M. Gervreau, Deputy

ARIZONA SUPERIOR COURT  
MARICOPA COUNTY

12 PHOENIX NEWSPAPERS, INC., an  
13 Arizona corporation, and KATHY  
14 TULUMELLO,  
15  
16 Plaintiffs,  
17  
18 vs.  
19  
20 ARIZONA STATE SENATE, a public  
21 body of the State of Arizona; KAREN  
22 FANN, in her official capacity as President  
23 of the Arizona State Senate; WARREN  
24 PETERSEN, in his official capacity as  
25 Chairman of the Arizona Senate Committee  
26 on the Judiciary; SUSAN ACEVES, in her  
27 official capacity as Secretary of the Arizona  
28 State Senate; and CYBER NINJAS, INC.,  
29  
30 Defendants, and  
31  
32 CYBER NINJAS, INC.,  
33  
34 Real Party in Interest.

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.

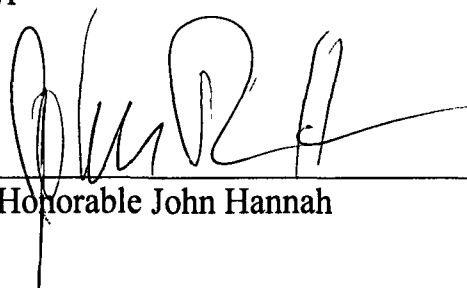
28

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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# APPENDIX 11





## 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.

# APPENDIX 12



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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

# APPENDIX 13



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PHOENIX NEWSPAPER, INC. AND  
KATHY TULUMELLO,

Plaintiff,

vs.

ARIZONA STATE SENATE, CYBER  
NINJAS, INC., DOUGLAS LOGAN,

Defendants.

No. LC2021-000180-001

Phoenix, Arizona

January 6, 2022

9:34 a.m.

BEFORE THE HONORABLE JOHN R. HANNAH JR.

TRANSCRIPT OF PROCEEDINGS

Status Conference And Evidentiary Hearing

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

AMY ROTTINGHAUS  
Transcriptionist



I N D E X

M I S C E L L A N E O U S

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Court's Orders	62

APPEARANCES

(All present by video or telephone)

January 6, 2022

Judge: John R. Hannah Jr.

For the Plaintiff:

Craig C. Hoffman

Witnesses:

None

For the Defendant, Arizona State Senate:

Korey A. Langhofer

For the Defendant, Cyber Ninjas, Inc.:

John D. Wilenchik

For the Defendant, Douglas Logan:

Jonathan Miller

Mike Smith

Witnesses:

None

1 Phoenix, Arizona

2 January 6, 2022

3 (The Honorable John R. Hannah Jr. Presiding)

4 STATUS CONFERENCE AND EVIDENTIARY HEARING:

5 THE COURT: This is Phoenix Newspapers, Inc. v.  
6 Arizona State Senate LC2021-000180. Appearances, please?

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

10 MR. LANGHOFER: Good morning, Your Honor. Korey  
11 Langhofer for the defendants.

12 MR. WILENCHIK: Good morning, Your Honor. This is  
13 John Wilenchik as the withdrawing attorney for Cyber Ninjas,  
14 Inc. I would also like to announce that there are two out-of-  
15 state attorneys present who represent the former CEO of Cyber  
16 Ninjas, named Mike Smith and Jon Miller.

17 THE COURT: Okay. And their client is whom?

18 MR. WILENCHIK: The former CEO of Cyber Ninjas,  
19 Douglas Logan.

20 THE COURT: Okay. Mike Smith, and I'm sorry. The  
21 other one was named?

22 MR. WILENCHIK: Jon Miller.

23 THE COURT: Jon Miller.

24 Gentlemen, can you hear me?

25 MR. MILLER: Yes, Your Honor.



1 MR. SMITH: Yes. Yes, Judge.

2 THE COURT: Okay. Are either or both of you licensed  
3 in Arizona?

4 MR. SMITH: No, Your Honor. That was Mike Smith.

5 MR. MILLER: No, Your Honor.

6 MR. SMITH: Myself or Jonathan Miller are not  
7 licensed in the State of Arizona. We need to get pro hac vice  
8 in, and we're looking for local counsel presently.

9 THE COURT: Okay. Well, then for today's hearing,  
10 you're welcome to observe, but I can't allow you to  
11 participate.

12 MR. SMITH: No, we understand that, Your Honor.  
13 Thank you.

14 THE COURT: Okay.

15 MR. MILLER: Yes, Your Honor. We understand. Thank  
16 you.

17 THE COURT: All right. Then this is the time set for  
18 a status conference and evidentiary hearing on the plaintiff's  
19 renewed motion to hold Cyber Ninjas in contempt.

20 Let's start with Mr. Wilenchik's motion to withdraw.  
21 I've seen the motion. I've seen the response. Have there been  
22 any other filings in connection with that motion?

23 MR. WILENCHIK: No, Your Honor.

24 THE COURT: Okay.

25 Mr. Wilenchik, is there anything else that you want

1 to add in addition to what's been submitted in writing?

2 MR. WILENCHIK: I'll just add that the motion bears  
3 client consent. It was properly submitted ex parte and  
4 expressed the client's (indiscernible). And as the motion  
5 stated, the reason for withdrawal is that I'm not getting paid.

6 THE COURT: Before I hear from Mr. Hoffman, Mr.  
7 Langhofer, what's the Senate's position on this?

8 MR. LANGHOFER: We take no position. We think it's  
9 an issue between Cyber Ninjas and its lawyer.

10 THE COURT: Okay.

11 Mr. Hoffman?

12 MR. HOFFMAN: Sure, Your Honor. Two things. Number  
13 one, we don't think it's appropriate to allow withdrawal until  
14 replacement counsel's in place. As you noted, the two  
15 gentlemen who are on the phone, who are not participating in  
16 today's hearing, are not licensed in Arizona. They're looking  
17 for local counsel. Until that's accomplished, I don't think  
18 it's appropriate to allow Cyber Ninjas to proceed with an  
19 attorney which presents a number of problems, which we're  
20 actually trying to force their compliance with the Public  
21 Records Law.

22 The other issue is, we have noted in our response  
23 that we potentially intend to seek sanctions under A.R.S. 12-  
24 349 against Mr. Wilenchik's firm. So long as Your Honor's  
25 granting a withdrawal would not prejudice our ability to seek



1 those sanctions, we would not continue to state our objection  
2 on those grounds.

3 THE COURT: All right.

4 Anything else, Mr. Wilenchik?

5 MR. WILENCHIK: No, Your Honor. Clearly, we don't  
6 believe any motion for sanctions is proper whatsoever. I have  
7 acted in good faith throughout this entire litigation.  
8 Clearly, nothing was groundless whatsoever. As this recent  
9 order from the Supreme Court has indicated, they are very  
10 engaged on this case. They are very interested in this Court's  
11 rulings. You know, if the Court would just indicate that it is  
12 not going to entertain such a motion, I would prefer that  
13 because I'm trying to work here and make a living and move on,  
14 here. But I think, again, withdrawal is entirely proper.

15 THE COURT: Well, I can't indicate that 12-349  
16 sanction motion would not be proper. I'm not in a position to  
17 rule on a motion that's not in front of me. I don't know if I  
18 lose jurisdiction if a lawyer withdraws, but I can't say that  
19 there would be no basis for that motion on this record.

20 Whether to permit a lawyer to withdraw is a matter of  
21 the Court's discretion. The Riley, Hoggatt, & Suagee, vs.  
22 Riley, case 165 Arizona 138, says that the court has discretion  
23 and that the discretion is to be exercised with reference to  
24 the reasons given by counsel for withdrawal, possible prejudice  
25 to the adverse party, potential prejudice to the judicial

1 process and the administration of justice, and the court's and  
2 the public's interest in the prompt disposition of this matter.

3 The public has a surpassing interest -- pressing  
4 interest in this case and its prompt disposition. I do not  
5 believe I've had a more important case in the 16 years I've  
6 been on the bench because this case goes to the legitimacy of  
7 the process that creates the government that I serve.

8 The Cyber Ninjas can't appear in this case without a  
9 lawyer. If counsel is permitted to withdraw and no other  
10 lawyer appears, Cyber Ninjas will be in default, and the  
11 Court's authority to take steps to compel their client to -- to  
12 compel their compliance with the existing orders will be called  
13 into question. That will prejudice the administration of  
14 justice.

15 The attorneys who've appeared on the phone today have  
16 indicated that they represent Mr. Logan. They have not  
17 indicated that they represent or intend to represent Cyber  
18 Ninjas, Inc. so there is not, to the Court's knowledge, an  
19 attorney that's prepared to step in to represent the  
20 organization. I also note that they've described Mr. Logan as  
21 the former CEO of Cyber Ninjas, which adds to the body of facts  
22 suggesting here that there's an intention to leave the Cyber  
23 Ninjas entity as an empty piñata for all of us to swing at.

24 At a minimum, Counsel's withdrawal will delay the  
25 proceedings. Delay is not just prejudicial to the interest of

1 justice. It directly violates the rights that the Plaintiff is  
2 trying to vindicate because the statute explicitly equates non-  
3 compliance with denial of the right to obtain public records.  
4 To the extent there's prejudice to the lawyers, it's a matter  
5 of the cost of going forward. The cost, to the extent that Mr.  
6 Wilenchik's firm has not been paid for work that's already been  
7 done, that's a sunk cost, and that's between them and Cyber  
8 Ninjas.

9 To the extent that the only -- the prejudice to them  
10 that may ensue from my order if they're required to stay in the  
11 case is the cost of representation going forward. And frankly,  
12 that since Cyber Ninjas can comply by simply turning over the  
13 document at issue to the Senate, that cost is minimal. Or that  
14 the cost to the lawyer representing Cyber Ninjas in that  
15 process is minimal. We're really talking about a small amount  
16 of work. To say that the litigation ahead will be costly is to  
17 say that the Cyber Ninjas have a vested right to continue to  
18 resist the Court's orders, which they don't. So for all of  
19 those reasons, the motion of Mr. Wilenchik and the Wilenchik  
20 firm to withdraw is denied.

21 MR. WILENCHIK: I need to respond to that, Your  
22 Honor, if I may?

23 THE COURT: No, I don't think so. I think we need to  
24 move forward.

25 MR. WILENCHIK: I need a special action effort as

1 soon as I --

2 THE COURT: I'm sorry?

3 MR. WILENCHIK: I need a special action effort for a  
4 number of reasons, including you said it's predicated on the  
5 fact that they need to comply with your orders, which ignores  
6 the possibility and likelihood of an appeal. You know, this is  
7 beyond comprehensible, Your Honor. I don't know what issue you  
8 have with me or my firm, but this makes no sense at all to me.  
9 And by the way, you said it would prejudice justice for a  
10 default to occur, that kind of thing. I don't even understand  
11 that thinking.

12 I think the proper action to take here is to allow  
13 these lawyers to get admitted pro hac vice, represent the  
14 former CEO. And by the way, we'll put on the record, this  
15 company has no employees. It has laid off all its employees.  
16 They are considering pursuing bankruptcy. I think that's sort  
17 of in limbo here. But there's nobody to pay me. I just don't  
18 understand the Court's thinking here. I'm just going to sit on  
19 this case and not get paid? That's just not the way the world  
20 of lawyers work, okay? I need to make a living. So I had to  
21 put that objection on the record.

22 I will be special actioning that at my own expense,  
23 apparently. And I don't appreciate the comments about  
24 sanctions. You are currently on appeal in another case for  
25 sanctions, as you know. I expect you to be reversed. I have

1 acted in good faith here with all grounds for everything I've  
2 done. I see you smiling, and I want to put that on the record  
3 as well. I think you've shown a tempered attitude towards me  
4 and my firm, and I'm appealing you. Thank you.

5 THE COURT: I'm smiling because I'm thinking of the  
6 accusations against me that you made and the motion to recuse  
7 me for cause that you did not appeal -- which you did not  
8 appeal the denial, where you said that I'm biased against  
9 conservatives and, on information and belief, a Democrat. I  
10 smile every time I think about it because I'm not a Democrat.

11 All right.

12 MR. WILENCHIK: But you are biased against  
13 conservative causes. I notice you didn't deny that, Your  
14 Honor. But please, let's proceed.

15 THE COURT: Mr. Hoffman, let's get to the primary  
16 issue today which is -- well, let me back up. Before we get to  
17 that motion, I originally set this as a status hearing because  
18 I hadn't heard from you all for a while. Since I issued that  
19 order, the Supreme Court obviously issued the order it issued  
20 yesterday denying review. So we have that. Tell me what's  
21 going on in the case, Mr. Hoffman, and we'll start there.

22 MR. HOFFMAN: Sure, Your Honor. With respect to the  
23 production of Cyber Ninja's records to PNI or to the Senate, we  
24 have received nothing for months. I understand that your  
25 Court's order today requires somebody from Cyber Ninjas to

1 appear at this hearing. As I understand it, there's nobody  
2 present, so I think the major issue for Your Honor to address  
3 today would be our renewed motion for sanctions.

4 THE COURT: Okay. What's the status of the process  
5 as between the Senate and PNI. Is that, essentially, on hold  
6 while the Court of Appeals decides the privilege issue in the  
7 American Oversight case?

8 MR. HOFFMAN: Yeah. And I'm sure Mr. Langhofer can  
9 speak more directly to this because he's directly involved in  
10 the American Oversight case, but I understand there was an oral  
11 argument on the legislative privilege issue in that case. I  
12 believe it's still under advisement, and until we get that  
13 ruling, I think it's proper for us to await what the Court of  
14 Appeals has to say before we decide how to proceed.

15 MR. LANGHOFER: I --

16 THE COURT: I'm sorry, Mr. Langhofer, go ahead.

17 MR. LANGHOFER: I've confirmed it with Mr.  
18 (Indiscernible). In the oral argument, (indiscernible) from  
19 Judge Kemp's case.

20 THE COURT: I'm sorry. You're echoing.

21 MR. LANGHOFER: I'll call in.

22 THE COURT: Okay.

23 (Pause)

24 MR. LANGHOFER: Is this any better?

25 THE COURT: That's much better. Thank you very much.

1 MR. LANGHOFER: Okay. I apologize the inconvenience.  
2 I know this has happened before, and it seems to be an issue  
3 that I have when we use Microsoft Teams. I don't know why that  
4 would make a difference, but it seems to.

5 I can confirm that what Mr. Hoffman said is correct.  
6 In the special action taken from Judge Kemp, we've had oral  
7 arguments or (indiscernible). I had sort of hoped for a faster  
8 resolution, but it's taking some time. I don't know why that  
9 is because there's dissent or concurrence, or they're  
10 publishing and so they circulate to -- I just don't know the  
11 reason for that. At this time, we have not -- the issues  
12 appears to be substantively identical.

13 We have not filed special action from Your Honor's  
14 sworn ruling in our last hearing largely because we interpreted  
15 your comments at the end of that hearing, Your Honor -- I think  
16 you'd said that you would await direction from the Court of  
17 Appeals. We interpreted that as effectively, you know,  
18 acceding to whatever ruling there would be in the Kemp case.  
19 But -- and of course, PNI has participated in that as an  
20 amicus.

21 But that's the state of play at the moment. If we  
22 misapprehend Your Honor's position on the, effectively, Kemp  
23 case on this case, then obviously, we could discuss some other  
24 procedural device to avoid delays.

25 THE COURT: Well, the -- I think maybe you over-

1 interpreted what I said. What I meant by that is that the  
2 Court of -- I expect that the Court of Appeals will issue  
3 guidance on the question of legislative privilege, and we'll  
4 obviously follow it here. The concern that I have, if there's  
5 not a special action from my ruling, is that that would delay  
6 this case because -- or that will delay this case because we  
7 will then have a ruling from a different case that we will have  
8 to interpret.

9 MR. LANGHOFER: Okay.

10 THE COURT: And then, my interpretation will be  
11 another potential subject of litigation. So my hope, frankly,  
12 was that somebody would special action my ruling, put it before  
13 the Court of Appeals, and ask for them to decide our case at  
14 the same time. That's obviously up to the parties, and you all  
15 decide that. But for example, you all had asked me -- the  
16 Phoenix Newspapers had asked me to make a decision on that  
17 small transfer documents as sort of a way of actualizing my  
18 interpretation of the legislative privilege and making it  
19 concrete, which I thought was a good idea, and I tried to do  
20 that.

21 That work is going to go to waste if it's not  
22 reviewed. I'm going to have to do it over again. So those are  
23 my thoughts. I'm not in a position to direct the parties on  
24 how to conduct the litigation. That's not my place, but I  
25 don't think it's inappropriate for me to express my view on



1 what would be the most efficient way to proceed, and that's  
2 what I think.

3 MR. LANGHOFER: I'm glad we raised this issue, Your  
4 Honor, because we thought about whether to file a special  
5 action here and move to consolidate. But we didn't know how  
6 that would be received by both Your Honor and the Court of  
7 Appeals, but this was helpful to us. And let me take back to  
8 our clients. We don't want any unnecessary delays, and so  
9 we'll probably speak with Mr. Hoffman and work out some  
10 position path forward. Thank you, Your Honor.

11 THE COURT: Okay. And the other -- the other thing  
12 I'm thinking, and there's a lot of -- obviously, the Court of  
13 Appeals had this now for some time. And none of us has any  
14 idea if there's an order that might come out tomorrow or the  
15 next day or what have you. But consolidation also makes sense  
16 in the sense that it's not unlikely that if there's a separate  
17 case that proceeds separately, that it will go to a different  
18 panel, and we could even get inconsistent decisions or -- not  
19 inconsistent decisions, but more than one decision from the  
20 Court of the Appeals which would make it that much more  
21 complicated.

22 All right. Then I don't know that there's anything  
23 else on that front. The other thing that I had thought of in  
24 the way of -- and I know this is a digression, so forgive me  
25 for pursuing it. But I want to pursue it out while I'm

1 thinking about it. The other thing that I had thought of to  
2 try to expedite the litigation would be perhaps for me to  
3 continue the process of reviewing documents in camera to be --  
4 I realize that that's a question that's before the Court of  
5 Appeals. I don't know what the -- if the extent to which the  
6 Senate is still contesting at, but I just throw that out there  
7 as another way of moving the case forward.

8 Okay. Mr. Hoffman --

9 MR. SMITH: Your Honor?

10 THE COURT: Yes?

11 MR. SMITH: Your Honor, if I -- Your Honor, this is  
12 Mike Smith, and I was listening to you intently, and I know  
13 we're not talking about the substance of the case at all. But  
14 I was just suggesting, I was going to talk to the CEO, and I  
15 was going to see if there's no conflict of interest whether or  
16 not we could appear on behalf of Cyber Ninja. That might help  
17 this matter out and get to a quicker resolve. And we're still  
18 looking for local counsel, but I would need a few minutes to  
19 even -- to talk to Jack about an issue or two. And I'm  
20 wondering if we could have a -- you know, a short adjournment  
21 on this matter to see if we could expedite that.

22 THE COURT: Would -- have you ever been -- where are  
23 you in the world? Where are you admitted?

24 MR. SMITH: In the State of Michigan for  
25 approximately 38 years.

1 THE COURT: Okay. Have --

2 MR. SMITH: I've been pro hac vice in -- not in  
3 Arizona but in Pennsylvania, and there was a motion filed in  
4 (indiscernible) also.

5 THE COURT: Okay. So you've never appeared pro hac  
6 vice in Arizona?

7 MR. SMITH: No, I have not, Your Honor.

8 THE COURT: Okay. Are you aware of any reason that  
9 Arizona would not admit you pro hac vice. For example, do you  
10 have any record of issues with the -- well, I guess that's not  
11 the question. Are you in good -- the question is, are you in  
12 good standing in the State of Michigan?

13 MR. SMITH: Yes, I am, Your Honor. I've been in good  
14 standing for all my 38 years. I've never had an issue with the  
15 state bar of Michigan. I also have a bar number for the U.S.  
16 tax courts, and I do practice in those tax courts in various  
17 places. So no, I do not have any issues whatsoever. I used to  
18 sit on the bench as a magistrate for a number of years, and  
19 Your Honor, I'd be honored be admitted pro hac vice in the  
20 State of Arizona.

21 And the other thing is, is that we would need a short  
22 continuance just to get up to speed on that part of the case,  
23 but to at least get somebody in there locally to pro hac vice  
24 both myself and Jonathan Miller.

25 THE COURT: All right. Well, I'm not going to grant

1 a continuance. I'm sorry. I need to get my hands out from in  
2 front of my face. I'm not going to grant a continuance of  
3 today's proceeding, so if that's -- so if you all are not  
4 prepared to immediately appear on behalf of Cyber Ninjas, we'll  
5 go ahead today. I would be happy, however, to do whatever I  
6 need to after today's hearing to expedite your admission in the  
7 State of Arizona and your appearance. And at that point, if  
8 Mr. Wilenchik were to renew his motion to withdraw, that would  
9 substantially change the landscape on that matter. So --

10 MR. SMITH: Thank you, Your Honor.

11 THE COURT: Okay.

12 Mr. Hoffman, let's go ahead with the motion  
13 concerning enforcement of my order. I set today's hearing as  
14 an evidentiary hearing. I think there are a number of factual  
15 findings that I need to make in order to proceed with  
16 enforcement of the order. And part of the reason I set today's  
17 hearing as an evidentiary hearing was to permit you to put in  
18 the record whatever it is that you think needs to be there in  
19 order for me to make the findings I need to make. So I'm going  
20 to give you the floor and let you address that.

21 MR. HOFFMAN: Well, thank you, Your Honor.

22 THE COURT: Oh, you know what?

23 MR. HOFFMAN: I think the proper starting point --

24 THE COURT: I apologize. I do have one thing that I  
25 wanted to say before you start. And that is that --

1 THE CLERK: Your Honor, I'm so sorry to interrupt. I  
2 think we may have lost Mr. Langhofer. I'm seeing his screen  
3 disappeared there, and I don't want us to proceed ex parte.  
4 There he is.

5 THE COURT: Okay.

6 MR. LANGHOFER: Sorry, I'm here. I just took myself  
7 off the camera.

8 THE CLERK: I'm sorry. I thought we lost you.

9 THE COURT: He keeps disappearing, and Mr. Wilenchik  
10 gets big.

11 THE CLERK: I think he's still here. He just turned  
12 his camera off.

13 THE COURT: I don't know the extent to which once  
14 there's a motion for enforcement by a contempt order that's  
15 been placed before the court as has happened here, whether I  
16 have discretion as to the exact character of the order that's  
17 entered. Let me not be obtuse. The request is for \$1,000 a  
18 day. That strikes me as potentially grossly insufficient to  
19 actually compel action under these circumstances.

20 If I were initially addressing this, I would say that  
21 the amount ought to be more in the neighborhood to \$25,000 to  
22 \$50,000 a day. I want to put that out there and have everyone  
23 address it because it's on my mind because I think it's  
24 important for the parties to know exactly what the -- all the  
25 possibilities are before we start. And then, I'll address it

1 at the end of the hearing.

2 So Mr. Hoffman, I apologize for interrupting. Go  
3 ahead.

4 MR. HOFFMAN: Sure. Let me go ahead and address that  
5 point you just made at the outset, Your Honor. The whole point  
6 of contempt sanctions is to obtain compliance with Your Honor's  
7 orders, and if you're under the belief that \$1,000 a day would  
8 not be sufficient to achieve that compliance, then obviously, a  
9 more severe contempt sanction is appropriate. And it's up to  
10 Your Honor's discretion, as I understand it, to set a contempt  
11 sanction at an appropriate level, not to be punitive but to  
12 secure compliance with Your Honor's orders.

13 So if you believe it to be appropriate to charge  
14 \$25,000 to \$50,000 a day to try to get Cyber Ninjas to -- after  
15 a number of months -- actually comply with Your Honor's orders,  
16 we obviously have no objection. Our goal here is not to get  
17 sanctions. Our goal is to get the documents.

18 With that being said, I want to start back in  
19 September, when Cyber Ninjas filed its petition for special  
20 action with the Arizona Court of Appeals. And in conjunction  
21 with that petition, Cyber Ninjas filed an application for a  
22 stay. And during the hearing on the application for the stay,  
23 Cyber Ninjas said it was a small company. It had few  
24 resources, and it could not possibly review more than 60,000  
25 audit-related records that it had in its possession in the

1 short time frame that was required by this Court's order.

2           And during that same hearing, counsel of the Senate  
3 explained that he had a team of -- presumably, a team of  
4 contract attorneys who were ready, willing, and able to review  
5 Cyber Ninjas' documents as they were turned over to the Senate  
6 for review for potential privilege. And on September 16th, the  
7 Court of Appeals issued its partial stay related to that  
8 petition for special action that was filed by Cyber Ninjas.  
9 And the partial stay required that Cyber Ninjas turn over its  
10 audit-related records to the Senate for the Senate's review in  
11 its rolling production of PNI.

12           And that arrangement would allow the Senate to assert  
13 applicable privileges, and it would have alleviated any  
14 concerns, or it did alleviate any concerns regarding Cyber  
15 Ninjas' lack of resources. And that partial stay is Exhibit B  
16 to our renewed motion. And that partial stay was issued 112  
17 days ago, and since that time, only 300 substantive records  
18 have been turned over by Cyber Ninjas to the Senate and  
19 produced to PNI despite multiple representations to this Court  
20 and the Court of Appeals that Cyber Ninjas has at least 60,000  
21 audit-related records.

22           THE COURT: Can you be --

23           MR. HOFFMAN: It would have been nice to have someone  
24 here from Cyber Ninjas --

25           THE COURT: Can you be specific --

1 MR. HOFFMAN: Go ahead.

2 THE COURT: -- about the nature of the records that  
3 have been turned over and what, if any, representations have  
4 been made to you about what those records represent or the  
5 nature of that group of records, or how those records were  
6 selected?

7 MR. HOFFMAN: I can refer Your Honor to an email that  
8 was sent from Cyber Ninjas to the Senate the day after the  
9 Court issued its -- the Court of Appeals issued its partial  
10 stay. That email is Exhibit C to our renewed motion.

11 THE COURT: September 17th --

12 MR. HOFFMAN: Cyber Ninjas, in that document --

13 THE COURT: September 17th?

14 MR. HOFFMAN: Correct.

15 THE COURT: Okay.

16 MR. HOFFMAN: Yes, it's an email. September 17th is  
17 Exhibit C to our renewed motion.

18 THE COURT: Go ahead.

19 MR. HOFFMAN: In that email, the day after the Court  
20 of Appeals issued its partial stay and ordered for Cyber Ninjas  
21 to produce its records directly to the Senate, Cyber Ninjas  
22 disclaimed any legal obligation to turn its records over to the  
23 Senate and said it would search for and produce certain  
24 documents, but that it had no interest in going through with  
25 emails and other internal audit-related records because as



1 Cyber Ninjas claimed in this email, to do so wouldn't be,  
2 quote, practical, workable, fair, or legal.

3 And so that's, I think, the best evidence that I can  
4 point to as to what's been provided, Your Honor. I understand  
5 it to be something like 300 emails that are potentially  
6 substantive. And then the remainder of the materials that have  
7 been turned over are largely tally sheets and things that,  
8 frankly, are outside of the scope of the records that we've  
9 requested.

10 THE COURT: Have you received --

11 MR. HOFFMAN: In any case --

12 THE COURT: Have you received those emails or is what  
13 you're telling me based on what the Senate has told you about  
14 what they've received?

15 MR. HOFFMAN: So -- and that may be a question that's  
16 better directed at Mr. Langhofer. I understand that the  
17 Senate's received some documents from Cyber Ninjas, that it has  
18 produced a subset of those documents to PNI, and it that it has  
19 withheld some of those documents on the basis of potential  
20 privileges. But I can't tell you how many documents fall into  
21 each one of those buckets.

22 THE COURT: Okay. So the question of what's been  
23 produced by Cyber Ninjas to the Senate -- that's secondhand --  
24 is that all secondhand from where you sit? Is the only  
25 information you have about that what you've received from the

1 Senate?

2 MR. HOFFMAN: Correct, Your Honor. We have not  
3 received a single document throughout the life of this  
4 litigation directly from Cyber Ninjas.

5 THE COURT: Okay. Thank you. Go ahead.

6 MR. HOFFMAN: So on November 9th, the Court of  
7 Appeals issued its memorandum decision in this matter in which  
8 it affirmed Your Honor's order to produce public records and  
9 its denial of Cyber Ninjas' motion to dismiss. That ruling,  
10 obviously, eliminated the partial stay that was issued by the  
11 Court of Appeals. And at that point, Cyber Ninjas was  
12 obligated to produce its responsive records directly to PNI but  
13 obviously, pursuant to Your Honor's order, still consult with  
14 the Senate regarding potentially privileged documents prior to  
15 that production.

16 And that was nearly two months ago. Since that time,  
17 we have not received a single document from Cyber Ninjas, and I  
18 am not aware of the Senate receiving a single document from  
19 Cyber Ninjas since the memorandum decision was issued by the  
20 Court of Appeals. Instead, what happened is the same day that  
21 that memorandum decision was issued, Cyber Ninjas wrote a  
22 letter to the Senate and claimed that my client's public  
23 records requests were limited to the documents that had a  
24 substantial nexus only to the final audit report and claimed  
25 that it had already produced those limited records to the

1 Senate some time ago. That letter is Exhibit H to our renewed  
2 motion.

3 We've already addressed that substantively before  
4 Your Honor. We believe that argument to be baseless, and it  
5 flew in the face of the substance of my client's public records  
6 request. And Your Honor agreed back in November when we had a  
7 status conference when you rejected Cyber Ninjas attempt to  
8 construe my client's public records request so narrowly. You  
9 provide a clarification of what the public records at issue in  
10 this dispute are, and you define those as those records that  
11 relate to the entire process of the audit, the amassing and  
12 interpreting data related to the accuracy and efficacy of the  
13 electoral infrastructure.

14 Then, that same minute entry, you direct Cyber Ninjas  
15 to immediately begin producing those records and the document  
16 log that we talked about before, including privileged documents  
17 and those documents that are audit-related that Cyber Ninjas  
18 contends are not public records because they do not bear a  
19 substantial nexus to the audit. You order Cyber Ninjas to  
20 produce that log and respond to records to my client, but you  
21 also provided an alternative.

22 Because Cyber Ninjas was complaining that it lacked  
23 resources, you said in the alternative, rather than providing  
24 documents directly to me or my client, Cyber Ninjas have the  
25 option of giving those documents to the Senate. And the Senate

1 could review those documents for privilege and do its own  
2 production. And in that regard, Your Honor's orders sort of  
3 mirrored in some respects the Court of Appeals partial stay  
4 that had been issued back in mid-September. So that minute  
5 entry order was issued more than a month ago. And since that  
6 time, we have not received a single record from Cyber Ninjas.  
7 And to our knowledge, no documents have been turned over from  
8 Cyber Ninjas to the Senate.

9           And what do we get instead of documents and records  
10 that we've requested many, many months ago? We got a copy of a  
11 December 16th, 2021 letter from Cyber Ninjas' counsel. That  
12 letter, Your Honor, is Exhibit C to our request for summary  
13 adjudication that we filed very recently. The letter makes a  
14 number of unsupported claims, the first of which is that the  
15 Arizona Supreme Court somehow stayed Cyber Ninja's obligations  
16 to produce public records. But if you look to the order on the  
17 application for stay, it was issued by the Arizona Supreme  
18 Court. The stay was explicitly denied.

19           In the same letter, Cyber Ninjas' claims, remarkably,  
20 that its audit-related records are not public records despite  
21 multiple orders from this Court and multiple rulings from the  
22 Arizona Court of Appeals that conclude the exact opposite. And  
23 the letter claims that Cyber Ninjas has no obligation to turn  
24 those records over in any case unless its counsel's paid a  
25 small fortune, which ignores the no-cost option of Cyber Ninjas

1 simply turning its records over to the Senate which is,  
2 frankly, Your Honor, the public entity that's charged with  
3 maintaining those records in the first place.

4 And that brings us to the decision from the Arizona  
5 Court of Appeals that was issued yesterday that Your Honor  
6 mentioned earlier. Upon that decision being issued, Cyber  
7 Ninjas filed a (indiscernible) as a response to our renewed  
8 motion for sanctions. That was filed yesterday afternoon. I  
9 don't know if Your Honor's had a chance to look at it.

10 THE COURT: No, I haven't seen it.

11 MR. HOFFMAN: In any case --

12 MR. WILENCHIK: The Supreme Court made an entry. It  
13 was part of our filing. I quoted it.

14 THE COURT: Yeah, and you misspoke, Mr. Hoffman. It  
15 was the Supreme Court's order, not the Court of Appeals' order.

16 MR. HOFFMAN: I apologize for misspeaking. Thank you  
17 for catching that.

18 Let me go ahead and address the response to our  
19 renewed motion for sanction that was filed yesterday afternoon  
20 by Cyber Ninjas. Number one, it's --

21 THE COURT: Let me just stop you there.

22 Mr. Wilenchik, if that's something that may not have  
23 made it to me, if you want to email it to Gail.Cody,  
24 Gail.Cody@jbazmc.maricopa.gov right now. That way, I'll have  
25 it while we're talking.

1 MR. WILENCHIK: I will do that. Thank you.

2 THE COURT: Go ahead.

3 MR. HOFFMAN: So the response, Your Honor, frankly,  
4 shouldn't be considered from a substantive perspective because  
5 it's untimely. It was filed about three weeks too late. In  
6 the response, Mr. Wilenchik states that he orally responded to  
7 the renewed motion for sanctions during our last status  
8 conference.

9 I went back and looked at the transcript. That's  
10 just not true. The only discussion we had regarding the  
11 renewed motion for sanctions was Mr. Wilenchik's request that  
12 Your Honor order that we meet and confer prior to my client  
13 seeking to enforce this Court's orders. And as Your Honor  
14 recalls, you declined to issue that order, noting the lack of  
15 cooperation. And you didn't think that the meet and confer  
16 process would be fruitful.

17 But if Your Honor is going to consider the response,  
18 the argument they made in the response lacked merit. Cyber  
19 Ninjas argues that because the Arizona Supreme Court denied  
20 Cyber Ninjas' petition for review without prejudice, that the  
21 Supreme Court has somehow issued an order that stays this  
22 Court's ability to enforce its existing orders. And that's  
23 just nonsensical. This Court and Judge Kemp have both  
24 concluded that Cyber Ninjas' records are public records. Both  
25 of those decisions were upheld on appeal.

1           And on appeal from Your Honor's orders, Cyber Ninjas  
2 argued before the Court of Appeals that it was a miscarriage of  
3 justice to allow a private company's records to be examined by  
4 the public under the Public Records Law. And that decision was  
5 affirmed by the Court of Appeals, with it holding that Cyber  
6 Ninjas is obligated to turn its records over to the Senate,  
7 that being its audit-related records, and if it fails to do so,  
8 they must be turned over to my client, PNI.

9           And the Supreme Court opted not to take up that  
10 decision. So you are currently free to enforce your orders  
11 notwithstanding the latest revisionist and self-serving attempt  
12 by Cyber Ninjas to interpret an order from an Arizona court in  
13 way that's completely inconsistent with its wording.

14           So that's where we find ourselves, Your Honor. We're  
15 seven months out from Cyber Ninjas being in receipt of our  
16 public records request. We are six months out from the filing  
17 of this lawsuit. My client has still not received a single  
18 record directly from Cyber Ninjas, and has received, if the  
19 60,000 record number is to believe, less than one half of one  
20 percent of Cyber Ninjas' audit-related records that were  
21 filtered through the Senate.

22           So Cyber Ninjas and its lawyers, who now want out  
23 because Cyber Ninjas is not intending to pay for their advice,  
24 have demonstrated a pattern and a practice of contemptuous  
25 conduct toward the Court and this Court's orders throughout

1 this case. And the consequence of that conduct, contemptuous  
2 as it is the rule of law, Your Honor, it does a disservice to  
3 the statutory rights of all persons who are entitled to prompt  
4 access to public records, and that starts with my client.

5 And these aren't just any public records, Your Honor.  
6 As you mentioned earlier, these are incredibly important. They  
7 go to the heart of the integrity of our election process. And  
8 it has been far too long, and there've been far too many orders  
9 that have been disregarded by Cyber Ninjas, and it needs to  
10 have its feet held to the fire through contempt sanctions to  
11 make it comply with Your Honor's orders.

12 THE COURT: This is going back to a detail in what  
13 you said. But you specified, and you just referred back to it,  
14 that 300 substantive records have been produced. Where did you  
15 get that number?

16 MR. HOFFMAN: I believe that was in correspondence  
17 from Cyber Ninjas. Let me try to put my hands on it, Your  
18 Honor, before this hearing's over. While perhaps you have  
19 questions or want to hear from Mr. Langhofer or Mr. Wilenchnik,  
20 and I'll try to get you that detail.

21 THE COURT: Okay. Thank you.

22 Tommy (phonetic), could you make sure that Gail knows  
23 that I asked counsel to email us that document?

24 MR. WILENCHIK: I sent that.

25 THE COURT: Mr. Langhofer, I want to hear from you



1 next. I do, obviously, need to know the Senate's position  
2 here. There's also an important extent to which you're in  
3 possession of some of the facts that are important to me in  
4 making this decision, so if you could both address the  
5 substance of the issue before us on behalf of your client and  
6 address the factual issues where Mr. Hoffman said he's getting  
7 his information from you. Both those things would be helpful  
8 at this time.

9 MR. LANGHOFER: Sure, Your Honor. Factually, the  
10 Senate has either produced the records it's received from Cyber  
11 Ninjas to the public reading room or identified them on a  
12 privilege log. If memory serves, the only items on that  
13 privilege log are withheld for attorney-client -- excuse me --  
14 legislative privilege, which is, of course, the issue you're  
15 very familiar with already and the procedural posture of that.

16 One thing I would add is this idea of 300 substantive  
17 records. That probably glosses over a little bit of nuance  
18 there. The -- I think what's doing the work there is the  
19 characterization of substantive records. There are about 300  
20 emails that have been received or policies or contracts that  
21 have been received and produced. But there were, in fact, many  
22 thousands of pages that the Senate received and has made  
23 available to the public in the form of tally sheets and  
24 reconciliation, I think, of the tally sheets over time.

25 So those are substantive in a sense, but apparently,

1 not in the sense that Mr. Hoffman is speaking of. In fact,  
2 some of those documents the Senate received were so voluminous  
3 that they couldn't be uploaded to the public reading room.  
4 They were just too large, and so they were made available for  
5 copying and inspection at the Senate's offices.

6 THE COURT: Would it be fair to characterize those  
7 as -- I don't know if work papers is the right word, but the  
8 day-to-day work product that went along with the review process  
9 that the people were actually doing the work, generally?

10 MR. LANGHOFER: Yes, Your Honor. That's a fair  
11 characterization. And it's also, though, some of the  
12 supervisory work that was done at the end, sort of reconciling  
13 all of the individual reviewers tallied into one aggregate  
14 count. And then as I understand, there was some discrepancies  
15 due to, you know, just transpositional errors that had to be  
16 resolved. And so it's just reflecting how they came to their  
17 final count. That's obviously very voluminous as we're talking  
18 about 2.1 million documents.

19 So if we put those aside, which are really -- there's  
20 a lot of those, and some are online. Some are at the Senate  
21 for anyone who wants to see them. Then it's correct. There's  
22 about 300 records on balance. So factually, I think that's  
23 what I'd have to contribute to what Mr. Hoffman said.

24 On the merits of the motion, the Senate's not  
25 (indiscernible) argue as that's between the plaintiff and Cyber

1 Ninjas. We have certainly made clear in writing our view that  
2 Cyber Ninjas should give us all the records that have a  
3 substantial nexus to the audit. And then, what happens from  
4 there with this motion, I think, is between the other two  
5 parties.

6 THE COURT: In what the Senate has either going back  
7 to the, quote, 300 records which you've described, and I'll  
8 digress for a second. You've described those as emails,  
9 contracts, policies. Were those the -- were those all produced  
10 with the September 17th memo? What I have, there's an  
11 attached -- the memo indicates an attached zip file that,  
12 presumably, contained the policies. It says, attached hereto  
13 are copies of CNI's current policies and procedures. So  
14 presumably, that's what that was. Did that zip file contain  
15 all the documents we're talking about right now?

16 MR. LANGHOFER: I'll confess, I'm not sure what zip  
17 file Your Honor is speaking of, but I don't believe -- what you  
18 just described is not consistent with my recollection of when  
19 we received documents on a couple of occasions. It wasn't as  
20 one zip file. And then, I don't believe we ever aggregated  
21 that much in one zip file and sent it on. So I don't believe  
22 that would be correct, Your Honor.

23 THE COURT: Okay. Well, if you look at the September  
24 17th memo, which is Exhibit C to the renewed motion, there's  
25 a -- you could see that there was a file that was attached to

1 the memo. That's what I'm referring to. It says, policy --

2 MR. WILENCHIK: If you're referring to email, I can  
3 answer that. Yeah, I can short circuit this --

4 THE COURT: Go ahead.

5 MR. WILENCHIK: -- if you'd like to ask me. Is that  
6 my email you're referring to?

7 THE COURT: Yeah, or memo.

8 MR. WILENCHIK: I believe it was just the policies,  
9 procedures. So the several hundred emails that Mr. Langhofer's  
10 referring to were not attached to that particular email. If  
11 memory serves, the former CEO, Douglas Logan of Cyber Ninjas,  
12 was transmitting things directly to the Senate. And I think  
13 that's the path a lot of those documents followed.

14 THE COURT: Okay. Well, then let me get back to my  
15 question to you, Mr. Langhofer, which is whether the documents  
16 that are in this group that were received by the Senate and  
17 either uploaded to the reading room or placed on a privilege  
18 log, are they identified as records that the Senate received  
19 from Cyber Ninjas?

20 MR. LANGHOFER: I have -- the ones in the privilege  
21 log are. If they're in the public reading room, they are not  
22 necessarily because once they come into the Senate's  
23 possession, we're producing without regard to where they came  
24 from.

25 THE COURT: Does the -- is there a version of the

1 privilege log that's different from the one that I've seen that  
2 was -- I don't know. It's probably at least six or eight weeks  
3 old.

4 MR. LANGHOFER: Yes, Your Honor. We have two  
5 different files that are privilege logs. One is for the  
6 Senate's own records. The other is for the CNI records that  
7 the Senate has received.

8 THE COURT: Mr. Hoffman, do you have the log of the  
9 CNI documents that the Senate has received?

10 MR. HOFFMAN: I don't know off the top of my head,  
11 Your Honor. Although if we don't, I'm sure Mr. Langhofer would  
12 be perfectly willing to send it over. I assume we have a copy,  
13 but I haven't looked at the privilege log in a number of weeks.

14 THE COURT: Okay.

15 MR. LANGHOFER: I believe I sent it to defense  
16 counsel including Mr. Hoffman on October 26th at 6:30 p.m.

17 THE COURT: Was that -- to your knowledge, has the  
18 Senate received any documents from CNI since then?

19 MR. LANGHOFER: I don't believe so, Your Honor. Or  
20 if we have, they've been produced without withholding or  
21 redacting. So the version of privilege logs we've circulated  
22 previously, it should be current.

23 THE COURT: Okay. But would you be aware of it had  
24 there been additional documents by CNI and placed in the  
25 reading room since then? I assume that they all go through

1 your hands at some point before they get made public.

2 MR. LANGHOFER: Unfortunately, Your Honor, you are  
3 correct. And I can pull up -- if you'll give me just 30  
4 seconds here, I believe I can answer your question. But I want  
5 to check to make sure I'm answering this correctly.

6 THE COURT: Sure.

7 MR. HOFFMAN: And Your Honor, while he's checking,  
8 the document where I pulled the 300 emails from and the  
9 description of the records that have been produced by Cyber  
10 Ninjas, that is in the November 9th, 2021 letter sent from  
11 Cyber Ninjas counsel to Mr. Langhofer, the same day the  
12 memorandum decision was issued by the Court of Appeals. And  
13 that describes the document that Cyber Ninjas have produced to  
14 date, which it claimed were compliant with its obligations  
15 under the Public Records Law because those were the documents  
16 that bore a substantial nexus to the final audit report.

17 THE COURT: Okay.

18 MR. LANGHOFER: And Your Honor, in answer to your  
19 earlier question, there have been three days in which we  
20 received or produced additional records from Cyber Ninjas since  
21 October 26th. And that's October 29th, November 1st, and  
22 November 10th. And there are upload -- I'm getting that from  
23 the public reading room where we have different upload folders  
24 for each day, and we have files in those. I think it's a total  
25 of five files, but I can double check that. It's not a large

1 number.

2 THE COURT: Five files, meaning is each record a  
3 separate file typically?

4 MR. LANGHOFER: Generally, that's correct. There  
5 is -- one of these files is very large. It's a zip file with  
6 aggregation data, and that -- you know, the many, many pages of  
7 the aggregation data file. If memory serves, it was too large  
8 to upload without zipping it. But that kind of fits into the  
9 working papers category that we were discussing earlier.

10 THE COURT: Okay. Okay. All right. Then Mr. -- you  
11 know, in light of the importance of these issues, I'm not going  
12 to stand on ceremony in terms of whether responses were timely  
13 filed and that kind of thing. I'm going to take them in and  
14 read CNI's response to the motion to contempt -- to the motion  
15 for contempt, and I'm going to consider their arguments on the  
16 merits. So just --

17 MR. WILENCHIK: It was timely, yeah.

18 THE COURT: Well, what I'm saying is, it doesn't  
19 matter to me one way or the other. In my discretion --

20 MR. WILENCHIK: Thank you.

21 THE COURT: -- I won't consider it. So the -- give  
22 me a minute to read this, and then I'll hear from counsel.

23 MR. WILENCHIK: Thank you.

24 (Pause)

25 THE COURT: Before I get any further, the very first

1 footnote implies that CNI hasn't had a fair opportunity to  
2 respond to the PNI's motion. So if you have anything else to  
3 add on that, Mr. Wilenchik, I'd like to hear it now,  
4 separately, from whatever else we're going to talk about.

5 MR. WILENCHIK: I'm not sure I understand that  
6 statement, but let me clarify what I've said in footnote four  
7 or footnote one -- I'm sorry -- on page two. The first  
8 footnote. Contrary to what Mr. Hoffman said earlier, this is  
9 very much a timely response because this is the fourth motion  
10 for contempt -- whether filed in this Court or the Court of  
11 Appeals -- that the plaintiff has filed. The last motion for  
12 contempt -- on the last motion for contempt, which I'll  
13 characterize as the third motion, the Court set a hearing  
14 before the response was due. I did a response verbally,  
15 orally, and we addressed the motion in that hearing.

16 So as I understand it, a big bulk of this motion is  
17 asserting that the Court can summarily find CNI in contempt  
18 because it did not respond. It very much did. The fourth  
19 motion now, which is what I'll call this, the fourth motion for  
20 contempt -- the time to respond to this has not even come due  
21 yet. So the Court has, once again, set a hearing before the  
22 time for response has come due. I've done my best here --  
23 especially in light of the fact I'm not getting paid -- to  
24 brief CNI's position on this with the Court. And I assume  
25 you're wanting me to respond more fully later after you've read



1 it. Otherwise, I can just go on now.

2 THE COURT: No. That's what I wanted to hear from  
3 you about. Thank you.

4 MR. WILENCHIK: Thank you.

5 (Pause)

6 THE COURT: All right. Counsel, go ahead, please.

7 MR. LANGHOFER: Jack, you're on mute.

8 MR. WILENCHIK: Thank you, and thank you, gentlemen.  
9 The first issue here is what order is CNI being accused in  
10 contempt of? The issue that we just had with the Arizona  
11 Supreme Court is that we appealed this, and they actually took  
12 a look at your orders, Your Honor. They read through them.  
13 And their conclusion is stated in their order, which I quote at  
14 the beginning of this brief -- the December 1st order -- where  
15 they noted -- and it's very important that all you've actually  
16 ordered here is that CNI prepare a, quote, privilege log of  
17 some sort and confer with the Senate and produce any documents  
18 to the Senate that are not on its log. And the log should list  
19 documents withheld on a purported privilege or for any other  
20 legal reason.

21 And this is the Supreme Court making an order in your  
22 case. Let me quote, "CNI may, therefore, assert any pertinent  
23 objections in the Superior Court and if necessary, seek  
24 appropriate review in the Court of Appeals." So what is clear  
25 to me, based on that, and combining that with the recent minute

1 entry in which they did not deny the appeal of prejudice. They  
2 went out of their way to say without prejudice to raising these  
3 issues on appeal when the case before the Superior Court is  
4 final. Is final, i.e. when there is an order that CNI can even  
5 be accused of contempt of in terms of producing documents.

6 That is where we are today. And we have dual problem  
7 here, which is one, you haven't actually issued an order for  
8 CNI to produce the documents on its log. All you've done is  
9 order them to produce a log. I just pulled up your last order  
10 in this case which was clear on that point. It says it's  
11 ordered that CNI immediately begin complying with the Court's  
12 previous order to produce what has been termed a privilege log,  
13 although it's a bit of a misnomer, et cetera.

14 You also stated -- let's see here -- that the log  
15 should describe not only records which have privileges claimed,  
16 but also audit-related records that CNI contends are not public  
17 records. You haven't actually issued the order to say they  
18 have to produce the documents on the log. And the practical  
19 issue this creates is that we have tried to appeal this. And  
20 the Court just looked -- or the Supreme Court looked at your  
21 orders, and they didn't see that either.

22 THE COURT: What about the -- wait a second, Mr.  
23 Wilenchik. What about the order all the way back in August  
24 that required the production of the records?

25 MR. WILENCHIK: That's the order they were looking

1 at. And if you read it carefully, it says that CNI is to  
2 produce a log. That's what I just quoted. That's what they  
3 were quoting in their December 1st order. Let me pull it back  
4 up again and quote it again. This is the area that the Supreme  
5 Court (indiscernible), Your Honor. Issuing order that says --  
6 so they wrote -- this is all in the beginning, you know, the  
7 second page there, of my response.

8 Respondent PNI filed a response to the application  
9 for a stay, pointing out that under the Superior Court order --  
10 this is binding on PNI, by the way. CNI is not required to  
11 produce documents directly to PNI but is instead required to  
12 produce documents to the Senate. And in conjunction with the  
13 Senate, may confer regarding which public records, if any --  
14 and this is them quoting you in your original order -- should  
15 be withheld based on a purported privilege or for any other  
16 legal reason.

17 CNI made -- and then, that's the end quote. That was  
18 their quote of the order you just referred to, Your Honor --  
19 your original order. This is now the Supreme Court, in my  
20 eyes, issuing its own order. CNI may, therefore, assert any  
21 pertinent objections in Superior Court, and if necessary, seek  
22 appropriate review in the Court of Appeals. And then combine  
23 that, again, with the fact that they're saying, well, you know,  
24 come back and see us when there's a final order here to appeal  
25 from.

1           You know, you can't have it both ways. You can't be  
2 saying, oh, CNI is in defiance of my orders, but I haven't  
3 actually ordered them to produce the documents on the log. The  
4 latest piece of correspondence, in direct compliance with your  
5 last order dated November 30th and attached to this brief, is  
6 exactly that. It's a log identifying the reasons, which  
7 include burden -- the fact they're not getting paid to do any  
8 of this, and it costs money.

9           And the fact that -- I can't get over this. These  
10 are not public documents. If you've reviewed the case law on  
11 this, there's a Seminole case -- the Salt River case in the  
12 Arizona Supreme Court. And in that case, the issue was where  
13 the government actually has documents, but they're not owned by  
14 the government. In that case, it was a list of tribal members  
15 that belonged to a tribe. Even that's not a public record.  
16 You know, when the government actually has something that it  
17 doesn't own. Here, you don't have either one. The government  
18 doesn't have these documents. It doesn't own them. So that is  
19 a huge objection we continue to preserve and will be raised  
20 again with the Supreme Court.

21           But Your Honor, the problem I have here is you can't  
22 even point to an order they've defied. And it's a real problem  
23 because I can't appeal one. I haven't been able to appeal one.  
24 So if you've read through the brief -- I mean, to be somewhat  
25 helpful here to the process. There does need to be an order

1 here -- presumably Rule 54(B) so we don't have that issue  
2 either -- that specifically says you have hopefully considered  
3 and ruled on CNI's objection in the log. It is ordered to  
4 produce the documents, and that's something it can appeal. But  
5 you can't, again, have it both ways. You can't accuse them of  
6 contempt and actually issue an order and prevent them from  
7 appealing at the same time.

8 THE COURT: Isn't it entirely clear that the existing  
9 orders require in the alternative to delivering the records  
10 directly to PNI, that they be turned over to the Senate and  
11 reviewed?

12 MR. WILENCHIK: Subject withholding -- go ahead.  
13 Subject withholding on a privilege log. That's been your  
14 order, and that's what the Supreme Court got caught up on. You  
15 haven't actually ordered that the documents in the log, which  
16 was recently produced per your order, be produced.

17 THE COURT: So your interpretation of my order is  
18 that CNI satisfies my order by producing a privilege log to the  
19 Senate?

20 MR. WILENCHIK: Not just my interpretation, Your  
21 Honor. That is the Arizona Supreme Court's (indiscernible)  
22 interpretation of your order as of December 1st and today.

23 THE COURT: Okay. Your December 17th correspondence  
24 acknowledges that the privilege log does not comply with the  
25 specificity requirement of my order. If I'm not mistaken, the

1 categories in the privilege log mirror the original public  
2 records request. In other words, there were categories of  
3 records requested and what the log does is it lists each of  
4 those categories of records and addresses them. Is that a  
5 correct description of the log, generally?

6 MR. WILENCHIK: No. Well, let me take issue with  
7 your statement that I acknowledge a failure to comply. There's  
8 no failure to comply there. The original order talked about  
9 individual listings, and that's what we got there. And it also  
10 talked about, you know, sufficient to -- for the plaintiff,  
11 again, from even it's -- you know, I can start quoting from it  
12 if you want. This is the August 24th order. Let me do that.  
13 Let me just try a quote from it. Let's see, here. I'm looking  
14 at page 4 of it.

15 Cyber Ninjas and the Senate defense may confer  
16 regarding which public records in the possession, custody, and  
17 control of one defendant or another should be withheld on the  
18 basis of purported privilege or for any other reason. By the  
19 way, the Supreme Court inserted the word legal there. Your  
20 original order actually said any other reason, not just legal.  
21 Any public records, whether maintained by Cyber Ninjas or the  
22 Senate defense or any one of them, they're withheld on the  
23 basis of purported privilege or for any other reason should be  
24 listed on the log with individual descriptions of each withheld  
25 record in sufficient detail to allow Plaintiffs to challenge

1 the basis for it -- in sufficient detail to allow Plaintiffs to  
2 challenge the basis for withholding the record if necessary.

3 So two things here. One, there is compliance with  
4 that. There are individual descriptions of the categories.  
5 They are sufficient for Plaintiff to challenge them. Two, I  
6 did, again, out of good faith here -- I'm an officer of the  
7 court -- acknowledge the fact that it sure would be nice to  
8 have individual of every single individual record, but there's  
9 nobody to pay for that. There's nobody who's doing that.

10 This is the basic problem with this case. Why, in my  
11 eyes, the law has been broken here. The law was intended --  
12 the Public Records Law was intended for only public agencies --  
13 government agencies to respond to records requests. They're  
14 tax payer funded. They have a tax payer funded attorney in the  
15 form of the Attorney General's office. Private companies like  
16 this don't have any of that. And as we point out in the  
17 filings, the Senate has not paid Cyber Ninjas, isn't paying for  
18 its legal counsel either.

19 So you know, in a weird, twisted way, we can actually  
20 bring Arizona public records case law back on, you know, to  
21 bear on that issue, which does say that even for the actual  
22 government, unreasonable burden is an objection to production  
23 of documents. So here, again, we don't have anybody paying for  
24 this, anybody able to do it. The company has no further  
25 employees. I'm attempting to withdraw. That's an issue too,

1 but the bottom line to me is, you have not actually issued an  
2 order which they can be accused of contempt of and that is  
3 appealable.

4 THE COURT: How did you derive the amounts that it  
5 would cost the Cyber Ninjas to comply with the order?

6 MR. WILENCHIK: Sure. For clarity, I did not derive  
7 them. The former CEO derived those, and as stated in the  
8 letter, he used FOIA rates. And this leads to an interesting  
9 legal point, Your Honor, which is that under FOIA, the federal  
10 government does charge for exactly what Cyber Ninjas is asking  
11 for here. It charges for searching, editing, reviewing  
12 documents. Arizona Public Records Law -- generally, agencies  
13 don't charge for that because, again, they have taxpayer money.  
14 They have the money to do that. Cyber Ninjas doesn't.

15 So again, because in my eyes, the law's very much  
16 been broken here to the point that I think is a constitutional  
17 problem. We're trying to have the government gather private  
18 documents without probable cause from a private company it  
19 doesn't own. That is what you are doing. We've gone so far  
20 beyond the bounds of what is legal here, what is reasonable,  
21 what is workable, that we are having these very real problems.

22 THE COURT: So he used FOIA rates which I'm not  
23 entirely familiar with, but my understanding is that those are  
24 hourly rates person hours for compliance?

25 MR. WILENCHIK: Correct, yeah. They charge hourly



1 rates, and I can get more information as to, you know, which  
2 agency he derived that from. I know it was a federal agency's  
3 listing of rates. You know and frankly, Your Honor, again,  
4 I've acted in good faith here. I've tried to talk to counsel  
5 about can somebody pay for this? Counsel on all sides. Can  
6 somebody pay for this, and if somebody would, I think that  
7 would resolve our issue here. But you know, instead, we're  
8 bouncing around among courts here, and I'm being accused of  
9 whatever. And you know, I do think there's a practical  
10 solution here, if somebody would pay for that review.

11 THE COURT: Well, my understanding of Arizona law is  
12 that to the extent the inability to comply with an order is a  
13 defense to contempt, that it's an affirmative defense that has  
14 to be proved by the party that's asserting it.

15 MR. WILENCHIK: You have to tell me what order you're  
16 talking about, Judge. Because again, I just went through that.  
17 There's an order I can appeal. There's an order -- you need an  
18 order -- you need to issue an order telling them to produce the  
19 documents on that log. That's why I couldn't appeal.

20 THE COURT: So the -- getting back to my question.  
21 You can't tell me anything more about the inputs to the amounts  
22 that were estimated by Cyber Ninjas as the cost of compliance?  
23 How many person hours we're talking about? What the per-hour  
24 cost might be? Anything of that nature?

25 MR. WILENCHIK: I do think there's an Excel

1 spreadsheet that details though. If that's of significance to  
2 the Court, I can, you know, try to get that produced to you,  
3 sure. Otherwise, I know we made -- we included a statement in  
4 that letter just generally about it being FOIA rates. I don't  
5 know if I was any more detailed than that.

6 THE COURT: Okay. So how many records does that  
7 calculation assume that there are?

8 MR. WILENCHIK: This is definitely a question for the  
9 former CEO. He went through and determined those quotes there.  
10 I don't even have these records, so I don't have a direct  
11 answer for you on that.

12 THE COURT: Okay. But you're aware that this was set  
13 as an evidentiary hearing today?

14 MR. WILENCHIK: I am for contempt on an order you've  
15 yet to identify to me. So I'm aware of that. I've passed the  
16 order on. I don't know why -- you know, again, you need to  
17 identify an order that I can one, appeal and two, you can  
18 enforce.

19 THE COURT: Okay.

20 MR. WILENCHIK: Or if not me, the subsequent  
21 attorney.

22 THE COURT: Thank you.

23 Mr. Hoffman?

24 MR. HOFFMAN: Sure. A couple things, Your Honor.  
25 The notion that we're obligated to pay costs, I would note --

1 or that somebody's obligated to pay costs, I would note that  
2 this -- our public records request was submitted for a non-  
3 commercial news gathering purpose. And under the Arizona  
4 Public Records law, you're not permitted to charge clerical  
5 fees to go look for those documents. The only thing you can  
6 charge for is making copies and postage, neither one which is  
7 at issue here because this has been an electronic production.

8 Number two, it's very interesting to hear that Cyber  
9 Ninjas now wants to cooperate with the Senate when they've been  
10 stonewalling the Senate since at least September 14th of this  
11 year, when the Senate demanded that Cyber Ninjas turn over all  
12 of its audit-related records. And to date, Cyber Ninjas has  
13 turned over a very small subset of the 60,000 records that --

14 THE COURT: You know --

15 MR. HOFFMAN: -- it's represented multiple times.

16 THE COURT: You know what, Mr. Hoffman, you're going  
17 back to the facts. I just want to make sure that I have a  
18 clear record here.

19 Mr. Wilenchik, are there -- I meant to ask you this  
20 question, and I forgot. I apologize. Are there any factual  
21 representations by the Senate or by PNI that have been made in  
22 this hearing today that your client specifically contests other  
23 than what you've already mentioned? And I don't want to get  
24 into an argument about characterizations. That's not what I'm  
25 talking about.

1 I'm talking about -- for example, that the number of  
2 pages of email policies and procedures and other materials  
3 beyond the -- what I'll call the work papers of the actual  
4 audit -- that the extent of that production is, in fact, 300  
5 pages; that those pages had to do with the -- what Mr. Logan  
6 understood to be the -- related to the final report. Those are  
7 the kinds of things that I'm thinking of. Is there anything  
8 that you can think of?

9 MR. WILENCHIK: I -- I -- go ahead. What's the  
10 question, Your Honor?

11 THE COURT: No, I was repeating myself. Go ahead.

12 MR. WILENCHIK: I'm asking what your question is.

13 I --

14 THE COURT: No.

15 MR. WILENCHIK: Do they contest anything factual  
16 since dating this hearing? Absolutely. I heard a number of  
17 inaccurate statements from Mr. Hoffman. My bigger issue here  
18 is, what is this hearing for? Can you please identify the  
19 order that you are talking about contempt of? Because that  
20 will help me to determine what is even relevant to this.

21 THE COURT: Okay. Let's have me ask my questions  
22 directly and specifically. Do you contest that the amount of  
23 records that the statement --

24 Mr. Hoffman, help me out here. The 300 records  
25 statement was where, exactly?

1 MR. HOFFMAN: The November 10th, 2021 letter offered  
2 by Mr. Wilenchik that was sent to Mr. Langhofer.

3 THE COURT: Okay. There it is. Are this -- then  
4 that will make it easier. Are the factual statements in the  
5 third paragraph about what's been produced by Cyber Ninjas --  
6 is that factually correct? November -- your November 9th --

7 MR. WILENCHIK: Which paragraph?

8 THE COURT: -- letter to Korey.

9 MR. WILENCHIK: November 9th letter. Well, let me  
10 clear what we're talking about here. November 9th letter,  
11 third paragraph. So CNI -- yeah, I mean there's been two  
12 privilege logs here. In the first, CNI defined substantial  
13 nexus as it's defined in the affidavit of Doug Logan, as it's  
14 defined in Black's Law, which is anything -- so let me relate  
15 it as (indiscernible).

16 Of course, what I wrote in the letter is correct.  
17 I'm a good lawyer, okay? I do write correct things. So yeah,  
18 when it states that CNI's productions include a final report of  
19 all audit findings and recommendations, 23 appendices  
20 supporting all report findings, copies of the processes and  
21 procedures utilized with respect to the investigation conducted  
22 for the audit, a copy of the security plan utilized for the  
23 investigation conducted for the audit, digital scans and more  
24 than 70,000 tally sheets, copies of aggregation database and  
25 master tally sheets, copies of over 300 emails directly related

1 to audit activities, and a copy of a financial statement of all  
2 audit funds and expenditures. Those documents were indeed  
3 produced, if that is your question.

4 THE COURT: Okay. And Mr. Langhofer represented that  
5 there's been nothing produced by CNI since then; is that true?

6 MR. WILENCHIK: No, I don't believe that is true. I  
7 do believe Douglas Logan was producing a number of doc -- I'm  
8 not sure that's even what Korey said, that -- or that Korey  
9 knows that for certain. Mr. Logan was producing documents  
10 directly to the Senate.

11 MR. LANGHOFER: If it's helpful to everybody, I will  
12 offer that the latest entry on the Senate's reading room is  
13 dated November 10th of 2021, and that is a copy of this letter  
14 that was sent to Mr. Wilenchik. There's nothing in the reading  
15 room since then.

16 THE COURT: All right.

17 MR. WILENCHIK: It's a question for Douglas Logan.  
18 Yeah, I mean he may have produced some redundant things, or  
19 maybe there was nothing since this particular letter. I know  
20 there was a period where he was producing things directly to  
21 the Senate, of which I have no direct knowledge and neither  
22 does Korey -- Mr. Langhofer.

23 THE COURT: Why is Mr. Logan not here today?

24 MR. WILENCHIK: You know, he works for the company.  
25 I know the company is, again, contemplating bankruptcy.

1 Otherwise, as I say, I've passed it on, and I would put on the  
2 record that I don't know what the need is for him to be here  
3 given that I don't know what order he's being -- his company --  
4 his former company is being accused of contempt of. I, you  
5 know, there would have to be some basis there for the relevance  
6 of his testimony.

7 THE COURT: Was he deposed yesterday in the AO case?

8 MR. WILENCHIK: He was not, no.

9 THE COURT: Did he appear?

10 MR. WILENCHIK: How are you aware of that case, Your  
11 Honor? How are you aware of the fact there was a deposition?  
12 Have you been reading the news on this?

13 THE COURT: The record in the -- in another case is  
14 subject to judicial notice.

15 MR. WILENCHIK: That's not a part of the record, Your  
16 Honor. That was a notice deposition that was publicly reported  
17 on, so I take it you've read the news.

18 THE COURT: Okay.

19 Go ahead Mr. Hoffman.

20 MR. HOFFMAN: Your Honor, I have little else to add.  
21 I would note that in your minute entry, as you know, you noted  
22 that the failure of a representative of Cyber Ninja to appear  
23 could result in you making such as orders as you believe are  
24 just, including granting the relief requested by the party who  
25 does appear.

1           And finally, the notion that there wasn't an order  
2 issued by Your Honor that was appealable -- I don't frankly  
3 understand that argument. Your Honor's August 24th order to  
4 produce public records was the subject of the appeal that was  
5 filed by Cyber Ninjas and the petition for review to the  
6 Arizona Supreme Court. And in those pleadings, there was also  
7 reference to the motion to dismiss Cyber Ninjas.

8           So both those orders were considered. They were  
9 upheld by the Arizona Court of Appeals who noted that it's  
10 Cyber Ninjas' obligation to produce documents to the Senate,  
11 which I believe we've all agreed that not a single document has  
12 been produced since at least November 10th of this year. Or on  
13 the alternative, they're obligated to produce those documents  
14 to my client, and they have not done so. And for those  
15 reasons, we think contempt is appropriate.

16           THE COURT: All right. The motion is going to be  
17 granted. I will try to lay out my reasoning to the extent that  
18 it's not in a logical sequence, I apologize. I want to make  
19 sure that I mention all the things that I think need to be  
20 mentioned.

21           Starting first with the alleged inability of Cyber  
22 Ninjas to comply. No, I'm going to start from the beginning.  
23 The beginning is that I have to find -- I have to make findings  
24 by clear and convincing evidence here. So all of the -- all of  
25 the factual findings that will be stated in the next few



1 minutes, the Court finds those to be true by clear and  
2 convincing evidence.

3 Cyber Ninjas knew of the court order. There's no  
4 question about that. They have not complied with the order.  
5 The order required Cyber Ninjas to either produce records to  
6 Phoenix Newspapers directly, or in the alternative, to produce  
7 those records to the Senate for the issuance of a -- for a  
8 mutual decision on what records were going to be produced or  
9 withheld for one reason or another.

10 My November 30th -- to the extent that there was any  
11 doubt about that, my November 30th order removed it because I  
12 said that the decision is not up to Cyber Ninjas, it's up to  
13 the court. That should have made it clear, as if it wasn't  
14 already clear enough that Cyber Ninjas could not simply stand  
15 on the nonproduction of the records that had taken place up to  
16 that point.

17 The order also required a specific privilege log.  
18 The privilege log that was produced by Cyber Ninjas is  
19 completely insufficient. It does not enable Phoenix Newspapers  
20 to contest the decisions of Cyber Ninjas to withhold documents  
21 on anything other than the broad grounds that they've been  
22 stating.

23 Beyond that, broad objections of Cyber Ninjas that  
24 have been stated again here today, that none of the -- that  
25 only a handful of the records in their possession are public

1 records as been rejected by this Court. It's been rejected by  
2 the Court of Appeals. The Supreme Court denied review. Cyber  
3 Ninjas does not have the right to continue not to comply with  
4 this Court's order based on its anticipated appeal. It doesn't  
5 work that way. There is an order that is currently effective.  
6 Cyber Ninjas went to the Supreme Court and asked for a stay of  
7 that order. The stay was denied. That means the order is in  
8 effect.

9 The main argument that Cyber Ninjas is making now  
10 based on the ownership of the documents has never been made to  
11 this Court, ever. It was briefly alluded to in one filing at  
12 the beginning of the case. The arguments that were made to  
13 this Court were different. Cyber Ninjas developed that  
14 argument at some point after the appeals began. The time for  
15 making that argument is over.

16 One of the other things that I have to find is that  
17 Cyber Ninjas noncompliance is not based on a good faith,  
18 reasonable interpretation of the Court's order. The Court  
19 finds that the interpretations of the Court's order that were  
20 advanced today concerning what Cyber Ninjas is required to do  
21 are not reasonable or in good faith, that Cyber Ninjas' legal  
22 position concerning its obligation to comply with a court order  
23 is not reasonable.

24 Factually, it is clear that what has been produced --  
25 what have been generally characterized as the 300 records --

1 that that is not -- that does not represent all or  
2 substantially all of the records with a substantial relation to  
3 the election review that are in the possession of Cyber Ninjas.  
4 The letter in which counsel described what was being produced  
5 was specifically limited to -- based on an interpretation of  
6 this Court's order that deemed substantial nexus limited to  
7 those documents with a, quote, substantial nexus to the final  
8 audit report.

9 Cyber Ninjas has not repeated that position today.  
10 It's relevant because it was the basis of their production.  
11 And so it is therefore relevant to my finding, which I do find  
12 by clear and convincing evidence that they have not complied  
13 with the order, that there are -- and they have not complied  
14 with the order, and they have not substantially complied with  
15 the order. Substantial compliance would be sufficient, but  
16 there has not been substantial compliance.

17 It is clear on the record that there are a material  
18 number of records that are responsive to PNI's public records  
19 request that this Court has ordered produced that have not been  
20 produced. And there's been nothing since the November 9th  
21 letter that -- nothing has happened that would change the  
22 factual landscape that would ameliorate or address what was  
23 plainly noncompliance with the Court's order that existed at  
24 the time of the November 9th memo. There's been nothing  
25 produced since then. There's been nothing produced despite my

1 clarification on November 30th.

2 I don't think I have to find that Cyber Ninjas is not  
3 acting in good faith. I think all I have to do is find that  
4 they're not complying. And there is -- that their  
5 noncompliance is not based on a good faith, reasonable  
6 interpretation of the order. But I think the variety of  
7 creative positions that Cyber Ninjas has taken to avoid  
8 compliance with this order speaks for itself.

9 Let me, finally, address the ability of Cyber Ninjas  
10 to comply with the order. Oh, one other thing before I go  
11 there. In terms of the completeness of the response and  
12 whether the document that were ordered produced -- the records  
13 that were ordered produced or placed on a privilege log has  
14 been -- whether that's been complied with. There've been a  
15 wide variety of representations about how many records we're  
16 talking about. Frankly, nobody knows that -- appears to know  
17 that except for Cyber Ninjas. There have been representations  
18 made along the way that there are too many to count -- was  
19 not -- those words were never used, but there are so many that  
20 it was unreasonable to even expect Cyber Ninjas to comply.

21 What I find interesting is the specificity of the  
22 statements in the December 16th communication considering the  
23 costs for searching, editing, and reviewing each item. Without  
24 speaking to the question of who's going to pay those costs, it  
25 is under FOIA law a question of person hours for production of

1 records. The first one I'm looking at here is \$5,776. That  
2 plainly represents some amount of person hours at some fixed  
3 per-hour cost.

4 What that says to me is that there is -- there are a  
5 lot of records that have not been produced since the total  
6 amount here is between 65 and \$70,000 and that Cyber Ninjas  
7 knows how many there are. And they can tell me how much it  
8 would cost them to produce these records. So that tells me  
9 that their -- it gives me reason to find not credible the  
10 claims that have been made, at times, during this case that  
11 this is a completely unmanageable task, that nobody has their  
12 arms around it, that it's not possible for them to comply.

13 Now, going --

14 MR. WILENCHIK: No (indiscernible), Your Honor.  
15 That's an unreasonable burden, please. I can only listen to so  
16 much mischaracterization here. It's an unreasonable burden,  
17 not that we cannot comply.

18 THE COURT: Okay. It is my understanding of Arizona  
19 law that ability to comply is part of the consideration here.  
20 Under A.R.S section 12-864.01, inability to comply appears to  
21 be an affirmative defense. 12-864.01, by the way, refers in  
22 subsection A to child support orders. But the rest of the  
23 statute doesn't say anything about child support orders, so I  
24 do interpret that as being applicable here. That means that  
25 the burden is on Cyber Ninjas to establish that it's unable to

1 comply.

2           What is just described in terms of the magnitude of  
3 the task and the ability to get arms around the task is one  
4 reason that Cyber Ninjas has not even begun to establish its  
5 inability comply. Cyber Ninjas has not established by any even  
6 representations that it is financially unable to comply. What  
7 I have are the representations of Mr. Wilenchik that Cyber  
8 Ninjas is insolvent. That's literally all there is in terms of  
9 establishing their inability to comply.

10           Even if we take the \$65,000 as the cost of  
11 compliance, it is the law under the public records statute that  
12 a noncommercial request is not subject to charging costs of  
13 compliance other than copying. What's more fundamental than  
14 that is that that's the government's responsibility. Here,  
15 Cyber Ninjas is an agent of the Senate, so to the extent  
16 somebody has a responsibility to pay those costs, that's a  
17 matter of contract, I suppose, between the Senate and the Cyber  
18 Ninjas. It is not a -- so if Cyber Ninjas has an issue with  
19 not being paid for the cost of producing the records, that's a  
20 matter to be taken up with the Senate. But I will note that  
21 the -- well, I'm not going to say that. I'm just going to stop  
22 there.

23           For all those reasons, the Court finds that Cyber  
24 Ninjas is in contempt of this Court's orders requiring  
25 compliance with the Arizona State Senate's obligation and Cyber

1 Ninja's own obligation as an agent of the Senate to produce  
2 public records under 39-121.01.

3 MR. WILENCHIK: I'm sorry. For a clear record, Your  
4 Honor, what order were you referring to? I mean, that is the  
5 issue, but go ahead. I don't mean to be difficult.

6 THE COURT: Mr. Wilenchik, you're really -- you're  
7 trolling me, and it's getting very close to direct contempt.  
8 The order is --

9 MR. WILENCHIK: Your Honor --

10 THE COURT: The order is the -- this Court's order  
11 of -- this Court's order of August 24th, 2021, as modified by  
12 this Court's order of December 17th -- I'm sorry -- September  
13 17th, 2021. Doggone it. Check that. As modified on September  
14 22nd, 2021, applied to Cyber Ninjas expressly by minute entry  
15 order on October 11th, 2021. Clarified and restated on  
16 November 30th, 2021.

17 (Pause)

18 THE COURT: It appears there was also a clarification  
19 on October 28th, 2021. Mr. Wilenchik was present at each of  
20 these hearings. All of which are still in effect because  
21 the -- all of which have been affirmed by the Court of the  
22 Appeals and are still effect on denial of a stay by the Arizona  
23 Supreme Court. And those orders, specifically, require Cyber  
24 Ninjas to produce on an ongoing basis for work toward the  
25 production of the public records to which Phoenix Newspapers,

1 Inc. is entitled.

2 The best statement of it is by the Court of Appeals,  
3 although that is not my order. But that order well expresses  
4 the substance of my orders that requires ongoing work toward  
5 compliance by Cyber Ninjas. And it is (indiscernible) clear on  
6 this records that Cyber Ninjas has disregarded that order. I  
7 hope that's specific enough.

8 MR. WILENCHIK: I don't want to perturb the Court, so  
9 I mean, I just want a clear record. I obviously don't agree  
10 with any of that, but thank you.

11 THE COURT: All right. I think that's all for today.

12 MR. HOFFMAN: Your Honor, if I may? What is the  
13 nature of the sanction that you're ordering?

14 THE COURT: Oh, you're right. \$50,000 a day,  
15 effective tomorrow. The Court is aware from the record in this  
16 case that Cyber Ninjas agreed to undertake this work for  
17 \$150,000. The Court is also aware from the record that Cyber  
18 Ninjas took in several million dollars from various sources  
19 that it says helped pay for this task. Having no more  
20 information than that, the Court has to choose a amount that is  
21 substantial enough to incentivize Cyber Ninjas to comply. When  
22 we're talking about revenue of millions of dollars, \$1,000 a  
23 day is, the Court's mind, grossly insufficient.

24 In light of the failure of Cyber Ninjas to present  
25 any information to the Court about its financial position that



1 the Court can really take into account, that's the -- the Court  
2 has settled on \$50,000 as a number that is coercive and,  
3 frankly, intended to be coercive, but not punitive. I guess I  
4 have to add that the next step after this, if Cyber Ninjas  
5 continues its noncompliance, is orders directed personally  
6 against individuals who are responsible for compliance with  
7 this order.

8 So I want to put Cyber Ninjas on notice that under  
9 Arizona law, this order does run against the individuals -- the  
10 people who are responsible for seeing that the entity complies  
11 with this order. And the Court is not going to accept the  
12 assertion that Cyber Ninjas is an empty shell and that no one  
13 is responsible seeing that it complies.

14 Thank you, Mr. Hoffman. I got sidetracked, as I  
15 sometimes do. Is there anything else that I should do today?

16 MR. HOFFMAN: Your Honor, if I may? I'm hopeful that  
17 this is unnecessary, that the documents get produced. But  
18 would it be productive to set a status conference out, maybe a  
19 week to ten days, to see if it's necessary to enforce this  
20 order against individuals because what you just ordered was not  
21 sufficient to cause these documents to be produced?

22 THE COURT: Sure, I'd be happy to do that. Although,  
23 that's going have to be -- I'd be happy to set a status  
24 conference. And I'll set a status conference a week from  
25 Friday or the next Friday?

1 THE CLERK: We can do the 21st at 11:30.

2 THE COURT: 21st of January of 11:30. That'll  
3 give -- if Cyber Ninjas is going to get substitute counsel,  
4 that'll give them plenty of time get that taken care of.

5 But Mr. Hoffman, as I think I've already made clear,  
6 I don't think there's any such thing as a self-executing order.  
7 I can say what to a party what I think might happen if there  
8 continues to be noncompliance, but I'm not going to issue that  
9 order unless somebody asks me to. I'm not going -- this is not  
10 my order. I'm not going to do it myself. So if Phoenix  
11 Newspapers thinks that's a step that I should take, Phoenix  
12 Newspapers needs to make that request and make it in writing.

13 MR. HOFFMAN: Understood, Your Honor.

14 THE COURT: Okay.

15 Anything else from the Senate, Mr. Langhofer?

16 MR. LANGHOFER: No, Your Honor. Thank you.

17 THE COURT: Anything else from Cyber Ninjas?

18 MR. WILENCHIK: Thank you, Your Honor. I generally  
19 don't mean to perturb you. I would like to make a record of  
20 the fact that we do have a Supreme Court order here which has  
21 interpreted things differently. And you know, either or my  
22 subsequent counsel may consider an appeal directly to the  
23 Supreme Court from this order. That's it. Thank you, Your  
24 Honor.

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

(Proceedings concluded at 11:33 a.m.)

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AMY ROTTINGHAUS,  
Transcriber

January 19, 2022

