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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AMERICAN OVERSIGHT,
Plaintiff,

v.

KAREN FANN, *et al.*,
Defendants.

PHOENIX NEWSPAPERS, *et al.*
Plaintiffs,

v.

ARIZONA STATE SENATE, *et al.*,
Defendants,

and

CYBER NINJAS, INC.,
Real Party in Interest.

No. CV2021-008265
No. LC2021-000180-001
[Consolidated]

**SENATE DEFENDANTS' RESPONSE
TO AMERICAN OVERSIGHT'S
SECOND APPLICATION FOR
ORDER TO SHOW CAUSE**

(Assigned to the Hon. Michael Kemp.)

Defendants Arizona State Senate; Karen Fann, in her official capacity as President of the Arizona Senate; Warren Petersen, in his official capacity as Chairman of the Senate Judiciary Committee; and Susan Aceves, in her official capacity as Secretary of the Senate

1 (collectively, the “Senate”) submit this response to American Oversight’s “Renewed
2 Application for Order to Show Cause.”

3 **I. The Court Should Not Act on the Application While a Motion to Disqualify is**
4 **Pending**

5 The Senate objects in the strongest terms possible to any action or decision by this
6 Division with respect to American Oversight’s Application pending a ruling on Cyber
7 Ninjas, Inc.’s (“CNI”) Motion to Disqualify. If Judge Warner finds CNI’s motion to be
8 meritorious, both CNI and the Senate are entitled to an adjudication of the Application that
9 is both substantively and facially fair—a prerogative that would be prejudiced by a
10 gratuitous and premature disposition. *See generally Kay S. v. Mark S.*, 213 Ariz. 373, 381–
11 82, ¶ 42 (App. 2006) (holding that a party “is entitled to have a judge whose impartiality is
12 not subject to question exercise independent judgment in arriving at the determinations of
13 which she complains unless we can determine on appeal that the challenged decisions would
14 have been substantially the same if made by a judge whose partiality was not reasonably
15 subject to question. We cannot do so here.”).

16 Nevertheless, in the event that this Division chooses a different course, and to ensure
17 that the Senate’s defenses arguments are adequately preserved, the Senate proffers below
18 its response to the Application.¹

19 **II. American Oversight Cannot Obtain an “Order to Show Cause” Against the**
20 **Senate**

21 In addition to being procedurally improper, American Oversight’s Application is a
22 performative exercise in extracting redundant and superfluous judicial orders, taxing the
23 resources of the parties and the Court.

24 Notwithstanding American Oversight’s misapprehension to the contrary, an “order
25 to show cause” is not a talismanic incantation that allows a party to obtain whatever it wants,
26 whenever it wants it. The OSC is simply a timing device that accelerates the defendant’s
27

28 ¹ The Senate takes no position on the Application to the extent it is directed to CNI.

1 deadline to respond to allegations leveled in a special action complaint by permitting the
 2 court to “set a speedy return date.” *See* Ariz. R. Special Action P. 4(c) & State Bar
 3 Committee Note (c).² It is not a procedural bulldozer that permits a party to curtail the
 4 customary fact-finding and adjudicatory processes and deadlines that govern final
 5 determinations on the merits, or that obviates customary burden of proof regime.

6 More fundamentally, American Oversight is not entitled to any form of an “order to
 7 show cause”—whatever American Oversight misconceives that term to mean—with
 8 respect to the Senate. To recount, this proceeding implicates essentially three categories of
 9 alleged “public records.” The first consists of non-privileged records in the physical
 10 custody of the Senate or its liaisons, Messrs. Bennett and Pullen, concerning the audit. Long
 11 before this litigation began, the Senate voluntarily agreed to obtain, review and produce
 12 these materials [*see* Am. Oversight Second Am. Compl. ¶¶ 68, 72; Senate Defendants’ Mot.
 13 to Dismiss (Jun. 9, 2021) at p. 3] and has honored that commitment. The second category
 14 is comprised of documents over which the Senate has interposed claims of privilege, some
 15 of which are the subject of an extant special action proceeding now pending before the
 16 Arizona Supreme Court; American Oversight apparently has disclaimed any request for an
 17 order concerning those documents at this time.

18 The third category is at the crux of American Oversight’s Application, and contains
 19 putative public records that are in the physical possession of CNI but not the Senate. The
 20 Court, however, has already directed the production of these records in an order entered on
 21 August 2, 2021. Following the Arizona Supreme Court’s declination of review on
 22 September 14, 2021, the Senate (i) immediately demanded that CNI furnish to the Senate
 23 any and all records within the scope of the August 2 order, and (ii) continuously has
 24 maintained that it will expeditiously release to American Oversight and the public any and
 25 all records received in response to that demand (subject to claims of applicable privileges).
 26 It appears that CNI has not tendered a substantial portion of these records, although the

27
 28 ² Claims arising under the Arizona Public Records Law must be asserted in a special
 action. *See* A.R.S. § 39-121.02(A).

1 Senate has no way of knowing the nature or quantity of potentially responsive materials that
2 remain in CNI’s possession.

3 The Senate has fully discharged the obligations imposed on it by the August 2 order,
4 and will continue to adhere to its terms if and when it receives additional documents from
5 CNI.³ In this vein, American Oversight’s Application is—as it relates to the Senate—
6 nothing more than futile fulminations against the disconnect between legal fictions and
7 objective reality. The Court of Appeals has concluded that audit-related records in the sole
8 physical possession of CNI nevertheless are in the legal “custody” of the Senate for
9 purposes of A.R.S. § 39-121. *See Fann v. Kemp*, 2021 WL 3674157 (Ariz. App. Aug. 19,
10 2021). The Senate respects the finality of that judgment, as evidenced by its prompt demand
11 that CNI tender its responsive records—a request that the Senate has since reiterated on
12 multiple occasions. Indeed, the Senate’s most recent iterative request on January 10, 2022
13 (attached hereto as Exhibit 1) emphasized that “[t]o avoid any need for further redundant
14 communications on these issues, you should assume that the foregoing remains the
15 considered position of the Arizona State Senate unless and until you hear otherwise from
16 the Senate itself.”⁴

17 No matter how hard American Oversight pounds the proverbial table and no matter
18 how many duplicative orders it entreats this Court to rubber-stamp, the inconvenient but
19 unalterable fact endures that the Senate cannot produce what it does not have. As American
20 Oversight’s ill-fated gambit for a finding of contempt underscored, the Senate cannot be
21 judicially compelled to do anything more than what it did months ago—*i.e.*, exercise its
22

23 ³ Indeed, the Senate received on May 9, 2022 approximately 1,000 pages of additional
24 audit-related documents, which it promptly released to the public.

25 ⁴ American Oversight professes—apparently with a straight face—“shock[.]” [App. at
26 5] that the Senate has not repeated itself for yet another time. To spare American Oversight
27 such distress, the Senate could perhaps send an automated email to CNI’s counsel at 9:00
28 a.m. on each weekday, re-transmitting President Fann’s January 10 letter—but even such
senseless redundancy would not spare the Court and the Senate from future expressions of
dismay from American Oversight at the fact that President Fann’s letter was not sent on
weekends and twice on weekdays. The problem is not the frequency of the Senate’s
demands for records, but the now-obvious fact that its demands have no effect.

1 putative right to demand the relevant records from CNI. Because American Oversight has
2 not provided any articulable legal basis for ordering the Senate to do anything other than
3 what it already has done, the Application should be denied with respect to the Senate.
4

5 RESPECTFULLY SUBMITTED this 12th day of May, 2022.

6 STATECRAFT PLLC
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