ARIZONA SUPREME COURT

KAREN FANN, et al., Petitioners, v. HON. MICHAEL KEMP, Judge of the Superior Court, Maricopa County, Respondent Judge, AMERICAN OVERSIGHT, Real Party In Interest.	No. CV-22-0018-PR Court of Appeals Division One No. 1 CA-SA 21-0216 Maricopa County Superior Court No. CV2021-008265

SUPPLEMENTAL BRIEF OF REAL PARTY IN INTEREST AMERICAN OVERSIGHT

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Introduction

During the 2020 General Election, Maricopa County officials performed the important administrative tasks of testing ballot tabulation machines and then counting more than two million ballots. Dissatisfied with the results, some embraced conspiracy theories and claimed the election was "rigged" or "stolen." But for all the talk, there wasn't a shred of proof. Courts uniformly rejected those unfounded claims.

Undeterred, Senate President Karen Fann and Senator Warren Petersen signed a subpoena seeking voted ballots and tabulation equipment from Maricopa County to conduct their own count. President Fann then hired a vendor to perform a "full and complete audit of 100% of the votes cast . . . within Maricopa County, Arizona," which she explained would merely "validate every area of the voting process to ensure the integrity of the vote." In other words, President Fann hired a vendor to re-test tabulation machines and recount ballots.

Since then, President Fann, Senator Petersen, and the Arizona Senate ("Senate") have fought tooth and nail to hide from the public key communications relating to this exercise ("Audit") despite the intense public interest it generated and the interim public announcements made

by the Senate and its vendor. After American Oversight ("AO") sued under the Public Records Law ("PRL") to obtain Audit-related records, the Senate withheld or redacted more than 1,000 documents based on legislative privilege. The result is that most "every communication between or among" President Fann and other key players "relating to the [A]udit [has] been withheld." Nearly a year after the Audit began, the public remains in the dark about its planning, funding, execution, and purpose. This violates Arizonans' right under the PRL to be "informed about what their government is up to." *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 303 ¶ 21 (1998) (cleaned up).

The trial court rejected the Senate's expansive view of legislative privilege, which would: (1) allow any Senator to withhold public records by claiming that the communication relates to an "investigation"; (2) eliminate the requisite showing that the "investigation" relate to pending legislation or other matters within the jurisdiction of the Legislature; and (3) allow such documents to be withheld with no showing that disclosure would impair legislative deliberations. The court of appeals affirmed.

This Court should follow suit. The Senate made no effort to demonstrate that the withheld records were integral to the deliberative

or communicative process associated with either "proposed legislation" or "other matters placed within legislature's jurisdiction." The Audit was never tied to any true legislative act, but to the administrative acts of recounting ballots and re-testing tabulation machines. The Senate also made no showing that disclosure of the withheld communications generated in the first eight months of 2021 would impair any legislative deliberations, and in fact there were no relevant legislative deliberations taking place in that period. As a result, the Senate's privilege log is filled with conclusory descriptions such as "communications re legislative factfinding, subpoena compliance, audit process and procedures" that fall far short of what's required to withhold documents from the public.

More than four decades ago, this Court made clear that legislative privilege does not "extend . . . to include all things in any way related to the legislative process." *Steiger v. Superior Ct. for Maricopa Cty.*, 112 Ariz. 1, 4 (1975). It should reaffirm that holding here.

Argument

This Court granted review of three rephrased issues. As detailed in AO's Response to the Senate's Petition for Review ("Response") and below, this Court should affirm the court of appeals' opinion in *Fann v.*

Kemp ("*Fann II*"), __ Ariz. __, 2022 WL 189825 (App. 2022). The Senate failed to establish – by its privilege log or otherwise – that legislative privilege applies to these communications. But if the Senate believes any withheld public record meets the *Fields/Gravel* test as confirmed in *Fann II*, that decision properly permits *in camera* review.

I. The Court of Appeals Properly Applied the *Fields/Gravel* Framework and Held the Senate to Its Burden.

First, the court of appeals did not err by applying the plain language of *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, (App. 2003) and *Gravel v. United States*, 408 U.S. 606 (1972).

Those cases hold that legislative privilege extends beyond actual speech on a legislative floor only (1) for materials that are "an integral part of the communicative or deliberative process" that (2) "relat[e] to proposed legislation or other such matters within the legislature's jurisdiction," and (3) "when necessary to prevent indirect impairment of such deliberations." *Fields*, 206 Ariz. at 137 ¶ 18. Under well-established law, the privilege thus "does not extend to cloak all things in any way related to the legislative process," including "political acts" or "the performance of administrative tasks." *Id.* (cleaned up). And here, the Senate failed to carry its burden to prove that this privilege applies.

A. Not every legislative "investigation" is an "integral part of the communicative or deliberative process."

No one disputes that the Senate has broad authority to conduct an "investigation." But the Senate takes this fact to the extreme, arguing [at 7] that anything it labels an "investigation" (at any time, no less) "necessarily 'relate[s] to proposed legislation or other matters placed with the jurisdiction of the legislature.'" If the Senate is correct, it has unfettered discretion to call anything it does outside the regular legislative process an "investigation" and shield that activity from meaningful public scrutiny under the PRL. This exception could thus swallow the rule that the PRL applies to the Senate.

The court of appeals recognized the overbreadth of the Senate's argument, holding that "the mere fact that the legislature conducted an investigation does not mean it is necessarily protected by the legislative privilege." *Fann II* ¶ 28. Indeed, not only was there no "election legislation pending before the legislature" during the Audit, but "[n]othing in the record shows that the prime purpose of the audit was to identify changes required to Arizona's voting laws." *Fann II* ¶ 26. Thus, the claim of legislative privilege failed because it "is far from certain that

the [A]udit was, or even could be, integral to the deliberative and communicative processes of the legislature." *Id.*

Unable to refute these facts the Senate [at 8] seeks to ignore or rewrite the *Fields/Gravel* factors by claiming an "investigation" need only relate to something that might lead to proposed legislation at some unknown point in the future. Citing [at 8-9] a handful of inapposite federal cases applying the federal Speech or Debate Clause, the Senate says the court of appeals erred by construing legislative privilege to cover "[o]nly activities 'done in the course of the process of enacting legislation' receive protection." *Fann II* ¶ 31 (citing *Steiger*, 112 Ariz. at 3).

To begin, this Court need not defer blindly to federal case law. Arizona's Speech or Debate Clause and the federal Speech or Debate Clause are different. *Compare* Ariz. Const. art. IV, pt. 2 § 7 ("No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate"), *and* U.S. Const. art. I § 6 ("for any speech or debate in either House, they shall not be questioned in any other place"). There's an obvious difference between a prohibition on a legislator being "liable" and being "questioned." Under these circumstances, this Court "ha[s] the right . . . to give such construction to our own constitutional

provisions as [it] think[s] logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution." *Turley v. State*, 48 Ariz. 61, 70-71 (1936). And beyond the textual differences, that the Arizona Legislature subjected itself to the PRL, *Fann v. Kemp* ("*Fann I*"), No. 1 CA-SA 21-0141, 2021 WL 3674157, at *3 (Ct. App. Aug. 19, 2021), when the United States Congress exempted itself from the Freedom of Information Act, 5 U.S.C. § 551(1)(A), is evidence that the two need not have the same meaning.

But even the five federal cases cited by the Senate are unpersuasive. Three don't involve legislative privilege, and instead discuss either legislative immunity (a related, but distinct concept) or general principles about the scope of legislative investigations. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507 (1975) (Speech or Debate Clause "provides complete immunity" for legislators arising out of subpoenas); *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 12 (D.C. Cir. 2006) (deciding whether the Speech or Debate Clause "requires dismissal of [] suits brought under the Congressional Accountability Act of 1995"); *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 77 (D.D.C. 2008) (determining propriety of legislative

subpoenas without discussing legislative immunity or legislative privilege). Another didn't involve constitutional legislative immunity, but the common law "state legislative privilege," and even then, required withheld documents to relate to "bona fide attempt[s] to enact legislation." *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 & n.3 (D. Ariz. 2016).

That leaves the Senate with *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), a case in which two members of Congress sought to quash document subpoenas issued to them in private litigation. Those subpoenas sought documents obtained by the legislators through their work on a congressional subcommittee conducting a formal investigation – including sworn testimony from tobacco company CEOs – into the "effects of tobacco products." *Id.* at 412. The D.C. Circuit held that the federal Speech or Debate Clause barred enforcement of the subpoenas because legislative privilege "permits Congress to conduct investigation and obtain information without interference from the courts, at least when these activities are performed in a procedurally regular fashion." *Id.* at 416-17. To reach that result, the court applied a

very broad conception of legislative privilege, one it acknowledged conflicted with the Third Circuit's approach. *See id.* at 420.

This last point is key, because at least two other circuits considered and rejected the D.C. Circuit's overbroad formulation of legislative privilege. *See In re Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc.* (*"Fattah"*), 802 F.3d 516, 529 (3d Cir. 2015); *United States v. Renzi*, 651 F.3d 1012, 1034-37 (9th Cir. 2011). In *Fattah*, the Third Circuit reaffirmed its narrower, textual construction of the privilege under which the Speech or Debate Clause "prohibits hostile questioning regarding legislative acts in the form of testimony to a jury" but "does not prohibit disclosure of Speech or Debate Clause privileged documents to the Government." 802 F.3d at 528-29. And in *Renzi*, the Ninth Circuit expressly rejected the D.C. Circuit's formulation and held that "[w]hen the underlying action is not precluded by the Clause . . . other legitimate interests exist" that might require disclosure of documents related to alleged legislative activity (including the need to investigate potential criminal activity). 651 F.3d at 1035-36.

In short, this Court need not adopt the D.C. Circuit's expansive view of legislative privilege, which goes well beyond the relevant

constitutional text. Instead, it need only apply *Steiger*. There, a Congressman invoked the federal Speech or Debate Clause to try to preclude his aide from testifying about the aide's involvement in a meeting the aide allegedly recorded. *Id.* at 690. The Congressman argued that the aide's acts were "in furtherance of his legislative duties, and, by reason of legislative privilege[], an[y] claims or inquiry into those acts are barred." *Id.* at 691. This claim turned on the Congressman's assertion that his aide's activities were part of an "investigation" he commissioned, but "[t]here [was] no showing that the investigation was related to any pending congressional inquiry or legislation." *Id.*

This Court rejected the Congressman's claim, holding that "[o]nly those acts generally done in the course of the process of enacting legislation are protected." *Id.* Though this Court noted that the Congressman later introduced a bill arguably related to the aide's alleged "investigation," it was of no moment because "[u]nder such an expansive view there are few activities in which a legislator engages that could not be somehow related to the legislative process." *Id.* at 692.

There was no error in the court of appeals' reliance on *Steiger*, an extant decision of this Court that it had "no authority to overrule, modify,

or disregard." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (App. 1993). Nor is there any compelling reason to overrule *Steiger* and its limitation of the legislative privilege to "those acts generally done in the course of the process of enacting legislation"; indeed, this Court cited *Steiger* approvingly mere months ago. *See Mesnard v. Campagnolo*, 251 Ariz. 244 ¶ 14 (2021).

Steiger should apply on the facts here, particularly given the public's interest under the PRL. Not only was there no "election legislation pending before the legislature" during the Audit, but the record also didn't "show[] that the prime purpose of the audit was to identify changes required to Arizona's voting laws" such that "proposed legislation" was a contemplated end goal of the Audit. *Fann II* ¶ 26. To say that an "investigation" might lead to some proposed legislation at some unknown point in the future is indeed "too tenuous" to invoke legislative privilege. *Fann II* ¶ 30. Rather, as the court of appeals confirmed, the better rule, and the rule resulting from the proper "narrow" construction of this truth-concealing privilege, is that "[o]nly activities 'done in the course of the process of enacting legislation' receive protection." *Fann II* ¶ 31 (citing *Steiger*, 112 Ariz. at 3).

If this Court decides to revisit *Steiger* and look to federal law to interpret Arizona's Speech or Debate Clause, *Renzi* provides the most principled path forward. The distinction *Renzi* draws between underlying actions "precluded by the Clause" and those "not precluded by the Clause" translates well into Arizona law and the overlay of the PRL this case presents. *Renzi*, 651 F.3d at 1036. The Speech or Debate Clause doesn't bar the "underlying action" here; the court of appeals said as much, and this Court denied review. *Fann I*, 2021 WL 3674157, at *3 ¶ 17. And "other legitimate interests exist" that should require production of the withheld documents at issue. *Renzi*, 651 F.3d at 1036. These include the public's interest in vindicating its right under the PRL to "monitor the performance of government officials," *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶ 33 (App. 2001) (cleaned up).

B. The conduct of the Audit was an administrative act.

Next, the court of appeals didn't err by concluding that the Audit has "the hallmarks of an administrative action" that enjoys no protection under the legislative privilege. *See Fann II* ¶ 26. The Senate [at 11] disagrees, claiming this cannot be true because the court of appeals

described the Audit as an "important legislative function," and "an act that is 'legislative' necessarily cannot be 'administrative.'"

Case law interpreting legislative privilege has always distinguished between core "legislative" acts that might enjoy protection and "administrative" or "political" acts that do not. *See Fields*, 206 Ariz. at 137 ¶ 18. *Fields* itself (¶ 21) described the general standard for determining whether something is "legislative":

> [w]hether an act is "legislative" depends on the nature of the act. An act is legislative in nature when it bears the hallmarks of traditional legislation by reflecting a discretionary, policymaking decision that may have prospective implications, as distinguished from an application of existing policies.... Further, a legislative act occurs in a field where legislators traditionally have power to act.

The Senate's suggestion that a legislative body or individual legislators can never engage in unprotected "legislative action" – *i.e.*, action taken through their legislative authority – is betrayed by precedent. The most obvious example is *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103 (App. 2012). There, the court of appeals applied *Fields* to hold that while the Independent Redistricting Commission enjoyed legislative privilege and had discretion to hire a mapping consultant, its decisions of "whether to hire a mapping consultant and

whom to hire" were not protected. Why? Because those decisions, though "related to the legislative process and [which] may facilitate [the legislative process], do not in themselves bear the 'hallmarks of traditional legislation by reflecting a discretionary *policymaking* decision.'" *Id.* at 123 ¶ 79 (citing *Fields*, 206 Ariz. at 138 ¶ 21) (underlined emphasis added).[1]

Fields and *Mathis* teach that in determining whether something is "legislative," the focus must be on the specifics of the challenged action is "in [itself]," not on the mere fact the challenged action falls within the general discretion or power of the legislative body. And here, President Fann's own words and the Senate's contract with its vendor leave no question that the Audit comprised two tasks: (1) (re)counting Maricopa County's ballots, and (2) (re)testing the accuracy of Maricopa County's voting machines. Both are administrative tasks in any other conceivable context. *See, e.g.*, A.R.S. § 16-449 (describing the procedure for elections officials to test electronic "tabulating equipment"); A.R.S. § 16-552

[1] *See also Alexander v. Holden*, 66 F.3d 62, 67 (4th Cir. 1995) (decision to terminate an employee was an administrative act); *Bryan v. City of Madison*, 213 F.3d 267, 274 (5th Cir. 2000) (holding several official acts of a city mayor to be "non-legislative").

(describing the process for processing early ballots); A.R.S. § 16-664 (recount procedures).

When looking at the specifics of the Audit – and not, as the Senate urges, the Senate's general investigative authority or the legislative subpoena that allowed the Audit to occur – the court of appeals correctly applied *Fields* to hold that the Audit itself didn't bear the "hallmarks" of legislation, but an administrative act.[2]

C. Legislative "impairment" is a necessary element.

Lastly, because legislative privilege applies only to particular communications when doing so is "necessary to prevent indirect impairment" of legislative deliberations, *Fields*, 206 Ariz. at 137 ¶ 18 (citing *Gravel*, 408 U.S. at 625), it wasn't error for the court of appeals to require some showing of legislative impairment. The Senate doesn't dispute that it "made no attempt to show how confidential treatment of its communications relating to the audit was necessary to prevent indirect impairment of its legislative deliberations." *Id.* Rather, it says

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[2] The Senate also criticizes [at 11-12] the lower courts' description of a Senate "hearing" related to the Audit as a "political" act. Not to dwell on the point, but a gathering where two legislators of only one party held a one-sided discussion with witnesses who weren't under oath does, in fact, "lack the hallmarks of traditional legislation." *Fann II* ¶ 27.

that no such showing is required at all, relying mainly (again) on D.C. Circuit cases. The Senate thus asks this Court to (again) bless its failure to produce any evidence proving that the privilege applies.

Consistent with *Fields* and the rights of the public under the PRL, this Court should demand more. True, the D.C. Circuit has rejected arguments that the burdens on legislators and their staffs might be "minimal," and that such minimal "distraction" doesn't support applying legislative privilege. *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988). But again, *Renzi* did not follow the D.C. Circuit's approach in *MINPECO*. In fact, the Ninth Circuit in *Renzi* disapproved the D.C. Circuit's citation of one of its earlier decisions (also cited by the Senate [at 13]), *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Circ. 1983). And as noted above, the Ninth Circuit draws an important distinction between when the Speech or Debate Clause bars the "underlying action" and when it doesn't, *Renzi*, 651 F.3d at 1036, and has also noted the important textual distinction between compelled testimony and compelled document production, *id.* at 1034 n.26.

Renzi placed reasonable boundaries on legislative privilege that should apply here. But even beyond doctrinal problems, the Senate's

approach has a more fundamental evidentiary defect. The Senate had the burden to show that producing these communications in response to AO's public records requests would either directly or indirectly impair legislative deliberations. *See, e.g.*, *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993) ("[I]t was incumbent upon Collins to specifically demonstrate how production of the documents . . . would be 'detrimental to the best interests of the state.'"); *Steiger*, 112 Ariz. at 3 (party invoking privilege has the burden). The Senate "made no attempt to show how confidential treatment of its communications . . . was necessary to prevent indirect impairment of its legislative deliberations." *Fann II* ¶ 32 (emphasis added). There was no showing that relevant legislative deliberations occurred in the first eight months of 2021, when these public records were created. The court of appeals thus properly held that "the Senate failed to meet its burden of establishing that each of the records listed in the privilege log are shielded from disclosure." *Fann II* ¶ 32

II. A Privilege Log Must Be Specific and Detailed.

The Senate invoked legislative privilege to withhold or redact more than 1,000 documents based on its misunderstanding of the scope of

Arizona's legislative privilege. Compounding that error, its privilege log contained boilerplate descriptions insufficient to permit AO or the trial court to evaluate whether the privilege applied to any given document. For this reason, AO challenged the application of legislative privilege to any of these documents while reserving its right to seek *in camera* review with respect to specific documents depending on the outcome of its general challenge. [AO's Motion to Compel at 3-4 n. 2, Sept. 17, 2021]

The hallmark of a legally sufficient privilege log is specificity. Rule 26(b)(6)(A)(iii), Ariz. R. Civ. P., provides the bare minimum requirement. The log "must . . . describe the nature of that . . . document. . . in a manner that--without revealing information that is itself privileged or protected--will enable other parties to assess the claim." In the context of legislative privilege, courts have explained that a privilege log's adequacy hinges on "whether, as to each document, [the privilege log] sets forth specific facts that, if credited, would suffice to establish each element of the privilege." *Favors v. Cuomo*, 285 F.R.D. 187, 222 (E.D.N.Y. 2012) (cleaned up); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 345 (E.D. Va. 2015) (same). A privilege assertion may also require

"affidavits or testimony" to provide key information necessary for a party to carry its burden. *Favors*, 285 F.R.D. at 222.

The Senate's privilege log fails under this commonsense test. For example, entries that say "[t]ext message communications re: legislative investigation and audit process and procedures" [SA241 (Fann/Phil Waldron)] or "[t]ext message communications re: legislative investigation and audit process" [SA242 (Fann/Doug Logan)] don't provide AO with sufficient information. This is particularly true given the undisputed facts that: (i) the Audit was not intended to develop legislation; (ii) the Senate was not in session when the Audit began and no committee was investigating this issue, and (iii) most of the withheld communications are not exclusively among legislators and staff but involved third parties.

Here, the court of appeals ordered the Senate to either produce the withheld documents or submit them to the trial court for *in camera* review if a good-faith basis exists under the *Fields/Gravel* framework. *Fann II* ¶ 38. This Court, however, has asked what the burden is "on the party seeking disclosure to trigger in camera review."[3] That burden is

[3] The Court's February 15, 2022 Order refers to "legislative immunity." AO presumes the Court intended to say "legislative privilege"

minimal and is met here where the privilege log is facially deficient and the Senate made no effort to make the predicate showings necessary to invoke legislative privilege. AO's Motion to Compel [at 10-11] challenged each legislative privilege designation on the Senate's privilege log because "the entries must meet Defendants' burden of establishing legislative privilege, which must include information sufficient to conclude" that the communications met the *Fields* test.[4] This was true then and remains true now, particularly considering the requirements set forth in *Favors* and *Bethune-Hill*.

Conclusion

Legislative privilege has never "extend[ed] . . . to include all things in any way related to the legislative process." *Steiger*, 112 Ariz. 4. Because the Audit was not tethered to bona fide legislative activity and comprised only administrative tasks – and alternatively, because the Senate failed to prove that legislative privilege protects the specific documents at issue – this Court should affirm.

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because it denied review of the court of appeals' holding in *Fann I* that legislative immunity doesn't preclude this action under the PRL.

[4] AO's objection to the legislative privilege entries distinguishes this case from *Lund v. Myers*, 232 Ariz. 309, 312 ¶ 18 (2013).

RESPECTFULLY SUBMITTED: March 7, 2022

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