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

RESPONSE TO PETITION FOR REVIEW

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Introduction

Arizona courts narrowly construe all privileges – common law, statutory, and constitutional – because they "lead to the suppression of truth and the defeat of justice." *Indus. Comm'n v. Superior Ct. In & For Maricopa Cty.*, 122 Ariz. 374, 375 (1979). A party invoking a privilege thus carries the heavy burden of proving that it applies, including that the privilege's "purposes" support its application to particular facts. *Id.*

In their Petition for Review, Senate President Karen Fann, Senator Warren Petersen, and the Arizona Senate (collectively, "Senate") ask this Court to abandon this longstanding rule as to the legislative privilege. It champions a sweeping construction that would relieve legislators of any burden to prove its application and prevent the judiciary from scrutinizing invocation of the privilege, all while ignoring that the purpose of the privilege is not to protect legislators but to support the rights of the people.

The Senate's request is almost as remarkable as the vehicle that brings it to this Court. This case has its origins in the Senate's "audit" of the 2020 General Election results in Maricopa County, one undertaken by a conspiracy theory-spouting vendor on the signature of just two

senators when the Legislature wasn't in session. Nothing in the vendor's contract suggests the Senate intended its work to inform legislation; indeed, in President Fann's own words, the "audit" was supposed to do no more than "validate every area of the voting process to ensure the integrity of the vote."

Real Party in Interest American Oversight ("AO") sued under the Public Records Law to obtain records related to the "audit." The Senate withheld or redacted about 700 documents on legislative privilege grounds alone and another 492 documents based in part on legislative privilege. These documents spanned the period December 2020 through August 2021. [SA012-245]

But the Senate submitted no declaration and ignored its obligation to demonstrate that these records were integral to the deliberative process associated with proposed legislation and that disclosure of any one of these documents – much less all of them – would impair legislative deliberations. It's thus no surprise that the trial court found the Senate failed to carry its burden to prove the privilege applied to these documents and that the court of appeals left that finding undisturbed.

Fann v. Kemp ("*Fann II*"), __ Ariz. ___, 2022 WL 189825, at *1 (App. Jan. 21, 2022).

Contrary to the Senate's accusation [at 1, 3] that *Fann II* was "unprincipled" and an exercise in "doctrinal acrobatics," that unanimous opinion (1) hinged on well-established principles of law and the record below, (2) broke no new ground, and (3) allows the invocation of legislative privilege consistent with its purpose. There is no reason for this Court to grant review and further delay the production of key public records about an issue of intense public importance.

Issue Presented for Review

The Petition presents one true underlying issue for review:

Legislative privilege "extends to matters beyond pure speech or debate in the legislature only when such matters are [1] 'an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature [] and [2] 'when necessary to prevent indirect impairment of such deliberations.'" Did the court of appeals err by concluding that the Senate failed to carry its heavy burden to establish both elements?

Material Facts

This litigation already has a long history and is before this Court for the second time.

In short, AO sued the Senate under the PRL after the Senate refused to produce public records related to the Senate's "audit" of the 2020 General Election results in Maricopa County ("Audit"). The Audit placed Arizona in the national spotlight for months, and there is intense public interest in both its origins and conduct. There's no dispute that:

- The Audit began when the Legislature wasn't in session after President Fann and Senator Petersen issued legislative subpoenas;
- President Fann selected Cyber Ninjas, Inc. to conduct the Audit, an entity with no relevant experience and whose CEO touted baseless and disproven theories about the 2020 General Election;
- The Senate committed $150,000 in taxpayer dollars to pay for the Audit with full knowledge that its true cost would be many multiples of that sum and financed by third parties; and
- In announcing Cyber Ninjas' selection, President Fann said that the audit would merely "validate every area of the voting process to

ensure the integrity of the vote," and promised the "audit" would be "the most transparent [] in history."

There's also no dispute that Arizona courts – this Court included – rejected a host of challenges to the validity of the 2020 General Election.

Four months ago, this Court denied review of the court of appeals' memorandum decision holding that (1) legislative immunity didn't preclude this PRL litigation, and (2) Audit-related records held by the Senate's contractors are "public records" under the PRL. *Fann v. Kemp* ("*Fann I*"), No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. Ct. App. Aug. 19, 2021). At issue now are around 1,192 documents withheld, in whole or in part, by the Senate based on legislative privilege. The privilege log's descriptions of these documents are as vague as can be, with a document (or months-long text string) described, for example as: "[t]ext message communications re legislative factfinding, subpoena compliance, audit process and procedures." [*See* SA242-245.] As the trial court found, "[n]early every communication between or among" President Fann and other key players "relating to the audit [has] been withheld on the basis of legislative privilege." [SA248.]

The Senate's obstinance led AO to file a Motion to Compel. The trial court granted that Motion because the Senate failed to show that (1) "[t]he audit was [] an integral part of a deliberative process," (2) "the withheld information is [] tethered to proposed legislation," or (3) "that disclosure of the records sought would impair legislative deliberations." [SA249-251.] In *Fann II*, the court of appeals affirmed these core findings in a unanimous opinion that rests on four overarching holdings about the scope of legislative privilege.

First, the court of appeals held that the Senate bore the burden of proving that legislative privilege applied, and that legislative privilege must be "narrowly construed . . . because [it is] in derogation of the search for truth." *Fann II* ¶ 19 (cleaned up). As a result, "a legislator seeking to invoke the legislative privilege to prevent disclosure of public records under the PRL carries a heavy burden." *Id.* ¶ 22.

Second, the court of appeals reaffirmed that legislative privilege doesn't apply to everything a legislator may do. Instead, it applies only to matters that are an "integral part of the deliberative and communicative processes relating to proposed legislation or other

matters placed within the jurisdiction of the legislature, and when necessary to prevent indirect impairment of such deliberations." *Id.* ¶ 24.

Third, the court of appeals found no evidence that the Audit "was, or even could be, integral to the deliberative and communicative processes of the legislature." *Id.* ¶ 26. That is, "[n]othing in the record shows that the prime purpose of the audit was to identify changes required to Arizona's voting laws, and it is undisputed that at no time during the audit was any election legislation pending before the legislature." *Id.* Relatedly, the court of appeals found no error in the trial court's determination that the Senate's "hearing" about the Audit was a "political act." *Id.*

Lastly, the court of appeals also reaffirmed that the Senate had to show that the privilege was "necessary to prevent indirect impairment" of legislative deliberations and that the Senate "made no attempt" to do so. *Id.* ¶ 32.

The court of appeals "direct[ed] the Senate to immediately disclose . . . all records listed in its privilege log that do not fall within" these parameters, but also allowed the Senate to submit documents for *in camera* review under the standards articulated above. *Id.* ¶ 38. Before

seeking this Court's intervention through its Petition and "Emergency Motion for Stay," the Senate neither produced any withheld documents nor submitted any of those documents for *in camera* review.

Reasons the Petition Should Be Denied

In affirming the rejection of the Senate's broad conception of legislative privilege, the court of appeals did nothing other than faithfully apply precedent (this Court's and its own) to the unique facts of the Audit. It did so while preserving (1) the legislative privilege in appropriate cases when its application reflects that privilege's "purposes," and (2) the judiciary's important role in public records and other litigation. For these reasons, the Court should deny the Petition despite the Senate's repeated attacks [at 2-3, 12 n.4] on the judiciary and dramatic declaration [at 5] that *Fann II* "corrodes a core facet of the legislative power."

I. An Overview of Legislative Privilege.

A few first principles provide important context for the Senate's arguments.

Legislative privilege arises from the Speech and Debate Clause of the Arizona Constitution, which says that "[n]o member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. This privilege extends beyond

these textual bounds (*i.e.*, actual speech on a legislative floor) only (1) for materials integral to the communicative or deliberative process (2) "associated with proposed legislation or other such matters within the legislature's jurisdiction," and (3) "when necessary to prevent indirect impairment of such deliberations." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶ 19 (App. 2003) (citing *Gravel v. United States*, 408 U.S. 606 (1972)). In other words, the 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), including (among many other things) either "political" or "administrative" acts, *Fields*, 206 Ariz. at 137 ¶ 18.

Legislative privilege "is not intended to protect legislators' individual interests, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Fields*, 206 Ariz. at 137 ¶ 17 (cleaned up). As a result, "invocations of [legislative privilege] that go beyond what is needed to protect legislative independence must be closely scrutinized." *United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016) (citation omitted). And the burden of proving this narrow privilege applies – like

all other privileges – is on the party invoking its protection. *Steiger*, 112 Ariz. at 3.

II. Every Legislative "Investigation" Isn't Integral to the Body's Deliberative and Communicative Processes.

The Senate first argues [at 7] that the court of appeals erred in holding that "(1) the privilege reaches only investigations in furtherance of 'pending legislation;' (2) the Audit is primarily 'administrative;' and (3) some, if not all, facets of the Audit are primarily 'political.'" None convinces.

A. The necessity of legislative process.

First, the Senate [at 7] chides the court of appeals for trying to find any arguable link between the Audit and proposed legislation or another "matter within the legislature's jurisdiction" because anything labeled as a legislative investigation "necessarily" satisfies this element of legislative privilege. *See also Fann II* ¶ 25 (noting the Senate's argument that "legislative privilege automatically attaches to every legislative investigation"). In other words, the Senate asks for free rein to call anything it does outside the regular legislative process an "investigation" and shield that activity from public scrutiny (and divest the judiciary of

jurisdiction to inquire any further in the process). But that is not – and cannot be – the law.

As the court of appeals rightly recognized, "[t]he legislature has the power to conduct investigations aimed at determining the need for new legislation," but "the mere fact that the legislature conducted an investigation does not mean it is necessarily protected by the legislative privilege." *Fann II* ¶ 28. This simple conclusion reflects this Court's decision in *Steiger*, where it rejected a similarly broad invocation of legislative privilege to an alleged "investigation" by a congressional staffer absent a showing of relation "to any pending congressional inquiry or legislation." 112 Ariz. at 3-4.

The Senate claims [at 10] that *Steiger* has been "supplemented" or "superseded" by intervening federal cases, and that the Audit is distinguishable from the communications at issue in *Steiger* because it was supposedly more formal. But *Steiger* remains good law in Arizona, and under the Senate's expansive view of legislative privilege, its alleged factual distinction is no distinction at all. If all "investigations" are inherently tied to potential legislation, then there is no legal distinction between a Senate committee's formal investigation expressly intended to

inform future legislation about elections and President Fann asking an aide to perform an "investigation" by standing on a street corner and asking passersby about their thoughts on elections. Both could, in theory, lead to future legislation. But the mere fact that a legislator calls the latter an "investigation" doesn't – and shouldn't – end the inquiry.

The facts here support the application of *Steiger*. 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. Instead, the Statement of Work executed by the Senate authorizing Cyber Ninjas to perform the Audit demonstrated that all understood the Audit would merely "verify that election procedures were sufficiently observed." *Id.* And 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 "[o]nly

activities 'done in the course of the process of enacting legislation' receive protection." *Fann II* ¶ 31 (citing *Steiger*, 112 Ariz. at 3).[1]

Recognizing these difficult facts, the Senate [at 8-9] provides a string cite of cases that say an "investigation" need only pertain in any way to something on which legislation could be had. But nearly all those cases arise under the law of the D.C. Circuit which takes a particularly expansive view of the federal legislative privilege as broad and "absolute," a view rejected by both the Ninth Circuit and Third Circuit. *See United States v. Renzi*, 651 F.3d 1012, 1034-37 (9th Cir. 2011); *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). In any event, these federal cases conflict with *Fields*, and thus don't reflect Arizona law.[2] The court of appeals' limitation of the

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[1] The Senate says [at 9] that "approximately 100 election-related bills already have been introduced in the new legislative session, some of which undoubtedly were induced by the Audit." But the Senate provides no factual support for this belated assertion, nor can it connect these bills to the withheld documents at issue.

[2] Though Arizona courts sometimes consult federal case law about the meaning of Arizona's Speech and Debate Clause, the federal Speech and Debate Clause is 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

legislative privilege to those acts "done in the course of the process enacting legislation" was both sound and correct.

B. The Audit bears no resemblance to traditional legislation or legislative activities.

The Senate [at 11] also quarrels with the court of appeals' statement that the Audit has "the hallmarks of an administrative action." *See Fann II* ¶ 26. It claims this cannot be true because in *Fann I*, the court of appeals described the Audit as an "important legislative function" and "an act that is 'legislative' necessarily cannot be 'administrative.'" They also claim that "the term 'administrative' denotes functions associated with the executive branch," and call the court of appeals' comparison of the Audit to "executive branch activity" a "baffling insinuation."

Both arguments are easily dispatched because legislatures, legislators, and their agents perform "administrative" tasks unprotected by either legislative privilege or legislative immunity all the time. *See, e.g.*, *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 123 ¶ 80 (App. 2012) (act of hiring a consultant was "administrative"). And though it

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any speech or debate in either House, they shall not be questioned in any other place").

may be true that the executive performs most traditional tasks that might be described as "administrative," it doesn't do so exclusively. Here, the Audit was little more than recounting voted ballots[3], an administrative task in other contexts. *See* A.R.S. § 16-664 (describing the tasks to be carried out in a court-ordered recount). It was not reversible error – to say one meriting this Court's intervention – for the court of appeals to recognize as much.[4]

III. "Impairment" Is a Necessary Element of a Legislative Privilege Claim.

The Senate next [at 12-14] contends the court of appeals erred by requiring a legislator invoking the legislative privilege to make some showing that it's necessary to avoid impairing legislative deliberations. *See Fann II* ¶ 32. It doesn't dispute that it "made no attempt to show how

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[3] Cyber Ninjas' Statement of Work described its task as performing a "full and complete audit of 100% of the votes cast . . . within Maricopa County, Arizona," including "auditing the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results." [SA002]

[4] The Senate also criticizes [at 11-12] the lower courts' description of a Senate "hearing" related to the Audit as a "political" act, even accusing [at 12 n.4] the judiciary of being the true "political" actor in this saga. Inappropriate attack aside, 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.

confidential treatment of its communications relating to the audit was necessary to prevent indirect impairment of its legislative deliberations." *Id.* Rather, it says that no such showing is required at all, relying mainly (again) on cases from the D.C. Circuit.

The court of appeals committed no error by applying the governing *Fields* framework. For decades, the prevailing formulation of legislative privilege has been stated in the conjunctive; the "privilege extends to matters beyond pure speech or debate in the legislature only when such matters are 'an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature [] and 'when necessary to prevent indirect impairment of such deliberations.'" *Fields*, 206 Ariz. at 137 ¶ 18 (citing *Gravel*, 408 U.S. at 625) (emphasis added). Conceivably, a case requiring a trial court to weigh the extent of "impairment" could yield questions for this Court to consider, but that's not what either the trial court or court of appeals did here. Instead, they merely recognized that "the Senate . . . 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." *Fann II* ¶ 32. And

for that simple reason – one the Senate could have perhaps remedied by making even the slightest effort had its blanket assertions of legislative privilege been valid in the first place – the Senate "necessarily failed to meet its burden of establishing that each of the records listed in the privilege log are shielded from public disclosure." *Id.*

Here again, D.C. Circuit case law is unpersuasive. Both *Renzi* and *Fattah* disagree with the D.C. Circuit on whether the purpose of preventing "distraction" should be weighed against the purpose of preserving the "independence" of the separate branches of government. *See Renzi*, 651 F.3d at 1036 ("Were we to join the D.C. Circuit in precluding review of any documentary 'legislative act' evidence, even as part of an investigation into unprotected activity, for fear of distracting Members, we would thus only harm legislative independence."). By focusing on D.C. Circuit cases, Petitioners ignore the precedential, Arizona-specific test delineated in *Fields* and properly applied below.

Rule 21(a) Notice

AO seeks its fees and costs incurred in responding to the Petition and "Emergency Motion for Stay" under A.R.S. §§ 12-341, 12-342, and 39-121.02(B).

Conclusion

The Senate advances no compelling reason to delay the production of public records that should have been disclosed months ago. The Court should thus deny the Petition, dissolve the administrative stay of the trial court's order, and reaffirm Arizonans' right under the PRL to "be informed about what their government is up to." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 303 ¶ 21 (1998) (cleaned up). The transparency guaranteed by the PRL and promised by President Fann herself demands no less.

RESPECTFULLY SUBMITTED: February 4, 2022.

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