IN THE SUPREME COURT
STATE OF ARIZONA

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

Petitioners,

v.

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

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. _____

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

Maricopa County Superior Court No.
CV2021-008265

PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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The oversight of this Court is most urgently needed when contradictory and unprincipled rulings of the lower courts, seemingly driven by *short*-term political currents, create significant *long*-term barriers to the legitimate undertakings of a co-equal branch. This is such a case.

Litigation arising out of the Arizona State Senate's audit of the November 3, 2020 general election in Maricopa County (the "Audit") has been defined by litigants' pleas—too often indulged by courts—to craft "just this once" edicts tailored to satiate the partisan fervor that has assailed a politically controversial investigation, but that undoubtedly will be quickly discarded in more mundane disputes. This dynamic manifested in the Court of Appeals' revelation last year that the Arizona Public Records Law, A.R.S. § 39-121, *et seq.* ("PRL"), reaches the internal records of private contractors, but only if the vendor is assisting in "core governmental functions"—a novel and non-textual distinction that evidently encompasses the Audit but presumably not much else. *See Fann v. Kemp*, 2021 WL 3674157, at *4, ¶ 24 (Ariz. App. Aug. 19, 2021) [*Fann I*].[1]

While the ruling in *Fann I* is at least in theory amenable to future legislative remedies, the repercussions of the Court of Appeals' opinion in this action—which derogates a vital institutional privilege secured by the Constitution—are not so easily

[1] The foreseeable consequence of this ruling has been threats to hold the Senate and its officers in contempt of court for not producing records they have never possessed and cannot practicably obtain.

contained. Legislative investigations, such as the Audit, are intrinsically "an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶ 18 (App. 2003) (quoting *Gravel v. United States*, 408 U.S. 606 (1972)). For this reason, a litany of precedents accreting over decades has affirmed that "[t]he power to investigate and to do so through compulsory process plainly falls within" the privilege rubric articulated in *Gravel* and adopted by Arizona courts in *Fields*. *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *see also id.* at 505 (reiterating that "the act 'of authorizing an investigation pursuant to which . . . materials were gathered' is an integral part of the legislative process"). Further, while the privilege is animated by a desire to avoid "impairment" of the legislative process, courts have never before misconceived this generalized principle as an independent element of a *prima facie* privilege claim.

Seeking to avert its own precedents, the Court of Appeals held that the Audit was fundamentally an "administrative" task, not a "legislative" investigation, and endorsed the trial court's disparagement of the Senate's hearing on the Audit report as a "political act." COA Op. ¶¶ 26–27. In addition to being factually and legally erroneous, the Court of Appeals' holding essentially posits a new, judge-made rubric that dictates to a coordinate branch heretofore unknown criteria for denominating a 'legitimate' legislative hearing–but fails to specify the extent to which legislative hearings may be politicized before members

forfeit their constitutional privilege, or whether this result can be avoided by advocating for more genteel political positions. More broadly, the lower courts' approach bespeaks a troubling willingness to opportunistically mutate their characterization of the Audit to facilitate a particular end result. It is curious that what just a few months ago was an "important legislative function," *Fann I*, 2021 WL 3674157, at *4, ¶ 24, is suddenly now ***not*** a "legitimate legislative act" at all, but merely a "political" or "administrative" exercise, *see* COA Op. ¶¶ 26–27, 30. Whatever this is, it is not law.

These doctrinal acrobatics may gratify certain political sensibilities of the moment, but they portend an erosion of legislative independence and a dilution of the judiciary's role as a neutral bulwark of the separation of powers. As "the final arbiter of Arizona constitutional issues," *State v. Youngblood*, 173 Ariz. 502, 506 (1993), this Court's intervention is imperative.

STATEMENT OF THE ISSUES

1. Did the Court of Appeals err in holding that the legislative privilege generally does not apply to communications concerning the planning, execution or results of the Audit, on the grounds that the Audit (a) does not relate to "pending legislation," (b) is an "administrative" function, and/or (c) is "political"?
2. Did the Court of Appeals err in holding that a *prima facie* claim of legislative privilege requires affirmative evidence of legislative impairment?

STATEMENT OF THE CASE

Since the inception of the Audit, the Senate has been deluged with countless public records requests, including several from Real Party in Interest American Oversight. Although the parties subsequently litigated the availability of the corporate records of Senate vendors and subvendors under the PRL, the Senate consistently maintained that it would produce non-privileged internal legislative records that were responsive to the public records requests, including those on the personal devices of President Fann, Chairman Petersen, and Audit liaisons Ken Bennett and Randy Pullen. The Senate eventually released more than 80,000 pages of records, accompanied by a privilege log cataloguing withheld documents.

To date, the Senate has produced approximately 22,000 records in their entirety. *See* Senate Audit Public Reading Room, *available at* *https://statecraftlaw.app.box.com/v/senateauditpublicreadingroom/folder/138506536893*. It has withheld in whole or in part approximately 700 documents solely on grounds of legislative privilege; of those, approximately 272 have already been disclosed in redacted form.[2]

The Superior Court in this proceeding ruled on October 13, 2021 that the Senate had "waived" legislative privilege over documents and communications pertaining to the Audit

[2] An additional 1,161 documents are protected from disclosure (in whole or in part) on grounds of attorney-client privilege, including 402 that include material protected by the legislative privilege.

because the Senate had voluntarily released the final Audit report and held a public hearing in the Senate chamber, which the Superior Court disparaged as "more akin to a press conference." Notwithstanding its finding of waiver, the Superior Court also rejected the Senate's position that internal factual documents and communications relating to the Audit are privileged, holding instead that the privilege can attach only to internal communications discussing "proposed legislation." Finally, adopting an argument that even American Oversight had never advanced, the Superior Court announced that, even when it applies, legislative privilege is merely "qualified" and subject to a balancing test.

The Senate then petitioned the Court of Appeals for special action relief, which was granted in part and denied in part. The Court of Appeals vacated the Superior Court's finding of waiver, but ratified a narrow conception of the privilege as attaching only to communications concerning pending items of legislation.

ARGUMENT

In determining whether to accept review of a denial of special action relief, this Court weighs several factors, including whether there are conflicting decisions by the Court of Appeals, and whether important issues of law have been incorrectly decided. *See* Ariz. R. P. Special Action 8(b), A.R.C.A.P. 23(d)(3). Both considerations militate in favor of review; the Court of Appeals' opinion deviates from its own precedents and the cases that underlie them, and corrodes a core facet of the legislative power under Article IV.

I. The Audit Is a Legislative Investigation and Thus Integral to the Body's Deliberative and Communicative Processes

Legislative investigations aimed at adducing facts that may (or may not) inform future lawmaking endeavors are integral to the deliberative and communicative functions of the body. Internal legislative communications and records concerning such matters accordingly are immune from compulsory disclosure by the Speech or Debate Clause, *see* ARIZ. CONST. art. IV, pt. 2, § 7.

The Senate has long acknowledged that the privilege "does not insulate 'all things in any way related to the legislative process.'" COA Petition at 16; Reply at 5.[3] Rather, the Senate has confined its claims of legislative privilege to confidential internal communications between and among legislators, legislative staff and legislative contractors and consultants relating to Audit planning, processes, and results.

This conception of the privilege bears a direct fidelity to decades of case law recognizing that there is simply "no support for the[] assertion that 'investigative' materials fall outside the protection of the Speech or Debate Clause." To the contrary, controlling precedents, including those of the U.S. Supreme Court, "have explicitly held otherwise." *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations of U.S. House of Representatives*, 20 F. Supp. 2d 41, 44 (D.D.C. 1998). Indeed, "the power to investigate is inherent in the

[3] Contriving a disagreement where there is none, the Court of Appeals curiously denounced the Senate's "apparent contention that the privilege blocks disclosure under the PRL of any record that bears any connection to a legislative function." COA Op. ¶ 21.

power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Eastland*, 421 U.S. at 504.

In denuding nearly all internal communications about the Audit of legislative privilege, the Court of Appeals reasoned 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." All three conclusions are erroneous and deviate substantially from this Court's precedents.

A. Investigative Communications Need Not Relate to Specific Legislation to Be Privileged

Because the Audit is a legislative investigation in aid of the Senate's policymaking responsibilities, it necessarily "relate[s] to proposed legislation or other matters placed within the jurisdiction of the legislature." *Fields*, 206 Ariz. at 137, ¶ 18. As the U.S. Supreme Court aptly explained, the legislative power to investigate "is broad and indispensable. It encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2019). In other words, the intrinsic purpose of legislative investigations is to amass facts that may (to varying degrees) inform the future judgments and decisions of

elected representatives. Accordingly, such inquiries necessarily bear a direct nexus to the act of legislating.

Dissatisfied with this intuitive proposition, the Court of Appeals insists that the Senate must make a "showing that the audit was . . . related to any proposed legislation." COA Op. ¶ 30. But legislative investigations are, by their very nature, antecedent to the task of drafting and debating particular legislation. As the U.S. Supreme Court observed in delineating the expansive scope of the congressional subpoena power in connection with an investigation of the Department of Justice:

> It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice-whether its functions were being properly discharged or were being neglected or misdirected. . . . Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

McGrain v. Daugherty, 273 U.S. 135, 177–78 (1927).

For this reason, courts have always sustained claims of legislative privilege in connection with investigations that are not necessarily tethered to some specific future lawmaking endeavor. *See Eastland*, 421 U.S. at 493 (ratifying pursuant to the Speech or Debate Clause a subpoena in furtherance of "a complete and continuing study and investigation of . . . the administration, operation, and enforcement of" a particular statute); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 11 (D.C. Cir. 2006) (holding that "making, publishing, presenting, and using legislative reports; authorizing investigations

and issuing subpoenas" are "integral" to the legislative process and hence covered by the Clause); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (privilege covered private corporate documents submitted by whistleblower); *U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 77 (D.D.C. 2008) ("So long as the Committee is investigating a matter on which Congress can ultimately propose and enact legislation," it was exercising a *bona fide* legislative function); *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016) (noting that "obtaining information pertinent to potential legislation ***or investigation***' is a legitimate legislative activity" (internal citation omitted; emphasis added)).

The same reasoning transposes directly onto these circumstances. As the Court of Appeals itself previously recognized, the Audit is an "official legislative activity," *Fann I*, 2021 WL 3674157, at *4, ¶ 19, aimed at evaluating the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties, with an eye to enacting potential reforms. In demanding a nexus to particular legislation, however, the Court of Appeals' peculiar, newfound conception of legislative privilege puts the proverbial cart before the horse. The purpose of many legislative inquiries, including this one, is to discern whether reform legislation is warranted at all, and if so, what ills it should seek to remedy. Indeed, Legislative Council reports that approximately 100 election-related bills already have been introduced in the new legislative session, some of which undoubtedly were induced by the Audit.

The legislative privilege reaches all legislative investigations. This principle illuminates the fallacy in the Court of Appeals' heavy reliance on *Steiger v. Superior Court*, 112 Ariz. 1 (1975). There, this Court held that the federal Speech or Debate Clause permitted the civil deposition of a congressional aide regarding the aide's meeting at a hotel with representatives of a private corporation. Preliminarily, *Steiger*'s conception of the federal Speech or Debate Clause is supplemented—if not superseded—by intervening federal cases emphasizing that "acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege." *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976); *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) (holding that "a Member's gathering of information beyond the formal investigative setting is protected by the Speech or Debate Clause").

More fundamentally, any attempted analogy to *Steiger* fails on its own terms. The communications in dispute here are not remotely akin to an *ad hoc* conversation in a hotel room between a legislative aide and a company's representatives. The Audit is a comprehensive inquiry structured and directed by the President of the Senate and the Chairman of the Judiciary Committee, and conducted in part under the auspices of valid and binding legislative subpoenas. Thus, even if the Court were to interpolate some "formality" precondition into the privilege analysis, the Audit conforms to it in any event.

B. The Audit Is Not an "Administrative" Function

If the Audit is not a "legitimate legislative act," COA Op. ¶ 30, then what is it? The Court of Appeals responds that it has "the hallmarks of an administrative action." *Id.* For two reasons, however, this statement is—and must be—wrong. First, the same tribunal previously held that the Audit is an "important legislative function," *Fann I*, 2021 WL 3674157, *4, ¶ 24. "Legislative" and "administrative" are mutually exclusive classifications; an act that is "legislative" necessarily cannot be "administrative." *See Mesnard v. Campagnolo*, 489 P.3d 1189, 1194, ¶ 16 (Ariz. 2021) (describing the dichotomy between legislative and administrative matters). Second, the term "administrative" denotes functions associated with the executive branch. *See id.* The Court of Appeals made no effort to expound on its baffling insinuation that a legislative inquiry into election integrity partakes of an executive branch activity, or to explain why other legislative investigations into the efficacy of existing laws do not carry the same character. *Contrast Eastland*, 421 U.S. at 504 (investigation into administration of existing law was legislative in nature).

C. The Audit Is Not a "Political" Function

The Court of Appeals ratified the Superior Court's disparagement of a Senate hearing as a "political act," reasoning that, regardless of the "label," it "lacked the hallmarks of traditional legislation." COA Op. ¶ 27. This canard is as disconcerting as it is incorrect. In the parlance of the privilege, the term "political act" connotes "'errands'

performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the [legislative body]." *United States v. Brewster*, 408 U.S. 501, 512 (1972); *Mesnard*, 489 P.3d at 1194, ¶ 16.

The hearing disdained by the lower courts was a formal proceeding convened by the President of the Senate and held inside the Senate chamber at the Arizona State Capitol; it entailed testimony from, and questions posed to, witnesses whose attendance was demanded by the presiding Senate officers. The undersigned's research has located no case in which a court arrogated to itself the power to unilaterally relegate to "political" or even "non-legislative" status an official proceeding convened by a legislative officer in the house chamber.[4]

II. A Showing of "Impairment" Is Not an Element of a Privilege Claim

The legislative privilege undisputedly exists "to prevent indirect impairment of [legislative] deliberations." *Fields*, 206 Ariz. at 137, ¶ 18 (quoting *Gravel*, 408 U.S. at

[4] To do so now is both substantively erroneous and institutionally inappropriate, and perhaps underscores why some have queried whether the "political" appellation might more appropriately attach to aspects of the *judiciary*'s conduct in Audit-related litigation. *E.g.*, Motion of Cyber Ninjas, Inc. to Disqualify Judicial Officer for Cause, *Phoenix Newspapers, Inc. v. Arizona State Senate*, LC2021-000180-001 (Jan. 12, 2022) (citing, *inter alia*, multiple political contributions by judge presiding over parallel proceeding to Democratic candidates and causes). Judge Kemp mooted the motion by *sua sponte* consolidating the *PNI* action with this case—a surprising development, given that Judge Kemp had previously twice denied the Senate's requests for consolidation.

625). The Court of Appeals erred, however, in straining to convert this foundational principle into an independent criterion that must be satisfied through some unspecified quantum of extrinsic factual proof. *See* COA Op. ¶ 32. As courts have noted pointedly, such a notion implies that each time legislative privilege is invoked, "an initial judicial inquiry would be required to calibrate the degree to which its enforcement would burden the [legislative body's] work." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859–60 (D.C. Cir. 1988). The argument is facially "absurd," *id.*, because the privilege "would be virtually worthless if courts judging its applicability had to scrutinize very closely the acts ostensibly shielded." *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1206 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quotation omitted). The Ninth Circuit likewise has concluded that legislative privilege attaches even to *former* lawmakers in connection with their erstwhile legislative acts, despite agreeing that "the rationale of preventing distraction from legislative duties is not applicable." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983). Indeed, although the Court of Appeals invoked *Fields* as ordaining its doctrinal invention, one will search the *Fields* opinion in vain for any indication that the Redistricting Commission had made any articulable showing of "impairment," or that the court had ever demanded that it do so.

In sum, if this Court were to mandate a factual showing of "impairment" of the legislative process attributable to a compulsory disclosure, it would be declaring a new

substantive limitation on the legislative privilege never previously adopted by any court in any jurisdiction.

III. When It Applies, the Legislative Privilege Is Absolute

Finally, this Court should reaffirm that the legislative privilege is "absolute," *Mesnard*, 489 P.3d at 1193, ¶ 12; *see also United States v. Rayburn House Office Bldg*, 497 F.3d 654, 660 (D.C. Cir. 2007) ("When the privilege applies it is absolute").

Remarkably, the Court of Appeals vacillated on this key question, embedding direct contradictions within its own opinion. At one point, the court repudiated the notion that "legislative privilege, even where applicable, necessarily defeats every public records request," but added that it "need not" decide the question. COA Op. ¶ 16. Later, however, it (correctly) held that "[t]o the extent the [superior] court reasoned that the state legislative privilege is qualified . . . this was error." *Id.* ¶ 20.[5]

The PRL nowhere purports to abrogate or restrict any constitutional privileges—and could not do so in any event. Not only is the Speech or Debate Clause superordinate to statutory enactments, but the legislative privilege is personal to each individual legislator. *Id.* ¶ 34. Even if it desired to do so, a legislative body could not permanently and perpetually divest all current and future legislators of a personal constitutional privilege.

[5] The court also confusingly faulted the Senate for asserting that courts cannot determine application of the privilege. COA Op. ¶ 20. The Senate did not advance that argument.

But if the Court finds that the PRL vitiates legal privileges, such a conclusion must embrace **all** privileges available to **all** litigants in **all** cases.

CONCLUSION

The Court should grant review and reverse the Court of Appeals' opinion in part.

RESPECTFULLY SUBMITTED this 25th day of January, 2022.

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