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. CV-22-0018-PR Court of Appeals No. 1 CA-SA 21-0216 Maricopa County Superior Court No. CV2021-008265

RESPONSE OF PETITIONERS TO THE BRIEF OF *AMICI CURIAE* PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO

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Petitioners Arizona Senate; Karen Fann, in her official capacity as President of the Arizona Senate; and Warren Petersen, in his official capacity as Chairman of the Senate Judiciary Committee (collectively, the "Senate") respectfully submit this Response to the brief of *amici curiae* Phoenix Newspapers, Inc. and Kathy Tulumello (collectively, "PNI").

I. The Audit is a Protected Legislative Function, Not an Administrative Function

The first twelve pages of PNI's *amicus* submission are a microcosm of its action in the Superior Court, *see Phoenix Newspapers, Inc. v. Arizona State Senate* (Maricopa County Superior Court No. LC2021-000180-001): a superfluous exercise in regurgitating arguments already advanced by American Oversight. Because "[n]obody benefits from a copycat *amicus* brief," *Prairie Rivers Network v. Dynergy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020), the Senate will not tarry over PNI's redundant ruminations.

It suffices to note that PNI's assertion that the Senate's audit of the 2020 general election in Maricopa County (the "Audit") is "more administrative than legislative," Br. at 7, would come as a surprise to its former self, which successfully argued to the Court of Appeals that "the Senate's decision to undertake the audit was premised on its oversight authority, an important legislative function." *Cyber Ninjas, Inc. v. Hannah*, 2021 WL 5183944, at *4, ¶ 19 (Ariz. App. Nov. 9, 2021). But the temerity of PNI's opportunistic backflip is more impressive than the merits

of its newfound position. PNI's purported distinction between an allegedly administrative "retrospective review" and a legislative "policymaking exercise with prospective effects," Br. 6, is both doctrinally unsound and practically unworkable. By definition, the predicate of any legislative investigation (or any investigation at all, for that matter) is events or transactions that have already occurred. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503–04 (1975) (committee's "continuing study and investigation of . . . the administration, operation, and enforcement of the Internal Security Act of 1950" fell within the "legitimate legislative sphere" of the Speech or Debate Clause); *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009) (investigation into the ethical propriety of congressman's past travel was protected by the Speech or Debate Clause); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (corporate documents provided by whistleblower in connection with congressional investigation into alleged past misdeeds were privileged). It is sufficient that the focus of the investigation—here, the integrity and reliability of existing ballot casting and tabulation processes—"concern[s] a subject on which legislation could be had." *Eastland*, 421 U.S. at 506 (internal citation omitted). PNI does not (and

cannot) plausibly controvert that the Audit findings will—or, at the very least, could—inform future policymaking projects.[1]

II. The Legislative Privilege Is Absolute and American Oversight Bears the Burden of Overcoming *Prima Facie* Privilege Claims

PNI's more original contribution consists of its exertions to transmogrify the Arizona Public Records Law, A.R.S. § 39-121, *et seq.* ("PRL"), into a *de facto* amendment of the Speech or Debate Clause, *see* ARIZ. CONST. art. IV, pt. 2, § 7, and invert the burden of proof regime that has always attended *in camera* review of privilege claims. PNI's argument on this score suffers from at least three defects—one factual, and two legal.

First, PNI contends that "[t]he Court of Appeals concluded that the[] vague descriptions [on the Senate's privilege log] were insufficient for the Senate to meet its burden." Br. at 4. That is incorrect. The Court of Appeals never opined (and was never asked to opine) on the legal sufficiency of particular privilege log entries.

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[1] PNI's curious insistence that claims of privilege over communications with "'persons who acted as consultants or vendors' go well beyond the narrow confines of the privilege," Br. at 8 (citation omitted), collides with the settled legal truism that "a legislator may invoke the legislative privilege to shield from inquiry the acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 140, ¶ 30 (App. 2003). If anything, the contours of the privilege applied by the Senate in this litigation are more constricted than the case law requires. *See, e.g.*, *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016) (privilege can reach even communications with lobbyists and constituents).

Rather, the court articulated its own conception of the legislative privilege *as a matter of law*—which was substantially narrower than that espoused by the Senate—and effectively remanded to the Superior Court the task of applying its formulation to particular disputed documents. *See* COA Op. ¶ 38.

Second, citing the PRL, PNI argues that the Senate "must prove specifically how the public interest outweighs the right of disclosure." Br. at 13 (quoting *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344 (App. 2001)). But this paralogism confounds an absolute constitutional privilege with a conditional statutory obligation. "[T]he legislative privilege is 'absolute' where it applies at all." *Brown & Williamson*, 62 F.3d at 416; *see also Mesnard v. Campagnolo*, 251 Ariz. 244, 248, ¶¶ 10, 12 (2021) (characterizing Speech or Debate Clause protections as "absolute"); COA Op. ¶ 20 ("To the extent the [superior] court reasoned that the state legislative privilege is qualified and subject to the same balancing tests as the federal common law privilege, this was error.").

By contrast, the canonical defenses to disclosures otherwise mandated by the PRL—namely, privacy rights, confidentiality and the best interests of the state—are of a common law provenance, and thereby subject to *ad hoc* judicial weighing. *See generally Carlson v. Pima Cty.*, 141 Ariz. 487, 490 (1984). As a superordinate and absolute constitutional prerogative that is "personal," COA Op. ¶ 34, to each legislator, the legislative privilege cannot be curtailed by statutory caveats or

common law limitations. Once a valid claim of legislative privilege is interposed, the bar to compulsory disclosure is absolute, and the inquiry is at an end.

Third, PNI believes it is the Senate's "burden to establish *in camera* review is unnecessary." Br. at 14. But this doctrinal novelty contradicts PNI's assurance just a few paragraphs earlier that "Rule 26(b) provides a familiar and reasonable standard courts can apply effectively in public records actions," *id.* As this Court has explained in the Rule 26 context, "the court may not view" putatively privileged documents unless and until **the challenger** "makes a factual showing to support a reasonable, good faith belief that the document is **not** privileged." *Lund v. Myers*, 232 Ariz. 309, 312, ¶ 15 (2013) [emphasis added]; *see also Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) ("Rock River's belief that the documents are not privileged appears to be based on little more than unfounded suspicion, and the district court correctly concluded that Rock River had not made the requisite factual showing to justify an *in camera* review."). Stated another way, PNI has it exactly backwards.

In support of its misconception, PNI invokes *Griffis v. Pinal Cty.*, 215 Ariz. 1 (2007)—a sleight of hand that ultimately falls flat. There, the Court countenanced the use of *in camera* review to determine whether a given document constitutes a "public record." *Id.* at 5, ¶ 15. Here, no one disputes that the documents itemized on the Senate's privilege log qualify as "public records," within the meaning of the

PRL. Rather, American Oversight and PNI ask the judiciary to infringe an asserted privilege of a coequal branch—an incursion that inevitably and irretrievably compromises the confidentiality of the disputed communications and materials. Even assuming *arguendo* that such an impingement ever can be consistent with the separation of powers, it must, at the very least, be premised on an affirmative and articulable "factual showing," *Lund*, 232 Ariz. at 312, ¶ 15, by American Oversight (or PNI) that each document or communication at issue is not privileged. *See Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 62 (D.D.C. 2007) (explaining that, given the doctrinal complexities of the legislative privilege and "the sensitive constitutional interests at stake, the Court will entrust the Members with the initial—and perhaps the ultimate—responsibility of applying" the privilege).

CONCLUSION

For the reasons stated herein and in the Senate's Petition for Review and Supplemental Brief, the Court should reverse or vacate the judgment of the Court of Appeals with respect to the issues presented for review.

RESPECTFULLY SUBMITTED this 11th day of April, 2022.

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