ARIZONA SUPREME COURT

NO. CV-20-0209-PR

Court of Appeals, Division One 1 CA-SA 20-0125

Maricopa County Superior Court CV2019-050782

JAVAN "J.D." AND HOLLY MESNARD,

Petitioners,

V.

HON. THEODORE CAMPAGNOLO, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

DONALD M. SHOOTER,

Real Party in Interest.

AMICUS BRIEF ON BEHALF OF KIRK AND JANAE ADAMS

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INTRODUCTION AND STATEMENT OF INTEREST

Kirk and Janae Adams are defendants in the underlying action, currently pending before the Arizona Superior Court, Maricopa County. Mr. Adams is the former Chief of Staff for Arizona Governor Douglas A. Ducey. Mr. Adams is also a former Speaker of the Arizona House of Representatives (the "House"). The issues presented in the Petition for Review are of immense importance to the Adams; indeed, they are of immense importance to the preservation of the separation of powers doctrine upon which American Government is founded. The recognition and protection of absolute legislative immunity in Arizona, consistent with the Arizona Constitution and Arizona and federal common law, are also essential to foster open debate and discussion among Arizona's elected leaders within the legislature, and critical to attract qualified individuals to serve in the legislature in the first instance.

Absolute legislative immunity bars Mr. Shooter's claims against Petitioners Javan (J.D.) and Holly Mesnard. Mr. Mesnard's alleged conduct – overseeing a House investigation of sexual harassment claims against Mr. Shooter, allegedly editing the investigative report, engaging in additional fact-finding relating to the sexual harassment allegations, and explaining his introduction of a House Resolution to expel Mr. Shooter – are all quintessential legislative acts for which Mr. Mesnard is absolutely immune from liability and about which Mr. Mesnard cannot be questioned. Mr. Shooter's effort to shift the focus away from the nature of the alleged underlying acts to suggest Mr. Mesnard acted with improper motives is misplaced. It is the act,

not its motive, the occasion for the speech, not its content, which gives rise to immunity. "Any other rule would frustrate the purposes for which immunity is granted" and should be rejected. *Sanchez v. Coxon*, 175 Ariz. 93, 97 (1993). The Superior Court erred when it denied the Mesnards' Motion to Dismiss on legislative immunity grounds. This Court should vacate the Superior Court's decision and remand with instructions to dismiss Mr. Shooter's claims against the Mesnards.[1]

LEGISLATIVE IMMUNITY BARS MR. SHOOTER'S CLAIMS

"It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). There is no dispute that Mr. Mesnard is the former Speaker of the House or that the alleged actions giving rise to Mr. Shooter's claims in the Amended Complaint concern Mr. Mesnard's conduct as Speaker of the House. The key issue in this case, thus, is whether the Speaker's alleged acts constitute "legislative activities." As set forth below, this Court's precedent, the abundance of federal common law addressing legislative immunity, and the breadth of protection afforded by the Speech or Debate Clause, decidedly tip in favor of granting immunity.

I. THE ORIGINS OF LEGISLATIVE IMMUNITY.

Legislative immunity afforded to state legislators in Arizona is borne out of the Speech or Debate Clause of the United States Constitution, Arizona's constitutional

[1] The Arizona Department of Administration, Risk Management Division, provides financial resources for the Adams' defense of the claim against them in the underlying action and the related preparation of this brief.

counterpart, and state and federal common law. *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶¶ 15-16 (App. 2003). The Clause provides:

> The Senators and Representatives …. shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; ***and for any Speech or Debate in either House, they shall not be questioned in any other Place***.

U.S. Const. art. I, § 6 (emphasis added); *see also* 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."); *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 137, n.4 (describing the differences between the federal and state Speech or Debate Clauses as "not significant" and confirming that "cases construing the federal Speech or Debate Clause and the federal common law are persuasive in interpreting the scope of the immunity and privilege afforded by the Arizona Constitution").[2] The Speech or Debate Clause originated from the English Bill of Rights of 1689 following "a long struggle for parliamentary supremacy." *United States v. Johnson*, 383 U.S. 169, 177-78 (1966); *see also Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 136, ¶ 15 (citing *Bogan*'s recognition of the "taproots" of legislative immunity); Todd Garvey, *Understanding the Speech or Debate Clause*, Congressional Research Service 1 (Dec. 1, 2017), *available at* https://fas.org/sgp/crs/misc/R45043.pdf. The Constitutional Clause was "a

[2] Arizona's Statutes further embrace and codify absolute immunity for the exercise of legislative functions by any public employee. *See* A.R.S. § 12-820.01(A) ("A public entity shall not be liable for acts and omissions of its employees constituting … [t]he exercise of a judicial or legislative function.").

reflection of political principles already firmly established in the States, *Tenney v. Brandhove*, 341 U.S. 367, 786 (1951), and "approved at the Constitutional Convention without discussion and without opposition." *Johnson*, 383 U.S. at 177.

As has long been recognized, the Speech or Debate Clause protects the integrity and independence of the legislature and underscores the separations of powers doctrine "deliberately established by the Founders" of American Government. *Id.* at 178. As the Supreme Court explained in *United States v. Johnson*:

> "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly [sic] administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers…. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others…." The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for ensuring the independence of the legislature.

Id. at 178-79 (quoting THE FEDERALIST NO. 48 (Cooke ed.)); *accord* 383 U.S. at 180-81 ("[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits…, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."); *Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch."); *Tenney*, 341

U.S. at 373 ("'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.'" (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896))).[3]

In recognition of and to effectuate the Speech or Debate Clause's purposes, the United States Supreme Court has repeatedly interpreted the Clause broadly. *See, e.g.*, *Gravel*, 408 U.S. at 618 ("Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."); *accord Johnson*, 383 U.S. at 179 (citing *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)); *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (citing *Johnson*, *Kilbourn*, and *Gravel*); *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 137, n. 4 (noting by 1910, the United States "Supreme Court had liberally construed the federal Speech or Debate Clause"). The Speech or Debate Clause, thus, affords absolute immunity to federal and state legislators for all words spoken, all actions taken, and any omissions alleged "in the sphere of legitimate legislative activity." *E.g.*, *Tenney*, 341 U.S. at 376.

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[3] As recognized by this Court, absolute legislative immunity serves several additional important purposes, including fostering vigorous and open debate among members of the Legislature, encouraging qualified candidates for office, and eliminating the time, expense and distraction of suits. *See Sanchez*, 175 Ariz. at 96-97 (reasoning, *inter alia*, that a qualified, as opposed to absolute, immunity, would hinder debate and discussion; noting that "[w]ithout absolute immunity, it could be argued that only the foolish or irresponsible would serve").

II. Protected Legislative Acts Include All Matters in the Sphere of Legitimate Legislative Activity.

As the Supreme Court has explained, protected legislative acts, although not immunizing all conduct a legislator or his or her agent takes, are broader than the literal terms of the Speech or Debate Clause and include other matters that are "an integral part of the deliberative and communicative processes" or which relate to matters "the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625 (emphasis added); *see also Bogan*, 523 U.S. at 54 ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" (quoting *Tenney*, 341 U.S. at 376); *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 137, ¶ 18; *cf.* Restatement (Second) of Torts § 590 (State or local legislative bodies are "absolutely privileged to publish defamatory matter concerning another in the performance of his legislative functions"). By contrast, administrative, ministerial or political acts are ***not*** traditionally legislative activities and, thus, do not receive the same protection. *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 137, ¶ 18 (citing *United States v. Brewster*, 408 U.S. 501, 512 (1972) and *Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir. 2000)). To determine whether acts fall within this protected "sphere," courts evaluate "whether the activities took place 'in a session of the House by one of its members in relation to the business before it.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503-04 (1975) (citation omitted).

Of note, the Speech or Debate Clause bars not only claims based on legislative

acts, it also bars claims based on ***arguably*** legislative acts. *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) ("[I]t is generally true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative, but also inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact....'" (quoting *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973)); *accord Eastland*, 421 U.S. at 508 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). This is necessarily so because the immunity attaches based on the context in which the act occurs ***not*** because of the conduct or content of the act itself. *See, e.g.*, *McMillan*, 412 U.S. at 312-13 (explaining that the Speech or Debate Clause provides immunity for acts performed in the "legislative sphere," "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes"); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (same); *Sanchez*, 175 Ariz. at 97 ("It is the occasion of the speech, not the content, that provides the privilege.").[4]

Speaking or acting on the floor of the House, speaking or acting in committee hearings or meetings, introducing bills and resolutions in the House, and voting on bills and resolutions are all quintessential legislative activities for which legislators are entitled to immunity under the Speech or Debate Clause. *See, e.g.*, *Kilbourn*, 103 U.S. at

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[4] Legislative immunity further extends beyond personal acts of legislators and includes acts of agents "that would be privileged legislative conduct if personally performed by the legislator." *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 140, ¶ 30.

204 (confirming that the Speech or Debate Clause protects offering and voting on bills and resolutions); *Gravel*, 408 U.S. at 616 (expressing "no doubt" that a legislator's acts during a subcommittee meeting are legislative activities entitled to protection); *McMillan*, 412 U.S. at 311-12 (stating that voting, committee reports, and conduct at committee hearings constitute conduct within the "sphere of legitimate legislative activity" and is protected under the Speech or Debate Clause).

Engaging in investigative activities also "plainly falls within" the "legitimate legislative sphere." *Eastland*, 421 U.S. at 504 ("The power to investigate and to do so through compulsory process plainly falls within that definition [of activities within the legitimate legislative sphere]. This Court has often noted that the power to investigate is inherent in the 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.'" (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927))); *accord Tenney*, 341 U.S. at 377 ("Investigations, whether by standing or special committees, are an established part of representative government."). As the Supreme Court confirmed in *Doe v. McMillan*:

> The acts of authorizing an investigation pursuant to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report were all 'integral part(s) of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places

> within the jurisdiction of either House. As such, the acts were protected by the Speech or Debate Clause.

McMillan, 412 U.S. at 313 (*quoting Gravel*, 408 U.S. at 625); *see also, e.g.*, *Carlos v. Santos*, 123 F.3d 61, 66-67 (2d Cir. 1997) (applying legislative immunity to bar claim alleging that members of town board hired consultant to investigate and produce a negative report concerning the town police department).

The formality of the investigative activities is immaterial. Whether through formal investigation by a standing or special committee, the formal issuance of subpoenas, or the informal fact finding, a legislator's investigation into the matters before the House are protected. *See, e.g.*, *Biaggi*, 853 F.2d at 103 (holding "legislative factfinding" trips protected); *McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976) (en banc) ("We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation…. 'The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.'" (quoting Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1154 (1973))).

Investigation into the activities of members of the legislative body, and the assessment of any sanctions as a result of those activities, is also protected legislative activity committed firmly in the Arizona Constitution to the legislative body. *See* Ariz.

Const. art. IV, pt. 2, § 11 ("Each house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds of its members, expel any member."); *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 411-12 (2006) (recognizing that Arizona Constitution does not limit the legislature's power to remove elected officers); *cf. Monserrate v. N.Y. State Senate*, 599 F.3d 148, 155-56 (2d Cir. 2010) (citing cases recognizing the unwavering power of the legislature to expel a member). As Courts across the nation have held, investigation into a member's conduct, recommending an outcome, and voting on that outcome – including expulsion – is a protected legislative activity. *See Rangel v. Boehner*, 20 F. Supp. 3d 148, 177-80 (D.D.C. 2013) ("Discipline Clause activities are plainly within that sphere" and serve an "integral and indispensable part[] of the legislative process"; holding defendants absolutely immune from suit under the Speech or Debate Clause) (citation omitted)); *Gamrat v. Allard*, 320 F. Supp. 3d 927, 936 (W.D. Mich. 2018) ("engaging in the investigation of Gamrat's and Courser's [members of Michigan House of Representatives] activities, recommending a particular outcome, and voting on Gamrat's expulsion" constitute protected "legislative activity"); *Whitener v. McWatters*, 112 F.3d 740, 741, 744 (4th Cir. 1997) (describing the right of a legislative body to investigate and discipline its members as a "core legislative act" and a "legislative power inherent even in the humblest assembly of men" (quotations omitted)).

Authorizing the publication or dissemination of a legislative report or document is further protected legislative activity, even if the ultimate act of

publication by an individual staff member falls outside of the Speech or Debate Clause. *Compare McMillan*, 412 U.S. at 317-18 ("It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for a suit."), *with id.* at 323 (concluding that the Public Printer and Superintendent of Documents, responsible for the actual printing and distribution of public documents, are not entitled to legislative immunity); *accord Kilbourn*, 103 U.S. at 202 (holding House members protected by absolute legislative immunity for their acts in adopting a resolution authorizing Kilbourn's arrest, but not extending protection to the individual(s) executing the arrest); *see also Green v. DeCamp*, 612 F.2d 368, 372 (8th Cir. 1980) (holding that release of report to news agencies is equivalent to "authorizing the report for publication" and, thus, a protected legislative activity).

The existence of legislative immunity does not turn on the nature of a plaintiff's claim.[5] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 7 ("No member of the legislature shall be liable in ***any*** civil or criminal prosecution . . . ." (emphasis added));

[5] The Superior Court's May 26, 2020 Under Advisement Ruling Regarding Motions to Dismiss reversed its prior grant of legislative immunity, reasoning that the cases upon which it had relied involved § 1983 claims. [*See* APP 028-029.] This is a distinction without a difference in the context of legislative immunity under the Speech or Debate Clause and federal common law. Moreover, the distinction cannot stand where the very language of the Speech or Debate Clause protects speech itself.

Ariz, Indep. Redistricting Com'n, 206 Ariz. at 137, ¶ 17 (recognizing that the immunity applies "in ***any*** judicial proceeding" (emphasis added)); *see also* U.S. Const. art. I, § 6 (stating that legislators "shall not be questioned in ***any*** other Place" (emphasis added)); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 29 (1st Cir. 1996) (applying legislative immunity to affirm the dismissal of federal § 1983 claims and state law claims for libel and slander, focusing on the alleged conduct instead of the nature of the claim asserted). A plaintiff's characterization of claims as sounding in tort (defamation, civil conspiracy) rather than under 42 U.S.C. § 1983 is simply immaterial to the application of legislative immunity. *See also Sanchez*, 175 Ariz. at 97 (adopting the absolute immunity concept of the RESTATEMENT (SECOND) OF TORTS § 590); RESTATEMENT (SECOND) OF TORTS § 590 ("A member of … a State or local legislative body is absolutely privileged to publish defamatory matter concerning another in the performance of his legislative function.").[6]

An act also does not lose immunity simply because a plaintiff claims an "unworthy purpose":

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost

[6] This Court in *Sanchez* expressly left "open possible further application or extension of the rule of absolute immunity" as discussed in § 590, comment "a." *Sanchez*, 175 Ariz. at 97, n.8. Consistent with federal common law, comment "a" confirms that this privilege "is not confined to conduct on the floor of the legislative body" and includes investigative work "or other work authorized by the legislative body, whether the work is performed while that body is in session or during a recess." RESTATEMENT (SECOND) OF TORTS § 590, cmt. a.

> and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377; *accord Johnson*, 383 U.S. at 180 ("[A] charge … that the Congressman's conduct was improperly motivated … is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."); *McSurely*, 553 F.2d at 1295 (en banc) (If "activity is arguably within the 'legitimate legislative sphere[,]' the Speech and Debate Clause bars inquiry even in the face of a claim of 'unworthy motive.'"). Similarly, "[a]n act does not lose its legislative character simply because a plaintiff alleges that it violated the House Rules, or even the Constitution. Such is the nature of absolute immunity, which is—in a word—absolute." *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) (internal citations omitted). "This leaves us [and it leaves this Court] with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative." *Bogan*, 523 U.S. at 55. Just as in *Bogan*, this Court should "have little trouble concluding that they were." *Id.*[7]

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[7] Mr. Shooter cites multiple Arizona cases in opposition to Mr. Mesnard's Petition. The cases upon which Mr. Shooter relies do not address absolute legislative immunity and are inapposite. *See Chamberlain v. Mathis*, 151 Ariz. 551, 553-55 (1986) (addressing qualified immunity for defamation claims asserted against executive officials); *City of Tucson v. Fahringer*, 164 Ariz. 599, 600 (1990) (involving a negligence claim against the City; addressing City's assertion of affirmative defenses); *Fidelity Sec. Life Ins. v. Dep't of Ins.*, 191 Ariz. 222, 225, ¶¶ 8-9 (1998) (addressing claim for absolute immunity for determinations of fundamental public policy; distinguishing such immunity from absolute legislative or judicial immunity); *Goddard v. Fields*, 214 Ariz. 175, 180, ¶ 24 (App. 2007) (involving executive immunity, not absolute legislative immunity); *Grimm v. Ariz. Bd. of Pardons & Paroles*, 115 Ariz. 260 (1977) (involving personal injury/wrongful death claims). The distinction between executive or other governmental immunity (addressed in Mr. Shooter's cases) and legislative immunity

III. LEGISLATIVE IMMUNITY INCLUDES PRIVILEGE FROM EXAMINATION.

In addition to granting immunity for legislative acts, the legislative immunity doctrine "functions as a testimonial and evidentiary privilege." *Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 137, ¶ 17; *see also, e.g.*, *United States v. Helstoski*, 442 U.S. 477, 488-89 (1979) (explaining the Speech or Debate Clause prohibits reference to or inquiry into past legislative acts, as such references "cannot be admitted without undermining the values protected by the Clause," even when that makes prosecution more difficult or where the references are essential to prove a claim); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2006) (addressing the evidentiary privilege under the Speech or Debate Clause). As the District of Columbia Circuit Court of Appeals explained in *Fields*, even if absolute legislative immunity does not bar a plaintiff's claim itself, the testimonial and evidentiary privileges may nevertheless require dismissal of claims if the prosecution of those claims will require inquiry into legislative acts or motives. *Fields*, 459 F.3d at 14-17 (explaining, in context of employment suit, if rebuttal of defendant's justifications for employee termination would require inquiry into protected legislative activity, "the action most likely must be dismissed"); *id.* at 19 (Tatel, C.J., concurring) ("Judge Randolph then points out that the Speech or Debate Clause may preclude some evidence, that in many employment cases it may preclude the very evidence upon which plaintiffs seek to rely, and that if it does, the suit may

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(relevant to the Mesnards' Petition) is further confirmed by Arizona's Revised Statutes. *Compare* A.R.S. § 12-820.01(A)(1), *with* A.R.S. § 12-820.01(A)(2)-(B), *and* A.R.S. § 12-820.02.

not proceed.”). Indeed, “[t]his rule makes sense because, in order to defend the suit fully, the member or aide would have to respond to any evidence of legislative acts introduced against him, no matter the source of the evidence, and the member's silence might work to his disadvantage.” *Id.* at 32 (Brown, C.J., concurring).

IV. LEGISLATIVE IMMUNITY AND LEGISLATIVE PRIVILEGE BAR MR. SHOOTER'S CLAIMS AGAINST THE SPEAKER OF THE HOUSE.

Mr. Shooter's Amended Complaint is, respectfully, difficult to follow and pleads a number of different allegations, some of which relate to the claims remaining in this action and for which Mr. Mesnard seeks immunity, and others which bear no apparent relation to the claims in this action. Stripped of the noise, adjectives, and repeated allegation of improper motive or intent, Mr. Shooter's Amended Complaint essentially challenges the following conduct allegedly taken by Mr. Mesnard as Speaker of the House or by House staff: (i) the hiring of the law firm of Sherman & Howard to investigate allegations of misconduct by House Members, including Mr. Shooter; (ii) the editing of Sherman & Howard's resulting investigatory report; and (iii) the authorization of an allegedly defamatory press release. [*See* Mr. Shooter's Supplemental Brief, p. 2.[8]] When “stripped of all considerations of intent and motive,” the challenged conduct plainly falls within the sphere of legitimate legislative activities. *See Bogan*, 523 U.S. at 55.

[8] Mr. Shooter argues Mr. “Mesnard issued a press release not about legislative activities, but to attack and defame Shooter politically ....” [Supplemental Brief, pp. 2, 15.] This allegation that this document did not address “legislative activities,” but was instead a political attack, is not found in the Amended Complaint.

Case after case recognizes that investigative actions, whether through standing or special committees, retention of independent investigators, or informal fact finding, "plainly falls within" the "legitimate legislative sphere." *Eastland*, 421 U.S. at 504; *see also, e.g.*, *Tenney*, 341 U.S. at 376; *McMillan*, 412 U.S. at 313; *Carlos*, 123 F.3d at 66-67; *McSurely*, 553 F.2d at 1295. This is especially and necessarily true when the subject of the investigation is alleged misconduct of the legislative body's own members. *See Whitener*, 112 F.3d at 744 (discipline of members is a "legislative power inherent even in the humblest assembly of men" (quotations omitted)); *see also Rangel*, 20 F. Supp. 3d at 177-78; *Gamrat*, 320 F. Supp. 3d at 936. Allegations that Mr. Mesnard, as House Speaker, hired or authorized the hiring of Sherman & Howard to investigate allegations of misconduct levied against Mr. Shooter are plainly within the scope of legitimate legislative activities for which Mr. Mesnard is entitled to absolute immunity.

Mr. Shooter's allegations that Speaker Mesnard edited the Sherman & Howard investigative report prior to its release suffer the same fate, particularly as "[i]t is the occasion of the speech, not the content," out of which immunity arises. *See Sanchez*, 175 Ariz. at 97. The preparation of the investigative report falls squarely within and is an integral part of – indeed the culmination of – the House's investigation into the allegations of member misconduct. Legislative immunity, thus, bars any claims based on such conduct to the same extent as it bars claims based upon the investigative activities themselves or the subsequent introduction of legislation to expel Mr. Shooter. *See, e.g.*, *McMillan*, 412 U.S. at 311-13 (stating that voting, preparing reports,

and conduct at hearings are within the "sphere of legitimate legislative activity"); *see also Rangel*, 20 F. Supp. 3d at 177-78; *Gamrat*, 320 F. Supp. 3d at 936.

Authorizing the publication or dissemination of House documents, including the Sherman & Howard investigative report or subsequent news release (the "House News Release") regarding Speaker Mesnard's additional investigative activities and introduction of a House Resolution, is likewise a protected legislative activity. *See McMillan*, 412 U.S. at 317-18; *Green*, 612 F.2d at 372. This remains true even if the ultimate ministerial or administrative act (taken by another) of actually publishing the report or House News Release to media outlets is actionable. Just as in *McMillan*, where the Supreme Court granted immunity to a legislator who, as a protected legislative activity, authorized the publication of documents, Speaker Mesnard is entitled to legislative immunity for his alleged authorization of the release or publication of documents. *See* 412 U.S. at 317-18, 323. To be clear, even if Mr. Shooter was able to bring a claim against the actual publisher of the report or House News Release for the administrative act of publishing the documents, he chose not to do so.[9] Mr. Shooter's decision to challenge the legislative conduct of Mr. Mesnard in authorizing the publication has consequences: legislative immunity bars the claim.

In addition to legislative immunity against suit, Mr. Shooter's claims against Mr. Mesnard are also barred, as a practical matter, by the legislative privilege against

[9] The Communications Director, whose office is responsible for the administrative act of disseminating news releases, is identified on the House News Release upon which Mr. Shooter bases his defamation claim. [APP 147.]

inquiry into Speaker Mesnard's legislative activities. In particular, Mr. Shooter has alleged claims against Mr. Mesnard that require proof of motive – actual malice – by clear and convincing evidence. *See, e.g.*, *Chamberlain*, 151 Ariz. at 559. Unable to inquire into or introduce evidence of the Speaker's legislative activities, Mr. Shooter will not be able to prove the requisite actual malice.[10] His claims, in turn, may not proceed. *See Fields*, 459 F.3d at 32 (Brown, C.J., concurring) ("This rule makes sense because, in order to defend the suit fully, the member or aide would have to respond to any evidence of legislative acts introduced against him, no matter the source of the evidence, and the member's silence might work to his disadvantage.").

In short, Mr. Shooter's position in this litigation regarding the scope of legislative immunity – and his attempt through artful (or inartful) pleading to narrow the scope of absolute legislative immunity – contravenes decades of federal common law and Arizona precedent and undermines the salient purposes of the Speech or Debate Clause. To begin, Mr. Shooter's position encourages litigation against members of the Legislature regardless of whether the conduct ultimately at issue (*i.e.*, stripped of all allegations of motive or purpose) constitute legitimate legislative activities. Any plaintiff wanting to challenge legitimate legislative acts taken by a

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[10] By way of example, legislative privilege bars Mr. Shooter's inquiry into Mr. Mesnard's conduct related to the Sherman & Howard investigation of Mr. Shooter; Mr. Mesnard's subsequent additional investigative activities, including interviewing the witness referenced in the House News Release at issue in the Amended Complaint; Mr. Mesnard's evaluation of Mr. Shooter's conduct as violating the House's policy against sexual harassment; Mr. Mesnard's decision to introduce legislation expelling Mr. Shooter; and Mr. Mesnard's motivations for any of the above.

member that plainly fall within the legislative sphere – for example, investigations and reports commissioned by Members of the House on issues within the jurisdiction of the House or actions carried out by that Member's agents and/or assistants, such as outside legal counsel – could file a lawsuit and overcome absolute legislative immunity by artful pleading alone. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 522 (1978) (Rehnquist, J., concurring in part) (mere allegations of impropriety or unconstitutionality "obviously unproved at the time made" would allow "any legal neophyte" to overcome immunity and, in turn, effectively abolish the doctrine).[11] Such a result flouts courts' uniform refusal to consider alleged motives or intentions in determining legislative acts. *See, e.g.*, *Eastland*, 421 U.S. at 508.

This Court has further recognized the "chilling effect" an erosion of absolute legislative immunity would have on vigorous and open debate by elected officials. Thorough consideration of and debate regarding information before the legislative body are crucial for careful deliberations and decisions on issues within the legislative sphere. Hindering such discussions intrudes on legislators' ability and obligation to carry out their responsibilities, to the detriment of the public. *See Sanchez*, 175 Ariz. at 96-97; *see also Tenney*, 341 U.S. at 377. Narrowing absolute legislative immunity for Members of the House further undermines the integrity and independence of our

[11] Mr. Shooter's position would also undermine recognized privileges in Arizona, as erosion of legislative immunity necessarily also erodes its attendant privileges. *See Ariz. Indep. Redistricting Comm'n*, 206 Ariz. at 136, ¶ 15 (recognizing legislative privilege, as an important function relating to legislative immunity, springing from the Speech or Debate Clause and separation of powers principles).

Legislature and will dissuade qualified citizens from serving in elected positions. *See Sanchez*, 175 Ariz. at 96-97 ("Without absolute immunity, it could be argued that only the foolish or irresponsible would serve[.]"). Such a result must be rejected.

CONCLUSION

The Speech or Debate Clause, and legislative immunity born therefrom, is critical to the integrity and independence of our Legislature, and the preservation of the separation of powers doctrine upon which American Government is founded. This Court should interpret the Speech or Debate Clause broadly and fairly, consistent with Arizona and federal common law, to effectuate its purposes – not undermine them. When viewed in the proper context, and in light of the authority detailed above, the required result is clear. Mr. Mesnard is entitled to legislative immunity for all acts within the sphere of legitimate legislative activities, including all acts that form the basis of Mr. Shooter's claims. The claims must, therefore, be dismissed.

RESPECTFULLY SUBMITTED this 22nd day of January, 2021.

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