IN THE SUPREME COURT 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, vs. THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, AMERICAN OVERSIGHT, PHOENIX NEWSPAPERS, INC., AND KATHY TULUMELLO, Real Parties in Interest.	Case No. CV-22-0018-PR Arizona Court of Appeals Division One No. 1 CA-SA 2021-0216 Maricopa County Superior Court Nos. CV2021-008265 and LC2021-000180-001 (Consolidated)

REAL PARTIES IN INTEREST PHOENIX NEWSPAPERS, INC.'S AND KATHY TULUMELLO'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

David J. Bodney, Bar No. 006065
Craig C. Hoffman, Bar No. 026017
Matthew E. Kelley, Bar No. 037353
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555

Telephone: 602.798.5400
Facsimile: 602.798.5595
Email: bodneyd@ballardspahr.com
Email: hoffmanc@ballardspahr.com
Email: kelleym@ballardspahr.com
Attorneys for Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes & Other Authorities

Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") hereby respond in opposition to the Petition for Review of a Special Action Decision of the Court of Appeals (the "Petition" or "Pet.") by Petitioners Karen Fann, Warren Petersen, and Arizona Senate (together, the "Senate").

Introduction

This case is *not* about "just this once" remedies motivated by "partisan fervor" running roughshod over the legislature's constitutional prerogatives, as the Senate hyperbolically claims. Pet. at 1. Rather, it is about courts of this state properly rejecting the Senate's unfounded and unbounded claims of legislative privilege to evade its duties under the Public Records Law to provide the promised transparency into the operation of its audit of the 2020 election results in Maricopa County (the "Audit").

Here, the Superior Court and Court of Appeals correctly recognized that, under settled Arizona law, the narrow legislative privilege applies only to matters that are an integral part of the deliberative and communicative processes of legislating and whose release would indirectly impair those deliberations. The courts below applied this

Court's holdings that the legislative privilege does *not* shield administrative or political matters that, while proper legislative undertakings, are not themselves directly involved in the process of crafting, debating and enacting actual legislation.

This Court should deny review of the Petition because the courts below did not err, nor are there any conflicting rulings of the Court of Appeals. The Senate's Petition is but its latest attempt to circumvent its duty to participate in the *in camera* review process in trial court and produce public records *promptly*, as required by Arizona law. However, if this Court does grant review, it should deny the Senate the relief it seeks and affirm the Court of Appeals, which simply applied established law to the record before it.

Statement of the Case

The Senate's Petition fails to fully explain the factual and procedural history of this case – principally, by failing to apprise this Court of PNI's special action over Audit-related public records that was consolidated with American Oversight's special action *before* the Senate filed this most recent of its Petitions for Review. Nor does it attempt to distinguish PNI's interest in the public records at issue from American

Oversight's lawsuit, preferring instead to cast the dispute in partisan rhetoric rather than straightforward legal rights and duties.

On August 19, 2021, the Court of Appeals rejected the Senate's assertions that it was immune from special actions to enforce its compliance with the Public Records Law regarding Audit-related public records. *See Fann v. Kemp* ("*Fann I*"), No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834 (Aug. 19, 2021), *review denied,* 2021 Ariz. LEXIS 333 (Sept. 14, 2021). The Senate then released a privilege log listing *thousands* of records it was withholding pursuant to claims of legislative and other privileges. Both American Oversight and PNI challenged the withholdings in their respective actions, including, as relevant here, on grounds that the Senate improperly claimed legislative privilege for hundreds of emails and text messages. As the Court of Appeals later noted: "According to the Senate's privilege log, the emails contain 'internal legislative discussions regarding [the] audit,' while the text messages refer to 'communications re: legislative investigation and audit process.'" *Fann v. Kemp* ("*Fann II*"), No. 1 CA-SA 21-0216, 2022 Ariz. App. LEXIS 17, at *5 ¶ 8 (Jan. 21, 2022).

In the American Oversight action, Judge Kemp held that the Senate failed to meet its burden to show that the legislative privilege applied to the withheld records because the privilege log provided insufficient information to conclude that the Audit-related discussions were "an integral part of the deliberative and communicative processes relating to proposed legislation" and were "necessary to prevent indirect impairment of such deliberations." *Id.* ¶ 9. In PNI's action, Judge Hannah also found the Senate's privilege claims to be inadequate, concluding after an *in camera* review of a sampling of six withheld records that only a small portion of one of them actually qualified for the privilege's protection. A true and correct copy of that ruling is attached hereto as Exhibit A.

The Senate challenged Judge Kemp's ruling in a special action at the Court of Appeals, which resulted in the ruling at issue here. *See Fann II*, ¶ 12. The Court of Appeals affirmed Judge Kemp's ruling that the legislative privilege does not shield *all* of the records listed on the Senate's privilege log, holding that the Senate had not shown either that the Audit "was in any way related to any proposed legislation" or that

releasing the withheld records would impair legislative deliberations. *Id.* ¶¶ 30, 32.

Counterstatement of Issues Presented

1. Did the Court of Appeals err in holding that the legislative privilege did not apply to all Audit-related public records the Senate described on its privilege log as containing "internal legislative discussions regarding [the] audit" or "communications re: legislative investigation and audit process"?

2. Did the Court of Appeals err in holding that the Senate failed to meet its burden to show the legislative privilege applied to the withheld public records because it did not attempt to show how releasing the records would indirectly impair legislative deliberations?

Argument

I. THIS COURT SHOULD DENY REVIEW BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED ESTABLISHED LAW.

Under Arizona Rule of Procedure for Special Actions 8(b) and Arizona Rule of Civil Appellate Procedure 23(d)(3), this Court has discretion to grant or deny a petition for review of a Court of Appeals ruling on a special action. This Court should exercise its discretion to

deny review because, as discussed in more depth in the sections that follow, the Court of Appeals' ruling faithfully applied settled law. Thus, there are no conflicting decisions by the Court of Appeals and no important issues of law have been incorrectly decided. *See* Ariz. R. Civ. App. P. 23(d)(3). Further, granting review would only serve to further frustrate the Public Records Law's goal of prompt public access to records of government activities in a case that already has been pending for some nine months. A.R.S. § 39-121.01(D)(1); *see also, e.g.*, *ACLU of Ariz. v. Ariz. Dep't of Child Safety*, 248 Ariz. 26, 31 ¶15 (App. 2020) (delay of nearly five months violated promptness requirement).

II. IF THIS COURT GRANTS REVIEW, IT SHOULD AFFIRM THE COURT OF APPEALS AND DENY RELIEF TO THE SENATE.

If this Court decides to grant review, it should deny the relief the Senate seeks and affirm the Court of Appeals, which correctly applied Arizona law regarding legislative privilege. The Court of Appeals properly held that the scope of the legislative privilege does not extend to shield all communications among legislators, their agents and employees regarding the Audit. The court below also correctly applied existing law in holding that the Senate had not met its burden to show that the public

records it has withheld are an integral part of the Senate's deliberative and communicative processes whose release would impair those deliberations.

A. The Court of Appeals Correctly Held That Legislative Privilege Does Not Protect All Audit-Related Documents Listed on the Senate's Privilege Log.

The Court of Appeals should be affirmed because it appropriately applied existing Arizona law in concluding that the Senate has not justified its withholding of Audit-related public records on the grounds of legislative privilege. Assuming, as the Court of Appeals did, that the Audit was a legitimate legislative undertaking, the Audit nevertheless was not so intertwined with the process of proposing and enacting legislation as to render privileged all of the Audit-related communications for which the Senate claims privilege.

i. The Court of Appeals Correctly Recognized That Communications Regarding Legislative Investigations Are Not Automatically Privileged.

The Senate asserts that *all* legislative investigations "are integral to the deliberative and communicative functions of the body," and therefore "[i]nternal legislative communications and records concerning

such matters accordingly are immune from compulsory disclosure." Pet. at 6. But legislative privilege is not that broad. Courts must narrowly construe all constitutional, common law and statutory privileges and legislative privilege "does not apply to all legislative-related conduct in all circumstances." *Fann II*, ¶¶ 19, 21. Rather, as the Court of Appeals recognized, *id.* ¶ 24, legislative 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.'" *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶ 18 (App. 2003) (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972) (emphasis added)).

The Court of Appeals applied this settled law and concluded that, although "[t]he legislature has the power to conduct investigations aimed at determining the need for new legislation," *Fann II*, ¶ 28, the Audit was not so closely connected with the process of proposing and enacting legislation as to be integral to that process, *id.* ¶ 28. Key to that finding was the fact that "[n]othing in the record shows that the prime purpose

of the audit was to identify changes required to Arizona's voting laws" and no election legislation was pending at the time. *Id.* ¶ 26.

As the Court of Appeals correctly observed, the self-described purpose of the Audit was to "verify that election procedures were sufficiently observed" and to "validate every area of the voting process to ensure the integrity of the vote." *Id.* ¶¶ 26, 30. The Court of Appeals concluded: "In short, the Senate has made no showing that the Audit was in any way related to any proposed legislation." *Id.* ¶ 30. This was not the dire corrosion of legislative power that the Senate imagines, Pet. at 5, but rather the proper application of existing law to the circumstances in the record before the court.

While the Senate argues its Audit-related records must be subject to the legislative privilege because the Court of Appeals previously concluded that the Audit was an "official legislative activity," the Court of Appeals found that description was not sufficient to shroud all Audit-related records with the legislative privilege. *Id.* ¶ 16. The principle that not every legitimate act within a legislator's power is privileged is illustrated by *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103 (App. 2012). There, the Independent Redistricting Commission asserted

legislative privilege over records regarding its selection of a consultant to assist with drawing legislative district boundaries. *Id.* at 123 ¶ 78. Drawing district lines, of course, is the Commission's constitutionally mandated, legislative function. *Id.* at ¶ 76. But the Court of Appeals rejected the Commission's argument that hiring a mapping consultant was covered by the legislative privilege because, "while such decisions are related to the legislative process and may facilitate the creation of districts, they do not themselves bear the 'hallmarks of traditional legislation by reflecting a discretionary, policymaking decision.'" *Id.* at ¶ 79 (quoting *Fields*, 206 Ariz. at 138 ¶ 21). Here, like the Commission's selection of a mapping consultant, the Audit is related to and may facilitate the process of formulating legislation, but it is not in itself legislating. Put differently, that legislative investigations "bear a direct nexus to the act of legislating," Pet. at 8, does not categorically mean that privilege applies to *all* documents and communications about every investigation conducted by any legislator. *See Fann II*, ¶ 28.

The Senate attacks the Court of Appeals' ruling in part by attempting to shift the terms of its invocations of legislative privilege, claiming that "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, processing and results." Pet. at 8. But the Senate's claims of legislative privilege below were much broader: all "emails contain[ing] 'internal legislative discussions regarding [the] audit,' [and] text messages refer[ring] to 'communications re: legislative investigation and audit process.'" *Fann II*, ¶ 8. The Senate cannot fault the courts below for basing their rulings on the overly broad and vague assertions of privilege it made in its log. *See id.* ¶ 30.

ii. *The Court of Appeals Did <u>Not</u> Hold That All Audit-Related Communications Are Unprivileged.*

The Senate also falsely accuses the Court of Appeals of "denuding nearly all internal communications about the Audit of legislative privilege." Pet. at 7. The Court of Appeals' ruling does not slam the door on all invocations of privilege related to the Audit, however; it merely holds that the Senate's blanket claims of legislative privilege are insufficient. *Fann II*, ¶ 30. Indeed, the Court of Appeals explicitly stated that

> the Senate is not necessarily foreclosed from establishing the privilege applies as to individual records that could

> conceivably fall within the *Gravel/Fields* framework. We express no opinion, however, whether the Senate can meet its burden of showing that any of the records listed in the privilege log are protected by the legislative privilege.

Fann II, ¶ 35. The ruling's provision for *in camera* review, *id.* ¶ 38, would be meaningless if the Court of Appeals had held that records related to the Audit are categorically unprivileged. But that, unfortunately, is what the Senate is telling this Court, and it is not the case.

iii. The Senate Mischaracterizes the Law Regarding Legislative Privilege and Investigations.

The Senate's claim that "courts have *always* sustained claims of legislative privilege in connection with investigations that are not necessarily tethered to some specific future lawmaking endeavor," Pet. at 8 (emphasis added), is also false. *Steiger v. Superior Court*, 112 Ariz. 1 (1975), is binding precedent of this Court directly to the contrary. There, this Court held that discussions involving an aide to a member of Congress and third parties were *not* shielded by legislative privilege, despite the lawmaker's assertion that those discussions were in furtherance of his investigation of issues that eventually led to proposed legislation and committee hearings. *Id.* at 2-4.

Without addressing *Steiger*'s direct contradiction of its false characterization of the law, the Senate unsuccessfully attempts to distinguish the case. Pet. at 10. Contrary to the Senate's contentions, the aide's *ad hoc* meeting with third parties in furtherance of a lone Congressman's investigation is quite similar to the Audit, which was launched by Petitioners Fann and Petersen as individual officers of the Senate, *not* as a result of a vote by the Senate or its committees and *not* in connection with any specific legislation. Moreover, the federal cases extending the legislative privilege to informal investigations by members of Congress, Pet. at 10, do not override this Court's or the Court of Appeals' holdings to the contrary.

iv. The Court of Appeals Correctly Recognized That Communications Regarding Administrative Activities Are Not Privileged.

The Senate contends that the Court of Appeals wrongly observed that the Audit has "the hallmarks of an administrative action" in discussing why the privilege does not attach. Pet. at 11. The court correctly discussed the fact that the legislative privilege does not apply to administrative acts, and the Senate's contention that only Executive

Branch actions can be "administrative" within the meaning of the legislative privilege is pure sophistry.

First, it would make no sense for courts, least of all this one, to have held that the *legislative* privilege does not apply to administrative matters if administrative matters are exclusively an *executive* branch function. Second, the case the Senate cites – *Mesnard v. Campagnolo*, --- Ariz. ---, 489 P.3d 1189 (2021) – does not support the Senate's contention. In the cited passage of *Mesnard*, this Court explained that "[a]dministrative matters undertaken by legislators, *such as exhorting an executive branch agency to administer a law in a particular way*, are similarly unprotected" by legislative privilege. *Id.* at 1194 ¶ 16 (emphasis added). The Court of Appeals was on solid ground in determining that the Audit, whose Statement of Work shows that its "primary objective was to verify that election procedures were sufficiently observed," *Fann II*, ¶ 26, was more akin to an exhortation to executive agencies to act in a particular way than a deliberative process undertaken to formulate legislation.

Further, communications about "Audit planning [and] processes," Pet. at 6, are likely not privileged because they concern the

administration of the Audit rather than any legislative deliberations. As was the case in *Montgomery*, where hiring a consultant was an administrative task not integral to the legislative work of redistricting, 231 Ariz. at 123-24 ¶ 80, so too the planning and execution of the Audit are not integral to any *legislative* process.

v. Describing a Hearing in the Senate Chamber as "Political" Is Irrelevant, Even if Inaccurate.

The Senate's gripe that the Court of Appeals and Superior Court "disparage[d] the Senate's hearing on the Audit report as a 'political act,'" Pet. at 2, 11-12, is likewise unavailing.[1] Here, "political" is nothing more than a descriptive term, not an epithet. The lower courts used the term to distinguish "political" acts that are not subject to the legislative privilege as a matter of law. *See Fann II*, ¶ 27. Like the Audit itself, the "hearing" was not a proceeding of the full Senate or any of its committees. As the Court of Appeals noted, its stated purpose was to lay out the findings and conclusions of the Audit; it did not involve any debate or

[1] The Senate's use of this discussion to indulge in baseless *ad hominem* attacks on the courts below, Pet. at 12 n.4, is as inappropriate as it is unseemly.

deliberating, nor did the two legislators question the "witnesses" present. *Id.* It was not, therefore, an integral part of the process of legislating, the Court of Appeals said, whether or not the term "political" was an accurate description. *Id.* As the Court of Appeals did not itself determine that the hearing was "political," let alone base its ruling on such a finding, it is mere *obiter dictum* and there is nothing about this issue that this Court need address.

Because the Court of Appeals appropriately applied Arizona law to the claims of legislative privilege in the Senate's privilege log, this Court should affirm that ruling and deny the Senate the relief it seeks.

B. The Court of Appeals Correctly Held That the Senate Failed to Show Releasing the Disputed Records Would Impair Legislative Deliberations.

The Court of Appeals also did not err in holding that the Senate had not made the required showing that releasing the Audit-related public records it claims are privileged would impair legislative deliberations. Again, the court did not break any new ground but simply applied an uncontested principle of existing law established by this Court decades ago: the proponent of the legislative privilege has the burden to show that it applies. *Fann II,* ¶ 19 (citing *Steiger*, 112 Ariz. at 3).

To repeat, it is settled law that legislative privilege applies *only* to "matters [that] are 'an integral part of the deliberative and communicative processes' relating to proposed legislation . . . *and* 'when necessary to prevent indirect impairment of such deliberations.'" *Fields*, 206 Ariz. at 137 ¶ 18 (quoting *Gravel*, 408 U.S. at 625) (emphasis added). Thus, showing that the privilege applies necessarily requires showing that the records at issue *both* are an integral part of the legislature's deliberative and communicative processes *and* that their release would impair legislative deliberations.

The Court of Appeals did not engage in any unprecedented "doctrinal invention," nor did it mandate any "factual showing of 'impairment,'" as the Senate exaggerates. Pet. at 13. It simply held that the Senate failed to meet its burden to show the privilege applies to the withheld public records, partly because the Senate did not even attempt to explain how releasing those records would impair legislative deliberations. *Fann II*, ¶ 32. The Senate cannot excuse its own failure to meet its burden in this regard by acting as if one criterion for the

privilege is merely a "foundational principle" with no practical application. Pet. at 13.[2]

This Court should deny the Senate relief and affirm the courts below because the law is clear that the proponent of a legislative privilege must show it applies and that the privilege applies only when necessary to prevent indirect impairment of legislative deliberations, and because it is undisputed that the Senate did not show releasing the records at issue would cause such an impairment.

Conclusion

For the foregoing reasons, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny review of the Petition or, if it grants review, deny the relief requested by Petitioners Karen Fann, Warren Petersen, and Arizona Senate and affirm the Court of Appeals.

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[2] The Senate's exhortation to this Court to "reaffirm that the legislative privilege is 'absolute,'" Pet. at 14, is unnecessary and unwarranted. There is no need to "reaffirm" this principle because the Court of Appeals acknowledged that the privilege is absolute when it applies. *Fann II*, ¶ 20 ("Once a court determines that legislative privilege attaches, it is absolute in nature.").

Respectfully submitted this 4th day of February, 2022.

By: */s/ David J. Bodney*

David J. Bodney
Craig C. Hoffman
Matthew E. Kelley
BALLARD SPAHR LLP
1 East Washington St, Suite 2300
Phoenix, Arizona 85004
602.798.5400
Email: bodneyd@ballardspahr.com
Email: hoffmanc@ballardspahr.com
Email: kelleym@ballardspahr.com

Attorneys for Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello