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, Real Party in Interest.	Case No. CV-22-0018-PR Arizona Court of Appeals Division One No. 1 CA-SA 2021-0216 Maricopa County Superior Court Case No. CV2021-008265 (Consolidated with No. LC2021-000180-001)

BRIEF OF *AMICI* PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO

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; hoffmanc@ballardspahr.com; kelleym@ballardspahr.com
Attorneys for Amici Phoenix Newspapers, Inc. and Kathy Tulumello

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

Interest of Amici

Pursuant to this Court's February 15, 2022 Order and Ariz. R. Civ. App. P. 16(a)(3), *Amici* Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") file this brief on their own behalf and without an external sponsor. PNI's special action seeking access to public records regarding the Audit has been consolidated in Maricopa County Superior Court with American Oversight's special action, and this Court's ruling here will materially affect PNI's interests in that pending litigation.

Introduction

Through this latest special action attempting to justify the withholding of key communications regarding its audit of 2020 Maricopa County election results (the "Audit"), the Arizona Senate is once again attempting to undermine "the strong policy favoring open disclosure and access, as articulated in Arizona statutes and case law." *Cox Ariz. Publ'ns v. Collins*, 175 Ariz. 11, 14 (1993). The position the Senate advocates would make its broad and vague invocations of legislative privilege essentially immune from any challenge by public records requestors or any meaningful review by the courts. That is not what Arizona law allows, and this Court should not provide legislators the

wholesale exemption from the Public Records Law that the Senate seeks. The time for the Senate to start producing public records that were first requested nearly a year ago – and to stop frustrating the public's right to prompt inspection of these records – has well and truly come.

After this Court denied review of the Court of Appeals' ruling that the Senate was not immune from the Public Records Law, the Senate attempted to do via legislative privilege what it could not do via legislative immunity: withhold from public scrutiny key communications about the Audit that are unquestionably public records. Both the Superior Court and the Court of Appeals rejected this latest attempt to end-run the Public Records Law, correctly recognizing that the Senate's vague privilege log entries were insufficient to meet its burden to show that the legislative privilege applied to each of the hundreds of communications for which the Senate claimed the privilege. *See Fann v. Kemp* ("*Fann II*"), --- Ariz. ---, 2022 Ariz. App. LEXIS 17, at *1-2, ¶¶ 1-2 (App. Jan. 21, 2022).

This Court's Order setting the briefing schedule in this action phrased the questions presented as follows:

> 1. Did the Court of Appeals err in holding that the legislative privilege generally does not apply under the

Gravel/Fields analytical framework to communications concerning the planning, execution, or results of the Audit, on the grounds that the Audit (a) does not relate to "pending legislation" or "other matters placed within the jurisdiction of the legislature," (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?

3. What is the nature and extent of the information that must be provided in a privilege log to invoke legislative immunity; and what is the burden on the party seeking disclosure to trigger in camera review?

February 15, 2022 Order at 2. PNI address each of these questions in the sections that follow.

Argument

I. THE COURT OF APPPEALS APPROPRIATELY REJECTED THE SENATE'S VAGUE AND OVERBROAD INVOCATIONS OF LEGISLATIVE PRIVILEGE.

This Court should affirm the Court of Appeals because it faithfully applied existing Arizona law in concluding that the Senate's privilege log was insufficient to meet its burden to justify withholding of Audit-related public records on the grounds of legislative privilege.

The Court of Appeals correctly held that under the *Gravel/Fields* framework that governs the legislative privilege under Arizona law, "the

privilege extends to matters beyond pure speech or debate in the legislature *only* when such matters are 'an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the legislature, *and* '*when necessary* to prevent indirect impairment of such deliberations.'" *Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 24 (citing *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 (App. 2003)) (quoting *Gravel v. United States,* 408 U.S. 606, 625 (1972) (emphasis added)). The Court of Appeals also correctly noted that "[t]he legislator asserting the privilege has the burden to show that the *Gravel/Fields* framework is satisfied." *Id.* (citing *Steiger v. Superior Ct.*, 112 Ariz. 1, 3 (1975)).

The Senate withheld or redacted hundreds of Audit-related records, describing them on its privilege log as containing "internal legislative discussions regarding [the] audit" or "communications re: legislative investigation and audit process." *Id.* ¶ 8. The Court of Appeals concluded that these vague descriptions were insufficient for the Senate to meet its burden, and thus the court "reject[ed] the Senate's broad assertion that

the legislative privilege covers every legislative communication listed in its privilege log." *Id.* ¶ 30.

A. The Audit Was Not an Integral Part of the Deliberative and Communicative Processes Regarding Pending Legislation or Other Matters Within the Senate's Jurisdiction.

The Senate argues that the withheld public records are privileged because the Audit was a legislative investigation on a subject about which legislation "could be had," and, alternatively, an "other matter" within the Legislature's constitutional purview, namely, oversight of the elections process. Senate Supp. Br. at 2-10. Arizona's legislative privilege is not so broad as to cover investigations such as the Audit launched by individual lawmakers and untethered to any actual legislation. *See Steiger*, 112 Ariz. at 3-4 (rejecting claim of legislative privilege by member of congress over communications in the course of his unilateral "investigation" because there was "no showing that the investigation was related to any pending congressional inquiry or legislation").

To be sure, as the Court of Appeals acknowledged, "[t]he legislature has the power to conduct investigations aimed at determining the need for new legislation." *Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 28. But "[n]ot

everything a legislator does qualifies as a legislative act," *id.* ¶ 23, and *Steiger* and similar precedents teach that "the mere fact that the legislature conducted an investigation does not mean it is necessarily protected by the legislative privilege," *id.* ¶ 28. Rather, the privilege is confined to actions with a legislative character – *i.e.*, those that involve a "discretionary, policymaking decision that may have prospective implications." *Id.* ¶ 27 (quoting *Fields*, 206 Ariz. at 138, ¶ 21).

The Audit was not an integral part of the deliberative process of legislating because it was unconnected to any legislative proposal, whether pursuant to the Legislature's responsibility to "secure the purity of elections and guard against abuses of the election franchise," Ariz. Const. art. VII, § 12, or otherwise. It was a retrospective review of Maricopa County's administration of the 2020 election and a recount of ballots, not a policymaking exercise with prospective effects. Communications regarding the Audit, therefore, are not categorically exempt from public disclosure under legislative privilege.

B. The Court of Appeals Correctly Recognized Legislative Privilege Does Not Apply to Administrative or Political Functions.

Under Arizona law, legislative privilege does not attach to administrative or political[1] actions not integral to the process of legislating. *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 123-24, ¶¶ 79-80 (App. 2012); *Fields*, 206 Ariz. at 137, ¶ 18; *see also Mesnard v. Campagnolo*, 251 Ariz. 244, 249 ¶ 16 (2021) (same regarding legislative immunity). Because the Audit's primary purpose was "to verify that election procedures were sufficiently observed," the Court of Appeals correctly concluded that the Audit is more administrative than legislative and thus outside of the umbrella of legislative privilege. *Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 26. This holding aligns with this Court's recent ruling in *Mesnard*, which described unprivileged administrative matters to include "exhorting an executive branch agency to administer a law in

[1] The privilege's application to political matters is not at issue here. The Court of Appeals did not hold that the Audit was a "political" act outside the scope of the legislative privilege. *See Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 27. The Senate also asserts that it is not claiming legislative privilege for political communications such as those with political party leaders or discussions of media strategy or press releases. Senate Supp. Br. at 12 n.6.

a particular way." 251 Ariz. at 249, ¶ 16. That was certainly a primary aim of the Audit.

Relatedly, even if the Audit itself were a legislative function protected to some extent by legislative privilege, administrative and political acts in connection with the Audit remain outside the privilege's scope. The Senate claims legislative privilege for communications involving the process, planning and execution of the Audit, which are administrative functions and therefore not protected by the privilege. *See Montgomery*, 231 Ariz. at 123-24, ¶¶ 78-80 (Independent Redistricting Commission communications regarding hiring a mapping consultant were administrative acts not covered by legislative privilege because while hiring the consultant facilitates the district-drawing process, their hiring "precedes the IRC's discretionary policy-making decisions related to its legislative function of redistricting"). Similarly, the Senate's claims of legislative privilege for lawmakers' communications with persons who are neither legislators nor their employees – "persons who acted as consultants or vendors," Senate Supp. Br. at 2 n.1 – go well beyond the narrow confines of the privilege.

Because the Audit was not the type of legislative function that gives rise to legislative privilege, and because even the Senate's vague descriptions of the records indicate that many of them are administrative in any event, this Court should affirm the Court of Appeals and deny the Senate the relief it seeks and remand to the Superior Court to perform the necessary review to determine whether the withheld records are privileged.

II. THE SENATE MUST EXPLAIN HOW LEGISLATIVE FUNCTIONING WOULD BE IMPAIRED TO MEET ITS BURDEN TO SHOW LEGISLATIVE PRIVILEGE APPLIES.

The Senate asserts that it has no obligation to make any showing that releasing the contested public records would impair legislative functioning, and claims the Court of Appeals erred by supposedly requiring "affirmative proof of some tangible legislative 'impairment' [a]s a precondition to the invocation of legislative privilege." Senate Supp. Br. at 14-16. It is wrong on both counts.

As discussed *supra*, under the *Gravel/Fields* framework, legislative privilege applies only where (1) the matter involved was "'an integral part of the deliberative and communicative processes' relating to proposed legislation or other matters placed within the jurisdiction of the

legislature," *and* (2) "*when necessary* to prevent indirect impairment of such deliberations.'" *Fields*, 206 Ariz. at 137, ¶ 18 (citation omitted) (emphasis added); *see also Montgomery*, 231 Ariz. at 122, ¶ 75 (same). The Senate conveniently elides "when necessary" from its quotations of this case law in making its inaccurate argument that avoiding impairment of legislative functions is just a "practical purpose or normative objective" for the privilege. Senate Supp. Br. at 14. Legislative impairment is not merely a description of the purpose of the legislative privilege, it is a requirement for the privilege to apply.

Indeed, in every public records case, a public body or public official wishing to withhold records must "*specifically demonstrate* how production of the documents would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state.'" *Cox*, 175 Ariz. at 14 (emphasis added); *see also, e.g.*, *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, ¶ 22 (App. 2007) (same); *KPNX-TV v. Superior Court*, 183 Ariz. 589, 592 (App. 1995) (same). Similarly, whenever a legislator claims legislative privilege, "the legislator has 'the burden of establishing that [the] matter is privileged.'" *Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 19 (quoting *Steiger*, 112 Ariz. at 3);

see also id. ¶ 24 (same). Thus, when the basis for withholding public records is the legislative privilege, the required showing by the government must include a showing that releasing the records would indirectly impair legislative functioning.

The Court of Appeals held that the Senate did not even attempt to meet its burden to show impairment, which the Senate does not and cannot dispute. *Fann II*, 2022 Ariz. App. LEXIS 17, ¶ 32. The Court of Appeals did not require the Senate to provide affirmative proof or make any kind of factual showing; it simply noted that the Senate was required to make *some* showing of legislative impairment but did not bother to do so. *Id.* The showing required is the same showing for any other claim of exemption from the public records law.

The Senate's apocalyptic rhetoric regarding separation of powers, Senate Supp. Br. at 17, is curious given that it made no effort to explain to the Superior Court how releasing the public records at issue here would impair legislative functioning. Regardless, there is no threat to separation of powers here. A court determining whether a legislator or legislative body can properly withhold public records no more infringes on separation of powers than the court doing the same regarding a

governor's documents. *See Mathews v. Pyle*, 75 Ariz. 76, 81 (1952). This Court definitively settled the issue some 70 years ago: "It rests within the jurisdiction of the courts of the state to determine" whether government records may be withheld or must be released. *Id.* There is no reason for this Court to reverse course now.

III. THE SENATE'S PRIVILEGE LOG MUST CONTAIN SUFFICIENT DETAIL TO MEET ITS BURDEN TO SHOW IT PROPERLY WITHHELD PUBLIC RECORDS, AND THE SENATE CANNOT SHIFT ITS BURDEN TO THE PARTIES SEEKING DISCLOSURE.

It is well settled that in actions under the Public Records Law, the party seeking to withhold public records "has the burden of overcoming 'the legal presumption favoring disclosure.'" *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9 (1998) (quoting *Cox*, 175 Ariz. at 14); *see also, e.g., Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 395, ¶ 10 (App. 2011) (same); *Ellis*, 215 Ariz. at 273, ¶ 22 (same). The courts below correctly found that the Senate did not meet this burden with a privilege log which relied on vague boilerplate assertions rather than descriptions sufficient to allow opposing parties and the courts to evaluate the merit of the privilege claims.

A. The Proponent of Legislative Privilege Must Provide a Reviewing Court With Sufficient Information to Determine the Privilege Applies.

Over and over again, Arizona courts have stressed that in public records cases, "[t]he official who wishes to withhold public documents must prove specifically how the public interest outweighs the right of disclosure." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 349, ¶ 19 (App. 2001). Where, as here, a public official attempts to meet her burden to justify withholding public records via a privilege log, the log entries must sufficiently establish that any claimed privilege applies to each withheld document.

While this Court has not laid out specific criteria for public bodies to meet their burden, it is reasonable that such privilege log entries must, at a minimum, "describe the nature of that [record] in a manner that—without revealing information that is itself privileged or protected—will enable other parties to assess the claim." Ariz. R. Civ. P. 26(b)(6)(A)(i); *see also Vanoss v. BHP Copper Inc.*, 244 Ariz. 90, 100, ¶ 32 (App. 2018) (affirming award of attorneys' fees against party whose privilege log failed to comply with Rule 26(b)(6)(A)(i)). Although it is true that the Rules of Civil Procedure governing discovery do not directly apply here,

there is no reason why the standard required to justify withholding public records under legislative privilege should be any less than that required to justify withholding purportedly privileged documents in civil discovery. Rule 26(b) provides a familiar and reasonable standard courts can apply effectively in public records actions.

Without a more detailed privilege log or in camera review, the court below will have no way of determining whether the public records the Senate is withholding are actually privileged. The Senate should not get a free pass here.

B. The Party Withholding Public Records Has the Burden to Establish In Camera Review Is Unnecessary.

This Court and the Court of Appeals have long encouraged in camera review of disputed public records to determine whether the government has met its burden to justify withholding them, beginning with the seminal case of *Mathews*. There, this Court rejected the governor's contention, similar to the Senate's here, that he could unilaterally determine what records could be released to the public. 75 Ariz. at 81 (remanding to trial court "to require the supplemental documents and letter in question to be produced in court for the private examination of the trial judge in order that the court may determine

whether [they] are confidential and privileged or whether their disclosure would be detrimental to the best interests of the state."). *See also, e.g.*, *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5, ¶15 (2007) (trial courts "***should perform an in camera review***" to determine if disputed documents are public records) (emphasis added); *Mitchell v. Superior Court*, 142 Ariz. 332, 334 (1984) (noting this Court has "asked trial courts to make *in camera* inspections of the relevant documents and balance the rights of the parties" when government records were withheld); *Lunney v. State*, 244 Ariz. 170, 179, ¶ 29 (App. 2017) ("*In camera* review is appropriate when competing interests may limit disclosure."); *Schoeneweis v. Hamner*, 223 Ariz. 169, 171, ¶ 2 (App. 2009) (holding "a court must conduct an *in camera* review before permitting the release" of medical examiners' records because of the "significant privacy concerns" involved).

Further, "[i]n camera review of disputed documents also reinforces this Court's previous holding that the courts, rather than government officials, are the final arbiter of what qualifies as a public record." *Griffis*, 215 Ariz. at 5, ¶ 15; *see also Mathews*, 75 Ariz. at 81 ("It rests within the jurisdiction of the courts of the state to determine" whether a public

record may be properly withheld.). Contrary to the Senate's misconceptions, in camera review *protects* any available privilege by ensuring that truly privileged records are kept out of public view. *See, e.g.*, *Little v. Gilkinson*, 130 Ariz. 415, 417 (App. 1981) ("The confidentiality of police files is adequately protected by the kind of *in camera* inspection made by the trial court in this case.")

As discussed *supra*, this Court has made it crystal clear that the law creates a presumption of disclosure of public records and therefore the burden is *always* on the party withholding public records to show that secrecy is proper to protect privacy, confidentiality or the best interests of the state. *E.g.*, *Cox*, 175 Ariz. at 14 ("The burden fell squarely upon Collins, as a public official, to overcome the legal presumption favoring disclosure."). Put differently, "[t]he burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access." *Mitchell*, 142 Ariz. at 335.

In other words, if it is possible to persuade a court that the records at issue are so clearly exempt from disclosure that an in camera review

is unnecessary, that burden rests squarely on the shoulders of the party seeking to evade judicial review. Otherwise, government officials could use broad and essentially unreviewable privilege claims to hide public records, effectively arrogating to themselves the decision of what the public is allowed to know about what their government is doing. That, clearly, not only violates Arizona law but "is inconsistent with all principles of [d]emocratic [g]overnment." *Mathews*, 75 Ariz. at 80-81.

The standard the Senate demands – that for each disputed document, a requestor must supply a factual basis for a reasonable belief that the privilege does not apply, Senate Supp. Br. at 19[2] – would turn 70 years of public records jurisprudence on its head. Indeed, it would upend an attribute of Arizona government since statehood: "Historically," as this Court has observed, "this state has always favored

---

[2] The cases the Senate cites for this proposition involve neither legislative privilege nor public records; they involve either situations where both sides to the dispute already have the records at issue or where the court must determine whether the crime-fraud exception to attorney-client privilege applies. *See, e.g.*, *State ex rel. Adel v. Adleman*, --- Ariz. ---, 2022 Ariz. LEXIS 75 (Feb. 9, 2022) (dispute regarding inmate's allegedly privileged communications with legal team obtained by prosecution); *In re Grand Jury Investigation*, 974 F.2d 1068, 1073 (9th Cir. 1992) (applying standards for in camera review of attorney-client privileged documents where crime-fraud exception is claimed).

open government and an informed citizenry." *Arizona Newspapers Ass'n, Inc. v. Superior Court*, 143 Ariz. 560, 564 (1985). Yet the Senate's proposal would allow legislators to foreclose via invocations of legislative privilege precisely what the Public Records Law requires: that the courts, not legislators, make the final calls regarding what public records may be withheld from the Arizonans they purportedly represent and whose taxes fund their salaries. If the legislature thinks the law should be otherwise, it should amend it, and hold itself accountable to the people for its handiwork. This Court should keep the burden where it belongs: with the persons withholding the public records.[3]

Conclusion

For the foregoing reasons, *Amici* Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny the Petition and its relief sought in its entirety.

[3] The Senate's request that this Court hold it is entitled to a change of judge on remand should be rejected because it is procedurally improper, as it was neither raised in the Senate's Petition nor included in any of the issues on which this Court granted review.

Respectfully submitted this 21st day of March, 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 Amici Phoenix Newspapers, Inc. and Kathy Tulumello