ARIZONA SUPREME COURT

JAVAN "J.D." and HOLLY MESNARD, husband and wife, Petitioners, v. HON. THEODORE CAMPAGNOLO, Respondent, DONALD M. SHOOTER, Respondent-Real Party in Interest,	No. CV-20-0209-PR Court of Appeals No. 1 CA-SA-20-0125 Maricopa County Superior Court No. CV2019-050782

BRIEF OF AMICUS CURIAE RUSSELL BOWERS, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

///

CONSTITUTIONAL PROVISIONS

STATUTES

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2018, a bipartisan supermajority of his colleagues expelled Donald M. Shooter from the Arizona House of Representatives. The superior court allowed Mr. Shooter to assert defamation claims against Javan "J.D." Mesnard, the former Speaker of the House, based on allegations about Mr. Mesnard's actions leading up to that expulsion. Russell Bowers, the current Speaker of the House, submits this short brief to explain why Mr. Mesnard's alleged acts were legislative acts and are therefore absolutely privileged against Mr. Shooter's claims.[1]

ARGUMENT

1. "[L]egislative immunity … shield[s] individual officials from personal liability for their legislative acts." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 314, ¶ 28 (Ariz. 2020). "[T]he legislative immunity shielding members of the Arizona legislature is rooted in both federal common law and the Arizona Constitution," and attaches when legislators "are acting within their 'legitimate legislative sphere.'" *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136–37, ¶¶ 15–16 (App. 2003) (quoting *Gravel v. United States*, 408 U.S. 606, 624 (1972)).

"Whether an act is 'legislative' depends on the nature of the act." *Id.* at 138,

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[1] Speaker Bowers, the presiding officer of the Arizona House of Representatives, files this brief pursuant to Rule 16(b)(1)(A) of the Arizona Rules of Civil Appellate Procedure. No group or organization has sponsored this brief or provided financial resources for its preparation. The brief was prepared by the undersigned counsel, who is general counsel of the Arizona House of Representatives.

¶ 21. Among other things, "a legislative act occurs in 'a field where legislators traditionally have power to act.'" *Id.* (quoting *Bogan v. Scott-Harris*, 524 U.S. 44, 56 (1998)). While the legislative privilege "does not apply to political acts" or "administrative tasks," it does extend to "matters [that] are an integral part of the deliberative and communicative processes relating to … matters placed within the jurisdiction of the legislature, … and when necessary to prevent indirect impairment of such deliberations." *Id.* at 137, ¶ 18 (internal quotation marks and citations omitted). Although the privilege has deep historical roots, courts apply it in light of "modern" legislative realities. *Id.* at 139–40, ¶¶ 27 & 29.

2. As an initial matter, it is unclear exactly which of Mr. Mesnard's acts are at issue here. The superior court appears to have focused on Mr. Shooter's allegations that "Mr. Mesnard defamed [him] by adding to or removing portions from the Sherman & Howard report before it was shown to the House Members or to the public," and that "Mr. Mesnard's press release contained untrue and defamatory statements." APP 027. Mr. Shooter's opposition to the petition for review focused on those same two acts: Mr. Mesnard's supposed "surreptitious editing of the Sherman & Howard report" and his subsequent "press release." Opp. to Pet'n for Rev. at 9, 12. But Mr. Shooter's supplemental brief goes farther, apparently claiming that Mr. Mesnard defamed him by "releasing" or "issu[ing]" the report, and also by "retain[ing] a law firm to create" it. *E.g.*, Shooter's Supp. Br. at 11–12, 14.

That Mr. Shooter cannot seem to settle on how, exactly, Mr. Mesnard is supposed to have defamed him is revealing. But regardless, all of these alleged acts fall within the "legitimate legislative sphere" and are therefore privileged against Mr. Shooter's claims. *AIRC*, 206 Ariz. at 136, ¶ 15.

3. Our constitution authorizes each house of the Legislature to "punish its members for disorderly behavior, and … with the concurrence of two thirds of its members, expel any member." Ariz. Const., art. 4, part 2, § 11. The constitutional power to punish members for disorderly behavior necessarily entails the power to investigate whether such behavior occurred. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[T]he 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 ….'"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Investigations … are an established part of representative government."). Even accepting Mr. Shooter's allegations as true, Mr. Mesnard was performing these "core legislative function[s]," and so his alleged acts are "protected by legislative privilege." *Edwards v. Vesilind*, 790 S.E.2d 469, 480 (Va. 2016).

a. To begin, Mr. Mesnard is clearly immune from claims based on his "retain[ing] a law firm to create" an investigative report regarding Mr. Shooter's conduct. Shooter's Supp. Br. at 14. As the court of appeals has recognized, "the modern, part-time legislature, in light of budgetary constraints, contracts with expert

consultants on a variety of subjects," and so the legislative privilege protects "the acts of independent contractors that would be privileged legislative conduct if personally performed by the legislator." *AIRC*, 206 Ariz. at 140, ¶¶ 29–30. *See also Eastland*, 421 U.S. at 507 ("draw[ing] no distinction between the Members [of Congress] and the Chief Counsel" of an investigative subcommittee). If legislative immunity applies to lawyers' performing legislative work, then surely it applies to legislators' retaining those lawyers in the first place.

b. Legislative immunity also clearly bars Mr. Shooter's defamation claim based on Mr. Mesnard's supposed "surreptitious editing of the Sherman & Howard report to remove exculpatory information about Shooter." Opp. to Pet'n for Rev. at 9. More than two centuries ago, the Massachusetts Supreme Judicial Court extended the legislative privilege "to the making of a written report" or "draughting a report." *Coffin v. Coffin*, 4 Mass. 1, 27–28 (1808); *see AIRC*, 206 Ariz. at 137, ¶ 17 (quoting *Coffin* approvingly). It follows that legislative immunity applies to the editing of a report, which is an integral part of the report-making or -drafting process.

c. Legislative immunity should also apply to Mr. Mesnard's "release" of the investigative report. Shooter's Supp. Br. at 18. Construing the Speech and Debate Clause of the federal constitution, the U.S. Supreme Court repeatedly has held that "committee reports are protected" by legislative immunity. *Gravel*, 408 U.S. at 624. The Court also has concluded that "Members of Congress are themselves immune

for ordering or voting for a publication [even] going beyond the reasonable legislative function," even if others are not "always" so immune. *Doe v. McMillan*, 412 U.S. 306, 314–15 (1973).

Here, the release of the investigative report was well within the reasonable legislative function. Since statehood, the Arizona Constitution has authorized the House of Representatives to "expel" a member for "disorderly behavior." Ariz. Const., art. 4, part 2, § 11. Yet expulsion is an extraordinary remedy. In fact, Mr. Shooter was only the third member of the House of Representatives to be expelled by his colleagues in Arizona history. And when the House takes that grave step, its members—and particularly its presiding officer, the Speaker—are dutybound to disclose the behavior that precipitated it. Here, they were also legally bound to do so, because the report was a public record. *See* A.R.S. § 39-121 (requiring that "[p]ublic records" be "open to inspection by any person at all times during office hours"). That is true regardless whether Mr. Shooter disputes the report's substance. *See* Shooter's Supp. Br. at 19; A.R.S. § 41-151.18 (defining "records").

d. For similar reasons, legislative immunity should extend to Mr. Mesnard's press release explaining his reasons for moving to expel Mr. Shooter. True, the U.S. Supreme Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), held that the "transmittal of … information [about Congressmembers' activities] by press releases and newsletters is not protected by the Speech and Debate Clause" of the federal

constitution, in part because "they represent the views and will of a single Member." *Id.* at 133. But to categorically exclude press releases from legislative immunity would contravene this Court's directive that "[i]t is the occasion of the speech, not the content"—and presumably not the format—"that provides the privilege." *Sanchez v. Coxon*, 175 Ariz. 93, 97 (1993). Moreover, the Speaker is not simply a "single Member" of the House; he is its presiding officer, who is authorized by a constitutionally-based rule to speak and act for the body as a whole. And on the solemn and rare occasion that the Speaker moves to expel another member, the Speaker must be able to explain why—not only to the body, but also to the member's constituents, the Capitol community and members of the public who interact with him, and the voters more generally. That this explanation may (and often will) prove embarrassing to the member being expelled is all the more reason why it must be absolutely privileged against a suit like this.

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CONCLUSION

Each of Mr. Mesnard's alleged acts falls within the legitimate legislative sphere and is therefore absolutely privileged against Mr. Shooter's claims. The Court should vacate the superior court's decision and order that Mr. Shooter's claims be dismissed.

Respectfully submitted this 22nd day of January, 2021, by:

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