

## ARIZONA SUPREME COURT

KAREN FANN, et al.,

Petitioners,

v.

HON. MICHAEL KEMP, Judge of  
the Superior Court, Maricopa  
County,

Respondent Judge,

AMERICAN OVERSIGHT,

Real Party In Interest.

No. CV-22-0018-PR

Court of Appeals

Division One

No. 1 CA-SA 21-0216

Maricopa County

Superior Court

No. CV2021-008265

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### MOTION FOR RECONSIDERATION

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Pursuant to [Rule 22](#), Ariz. R. Civ. App. P., Real Party in Interest American Oversight (“AO”) requests that the Court reconsider and revise its August 31 opinion (“Opinion”) to address AO’s outstanding fee request by: (1) acknowledging that AO prevailed in part, and (2) directing the trial court to consider that partial success when deciding any forthcoming fee application.

Reconsideration and revision are appropriate because the Opinion neither mentioned nor decided AO’s request<sup>1</sup> for attorneys’ fees, and AO prevailed in part given this Court’s holding that Petitioners’ privilege log must be revised so as not to “defeat transparency in government activities as required by law.” *Fann v. Kemp*, \_\_ Ariz. \_\_, 2022 WL 3905322, at \*8 ¶ 34 (Ariz. Aug. 31, 2022). And there is no question that AO has always sought a revised privilege log as relief in this dispute. [See **Exhibit 1** (9/17/2021 Motion to Compel Documents Withheld on Legislative Privilege Grounds, at 10-11 (exhibits omitted))]

On these facts, this Court’s remand and instructions to Petitioners about required revisions to their privilege log are a part of AO’s success in this long-running public records litigation, a case in which AO has

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<sup>1</sup> See AO’s Response to Petition for Review at 17.

“substantially prevailed” by creating new law and securing the release of thousands of previously withheld public records. See *Am. C.L. Union of Arizona v. Arizona Dep't of Child Safety*, 251 Ariz. 458, 461 ¶ 14 (2021) (“[A] party has ‘substantially prevailed’ if, after a comprehensive examination by the trial court, it was more successful than not in obtaining the requested records, defeating the government’s denial of access to public records, or securing other relief concerning issues that were contested before litigation was initiated.”). As a result, this Court should revise the Opinion to (1) acknowledge AO’s partial success, and (2) direct the trial court to consider that partial success when considering any fee application that AO may file.<sup>2</sup>

RESPECTFULLY SUBMITTED: September 8, 2022.

**COPPERSMITH BROCKELMAN PLC**

By: /s/ D. Andrew Gaona

Keith Beauchamp

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<sup>2</sup> In the alternative, AO has no objection to the Court issuing a separate order to this same effect.

# **EXHIBIT 1**

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9 **ARIZONA SUPERIOR COURT**  
10 **MARICOPA COUNTY**

11 AMERICAN OVERSIGHT, ) No. CV2021-008265  
12 )  
13 Plaintiff, ) **PLAINTIFF’S MOTION TO COMPEL**  
14 v. ) **DOCUMENTS WITHHELD ON**  
15 KAREN FANN, et al. ) **LEGISLATIVE PRIVILEGE**  
16 Defendants. ) **GROUND**  
17 ) (Oral Argument set for October 7, 2021 at  
18 ) 10:30 a.m.)  
19 ) (Assigned to the Hon. Michael W. Kemp)

19 Arizonans continue to be deprived of their right to review public records possessed by  
20 Defendants relating to the “audit” of Maricopa County’s 2020 election results. Pursuant to this  
21 Court’s orders, on August 31, 2021 Defendants finally produced documents purportedly  
22 responsive to American Oversight’s (“AO”) April and May 2021 public records requests and  
23 supplied a privilege log.<sup>1</sup> But a review of those records—and the accompanying privilege  
24 log—makes clear that Defendants used this four-month delay to separate the wheat from the

25 <sup>1</sup> On September 14, 2021, following an earlier meet and confer with counsel, Defendants  
26 supplied a revised privilege log and produced additional documents. [See Ex. 1]

1 chaff so they could produce the chaff and withhold the wheat, almost entirely on grounds of  
2 “legislative privilege.”

3 Defendants’ view of legislative privilege—like their since-rejected view of legislative  
4 immunity—is wildly overbroad. Defendants now rely on legislative privilege to shield from  
5 public view virtually every communication between or among Senator Fann, Senator Peterson,  
6 Senate Liaison Ken Bennett and/or Senate Liaison Randy Pullen relating to the Audit. They  
7 also cite legislative privilege to shield from review communications between any of the  
8 aforementioned individuals on the one hand and anyone at Cyber Ninjas or the various  
9 subcontractors who are conducting the audit on the other.

10 Defendants have withheld virtually every substantive text message and email about the  
11 audit while providing AO (and the public at large) with many thousands of pages of irrelevant  
12 materials, such as multiple copies of newspaper articles, generic emails from members of the  
13 public commenting on the audit and even multiple copies of already-public filings from this  
14 and other litigation. But the documents produced provide no answers to the fundamental  
15 questions that AO’s requests sought public records to help answer: Where are the funds to pay  
16 Cyber Ninjas and its subcontractors coming from and what conduits are being used to pay  
17 them? What were the funders promised in return for their payments? How and why was Cyber  
18 Ninjas selected to conduct the audit? Who participated in that decision and what input did they  
19 receive? What are Cyber Ninjas and the various subcontractors actually doing? Who is  
20 directing them? Why was Senate Liaison Bennett physically barred from the audit grounds for  
21 a period of time? What caused him to publicly announce his resignation as liaison, and then be  
22 persuaded to rejoin the team? All of these questions, and more, remain unanswered. And surely  
23 the answers will be found in the public records the Defendants continue to withhold.

24 Defendants were ordered on August 2, 2021 to produce “all documents and  
25 communications relating to the planning and execution of the audit, all policies and procedures  
26 being used by the agents of the Senate Defendants, and all records disclosing specifically who

1 is paying for and financing this legislative activity, as well as precisely how much is being  
2 paid,” as well as all other documents having “a substantial nexus to the audit activities.”  
3 August 2, 2021 Order at 2. The Court of Appeals rejected Defendants legislative immunity  
4 defense and found “no error with the superior court’s determination that the requested  
5 documents are public records that must be disclosed.” *Fann v. Kemp*, No. 1 CA-SA 21-0141  
6 Memorandum Decision at 9 (Aug. 19, 2021). The Arizona Supreme Court declined to accept  
7 review of the Court of Appeals’ ruling. Yet the documents described in this Court’s August 2,  
8 2021 Order still have not been produced.

9         Although Defendants’ broad legislative immunity defense was rejected at every turn,  
10 they now seek to achieve the same result by invoking the narrower offshoot of that defense,  
11 legislative privilege. But “legislative privilege does not extend to cloak ‘all things in any way  
12 related to the legislative process.’” *Arizona Indep. Redistricting Comm’n v. Fields* (“*Fields*”),  
13 206 Ariz. 130, 137 ¶ 18 (App. 2003) (citation omitted). And with their deficient log, even  
14 assuming legislative privilege could apply at all, Defendants failed to meet their burden of  
15 establishing that legislative privilege applies to any of the withheld communications—much  
16 less to all of them. The invocations of legislative privilege are wholly conclusory, with no  
17 information provided on the privilege log upon which Plaintiff or this Court may assess the  
18 applicability of the asserted privilege.

19         Accordingly, Defendants should be ordered to comply with the orders of this Court and  
20 the Arizona Court of Appeals and produce the documents described in the August 2, 2021  
21 Order unless such documents are subject to a valid claim of attorney client privilege, the  
22 attorney work-product doctrine or spousal privilege.<sup>2</sup> To the extent they ever had viable claims  
23 of legislative privilege over any of the documents, or parts thereof, they have forfeited them.

24  
25  
26 <sup>2</sup> These are the three other grounds on which Defendants have withheld records, according to  
their privilege logs. As noted at the hearing on September 16, 2021, American Oversight

1 **Argument**

2 **I. Defendants’ Legislative Privilege Claims Are Overbroad and Improper.**

3 Given that Defendants’ legislative immunity defense has been rejected in this case, their  
4 blanket invocation of legislative privilege to shield every substantive communication about the  
5 audit—thereby avoiding compliance with the very order that was the subject of their special  
6 action—must also be rejected. As the Court of Appeals explained in rejecting the legislative  
7 immunity defense:

8 This is not to say the legislature can never properly refuse to disclose records under  
9 the PRL. There are many statutory exemptions to the PRL. *See, e.g.,* A.R.S. §§ 41-  
10 1279.05, 49-1403. Additionally, though there is a presumption in favor of  
11 disclosing public records, this presumption can be rebutted by a demonstration of  
12 “confidentiality, privacy, or the best interests of the state.” *Scottsdale Unified Sch.*  
13 *Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶9 (1998)  
14 (citation and internal quotation marks omitted). If any of these interests outweigh  
15 the public’s right to access the records, the legislature can refuse disclosure. *Id.*  
16 However, the legislature is not afforded a blanket exemption from compliance with  
17 the PRL, nor is it exempt from lawsuits contesting a denial of access to public  
18 records.

19 *Fann v. Kemp*, Mem. Dec. at 6.

20 Defendants have not sought to withhold any documents on the grounds of  
21 “confidentiality, privacy, or the best interests of the state.” Instead, they invoke legislative  
22 privilege as a blanket exemption to avoid compliance with the August 2 Order, ignoring that  
23 the scope of legislative privilege is even narrower than their already-rejected legislative  
24 immunity defense.

25 This not only constitutes an end-run around the appellate ruling, which is the law of the  
26 case, but it also would drastically expand legislative privilege far beyond its intended  
27 constitutional scope. Just as this Court held that legislative immunity does not allow

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reserves the right to challenge or seek *in camera* review with respect to specific documents that  
have been withheld.

1 Defendants to violate the PRL with impunity, so too it should hold that legislative privilege  
2 does not extend to every communication between/among members of the Legislature and the  
3 contractors performing the audit, even assuming it applies at all. In the alternative, the Court  
4 should hold that Defendants have waived legislative privilege regarding the audit.

5 **A. Legislative Privilege Does Not Apply to the Planning and Conduct of the**  
6 **Audit.**

7 Legislative privilege arises from the Speech and Debate Clause of the Arizona  
8 Constitution, which protects legislators from liability for their “words spoken in debate.” Ariz.  
9 Const. art. IV, pt. 2, § 7. This privilege “extends to matters beyond pure speech or debate in the  
10 legislature,” but “only when such matters are an integral part of the deliberative and  
11 communicative processes relating to proposed legislation or other matters placed within the  
12 jurisdiction of the legislature, and when necessary to prevent indirect impairment of such  
13 deliberations.” *Fields*, 206 Ariz. at 137 ¶ 19 (quotations omitted); *see also Gravel v. United*  
14 *States*, 408 U.S. 606, 625 (1972) (“The heart of the Clause is speech or debate in either House.  
15 Insofar as the Clause is construed to reach other matters, they must be an integral part of the  
16 deliberative and communicative processes by which Members participate in committee and  
17 House proceedings.”).

18 “[B]ecause the privilege was designed to preserve legislative independence, not  
19 supremacy, invocations of it that go beyond what is needed to protect legislative independence  
20 must be closely scrutinized.” *United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016)  
21 (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 126-27 (1979)) (quotation marks omitted). “A  
22 Member seeking to invoke the Clause’s protections bears ‘the burden of establishing the  
23 applicability of legislative immunity . . . by a preponderance of the evidence.’” *Id.* (citation  
24 omitted).

25 This privilege “is not intended to protect legislators’ individual interests, ‘but to support  
26 the rights of the people, by enabling their representatives to execute the functions of their

1 office without fear of prosecutions, civil or criminal.” *Fields*, 206 Ariz. at 136 ¶ 17. As a  
2 result, the privilege “does not extend to cloak all things in any way related to the legislative  
3 process,” including legislators’ “political” or “administrative” acts. *Id.* at ¶ 18 (cleaned up).  
4 Indeed, “[o]nly those acts generally done in the course of the process of enacting legislation are  
5 protected.” *Steiger v. Superior Ct. for Maricopa Cty.*, 112 Ariz. 1, 3 (1975).

6 *Fields* and its progeny highlight the key distinction between “legislative” acts covered  
7 by the privilege and “administrative” acts of legislators falling outside the privilege. In *Fields*,  
8 court of appeals found that the Independent Redistricting Commission and its consultants  
9 enjoyed legislative privilege, but only in performing the very tasks the court considered  
10 “legislative,” including “preparing final congressional and legislative redistricting plans,”  
11 which have the force of law. *Fields*, 206 Ariz. at 135, 138 ¶¶ 6, 22-23. Yet in *State ex rel.*  
12 *Montgomery v. Mathis*, 231 Ariz. 103 (App. 2012), the court of appeals held that legislative  
13 privilege did not apply to inquiries into the IRC’s decision about hiring a mapping consultant,  
14 even though those “decisions are related to the legislative process and may facilitate the  
15 creation of districts,” because “they do not in themselves bear the ‘hallmarks of traditional  
16 legislation by reflecting a discretionary, policymaking decision.” *Id.* at 123 ¶ 79.

17 The same is true for the audit, the conduct of which is itself a purely administrative  
18 function that the whole Senate never authorized (indeed, it isn’t authorized by even a committee  
19 vote). There is no proposed legislation related to the audit (the Legislature isn’t even in  
20 session), and having legislative authority to issue a subpoena and conduct an audit does not  
21 mean those tasks are “an integral part of the deliberative and communicative processes relating  
22 to proposed legislation.” *Fields*, 206 Ariz. at 137 ¶ 19. To the contrary, performing the audit of  
23 specific ballots is, in and of itself, an administrative task, not a traditional lawmaking function.  
24 See A.R.S. § 16-661, *et seq.* (providing procedures for recounts that involve the judiciary and  
25 elections administrators). Indeed, Defendants are not even conducting or overseeing directly  
26 (in their own words, “Because it is an independent audit, [Senate] leadership will not be directly

1 involved . . . .”<sup>3</sup>).

2 Here, the audit does not constitute *bona fide* legislative activity. Though Defendants  
3 claim they are conducting the Audit “with an eye toward” legislation, the same could be said  
4 about many administrative tasks that cannot be shielded from public scrutiny via legislative  
5 privilege. In President Fann’s words, the audit is supposed to do no more than “validate every  
6 area of the voting process to ensure the integrity of the vote” in the General Election. Ariz.  
7 Senate Republican Caucus, Press Release,  
8 [https://www.azsenaterepublicans.com/post/arizona-senate-](https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county) [hires-auditor-to-review-2020-](https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county)  
9 [election-in-maricopa-county](https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county). Like the administrative tasks in *Mathis*, even if the Audit may  
10 ultimately be “related to” or “facilitate” legislation, the conduct of the Audit itself is not  
11 an act of legislation, and the communications related to its conduct do not enjoy the  
12 protections of legislative privilege. *See, e.g., Steiger*, 112 Ariz. at 4 (rejecting “an expansive  
13 view” of the privilege under which “there are few activities in which a legislator engages that  
14 could not be somehow related to the legislative process”).

15 And even if the Senate were in session and considering legislation based on this audit,  
16 legislative privilege can shield few, if any, of the documents being withheld on the alleged  
17 basis of legislative privilege. Senators communicating with other senators or their contractors  
18 related to the conduct or mechanics of the audit is simply not “an integral part of the  
19 deliberative and communicative processes relating to proposed legislation.” And that is  
20 especially the case with respect to communications between only agents and contractors, such  
21 as texts between and among Randy Pullen, Ken Bennett and Cyber Ninjas’ CEO Doug Logan.  
22 [*See, e.g., Ex. 1 at 266-267*]

23 For example, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), Hutchinson sued Senator  
24 \_\_\_\_\_

25 <sup>3</sup> Ariz. Senate Republican Caucus, Press Release, Arizona Senate hires auditor to review 2020  
26 election in Maricopa County, *available at* [https://www.azsenaterepublicans.com/post/arizona-](https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county)  
[senate-hires-auditor-to-review-2020-election-in-maricopa-county](https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county).

1 Proxmire for defamation after the Senator gave his “Golden Fleece” award for wasteful  
2 spending to federal agencies that had sponsored Hutchinson’s research. *Id.* at 114. Proxmire  
3 gave the “award” in a speech on the Senate floor, incorporated the speech into a press release,  
4 and repeated the essence of the speech in a newsletter sent to constituents. *Id.* at 115-17.  
5 Proxmire’s speech on the Senate floor was immune. *Id.* at 130. But the Court held that neither  
6 the press release nor the newsletters were protected. *Id.* The Court “carefully distinguished  
7 between” those acts, which were “only ‘related to the due functioning of the legislative  
8 process,’” and acts that “constitute[]the legislative process entitled to immunity under the  
9 Clause.” *Id.* at 131 (citation omitted, emphasis added). The Court explained that, although  
10 “congressional efforts to inform itself through committee hearings are part of the legislative  
11 function,” and therefore protected by the Speech or Debate Clause, efforts by “individual  
12 Members” to gather or disseminate information with “those outside the legislative forum” are  
13 not protected, regardless of “their value or their importance.” *Id.* at 132-33; *see also Bastien v.*  
14 *Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1316 (10th Cir. 2004) (“To extend  
15 protection to informal information gathering—either personally by a member of Congress or  
16 by congressional aides—would be the equivalent of extending Speech or Debate Clause  
17 immunity to debates before local radio stations or Rotary Clubs.”)

18 These cases were about legislative immunity. But their logic extends to legislative  
19 privilege as well, which has the same source (the Speech and Debate Clause) and serves the  
20 same purpose (protecting the independence of the Legislature and avoiding the burdens of  
21 litigation).

22 As our court of appeals has made clear, “legislative privilege does not extend to cloak  
23 ‘all things in any way related to the legislative process.’” *Fields*, 206 Ariz. at 137, ¶ 18 (citation  
24 omitted). “Rather, the privilege extends to matters beyond pure speech or debate in the  
25 legislature only when such matters are ‘an integral part of the deliberative and communicative  
26 processes’ relating to proposed legislation or other matters placed within the jurisdiction of the

1 legislature, and ‘when necessary to prevent indirect impairment of such deliberations.’” *Id.*  
2 (quoting *Gravel*, 408 U.S. at 625) (emphasis added). The approximately 2,800 documents  
3 (some of which are text strings extending for many months) withheld by Defendants are not an  
4 integral part of the deliberative and communicative processes relating to proposed legislation,  
5 and therefore must be produced.

6 **B. Defendants Waived Legislative Privilege About the Audit.**

7 Even if legislative privilege could theoretically apply to some of the withheld  
8 documents, Defendants have waived legislative privilege about the audit. They have not only  
9 made repeated public statements about the audit but held “hearings” at which their contractor  
10 and subcontractors have made selective public disclosures of their interim findings. [Amended  
11 Compl. at ¶ 102]

12 Like all other privileges and immunities under Arizona law, legislative privilege can be  
13 waived by legislators, *Fields*, 206 Ariz. at 144 ¶ 48, and should be narrowly construed, *cf. Doe*  
14 *ex rel. Doe v. State*, 200 Ariz. 174, 176 ¶ 4 (2001). Indeed, legislators “can waive the privilege  
15 concerning a subject,” *Fields*, 206 Ariz. at 144 ¶ 48, as with other waivers; either by the  
16 “express, voluntary, intentional relinquishment of a known right or such conduct as warrants  
17 an inference of such an intentional relinquishment . . . established by evidence of acts  
18 inconsistent with an intent to assert the right.” *Am. Cont’l Life Ins. Co. v. Ranier Constr. Co.*,  
19 125 Ariz. 53, 55 (1980). “Unlike a waiver of legislative immunity, the waiver of the privilege  
20 need not be ‘explicit and unequivocal.’” *Favors v. Cuomo*, 285 F.R.D. 187, 211–12 (E.D.N.Y.  
21 2012) (citation omitted).

22 Waiver by conduct is precisely what has happened here. Even while being sued for  
23 failing to provide the public with records about the audit, Defendants have (1) made public  
24 statement after public statement about the audit, (2) selectively released (usually incorrect)  
25 information about the audit and its findings, (3) have held multiple “hearings” (not open to the  
26 public) discussing the progress, conduct and preliminary findings of the audit, and (4) all

1 along, have selectively released public records in their possession while likely withholding any  
2 of consequence. Allowing Defendants to selectively disclose information that they now claim  
3 is subject to legislative privilege while hiding the source documents that would reveal the full  
4 story is contrary to the PRL and falls squarely into familiar concepts of waiver that apply to  
5 rights and privileges of all sorts.

6 At bottom, the Defendants have waived legislative privilege – if it applies at all in this  
7 context – regarding the audit and the Court should order the production of all records withheld  
8 by Defendants on this basis.

9 **C. In the Alternative, Defendants’ Inadequate Privilege Log Merits**  
10 **Expeditious Revision and *In Camera* Review.**

11 For the reasons described above, Defendants’ conception of legislative privilege  
12 exceeds any established legal standard and their claims should be rejected wholesale and  
13 documents ordered released. Moreover, to the extent legislative privilege may have ever  
14 existed, it has been waived by Defendants’ conduct. If, however, the Court finds that wholesale  
15 release or waiver are not established at this juncture, it nevertheless should require Defendants  
16 to expeditiously remedy their inadequate privilege log and to provide the Court with  
17 representative samples of withheld documents against which to adjudicate their claims.

18 In the overwhelming majority of privilege log entries, Defendants have done no more  
19 than make the tautological assertion that documents contain “internal legislative discussions  
20 regarding the audit.” For example, a recent supplemental production of documents revealed  
21 that the Senate has been improperly withholding newsletters, news clippings and other general  
22 (and arguably unresponsive) documents under the guise of legislative privilege. Only after  
23 American Oversight challenged certain designations based on the limited information provided  
24 in the privilege log did Defendants lift the privilege designation and produce the records.  
25 Based on the Defendants’ practice of widely designating all matter of documents as covered by  
26 the legislative privilege, there is no telling what else has been improperly withheld on

1 legislative privilege grounds.

2 As described above, legislative privilege requires more—much more—than documents  
3 being “internal” or “legislative” or “discussions.” At minimum, the entries must meet  
4 Defendants’ burden of establishing legislative privilege, which must include information  
5 sufficient to conclude that the “discussions” were “an integral part of the deliberative and  
6 communicative processes relating to proposed legislation or other matters placed within the  
7 jurisdiction of the legislature.” “Only those acts generally done in the course of the process of  
8 enacting legislation are protected.” *Steiger*, 112 Ariz. at 3. To require less of Defendants would  
9 indulge them to extend the privilege to cloak all things in any way related to audit. Plaintiff  
10 strongly asserts that legislative privilege does not apply here, and/or that it has been waived.  
11 But if the Court does not accept these arguments, Plaintiff urges the Court to require  
12 Defendants to submit representative samples (selected by the Court or Plaintiff) of withheld  
13 documents for *in camera* review to facilitate and expedite resolution. Given the delays in this  
14 case, multiple rounds of briefing and re-briefing in the dark will only extend this litigation and  
15 harm the public’s right to know.

16 **Conclusion**

17 Defendants may not withhold every substantive communication and document relating  
18 to the audit on grounds of legislative privilege because the privilege does not generally apply  
19 to these audit-related activities. And even if it did, it has been waived. Defendants should be  
20 ordered to immediately produce all documents withheld on the basis of legislative privilege as  
21 directed by this Court’s August 2, 2021 Order.

1 RESPECTFULLY SUBMITTED this 17th day of September, 2021.

2 **COPPERSMITH BROCKELMAN PLC**

3 By: /s/ Keith Beauchamp

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7 ORIGINAL of the foregoing efiled and  
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