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IN THE SUPREME COURT
STATE 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,

v.

THE HONORABLE MICHAEL KEMP, in his official capacity as a judge of the Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. _____

Court of Appeals No.
1 CA-SA 21-0216

Maricopa County Superior Court No.
CV2021-008265

PETITIONERS' EMERGENCY MOTION FOR STAY

Pursuant to A.R.C.A.P. 7(c) and Arizona Rule of Special Action Procedure 7(c), Petitioners Arizona Senate; Karen Fann, in her official capacity as President of the Arizona Senate; and Warren Petersen, in his official capacity as Chairman of the Senate Judiciary Committee (collectively, the "Senate") respectfully move for a stay of the Court of Appeals' order compelling the Senate to produce documents over which the Senate has asserted claims of legislative privilege.

FACTUAL BACKGROUND

The Senate has voluntarily produced over 22,000 public records relating to its audit of the November 3, 2020 general election in Maricopa County (the "Audit"). *See* Senate Audit Public Reading Room, *available at* *https://statecraftlaw.app.box.com/v/senateauditpublicreadingroom/folder/138506536893*. To date, it has withheld, in whole or in part, approximately 700 documents solely on grounds of legislative privilege; of those, approximately 272 have already been disclosed in redacted form.[1]

On October 13, 2021 the Superior Court granted a motion by Real Party in Interest American Oversight to compel production of all documents over which legislative privilege was claimed. The Senate thereafter petitioned the Court of Appeals for special action relief, which the court granted in part and denied in part. Specifically, the Court of

[1] An additional 1,161 documents are protected from disclosure (in whole or in part) on grounds of attorney-client privilege, including 402 that also include material protected by the legislative privilege.

Appeals vacated the Superior Court's holding that the Senate had effectuated a subject matter waiver of legislative privilege with respect to the Audit. It also concluded, however, that the privilege extends only to communications concerning "pending legislation," that the Audit—despite being an investigation by a legislative house—is outside the scope of the privilege, and that the Senate had failed to make a *prima facie* showing of privilege as to the records catalogued in its privilege log. In a doctrinal innovation, the Court of Appeals further held that the generalized constitutional interest in avoiding an impairment of legislative functions actually is a freestanding, independent element of a *prima facie* legislative privilege claim—a notion never before applied in this state and rejected by every federal court to have considered it. In closing, the Court of Appeals expressly directed the Senate to "immediately" disclose to American Oversight all records that are not within the rubric of legislative privilege, as redefined by the Court of Appeals.

The upshot is that, if the Court of Appeals' ruling is not stayed, a substantial number of the records over which the Senate has asserted legislative privilege will be subject to disclosure before this Court can properly consider the Senate's pending Petition for Review—and the public disclosure of the Senate's privileged records would, by definition, constitute an irreparable injury.

ARGUMENT

Special Action Rule 7(c) expressly contemplates a stay of pending lower court proceedings when "it is impracticable for the [appellate] court to hear the application for

relief immediately." In evaluating a motion for a stay, the Court weighs the following factors: "[1] a strong likelihood of success on the merits; [2] irreparable harm if the stay is not granted; [3] that the harm to the requesting party outweighs the harm to the party opposing the stay; and [4] that public policy favors the granting of the stay." *Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, ¶ 10 (2006). Each element is addressed below.

I. The Senate Is Likely to Succeed on the Merits

The deficiencies in the Court of Appeals' reasoning are set forth at length in the Petition for Review; in brief, however, the court erred in two critical respects.

First, the Court of Appeals' conclusion that only communications discussing "proposed legislation" are protected by the legislative privilege [COA Op. ¶ 30] is deeply dissonant with the case law. It is—and throughout these proceedings always has been—undisputed that legislative privilege applies to documents and communications that "are 'an integral part of the deliberative and communicative processes" relating to proposed legislation or other matters placed within the jurisdiction of the legislature." *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶ 18 (App. 2003) (quoting *Gravel v. United States*, 408 U.S. 606 (1972)). But legislative fact-finding investigations, such as the Audit, are themselves innately "integral" to the Senate's deliberative and communicative processes because they are necessary antecedents to the task of formulating and debating legislation. The notion that an investigative communication must reference

or otherwise be tethered to an identifiable legislative proposal is a contrived and artificial limitation that is unmoored from any precedential support. *See Brown & Williamson v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (applying privilege to corporate records given to Congress by a putative "whistleblower," explaining that "[c]losely related—indeed a corollary—to th[e] right to pursue investigations is Congress' privilege to use materials in its possession without judicial interference"); *Pentagen Tech. Int'l Ltd. v. Comm. on Appropriations of the United States House of Representatives*, 20 F. Supp. 2d 41, 44 (D.D.C. 1998) (commenting that there is "no support for the[] assertion that 'investigative' materials fall outside the protection of the Speech or Debate Clause"); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 11 (D.C. Cir. 2006) (holding that "making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas" are "integral" to the legislative process and hence covered by the Clause); *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016) (acknowledging that "'obtaining information pertinent to potential legislation ***or investigation***' is a legitimate legislative activity" [emphasis added]); *Citizens Union of the City of New York v. Att'y Gen. of the State of New York*, 269 F. Supp. 3d 124, 151 (S.D.N.Y. 2017) (noting that the privilege extends to "factual information" collected in a legislative investigation); *Jewish War Veterans of the United States v. Gates*, 506 F. Supp. 2d 30, 55 (D.D.C. 2007) (reaffirming that legislative "efforts to acquire information during committee investigations or through the issuance of subpoenas constitute legislative acts protected by the Speech or Debate

Clause," and adding that the same protections extend to "informal" information gathering as well).

To avert the entrenched truism that legislative investigations are in fact within the ambit of the privilege, the Court of Appeals reimagined the Audit as an "administrative" or potentially "political"—rather than legislative—act. *See* COA Op. ¶¶ 26-27. As an initial matter, the Court of Appeals' newfound conception of the Audit as not "a legitimate legislative act," COA Op. ¶ 30, collides squarely with its finding just a few months ago that the very same investigation is in fact an "important legislative function." *Fann v. Kemp*, 2021 WL 3674157, at *4, ¶ 24 (Ariz. App. Aug. 19, 2021).[2]

Even putting aside this law of the case, neither an "administrative" nor "political" appellation—as those terms have been traditionally defined—can be plausibly applied to the Audit. An "administrative" act is generally a function of the Executive Branch, and denotes actions to implement or apply specific laws to particular individuals. *See Mesnard v. Campagnolo*, 489 P.3d 1189, 1194, ¶ 16 (Ariz. 2021); *Wennerstrom v. City of Mesa*, 169 Ariz. 485 (1991) (discussing the distinction between legislative and administrative acts). Rather, the Audit was an examination of the efficacy and security of Maricopa County's election system, with an eye to identifying potential areas for improvement or reform—

[2] What ostensibly distinguishes an "important legislative function" from a "legitimate legislative act" remains unexplained, and this novel distinction finds no lineage in the case law.

precisely the kind of inquiry that is quintessentially "legislative." *See Buell v. Superior Court*, 96 Ariz. 62 (1964) (involving legislative subpoena issued in connection with investigation of certain practices of the Corporation Commission); *Trump v. Mazars USA LLP*, 140 S. Ct. 2019, 2031 (2019) (holding that the congressional power of investigation "encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system"); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (a congressional "study of the administration, operation, and enforcement" of a particular statute was a legislative investigation within the scope of the Speech or Debate Clause).

Likewise, the "political" realm envelopes such matters as "[m]aking speeches outside the legislative body, performing tasks for constituents, sending newsletters, issuing news releases, and the like." *Mesnard*, 489 P.3d at 1194, ¶ 16. To be sure, some individual communications relating to the Audit do partake of a "political" character (for example, emails between legislators and political party leaders)—and the Senate long ago released such records without asserting legislative privilege. The Court of Appeals, however, took the unprecedented leap of decreeing entire facets of the Audit—including a formal hearing held in the Senate chamber and officiated by the President of the Senate—to be "political" acts that elude the privilege. *See* COA Op. ¶ 27. This conclusion is factually unsound, doctrinally unsupported, and marks a consequential breach of the separation of powers.

Second, the Court of Appeals held that, to invoke the privilege, legislators must make some unspecified showing that a compelled disclosure would "impair[]" legislative deliberations. *See* COA Op. ¶ 32. While protecting the institution from undue interference certainly underpins the privilege as a conceptual matter, no court has ever reified that generalized principle into a factual element of a *prima facie* privilege claim. To the contrary, such a proposition has been roundly rejected as "absurd." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-60 (D.C. Cir. 1988) (deriding the notion that courts should "calibrate the decree" to which disclosure would "burden" legislators); *see also Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983) (holding that former congressman could invoke legislative privilege, even though "the rationale of preventing distraction from legislative duties is not applicable"). Indeed, even the Court of Appeals' own opinion in *Fields* nowhere demanded that the body invoking the privilege (*i.e.*, the Independent Redistricting Commission) make a particularized showing of injury or prejudice attributable to compelled disclosure of its internal records.[3] This innovation represents a substantial restructuring of the legislative privilege that will significantly

[3] In another inexplicable departure from the same precedent to which it purportedly adhered, the Court of Appeals faulted the Senate for not presenting "evidence that the requested records might be used in any criminal or civil proceeding against any legislator." COA Op. ¶ 21. But *Fields* ***rejected*** the notion that the judicial use of privileged communications is a prerequisite to a viable privilege claim. *See Fields*, 206 Ariz. at 140, ¶ 32 (sustaining privilege claim "[e]ven though such documents will not be used in any evidentiary proceeding").

enervate its protections and inappropriately insert the judiciary into *ad hoc* "calibrat[ions]," *MINPECO*, 844 F.2d at 859, of internal legislative workings.

II. Compelled Disclosure of Privileged Documents Inflicts an Irreparable Injury and Extinguishes the Senate's Right to Seek Review in This Court

A stay is appropriate when necessary "to preserve the status quo during the appeal and to protect the unsuccessful party from any irreparable harm that would occur from enforcing the ruling on the injunction." *State ex rel. Corbin v. Tolleson*, 152 Ariz. 376, 378 (App. 1986). Application of the Court of Appeals' revamped understanding of the legislative privilege will result in the compelled disclosure of a significant number of documents over which the Senate has asserted privilege. If these documents are in fact privileged, then their compelled disclosure would *per se* irreparably injure the Senate. *Cf. Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 77 (D.D.C. 2009) ("[T]he general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough." (quoting *U.S. v. Philip Morris, Inc.,* 314 F.3d 612, 622 (D.C. Cir. 2003)).

Further, the compelled disclosure here is not in the nature of a discovery production that is amenable to some mitigating procedural safeguards, such as a protective order. If the disputed documents are in fact non-privileged public records, then they are, by definition, open to inspection by any and every member of the public. In other words, it is impossible for the Senate to comply with the Court of Appeals' order but still preserve and

maintain any right to meaningful appellate review of its privilege claims. *See People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) ("Particularly in the [public records] context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal."). A stay will ensure that this Court is afforded an opportunity to carefully evaluate the Senate's Petition for Review and, if it deems appropriate, furnish effective relief.

III. The Equities and Public Policy Favor a Stay

American Oversight's only evident countervailing interest against a stay is its rote incantation of the need for "transparency." But the Senate already has made what is likely the largest production of public records in Arizona history. The approximately 700 documents that remain withheld solely on legislative privilege grounds equate to only around 3% of the total universe of Audit-related public records released to date—and approximately 272 of even these documents already have been produced in redacted form. Further, legislative privilege, like all privileges, is undergirded by broader and transcendent public interests in preserving the confidentiality of certain relationships and communications. *See Council on Am.-Islamic Relations*, 667 F. Supp. 2d at 79-80 ("The Court concludes that preventing further disclosure 'to allow [party] to defend its claim of privilege will serve . . . public interests.'"); *see also Puente*, 314 F.R.D. at 672 (recognizing the importance of "protecting the Arizona legislative process from unwarranted intrusion"); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909,

911 (D.C. Cir. 2008) (acknowledging that dispute over executive privilege "is of potentially great significance for the balance of power" between the branches of government, and granting a stay). The Senate is entitled to an opportunity to vindicate those interests through the appellate process.

CONCLUSION

For the foregoing reasons, the Court should stay pending its adjudication of the Petition for Review the Court of Appeals' order compelling the Senate to produce records over which it has asserted claims of legislative privilege.

RESPECTFULLY SUBMITTED this 25th day of January, 2022.

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