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. CV-22-0018-PR

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

Maricopa County Superior Court No.
CV2021-008265

RESPONSE OF PETITIONERS TO PHOENIX NEWSPAPERS, INC.'S AND KATHY TULUMELLO'S NOTICE OF CONSOLIDATION OF CASES AND REQUEST TO BE CONSIDERED REAL PARTIES IN INTEREST

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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 submit this Response to the request of Phoenix Newspapers, Inc. and Kathy Tulumello (collectively "PNI") to be considered "real parties in interest" to this special action.

I. Consolidation of Different Actions in the Superior Court Does Not Make PNI a "Real Party in Interest" to this Separate Special Action

That the Superior Court consolidated PNI's claims with those of American Oversight is procedurally and substantively irrelevant. Consolidation pursuant to Arizona Rule of Civil Procedure 42 is a ministerial mechanism designed to facilitate a more efficient litigation process. It "does not merge the suits into a single cause, or change the rights of the parties." *Yavapai Cty. v. Superior Court in and for Yavapai Cty.*, 13 Ariz. App. 368, 370 (1970) (internal citation omitted). Each party retains its separate and independent prerogative to pursue a freestanding appeal of any adverse rulings. *See Hall v. Hall*, 138 S. Ct. 1118, 1125, 1131 (2018) (reaffirming that courts have long "understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them," holding that "when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals"). This truism assumes additional force in the context of a

special action, which is itself a discrete proceeding that is divorced from the underlying trial court action. *See Coffee v. Ryan-Touhill in & for County of Maricopa*, 247 Ariz. 68, 71–72, ¶ 14 (App. 2019) (noting that an appellate special action is "a separate, original proceeding where an appellate court examines the action or inaction of public officials and may issue orders (similar to a common law writ) affecting future proceedings in a case").

To be sure, should this Court accept review and adjudicate the merits, any resulting published opinion will be binding on the lower courts. But the notion that the disposition of these proceedings is "law of the case" with respect to PNI is erroneous. Accordingly, there is no basis for "classif[ying]," Request at 4, PNI as a "real party in interest."

II. PNI Should Be Denied Leave to Intervene

Should the Court construe PNI's filing instead as a motion for "intervention" pursuant to Arizona Rule of Civil Procedure 24 (despite the significant procedural infirmities that would accompany such a designation), it still should deny the request. Prolonging a theme that has defined this litigation, PNI's proposed Response to the Petitioners' Emergency Motion for a Stay largely regurgitates arguments already advanced by American Oversight; the latter more than adequately represents whatever interests PNI purports to vindicate. *See* Ariz. R. Civ. P. 24(a)(2); *see generally League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) ("Where an applicant for intervention and an existing party have the same *ultimate objective*, a presumption of adequacy arises.") (internal citation and quotation omitted)).

It bears emphasis that PNI twice successfully resisted Petitioners' efforts to consolidate these proceedings in the trial court.[1] Equity precludes it from pursuing in an appellate forum precisely the same procedural remedy it resisted in the trial court. Because intervention at this late date would serve only to introduce inefficiency and redundancy, and to subject the Senate to the risk of fee-shifting against multiple adverse parties pursuing identical arguments, *see* A.R.S. § 39-121.02(B), the Court should deny any purported motion for intervention. *See generally Dowling v. Stapley*, 221 Ariz. 251, 273, ¶ 71 (App. 2011) (declining to grant permissive intervention pursuant to Rule 24(b) that would have the effect of protracting litigation and would "unduly delay[] or prejudice[] the adjudication of the" parties' rights).

Petitioners do not object to PNI's participation in these proceedings as *amici curiae*, which allows PNI to proffer whatever arguments it believes American Oversight has not already presented without prejudicing the Senate.

CONCLUSION

The Court should deny PNI's request to be joined as real parties in interest.

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[1] Consolidation ultimately was effectuated by Judge Kemp *sua sponte*, shortly after non-party Cyber Ninjas, Inc. filed a motion to disqualify the judge presiding over the *PNI* action.

RESPECTFULLY SUBMITTED this 31st day of January, 2022.

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