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, PHOENIX NEWSPAPERS, INC., AND KATHY TULUMELLO, Real Parties in Interest.	Case No. CV-22-0018-PR Arizona Court of Appeals Division One No. 1 CA-SA 2021-0216 Maricopa County Superior Court Nos. CV2021-008265 and LC2021-000180-001 (Consolidated)

REAL PARTIES IN INTEREST PHOENIX NEWSPAPERS, INC.'S AND KATHY TULUMELLO'S RESPONSE IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR STAY

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Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") hereby respond in opposition to the Emergency Motion to Stay (the "Motion" or "Mot.") by Petitioners Karen Fann, Warren Petersen, and Arizona Senate (together, the "Senate").

Introduction

This Court should deny the Senate's Motion because the Motion, like the associated petition for review, is a meritless attempt to forestall scrutiny of the Senate's use of baseless claims of legislative privilege to withhold public records regarding its "audit" of the 2020 general election results in Maricopa County (the "Audit"). Here, the Senate does not meet any of the criteria required for a stay: It has not shown a likelihood that it will succeed on the merits because the Court of Appeals correctly applied well-established law; it will not suffer irreparable harm absent a stay because it may still seek *in camera* review of withheld documents by the Superior Court; and the balance of harms and public interest tilt against the Senate because of Arizona's strong public policy in favor of open government and public access to information.

Argument

To obtain a stay, the Senate must establish that (1) it has "a strong likelihood of success on the merits;" (2) it will suffer irreparable harm if the stay is not granted; (3) the harm to the Senate absent a stay outweighs the harms to other parties if the stay is granted; and (4) "public policy favors granting of the stay." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 (2006). These criteria are considered on a sliding scale; "'the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply' in favor of the moving party." *Id.* at 410-11 (citations omitted).

This Court should deny the requested stay because none of the elements favors the Senate.

A. The Senate Is Unlikely to Succeed on the Merits.

This Court should deny the requested stay because the Senate has shown neither a strong likelihood of success on the merits nor that any serious questions exist regarding the Court of Appeals' ruling. To the contrary, the Senate cannot show the Court of Appeals' reasoning was

incorrect because it simply applies well-established Arizona law regarding legislative privilege.

The Senate makes two main arguments to support its assertion that the Court of Appeals erred, neither of which has merit. First, the Senate asserts that the Court of Appeals incorrectly limited the legislative privilege to discussions of proposed legislation, stating that "[t]he 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." Mot. at 3-4. But the Court of Appeals merely applied this Court's (and the U.S. Supreme Court's) longstanding principle that not everything done or said by a legislator in connection with their official duties is privileged; "[o]nly those acts generally done in the course of the process of enacting legislation are protected" by legislative privilege. COA Op. ¶ 29 (quoting *Steiger v. Superior Ct.*, 112 Ariz. 1, 3 (1975)); *see also Steiger*, 112 Ariz. at 4 (legislative privilege does not extend to "all things in any way related to the legislative process.").

The question the Court of Appeals examined was "whether the privilege applies to every confidential communication relating to the

audit between legislators, or between legislators and their agents." COA Op. ¶ 16. In "reject[ing] the Senate's apparent contention that the privilege blocks disclosure under the P[ublic] R[ecords] L[aw] of any record that bears any connection to a legislative function," COA Op. ¶ 21, the Court of Appeals correctly recognized that legislative privilege only attaches to acts of legislating. As this Court's opinion in *Steiger* illustrates, that the Audit is related to the legislative process does not cloak in legislative privilege all things related to the Audit.

Second, the Senate attacks the Court of Appeals' holding that to meet its burden of showing the application of legislative privilege, the Senate must explain "how confidential treatment of its communications relating to the audit was necessary to prevent indirect impairment of its legislative deliberations." COA Op. ¶ 32. The Senate claims that "[w]hile 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." Mot. at 7.

But that is an inaccurate statement of both existing law and what the Court of Appeals did. The ruling does not require any "particularized

showing of injury or prejudice attributable to compelled disclosure of its internal records," as the Senate claims. Mot. at 7. Instead, it simply applied the principle that "[w]hen a legislator asserts the legislative privilege, the legislator has 'the burden of establishing that a matter is privileged.'" COA Op. ¶ 19 (quoting *Steiger*, 112 Ariz. at 3); *see also id.* ¶ 24 (same). The Court of Appeals found that the Senate had neither met nor attempted to meet its burden on this front. *Id.* at ¶ 32.

The Senate does not contest, nor could it, that "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.'" *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 (App. 2003) (quoting *Gravel v. United States,* 408 U.S. 606, 625 (1972)). Because the privilege only attaches when it is necessary to prevent indirect impairment of legislative deliberations, showing that the privilege applies to a particular communication requires showing that such indirect impairment would occur. While it is understandable that the Senate

might want to evade its burden to show the privilege applies, that is not the law.

The Senate cannot show it is likely to succeed on the merits because the Court of Appeals correctly applied settled Arizona law. Its Motion for a stay – to forestall yet again its duty to disclose public records – therefore should be denied.

B. The Senate Will Not Suffer Irreparable Harm Absent a Stay.

The Motion also should be denied because the Senate will not suffer irreparable harm if a stay is not granted. The Court of Appeals' ruling does *not* require the Senate to make public immediately all records for which it has claimed legislative privilege. Rather, it specifically provides for the Senate to continue to withhold records it claims are subject to the legislative privilege. COA Op. ¶ 38. Only after an *in camera* review by the Superior Court and that court's determination that the privilege does not apply would the Senate be required to make any such records public. *Id.* There is no "emergency" or irreparable harm that would warrant a stay at this point, before any such *in camera* review has even begun.

C. The Balance of Harms Does Not Favor the Senate.

Even if providing public records to the public or submitting purportedly privileged records for *in camera* inspection would harm the Senate (it will not), any such harm would not outweigh the harm to PNI and the public by continued delay in obtaining access to public records regarding an issue of the utmost importance, governed by statutes that require prompt disclosure. See A.R.S. §§39-121.01(D)(1) and (E).

More specifically, the Public Records Law mandates that "the custodian of such records shall *promptly*" provide them upon request. A.R.S. § 39-121.01(D)(1) (emphasis added). Nearly nine months have passed since PNI made its first request for Audit-related records to the Senate and seven months since PNI was constrained to seek the courts' assistance in holding the Senate to its statutory obligations. That delay does not constitute prompt action as a matter of law. *See, e.g.*, *Phoenix New Times, LLC v. Arpaio,* 217 Ariz. 533, 541 (App. 2008) (holding that 141-day delay violated promptness requirement). The promptness requirement in the Public Records Law, and similar provisions in other government transparency statutes, recognize that the public deserves to have up-to-date information about what their government is doing. *See,*

e.g., *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770, 778 (D.C. Cir. 2018) ("stale information is of little value") (citation omitted).

This Court should deny the Motion because a stay would harm PNI and the public by further delaying their access to records about the Senate's unprecedented undertaking of an electoral audit, while the Senate would not be harmed if a stay is not granted.

D. A Stay Would Violate Arizona's Strong Public Policy Favoring Government Transparency.

The Senate claims that the only countervailing interest against a stay is a "rote incantation of the need for 'transparency.'" Mot. at 9. But the Senate ignores – as it has throughout this litigation – Arizona's strong and longstanding public policy in favor of government transparency. *See, e.g.*, *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5 (2007) (noting "Arizona's strong policy of public access and disclosure of public records"). This factor weighs heavily against granting the Motion.

To be sure, legislative privilege serves an important public interest in "protecting the Arizona legislative process from unwarranted intrusion." Mot. at 9 (quoting *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 672 (D. Ariz. 2016)). However, as discussed *supra*, the Court of Appeals'

ruling does not allow any unwarranted intrusion into the legislative process. It allows the Senate to claim legislative privilege within the confines already established by Arizona courts, including the long-approved process of *in camera* review. *E.g, Carlson v. Pima County*, 141 Ariz. 487, 491-92 (1984). Allowing the Senate to conceal public records from public view under an unbounded and unfounded interpretation of legislative privilege would harm the public interest, not serve it.

In sum, the Senate's Motion should be denied because it simply cannot show that it meets the criteria necessary to justify a stay.

Conclusion

For all of the foregoing reasons, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny the stay requested by Petitioners Karen Fann, Warren Petersen, and Arizona Senate.

Respectfully submitted this 27th day of January, 2022.

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