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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. CV-22-0018-PR

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

Maricopa County Superior Court No.
CV2021-008265

REPLY IN SUPPORT OF PETITIONERS' EMERGENCY MOTION FOR STAY

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 Reply in support of their Emergency Motion for a Stay.

I. In Holding That This Legislative Investigation Is Not Protected by Legislative Privilege and That "Impairment" Is an Element of the Privilege, the Court of Appeals Erred and Created a Conflict With Existing Precedent

The Court of Appeals' conclusion that internal legislative communications concerning the planning, execution and results of the Senate's audit of the November 2020 general election in Maricopa County (the "Audit") are not protected by legislative privilege is irreconcilable with its own opinion in *Arizona Independent Redistricting Comm'n v. Fields*, 206 Ariz. 130 (App. 2003), and with a venerable lineage of federal cases reaffirming, time and again, that the legislative privilege (1) envelopes all *bona fide* legislative investigations, irrespective of whether they are tethered to some item of pending legislation, and (2) is not conditioned on an extrinsic factual showing of an "impairment" that would ensue from compelled disclosure.[1]

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[1] American Oversight argues that the Senate has the burden of demonstrating in its Motion for a Stay a likelihood of success with respect to the A.R.C.A.P. 23 factors, rather than a likelihood of success on the merits. Preliminarily, no rule or case law buttresses that proposition. *Contrast Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, ¶ 10 (2006). More to the point, American Oversight's contention that "[t]here are no 'conflicting decisions by the court of appeals,'" Response at 8, finds its rebuttal in the Motion's extensive delineation of substantive inconsistencies between the Court of Appeals' opinion in this case and its own prior pronouncements in *Fields* and *Fann v.*

A. An Investigation into the Accuracy and Efficacy of Existing Election Administration Systems Is Integral to the Senate's Deliberative and Communicative Processes

If nothing else, American Oversight's Response crystallizes the crux of the parties' dispute. The blackletter standard governing the parameters of the legislative privilege is entrenched and undisputed. The privilege encompasses "matters [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." *Fields*, 206 Ariz. at 137, ¶ 18 (quoting *Gravel v. United States*, 408 U.S. 606 (1972)). American Oversight also concedes—as it must—that "a legislative 'investigation' could be an 'integral part' of the legislature's 'deliberative and communicative' processes." It insists, however, that ***this*** investigation does not maintain such a status. But why?

Notably, American Oversight does not even attempt to prop up the Court of Appeals' tortuous exertion to recast the Audit as an "administrative" or "political" undertaking, *see* COA Op. ¶¶ 26–27—which of course contradicts its own prior holding that the Audit is an "important legislative function." *Fann I*, 2021 WL 36774157, at *5, ¶ 24. Rather, American Oversight appears instead to shoehorn the Audit into a heretofore unknown interstitial classification of investigations that are "legislative" in character, but not

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Kemp, 2021 WL 3674157 (Ariz. App. Aug. 19, 2021) ("*Fann I*")—not to mention the Court of Appeals' deviations from (or disregard of) this Court's recent explication of relevant constitutional principles and definitional concepts in *Mesnard v. Campagnolo*, 489 P.3d 1189 (Ariz. 2021). *See* Motion at 4–7.

"integral" to the body's constitutional functions because—the reasoning goes—"proposed legislation" allegedly was not a *contemporaneous* objective of the Audit.[2]

But a nexus to "pending legislation" is not—and never has been—a prerequisite to invocation of the legislative privilege. American Oversight dismisses the litany of precedents encapsulating this proposition as "non-binding," Response at 9—but, in an ultimate exercise in circularity, mustered only the Court of Appeals' opinion in this case as the sole authority buttressing that same opinion.[3]

Even assuming *arguendo* that the Audit was divorced from specific "pending" or prospective legislation, "inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system," *Trump*

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[2] Even if it were legally material (and it is not), this representation is factually inaccurate. In sustaining the validity of subpoenas *duces tecum* issued by President Fann and Chairman Petersen to Maricopa County, Judge Thomason agreed that the Audit was precipitated at least in part by a desire to explore "possible reform proposals." *Maricopa County v. Fann*, Maricopa Couny Superior Court CV2020-016840, Minute Entry filed Feb. 25, 2021, at p. 9. American Oversight has never formally controverted, and the Superior Court in this action has never repudiated, that finding.

[3] As set forth in the Petition for Review, this Court's opinion in *Steiger v. Superior Court for Maricopa County*, 112 Ariz. 1 (1975), which interpreted the *federal* Speech or Debate Clause in the context of a meeting between a legislative aide and a corporate representative, has been abrogated in part by subsequent federal cases concluding that the federal analogue does in fact embrace "informal" fact-finding exercises by legislators. *See McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976). And, in any event, there is nothing "informal" about the Audit, which was authorized and overseen by the President of the Senate under the auspices of valid legislative subpoenas and funded in part with Senate resources.

v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2019), are innately "integral" to a legislative body's deliberative and communicative functions. Indeed, surely even American Oversight would agree that a legislative investigation into—for example—potential foreign interference in the 2016 election is central to the legislature's institutional obligation to ensure a secure elections infrastructure. *See Mazars*, 140 S. Ct. at 2027 (featuring subpoenas in investigation "examining alleged attempts by Russia to influence the 2016 election; potential links between Russia and the President's campaign; and whether the President and his associates had been compromised by foreign actors or interests"); *see also Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 992 (D.C. Cir. 2021) (investigation into President's communications with the Ukrainian government "was a legislative act protected by the Speech or Debate Clause").

Likewise, the assertion of legislative privilege over internal communications relating to, for instance, potential corrupt practices by a Corporation Commissioner, *see Buell v. Superior Court*, 96 Ariz. 62 (1964), or inquiries into the propagation of vaccine misinformation, *see Ass'n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 518 (D.D.C. 2021) (holding that committee chair's issuance of "information gathering letters" to social media companies "constitute protected legislative acts" within the Speech or Debate Clause), almost certainly would be summarily ratified. *See also In re Grand Jury Subpoenas*, 571 F.3d 1200, 1203 (D.C. Cir. 2009) (Ethics Committee investigation

into congressman's travel expenses was within the scope of the Speech or Debate Clause).[4]

So, why does the privilege elude *this* investigation uniquely? In railing against the Audit as "farcical," deriding the prime contractor as a "conspiracy theorist," and traducing the Senate President as animated by what American Oversight conjectures were political considerations, *see* Response at 1, 15, American Oversight tips its hand. At bottom, this dispute has never truly pivoted on whether legislative investigations into the integrity of existing election systems are within the ambit of the Speech or Debate Clause; the affirmative answer is well-settled. Rather, the principle of legislative privilege has become enmeshed with—and ultimately subordinated to—the perceived propriety of the factual circumstances and motives undergirding the Audit. But "in determining the legitimacy of a [legislative] act [courts] do not look to the motives alleged to have prompted it." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975). To the contrary, the privilege is an enduring bulwark against "an unfriendly executive" or "a hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 179 (1966).

If a legislative investigation proves improvident, electoral channels will supply recourse. In the meantime, however, tailoring the scope of a constitutional privilege to

[4] To be sure, a legislative investigation would shed its constitutional protection if it infringed the constitutional rights of private citizens or encroached on the domain of a coequal branch. *See Mazars*, 140 S. Ct. at 2031–32. No such allegations are leveled here in connection with the Audit. In the same vein, the Senate has not asserted privilege over communications that relate to the Audit but that are not legislative in character (*e.g.*, emails with political activists or discussions about press releases).

transient, politically-inspired contours permanently derogates legislative independence and distorts the separation of powers.

B. "Impairment" of Legislative Functions Has Never Been an Element of the Privilege

Since American Oversight cannot premise the novel idea that legislative "impairment" is a factual element of a *prima facie* privilege claim (as distinguished from simply a conceptual justification for the privilege) in existing precedent, it instead dismisses its practical significance, arguing that the "Senate could have remedied [the issue] by making even the slightest effort." Response at 12. But therein lies (at least part of) the problem with the Court of Appeals' doctrinal innovation. Does the "impairment" criterion translate into a burden of production? A burden of persuasion? Something else? And if the unspecified quantum of evidence is adduced, is the privilege conclusively established, or does the burden shift to the party contesting the privilege claim to make a countervailing showing? *See* COA Op. ¶¶ 16, 20 (making contradictory statements as to whether legislative privilege is "absolute" or "qualified" in the context of the Public Records Act). The Court of Appeals' unwillingness or inability to supply answers attests to the doctrinally dubious and conceptually inchoate nature of its newly announced test. And it portends precisely the inter-branch entanglement that has prompted another court to reject as "absurd" precisely the Court of Appeals' formulation. *See MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988).

II. A Denial of a Stay Promises Irreparable Injury and Would be Inequitable

Given that the Court has already entered a temporary stay, Petitioners will not tarry over the remaining elements of the *Smith* standard. It suffices to note, however, that American Oversight proffers no explanation for how the denial of a stay—and the attendant compelled disclosure of the disputed records—would *not* vitiate the Senate's ability to seek meaningful review of its claims in this Court. *See U.S. v. Philip Morris, Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (recognizing the obvious "injury" exacted by the coerced disclosure of information alleged to be privileged).

Further, American Oversight's gripes about the "quality," Response at 15, of the Senate's comprehensive document productions are discredited by the publicly available repository—which contains numerous communications, including text messages extracted from the personal cell phone of the Senate President, between and among legislators, legislative staff, and various outside third parties—but also would come as a surprise to readers of American Oversight's own press releases. *See* American Oversight, *Arizona Senate Releases 'Audit' Records Following Court Order*, Sept. 1, 2021, *available at* https://www.americanoversight.org/arizona-senate-releases-audit-records-following-court-order ("Included in the documents is information regarding audit payments as well as emails and text messages that audit officials and legislators exchanged with outside parties, including prominent Republicans, election conspiracy theorists and activists, members of Trump's legal team, and others."); American Oversight, *New Arizona 'Audit'*

Records Released, Oct. 5, 2021, *available at* https://www.americanoversight.org/new-arizona-audit-records-released (quoting at length from what American Oversight evidently considers 'substantive' emails and texts involving President Fann and Chairman Petersen). The Senate has more than fulfilled whatever duties the Public Records Act attaches to it.

CONCLUSION

For the reasons stated herein and in the Emergency Motion for a Stay, the Court should stay pending its adjudication of the Petition for Review (and, if review is granted, its adjudication of the merits) the lower courts' orders compelling the Senate to produce records over which it has asserted claims of legislative privilege.

RESPECTFULLY SUBMITTED this 28th day of January, 2022.

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