

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

**RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR
STAY**

Keith Beauchamp (012434)

kbeauchamp@cblawyers.com

Roopali H. Desai (024295)

rdesai@cblawyers.com

D. Andrew Gaona (028414)

agaona@cblawyers.com

COPPERSMITH BROCKELMAN PLC

2800 North Central Avenue, Suite 1900

Phoenix, Arizona 85004

T: (602) 381-5478

*Attorneys for Real Party in Interest American
Oversight*

Introduction

In the wake of a presidential election that didn't go as she and her supporters wanted, Senate President Karen Fann commissioned an "audit" of the election results in Maricopa County. President Fann chose Cyber Ninjas, Inc. – and its conspiracy theorist CEO – to conduct the "audit" over several experienced firms. And through it all, President Fann promised the "audit" would be "the most transparent [] in history."

Almost a year later, there's little question that President Fann's promise of transparency was as meaningless as the "audit" itself. True, the Senate released thousands of documents in response to public records requests. But the bulk of the Senate's productions are irrelevant materials such as newspaper articles and generic emails from the public about the audit. As the trial court found, "[n]early every communication between or among" President Fann and other key players "relating to the audit [has] been withheld on the basis of legislative privilege."

Under the Public Records Law ("PRL"), Arizonans have a right to understand what President Fann and other legislators knew about the audit's origins and conduct, and how an unqualified vendor came to be handed more than one million voted ballots. As a result, both the trial

court and court of appeals rightly rejected the Senate’s blanket invocation of legislative privilege over hundreds of documents absent evidence of (1) a connection to pending legislation or (2) the actual or threatened impairment of legislative deliberation. And the court of appeals’ well-reasoned, unanimous opinion provided a sensible test based on this Court’s own precedent for the Senate to apply to the withheld documents, and to guide further proceedings before the trial court as to specific withheld documents it’s never seen.

On these remarkable facts, the Senate asks this Court to intervene and give judicial imprimatur to its continued refusal to release public records related to the “audit.” The Senate requests a stay of pending orders requiring it to either release those records or submit them to the trial court for *in camera* review. But because the Senate is unlikely to prevail on the merits before this Court and fails to satisfy the other factors necessary to obtain a stay, the Court should deny the Senate’s “Emergency Motion for Stay” and reaffirm Arizonans’ right under the PRL to “be informed about what their government is up to.” *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 303 ¶ 21 (1998) (cleaned up).

Factual Background

This public records litigation already has a long history and is now before this Court for the second time.

In short, Real Party in Interest American Oversight (“AO”) sued President Fann, Senator Warren Petersen, and the Arizona Senate (collectively, “Senate”) after the Senate refused to produce public records related to the Senate’s “audit” of the 2020 General Election results in Maricopa County (“Audit”). Four months ago, this Court denied review of the court of appeals’ memorandum decision holding that (1) legislative immunity didn’t preclude this PRL litigation, and (2) Audit-related records held by the Senate’s contractors are “public records” under the PRL. *Fann v. Kemp* (“*Fann I*”), No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. Ct. App. Aug. 19, 2021).

At issue now are around 700 documents withheld, either in whole or in part, by the Senate based on legislative privilege. The privilege log’s descriptions of these documents are as vague as can be, with most entries generically referring to a document being “internal” or “legislative” or simply “discussions” on a vaguely defined topic. And as noted above, the withheld documents include (1) most communications between or among

Senator Fann, Senator Peterson, Senate Liaison Ken Bennett or Senate Liaison Randy Pullen relating to the Audit, and (2) communications between any of those individuals on the one hand and anyone at Cyber Ninjas or the various subcontractors who conducted the Audit on the other.

The Senate's obstinance led AO to file a Motion to Compel. The trial court granted that Motion because the Senate failed to show that (1) "[t]he audit was [] an integral part of a deliberative process," (2) "the withheld information is [] tethered to proposed legislation," or (3) "that disclosure of the records sought would impair legislative deliberations." On January 21, 2022, the court of appeals affirmed these core findings in a unanimous opinion. *Fann v. Kemp* ("*Fann II*"), __ Ariz. ___, 2022 WL 189825, at *1 (Ariz. Ct. App. Jan. 21, 2022). *Fann II* rests on four key overarching holdings about the scope of legislative privilege under the Arizona Constitution.

First, the court of appeals held that the Senate bore the burden of proving that legislative privilege applied, and that legislative privilege must be "narrowly construed . . . because [it is] in derogation of the search for truth." *Fann II* ¶ 19 (cleaned up). As a result, "a legislator seeking to

invoke the legislative privilege to prevent disclosure of public records under the PRL carries a heavy burden.” *Id.* ¶ 22.

Second, the court of appeals reaffirmed that legislative privilege doesn’t apply to everything a legislator may do. Instead, it applies only to 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, and when necessary to prevent indirect impairment of such deliberations.” *Id.* ¶ 24.

Third, the court of appeals found no evidence that the Audit “was, or even could be, integral to the deliberative and communicative processes of the legislature.” *Id.* ¶ 26. That is, “[n]othing in the record shows that the prime purpose of the audit was to identify changes required to Arizona's voting laws, and it is undisputed that at no time during the audit was any election legislation pending before the legislature.” *Id.* Relatedly, the court of appeals found no reversible error in the trial court’s determination that the Senate’s “hearing” about the Audit was a “political act” because “the hearing lacked the hallmarks of traditional legislation.” *Id.*

Lastly, the court of appeals also reaffirmed that the Senate had to show that the privilege was “necessary to prevent indirect impairment” of legislative deliberations and that it “made no attempt” to satisfy that element. *Id.* ¶ 32.

For all these reasons, the court of appeals “direct[ed] the Senate to immediately disclose . . . all records listed in its privilege log that do not fall within” these parameters, but also allowed the Senate to submit documents for *in camera* review. *Id.* ¶ 38.

Almost exactly 96 hours after the publication of *Fann II*, the Senate filed its “Emergency Motion for Stay” and an accompanying Petition for Review. During that four-day period, the Senate neither produced any withheld documents nor submitted any of those documents to the trial court for *in camera* review. In fact, it did nothing despite the alleged existence of an “[e]mergency.”

Argument

The Senate fails to prove that this Court should stay the orders below and further delay the production of public records already withheld for far too long. In considering the Senate’s request, this Court weighs four familiar 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). As detailed further below, the Senate meets none of these factors.

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

First, the Senate is not likely to succeed on the merits. In the context of a petition for review like the Senate’s, a party’s likelihood of success has two components: (1) is this Court likely to grant review under the criteria established by [Rule 23](#), Ariz. R. Civ. App., and (2) if so, is this Court likely to reverse? The answer to both questions is “no,” and the Senate’s failure to address whether this Court will grant review is telling.

A. There is no compelling reason for this Court to grant review.

[Rule 23](#) provides a nonexclusive list of reasons this Court should grant a petition for review, including “that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that there are conflicting decisions by the Court of Appeals, or that important issues of law have been incorrectly decided.”

Considering these factors, there's no reason this Court should grant review.

It is no wonder that the Senate overlooks this component of a petition for review, because the factors largely weigh against its cause:

- At least two Arizona decisions “control[] the point in law in question, see *Steiger v. Superior Ct. for Maricopa Cty.*, 112 Ariz. 1 (1975), and *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130 (App. 2003);
- They cannot identify any of this Court’s decisions that should be “overruled or qualified”; and
- There are no “conflicting decisions by the court of appeals.”

At most, the Senate [at 3] identifies “two critical respects” in which it claims the court of appeals erred, but only in its overall discussion of the merits. The Senate thus asks this Court to engage in mere (alleged) error correction, which is insufficient under Rule 23 (and misplaced in any event, as described below). As a result, the Senate cannot establish a likelihood that this Court will grant review.

B. The court of appeals broke no new ground in *Fann II*.

Even if the Senate established some likelihood that this Court will grant its pending petition for review (it didn't), it cannot clear the second hurdle of establishing a likelihood that this Court will reverse *Fann II*. As noted above, the Senate contends that the court of appeals "erred in two critical respects." Neither withstands scrutiny.

The Senate first says [at 3-4] that "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." According to the Senate, "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 Senate supports this broad argument [at 4-5] with a page-long string cite of non-binding decisions from other jurisdictions.

This arguments hinges on a fundamental misunderstanding of the law as it existed even before *Fann II* as applied to the facts here. As the court of appeals noted at the outset, federal law and binding court of appeals precedent hold that legislative privilege applies to matters

beyond “pure speech and debate” on the floor of 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.” *Fann II* ¶ 24 (referencing *Gravel v. United States*, 408 U.S. 606 (1972)) and citing *Fields*, 208 Ariz. 137 ¶ 18). And though a legislative “investigation” could be an “integral part” of the legislature’s “deliberative and communicative processes” related to legislation or other matters, “the mere fact that the legislature conducted an investigation does not mean it is necessarily protected by the legislative privilege.” *Fann II* ¶ 28.

Therein lies the problem for the Senate. It’s not enough for the Senate to proclaim that the Audit was a legislative “investigation” because, under well-established law, “legislative privilege does not extend to cloak ‘all things in any way related to the legislative process.’” *Fields*, 206 Ariz. at 137 ¶ 18 (emphasis added) (citation omitted). Not only was there no “election legislation pending before the legislature” during the Audit, but the record also didn’t “show[] that the prime purpose of the audit was to identify changes required to Arizona’s voting laws” such that “proposed legislation” was a contemplated end goal of the Audit. *Fann II*

¶ 26. Instead, the Statement of Work executed by the Senate authorizing Cyber Ninjas to perform the Audit demonstrated that all understood the Audit would merely “verify that election procedures were sufficiently observed.” *Id.* And to say that an investigation might lead to some proposed legislation at some unknown point in the future is indeed “too tenuous” to invoke legislative privilege, *Fann II* ¶ 30. But as the Court of Appeals confirmed, the better rule, and the rule resulting from the proper “narrow” construction of this truth-concealing privilege, is “[o]nly activities ‘done in the course of the process of enacting legislation’ receive protection.” *Fann II* ¶ 31 (citing *Steiger*, 112 Ariz. at 3).

Next, the Senate claims [at 7-8] it was error for the court of appeals to apply the plain language of *Fields* and *Gravel* to require a legislator invoking legislative privilege to make at least some showing that the requested disclosure would “impair” legislative deliberations. According to the Senate [*id.*], this requirement “represents a substantial restructuring of the legislative privilege that will significantly enervate its protection.”

Hardly. For decades, the prevailing formulation of legislative privilege has been stated in the conjunctive; 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.’” *Fields*, 206 Ariz. at 137 ¶ 18 (citing *Gravel*, 408 U.S. at 625) (emphasis added). Conceivably, a case requiring a trial court to weigh the extent of “impairment” could yield questions for this Court to consider, but that’s not what either the trial court or court of appeals did here. Instead, they merely recognized that “the Senate . . . made no attempt to show how confidential treatment of its communications relating to the audit was necessary to prevent indirect impairment of its legislative deliberations.” *Fann II* ¶ 32. And for that simple reason – one the Senate could have remedied by making even the slightest effort had its blanket assertions of legislative privilege been valid in the first place – “it . . . necessarily failed to meet its burden of establishing that each of the records listed in the privilege log are shielded from public disclosure.” *Id.* This conclusion was not error and is

no reason to stay the orders below requiring the Senate to comply with the PRL.

II. The Release of Public Records to the Public's Benefit Is Not "Irreparable Harm."

Next, the Senate's contention that it will suffer irreparable harm absent a stay rings hollow when considering its delay in seeking relief, that the legislative privilege is meant to protect the public and not individual legislators, and the public policy underlying the PRL.

The Senate frames its stay request as an "emergency," yet fails to justify why it waited 96 hours to declare such an "emergency" when filing a less-than-ten-page stay motion. In the interim, the Senate appears to have done nothing; that is, it produced no documents to American Oversight, provided no documents for *in camera* review, and did not first ask either the trial court or court of appeals to stay their orders pending proceedings in this Court. This delay is evidence of a lack of "irreparable harm."

Beyond that, the "irreparable harm" claimed by the Senate is no "harm" at all when considering that legislative privilege "is not intended to protect legislators' individual interests, 'but to support the rights of the people, by enabling their representatives to execute the functions of their

office without fear of prosecutions, civil or criminal.” *Fields*, 206 Ariz. at 137 ¶ 17. In other words, though the legislators at issue may not want the withheld records released, that’s insufficient to establish “irreparable harm” in this context.

Lastly (and relatedly), the Senate’s invocation of legislative privilege here conflicts with the PRL’s strong presumption favoring the disclosure of public records, one the Senate must defeat here to prevail. *Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 8 (2009). That presumption arises out of the PRL’s “core purpose”: “to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.” *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶ 33 (App. 2001) (citation omitted). And because “[t]he public’s right to know any public document is weighty in itself,” *id.* ¶ 30, and public records at issue belong to the public, the Senate’s claim of “irreparable harm” is particularly difficult to justify.

III. The Public’s Interest in Accessing Key Public Records Outweighs Any Harm to the Senate.

Finally, in considering the final two stay factors (*i.e.*, weighing the harm to the parties and public policy), the public’s strong interest in

accessing public records to monitor the conduct of its leadership, *e.g.*, *Cong. Elementary Sch. Dist. No. 17 of Yavapai Cty. v. Warren*, 227 Ariz. 16, 18 ¶ 11 (App. 2011), should prevail. The Senate’s farcical Audit has dominated the news cycle in Arizona for nearly a year, and the public deserves to understand the truth about its origin and conduct. It’s not enough that the Senate [at 9] allegedly “already has made what is likely the largest production of public records in Arizona history.”¹ The Senate’s myopic focus on quantity over quality should not go unnoticed. Indeed, the Senate’s reliance on abstract page counts overlooks that thousands of those pages are irrelevant materials, such as multiple copies of newspaper articles, generic emails from members of the public commenting on the audit and even multiple copies of already-public filings from this and other litigation.

Public records cases are brought as special actions so requesting parties can get expedited relief. This litigation has already gone on too long, and public policy thus counsels heavily against a stay.

¹ This is most certainly untrue, but beside the point.

Conclusion

The Senate failed to show that this Court should enter a stay that would only further delay the production of public records that should have been disclosed months ago. The Court should deny the Senate's "Emergency Motion for Stay."

RESPECTFULLY SUBMITTED: January 28, 2022

COPPERSMITH BROCKELMAN PLC

By: /s/ D. Andrew Gaona

Keith Beauchamp

Roopali H. Desai

D. Andrew Gaona