STATECRAFT
LAW • GOVERNMENT • CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com

*Attorneys for Defendants Arizona Senate President Karen Fann, Senate Judiciary Committee Chairman Warren Petersen, and former Arizona Secretary of State Ken Bennett*

**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**



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| ARIZONA DEMOCRATIC PARTY, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KAREN FANN, *et al.*,<br><br>Defendants. | No. CV2021-006646<br><br>**SENATE DEFENDANTS' COMBINED MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**<br><br>(Assigned to the Hon. Christopher Coury) |

Pursuant to the Court's order of April 23, 2021, Defendants Senate President Karen Fann, Senate Judiciary Committee Chairman Warren Petersen, and former Arizona Secretary of State and Senate audit liaison Ken Bennett (collectively, the "Senate Defendants") respectfully submit this consolidated Response to the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Motion to Dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6).

## INTRODUCTION

The Arizona Senate's audit of the November 3, 2020 general election in Maricopa County will be conducted in a fair, transparent manner that complies with applicable laws and respects the privacy of individual voters; that is not the issue in this case. Rather, this case concerns only *what* strictures govern the audit and *who* polices adherence to them. In that vein, the overtly partisan campaign by these Plaintiffs to interdict the Senate's audit fails for at least five independent reasons.

***First***, the Complaint proffers only a catalogue of diffuse political grievances by partisan actors; absent is any cognizable legal claim predicated on particularized injuries to specific individuals. Because this case presents no redressable cause of action, the Court can and should summarily dismiss it on those grounds. *See Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 13 (2005) ("[T]he threshold issue that must first be resolved is whether [plaintiff] has standing to sue.").

***Second***, even if the Plaintiffs did have standing, the Senate Defendants and their agents are immune from suit pursuant to two related but distinct protections conferred by the Arizona Constitution. As an initial matter, members of the Legislature "shall not be subject to any civil process during the session of the legislature." ARIZ. CONST. art. IV, Pt. 2 § 6. If this categorical command were not enough to preclude Plaintiffs' claims during the pendency of the ongoing legislative session, the Constitution's separate "speech and debate" privilege, *see id.* § 7, further insulates members of the legislature from civil liability and compelled disclosures in connection with the discharge of their official duties. *See Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136, ¶¶ 15-16 (App. 2003) (holding that when legislators "are acting within their 'legitimate legislative sphere,' the Speech or Debate Clause serves as an absolute bar to . . . civil liability" (quotation omitted)); *see also Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("Just as a criminal prosecution infringes upon the independence which the [Speech and Debate] Clause is designed to preserve, a private civil action, ***whether for an injunction or damages***, creates

a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." (emphasis added)). Further, immunities and privileges assertable by individual legislators transpose onto their agents and representatives in the course of the latter's authorized legislative functions. *See Fields*, 206 Ariz. at 140, ¶ 30.

***Third***, even if the Senate Defendants were not categorically immune from suit, the Court's adjudication of the Plaintiffs' claims would inevitably entail a substantial and improper incursion into the sovereign affairs of a coequal branch. When, as here, a legislative body is conducting an investigation evaluating materials obtained by an indisputably valid and lawful legislative subpoena, it is not the province of the judiciary to superintend the people's elected representatives in their work. *See* ARIZ. CONST. art. III; *Exxon Corp. v. Federal Trade Commission*, 589 F.2d 582, 590 (D.C. Cir. 1978).

***Fourth***, the provisions of law upon which Plaintiffs rely have no application to the Senate Defendants in any event. The cited portions of the Elections Procedures Manual (the "EPM") govern the responsibilities of county elections officials; nothing in the text of the EPM or the statutes it purports to interpret extends its directives to legislative officials undertaking a post-election audit in the course of a legislative investigation.

***Fifth***, in choosing to delay their litigation onslaught until the very day the audit was scheduled to commence—to the considerable detriment of the Defendants—the Plaintiffs have rendered their own claims time-barred.



## ARGUMENT

### I. Plaintiffs Lack Standing Because They Have Not Alleged Any Actual Injury, Let Alone a "Particularized" Harm

"To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69 (1998) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).[1] An "injury" sufficient to sustain standing is not merely any intangible or inchoate

[1] *See generally Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 22 (2003) ("Although we

adverse impact asserted by any citizen. Rather, "[t]o qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (internal citations omitted). When an organization invokes the principle of associational standing, as the Arizona Democratic Party has done in this case, *see* Compl. ¶¶ 1, 77, at least one of its members must have independent individual standing to assert the claims on his or her own behalf, *see United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) ("We have recognized that an association has standing to bring suit on behalf of its members when . . . its members would otherwise have standing to sue in their own right."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (noting that "the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm")

Here, the Complaint struggles unsuccessfully to articulate any tangible harm to any particular individual that is attributable to the audit. That failure alone necessitates the dismissal of this action in its entirety.[2]

**A. A Defendant's Alleged Non-Compliance with the Law is Not an "Injury"**

The Plaintiffs' claims can be distilled as follows: notwithstanding that the plain text of the EPM is facially inapplicable to the Legislature and its agents, the Court should distort and distend the text of these provisions, transpose them onto the Senate's audit, and find that any failure to comply with them injures the Plaintiffs.

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are not bound by federal jurisprudence on the matter of standing, we have previously found federal case law instructive."). The Supreme Court has suggested that a more "relaxed" standing rubric governs mandamus actions, *see Ariz. Pub. Integrity Alliance v. Fontes*, 250 Ariz. 58, ¶ 11 (2020), which this case is not.

[2] Indeed, the Attorney General has deemed the accusations lobbed by Secretary Hobbs—which are largely identical to the allegations in the Complaint—as "speculation" that cannot sustain even an investigation by that office. *See* Letter of Attorney General Mark Brnovich to Secretary of State Katie Hobbs, dated Apr. 23, 2021, attached hereto as Exhibit 1.

This proposition quickly dissipates under the weight of the case law and common sense. It is a foundational tenet of standing that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements" of an actual injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575–76 (1992); *see also Carney v. Adams*, 141 S. Ct. 493, 498 (2020) ("[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact.' And it consequently does not show standing."); *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (admonishing that "standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" (internal citations omitted)).

A review of the Complaint reveals that it is largely a litany of gripes concerning the procedures pursuant to which the audit is being conducted. Absent is any factual nexus conjoining any supposed act of misconduct to any particular voter. For example, Plaintiffs grouse there is allegedly no "secure and documented chain of custody for the ballots and election equipment," Compl. ¶ 46(A), that "the Audit workers who will perform signature comparison are not trained in signature comparison or verification techniques," *id.* ¶ 50, and that the majority of the audit observers are registered Republicans, *id.* ¶ 53.[3] Even assuming the truth of these contentions, they do not evince any legal "injury" to any identifiable individual. *See Mecinas v. Hobbs*, 468 F. Supp. 3d 1186, 1204 (D. Ariz. 2020) (Democratic Party committee's allegation that ballot ordering statute conferred "unfair" and "arbitrary" advantage for one political party "is not a concrete injury to establish standing, but rather a generalized grievance with the political process that this court 'is not responsible for vindicating.'").

[3] As demonstrated in the brief filed by Cyber Ninjas, the Plaintiffs instructed all members of the Democratic party to boycott the audit—and now disingenuously urge this Court to enjoin the very circumstances that the Plaintiffs themselves induced.

At bottom, Plaintiffs' theory is fundamentally infirm for the simple reason that such alleged "procedural" harms cannot engender standing unless they impair some tangible and substantive interests of a particular individual. *See Summers*, 555 U.S. at 496 ("[A] deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create . . . standing."). Here, the audit's dispositions of ballots or other election materials have no effect on the legal rights or interests of anyone. The returns of the November 3, 2020 general election have been tallied, canvassed and certified. The audit's results will not and cannot affect the validity of any previously counted ballots, or determine the legal eligibility of any individual to vote in future elections. For example, suppose that a member of the audit team makes an errant signature verification determination[4] and, on that basis, concludes that a given ballot should not have been counted. What then? Such a mistake would certainly elicit reasonable political criticism, but it has no import for any voter's legal rights. The ballot at issue would not be—and could not be—removed from the previously certified returns, and the voter who cast it would remain on the rolls as a qualified elector.

In short, the audit is merely a vehicle for obtaining and analyzing factual information to inform the legislative process; while the facts it yields may illuminate errors, flaws or vulnerabilities in Maricopa County's election infrastructure that future legislation may remedy, it does not dispose of any identified individual's rights or interests. Plaintiffs apparently feel politically frustrated with the audit procedures, but they cannot extrude from their dissatisfaction any discernible legal injury.

### B. Even If the Complaint Adequately Alleged an "Injury," It Is Not Particularized

As discussed above, the Complaint's captious parsing of the audit procedures does not delineate any articulable harm to any individual. Indeed, only a single sentence in the

[4] Although this motion assumes the truth of the Complaint's allegations, it bears noting that Cyber Ninjas' current contract with the Senate does not, in fact, contemplate any signature review or verification activities. The Plaintiffs are asking this Court to enjoin activities that are not currently and have never been part of the audit plan.

entire pleading adumbrates anything approximating an "injury"—to wit, paragraph 77, which avers that "Plaintiff ADP will suffer irreparable harm . . . because the private information of its members—including how they voted in the 2020 General Election—will be placed into the hands of unknown, untrained agents of the Private Auditors without the protections guaranteed by statute and the EPM."

Preliminarily, this statement is facially insufficient to sustain a cognizable "injury." To the extent it refers to non-public voter registration information, existing law expressly permits access to such data by "an authorized government official in the scope of the official's duties," and as well as "for election purposes and for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work." A.R.S. § 16-168(F). Either exemption—and certainly their aggregate import—encompasses the authorized investigators of government officials. To the extent it refers to voted ballots, this point should be too obvious to bear repeating, but it is not possible to identify the electoral choices of any given voter. The privacy of a voter's secret ballot will not be—and simply could not be—compromised by the audit. And if, through some implausible constellation of circumstances, the audit has somehow revealed a particular voter's candidate preferences, the Complaint nowhere identifies any such individual. *See Californians for Renewable Energy v. U.S. Dept. of Energy*, 860 F. Supp. 2d 44, 48 (D.D.C. 2012) (to claim associational standing, "the organization must name at least one member who has suffered the requisite harm").

More fundamentally, even if the auditors' review of voter rolls and anonymous voted ballots did inflict some conceivable "injury," the harm is too diffuse to sustain any particular plaintiff's standing. This point is important; an injury sufficient for standing must not only be "concrete," it also must be "particularized." *See Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 17 (2005) ("To establish standing, we require that petitioners show a particularized injury to themselves."). The terms are not interchangeable; as the Supreme Court has explained, "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). That is, a harm

that is "widely dispersed . . . is not sufficient to establish individual standing." *Bennett v. Napolitano*, 206 Ariz. 520, 526–27, ¶ 28 (2003); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (to be "particularized," an injury must be "personal, individual, distinct, and differentiated").

Thus, if the auditors' review of voter rolls and every voted ballot is an "injury," it impacts every Maricopa County voter in the same unitary and undifferentiated way. There necessarily is no harm that is "particularized" to any specific individual—and certainly not to any named plaintiff in this case. *See generally Lujan*, 504 U.S. at 574 (explaining that there is no standing when a plaintiff alleges "merely that he suffers in some indefinite way in common with people generally" (internal citation omitted)).

Perhaps the most resounding refutation of the Plaintiffs' claim of standing can be found in the theory their political compatriots championed in courts nationwide just months ago. A spate of lawsuits brought by President Trump's campaign and its allies in connection with the 2020 election challenged elections officials' failure to comply with, or to adequately enforce, various procedural safeguards prescribed by state law, arguing that these derelictions increased the risk that fraudulent or unlawful ballots would be included in the canvass, thereby diluting the votes of qualified electors. In case after case, courts—including the District of Arizona—disposed of the claims on standing grounds, reasoning that even assuming that elections officials' actions or omissions would facilitate the casting of illegal ballots, the resulting dilutive effect would impact every lawful voter to precisely the same proportionate extent; accordingly, no particular plaintiff had standing. *See, e.g.*, *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pennsylvania*, 980 F.3d 336, 356 (3d Cir. 2020), *vacated as moot*, 2021 WL 1520777 (U.S. Apr. 19, 2021) ("'A vote cast by fraud or mailed in by the wrong person through mistake,' or otherwise counted illegally, 'has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged.'") (quoting *Martel v. Condos*, 487 F. Supp. 3d 247 (D. Vt. 2020)); *Bowyer v. Ducey*, -- F. Supp. 3d --, 2020 WL 7238261, at *6 (D. Ariz. Dec. 9, 2020) ("This conceptualization of vote dilution—state actors counting ballots

in violation of state election law—is not a concrete harm." (internal citation omitted)); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) ("[T]he theory of Plaintiffs' case . . . is that the Plan [for an all-mail election] will lead to an increase in illegal votes thereby harming them as rightful voters by diluting their vote. But Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Moore v. Circosta*, 1:20CV911, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020) ("[T]he notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."); *see also Republican Nat'l Comm. v. Common Cause Rhode Island*, 141 S. Ct. 206 (2020) (holding that political party entities "lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws"). Indeed, the Plaintiffs' putative "injury" in this case is even more attenuated and tenuous. As discussed above, the audit does not (and could not) determine the legality of any voter's qualifications or any ballot's validity; it is devoid of any capacity whatsoever to derogate or dilute the protected rights and interests of any individual.

In sum, the Plaintiffs cannot alchemize political grievances and partisan cavils into redressable injuries. Even if the procedural schemes outlined in the EPM applied to the audit, any alleged failure to adhere to them would have no tangible injurious effect on any given voter. And even if some semblance of legal "harm" could be gleaned from the auditors' review of voter rolls and ballots, it does not redound in any "particularized" manner to any specific voter. Accordingly, Plaintiffs lack standing to pursue their claims.

**C. There is No "Exceptional" Reason That Could Justify Waiving Standing**

Although standing is not a jurisdictional prerequisite in this state's judiciary, "Arizona courts nonetheless impose a 'rigorous' standing requirement." *Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 13, ¶ 16 (App. 2009). Standing may be waived "only in exceptional circumstances," *Sears*, 192 Ariz. at 71, ¶ 25, to resolve important issues that "are likely to recur," *id.*—a criterion that this unprecedented audit

surely does not satisfy. Research reveals fewer than a handful of published appellate cases permitting a waiver of standing, and nothing about this dispute countenances one of these "rare" dispensations, *Bennett*, 206 Ariz. at 527, ¶ 31, particularly given the separation of powers concerns that an adjudication of the merits would precipitate. *See infra* Section III. Further, this is not a case where the "wrong" plaintiff brought what otherwise would be a colorable suit. As outlined above, the standing deficiencies are endemic to the nature of their claims. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." (citation omitted)).

## II. The Senate Defendants And Their Agents Are Immune from Civil Process, Compelled Disclosures, and Civil Liability in Connection with Their Official Duties

Two conceptually related but textually distinct constitutional protections confer on the Senate Defendants and their agents absolute immunity from liability, as well as from the compelled disclosure of testimonial or documentary evidence, in this case.

### A. The Constitution Insulates Legislators From Civil Process While the Legislature Is in Session

One sentence in the Arizona Constitution can—and should—be dispositive of this case: "Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and ***they shall not be subject to any civil process during the session of the legislature***, nor for fifteen days next before the commencement of each session." ARIZ. CONST. art. IV, Pt. 2 § 6 [emphasis added]. This command is categorical, unqualified and pellucid: members of the Legislature may not be sued while the Legislature is in session. Period. The dearth of interpreting case law does not detract from the clarity of the constitutional text. *See generally Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992) ("[I]f the constitutional language is clear, judicial construction is neither required nor proper."); *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994) ("If the

[constitutional] language is clear and unambiguous, we generally must follow the text of the provision as written.")

As the California Supreme Court explained in connection with a parallel provision in that state's constitution, the plain language of the immunity grant "creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds." *Harmer v. Superior Court In & For Sacramento County*, 79 Cal. Rptr. 855, 857 (Ct. App. 1969) (addressing lawsuit seeking injunction against "secret meetings" by legislators who were serving on a non-legislative commission).

Further, the capacious term "civil process" encompasses not just the service of a complaint and summons, but any compulsory device to elicit testimonial or documentary evidence under the auspices of a court order (*e.g.*, a subpoena). *See Hart v. Idaho State Tax Comm'n*, 301 P.3d 627, 630 (Idaho 2012) (drawing on historical and dictionary sources in interpreting nearly identical provision in Idaho's constitution, and concluding that "'process,' as its etymology shows, is something issuing out of, or from a court or judge" and "connotes the State's authority to compel compliance with the law"); BLACK'S LAW DICTIONARY (defining "process" as "proceedings in any action or prosecution," or "a summons or writ, esp. to appear or respond in court").



Thus, the plain text of Article IV, Part 2, Section 6 precludes the exertion of compulsory process in any form—to include commands for the production of documentary or testimonial evidence—from any of the Senate Defendants during the pendency of the ongoing legislative session.

### B. The Speech and Debate Clause Immunizes All Actions Undertaken Pursuant to a Legislator's Official Duties, Including This Audit

#### 1. The Immunity and Its Cognate Privilege Apply to All Claims Predicated on Legislative Functions, Regardless of the Theory of Relief or Remedies Sought

The protection from civil process during the legislative session is complemented by a more general immunity for claims arising out of legislators' official acts and duties. Reified in Article IV, Part 2, Section 7 of the Arizona Constitution (which in turn is derived from Article I, Section 6 of the U.S. Constitution), this so-called "speech and debate" privilege traces its lineage to the common law. It is simultaneously broader and narrower than civil process immunity; while it is not temporally limited to only the legislative session, it does not protect legislators or their agents from acts undertaken in a personal or non-legislative capacity. *See Gravel v. United States*, 408 U.S. 606, 617 (1972) ("The Clause . . . speaks only of 'Speech or Debate,' but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view."). As distilled by the Court of Appeals, when legislators "are acting within their 'legitimate legislative sphere,' the Speech or Debate Clause serves as an absolute bar to criminal prosecution or civil liability." *Fields*, 206 Ariz. at 136, ¶¶ 15-16 (quoting *Gravel*, 408 U.S. at 624) (adding that "[t]he United States Supreme Court has held that common law legislative immunity similar to that embodied in the Speech or Debate Clause exists for state legislators acting in a legislative capacity. Additionally, most states, including Arizona, have preserved this common law immunity in state constitutions"); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'").

Like the immunity from civil process during session, the Speech and Debate Clause embraces not just a shield from civil liability but also an evidentiary privilege against the compelled disclosure of documents or information reflecting "'the deliberative and communicative processes' relating to proposed legislation or other matters placed within

the jurisdiction of the legislature." *Fields*, 206 Ariz. at 137, ¶¶ 17-18 (noting that "[t]he legislative immunity doctrine also functions as a testimonial and evidentiary privilege"); *see also Puente Arizona v. Arpaio*, 314 F.R.D. 664, 669 (D. Ariz. 2016) (explaining that "state legislators, like members of Congress, enjoy protection from criminal, civil, or evidentiary process that interferes with their 'legitimate legislative activity'").

Importantly, the Speech and Debate Clause's protections are not contingent upon the nature of the claim, the type of relief sought, or the capacity in which a legislator is sued. As long as the locus of the dispute is the legislator's official functions, then the immunity (and its subsidiary privilege) attach. *See Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (holding, in context of an action for injunctive relief, "a private civil action, ***whether for an injunction or damages***, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation" [emphasis added]); *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 725-26, 733 (1980) (holding that legislative immunity protected supreme court justices from claims for declaratory and injunctive relief in both their official and individual capacities in connection with their promulgation of attorney ethics rules, explaining that legislative immunity "is equally applicable to . . . actions seeking declaratory or injunctive relief"); *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005) (noting that "[t]he square holding of *Consumers Union*" is that "state legislator defendants enjoy legislative immunity protecting them from a suit challenging their actions taken in their official legislative capacities and seeking declaratory or injunctive relief"); *Freedom from Religion Found., Inc. v. Saccone*, 894 F. Supp. 2d 573, 582 (M.D. Pa. 2012) ("Legislative immunity does not just insulate legislators from monetary damages, but cloaks them in immunity from all suits."); *Fields*, 206 Ariz. at 139-41 (recognizing legislative privilege despite the apparent absence of any claims for monetary damages).[5]

[5] Plaintiffs presumably will rely heavily on a single paragraph in *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, ¶ 28 (2020), in which the Supreme Court held that legislative immunity did not shield the Board of Regents, as an entity, from an action to

In short, the protections of the Speech and Debate Clause encompass all actions undertaken by legislators in the course of their official duties; in this realm, "the prohibitions of the Speech or Debate Clause are absolute." *Eastland*, 421 U.S. at 501.

2. The Audit Is a Legitimate Legislative Function Within the Scope of the Speech and Debate Clause

Any contention that the audit is not in furtherance of a *bona fide* legislative activity is foreclosed by Judge Thomason's express finding that the subpoenas through which the audit materials were obtained advanced the valid legislative purpose of "evaluat[ing] the accuracy and efficacy of existing vote tabulation systems and competence of county officials in performing election duties, with an eye to introducing possible reform proposals." *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Minute Entry dated Feb. 25, 2021, at 9.

Animating Judge Thomason's conclusion was the settled constitutional precept that "[t]he power to investigate and to do so through compulsory process plainly falls within" the activities insulated from judicial interdiction by the Speech and Debate Clause. *Eastland*, 421 U.S. at 504; *see also id.* at 511 ("The Clause was written to prevent the need to be confronted by such 'questioning' [by courts] and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority."); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (holding that the legislative investigatory power is "broad and indispensable" and applies to anything that may "concern a subject on which legislation could be had"). It is undisputed that the Legislature may properly enact

recover alleged illegal payments. Importantly, though, that case did not feature claims against individual legislators, to whom the Speech and Debate Clause attaches—and *Brnovich* is entirely inapplicable to the more specific immunity from civil process during the legislative session, *see* ARIZ. CONST. art. IV, pt. 2, § 6. In addition, the Attorney General's action against the Board was expressly authorized by an act of the Legislature (*i.e.*, A.R.S. § 35-212(A)), a critical distinction absent from this case. Finally, if *Brnovich* were to be construed as confining all claims of legislative immunity or privilege to only disputes involving claims for monetary damages, it would place Arizona law squarely in conflict with decades of federal jurisprudence holding that the immunity encompasses all claims against legislators acting in the course of their duties. Indeed, *Fields*—a case the *Brnovich* court cited approvingly—validated the applicability of the legislative privilege, notwithstanding that damages claims were not at issue.

legislation relating to the conduct and administration of Arizona elections. Not only is this authority incidental to its general lawmaking power, but it is imbued with particular salience by the Arizona Constitution's express directive that the Legislature must enact "laws to secure the purity of elections and guard against abuses of the elective franchise." ARIZ. CONST. art. VII, § 12.

Because amassing data relating to the accuracy and efficacy of the existing electoral infrastructure is—as Judge Thomason found—manifestly a valid legislative purpose, *see Mazars USA*, 140 S. Ct. at 2031 (a valid legislative purpose "encompasses inquiries into the administration of existing laws" and "surveys of defects" in existing programs), it is *per se* within the scope of the Speech and Debate Clause. *See Eastland*, 421 U.S. at 505, 507 (concluding that "[t]he particular investigation at issue here is related to and in furtherance of a legitimate task of Congress" and therefore "the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena"); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (legislative privilege applies when legislators are "acting in a field where legislators traditionally have power to act"); *see also McGrain v. Daugherty*, 273 U.S. 135, 177 (1927) (finding that investigatory acts are proper if "the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit"). Indeed, at least one Senator has declared that she will not vote to adjourn *sine die* until the body has had an opportunity to appraise the audit results and incorporate its findings into its deliberations. *See* Julia Shumway, *GOP Lawmaker Kills Election Bill, Threatens to Torpedo Session*, ARIZ. CAPITOL TIMES, Apr. 22, 2021, *available at* https://azcapitoltimes.com/news/2021/04/22/gop-lawmaker-kills-election-bill-threatens-to-torpedo-session/.

Accordingly, any argument by the Plaintiffs that the audit is something other than "legislative" in character flounders. Informed and effective lawmaking necessarily demands access to facts and data; the process of assembling and synthesizing such information is integral to the functioning of the legislative branch, and thus subsumed into the Speech and Debate Clause. *See Fields*, 206 Ariz. at 139, ¶ 24 (holding that legislative

privilege covers "actions that are 'an integral part of the deliberative and communicative processes' utilized in developing and finalizing" legislative acts); *Puente Arizona*, 314 F.R.D. at 670 (commenting that because "'[o]btaining information pertinent to potential legislation or investigation" is a legitimate legislative activity, the federal legislative privilege applies to [such] communications" (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983)).

### C. The Legislative Immunities Extend in Equal Force to Authorized Agents and Independent Contractors

Because the 90 elected members of the Legislature cannot by themselves feasibly execute the sundry responsibilities entailed in effective governance, courts consistently have recognized that a privilege or immunity invested in a legislative office extends to employees or vendors acting in the course of their official duties under the auspices of legislative authority. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 621 (1972) ("[B]oth aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, . . . senatorial aides should enjoy immunity for helping a Member conduct committee hearings."); *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 926 (D.C. Cir. 1986) ("It is equally clear that the [Speech and Debate] clause protects Members' aides or assistants insofar as their conduct would be protected if performed by the Member himself."), *abrogated in part on other grounds in Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006). As the Arizona Court of Appeals explained:

> We decide that a legislator may invoke the legislative privilege to shield from inquiry the acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator. The privilege is held solely by the legislator and may only be invoked by the legislator or by an aide on his or her behalf. Therefore, to the extent the IRC engaged [consultants] to perform acts that would be privileged if performed by the commissioners themselves, these acts are protected by legislative privilege.

*Fields*, 206 Ariz. at 140, ¶ 30; *see also* 1988 Ariz. Op. Atty. Gen. 16 (1988) (concluding that, pursuant to Arizona's Speech and Debate Clause, "members of the legislature and its counsel, investigators, consultants and aides enjoy absolute immunity for the performance of their duties relating to the impeachment process, including speeches, discussion, debate, questions, answers, comments, briefings, investigations, preparation of reports and presentation of reports at meetings of members of the legislature"); *Eastland*, 421 U.S. at 507 ("We draw no distinction between the Members and the Chief Counsel" with respect to legislative immunity.); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) ("Because Congressmen must delegate responsibility, aides may invoke the privilege to the extent that the Congressman may and does claim it.").

In short, "[f]or purposes of construing the Speech or Debate Clause, a [legislator] and his aide may be treated as one, given their intertwined duties in performing complex legislative tasks." *Steiger v. Superior Court for Maricopa County*, 112 Ariz. 1, 3 (1975); *see also Fields*, 206 Ariz. at 140, ¶ 28 (observing that there is "no practical difference, for purposes of applying the privilege, between placing a consultant temporarily 'on staff' . . . and retaining that same consultant as an independent contractor"); *Doe v. McMillan*, 412 U.S. 306, 312 (1973) ("[I]t is plain to us that the complaint in this case was barred by the Speech and Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, ***from the consultant, or from the investigator***" for preparing and submitting an official report [emphasis added]).

The Senate's authorized agents and vendors—to include Secretary Bennett and Cyber Ninjas—are engaged in the collection, review and analysis of data and information at the behest and on the behalf of elected Arizona legislators to facilitate the quintessential lawmaking function of crafting legislative proposals. It follows ineluctably that they are protected to the same extent by the Arizona's dual guarantees of legislative immunity, *see* ARIZ. CONST. art. IV, pt. 2, §§ 6, 7. For this reason, President Fann and Chairman Petersen assert, and authorize Cyber Ninjas to assert, a claim of legislative privilege pursuant to both

Article IV, Part 2, Sections 6 and 7 with respect to documents and materials prepared in the course of its authorized legislative functions.

## III. Judicial Management of the Audit Would Violate the Separation of Powers

Even if the Court finds neither the civil process nor Speech and Debate Clause immunities applicable to this case, our separation of powers regime, *see* ARIZ. CONST. art. III, impels that it decline to engage the Plaintiffs' specious claims.

There are certain disputes that, while nominally presenting questions of law, are so innately entwined with political dimensions as to render them unamenable to judicial resolution. Recognizing that such cases "involve decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards," *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485, ¶ 7 (2006), "courts refrain from addressing political questions." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶ 12 (2007); *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) ("The political question doctrine first found expression in Chief Justice Marshall's observation that '[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to [another branch], can never be made in this court,'" and concluding that "if a case presents a political question, we lack subject matter jurisdiction to decide that question") (internal citation omitted).

In short, the political question doctrine is a self-imposed limitation on judicial power. It is founded in a recognition that when adjudication of a claim will entail impingement into the internal domain of the legislature or executive, respect for those coequal branches necessitates dismissal. An assertion that one branch of government has violated or neglected an ostensible statutory obligation in the conduct of its internal functions "does not give license to one of the coordinate branches to correct [it]. Correction comes from within that branch itself or from the people to whom all public officers are responsible for their acts." *Renck v. Superior Court of Maricopa Cnty.*, 66 Ariz. 320, 326 (1947). For precisely this reason, another division of this Court recently concluded that claims

concerning the Legislature's compliance with Arizona's Open Meeting Law, A.R.S. § 38-431, *et seq.*, present a non-justiciable political question because the Constitution entrusts to that elected body the conduct of its own affairs. *See Puente v. Arizona State Legislature*, CV2019-014945, Minute Entry dated Oct. 30, 2020 (Mikitish, J.).[6]

The contours of the political question principle engraft easily onto this case. The Senate's investigatory powers are an innate attribute of its sovereign authority. *See generally Buell v. Superior Court*, 96 Ariz. 62, 66 (1964). When, as here, it has obtained documents and materials pursuant to a valid subpoena, its use of such information is not susceptible to judicial management. *See Mecham v. Gordon*, 156 Ariz. 297, 302 (1988) (holding in impeachment context that "Article 3 of the state Constitution prohibits judicial interference in the legitimate functions of the other branches of our government . . . The separation of powers required by our Constitution prohibits us from intervening in the legislative process.").

The D.C. Circuit's analysis in *Exxon Corp. v. Federal Trade Commission*, 589 F.2d 582 (D.C. Cir. 1978), is instructive. There, the court reaffirmed the right of congressional committees to obtain private parties' confidential trade secret information via requests or subpoenas to the Federal Trade Commission, explaining:

> The material that the FTC proposed to divulge . . . was fully within the scope of the legislature's legitimate investigatory powers. For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever these inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality.

*Id.* at 588. Rebuffing the plaintiff's demands that the court should require the FTC to obtain congressional assurances of confidentiality protections as a precondition to the documents' production, the court added that "any such requirement would clearly involve an unacceptable judicial intrusion into the internal operations of Congress" and that "the

[6] A copy of the ruling is attached hereto as Exhibit 2.

separation of powers demands that the courts do little to interfere with how the Congress deals with this information." *Id.* at 590, 593.

It is no answer to point selectively at excerpts from the EPM. Even if those provisions applied by their plain terms to this audit (and, as discussed below in Section IV, they do not), diktats of the executive branch are impotent to limit the prerogative of the elected Legislature to investigate the critical affairs and electoral infrastructure of this state. *See Puente*, CV2019-014945; *cf. Hughes v. Speaker of the N.H. House of Reps.*, 876 A.2d 736, 744, 746 (N.H. 2005) ("The legislature, alone, 'has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.' The same is true of statutes that codify legislative procedural rules."); *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 440 (Wis. 2011) ("As the court has explained when legislation was challenged based on allegations that the legislature did not follow the relevant procedural statutes, 'this court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments.'" (internal citation omitted)).

Since the early days of statehood, the judiciary has recognized that "courts cannot interfere with the action of the legislative department." *State v. Osborn*, 16 Ariz. 247, 249 (1914); *see also City of Phoenix v. Superior Court of Maricopa County*, 65 Ariz. 139, 144 (1946) ("Courts have no power to enjoin legislative functions."); *Rubi v. 49'er Country Club Estates, Inc.*, 7 Ariz. App. 408, 418 (1968) ("The doctrine of separation of power renders conclusive upon us the legislative determination within its sphere of government."); *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997) ("We have long held that Article III requires the judiciary to refrain from meddling in the workings of the legislative process."). The manner in which the audit is conducted, to include whether and to what extent it will incorporate the EPM's procedural directives to county officials, is constitutionally committed to the plenary discretion of the elected members of the Arizona Senate, acting through their authorized agents.

## IV. The Cited Statutes and EPM Provisions Are Facially Irrelevant and Inapplicable to the Audit

Even indulging the Plaintiffs' insistence that they have pleaded cognizable claims amenable to judicial vindication and that the sources of law they cite can be enforced against these Defendants, their litigation project still fails for a simple reason: the cited provisions say absolutely nothing about the Legislature or this audit.

First, Plaintiffs invoke A.R.S. § 16-168(F), which governs confidential voter registration information. *See* Compl. ¶ 57. But not only does the statute expressly permit access by any "authorized government official in the scope of the official's duties"—a license that necessarily must extend to authorized agents and vendors[7] —but also by private individuals and companies undertaking "reportorial work," *id.*, an elastic classification that easily embraces the Senate's auditors. (Further, the record will ultimately establish that the auditors are not presently undertaking signature verifications in any event.).

Second, the Plaintiffs reference the criminal prohibition on ballot harvesting in A.R.S. § 16-1005(H). *See* Compl. ¶ 60. But this statute has no plausible application to the intergovernmental transfer and review of ballots in a previously canvassed and certified election. Further, the statute categorically exempts "election officials," *id.*, and, by extension, their authorized agents. Finally, even entertaining the peculiar theory that the audit somehow violates A.R.S. § 16-1005(H), these Plaintiffs have no private right of action to civilly enforce a criminal proscription. Indeed, Judge Thomason has already considered and rejected precisely this argument. *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Minute Entry dated Feb. 25, 2021, at 12 n.17.

Third, the Complaint invokes Chapter 10, Section I.A of the EPM, which requires certain election personnel to take a sworn oath before handling ballots or election equipment. *See* Compl. ¶ 62. A review of that provision, however, reveals that it applies

[7] Indeed, if it did not, the Secretary of State and county officials would be violating the law whenever they enlist the assistance of third party vendors and contractors (*e.g.*, electronic pollbook vendors) in election administration.

to activities at the "Central Counting Place" maintained by the County Recorder during the processing and tabulation of ballots. By its own terms, it has no relevance whatsoever to a post-election audit of previously canvassed returns by the legislative branch.

Fourth, the Plaintiffs cite EPM Chapter 6, Section II.C, which mandates that "staff performing the signature verification are properly trained." Compl. ¶ 64. Conspicuously omitted from the carefully cropped quote, however, are the subject of this command—namely, "The County Recorder"—and the context in which it applies—namely, the review of candidate nomination petitions. Disingenuous copy editing is doing all the work.

Finally, the Complaint recites various excerpts from Chapter 4, Section III and Chapter 8, Section V.E of the EPM, which prescribe certain security protocols for voting equipment and ballots. *See* Compl. ¶¶ 66-70. Only upon reviewing these provisions, however, does it become apparent that they are directed exclusively at the county recorder and the "officer in charge of elections," a title derived from the election code that denotes each county's elections director or comparable officer. *See, e.g.*, A.R.S. §§ 16-602, -542, 552. The Senate is investigating the "officer[s] in charge of elections," not acting as one. And no plausible construction of the term "officer in charge of elections," as used in Title 16 and the EPM, could ever encompass a member of the legislative branch. Indeed, the EPM is by its nature a compendium of directives to the Secretary of State's Office and county personnel governing the actual administration of elections. *See* A.R.S. § 16-452; *Fontes*, 250 Ariz. 58, ¶¶ 16-17. Its provisions are not, and never could be, edicts to the sovereign Legislature constraining the exercise of its inherent and constitutionally ordained investigatory powers.

In sum, courts will not "construe the words of a statute to mean something other than what they plainly state." *Canon Sch. Dist. No. 50 v. W.E.S. Const. Co., Inc.*, 177 Ariz. 526, 529 (1994). Even if the cited statutes and EPM provisions were operative authorities enforceable against the Legislature, they can be applied to the audit only by interpolating into them words—to wit, "the Legislature" and "post-election audit"—that simply are not there.

## V. The Plaintiffs' Claims Are Barred by Laches

The familiar elements of laches are (1) unreasonable delay and (2) resulting prejudice to the opposing party. *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009). Both facets are easily satisfied here.

### A. Plaintiffs' Delay Was Unreasonable

The unreasonableness of a delay is gauged primarily by reference to "party's knowledge of his or her right," and his or her timeliness in acting to vindicate it. *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993). As the Complaint itself acknowledges, President Fann publicly announced the Senate's selection of an auditor on March 31—some three weeks before the Plaintiffs initiated this action—and Secretary Hobbs released a letter itemizing her ostensible "concerns regarding the Audit" (which the Complaint largely parrots) the very next day. *See* Compl. ¶¶ 20, 24-25. Other information that Plaintiffs apparently deem somehow relevant to their claims (*e.g.*, the personal views of Cyber Ninjas' CEO) likewise has been in the public domain for weeks. *See id.* ¶¶ 29-30. Despite being on notice of the facts underlying their legal theories since at least early April, Plaintiffs deliberately held their claims in abeyance until the very day the audit commenced—presumably to maximize either the disruptive and/or public relations impact of their filing. Under these circumstances, Plaintiffs' dilatoriness was unreasonable and inexcusable. *See McClung v. Bennett*, 225 Ariz. 154, 157, ¶ 15 (2010) (finding appeal in nomination petition challenge barred by laches despite being filed before the statutory deadline); *Lubin v. Thomas*, 213 Ariz. 496, 498, ¶ 10 (2006) (cautioning that "merely complying with the [statutory] time limits . . . may be insufficient" to avoid finding of unreasonable delay).

### B. Plaintiffs' Delay Has Prejudiced the Defendants

The prejudice exacted by the Plaintiffs' tarrying manifests itself in several forms. First, the audit is an enormously complex and expensive logistical undertaking that requires significant manpower. The Senate has reserved the audit site for a period of only twenty

days, and so any disruption or suspension of audit activities occasioned by this litigation will beget substantial additional expenses for labor and physical space. Second, as noted above, several Senators are awaiting the results of the audit to inform their deliberations on election reform legislation, and so litigation-induced delays in the audit in turn may force the Legislature to prolong its regular session. Finally, and more generally, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 9 (2000), "by compelling the court to 'steamroll through . . . delicate legal issues in order to meet the ballot printing deadlines.'" *Lubin*, 213 Ariz. at 497, ¶ 10 (citation omitted). Had the Plaintiffs acted expeditiously, their request for injunctive relief could have been briefed and decided without unreasonable burden the other parties and the Court. *See Arizona Libertarian Party*, 189 F. Supp. 3d 920, 924 (D. Ariz. 2016) (finding prejudice in election case, reasoning that "Plaintiffs' delay has prejudiced the administration of justice. Plaintiffs' delay left the Court with only 18 days . . . to obtain briefing, hold a hearing, evaluate the relevant constitutional law, rule on Plaintiffs' motion, and advise the Secretary and the candidates"). The tenets of equity that undergird the laches doctrine counsel that the Plaintiffs cannot benefit from their transparently political calculation to strategically delay the pursuit of their claims.



## CONCLUSION

For the foregoing reasons, the Court should (1) deny Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and (2) dismiss the Complaint in its entirety and with prejudice, pursuant to Ariz. R. Civ. P. 12(b)(6).

RESPECTFULLY SUBMITTED this 25th day of April, 2021.

STATECRAFT PLLC

By: */s/ Thomas Basile*

Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
*Attorneys for Defendants Karen Fann, President of the Arizona Senate, Warren Petersen, Chairman of the Senate Judiciary Committee, and former Arizona Secretary of State Ken Bennett*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2021, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Roopali H. Desai (024295)
D. Andrew Gaona (028414)
Kristen Yost (034052)
**COPPERSMITH BROCKELMAN PLC**
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com

James E. Barton II
Jacqueline Mendez Soto
**BARTON MENDEZ SOTO PLLC**
401 West Baseline Road, Suite 205
Tempe, Arizona 85253
james@bartonmendezsoto.com
jacqueline@bartonmendezsoto.com
*Attorneys for Plaintiffs*

Alexander Kolodin
**KOLODIN LAW GROUP PLLC**
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012
Alexander.Kolodin@Kolodinlaw.com
*Attorney for Cyber Ninjas, Inc.*

By: */s/Thomas Basile*
Thomas Basile

# Exhibit 1

MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

April 23, 2021

The Honorable Katie Hobbs
1700 W. Washington, 7th Floor
Phoenix, Arizona 85007
khobbs@azsos.gov

Dear Secretary Hobbs:

I am in receipt of your letter dated April 23, 2021, requesting that the Attorney General's Office investigate "potential" violations of laws in connection with the Arizona State Senate's audit of the Maricopa County election.

I have previously informed the court that the Arizona Senate has broad constitutional and statutory authority to issue a legislative subpoena and consequently conduct the audit of the Maricopa County election. You allege that the Senate may be in violation of several election laws but provide no facts other than a reference to "recent reports" that you believe "suggest" that the Senate may be in violation of the court order in *Maricopa County et al. v. Fann et al.*, No. CV2020-016849.



This does not meet the standard of a credible allegation -- it is speculation insufficient to support the request for an official investigation. Moreover, the separation of powers in our political system demands deference to co-equal branches of government to conduct their lawful business. It would therefore be inappropriate to interrupt the auditing process simply because someone asserts that it could be handled in some other manner. Any such requests should be directed to Senate President Fann.

Rest assured that to the fullest extent of the Attorney General's jurisdiction, I have and will continue to investigate all allegations that our election laws have been violated. Any such complaints, however, must be based on credible facts and not conjecture or politics.

Perhaps one thing that we can all recognize at this point in the process is the imperative of pursuing and maintaining robust election integrity laws. They are necessary to secure accurate results and promote public confidence in the process.

Sincerely,

Mark Brnovich
Attorney General

# Exhibit 2

Clerk of the Superior Court
*** Electronically Filed ***
11/05/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-014945 10/30/2020

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
A. Walker
Deputy

PUENTE, et al. HEATHER HAMEL

v.

ARIZONA STATE LEGISLATURE THOMAS J. BASILE

JUDGE MIKITISH



MINUTE ENTRY

Ruling on Motion to Dismiss

The court has received and reviewed the Defendant Arizona State Legislature's (the Defendant) Motion to Dismiss filed March 19, 2020; the Plaintiffs Puente, Mijente Support Committee, Jamil Nasar, Jamar Williams, and Jacinta Gonzalez's (collectively the Plaintiffs) Response thereto filed May 4, 2020; and the Defendant's Reply filed May 18, 2020. The Court heard argument on the motion on September 1, 2020 and took the matter under advisement. For the reasons stated below, the motion is granted.

**Background**

On December 4, 2019, the Plaintiffs filed a complaint seeking declaratory judgment against the Defendant for violating Arizona's Open Meeting Law. The Plaintiffs asserted that a quorum of five legislative committees would be attending the American Legislative Exchange Council (ALEC) Summit on December 4, 5, and 6, 2019, in Scottsdale, Arizona (the Summit). Those five committees include 1) the Senate's Natural Resources and Energy Committee; 2) the Senate Water & Agriculture Committee; 3) the House of Representatives Appropriations Committee; 4) the House Federal Relations Committee; and 5) the House Health and Human Services Committee. The Plaintiffs assert that the summit will attract state legislators and private participants from across the country to formulate "model bills" that will be introduced in Arizona and nationwide. The Summit is not open to the public.

In the Complaint, the Plaintiffs assert that each of the legislative committees will have the ability to commit to introduce the model bills in one or both houses of the legislature and advance these bills through the legislative process. They argue that the participation of a quorum of each of the legislative committees at the summit will violate Arizona's Open Meeting Law, A.R.S. § 38-431, et seq. That law requires that "all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings," and that "all legal action of public body shall occur during a public meeting." A.R.S. §38-431.01. The Plaintiffs allege that the Legislature and legislative committees are public bodies as defined in the open meeting law. *See* A.R.S. §38-431.



**Legal standard**

A claim may be dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Ariz. R. Civ. P. Under the Rule, a claim must be dismissed when the plaintiff is not entitled to relief under any interpretation of the facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012). A court is to look only to the pleading itself and the well pled factual allegations therein. *Cullen v. Auto-Owners Insurance Company*, 218 Ariz. 417, 419 ¶ 7 (2008). Mere conclusory statements are insufficient to state a valid claim. *Id.* Courts must assume the truth of the factual allegations and all reasonable inferences therefrom in the light most favorable to the pleading party. *Logan v. Forever Living Products International Inc.*, 203 Ariz. 191 (2002).

**Discussion**

The Defendant argues that the court must dismiss the complaint for several reasons.

**1. Proper Parties**

As a preliminary matter, the Defendant argues that the Court should dismiss the action because the Plaintiffs failed to name and serve the proper defendant. Rule 12 (b) (5), Ariz. R. Civ. P. (insufficient service of process). It argues that the Arizona Constitution establishes the Legislature as two separate and independent houses, the Senate and the House of Representatives. Ariz. Const. art. IV, pt. 2, § 1. It argues that each house maintains its own membership, committee and subcommittee structures, and rules of proceedings. *Id.* §§ 8, 9. The Defendant argues that the Plaintiffs did not allege that it engaged in any wrongdoing, but rather that certain individual legislators acting as specific committees of a particular legislative house violated the open meeting law. It argues that the Constitution prohibits individual members from being served with civil process during the legislative session and that the Plaintiffs are suing the Legislature to get around that prohibition.



The Plaintiffs argue that the Legislature is a proper defendant in this matter. The Plaintiffs argue that the Legislature has been sued as the defendant or sued as the plaintiff in several cases. *See McLaughlin v. Bennett*, 225 Arizona 351 (2010) (including "Legislature of the State of Arizona" as a defendant); United States v. State of Arizona, No.CV 10-1413-PHX-SRB (D. Ariz. April 5, 2011) (order granting Motion of Arizona of State Legislature to appear as intervenor-defendant); Arizona State Legislature v. Arizona Independent Redistricting Commission, 997 F. Supp. 2d 1047 (D. Ariz. 2014) (holding that the Legislature has standing to bring a legal action where it shows a concrete injury). The Plaintiffs further argue that the fact that the Legislature consists of two chambers does not mean that it is not a single entity. See Ariz. Const. art. IV, pt. 1, § 1 (legislative authority vested "in the legislature, consisting of a Senate and a House of Representatives"). Finally, the Plaintiffs argue that the Open Meeting Law itself recognizes the Legislature as a specific entity because the law expressly includes the Legislature in the definition of a "public body." A.R.S. §38-431

The Court finds that the Arizona Constitution itself expressly refers to the Legislature as a discrete entity, albeit made up of two other discrete bodies, the Senate and House. Ariz. Const. art. IV, pt. 1, § 1. As a discrete entity, the Legislature has been a party in multiple legal actions. Further, the Open Meeting Law itself recognizes the Legislature as a public body subject to the law. For these reasons, the court concludes that the Defendant is a proper party to this action.

**2. Political question doctrine**

The Defendant next argues that the enforcement of the Open Meeting Law against it is a political question that is not enforceable through the courts. It argues that the case involves a decision that the Constitution commits to one of the political branches of government and raises issues not susceptible to judicial resolution. Therefore, courts should refrain from addressing the issue.

Specifically, the Defendant points to the Arizona Constitution which provides that each house of the legislature shall "determine its own rules of procedure." Ariz. Const. art. IV, pt. 2, § 8. It notes that the Constitution also provides that the majority of the members of each house shall constitute a quorum but a smaller number may meet for various purposes "in a manner and under such penalties as each house may prescribe." Ariz. Const. art. IV, pt. 1, § 9. The Defendant concludes that the entirety of legislative proceedings – including defining what constitutes a committee "meeting" and the definition of the term "committee" itself – are the exclusive province of each legislative chamber.

The Defendant argues that the Open Meeting Law itself acknowledges the constitutional grant of authority to the Legislature by noting that "either house of the legislature may adopt a rule or procedure pursuant to article IV, part 2 section 8, Constitution of Arizona, to provide an exemption to the notice and agenda requirements of this article." A.R.S. §38-431.08 (D). The Defendant goes on to note that both the House and the Senate of the 54th Legislature adopted meeting notice and agenda requirements and that each chamber and all committees and subcommittees shall be governed exclusively by these rules. *See* Arizona House of Representatives Rule 32 (H); Arizona Senate Rules, 54th Legislature, Rule 7. The Defendant argues that these rules entirely supplant the open meeting law.



The Defendant cites to cases in at least eight other states holding that the Legislature's compliance with the state's open meeting or similar sunshine law are not justiciable. It further notes that, in adopting the open meeting law in 1982, the 35th Legislature did not, and could not, limit the constitutional authority of future legislatures to control their own proceedings.

The Plaintiffs argue that the political question doctrine is a narrow exception to the judiciary's constitutional role of deciding cases and controversies. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2015). They argue that the U.S. Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. *See El-Shifa Pharmaceutical Industry Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh J. concurring). They note that the most important factors in evaluating whether a claim is a political question are whether there is: 1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" or 2) a "lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195.

The Plaintiffs argue that the Arizona Constitution does not supplant all restrictions on meetings such as those contained in the Open Meeting Law. They argue that the constitutional provisions only contemplate actions of a duly constituted, collective house body and not specific legislative committees. They further argue that the constitutional powers relate only to those procedures specifically listed in the Constitution. Because the constitutional provisions are not an all-encompassing grant of legislative authority, Plaintiffs argue that courts must determine the

limits of the legislative powers contained in the constitutional text. *See Powell v. McCormick*, 395 U.S. 486 (1969). Finally, the Plaintiffs argue that the Court must read the application of the open meeting law itself to determine whether it impedes the constitutional grant of authority to the legislature. They argue that the Open Meeting Law does not.

The political question doctrine flows from the basic principle of separation of powers and acknowledges that some decisions are entrusted to branches of government other than the judiciary. For these reasons, Arizona courts refrain from addressing political questions. *Kromko v. Arizona Board of Regents*, 216 Ariz. 190, 192-193 (2007). Our Constitution provides that the departments of our state government "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. Art. III. "A controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it....' " *Kromko*, 216 Ariz. at 192.



In this case, the relevant portions of the Arizona Constitution provide as follows:

8. Organization; officers; rules of procedure

Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and *determine its own rules of procedure*.

9. Quorum; compelling attendance; adjournment

The majority of the members of each house shall constitute a quorum to do business, but a smaller number may meet, adjourn from day to day, and compel the attendance of absent members, *in such manner and under such penalties as each house may prescribe*. Neither house shall adjourn for more than three days, nor to any place other than that in which it may be sitting, without the consent of the other.

Ariz. Const. art. IV, pt. 2, §§ 8, 9 (*emphasis added*).

In determining whether a court may decide if the Defendant violated the statutory requirements for public meetings, this Court must first determine whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." In this case, the Constitution provides for each house to determine its own rules of procedure. Ariz. Const. art. IV, pt. 2, § 8. That grant of authority specifically applies to the manner in which members of each house may meet. Ariz. Const. art. IV, pt. 2, § 9. The manner in which members of the legislature meet logically includes the types of requirements set forth in the open meeting law,

including whether the meetings are noticed and open to the public, the manner of how legal action occurs, whether minutes are taken, and the posting of legal actions taken. *See* A.R.S. § 38-431.01. Because the text of the Constitution commits these issues to the Legislature, the first factor of determining whether the issue is a political question is met.

In looking at the second factor for determining a political question, the courts must consider whether there is "a lack of judicially discoverable and manageable standards for resolving" the issue. In this case, the constitutional delegation is broad: each house is to determine its own rules of procedure. Given the Legislature's plenary authority in this arena, there appears to be no judicially manageable standard for determining what should be included in those legislative rules of procedure, including whether there should be a requirement for public meetings in the settings challenged by the Plaintiffs. In fact, a reasonable person could imagine a broad range of rules of procedure a Legislature might adopt to meet the specific needs of each house and its committees and its members. Therefore, the second factor in determining a political question likewise appears to be met in this case.



Contrary to the Plaintiffs' arguments, the constitutional text does not limit itself to rules and procedures for a "duly constituted and collective house body." In fact, the constitutional text appears to contemplate committees when it authorizes "a smaller number" than a quorum to meet and compel attendance "*in such manner and under such penalties as each house may prescribe*." Art. IV, pt. 2, § 9. The Court finds no basis to conclude that the text applies only to each house as a whole rather than individual committees.

Several other state courts likewise have concluded that their legislature's compliance with open meeting laws is a nonjusticiable political question. *See* Defendant's Motion at 7-8. As the New Hampshire Supreme Court recognized, "we emphasize that the question before us is not whether the Right-to-Know Law applies to the legislature. By the statute's express terms, it does. The question before us is whether the legislature's alleged violation of the Right-to-Know Law is justiciable. We have concluded that this question is not justiciable." *Hughes v. Speaker of the New Hampshire House of Representatives,* 876 A.2d 736, 746 (N.H. 2005).

Because the issue in this case is a political question, the Court must decline to address it.

**Other issues**

The Defendant also argues that the legislators' attendance at summit constituted a meeting of a political caucus which is exempted from the requirements of the open meeting law. *See* A.R.S. § 38-431.08 (A) (1). It further argues that the Complaint fails to allege an actionable violation of the Open Meeting Law or any cognizable relief. Finally, the Defendant asserts that the Plaintiffs' interpretation of the Open Meeting Law would entangle the courts in matters that exceed their

constitutional authority. Because the Court determines that the issue is a political question, it declines to address these additional issues raised in the motion to dismiss.

**Conclusion**

For the reasons stated herein,

IT IS ORDERED, **granting** the Defendant's Motion to Dismiss.