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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

AMERICAN OVERSIGHT, Plaintiff, v. KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Committee on Judiciary; ARIZONA SENATE, a branch of the State of Arizona, Defendants.	No. **VERIFIED COMPLAINT** (Tier 2)

Plaintiff American Oversight brings this statutory special action against Defendants Karen Fann, Warren Petersen, and the Arizona Senate (collectively, "Senate Defendants") to require their compliance with Arizona's Public Records Law. American Oversight seeks records relating to the Senate Defendants' audit of the 2020 General Election results in Maricopa County, including records that have been created, sent, and received by the Senate Defendants' agents. The records sought will shed light on, among other things, the planning and procedures of the audit, findings and conclusions of the audit team, costs and payment to entities and individuals

associated with the audit, and the overall integrity of the audit process. The public's right to see these public records is significant and immediate.

For example, yesterday, members of the Senate Defendants' audit team admitted that prior public accusations of illegality regarding deleted files, broken seals for secure bags used to transport ballots, and improper documentation of the chain of custody for ballots were not, in fact, true. But the inaccurate assertions of wrongdoing were made public on the Senate's audit Twitter account more than a week earlier and were widely disseminated. The public has a right to know and obtain prompt disclosure of information from those conducting the Senate's audit, particularly in light of the interim announcements being made even before the audit is complete. Using the example above, the public is entitled to records that may reveal who first "discovered" the alleged wrongdoing and who was told, how the claim was handled, what due diligence or steps were taken to confirm the conclusions reached, and how and when the decision was made to publish the information on the Senate audit's Twitter account.

Yet the Senate Defendants broadly contend that records in the possession of agents hired by the Senate to conduct a public function on behalf of the Senate need not be produced in response to public records requests. Such a result would vitiate Arizona's Public Records Law. Accordingly, Plaintiff alleges as follows:

Parties, Jurisdiction and Venue

1. Plaintiff American Oversight is a non-partisan, nonprofit organization dedicated to ensuring government transparency at all levels. American Oversight has developed a significant focus on voting rights and election oversight, including in Arizona, and seeks to ensure that the public has access to government records that enable them to monitor the performance and priorities of their public officials.

2. As detailed further below, American Oversight has sought public records from the Senate Defendants related to the Arizona Senate's ongoing audit of Maricopa County's 2020 general election results.

3. The Arizona Senate has repeatedly claimed that the audit is being overseen by Senate liaison Ken Bennett and conducted by Cyber Ninjas, Inc. under a contractual agreement with the Arizona Senate. The Arizona Senate has also repeatedly claimed that the audit furthers a governmental function, bestowed on the Senate by the Arizona Constitution, of enacting laws to "secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12.

4. The audit has been financed in part by Arizona tax dollars.

5. Because the Arizona Senate has outsourced its public function to an outside entity using public funds, the Senate Defendants have a duty to keep, preserve, and provide access to public records related in any way to the exercise of that function.

6. Defendant Karen Fann is named in her official capacity as President of the Arizona Senate and is an "officer" under A.R.S. § 39-121.01(A)(1).

7. Defendant Warren Petersen is named in his official capacity as Chairman of the Arizona Senate Committee on Judiciary and is an "officer" under A.R.S. § 39-121.01(A)(1).

8. Defendant Arizona Senate is a branch of the State of Arizona and a "public body" under A.R.S. § 39-121.01(A)(2). *See* Ariz. Op. Att'y Gen. No. I78-76 (Apr. 18, 1978).

9. Jurisdiction over this action is proper pursuant to A.R.S. §§ 39-121.02 and 12-123, as well as Rule 4(a) of the Arizona Rules of Procedure for Special Actions.

10. Venue is proper pursuant to A.R.S. § 12-401 and Rule 4(b) of the Arizona Rules of Procedure for Special Actions because the Senate Defendants work in and took official actions relevant to this dispute in Maricopa County.

11. Because this is a statutory special action and a show cause procedure is being used, "the court shall set a speedy return date" on Plaintiff's Application for Order to Show Cause filed herewith. Ariz. R. P. Spec. Action 4(c); *see also* Ariz. R. Civ. P. 7.3(a) (authorizing a superior court judge to "issue an order requiring a party to show cause why the party applying for the order should not have the relief therein requested").

Background

The 2020 Election

12. Arizona held a general election on November 3, 2020. During that election, over 3.4 million Arizonans cast ballots.

13. Joe Biden won the presidential election in Arizona.

14. President Biden won Maricopa County—which accounted for approximately 60% of the total votes cast in Arizona's general election—with a vote margin of 45,109 votes.

15. Maricopa County conducted a hand count audit and an independent audit of the tabulation machines and software, both of which confirmed that the reported election results were accurate.

16. In the post-election period, at least seven cases were filed challenging the results of the presidential election in Arizona, including a formal election contest.

17. All seven cases concluded that the election was secure, fair, and conducted in full accordance with Arizona law. *See Aguilera v. Fontes*, No. CV2020-014083 (Maricopa County Super. Ct., Nov. 7, 2020) (voluntarily dismissed); *Donald J. Trump v. Hobbs*, No. CV2020-014248 (Maricopa County Super. Ct., Min. Entry Order, Nov. 13, 2020) (dismissing complaint with prejudice after evidentiary hearing); *Arizona Republican Party v. Fontes*, No. CV2020-014553 (Maricopa County Super. Ct., Min. Entry Order, Nov. 18, 2020) (dismissing complaint with prejudice and ordering Secretary of State, who had requested fees, could file a motion pursuant to A.R.S. § 12-349 (frivolous litigation statute)); *Aguilera v. Fontes II*, No. CV2020-014562 (Maricopa County Super. Ct., Min. Entry, Nov. 29, 2020) (after conducting evidentiary hearing, "dismissing with prejudice" the action "for failure to state a claim upon which relief can be granted; or alternatively, denying the relief sought by Plaintiffs given their failure to produce evidence demonstrating entitlement to same"); *Kelli Ward v. Jackson*, No. CV2020-015285 (Maricopa County Super. Ct., Min. Entry Ruling, Dec. 4, 2020) (dismissing complaint after evidentiary hearing, and "confirming the election," because the court found that the evidence did

not show fraud, misconduct, illegal votes, or an erroneous vote count), *affirmed*, No. CV-20-0343-AP/EL (Ariz. S. Ct. Dec. 8, 2020); *Bowyer, et al., v. Ducey, et al.*, No. CV-20-02321-PHX-DJH, Doc. 84 (D. Ariz., Dec. 9, 2020) (dismissed and holding that "Plaintiffs failed to provide the Court with factual support for their extraordinary claims[.]"); *see also Burk v. Ducey*, No. S1100CV202001869 (Pinal County Super. Ct., Dec. 15, 2020) (dismissed), *affirmed*, No. CV20-0349-AP/EL (Ariz. S. Ct. Jan. 5, 2021).

18. The Arizona Supreme Court confirmed Arizona's presidential election result, holding that there was no "evidence of 'misconduct,' 'illegal votes' or that the Biden Electors 'did not in fact receive the highest number of votes for office,' let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results." *Ward v. Jackson*, CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020), *cert. denied*, 20-809, 2021 WL 666437 (U.S. Feb. 22, 2021).

The Arizona Senate's "Audit"

19. Notwithstanding the prior audits and the multiple election challenges, the Arizona Senate announced plans to further probe the outcome of the election. Several prominent Senators publicly stated (without any credible evidence) that they believed the election had been tampered with to ensure a Biden victory.

20. On December 15, 2020, the Senate issued legislative subpoenas to the Maricopa County Board of Supervisors requesting custody of tabulation equipment, software, ballots, and other election data. The County objected that the subpoenas exceeded the scope of the Senate's statutory power, and three court cases ensued. *Maricopa County I*, CV2020-016840 (Maricopa Cty. Super. Ct., Dec. 18, 2020); *Fann et al. v. Maricopa Cty. Bd. of Supervisors*, No. CV2020-016904 (Maricopa Cty. Super. Ct., Dec. 21, 2020); *Maricopa Cty. v. Fann*, No. CV2021-002092 (Maricopa Cty. Super. Ct., Feb. 5, 2021) ("*Maricopa County II*").[1]

[1] Matters CV2020-016840 and CV2021-002092 were subsequently consolidated. *See Maricopa County I*, No. CV 2020-016840, Dkt. Code 053 (Feb. 10, 2021).

21. On January 12, 2021, President Fann and Senator Petersen, on behalf of the Arizona Senate and the Senate Committee on Judiciary, served legislative subpoenas on the Maricopa County Board of Supervisors, the Maricopa County Recorder, and the Maricopa County Treasurer (the "Subpoenas"). A true and correct copy of the Subpoenas is attached as Exhibit 1.

22. The Senate asserted in litigation that its audit serves an "important" and "valid legislative purpose." *Maricopa County I*, Fann & Petersen's Motion for Judgment on the Pleadings, at pp. 2, 8 (Feb. 22, 2021). A true and correct copy of this Motion is attached as Exhibit 2.

23. The Senate argued that its authority to issue subpoenas related to the audit is incidental to its general lawmaking power and is particularly "salien[t]" in light of 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.'" *Id.* at p. 8 (citing the "Purity of Elections Clause," Ariz. Const. art. VII, § 12).

24. The Senate contends that the audit will allow it to "evaluate the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties, with an eye to enacting potential reforms." *Id.*; *see also* Fann & Farnsworth's Motion for Preliminary Injunction, at p. 9 (Dec. 29, 2020), a true and correct copy of which is attached as Exhibit 3; Fann & Petersen's Response to the Maricopa County Parties' Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction, at p. 13 (Jan. 11, 2021), a true and correct copy of which is attached as Exhibit 4.

25. In sum, the Senate contends that it is conducting the audit in connection with the exercise of its legislative constitutional powers and has stated that the information and records it obtains from the audit will be relied upon to evaluate whether "reforms" are appropriate.

26. On February 12, 2021, Judge Timothy Thomason found that the Senate's Subpoenas were valid and enforceable. *Maricopa County I*, No. CV2020-016840, Dkt. Code 901 (Feb. 25, 2021). A true and correct copy of Judge Thomason's order is attached as Exhibit 5.

27. Instead of taking custody of the materials it subpoenaed and conducting the audit that it claimed was part of its "legislative purpose," the Senate hired others to do its work.

28. On March 31, 2021, President Fann announced that "[a]fter months of interviewing various forensic auditors," the Senate selected four out-of-state private companies, led by Cyber Ninjas, Inc., to conduct the audit. The press release promised that the audit would "be done in a transparent manner. . . ." Arizona Senate Republicans Press Release, "Arizona Senate hires auditor to review 2020 election in Maricopa County." (Mar. 31, 2021), attached hereto as Exhibit 6.

29. Before being selected to lead the audit, Cyber Ninjas' CEO, Doug Logan, made public statements questioning the integrity of the 2020 general election—and the integrity of Maricopa County's results, specifically.

30. Logan drafted a document for U.S. Senators who planned to object to the certification of the 2020 general election results on Jan. 6, 2021, according to multiple news outlets. That document reportedly promoted various disproven or baseless conspiracy theories about the election, including claims against Dominion Voting Systems—the company whose ballot tabulation machines Cyber Ninjas is tasked with inspecting.

31. In addition, Logan has tweeted or re-tweeted several statements claiming that President Biden's victory was the product of fraud—including one retweet specifically about the Maricopa County election results.

32. Specifically, on Dec. 14, 2020, Logan retweeted a response to a tweet by Arizona Republican Party Chair Kelli Ward in which she questioned the validity of 200,000 Maricopa County ballots. The re-tweet said "Hint: After auditing the adjudicated ballots and corresponding

AuditMarks, you may discover Trump got 200k more votes than previously reported in Arizona."

33. Despite all this, or perhaps because of it, President Fann retained Cyber Ninjas to conduct the audit on behalf of the Senate.

34. Beyond retaining Cyber Ninjas, President Fann appointed former Arizona Secretary of State Ken Bennett to serve as the Senate's "liaison" to Cyber Ninjas and the other third-party contractors conducting the audit.

35. The Senate agreed to compensate Cyber Ninjas $150,000 for its work. *See* Cyber Ninjas Statement of Work (a true and correct copy of which is attached as Exhibit 7) and Master Services Agreement (a true and correct copy of which is attached as Exhibit 8).

36. Cyber Ninjas is contractually obligated, in the event of litigation, to "fully cooperate with the [Senate] by providing information or documents requested by the Indemnifying Party that are reasonably necessary to the defense or settlement of the claim." Exhibit 8, § 12.3.

37. Cyber Ninjas is also contractually obligated to "comply with all applicable laws, rules and regulations in delivering the Services (including without limitation any privacy, data protection and computer laws)." *Id.* § 15.4.

38. Because the Senate's payment of $150,000 of public funds to Cyber Ninjas will not cover the full cost of the "audit," unknown third parties are financing Cyber Ninjas' work.

39. For example, on April 7, 2021, attorney Lin Wood—known for his support of the "Stop the Steal" movement and adherence to the "QAnon" conspiracy theory—posted on Telegram pledging a donation to fund the Audit and asked others to donate. He added: "When the fraud is finally revealed in one state, just watch the other states fall like dominoes!" Lin Wood, Telegram (Apr. 7, 2021), https://t.me/linwoodspeakstruth/1400.

40. On April 9, 2021, Christina Bobb, a host on far-right media outlet "One America News," tweeted about the Audit as follows: "Our goal is to fund $150,000 to cover expenses of

the audit, which will ensure its complete scope of work. We're $10K away from our goal." Christina Bobb, Twitter (Apr. 9, 2021), https://twitter.com/christina_bobb/status/1380562776918200320.

41. In addition, an entity known as "The American Project" has stated its intent to raise $2.8 million to help finance the audit and claims to have already raised $1.5 million from unidentified donors. Caitlyn Huey-Burns, *The Arizona GOP's Maricopa County audit: What to know about it*, CBS News (May 9, 2021), https://www.cbsnews.com/news/arizona-audit-2020-election-recount-gop-maricopa-county/.

42. On information and belief, the Senate Defendants' agents are facilitating and assisting with fundraising efforts to raise money from private donors to fund the audit.

43. The Senate Defendants, Bennett, and Cyber Ninjas have not disclosed who is funding the audit and whether any of those parties expect anything in return for their financial contribution.

44. The Senate Defendants, Bennett, and Cyber Ninjas have not disclosed which entities and individuals involved in the Senate's audit are being paid and the specific amounts and sources of payment.

45. The Arizona Senate's audit began on April 22, 2021 at Veterans Memorial Coliseum in Phoenix.

46. One day earlier, the Arizona Democratic Party and Maricopa County Supervisor Steve Gallardo sued to enjoin the audit, alleging that the Arizona Senate and its contractors were proceeding in violation of Arizona law and did not have adequate procedures in place to protect ballots, voting equipment, and voters' personal information. *Arizona Democratic Party, et al. v. Fann, et al.*, CV2020-006646 ("*ADP*").

47. In the *ADP* litigation, President Fann and Senator Petersen repeatedly asserted that the audit—as performed by its contractor—was part of a fundamental legislative (and thus public) function. *See, e.g.*, Senate Defendants' Combined Response to Dismiss and Response to

Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction (Apr. 25, 2021) at 2 (alleging that the Senator-defendants were immune because the case involved "the discharge of their official duties"). A true and correct copy of this filing is attached as Exhibit 9.

48. President Fann and Senator Petersen told the Court that, through the audit, the Arizona Senate as a "legislative body is conducting an investigation evaluating materials obtained by indisputably valid and lawful legislative subpoena." *Id.* at 2.

49. President Fann and Senator Petersen also said that "[a]ny 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.'"

50. In that same filing, President Fann and Senator Petersen described Mr. Bennett and Cyber Ninjas as "[t]he Senate's authorized agents and vendor" who 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." *Id.* at 17.

51. The *ADP* litigation resulted in the public release of certain limited public records related to the conduct of the audit and was dismissed with prejudice after the parties entered into a public settlement agreement. A true and correct copy of the settlement agreement is attached as Exhibit 10.

52. On May 5, 2021, the United States Department of Justice expressed concerns about the conduct of the audit ("DOJ Letter"). Among other things, the DOJ Letter to Senator Fann articulated a concern that the materials obtained in response to the Subpoenas were "no longer under the ultimate control of state and local elections officials." A true and correct copy of the DOJ Letter is attached as Exhibit 11.

53. President Fann responded to the DOJ Letter ("Fann Response") by asserting that the Senate retained ultimate control over the audit. She also stated that she is "in regular communication with Secretary Bennett and remain[s] fully apprised of all material developments in the audit." A true and correct copy of the Fann Response is attached as Exhibit 12.

54. The audit has been the subject of intense local and national media coverage and is a matter of significant public interest.

55. There is a compelling public interest in information related to the conduct of the audit.

American Oversight's Public Records Requests About the Audit

56. On April 6, 2021, American Oversight sent five public records requests to President Fann seeking various records related to the audit (the "April 6 Requests"). True and correct copies of the April 6 Requests are attached as Exhibit 13. Very similar requests were sent to Senator Petersen.

57. On April 7, 2021, Public Records Attorney Norm Moore—on behalf of President Fann, Senator Petersen, and former Senator Eddie Farnsworth—responded in an email asking American Oversight to narrow the scope of the requests because "only 20 search terms can be included in a particular query."

58. On April 9, 2021, American Oversight sent a public records request to Cyber Ninjas ("Cyber Ninjas Request"). A true and correct copy of the Cyber Ninjas Request is attached as Exhibit 14.

59. On April 30, 2021, American Oversight sent a public records request to the Arizona Senate—through Mr. Moore—that requested the same documents set forth in the Cyber Ninjas Request (the "Senate Request"). A true and correct copy of the Senate Request is attached as Exhibit 15.

60. On May 4, 2021, Mr. Moore responded to the Senate Request by stating that "[t]here are no more responsive documents to provide at this time because the Senate doesn't

have custody, control or possession of any of the records requested." A true and correct copy of Mr. Moore's May 4 email to American Oversight is attached as Exhibit 16.

61. On May 10, 2021, American Oversight sent a letter to President Fann, Senator Petersen, and the Arizona Senate to clarify and supplement its prior public records requests and confirm that Senate Defendants were refusing to produce responsive records in the possession of Cyber Ninjas and Mr. Bennett ("Supplemental Request"). A true and correct copy of the Supplemental Request is attached as Exhibit 17.

62. In the Supplemental Request (at 2), American Oversight noted that "from prior correspondence with the Arizona Senate's public records attorney, Mr. Norm Moore, we understand that the Arizona Senate takes the position that documents and communications related to the conduct of the audit that are not in your physical possession but are held instead by Cyber Ninjas and/or Mr. Bennett are not public records (or are not within your custody, possession, or control) despite the fact that both Cyber Ninjas and Mr. Bennett are (a) serving as your contractors, (b) performing legislative and public functions, and (c) being paid with public funds."

63. The Supplemental Request (at 3–4) went on to clarify the prior requests by expressly requesting the following records ("Withheld Records") from the Senate Defendants:

> All communications . . . exchanged between former Secretary of State Ken Bennett and any party engaged in the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors, including but not limited to: Doug Logan or anyone communicating on behalf of Cyber Ninjas, Wake Technology Services, Digital Discovery, CyFIR, former state legislative candidate Liz Harris, or any other individual or entity engaged in work on the audit.
>
> Complete copies (including any attachments) of any contract . . . or other written agreement related to the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors. Responsive documents to this portion of this request this request would include, but not be limited to, any leases for space to conduct the audit, including any lease agreement following the expiration of the existing lease agreement with the Veterans Memorial Coliseum on May 14, 2021; any contracts, or other formal or informal agreements, with third-party security,

> transportation, or lodging vendors or volunteers; any formal or informal agreements with third parties regarding the tabulation and aggregation of audit data; any formal or informal agreements with consultants, advisors, or counsel; and any formal or informal agreements regarding the recruitment and training of employees, contractors, or volunteers to participate in any phase of the audit.
>
> All records reflecting the projected or actual costs of the audit, including but not limited to: . . . records reflecting estimated costs or the budget for the audit, including any expenses beyond the specified $150,000; records reflecting the collection of external funding for the audit, such as agreements with fundraisers, any policies regarding external revenue collection, and all records of external financial or in-kind resource contributions; and copies of all invoices, requests for reimbursement, and payments made relating to the planning, preparation, or execution of the audit or associated litigation.
>
> Any project plans or other documents detailing the steps or procedures to be followed in each phase of the audit, including those following the expiration of the existing agreement with the Veterans Memorial Coliseum on May 14, 2021. Responsive documents to this portion of the request would include, but not be limited to, any projected timelines for the completion of the audit; organizational charts or other documents memorializing chains of custody; plans for the accessing, storage, and handling of physical ballots, confidential voter information, voting equipment, and voting software; explanations or analyses of investigative techniques, including but not limited to ultraviolet inspection, kinematic artifact detection, or analysis of paper fibers; and procedures for the tabulation and aggregation of audit data.
>
> Records relating to or referencing the "Registration and Votes Cast Phase" of the audit, including records relating to work planned or completed in the "Registration and Votes Cast Phase," including but not limited to: records identifying the precincts to be canvassed and any justification for the selection of those precincts; logs or other records identifying those voters canvassed or selected for canvassing; any scripts or other guidelines, procedures, or protocols to be used by the auditors for contacting individual voters by phone, in person, or electronically; or agreements with any party regarding the recruitment and training of individuals to conduct canvassing.

See Exhibit 17.

64. In addition, the Supplemental Request (at 5) asked the Senate Defendants to "promptly notify us if you are taking the position that responsive records are either not public records or are not in your possession, custody, or control because they are in the physical

possession of Cyber Ninjas and/or Mr. Bennett. Mr. Moore's prior correspondence implies this, but we wish to be sure of your position."

65. On May 14, 2021, Mr. Moore responded to counsel's email and the parties agreed to speak on the afternoon of May 17, 2021 about the Supplemental Request and the parties' respective positions.

66. Later that same day, Mr. Moore responded to the Supplemental Request with an email to American Oversight attaching several responsive documents. Mr. Moore further generally stated that the Senate "does not have in its possession, custody or control" the remaining Withheld Documents. A true and correct copy of Mr. Moore's May 14, 2021 email to American Oversight is attached as Exhibit 18.

67. On the afternoon of May 17, 2021, counsel for American Oversight and a representative of American Oversight had a telephone call with Mr. Moore. On that telephone call, Mr. Moore confirmed that President Fann, Senator Petersen, and the Senate would not produce documents in the possession, custody, and control of Mr. Bennett or Cyber Ninjas, or any subcontractor performing work on the Senate's audit.

68. Mr. Moore was unable to confirm whether anyone from the Senate had asked for records from Cyber Ninjas or any subcontractor performing work on the Senate's audit in connection with American Oversight's records requests.

69. Mr. Moore was also unable to confirm whether anyone from the Senate had notified Mr. Bennett, Cyber Ninjas or any subcontractor performing work on the Senate's audit of the obligation to preserve records under the Public Records Law or for any other reason.

70. Mr. Moore indicated that persons other than himself may have requested certain responsive documents from Mr. Bennett, but he was unable to confirm if or when such request was made, and he was unable to identify what, if anything, had been requested, and (significantly) whether any documents possessed by Mr. Bennett would be produced in response to the pending public records requests.

71. American Oversight notified Mr. Moore of its intent to seek relief from the Court and requested that Mr. Moore respond with any new or supplemental information as soon as possible. American Oversight has not received any further communication from Mr. Moore.

72. Although American Oversight is awaiting responses to its other public records requests directed to the Senate Defendants and reserves the right to seek further relief if those requests are denied or the responses are inadequate, the Senate Defendants' refusal to provide records on behalf of their agents Cyber Ninjas, Mr. Bennett, and various subcontractors is a dispute ripe for resolution by this Court.

73. Because the audit is ongoing, and the Senate, Mr. Bennett, Cyber Ninjas, and other subcontractors are making interim public statements about its progress that cannot be checked for accuracy by the public, it is imperative that this public records dispute be resolved promptly.

Count I

(Violation of Arizona Public Records Law – Failure to Produce or Provide Access)

74. American Oversight re-alleges Paragraphs 1-73 as if fully set forth herein.

75. Under Arizona's Public Records Law ("PRL"), "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state." A.R.S. § 39-121.01(B).

76. President Fann and Senator Petersen are "officer[s]" under the PRL.

77. The Arizona Senate is a "public body" under the PRL.

78. Public records are to be available for public inspection. *See* A.R.S. § 39-121 ("Public records . . . shall be open to inspection by any person at all times during office hours.") The PRL presumes that all records are "open to the public for inspection as public records." *Carlson v. Pima Cty.*, 141 Ariz. 487, 490 (1984).

79. The PRL exists to "open agency action to the light of public scrutiny" and "allow citizens '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, 302 ¶ 21 (1998) (citations omitted).

80. There is thus a "clear policy favoring disclosure" of public records. *Carlson*, 141 Ariz. at 490-91.

81. President Fann, Senator Petersen, and the Arizona Senate have custody, possession, or control over the Withheld Records because, *inter alia*, Cyber Ninjas is an agent of the Senate, Cyber Ninjas is conducting official functions on behalf of the Senate, Cyber Ninjas is being paid with public funds, Cyber Ninjas has a contractual obligation to provide documents to the Senate in connection with litigation, and Cyber Ninjas has a contractual obligation to follow applicable laws.

82. The Senate Defendants' custody, possession, or control over the Withheld Records is actual, indirect, or constructive.

83. Cyber Ninjas, Mr. Bennett and the subcontractors working on the audit are performing a public function on behalf of the Senate Defendants. Thus, the Withheld Records in the possession of Cyber Ninjas, Mr. Bennett and the subcontractors are "reasonably necessary or appropriate to maintain an accurate knowledge of the[] official activities" of the Senate Defendants *See* A.R.S. § 39-121.01(B). Accordingly, the Withheld Records possessed by Cyber Ninjas, Mr. Bennett, and the subcontractors are public records.

84. The Withheld Records are public records, irrespective of the fact that they are held by third parties under contract to perform a public function that is "supported by monies from this state."

85. Officers and public bodies cannot avoid their responsibilities under the PRL to keep, maintain, and produce public records by contracting key public functions (using public funds) to private contractors. A contrary result would "circumvent a citizen's right of access to records" and "thwart the very purpose" of the PRL. *State ex rel. Toomey v. City of Truth or*

Consequences, 287 P.3d 364, 371 (N.M. App. 2012); *see also Hackworth v. Bd. of Educ. for City of Atlanta*, 447 S.E.2d 78, 80 (Ga. App. 1994) (certain records of private contractor that provided bus drivers to school were "public records" under Georgia's Open Records Act).

86. Because the Withheld Records are public records, they are subject to a strong presumption in favor of their disclosure. *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 396, ¶ 10 (App. 2011).

87. Consequently, the Senate Defendants can withhold the Withheld Records only if "privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure." *Griffis v. Pinal Cty*., 215 Ariz. 1, 6 ¶ 16 (2007). But the Senate Defendants have not articulated any of these reasons as the basis for their denial of the Withheld Records.

88. "The public's right to know any public document is weighty in itself," and is particularly strong where "the public documents are of broad and intense interest." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶¶ 30, 32 (App. 2001) (noting that a controversial state standardized test "has been the subject of significant public debate").

89. The contents of the Withheld Records are a matter of broad and intense public interest.

90. The Senate Defendants have violated the PRL by refusing to promptly produce the Withheld Records.

Prayer for Relief

WHEREFORE Plaintiff respectfully requests that this Court order the following relief on an expedited basis:

A. Enter an order compelling the Senate Defendants to comply with A.R.S. § 39-121, *et seq*., and to immediately provide access to (or copies of) the Withheld Records;

B. Enter an order directing the Senate Defendants to pay Plaintiff's reasonable attorneys' fees and costs pursuant to A.R.S. §§ 39-121.02(B), 12-341, 12-348, 12-2030, the

private attorney general doctrine, Rule 4(g) of the Arizona Rules of Procedure for Special Actions, or any other applicable provision of law or equitable principle; and

C. Grant Plaintiff such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 19th day of May, 2021.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai
Keith Beauchamp
Roopali H. Desai
D. Andrew Gaona

Attorneys for Plaintiff

VERIFICATION

Sara Kaiser Creighton states and swears under penalty of perjury and as permitted by Rule 80(c), Ariz. R. Civ. P., as follows:

I have read the foregoing Verified Complaint and, to the best of my knowledge, information and belief, the statements made therein are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of May, 2021.

Sara Kaiser Creighton
Deputy Chief Counsel
American Oversight

Exhibit 1

Exhibit 1

ARIZONA SENATE

Fifty-Fifth Arizona Legislature
First Regular Session

Senate Judiciary Committee

SUBPOENA *DUCES TECUM*

TO: The Maricopa County Board of Supervisors

YOU ARE COMMANDED TO APPEAR at the time, date and place set forth below to provide testimony concerning the items set forth in Exhibit A attached hereto. You must designate one or more of your officers, agents or representatives who consent to testify on your behalf about the same.

Date & Time: January 13, 2021 at 9:00 a.m.

Place: Arizona Senate
Arizona State Capitol
1700 West Washington Street
Phoenix, Arizona 85007

You or your representative must also produce, and permit inspection, testing or sampling of the items set forth in Exhibit A at the date, time and location set forth above.

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO A.R.S. § 41-1153

Executed this 12th day of January, 2021.

President Karen Fann
Karen Fann, President of the Arizona Senate

Warren Petersen, Chairman
Senate Judiciary Committee

EXHIBIT A

For the November 2020 general election in Maricopa County, Arizona:

1. The ballot tabulation and processing equipment from each polling place and tabulation center.

2. The software for the equipment described above and the election management system used.

3. Hardware and Forensic Images of Election Servers, Desktops, Removable Media (such as thumb drives, USB, memory cards, PCMIA cards, Compact Flash, CD/DVD etc.) used to transfer ballots to tabulation centers from voting locations and to load software/programming.

4. Election Log Files, in XML, EML, JSON, DVD and XSLT formats, and any other election files and logs for the:
   - Tabulators
   - Result Pair Resolution
   - Result Files
   - Provisional Votes
   - RTMLogs
   - SQL Database Files
   - Signature Checking & Sorting Machine

5. Election Settings
   - Rejected Ballots Report by Reason Code

6. Accounts and Tokens
   - Username & Passwords (Applications, Operation Systems)
   - Encryption Passwords (Bitlocker, Veracrypt, Etc)
   - Security Tokens (iButton, Yubikey, SmartCard, Etc)

7. Windows Server & Desktop
   - Windows software log
   - Windows event log and Access logs
   - Network logs
   - FTP Transfer Points Log
   - Usernames & Passwords
   - Application specific usernames and passwords (Election Software, Database Access)

8. Dominion Equipment
   - The Administrator & Audit logs for the EMS Election Event Designer (EED) and EMS Results Tally & Reporting (RTR) Client Applications.

9. Dominion Network

- Identity of each person accessing the domain name Admin.enr.dominionvoting.com and *. dominionvoting.com domains.
- Windows security log of the server that is hosted at Admin.enr.dominionvoting.com
- Internal admin.enr.dominionvoting.com logs

10. Election Systems & Software (ESS) Specific
    - The Administrator & Audit logs for the Electionware election management system, Ballot on Demand - BOD printing system, DS200 scanner and tabulator, DS450 scanner and tabulator, DS850 scanner and tabulator, and Voting Systems (ExpressPoll, ExpressVote, ExpressVote XL).

11. Voter rolls
    - Database of voter rolls
    - Forensic image of computers/devices used to work with voter rolls
    - Copy of media device used to transfer voter rolls

12. Daily and cumulative voter records for those who voted, with sufficient information to determine for each voter:
    - Name and voter registration address;
    - Mailing address
    - Date of birth;
    - Voter ID number;
    - Manner of voting (*e.g.*, early by mail, early in-person, in-person on Election Day)
    - Voting location (if applicable)
    - Date voted
    - Political party affiliation (if applicable);
    - Early ballot request date (if applicable)
    - Early ballot sent date (if applicable)
    - Voted early ballot return or receipt date (if applicable)
    - Ballot canceled date (if applicable)
    - Image of ballot envelope or pollbook entry in .RAW, HTML, XHTML, SVG, or other format

13. Access or control of ALL routers, tabulators or combinations thereof, used in connection with the administration of the 2020 election, and the public IP of the router.

14. Voter Rally Paper Rolls, Test Ballots, Ballot Test Matrix.

15. Access to all original, paper ballots (including but not limited to early ballots, Election Day ballots, and provisional ballots).

16. Each original, unique native electronic image of each early ballot cast, with the original associated metadata (multiple ballot images **may not** be combined into a single file and no metadata associated the original electronic ballot image shall be deleted, removed or altered).

17. Each image of each early ballot cast in (a) TIFF format, (b) PDF format, and (c) JPG format (multiple ballot images **may not** be combined into a single file).

18. From the Dominion electronic election management system, each of the following must be provided as (a) an XML file, (b) a JSON file, and (c) a TXT file:

- Dominion Electronic Cast Vote Record
- Ballot Images – Raw Images
- Ballot Images – Ballot Audit and Review
- Early Ballot Report
- Provisional Ballot Report
- Conditional Voter Registration Ballot Report
- Cast Vote Record (raw data) – JSON
- ImageCast Central Logs
- Ballot Scanning/Tabulation Machine Logs
- Ballot Scanning/Tabulating Machine Tape

Any electronically stored information contained in this Exhibit A shall be electronically uploaded to one or more computer drives supplied by the Senate Judiciary Committee or its agents.

ARIZONA SENATE

Fifty-Fifth Arizona Legislature
First Regular Session

Senate Judiciary Committee

SUBPOENA *DUCES TECUM*

TO: Stephen Richer, Maricopa County Recorder

YOU ARE COMMANDED TO APPEAR at the time, date and place set forth below to provide testimony concerning the items set forth in Exhibit A attached hereto. You must designate one or more of your officers, agents or representatives who consent to testify on your behalf about the same.

Date & Time: January 13, 2021 at 9:00 a.m.

Place: Arizona Senate
Arizona State Capitol
1700 West Washington Street
Phoenix, Arizona 85007

You or your representative must also produce, and permit inspection, testing or sampling of the items set forth in Exhibit A at the date, time and location set forth above.

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Executed this 12th day of January, 2021.

President Karen Fann
Karen Fann, President of the Arizona Senate

Warren Petersen, Chairman
Senate Judiciary Committee

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    - Name and voter registration address;
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    - Manner of voting (*e.g.*, early by mail, early in-person, in-person on Election Day)
    - Voting location (if applicable)
    - Date voted
    - Political party affiliation (if applicable);
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ARIZONA SENATE

Fifty-Fifth Arizona Legislature
First Regular Session

Senate Judiciary Committee

SUBPOENA *DUCES TECUM*

TO: John M. Allen, Maricopa County Treasurer

YOU ARE COMMANDED TO APPEAR at the time, date and place set forth below to provide testimony concerning the items set forth in Exhibit A attached hereto. You must designate one or more of your officers, agents or representatives who consent to testify on your behalf about the same.

Date & Time: January 13, 2021 at 9:00 a.m.

Place: Arizona Senate
Arizona State Capitol
1700 West Washington Street
Phoenix, Arizona 85007

You or your representative must also produce, and permit inspection, testing or sampling of the items set forth in Exhibit A at the date, time and location set forth above.

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO A.R.S. § 41-1153

Executed this 12th day of January, 2021.

President Karen Fann
Karen Fann, President of the Arizona Senate

Warren Petersen, Chairman
Senate Judiciary Committee

EXHIBIT A

For the November 2020 general election in Maricopa County, Arizona:

1. All ballots (including but not limited to early ballots, Election Day ballots, and provisional ballots).

2. Each original, unique native electronic image of each early ballot cast, with the original associated metadata (multiple ballot images **may not** be combined into a single file and no metadata associated the original electronic ballot image shall be deleted, removed or altered).

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Any electronically stored information contained in this Exhibit A shall be electronically uploaded to one or more computer drives supplied by the Senate Judiciary Committee or its agents.

Exhibit 2

Exhibit 2

STATECRAFT
LAW • GOVERNMENT • CRISIS MANAGEMENT

649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078

Kory Langhofer, Ariz. Bar No. 024722
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tom@statecraftlaw.com

Attorneys for Defendants Arizona Senate President Karen Fann and Senate Judiciary Committee Chairman Warren Petersen

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MARICOPA COUNTY, *et al.*,

Plaintiffs,

v.

KAREN FANN, *et al.*,

Defendants.

MARICOPA COUNTY, *et al.*,

Plaintiffs,

v.

KAREN FANN, *et al.*,

Defendants.

No. CV2020-016840
No. CV2021-002092
(Consolidated)

PRESIDENT FANN AND SENATE JUDICIARY COMMITTEE CHAIRMAN PETERSEN'S MOTION FOR JUDGMENT ON THE PLEADINGS

(Assigned to the Hon. Timothy Thomason)

Table of Contents

Defendants Karen Fann, President of the Arizona Senate, and Warren Petersen, Chairman of the Senate Judiciary Committee, respectfully move the Court to enter declaratory judgment on the pleadings in their favor pursuant to Arizona Rule of Civil Procedure 12(c) and A.R.S. § 12-1831, *et seq.*, finding that the subpoenas *duces tecum* issued by President Fann and Chairman Petersen and served on January 12, 2021 (hereafter, the "Subpoenas") are lawful, valid and enforceable in all respects.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Resurrecting issues they previously insisted this Court lacked any jurisdiction to consider, assailing a legislative objective they previously acknowledged as wholly valid, and seeking to thwart the same contempt remedies they previously conceded were the prerogative of the Legislature, Plaintiffs Maricopa County, the Maricopa County Board of Supervisors, and the Maricopa County Treasurer (collectively, the "County") are now, though this lawsuit, deploying another gambit in a prolonged pattern of delay, obstruction and contumacy. This Court should not indulge it. The County's contortion of contradictory claims and opportunistic oscillations aside, its excuses for evading the demands of the Subpoenas remain as specious now as they were when the County first raised them nearly two months ago. None of the arguments presented in the Amended Complaint is viable as a matter of law.

First, the Subpoenas are in proper form and contain all the elements and information required by statute. *See* A.R.S. § 41-1151. Substantively identical to two prior subpoenas issued to the Board of Supervisors during the preceding Legislature in December 2020, the Subpoenas were undergirded by ample notice to the County of what materials President Fann and Chairman Petersen were seeking and why.

Second, the Legislature's subpoena power is not encumbered by any temporal or subject matter limitations. *See Buell v. Superior Court*, 96 Ariz. 62, 66 (1964) ("It is within the powers of legislative committees to conduct investigations . . . and to issue subpoenas and to summon witnesses generally and punish them for contempt if they refuse to answer

relevant questions or produce records."). And even if it were, the purpose underlying the Subpoenas—*i.e.*, examining the accuracy, security and reliability of electoral processes in Maricopa County and assessing the necessity of future reforms—falls squarely within the legislative domain. In fact, this critical point was well-articulated by none other than the County's counsel just a few weeks ago, when they averred that the Board "respect[s] the Legislature and want[s] to help it accomplish its important legislative purpose of crafting laws to govern Arizona, including its elections." Letter from Maricopa County to Arizona State Senate of January 15, 2021.[1]

Third, the undisputed proposition that certain ballot materials are not publicly accessible simply evades the operative question of how or why Maricopa County—a subordinate political subdivision—could possibly assert a ***privilege*** of non-disclosure in response to compulsory process issued by the sovereign Legislature. The County is at a loss to produce any authority that could sustain the untenable position that the legislative subpoena power is effectively no broader than the Arizona Public Records Act. Further, the County's reliance on various criminal prohibitions on the corruption of ballot secrecy ambles into the realm of the absurd. If, as the County contends, the inspection or handling of voted ballots by elected officials in the course of their duties is a criminal offense, then presumably one should expect the County Attorney to imminently charge the County Recorder and his staff with multiple felonies. That the Supervisors who purport to competently administer elections in America's fourth-largest county would champion—repeatedly—such a flagrant misconstruction of the law is stunning, and itself underscores the need for greater legislative supervision of Maricopa County elections.

Fourth, the County's argument that the Legislature cannot access information on electronic voting devices collides with controlling statutory text. The legislative subpoena power encompasses the authority to demand the production of not only physical "books" or

[1] A copy of this letter, as well as a letter from Chairman Sellers to President Fann, are attached hereto as Exhibit 1.

"papers," but also "documents" in any and all forms, to include data in electronic media. *See* A.R.S. § 41-1154.

ARGUMENT

"A motion for judgment on the pleadings tests the sufficiency of the complaint, and a defendant is entitled to judgment 'if the complaint fails to state a claim for relief.'" *Save Our Valley Ass'n v. Arizona Corp. Comm'n*, 216 Ariz. 216, 218, ¶ 6 (App. 2007) (internal citation omitted); *see also Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 315 (1967). In adjudicating such a motion by the defendant, the court will "treat the allegations of the complaint as true, but conclusions of law are not admitted." *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2 (App. 1999).

The material facts are few and uncontested: the Subpoenas were issued by President Fann and Chairman Petersen and served on the Plaintiffs pursuant to A.R.S. § 41-1151, *et seq.*, and the Plaintiffs refuse to comply with the Subpoenas' demand for the production of, or access to, (1) unredacted voter information, (2) voting and tabulation devices used in the November 3, 2020 general election, and (3) ballots and images of ballots cast in the November 3, 2020 general election. *See* Am. Compl. ¶¶ 7, 81, 153-175.

I. The Subpoenas Were in Proper Form and the County Had Reasonable Notice of the Materials and Records Sought

A. The Subpoenas Required the Attendance of Witnesses

By statute, a properly issued legislative subpoena "is sufficient" if it, *inter alia*, "requires the attendance of the witness at a certain time and place." A.R.S. § 41-1151. It is undisputed that the Subpoenas informed the recipients that they were "COMMANDED TO APPEAR" at the Arizona Senate on January 13, 2021 at 9:00 a.m. *See* Am. Compl. Ex. A. Because the Subpoenas inarguably complied with this unequivocal statutory directive, the inquiry is at an end.[2]

[2] President Fann and Chairman Petersen never wished to burden County witnesses with the task of personally appearing at the Capitol and included this command in the Subpoenas only to placate the County, which had insisted in the prior round of litigation that such verbiage was required.

Undeterred by the dispositive force of this explicit statutory text, the County contends that the Subpoenas are invalid because "there must actually be a hearing at which the witness is commanded to attend in order to provide testimony." Am. Compl. ¶ 125. But 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), and the County's argument can be sustained only by interpolating into Section 41-1151 words that simply are not there. *See Hiskett v. Lambert in & for County of Mohave*, 247 Ariz. 432, 435, ¶ 12 (App. 2019) ("We will not read into a statute anything not within the clear intent of the legislature as indicated by the statute itself, nor will we 'inflate, expand, stretch[,] or extend a statute to matters not falling within its express provisions.'" (internal citation omitted)).

Nothing in Section 41-1151 or its neighboring statutes requires the existence of a "hearing," or secures for witnesses a right to deliver declamations to the Senate when no testimony is sought. If anything, the textual and semantic interpretive indicia point in the opposite direction. For example, the Senate President does not chair any standing "committee" in her capacity as the chamber's presiding officer, and so the exercise of her subpoena power generally could not entail a committee "hearing" in any conventional sense. Further, the statutory provisions governing contempt and criminal violations expressly differentiate between a refusal to "appear[]" and a refusal to "testify." This express distinction corroborates that the required appearance may, or may not, include committee testimony. *See* A.R.S. §§ 41-1153(A), -1154; *see generally State v. Dickens*, 66 Ariz. 86, 90 (1947) ("[W]here, in a statute, the disjunctive form is used, the various members of the sentence are to be taken separately.").

More fundamentally, it is worth pausing to appreciate the logical dissonance of the County's argument on this score. In essence, the County's complaint is that the Subpoena is invalid because the Senate did not force Supervisor Sellers to testify; in other words, the Court should quash the Subpoena because it was not sufficiently demanding of the witness. The absurdity is self-evident.

Finally, while the Court cannot and need not parse factual questions at this procedural juncture, the Court should be aware that the Amended Complaint's characterization of the circumstances surrounding Supervisor Sellers' appearance at the Senate is deeply misleading. Shortly after the Subpoenas were issued on January 12, counsel for the Senate contacted the County's counsel by email, stating that the Senate would assume that, given the pending legal dispute concerning the Subpoenas' legality, the County's representatives would not appear at the Capitol, but asking that the County alert the Senate if the County intended otherwise. In a phone call later that evening, Senate attorney Kory Langhofer stated to County counsel Joseph La Rue that the Senate did not view the subpoenaed witnesses' attendance as necessary and expressed the Senate's desire to avoid a "PR stunt" the next day. Mr. La Rue responded that he would relay this information to his clients. Sure enough, however, Supervisor Sellers appeared at the Capitol the next morning, with reporters and TV cameras in tow. When Langhofer expressed his surprise and dismay in a phone call with County counsel later in the day, the latter indicated apologetically that Supervisor Sellers' appearance resulted from an internal "miscommunication" within the County. For these same attorneys, who were personally aware of the above-referenced facts, to now represent to this Court that the Subpoenas' attendance command was "contemptuous[]," Am. Compl. ¶ 9, or some kind of ruse, is troubling. *See* Ariz. R. Civ. P. 11.

B. The County Had Reasonable Notice of the Subpoenas

In a Kafkaesque argument, the County contends that the Subpoenas afforded Supervisor Sellers insufficient time to prepare for a hearing that the Senate had never represented would occur and for which he was informed (through counsel) that he need not appear. *See* Am. Compl. ¶ 141. Preliminarily, the statutory requirement of "reasonable notice" extends only to the production of materials, not the offering of testimony. *See* A.R.S. § 41-1154. Further, questions concerning the County's compliance with the appearance facet of the Subpoenas are moot—if they were ever ripe in the first place. It is undisputed that the County witnesses fulfilled the Subpoenas' command of appearance at

the State Capitol (despite having been excused from doing so). It accordingly remains wholly unclear how or why the Court could quash or declare invalid an appearance demand that already has been satisfied and discharged.

The County's argument that it lacked sufficient notice of the Subpoenas' production commands fares no better. First, the scope of the Subpoenas is largely indistinguishable from the aggregate import of two subpoenas issued to the Board in December 2020. *See* Am. Compl. ¶¶ 54-55. President Fann and Chairman Petersen had forewarned the Board that they would re-issue the subpoenas should they remain unsatisfied at the conclusion of the Fifty-Fourth Legislature, *see Maricopa v. Fann*, CV2020-016840, Counterclaim ¶¶ 40-41 (Dec. 29, 2020), a promise that was consummated on January 12, *see* Am. Compl. ¶ 66. The County's cries of surprise ring of disingenuousness.

Second, and more fundamentally, considerations of timing are transparently irrelevant. The County has made it abundantly clear that it has no intention of complying with the outstanding commands of the Subpoenas, regardless of whether it is afforded 17 hours or 17 years in which to do so. In this respect, the County's eristic complaints concerning the form and timing of the Subpoenas are redolent of those advanced by the defendant in *United States v. Bryan*, 339 U.S. 323 (1950), who had been convicted of willfully defaulting on a congressional subpoena. Rejecting arguments that the defendant's non-compliance should be excused because the issuing committee lacked a quorum at the time the defendant had appeared, the court responded:

> [T]he alleged defect upon which respondent now insists is, in her own estimation, an immaterial one . . . . She does not deny, and the transcript of the hearing makes it perfectly clear, that she would not have complied with the subpoenas no matter how the Committee had been constituted at the time. . . . Here respondent would have the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands.

Id. at 333-34. Invoking an earlier case, the court added that it is nonsensical for a witness to demand "additional time to gather papers which he had indicated he would not produce in any event." *Id.* at 334 (citation omitted).[3]

In sum, the Subpoenas conformed fully to the requirements of A.R.S. § 41-1151. The County has known for nearly two months what materials the Senate is seeking and why, and any putative lack of notice is immaterial in any event; the County has made it clear that it will not comply fully with the Subpoenas unless compelled to do so.

II. The Subpoenas Advance the Valid Legislative Purpose of Investigating the Integrity of Elections and Assessing Potential Policy Reforms

A. The Legislative Subpoena Power is "Broad and Indispensable"

The Legislature's subpoena power emanates from Article IV of the Arizona Constitution, which embodies an implicit investigatory function that is intrinsic to the Legislature's sovereign authority. As the United States Supreme Court recently reaffirmed in discussing the cognate power of the Congress and its committees embedded in Article I of the federal Constitution:

> Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power to secure needed information in order to legislate. This power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . .The congressional power to obtain information is broad and indispensable. It encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.

Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (internal quotations and citations omitted). Given that "the power of the [Arizona] legislature is plenary . . . unless that power is limited by express or inferential provisions of the Constitution," *Whitney v. Bolin*, 85

[3] It bears emphasis that, in contrast to *Bryan*, the Subpoenas in this case were issued by legislative officers individually, not a committee (which, as the *Bryan* court acknowledged, generally can act only with a quorum). Further, the concerns that may counsel in favor of a formal hearing attended by a committee quorum in the context of testimonial evidence are "obviously inapplicable to the production of papers," *Bryan*, 339 U.S. at 332 n.8.

Ariz. 44, 47 (1958), then the same prerogative must necessarily reside in Article IV of the Arizona Constitution.

The upshot is that President Fann and Chairman Petersen may deploy the subpoena power for any "valid legislative purpose," an expansive concept that encompasses anything that may "concern a subject on which legislation ***could be*** had." *Mazars USA*, 140 S. Ct. at 2031 (internal citations omitted; emphasis added). If the subpoena pertains to a valid legislative purpose, then the Court must enforce its commands and "will not—indeed, may not—engage in a line-by-line review of [its] requests." *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.D.C. 2018) (addressing subpoena issued by House committee).

B. Assessing Electoral Integrity Is a Valid Legislative Purpose

It is undisputed[4] that the Legislature may properly enact 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. The Senate intends to use data and information gleaned through the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties, with an eye to enacting potential reforms. This is 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); *Buell*, 96 Ariz. at 64 (sustaining legislative subpoena issued in the course of an investigation into "all phases of the existing relationship between Corporation Commission personnel, elective and appointive, and persons and corporations subject to the regulatory jurisdiction of the Corporation Commission" and the solicitation of political contributions); *Bean LLC*, 291 F. Supp. 3d at 43 (holding that subpoena "was a valid part of the Committee's legitimate legislative investigation" into "the

[4] *See* Exhibit 1.

intelligence community's response to Russian active measures directed against the United States"); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975) ("Inquiry into the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative sphere."). Indeed, the Supreme Court has emphasized that the subpoena power is not contingent upon the express articulation of any particular legislative objective, 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." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

The County appears to posit three rationales as to why the Subpoenas ostensibly lack a valid legislative purpose, all of which fall flat.

1. Previous Judicial Proceedings Involving Different Parties Have No Bearing on the Legislature's Subpoena Power

First, the County advances the *non sequitur* that various private plaintiffs who brought election contests or similar claims in connection with the 2020 election did not prevail on the merits. As an initial matter, the operative inquiry in a statutory election contest is whether unlawful ballots, tabulation errors or other illegalities were sufficiently pervasive to change the outcome of the election. *See generally Huggins v. Superior Court*, 163 Ariz. 348 (1990). By contrast, the Legislature's focus is not so myopic; the existence of *any* vote tabulation errors in *any* candidate or ballot measure race—or, for that matter, procedural inefficiencies or security risks that may adversely impact future elections—are legitimate objects of legislative concern, regardless of whether they had a material impact on the November 3, 2020 general election. More fundamentally, the County is unable to muster any authority for its novel notion that the existence of a statutory election contest somehow extinguishes the Legislature's investigatory prerogative with respect to a subject matter area (*i.e.*, elections) that is within its constitutional purview.

The County's assurances concerning its own audit carry even less import. As one court observed in response to a congressional subpoena recipient's insistence that the

requested documents would reveal no improprieties, "it is manifestly impracticable to leave to the subject of the investigation alone the determination of what information may or may not be probative of the matters being investigated." *Bean LLC*, 291 F. Supp. 3d at 45 (internal citation omitted).[5]

2. The EAC Does Not Certify Auditors

The County's cavil that the Senate may retain an auditor who is not "certified" by the federal Election Assistance Commission ("EAC") is founded on a factually false premise; the EAC does not "certify" any person or entity to act as an "auditor." Rather, the EAC has accredited (not certified) certain laboratories (not auditors) to test only certain, delimited technical aspects of voting systems (not to conduct election audits). As the agency itself has cautioned, "accreditation does not imply any guarantee (certification) of laboratory performance or test/ calibration data; it is a finding of laboratory competence." *Establishment of a Laboratory Accreditation Program for Voting Systems Under the National Voluntary Accreditation Program*, 69 Fed. Reg. 34993, 34995 (Jun. 23, 2004). A laboratory's accreditation (or lack thereof) is not dispositive of its ability to lawfully and competently conduct comprehensive post-election audits of voting or tabulation devices. An audit by a laboratory that happens to hold an EAC accreditation is not performed under the auspices of that accreditation and does not carry any imprimatur of the EAC. The notion that the Senate's subpoena power is somehow conditioned upon a third party's federal regulatory accreditation that is irrelevant to the investigatory task (here, a post-election audit) is untethered from any Arizona law.

The County's efforts to imbue an EAC accreditation with an illusory significance obscures the true animating reason for its objection: it merely disapproves of one of the audit vendors under consideration. *See* Am. Compl. ¶¶ 102-110. But the purview of a legitimate legislative inquiry or the means of its execution are not conditioned upon the grace of its target. *See Barenblatt v. United States*, 360 U.S. 109, 124 (1959) ("[I]t goes

[5] Further, the County appears oblivious to the irony that if—as it now contends—the outcomes of the cited election contests foreclose subsequent audits by non-judicial bodies, then its own audit must itself be impermissible and *ultra vires*.

without saying that the scope of the Committee's authority was for the House, not a witness, to determine. . . ."). How the Senate chooses to use materials obtained by the Subpoenas and to whom it permits access are, simply put, far above the County's paygrade. *See generally McSurely v. McClellan*, 553 F.2d 1277, 1296–97 (D.C. Cir. 1976) (explaining that once Congress comes into possession of documents, "the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity").

3. The Subpoenas Do Not Require an Authorizing Resolution

Finally, the County contends that the Subpoenas are illegitimate because "there is not currently an open investigation in the Senate related to the November 3, 2020 general election." Am. Compl. ¶ 149. To the contrary, the Subpoenas themselves encapsulate the pending investigation, the subject of which is the Board of Supervisors and its conduct of the 2020 election. To the extent the County's complaint is that there has been to date no formal resolution of the Senate authorizing any denominated "investigation," this argument contrives an illusory prerequisite. It is true that because Congress' constitutional subpoena power is invested in the body as a whole, its delegation to a committee must entail an authorizing resolution. *See, e.g.*, *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 3d 53, 70-71 (D.D.C. 2008). In contrast, the Arizona Legislature has codified what is effectively a standing and perpetual delegation of its institutional subpoena power to the presiding officer and committee chairmen in each house. *See* A.R.S. § 41-1151. This statutory authorization negates any need for *ad hoc* resolutions directing discrete "investigations."

To the extent the County's position is that the Senate has not made what the County believes to be a satisfactory showing that its audit is in some sense "justified," this argument is equally feeble. The legislative subpoena power is not conditioned on some antecedent factual proof of the investigation's merits, nor is it controlled by the narrower relevancy and undue burden rubrics codified in the Rules of Civil Procedure. Nor are the putative motives undergirding a legislative investigation subject to judicial policing. *See Eastland*, 421 U.S.

at 508 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.").

To the contrary, legislative investigations partake of grand jury inquiries, and courts have regularly drawn on the extraordinarily deferential standards governing the latter when evaluating legislative subpoenas. *See Packwood*, 845 F. Supp. at 21 ("At this stage of its proceedings the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury," adding that "'[t]he function of the grand jury is to inquire about all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred'"); *Bean LLC*, 291 F. Supp. 3d at 45 (invoking grand jury analogy). The perceived worthiness of the inquiry or its likelihood of yielding actionable information are not matters of judicial cognizance. *See Eastland*, 421 U.S. at 509 ("Nor is the legitimacy of a congressional investigation to be defined by what it produces. The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."). And the subjects of a legislative investigation clearly may not exercise a discretionary veto over legislative subpoenas.[6]

In short, "[t]he propriety" of a legislatives subpoena "is a subject on which the scope of our inquiry is narrow" and "should not go beyond the narrow confines of determining that [the Senate]'s inquiry may fairly be deemed within its province." *Eastland*, 421 U.S. at 506 (internal citation omitted); *see also Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 21 (D.D.C. 1994) ("This Court . . . has no authority to restrict the scope of the Ethics Committee's investigation."). The Subpoenas easily clear that permissive threshold.

[6] The question of whether any given subpoenaed documents or information are "material and relevant," A.R.S. § 41-1154, hence is an endogenous inquiry that is determined by the scope of subpoena itself. The statutes impose no extrinsic reference point or rubric defining materiality or relevancy; if a document or item is responsive to the call of the subpoena, it is necessarily "material and relevant," and hence subject to production.

III. The Subpoenaed Materials Are Not Privileged, Do Not Implicate Any Constitutional Rights, and Are Not Germane to the Separation of Powers

Federal authorities analyzing the cognate investigatory powers of Congress have recognized three—and only three—potential defenses to compulsory disclosures with respect to a subpoena issued pursuant to a valid legislative inquiry. Specifically, an otherwise lawful command for the production of documents or adducement of testimony may be curtailed only if (1) the subpoenaed information is privileged, (2) the subpoena infringes on some constitutionally protected right or liberty interest of the recipient or (3) compliance would undermine the separation of powers between coordinate branches of government. None of these caveats is applicable to any materials the County has withheld.

A. Even if They Are "Confidential," Voting Machine Data and Voted Ballots Are Not "Privileged," and the Cited Statutes Do Not Prohibit Compliance with the Subpoenas in Any Event

1. Even Confidential Materials Are Not Privileged From Disclosure

A recognized *privilege* may, in some circumstances, serve as a conditional defense to the demands of a legislative subpoena. *See Buell*, 96 Ariz. at 69 (seemingly recognizing claims of attorney-client privilege but finding that they were defeated by Legislature's need for subpoenaed materials); *but see* Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges in Congressional Investigations*, 35 HARV. J. LAW & PUB. POL'Y 897, 907 (2012) (arguing that "Congress is not obligated to respect common law privileges in committee investigations," although it generally does so as a matter of "practice"); *cf. also State v. Zeitner*, 246 Ariz. 161, 167, ¶ 22 (2019) ("We cannot infer that the legislature, in granting such broad investigatory authority [to state agencies], intended the [physician-patient] privilege to stand as a bulwark against [Medicaid] fraud investigations").

But "[t]he terms 'privileged' and 'confidential' are not interchangeable." *Catrone v. Miles*, 215 Ariz. 446, 454, ¶ 21 (App. 2007) (concluding that while federal and state statutes make education records "confidential," they are not necessarily immune from disclosure through compulsory process). The laws cited by the County pertaining to the availability

of voting machines and voted ballots operate as restrictions on access ***by the general public***. There is no textual or extrinsic support for the notion that they were intended to serve as a privilege against disclosure demanded by compulsory process issuing from the same sovereign body that promulgated these same statutes.

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 prerogative 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." *Id.* at 590; *see also F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (reaffirming that "the Commission may not deny Congress access to confidential documents, including those that contain trade secrets"); *Packwood*, 845 F. Supp. at 19 (requiring Senator to produce sensitive but non-privileged entries from his diary in response to Ethics Committee subpoena). Likewise, whatever statutory confidentiality restrictions that may abridge public access to voting machines or ballots cannot sustain vindicable claims of ***privilege*** by the County against the Senate.

This abiding distinction between confidentiality and privilege is doctrinally sound and practically necessary. If every document or informational item that is subject to some statutory or common law confidentiality interest were immune from compulsory process,

then the legislative subpoena power would be effectively conterminous with the Arizona Public Records Act—in other words, entirely nugatory.

2. The Statutes Cited By the County Are Inapplicable

Even if the County could credibly alchemize various criminal prohibitions in Title 16 into a personal privilege of non-disclosure, the cited statutes do not prohibit the Senate's access to the subpoenaed materials. For example, that A.R.S. § 16-624 mandates the retention of ballots for up to two years implicitly acknowledges that these materials may be responsive to, and subject to disclosure by, compulsory process in various proceedings arising long after the election has been certified and the contest period has elapsed.

Other of the County's interpretative contortions defy common sense. A.R.S. § 16-1018(4) generally prohibits showing "another voter's" completed ballot to a third party. It self-evidently has no application to the review of ballots by government officials in the scope of their duties—and if it did, every County employee who exposes himself or a colleague to a ballot image during routine processing and tabulation activities would be committing a criminal act. This is nonsensical.

Similarly, Arizona's ban on "collect[ing]"—*i.e.*, harvesting—early ballots, *see* A.R.S. § 16-1005(H), has no plausible application to the intergovernmental transfer and review of ballots in a previously canvassed and certified election.[7] Further, the statute categorically exempts "election officials," *id.*, an undefined and protean term that just as easily embraces the elected legislators who draft and enact the election laws as it does the county bureaucrats who administer them. Finally, even entertaining the peculiar theory that compliance with the Subpoenas would violate A.R.S. § 16-1005(H), it is the Senate—not the County—that would bear any attendant risk of prosecution, and the state's chief law enforcement official has already endorsed in these proceedings the Senate's entitlement to

[7] If it did, the ballot harvesting ban—which was enacted ***after*** A.R.S. § 16-624—would also *de facto* criminalize the County Treasurer's preservation of voted ballots for 24 months after an election. *See generally See Pijanowski v. Yuma County*, 202 Ariz. 260, 263, ¶ 11 (App. 2002) ("In the event of a clear conflict between statutes enacted at different times, the later statute is usually presumed to accurately reflect the intent of the legislature and will therefore be found to have modified the earlier statute.").

the subpoenaed ballots. *See Amicus Curiae* Brief of Arizona Attorney General Mark Brnovich; A.R.S. § 16-1021 (conferring enforcement power on the Attorney General).

In short, the statutory safeguards governing public access to voter information and ballot materials do not clothe the County with an evidentiary privilege that it may assert against the sovereign Legislature in response to a valid subpoena.[8]

B. The Subpoenas Do Not Violate Any Person's Constitutional Rights

While the legislative subpoena power is tempered by the individual liberties—such as First Amendment rights and the privilege against self-incrimination—guaranteed by the Constitution, *see generally Watkins v. United States*, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to investigations as to all forms of governmental action."), that limitation is irrelevant to these Subpoenas, which merely seek the production of governmental records by a subordinate governmental body in its official capacity. Simply put, the County possess no constitutional "rights" that the Subpoenas could possibly infringe. *See Exxon*, 589 F.2d at 590 ("[W]here constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress.").

The County's Amended Complaint resurrects its bizarre argument that the Subpoena somehow undermines the secret ballot guaranteed by Article VII, Section 1 of the Arizona Constitution. *See* Am. Compl. ¶¶ 160-162. The Supervisors who oversee elections apparently remain unaware of a fact known to anyone who has ever voted: ballots do not contain any personally identifying information; it is impossible to identify the electoral choices of any given individual voter from any given ballot.

Even if the County's supposition that a small number of voters opt to sign or write their names on their ballot is factually true, it is legally irrelevant. First, ballot secrecy is a voter's right, not her obligation. A voter who (for whatever reason) chooses to divulge his identity on his ballot has freely abjured his right to anonymity; he has not been deprived by

[8] Indeed, with respect to voter information, Arizona law affirmatively authorizes access to otherwise confidential voter information by "authorized government official in the scope of the official's duties." A.R.S. § 16-168(F).

the state of any constitutional privilege. *Cf.* A.R.S. § 16-1018(4) (recognizing voters' right to publicize images of their own voted ballots on social media). Second, if in fact a third party's mere visual inspection of a ballot on which the voter inscribed his name is a constitutional offense, then County officials themselves are guilty of serial infractions in the course of handling and processing these ballots. Finally, even indulging this curious notion that the Subpoenas could conceivably compromise the secret ballot of an unspecified number of unnamed persons, any rights secured by Article VII, Section 1 are vested in, and assertable by, those citizens—not the County.

C. The Subpoenas Do Not Implicate Separation of Powers Principles

Although legislative subpoenas may not infringe on the independent domains of coequal branches, *see Trump*, 140 S. Ct. at 2034-35, such separation of powers concerns are not germane to this case. The Board enjoys no constitutionally ordained role in the conduct of elections at all. To the contrary, "[t]he boards of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature." *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 395–96 (1949); *see also* Ariz. Const. art. XII, § 4 ("The duties, powers, and qualifications of [county] officers shall be as prescribed by law."). The functions and duties the County officers possess under the current incarnation of Title 16 embody delegations *by the Legislature itself*, which the Legislature may maintain, rescind or modify in its discretion. Indeed, the Legislature's authority to prospectively change the statutory responsibilities of the Board or other county officials only underscores that an investigation into their exercise of those duties is necessarily in furtherance of a valid legislative purpose. *See McGrain*, 273 U.S. at 177-78 (holding that Congress' oversight responsibilities justified its investigation into the Attorney General, noting that "the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation" and also are subject to Congress' appropriations authority).

IV. Electronic Documents Are Subject to the Legislative Subpoena Power

Materials are not immune from compelled disclosure merely because they exist in electronic form. A legislative subpoena may command a recipient to produce "any material and relevant books, papers or documents." A.R.S. § 41-1154. When construing a statute, "[e]ach word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 10 (2017) (quoting *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949)). That the Legislature enumerated "documents" as a classification distinct from "books" and "papers" imparts an intent to imbue it with an expansive ambit that encompasses not just physical or tactile materials. Indeed, as commonly understood, the term 'document' "embraces any information stored on a computer, electronic storage device, or any other medium." BLACK'S LAW DICTIONARY (11th ed. 2019); *cf. Lake v. City of Phoenix*, 222 Ariz. 547, 551, ¶ 14 (2009) ("We . . . hold that when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law."); *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013) (noting in Fourth Amendment context that "[t]he papers we create and maintain [are] not only in physical but also in digital form").

Thus, although some of the materials sought by the Subpoenas are stored or reified in electronic media, they nonetheless remain "documents" that are subject to disclosure—if not pursuant to A.R.S. § 41-1154, then certainly under the auspices of the Legislature's inherent subpoena power.

CONCLUSION

For the foregoing reasons, the Court should enter a declaratory judgment on the pleadings against the Plaintiffs and in favor of President Fann and Chairman, finding that the Subpoenas are valid, lawful and enforceable in all respects.

RESPECTFULLY SUBMITTED this 22nd day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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:

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Exhibit 3

Exhibit 3

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MARICOPA COUNTY; CLINT HICKMAN, in his official capacity as Chairman of the Maricopa County Board of Supervisors; and JACK SELLERS, STEVE CHUCRI, BILL GATES, and STEVE GALLARDO, in their official capacities as Members of the Maricopa County Board of Supervisors,

Plaintiffs,

v.

KAREN FANN, in her official capacity as President of the Arizona Senate; EDDIE FARNSWORTH, in his official capacity as Chairman of the Arizona Senate Judiciary Committee; RICK GRAY, in his official capacity as Vice Chairman of the Arizona Senate Judiciary Committee; SONNY BORRELLI, VINCE LEACH, LUPE CONTRERAS,ANDREA DALESSANDRO, and MARTIN QUEZADA, in their official capacities as the Members of the Arizona Senate Judiciary Committee,

No. CV2020-016840

PLAINTIFFS-IN-COUNTERCLAIM'S MOTION FOR PRELIMINARY INJUNCTION

EXPEDITED RULING REQUESTED

(Assigned to the Hon. Timothy Thomason)

Defendants.

KAREN FANN, in her official capacity as President of the Arizona Senate; EDDIE FARNSWORTH, in his official capacity as Chairman of the Arizona Senate Judiciary Committee,

Plaintiffs-in-Counterclaim,

v.

MARICOPA COUNTY BOARD OF SUPERVISORS, the governing body of Maricopa County, Arizona; JACK SELLERS, in his official capacity as a member of the Maricopa County Board of Supervisors; STEVE CHUCRI, in his official capacity as a member of the Maricopa County Board of Supervisors; BILL GATES, in his official capacity as a member of the Maricopa County Board of Supervisors; CLINT HICKMAN, in his official capacity as a member of the Maricopa County Board of Supervisors; and STEVE GALLARDO, in his official capacity as a member of the Maricopa County Board of Supervisors,

Defendants-in-Counterclaim.

Pursuant to A.R.S. §§ 12-2212, -1801, and Ariz. R. Civ. P. 65, Plaintiffs-in-Counterclaim Karen Fann, President of the Arizona Senate, and Eddie Farnsworth, Chairman of the Senate Judiciary Committee, move the Court to enter a preliminary injunction or other order compelling the Counterclaim Defendants to immediately produce or make available in full to President Fann or Chairman Farnsworth (or their designees) all documents, records, materials, and information responsive to either or both of the subpoenas issued by President Fann and Chairman Farnsworth on December 15, 2020.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Maricopa County Board of Supervisors (hereafter, the "County") stands in continuing defiance of two legislative subpoenas seeking access to, or the production of, documents, information and materials relating to the casting and tabulation of ballots in connection with the November 3, 2020 general election (the "Subpoenas"). Both Subpoenas were validly issued pursuant to the plenary grant of subpoena power statutorily delegated by the Legislature to its presiding officers and committee chairmen, *see* A.R.S. §§ 41-1151, *et seq*., which is itself derived from Article IV, Part 2 of the Arizona Constitution.

None of the County's purported excuses for its obduracy is viable as a matter of law. Whatever functions and duties the County's officers possess in connection with the conduct of elections are a product of legislative grace. The County's efforts to weaponize the Legislature's own discretionary delegations as some sort of shield from legislative oversight are as logically incongruous as they are legally unsustainable. The statutory confidentiality protections that attach to certain voter data and ballot materials do not inoculate them from compulsory process—and, in any event, they invest in the County no cognizable rights or privileges that are assertable against the Legislature.

Because the County's unlawful disregard of valid legislative subpoenas deprives the Legislature of information to which it is constitutionally and statutorily entitled, immediate injunctive relief is necessary to remediate the ongoing informational injury to the

Legislature and to vindicate the constitutional prerogatives of Arizona's elected representatives.

FACTUAL BACKGROUND

On December 15, 2020 President Fann and Chairman Farnsworth jointly issued the Subpoenas, which were promptly served upon the County. To date, the County has not produced or made available **any** documents, information or materials in response to the Subpoenas, and apparently does not intend to comply with the Subpoenas unless and until it is compelled to do so. On December 18, 2020—the return date specified in the Subpoenas—the County filed suit in this Court, requesting a declaration that the Subpoenas are unlawful and an order quashing them. President Fann and Chairman Farnsworth thereafter initiated[1] a special action seeking a writ of mandamus requiring the County to comply with the Subpoenas.

On December 23, Judge Warner dismissed the special action, but commented that A.R.S. § 12-2212 provides a "plausible" alternative basis for jurisdiction and granted President Fann and Chairman Farnsworth leave to file an amended complaint. *See Fann v. Maricopa County Bd. of Supervisors*, CV2020-016904, Decision Order dated Dec. 23, 2020, attached hereto as Exhibit A. In the interest of litigation efficiency, President Fann and Chairman Farnsworth instead have filed a counterclaim in this action, and now seek preliminary injunctive relief.

ARGUMENT

In considering a motion for preliminary relief, this Court evaluates (1) the likelihood that the movant will succeed at trial on the merits, (2) the possibility of irreparable injury to the movant not remediable by damages if the requested relief is not granted, (3) whether the balance of hardships favors the movant, and (4) whether public policy favors an injunction. *See generally Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410–411, ¶

[1] While President Fann and Chairman Farnsworth initially sought to lodge the special action as a counterclaim in these proceedings, the undesigned was advised by the Civil Administration staff that Judge Mahoney, to whom this action was originally assigned, was unavailable to act on any request for emergency relief until at least January 4, 2021, thus impelling President Fann and Chairman Farnsworth to file a separate lawsuit.

10 (2006); *Apache Produce Imports, LLC v. Malena Produce, Inc.*, 247 Ariz. 160, 164, ¶ 10 (App. 2019); *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

Importantly, the moving party need not establish all four elements. Rather, the factors are considered on a sliding scale, and a movant is entitled to injunctive relief if it establishes "*either* (a) probable success on the merits and the possibility of irreparable injury; *or* (b) the presence of serious questions and 'the balance of hardships tip sharply' in his favor." *Shoen*, 167 Ariz. at 63 (emphasis added); *Smith*, 212 Ariz. at 410–411. All four considerations—whether evaluated individually or in any given permutation—impel the issuance of preliminary relief.

I. President Fann and Chairman Farnsworth Are Highly Likely To Succeed on the Merits of Their Claims That the Subpoenas Are Substantively Valid and Immediately Enforceable

A. The Court Has Jurisdiction Over the Counterclaims Pursuant to A.R.S. § 12-2212

The Legislature has authorized this Court to civilly enforce any subpoena issued by a public officer in the course of his or her legal duties.

Section 12-2212(A) of the Arizona Revised Statutes states that:

> When a public officer is authorized by law to take evidence, he may issue subpoenas, compel attendance of witnesses and production of documentary evidence, administer oaths to witnesses, and cause depositions to be taken, in like manner as in civil actions in the superior court.

If the subpoena's recipient fails to timely comply with its demands, the issuing public officer "may, by affidavit setting forth the facts, apply to the superior court where the hearing is held, and the court shall thereupon proceed as though such failure had occurred in an action pending before it." *Id.* § 12-2212(B).

Thus, distilling the statute to its constitutive elements, there are three necessary prerequisites to the Court's civil enforcement jurisdiction:

1. The subpoena was issued by a "public officer";
2. The issuing public officer was "authorized by law to take evidence"; and

3. The public officer applied to the Superior Court for enforcement remedies and set forth in an "affidavit" the facts compelling relief.

Each of these conditions is present on the face of the Verified Counterclaim.

First, Senate President Fann and Judiciary Committee Chairman Farnsworth unquestionably are "public officers." Although Title 12 itself contains no explication of the term, it is defined elsewhere by statute to encompass "the incumbent of any office, member of any board or commission, or his deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer." A.R.S. § 38-101(3). An "office," in turn, is "any office . . . of the state." *Id.* § 38-101(1); *see also* 1982 Ariz. Att'y Gen. Op. 123, I82-133 (relying on A.R.S. § 38-101's definition of "public officer" in construing Section 12-2212 and concluding that school district governing board could permissibly issue subpoenas); A.R.S. § 38-541(8) (denoting "public officer" to include "a member of the legislature" for purposes of financial disclosure mandates).

Second, President Fann and Chairman Farnsworth are "authorized . . . to take evidence" by A.R.S. § 41-1151, which enables "the presiding officer of either house or the chairman of any committee" to issue "a subpoena." *See also id.* § 41-1154 (indicating that legislative subpoenas may permissibly compel the production of "books, papers or documents"). While the County challenges certain attributes of the Subpoenas, its objections to the nature and scope of these particular requests cannot be confounded with the underlying jurisdictional prerequisite. Because President Fann and Chairman Farnsworth are generally "authorized" to issue subpoenas, the enforceability of these specific Subpoenas is appropriately a matter of judicial cognizance pursuant to A.R.S. § 12-2212.

Third, the Verified Counterclaim delineates "facts" detailing the County's non-compliance and "appl[ies]" to this Court for appropriate relief. *See* A.R.S. § 12-2212(B). Further, the Verified Counterclaim's averments were sworn under oath by President Fann under the auspices of Section 12-2212(B). *See Collins v. Streitz*, 47 Ariz. 146, 150–51 (1936) (finding that "it is not necessary that the affidavit be separate and distinct from the

complaint itself, but it is sufficient if it is a part thereof, provided that pleading is verified by the plaintiff.").

The interpretive query is linear and conclusive: because the Subpoenas were issued by public officers pursuant to statutorily conferred authority, the Court has jurisdiction to issue and enforce any and all appropriate remedial measures "as though such failure [to comply with the Subpoenas] had occurred in an action pending before it." A.R.S. § 12-2212(B). The plain statutory text is not cabined by an exception, caveat or proviso. *See generally Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 107 (1975) ("The statutes are remedial, and there is no exception or limitation stated in them. We will not read an exception.").

The contempt proceedings envisaged by A.R.S. § 41-1153 thus are merely cumulative to, and not exclusive of, the general civil enforcement framework furnished by A.R.S. § 12-2212. Indeed, the Legislature's supplementation of its contempt powers with a right of civil enforcement makes practical sense. Because a contempt resolution can be presented and approved only during the few months of the year when the Legislature is actually in session, *see* A.R.S. § 41-1153(A), civil proceedings are legislative officers' only effective avenue for redress when, as now, the Legislature has already adjourned.[2]

B. The Subpoenas Were Validly Issued Pursuant to A.R.S. § 41-1151 and the Legislature's Inherent Authority Under Article IV of the Arizona Constitution

President Fann and Chairman Farnsworth's issuance of the Subpoenas is sustained by both statutory and constitutional sources of authority.

1. Statutory Authority

Questions of statutory interpretation are undergirded by a fundamental "presumption that what the Legislature means, it will say." *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106 (1976). To this end, "the best and most reliable index of a statute's meaning is the plain

[2] The Legislature can be convened in a special session only by the call of the Governor or a petition signed by two-thirds of each house's members. *See* Ariz. Const. art. IV, pt. 2, §§ 1(2), 3.

text of the statute." *State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003). Here, Section 41-1151 of the Arizona Revised Statutes provides that either "the presiding officer of either house" or "the chairman of any committee" may issue "[a] subpoena," and a companion provision contemplates criminal sanctions for a subpoenaed individual who fails to produce "any material and relevant books, papers or documents in his possession or under his control," *id.* § 41-1154. The statutory authorization is not confined by any substantive or temporal limitations, conditions or caveats. Heeding this clear textual directive, the Arizona Supreme Court commented, in the only published case to date concerning the Legislature's subpoena power, that "[i]t is within the powers of legislative committees to conduct investigations . . . and to issue subpoenas and to summon witnesses generally and punish them for contempt if they refuse to answer relevant questions or produce records." *Buell v. Superior Court of Maricopa County*, 96 Ariz. 62, 66 (1964).[3]

The question of whether any given documents or information are "material and relevant" is an endogenous inquiry that is determined by the scope of subpoena itself. The statutes impose no extrinsic reference point or rubric defining materiality or relevancy; if a document or item is responsive to the call of the subpoena, it is necessarily "material and relevant," and hence subject to production.[4]

In short, because (1) the Subpoenas were properly issued by the Senate President and Judiciary Committee chairman[5] pursuant to a statutory grant of authority and (2) the County

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[3] While the County makes much of the fact that neither Subpoena mandates a specific individual to testify before any given committee on any set date, compliance with the Subpoenas necessarily requires some County "witness" to tender or produce the requested documents and materials to the Judiciary Committee (although President Fann and Chairman Farnsworth presently see no need to elicit verbal testimony from such individual).

[4] As discussed *infra* Section I.C, even if the subpoena power is cabined by implicit constitutional limitations, these Subpoenas are well within those parameters.

[5] The County notes that Senate Rule 2 authorizes the President to sign subpoenas "issued by the order of the Senate." Compl. ¶¶ 63-64. But nothing in Rule 2 displaces the President's (or, for that matter, Chairman Farnsworth's) independent statutory power to unilaterally issue subpoenas pursuant to Section 41-1151—and questions of compliance with internal legislative rules of procedure are non-justiciable in any event. *See Mecham v. Gordon*, 156 Ariz. 297, 302 (1988); *Rangel v. Boehner*, 20 F. Supp. 3d 148, 168 (D.D.C. 2013).

possesses or exerts legal control over documents and information that are "material and relevant" to the Subpoenas' demands, the Subpoenas are facially valid and subject to enforcement in this Court pursuant to A.R.S. § 12-2212. When, as here, "the text is clear and unambiguous, we apply the plain meaning and our inquiry ends." *Butler Law Firm, PLC v. Higgins*, 243 Ariz. 456, 459, ¶ 7 (2018) (internal quotation omitted).

2. Constitutional Authority

Although the Court need not venture beyond Title 41 to resolve this case, the controlling statutes emanate from Article IV of the Arizona Constitution, which embodies an implicit investigatory function that is intrinsic to the Legislature's sovereign authority.

As the United States Supreme Court recently reaffirmed in discussing the cognate power of the Congress and its committees embedded in Article I of the federal Constitution:

> Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power to secure needed information in order to legislate. This power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function . . .The congressional power to obtain information is broad and indispensable. It encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.

Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (internal quotations and citations omitted).[6] Given that "the power of the [Arizona] legislature is plenary . . . unless that power is limited by express or inferential provisions of the Constitution," *Whitney v. Bolin*, 85 Ariz. 44, 47 (1958), then the same prerogative must necessarily reside in Article IV of the Arizona Constitution.

In sum, the Legislature's investigatory powers—as exercised through its presiding officers and committee chairmen, *see* A.R.S. § 41-1151—are a constitutive attribute of sovereignty and an ineluctable corollary of its lawmaking functions.

[6] Although the *Mazars* Court cautioned that these investigatory powers can be tempered by the separation of powers principles implicated by the compelled production of documents or information from the Executive Branch, these Subpoenas trigger no such concerns; the County is a subordinate political subdivision, not a coequal branch or department of state government. *See infra* Section I.D.

C. The Subpoenas Serve a Valid Legislative Purpose and Are Not Impermissibly Broad

As discussed above, Title 41 imposes no substantive constrictions on the scope or nature of the Legislature's subpoena power. Even assuming, however, that the limitations that circumscribe the congressional investigatory power are also implicit in Article IV of the Arizona Constitution, these Subpoenas easily pass muster.

Applying the federal standard to this context, President Fann and Chairman Farnsworth may deploy the subpoena power for any "valid legislative purpose," an expansive concept that encompasses anything that may "concern a subject on which legislation could be had." *Mazars USA*, 140 S. Ct. at 2031 (internal citation omitted). If the subpoena pertains to a valid legislative purpose, then the Court must enforce its commands unless it "determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . investigation." *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.D.C. 2018) (addressing subpoena issued by House committee) (internal citations omitted). Importantly, legislative subpoenas are not controlled by the narrower relevancy and undue burden rubrics codified in the Rules of Civil Procedure. To the contrary, legislative investigations partake of grand jury inquiries, and courts have regularly drawn on the extraordinarily deferential standards governing the latter when evaluating legislative subpoenas. *See id.*; *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 21 (D.D.C. 1994) ("At this stage of its proceedings the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury.").

Each criterion—*i.e.*, the existence of a valid legislative purpose and the materiality of the subpoenaed materials to that purpose—is addressed below.

1. Valid Legislative Purpose

It is (or should be) undisputed that the Legislature may properly enact 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 significance 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. In addition, the Legislature is separately instructed by the federal Constitution to superintend the manner of selecting Presidential Electors. *See* U.S. Const. art. II, § 1.

As set forth in the Verified Counterclaim, the Legislature intends to use data and information gleaned through the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties, with an eye to introducing potential reform proposals in the imminent Fifty-Fifth Legislature. This is 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); *Buell*, 96 Ariz. at 64 (sustaining legislative subpoena issued in the course of an investigation into "all phases of the existing relationship between Corporation Commission personnel, elective and appointive, and persons and corporations subject to the regulatory jurisdiction of the Corporation Commission" and the solicitation of political contributions); *Bean LLC*, 291 F. Supp. 3d at 43 (holding that subpoena "was a valid part of the Committee's legitimate legislative investigation" into "the intelligence community's response to Russian active measures directed against the United States"); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975) ("Inquiry into the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative sphere."); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927) (subpoena seeking bank records in connection with investigation into Attorney General's alleged failure to prosecute certain crimes was for a valid legislative purpose because even though Senate did not express a legislative objective, "[p]lainly 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").

The County appears to propose three reasons why the Subpoenas ostensibly are not

in furtherance of a valid legislative purpose, none of which withstands even a perfunctory analysis.

First, the County contends that the Subpoenas seek to re-adjudicate "election contests" that Arizona courts have previously deemed to lack merit. *See* Compl. ¶ 93. Preliminarily, the actual or imagined subjective motivations that may have precipitated the Subpoenas' issuance is immaterial; "the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of [the investigatory] power." *Barenblatt v. United States*, 360 U.S. 109, 132 (1959); *Eastland*, 421 U.S. at 508 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). More to the point, while the Senate desires to potentially transmit its findings to the United States Congress in advance of its consideration of the Electoral College returns on January 6, 2021, *see* 3 U.S.C. § 15, the Subpoenas' primary objective is to amass information to assist in the formulation of prospective electoral reforms—not "adjudicate" the legal rights or obligations of any third party. Finally, even accepting *arguendo* the facially dubious and legally unsupported proposition that the disposition of third parties' election contests could somehow curtail the Legislature's investigatory functions, the outcomes of the cited court cases are irrelevant in any event. The operative inquiry in a statutory election contest is whether unlawful ballots, tabulation errors or other illegalities were sufficiently pervasive to change the outcome of the election. *See generally Huggins v. Superior Court*, 163 Ariz. 348 (1990). By contrast, the Legislature's focus is not so myopic; the existence of *any* vote tabulation errors—or, for that matter, procedural inefficiencies or security risks that may adversely impact future elections—are legitimate objects of legislative concern, regardless of whether they had a material impact on the November 3, 2020 general election.

Second, the County suggests that the Subpoenas "usurp[]" the election administration and canvassing duties entrusted to county officers and the Secretary of State, respectively. *See* Compl. ¶¶ 94-97. This position, however, overlooks that the state's entire electoral infrastructure is a legislative creation; neither the Secretary of State nor county

officials enjoy any constitutionally ordained role in the conduct of elections. *See State v. Payne*, 223 Ariz. 555, 561, ¶ 15 (App. 2009) ("A county's 'authority is limited to those powers expressly, or by necessary implication, delegated to [it] by the state constitution or statutes.'" (internal citations omitted)); Ariz. Const. art. V, § 9 ("The powers and duties of secretary of state . . . shall be as prescribed by law."). The functions and duties they possess under the current incarnation of Title 16 embody delegations *by the Legislature itself*, which the Legislature may maintain, rescind or modify in its discretion. Indeed, the Legislature's authority to prospectively change the statutory responsibilities of the Secretary and/or county officials only underscores that an investigation into their exercise of those duties is necessarily in furtherance of a valid legislative purpose. In short, to say that the Legislature has "usurped" a power that it alone can delegate and rescind is to posit a legal impossibility.[7]

Third, the County argues that compliance with the Subpoenas would "threaten one of the core tenants [*sic*] of our republic, the right to a secret ballot." Compl. ¶ 4. This statement is simply fatuous. One might expect the Board of Supervisors—as the officials who purport to competently administer elections in Maricopa County—to know that it is, quite literally, impossible to tie any given ballot to the voter who cast it, or to otherwise determine from any documents or information requested by the Subpoenas the electoral choices of any individual.

2. Breadth and Scope of the Subpoenas

As noted above, considerations of breadth and burden that prevail in the context of civil discovery disputes cannot be imported into the realm of legislative subpoenas. "In determining the proper scope of the Subpoena, 'this Court may only inquire as to whether the documents sought by the subpoena are not plainly incompetent or irrelevant to any lawful purpose of the Committee in the discharge of its duties. And the burden of showing that the request is unreasonable is on the subpoenaed party." *Bean LLC*, 291 F. Supp. 3d at

[7] The nature of the relationship between the Legislature and the County is discussed in greater depth *infra* Section I.D.

44 (internal citations and quotations omitted). While their requests are comprehensive, both Subpoenas command the production of only documents, materials and information that bear a direct nexus to the subject matter of the instant investigation—*i.e.*, the accuracy, efficacy and efficiency of voting and tabulation procedures in Arizona elections. While some of the produced materials ultimately may not yield actionable data or information, "[t]he very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509.

Further, even if the putative inconveniences posed to the County were germane to the legality of the Subpoenas (and they are not), most of the ostensible "burdens" are either legal contrivances or the fruits of the County's own obstinacy. For example, there is simply no statutory basis for the County's speculative supposition that compliance with the Subpoenas somehow nullifies previous federal and state certifications of its voting equipment. *See* Compl. ¶ 113. The County also argues that it needs access to its voting devices in connection with municipal elections scheduled for March 2021. *See id.* ¶ 146. While the Legislature is willing to accommodate this exigency, that task would have been much easier had the County alleviated its own time pressures by complying at least in part with the Subpoenas by the December 18 return date. It cannot now deflect to the Legislature responsibility for the consequences of its own stonewalling.

In sum, the County cannot credibly contend that "there is no reasonable possibility that the category of materials the [Subpoenas] seek[] will produce information relevant to the general subject matter of the investigation" into the administration of Arizona elections. *Bean LLC*, 291 F. Supp. 3d at 44 (internal citations omitted). The Court accordingly lacks any constitutional or statutory basis for unilaterally modifying the Subpoenas' requests to accommodate the County's preferences. *See id.* ("[T]his Court will not—and indeed, may not—engage in a line-by-line review of the Committee's requests" in the subpoena).

D. Statutory Protections for the Confidentiality of Voter Information and Ballots Cannot Excuse the County's Disregard of the Subpoenas

For at least two reasons, the County's reliance on various statutory and regulatory safeguards governing access to voter information and ballots to justify its continued obstruction of the Subpoenas is untenable.

1. The Legislature Maintains Plenary Control Over the County's Statutory Functions and Duties

First, and most fundamentally, none of these enactments vests in the County some privilege of non-disclosure relative to the Legislature. The County's argument to the contrary manifests a fundamental misunderstanding of Arizona's constitutional infrastructure and the County's station within it. The elected Legislature is the locus of sovereign power in the State of Arizona. It "is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution." *Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947); *see also Adams v. Bolin*, 74 Ariz. 269, 283 (1952) (recognizing that "the Legislature has all power not expressly prohibited or granted to another branch of the government").

By contrast, counties occupy the same constitutional plane as non-charter incorporated municipalities, which is to say, they are "no more than political entities created as the legislature deems wise." *City of Tucson v. Pima County*, 199 Ariz. 509, 515, ¶ 19 (App. 2001). "[T]he power of the Legislature over [them] is practically unlimited" and "it may grant or take away from them such powers as it may see fit." *Udall v. Severn*, 52 Ariz. 65, 69 (1938); *see also Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 395–96 (1949) ("The boards of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature."); Ariz. Const. art. XII, § 4 ("The duties, powers, and qualifications of [county] officers shall be as prescribed by law.").

To suggest that the County's statutory functions permit it to defy a lawfully issued legislative subpoena is to invert this schema of sovereignty. Unlike a private individual or entity, the County possesses no independent rights, privileges or immunities assertable against the Legislature; every function or duty it exercises derives from the Legislature's own revocable delegations to a subordinate political subdivision. *Contrast Buell*, 96 Ariz. at 69 (indicating that private party may in some circumstances assert attorney-client privilege in response to legislative subpoena); *Barenblatt*, 360 U.S. at 109 (recognizing that the First Amendment rights of subpoenaed individuals can cabin the permissible scope of a congressional subpoena). The County hence cannot invoke against the Legislature powers or prerogatives—to include those relating to the conduct of elections—that belong ultimately to the Legislature itself.

In short, the Subpoenas encapsulate an act of the Legislature that bind subsidiary political subunits, such as Maricopa County.[8]

2. The Confidentiality Statutes Do Not Permit Defiance of a Legislative Subpoena

Notwithstanding the County's confusion concerning the status of its statutory duties relative to the superordinate position of the Legislature, the cited statutes and Elections Procedures Manual provisions cannot excuse its non-compliance with the Subpoenas in any event. As an initial matter, the statute governing confidential voter identifying information expressly permits access by any "authorized government official in the scope of the official's duties," A.R.S. § 16-168(F), a proviso that plainly encompasses legislators acting in the course of a committee investigation. More to the point, statutes pertaining to the availability of voted ballots—most notably A.R.S. § 16-624 (relating to securing ballots)—operate as restrictions on access ***by the general public***. There is no textual or extrinsic support for the notion that they were intended to serve as a privilege against disclosure

[8] It bears emphasis that although the Subpoenas were issued by President Fann and Chairman Farnsworth, they acted pursuant to an authority expressly conferred on them by the Legislature as a whole. *See* A.R.S. § 41-1151.

demanded by compulsory process issuing from the same soverign body that promulgated them. The distinction is critical; "[t]he terms 'privileged' and 'confidential' are not interchangeable." *Catrone v. Miles*, 215 Ariz. 446, 454, ¶ 21 (App. 2007) (concluding that while federal and state statutes make education records "confidential," they are not necessarily immune from disclosure through compulsory process).[9]

Common sense buttresses this evidentiary axiom. The County cannot articulate any coherent reason why county officials may access voter identifying information and voted ballots, but such materials cannot be entrusted to officers of the same elected body that constructed these confidentiality safeguards in the first place.

In sum, the Subpoenas demand the production of, or access to, documentary evidence that—at the very least—carries a "reasonable possibility" of producing information relevant to the Judiciary Committee's inquiry into the accuracy, reliability and integrity of Arizona's voting systems. *See Bean LLC*, 291 F. Supp. 3d at 44 (internal citations omitted). The statutory and regulatory provisions that insulate some of the requested materials from general public access do not engender a privilege of non-disclosure that the County—an inferior political subdivision—can assert against the Legislature. It follows that the Subpoenas are valid and enforceable, and the County lacks any cognizable justification for its continuing and contumacious defiance of them.

II. The County's Ongoing Disregard of the Subpoenas Irreparably Injures the Legislature

When, as here, a subpoena recipient unlawfully withholds documents or testimony to which the issuing house or committee is entitled, it inflicts an "informational injury" on

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[9] Indeed, even an established privilege is not always a bar to compelled disclosure. *See State v. Zeitner*, 246 Ariz. 161, 167, ¶ 22 (2019) (concluding that Attorney General was entitled to subpoena a patient's medical records from the state Medicaid agency in connection with a pending investigation, explaining that even if the records were privileged "[w]e cannot infer that the legislature, in granting such broad investigatory authority, intended the privilege to stand as a bulwark against [Medicaid] fraud investigations"). And as discussed above, even if some kind of "privilege" could be extruded from the relevant statutes, it would not be a privilege of the County against the Legislature.

the legislative body. *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn II*, 968 F.3d 755, 766 (D.C. Cir. 2020) (holding in the context of a congressional subpoena that "the denial of . . . information is a concrete injury" and that "each House of the Congress has constitutionally grounded entitlement to obtain information . . . in carrying out its constitutional functions"). And because the Legislature as a unitary body has delegated to President Fann and Chairman Farnsworth the authority to invoke compulsory process on its behalf, *see* A.R.S. § 41-1151, the injury redounds to, and is assertable by, them. *See U. S. v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.").

Because this injury is not redressable by monetary damages, it necessarily is irreparable in the absence of intervening injunctive relief. *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65, ¶ 11 (App. 2011) (noting that injunctive relief may be appropriate when damages "are inadequate to address the full harm suffered"). Impending external events underscore the irremediability of the harm. The Fifty-Fifth Legislature will convene on January 11, 2021, *see* Ariz. Const. art. IV, pt. 2, § 3, and members already are drafting and pre-filing legislation proposing electoral reforms. The County cannot, by means of intransigence and dilatoriness, abridge or defeat the Legislature's constitutional prerogative to obtain data and information "in an area where legislation may be had." *Eastland*, 421 U.S. at 506.

III. Considerations of Equity and Public Policy Militate in Favor of Injunctive Relief

Injunctive remedies are necessary to vindicate the equitable and public policy imperatives of election security and integrity, as well as to remediate the unlawful obstruction of a legitimate legislative inquiry by county officials. *See generally Doe v. Reed*, 586 F.3d 671, 679 (9th Cir. 2009) (recognizing the "indisputably . . . compelling interest in preserving the integrity of the election process"); *Arizona Pub. Integrity All. v. Fontes*, -- Ariz. --, 475 P.3d 303, 309, ¶ 27 (2020) (holding that "public policy and

the public interest are served by enjoining [the County Recorder's] unlawful action").

Notably, the County is at a loss to advance any countervailing equitable or policy considerations. Contrary to the Complaint's rhetorical histrionics, the Subpoenas compromise neither sensitive identifying information nor the sanctity of the secret ballot. Arizona already authorizes access to otherwise confidential voter information by governmental officials, *see* A.R.S. § 16-168(F), and there is no plausible basis for insinuating that elected legislators, as stewards of the public trust who adopted the statutes requiring confidential treatment of certain voter information, are somehow more likely than county bureaucrats to misuse such information. And despite the County's demonstrably false contentions to the contrary, the Subpoenas do not, and could not, breach the secrecy of the ballot. No voted ballot contains any personally identifying information of the voter who cast it, and it is wholly impossible to ascertain the electoral choices of any given individual voter from any of the documents or materials requested by the Subpoenas.

CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction or other order compelling the County to immediately produce or make available in full to President Fann or Chairman Farnsworth (or their designees) all documents, records, materials, and information responsive to either or both of the Subpoenas.

RESPECTFULLY SUBMITTED this 29th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, 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:

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Exhibit A

SUPERIOR COURT OF ARIZONA

IN MARICOPA COUNTY

KAREN FANN, et al., Petitioners, v. MARICOPA COUNTY BOARD OF SUPERVISORS, et al., Respondents.	Case No. CV2020-016904 **DECISION ORDER** Honorable Randall H. Warner

This is a special action in the nature of mandamus. Petitioners, in their capacity as President of the Senate and Chair of the Senate Judiciary Committee, issued legislative subpoenas to Respondents. When Respondents failed to comply within the timeframe set forth in the subpoenas, Petitioners filed this special action. The Court accelerated briefing and argument on the question of whether it has subject matter jurisdiction.

A.R.S. § 41-1151 authorizes the presiding officer or a committee chair of either house of the Arizona Legislature to issue subpoenas. A.R.S. §§ 41-1153 and -1154 prescribe how to enforce a legislative subpoena. Plaintiffs have not followed the procedures set forth in those statutes, instead choosing to file suit under Arizona's mandamus statute, A.R.S. § 12-2021, and the Arizona Rules of Procedure for Special Actions.

Mandamus is not a proper remedy for enforcement of a legislative subpoena. That remedy exists to compel a public body or official to perform "an act which the law specially imposes as a duty resulting from an office." A.R.S. § 12-2021; *accord* Ariz. R. Spec. Act. 3. Although Respondents are public officials, they are in this context the subjects of a subpoena and their duty to comply arises from the subpoena, not from their offices. There is no basis in Arizona statute for treating the subject of a subpoena differently because they are a public official, and no basis for using mandamus in lieu of the procedures for enforcing subpoenas that apply to all persons served with a subpoena.

Petitioners argue, based on federal case law, that they have an implicit power under the Arizona Constitution to seek judicial enforcement of a legislative subpoena. As a general proposition, the Arizona Constitution is much more detailed than the United States Constitution, and the Court is reluctant to find powers in it that are not expressed.

But whatever implied power the Constitution might confer on the Legislature, neither the federal cases cited, nor any provision of the Arizona Constitution cited, supports a grant of such implied power to individual legislators or legislative leadership.

Petitioners argue that they can seek judicial enforcement of a subpoena under A.R.S. § 12-2212. That statute provides that, when a "public officer" is authorized to issue a subpoena, they may apply to the Superior Court to enforce the subpoena, and "the court shall thereupon proceed as though such failure had occurred in an action pending before it." A.R.S. § 12-2212(B). This is a plausible argument, but Petitioners made it for the first time in their memorandum on the issue or jurisdiction. The Complaint here was brought under the mandamus statute and the special action rules, not A.R.S. § 12-2212, and the latter is not even referenced in the Complaint.

Respondents have not had an opportunity to respond to this new theory. However, the Court will permit Petitioners to amend the Complaint to add a claim under A.R.S. § 12-2212, and the viability of that remedy can be addressed if a motion to dismiss is filed.

IT IS ORDERED dismissing Plaintiff's claim for special action.

IT IS FURTHER ORDERED granting Plaintiff leave to amend to add a claim under A.R.S. § 12-2212.

IT IS FURTHER ORDERED that the remainder of this matter will be dismissed without prejudice on February 1, 2021 unless an amended complaint is filed.

As to the special action claim, the court finds no just reason for delay and enters dismissal order as a partial final judgment under Rule 54(b).

DATE: December 24, 2020.

Honorable Randall H. Warner
Superior Court Judge

Exhibit 4

Exhibit 4

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MARICOPA COUNTY; CLINT HICKMAN, in his official capacity as Chairman of the Maricopa County Board of Supervisors; and JACK SELLERS, STEVE CHUCRI, BILL GATES, and STEVE GALLARDO, in their official capacities as Members of the Maricopa County Board of Supervisors,

Plaintiffs,

v.

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Judiciary Committee; RICK GRAY, in his official capacity as Vice Chairman of the Arizona Senate Judiciary Committee; SONNY BORRELLI, VINCE LEACH, LUPE CONTRERAS,ANDREA DALESSANDRO, and MARTIN QUEZADA, in their official capacities as the Members of the Arizona Senate Judiciary Committee,

No. CV2020-016840

PLAINTIFFS-IN-COUNTERCLAIM'S COMBINED RESPONSE TO MARICOPA COUNTY'S MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(Assigned to the Hon. Timothy Thomason)

Defendants.

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Judiciary Committee,

Plaintiffs-in-Counterclaim,

v.

MARICOPA COUNTY BOARD OF SUPERVISORS, the governing body of Maricopa County, Arizona; JACK SELLERS, in his official capacity as a member of the Maricopa County Board of Supervisors; STEVE CHUCRI, in his official capacity as a member of the Maricopa County Board of Supervisors; BILL GATES, in his official capacity as a member of the Maricopa County Board of Supervisors; CLINT HICKMAN, in his official capacity as a member of the Maricopa County Board of Supervisors; and STEVE GALLARDO, in his official capacity as a member of the Maricopa County Board of Supervisors,

Defendants-in-Counterclaim.

Plaintiffs-in-Counterclaim Karen Fann, President of the Arizona Senate, and Warren Petersen, Chairman of the Senate Judiciary Committee,[1] respectfully submit this combined Response to the Maricopa County parties' Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction, which seeks an order requiring the Maricopa County parties to immediately produce or make available in full to President Fann or Chairman Petersen (or their designees) all documents, records, materials, and information responsive to either or both of the subpoenas issued on December 15, 2020 (the "Subpoenas").

INTRODUCTION

The "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function," and thus "[t]he [legislative] power to obtain information is 'broad' and 'indispensable.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (internal citations omitted). Only in the febrile imaginations of the Maricopa County Board of Supervisors (hereafter, the "County") could requests by elected representatives for the same documents and materials already accessible to county bureaucrats be considered akin to the regicidal mayhem of revolutionary France. *See* County's Response at 3. But thunderous remonstrances are not substitutes for articulable facts and righteous indignation is not a proxy for sound reasoning.

Stripped of their rhetorical histrionics, the submissions of the County and their Democratic allies on the Senate Judiciary Committee[2] proffer no basis for quashing the Subpoenas or finding a jurisdictional inability to enforce them. As the County itself has

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[1] Pursuant to Ariz. R. Civ. P. 25(d), Senator Petsersen has been automatically substituted for former Senate Judiciary Committee Chairman Eddie Farnsworth as a defendant in the main action and as a plaintiff in the Counterclaim.

[2] Although they filed a response in opposition to the Counterclaim Plaintiffs' Motion for Preliminary Injunction, it bears noting that the Democratic members of the Senate Judiciary Committee are not parties to the Counterclaim proceedings at all. Why they are named defendants in the County's main action remains unclear. Pursuant to A.R.S. § 41-1151, the Subpoenas were issued by President Fann and then-Chairman Farnsworth. No other member of the Legislature executed, or was required to execute, the Subpoenas. Thus, even if the County were entitled to the relief it seeks, the resulting judgment would not, and could not, mandate any members of the Judiciary Committee other than the Chairman to undertake or refrain from any action.

already conceded by initiating these proceedings in the first instance, the Superior Court of course has subject matter jurisdiction to adjudicate the lawfulness of legislative subpoenas, and A.R.S. §§ 12-2212, -1801 and -1831 each supplies an independent and sufficient predicate for the Counterclaim.

Perhaps recognizing that President Fann's sworn averments that the Subpoenas were issued in furtherance of legislative efforts to explore electoral reforms, *see* Counterclaim ¶¶ 25-27, are fatal to its position, the County labors to construct and then demolish a strawman argument that the Subpoenas are actually a stealth instrument to "overturn," Motion to Dismiss at 1, the 2020 presidential election. This farcical notion dissipates quickly under the glare of common sense and empirical reality. The results of 2020 election have been tabulated, canvassed and certified by the Governor and Secretary of State; the deadline for any person to initiate any variety of an election contest has long since elapsed. The United States Congress has certified the Electoral College returns,[3] and Joseph Biden will be inaugurated President of the United States on January 20. Neither the Arizona Legislature nor anyone else could "overturn" the election, even if they wanted to do so.

These circumstances, however, do not extinguish the critical questions animating the Subpoenas. Were there tabulation errors, the casting of unlawful ballots, or security vulnerabilities in voting devices (regardless of whether such irregularities affected the outcome of any race)? Could legislative reforms decrease the risk of mistakes or anomalies in future elections? Is the Maricopa County Board of Supervisors a competent administrator of elections in Arizona's most populous counties, or should the Legislature consider assigning these vital responsibilities to a more qualified regulatory authority? That President Fann and Chairman Petersen remain steadfast in their enforcement of the Subpoenas itself attests to their lawful legislative purpose, which transcends the outcome of any given candidate race.

[3] While information yielded by the Subpoenas may or may not have proved useful to the United States Congress during the certification process, the County's unlawful obstinacy succeeded in extinguishing that possibility.

Further, the County's exertions to establish the undisputed proposition that certain voter registration information and ballot materials are not publicly accessible simply evades the operative question of how or why the County—a subordinate political subdivision—could possibly assert a ***privilege*** of non-disclosure in response to compulsory process issued by the sovereign Legislature. The County is at a loss to produce any Arizona authority that could sustain that untenable position.

Finally, the County lobs a scattershot of miscellaneous additional defenses to the Counterclaim, all of which fall flat. As the officers expressly authorized by the Legislature to issue the Subpoenas on its behalf, *see* A.R.S. § 41-1151, President Fann and Chairman Petersen have legal standing to assert claims arising out of non-compliance with them. Because the newly inaugurated Fifty-Fifth Legislature will imminently reissue subpoenas substantially identical to the ones now in dispute, the questions underlying these proceedings are not moot. Finally, documents maintained by the County Recorder are within the legal control of the Board of Supervisors, and even if the Recorder were a "necessary party," the Court can simply join him.

I. The Court Has Jurisdiction to Hear and Adjudicate the Counterclaim Pursuant to A.R.S. §§ 12-2212, 12-1801 and 12-1831

A. The Superior Court Has Subject Matter Jurisdiction Over Claims Relating to Legislative Subpoenas

As discussed below, the County has waived any argument that the validity and enforceability of legislative subpoenas are not justiciable. To avert this outcome, the County struggles unsuccessfully to cast the issue as one of the Court's "subject matter jurisdiction." The Court should not indulge this misnomer. "Subject matter jurisdiction is the court's fundamental power to grant relief in a pending case." *Pritchard v. State*, 163 Ariz. 427, 430 (1990). As a general jurisdiction tribunal, the Superior Court of Arizona is vested with plenary authority to hear and adjudicate nearly every species of civil claim. Indeed, the Arizona Constitution directs that "[t]he superior court shall have original jurisdiction of . . . cases and proceedings in which exclusive jurisdiction is not vested by

law in another court," as well as "special cases and proceedings not otherwise provided for." Ariz. Const. art. VI, § 14(1), (11).

No constitutional provision, statute or other source of law lodges exclusive jurisdiction over the enforcement of legislative subpoenas in any other court. While each house of the Legislature may employ contempt remedies, *see* A.R.S. § 41-1153, nothing in Title 41, Chapter 7, Article 4 divests the Superior Court of concurrent jurisdiction over the same subject matter. *See State ex rel. Ronan v. Superior Court In & For Maricopa County*, 96 Ariz. 229, 232 (1964) ("The jurisdiction so declared to reside in the superior courts is not taken away from such courts by a statute declaring that some other court shall have jurisdiction over such cases, unless the statute declares and vests jurisdiction exclusively in such other court" (internal citation omitted)); *Pritchard*, 163 Ariz. at 430 ("Because the superior court is a court of general jurisdiction, a presumption exists in favor of retention of jurisdiction, and a divestiture of jurisdiction cannot be inferred but must be clearly and unambiguously found.").

Maintaining a bifurcation between contempt proceedings and civil enforcement mechanisms is entirely sensible. As one court has remarked in a virtually identical context, "the two remedies serve different purposes;" while contempt citations are fundamentally punitive, civil relief is aimed primarily at eliciting the sought-after documents or information. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 92 (D.D.C. 2008) (adding that "imprisoning" and "prosecuting" recalcitrant officials "would present a grave risk of precipitating a constitutional crisis" and that "the disputed issue would in all likelihood end up before this Court, just by a different vehicle—a writ of habeas corpus . . . In either event there would be judicial resolution of the underlying matter"[4]).

[4] Precisely this scenario was actualized in the only published Arizona case adjudicating the validity of a legislative subpoena, which reached the Superior Court on a writ of habeas corpus, *see Buell v. Superior Court*, 96 Ariz. 62 (1964). The *Buell* court had no occasion to consider whether the legislative officers who issued the subpoena could have procured civil remedies as an alternative to contempt proceedings.

Thus, even assuming *arguendo* that President Fann and Chairman Farnsworth have failed to state a claim that aligns with the elements of A.R.S. § 12-2212 or some other governing statute, it would not establish an absence of general jurisdiction over the subject matter of legislative subpoenas.

B. The County Has Waived Any Argument That Pre-Contempt Judicial Review is Improper

The County's own representations to this Court in this action foreclose its recently discovered conviction that the Court may not opine on the validity of a legislative subpoena prior to a legislative finding of contempt. In its own Complaint for declaratory relief the County "asks the Court for a declaration that the Subpoenas are unlawful and to quash them." *See* Compl. ¶ 9. This critical admission that the Court can—and in fact must—assess the enforceability of the Subpoenas discredits the County's newfound insistence that such questions lie beyond the realm of the judiciary's institutional competence. *See generally Bank of Am. Nat. Tr. & Sav. Ass'n v. Maricopa County*, 196 Ariz. 173, 176, ¶ 11 (App. 1999) (adverse party's admission in a prior proceeding could carry evidentiary value (citing *Fox v. Weissbach*, 76 Ariz. 91, 95 (1953)); *KCI Rest. Mgmt. LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, 488, ¶¶ 12-13 (App. 2014) (same).

The County cannot have it both ways. "A lawsuit that asserts that a legislative subpoena should be *quashed* as unlawful is merely the flip side of a lawsuit that argues that the legislative subpoena should be *enforced*." *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 182 (D.D.C. 2019); *see also Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 85 (D.D.C. 2008) (finding that court had jurisdiction to adjudicate House committee's claims to enforce its subpoena, noting that a prior case had considered a declaratory judgment action brought by a subpoena recipient and reasoning that "[t]he difference between that case and this one is that the parties are reversed . . . This Court fails to see why that fact should alter the [declaratory judgment] analysis in any material respect").

Either the Court can adjudicate the validity of a legislative subpoena prior to

contempt proceedings—or it cannot. To posit that the County can appropriately invoke the Court's jurisdiction for a declaration concerning the Subpoenas' lawfulness but that legislative officers cannot present the same question in the same proceedings is untenable.

C. The Counterclaim States a Valid Claim Under A.R.S. § 12-2212

As "public officers" who are expressly "authorized by law," namely, A.R.S. § 41-1151, to "take evidence" via the subpoena process, President Fann and Chairman Farnsworth are entitled to "apply" to this Court for civil remedies to enforce the Subpoenas. *See* A.R.S. § 12-2212. The interpretive inquiry is that simple. To evade the controlling force of the unambiguous text, the County, citing *R.L. Whitmer v. Hilton Casitas Homeowners Ass'n*, 245 Ariz. 77 (App. 2018), insists that for Section 12-2212 to apply, "the statutory framework authorizing the subpoena must also authorize superior court enforcement of contempt proceedings," MTD at 15. How the County managed to extrude that sweeping proposition from the narrow question presented in *Whitmer* is baffling. There, the Court held that the Office of Administrative Courts lacked any statutory power to enforce its orders, but added that "the statutory schemes governing several administrative bodies allow the superior court to act as a forum for such contempt proceedings," citing Section 12-2212 as an example. 245 Ariz. at 81, ¶ 14. Nowhere did the court state that the existence of some ***other*** statute authorizing Superior Court contempt proceedings is a condition precedent to the invocation of Section 12-2212. To the contrary, if *Whitmer* carries some broader import, it only confirms that Section 12-2212 is itself a sufficient and independent predicate for enforcement jurisdiction. Indeed, if a plaintiff relying on Section 12-2212 were required to cite another statute authorizing Superior Court jurisdiction, then Section 12-2212 would be entirely nugatory and pointless.

The County's additional contention that Title 41 does not authorize legislative officers to take "evidence" finds easy refutation in the dictionary and in the controlling statutes. "Evidence" is simply "something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact." BLACK'S LAW

DICTIONARY (11th ed. 2019). The documents, materials and information demanded by the Subpoenas fall squarely within this definitional domain; they are things that may prove or disprove facts relating to the accuracy, reliability and security of election procedures. Notably, even Title 41 itself denominates the materials yielded by legislative subpoenas as "evidence." *See* A.R.S. § 41-1152 (conferring certain immunities in connection with "[t]estimony or evidence produced pursuant to this article"). Hence, the Counterclaim states a valid cause of action under A.R.S. § 12-2212.

D. The Court Also Has Jurisdiction Under the Declaratory Judgment and Injunction Statutes

Even if the County were correct that A.R.S. § 12-2212 is somehow inapplicable, the Court nevertheless maintains jurisdiction over the Counterclaim pursuant to the Uniform Declaratory Judgment Act, A.R.S. § 12-1831, *et seq.* as well as its statutory injunctive authority, *see* A.R.S. § 12-1801, *et seq.* *See* Counterclaim ¶¶ 6, 43-67. Arizona law broadly entrusts to the courts "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed," A.R.S. § 12-1831—a directive that is interpreted "liberally," *Russell Piccoli P.L.C. v. O'Donnell*, 237 Ariz. 43, 47, ¶ 12 (App. 2015). In the words of the County itself, "[t]here is a present controversy" relating to the validity and enforceability of the Subpoenas, and so "[t]his Court has jurisdiction pursuant to the Uniform Declaratory Judgments Act." County Compl. ¶¶ 10-11.

Courts' consideration of this issue in the context of subpoenas issued by the United States House of Representatives or its committees reinforces the conclusion. Whereas the U.S. Senate's right to initiate civil enforcement proceedings in the district courts is secured by statute, *see* 2 U.S.C. § 288d, no such statutory prerogative attaches to House subpoenas. The District of Columbia's federal courts thus have confronted the question of whether the House or its committees can assert a right of action to pursue civil remedies. They have twice answered in the affirmative.

In 2007, the House Judiciary Committee issued to two high-ranking White House officials subpoenas seeking testimony and documents relating to the dismissal of multiple

U.S. Attorneys. After the officials declined to comply and the Justice Department refused to bring the House's contempt citations to a grand jury, the Judiciary Committee filed suit in the district court seeking declaratory and injunctive relief. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Observing that "there can be no question that Congress has a right . . . to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas," it followed that there was "no reason why that right cannot be vindicated by recourse to the federal courts through the [Declaratory Judgment Act]." *Id.* at 84. The D.C. District Court reaffirmed this precept just a year ago, emphasizing that "[i]f Congress does somehow need a statute to authorize it to file a lawsuit to enforce its subpoenas . . . then the Declaratory Judgment Act plainly serves that purpose." *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 195 (D.D.C. 2019).[5]

The analytical framework expounded in *Miers* and *McGahn* transposes easily onto this case. The Legislature, acting through its presiding officers and committee chairmen, has a right to issue subpoenas, *see* A.R.S. § 41-1151, which in turn engenders a subsidiary right to the documents, materials and information requested therein. When, as here, there arises a resultant controversy relating to the validity or enforceability of specific subpoenas, it may be presented to the Court for a declaratory resolution. For the same reason, if the Court declares that the Subpoenas were lawfully issued, it may appropriately enlist its remedial powers to devise appropriate injunctive relief. *See* A.R.S. § 12-1801(1), (3) (authorizing writ of injunction "[w]hen it appears that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of

[5] A divided three-judge panel of the D.C. Circuit reversed the district court's order, *see* 951 F.3d 510 (D.C. Cir. Feb. 28, 2020), but the *en banc* court subsequently vacated the panel opinion, agreeing with the district court that the committee had Article III standing to enforce its subpoena and remanding the case to the panel to consider the cause of action issue, *see* 968 F.3d 755, 778 (D.C. Cir. Aug. 7, 2020). On remand, the panel found that the committee lacked a valid cause of action, *see* 973 F.3d 121 (D.C. Cir. Aug. 31, 2020)—but the *en banc* court has since vacated that opinion as well, granting the committee's petition for rehearing and scheduling oral arguments for February 2021, *see Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir.), Per Curiam Order of Oct. 15, 2020.

some act prejudicial to the applicant," as well as "[i]n all other cases when applicant is entitled to an injunction under the principles of equity"); *cf. Arizona Pub. Integrity All. v. Fontes*, -- Ariz. --, 475 P.3d 303, 307 (2020) ("[L]ike all public officials, the Recorder 'may be enjoined from acts' that are beyond his power."); *Rivera v. City of Douglas*, 132 Ariz. 117, 119 (App. 1982) (holding that "injunction is an appropriate remedy to determine whether rights have been or will be affected by arbitrary or unreasonable action of an administrative officer or agent").[6]

In sum, the Superior Court has subject matter jurisdiction over disputes concerning the enforceability of legislative subpoenas because no source of law invests jurisdiction exclusively in some other tribunal. *See* Ariz. Const. art. VI, § 14(1). Further, A.R.S. §§ 12-2212, 12-1831, and 12-1801 ***each*** supplies a sufficient jurisdictional premise and cause of action for the relief sought by the Counterclaim.

II. The Subpoenas Were Issued for the Valid Legislative Purposes of Investigating the Adequacy of Existing Election Procedures and Assessing the Necessity of Reforms

Finding the sworn factual averments of the Counterclaim uncongenial to its legal theories, the County instead concocts a fanciful, fictive narrative in which the Subpoenas are simply means of "overturning the People's lawful election of presidential electors." MTD at 5. Lacking any actual evidence for this subversive proposition, the County relies on the hearsay claims of third parties, such as the tweets of TV personalities, that the Legislature will "provide the information to counsel for the losing candidate so that he might attempt to use it to overturn the election results." *See* County Compl. ¶ 88, Exh. 8.

Although it is difficult to extract coherent principles of law from this yarn, the County appears to argue that (1) the Subpoenas and underlying investigation are actually a statutory "election contest," and (2) a legislative subpoena cannot be valid unless it is

[6] In arguing that Section 12-2212 does not admit of injunctive remedies, the County conflates two separate and distinct remedial schemes. Section 12-2212 is merely an alternative basis for adjudicating the Counterclaim; it does not subsume or abridge causes of action or remedies arising under different statutes, such as Section 12-1801.

explicitly tied to some specific item of pending legislation. Both contentions can be easily dispatched.

A. The Subpoenas Are Not—and Could Not Be—Part of an "Election Contest"

Preliminarily, whatever the County hypothesizes may or may not be the "true" motives undergirding the Subpoenas is devoid of any legal significance. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975) (holding in subpoena context that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it"); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

That being said, the County's sophistic notion that any legislative inquiry into the conduct of election procedures is somehow an "election contest" under A.R.S. § 16-672 depends on a profound definitional confusion. An "election contest" is a statutory term of art that denotes a judicial proceeding in which a qualified elector alleges, on one or more statutorily enumerated grounds, that someone other than the declared winner received the highest number of lawful votes, and should be certified by the Court as elected to the office. At the risk of stating the obvious: the Judiciary Committee's investigation is not, never was, and never could be an "election contest" that should be governed by A.R.S. § 16-672, *et seq*.

To be sure, one impetus for the Subpoenas' issuance was the possibility that they may yield information relevant to the certification of presidential electors by the United States Congress. As an initial matter, that in itself was a valid legislative purpose. The Arizona Legislature is charged by the federal Constitution with controlling the manner in which the state's presidential electors are selected, *see* U.S. Const. art. II, § 1. Further, because certification objections can be raised and adjudicated exclusively in the United States Congress, *see* 3 U.S.C. § 15, the Subpoenas intrinsically lacked any capacity to derogate the authority of the Arizona judiciary, even if they had impacted Congress'

certification determinations.

In any event, the County has, through its unlawful obstruction, rendered moot any relationship between the Subpoenas and Congress' certification of the Electoral College returns. Because all parties to this proceeding agree that the 2020 presidential election has definitively and irrevocably concluded, the County's continued ruminations about "overturning" it are a *non sequitur*. Notwithstanding the County's dogged efforts to resuscitate this dead issue, its continued defiance of the Subpoenas must rely on something other than tired canards about "overturning" the election.

B. Legislative Subpoenas Need Not Be Predicated on Specific Introduced Bills

Perhaps recognizing that its shibboleths about election subversions are rapidly losing any plausibility, the County instead pivots to a new theory that there must be "*actual, currently-pending* legislation," MTD at 4, before a subpoena may be properly issued. This novel "pending legislation rule" is a pure contrivance of the County. It is not, and never has been, a judicially ordained prerequisite to a lawful legislative subpoena. While the circumstances in *Wilkinson v. United States*, 365 U.S. 399 (1961)—the sole case cited by the County—may have included a particular relevant legislative item, the Supreme Court never suggested, let alone held, that a subpoena must be conjoined to an extant bill. To the contrary, the seminal case recognizing the congressional subpoena power eschewed exactly that proposition. Dismissing the contention that a Senate investigation into the Attorney General lacked any valid legislative purpose, the court reasoned, in words that resonate when contemplating the relationship of the Arizona Senate to County officials:

> It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice-whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged

> neglect being recited. Plainly 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. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

McGrain v. Daugherty, 273 U.S. 135, 177–78 (1927). Subsequent cases have reaffirmed the maxim that a legislative subpoena is in furtherance of a valid legislative purpose if its demands "concern a subject upon which legislation ***could be had***." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (citation omitted; emphasis added); *see also id*. at 2027 (subpoena was premised in part on committee's averment that it "planned 'to develop legislation and policy reforms to ensure the U. S. government is better positioned to counter future efforts to undermine our political process and national security'"); *Eastland*, 421 U.S. at 493 (upholding congressional subpoena issued pursuant to efforts to "make a complete and continuing study and investigation of . . . the administration, operation, and enforcement of" certain laws); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 43 (D.D.C. 2018) (congressional investigation into alleged Russian interference in U.S. elections was a valid legislative purpose).

Further, even if the County's chimerical "pending legislation" restriction could be unearthed in federal law (and, as discussed above, it cannot), it certainly has no application in Arizona. Recognizing that "[i]t is within the powers of legislative committees to conduct investigations," the Arizona Supreme Court affirmed the validity of a legislative subpoena issued pursuant to a legislative examination of "all phases of the existing relationship between Corporation Commission personnel, elective and appointive, and persons and corporations subject to the regulatory jurisdiction of the Corporation Commission" and the Commission's political contribution solicitation practices—notwithstanding that this endeavor appeared to be untethered from any identified legislative proposal. *Buell v.*

Superior Court, 96 Ariz. 62, 64, 66 (1964).

The County's doctrinal invention also makes no practical sense. The purpose of many legislative inquiries—including this one—is to discern whether reform legislation is warranted at all, and if so, what ills it should seek to remedy. The County's proposed rule would invert this logic, requiring the legislative body to first formulate a solution before it can ascertain the existence and nature of the problem. This notion that some antecedent item of pending legislation is a condition precedent to a valid subpoena lacks any legal or logical sustenance. The Legislature's inherent investigatory powers are expansive and indefinite; their validity is not contingent on the existence of past (or, for that matter, future) specific legislative proposals. *See Eastland*, 421 U.S. at 509 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces . . .To be a valid legislative inquiry there need be no predictable end result.").

In short, the Judiciary Committee's objective of using data and information gleaned through the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties—all with an eye to introducing potential reform proposals in the Fifty-Fifth Legislature— is self-evidently a valid legislative purpose.

III. The Confidentiality Laws Cited By the County Do Not Create a Privilege of the County to Defy Compulsory Process

President Fann and Chairman Petersen already have addressed at length in the Motion for Preliminary Injunction (pp. 13-15) the inapplicability of various statutes and provisions of the Election Procedures Manual to the Subpoenas. Those arguments need not be reiterated here. Two particular points, however, merit reemphasis in light of the County's submissions.

First, the County spills much ink to establish an undisputed proposition: certain voter information and balloting materials are confidential and insulated from access by the general public. But "[t]he terms 'privileged' and 'confidential' are not interchangeable." *Catrone v. Miles*, 215 Ariz. 446, 454, ¶ 21 (App. 2007). The County remains at a loss to

explain how general statutory restrictions on public access can be transmogrified into a cognizable *privilege* against disclosure demanded by lawfully issued compulsory process. Whatever the law may be in other states,[7] the Arizona authorities are bereft of support for the notion that general statutory confidentiality restrictions vest in an inferior political subdivision a personal privilege that can abrogate a valid legislative inquiry. Indeed, the Arizona Supreme Court has clarified that even recognized privileges do not necessarily immunize documents or information from compulsory process. *See Buell*, 96 Ariz. at 69 (rejecting claims of attorney-client privilege raised in response to legislative subpoena); *see also State v. Zeitner*, 246 Ariz. 161, 167, ¶ 22 (2019) ("We cannot infer that the legislature, in granting such broad investigatory authority [to state agencies], intended the [physician-patient] privilege to stand as a bulwark against [Medicaid] fraud investigations").

Second, many of the statutes invoked by the County either explicitly permit or impliedly contemplate the Legislature's access to the subpoenaed materials. A.R.S. § 16-168(F) expressly provides that otherwise confidential voter information is available to any "authorized government official in the scope of the official's duties." That A.R.S. § 16-624 mandates the retention of ballots for up to two years implicitly acknowledges that these materials may be responsive to, and subject to disclosure by, compulsory process in various proceedings arising long after the election has been certified and the contest period has elapsed. Other of the County's statutory arguments amble into the realm of the absurd. For example, A.R.S. § 16-1018(4) generally prohibits showing "another voter's" completed ballot to a third party. It self-evidently has no application to the review of ballots by government officials—and if it did, every County employee who exposes himself or a colleague to a ballot image during routine processing and tabulation activities would be committing a criminal act. This is nonsensical. The statutory safeguards governing public

[7] The Washington State case the County relies upon does not illuminate questions of Arizona law, and appears to have been impelled in part by separation of powers concerns implicated by the compelled disclosure of documents relating to state judges, *see Garner v. Cherberg*, 765 P.2d 1284, 1288 (Wash. 1988) ("This court has recognized that confidentiality of Commission proceedings is essential to the preservation of fundamental judicial independence.").

access to voter information and ballot materials simply do not clothe the County with an evidentiary privilege that it may assert against the sovereign Legislature in response to a valid subpoena.

IV. The Counties' Remaining Defenses All Fail as a Matter of Law

A. President Fann and Chairman Petersen Have Standing to Enforce the Subpoenas in this Court

Assuming that this Court has jurisdiction to fashion civil remedies enforcing the Subpoenas—and, for the reasons discussed in Section I above, it does—President Fann and Chairman Petersen undoubtedly maintain standing to obtain them. Preliminarily, the County appears to conflate two discrete and distinct remedial rubrics. While a resolution of the relevant legislative house is required for a formal finding of contempt, *see* A.R.S. § 41-1153(A), there is no textual basis for engrafting this prerequisite onto the civil claims raised in these proceedings.

Although a vote of the full legislative chamber is ***sufficient*** to initiate a civil suit, *see Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487, ¶ 16 (2006), it is not a ***necessary*** precondition to doing so. When a constitutional or statutory provision empowers an individual legislator or subset of legislators to effectuate some legal act, those lawmakers have independent standing to pursue claims arising out of this prerogative. *See, e.g.*, *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 131, ¶ 9 (2011) (finding that Speaker of the House and the Senate President, as the officials designated by the Constitution to make appointments to the Independent Redistricting Commission, "have standing to challenge the legality of the Appointment Commission's list of nominees" for those positions); *Biggs v. Cooper ex rel. County of Maricopa*, 236 Ariz. 415, 418, ¶ 8 (2014) (concluding that "a group of plaintiff legislators sufficient to have blocked [a bill's] passage has standing to challenge the law's enactment by only a majority vote"). Federal courts likewise have indicated that the legislative subunit authorized to issue subpoenas has standing to seek their enforcement. *See Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 765-66 (D.C. Cir. 2020) (concluding that

because the issuing committee was assigned the House's investigatory powers, the alleged disregard of the subpoena caused an informational injury to the committee, which in turn sustained the committee's Article III standing).

Thus, because A.R.S. § 41-1151 delegates each house's investigatory powers to its presiding officers and committee chairs, those legislators incur a concrete injury—redressable in this Court—when, as here, a properly issued subpoena is defied.

B. The Parties' Controversy Over the Validity and Enforceability of the Subpoenas Is Not Moot

The County's attempt to evade on ostensible "mootness" grounds judicial review of its ongoing obstruction of the Subpoenas is lacking. Courts "will consider cases that have become moot when significant questions of public importance are presented and are likely to recur." *Big D Const. Corp. v. Court of Appeals for State of Ariz., Div. One*, 163 Ariz. 560, 563 (1990). President Fann has averred under oath that she will reissue a substantively identical subpoena when the Fifty-Fifth Legislature commences its regular session on January 11 and that Chairman Petersen intends to do the same. *See* Verified Counterclaim ¶¶ 40-41. Although delay has been the *modus operandi* of the County in this case, its current mootness gambit is unavailing.

C. The Recorder Is Not a Necessary Party

The County's effort to deflect by pointing a finger at the Recorder fares no better. The Legislature has expressly charged the Board of Supervisors with the duty and authority to "[s]upervise the official conduct of all county officers . . . and, when necessary, require the officers to . . . make reports and present their books and accounts for inspection." A.R.S. § 11-251(1). Although the County Recorder's Office may be the physical repository for certain of the documents and records demanded by the Subpoenas, those materials thus remain under the legal supervision and control of the Board of Supervisors. *See* A.R.S. § 41-1154 (legislative subpoena may require recipient to produce documents "in his possession **or** under his control" (emphasis added)); *Helge v. Druke*, 136 Ariz. 434, 437–38 (App. 1983) (noting that "a witness may be compelled to produce a document that

he controls though he does not have possession of it"). Indeed, the Board has publicly endorsed "a forensic audit of election equipment," which necessarily presupposes that the Board possesses the authority to requisition the necessary materials from the County Recorder. *See* The Maricopa County Board of Supervisors, *Board of Supervisors Responds to Legislative Subpoenas*, DAILY INDEPENDENT, Dec. 22, 2020, *available at* https://www.yourvalley.net/stories/board-of-supervisors-responds-to-legislative-subpoenas,205361.

Further, even if the Board did lack legal control over some of the materials sought by the Subpoenas, it is not immune from an injunction or other order compelling production of the remainder. And if the Court for whatever reason concludes that the County Recorder's presence is necessary, it may simply add him. Arizona Rule of Civil Procedure 19(a)(2) instructs that "[i]f a person required to be made a party has not been joined, the court must order that the person be made a party." Dismissal is proper only if a missing party is necessary *and* his joinder is not feasible. *See id.* Rule 19(b); 59 AM. JUR. 2D PARTIES § 350 ("[T]he failure to join an indispensable party may be overcome by joining that party; dismissal for failure to join a necessary party is warranted only when the defect cannot be cured.").

D. Electronic Documents Are Subject to the Legislative Subpoena Power

Materials are not immune from compelled disclosure merely because they exist in electronic form. A legislative subpoena may command a recipient to produce "any material and relevant books, papers or documents." A.R.S. § 41-1154. When construing a statute, "[e]ach word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 10 (2017) (quoting *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949)). That the Legislature enumerated "documents" as a classification distinct from "books" and "papers" imparts an intent to imbue it with an expansive ambit that encompasses not just physical or tactile materials. Indeed, as commonly understood, the term 'document' "embraces any information stored on a computer, electronic storage device, or any other medium." BLACK'S LAW

DICTIONARY (11th ed. 2019); *cf. Lake v. City of Phoenix*, 222 Ariz. 547, 551, ¶ 14 (2009) ("We . . . hold that when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law.").

Thus, even if some of the materials sought by the Subpoenas are stored or reified in electronic media, they nonetheless remain "documents" that are subject to disclosure.

E. The County Has Had Ample Time to Respond to the Subpoenas

That the Subpoenas initially afforded the County three days in which to comply cannot plausibly excuse its ongoing obduracy. Despite twenty-seven days having elapsed since the Subpoenas' issuance, the County still has not produced a single document or item pursuant to them. Irrespective of whether it is allotted three days or 300 days in which to respond, the County has made clear that it will not comply with the Subpoenas unless and until this Court orders it to do so. If matters of timing are truly a genuine and good faith concern, President Fann and Chairman Petersen remain amenable to negotiating reasonable accommodations, provided that the County works diligently to supply the requested materials as expeditiously as possible.

CONCLUSION

For the reasons set forth herein and in the Motion for a Preliminary Injunction, the Court should (1) deny the County's Motion to Dismiss in its entirety, and (2) enter a preliminary injunction or other order compelling the County to immediately produce or make available in full to President Fann or Chairman Petersen (or their designees) all documents, records, materials, and information responsive to either or both of the Subpoenas.

RESPECTFULLY SUBMITTED this 11th day of January, 2021.

STATECRAFT PLLC

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Kory Langhofer
Thomas Basile
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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 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:

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Exhibit 5

Clerk of the Superior Court
*** Electronically Filed ***
03/01/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-016840

02/25/2021

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

MARICOPA COUNTY, et al.

STEPHEN W TULLY

v.

KAREN FANN, et al.

THOMAS J. BASILE

JAMES E BARTON II
JOHN A DORAN
THOMAS PURCELL LIDDY
JOSEPH EUGENE LA RUE
JOSEPH J BRANCO
EMILY M CRAIGER
KORY A LANGHOFER
JACQUELINE MENDEZ SOTO
GREGREY G JERNIGAN
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE THOMASON

MINUTE ENTRY

East Court Building – Courtroom 713

9:03 a.m. This is the time set for Oral Argument on Plaintiffs' Motion for Summary Judgment, filed February 22, 2021, President Fann and Senate Judiciary Committee Chairman Petersen's Motion for Judgment on the Pleadings, filed February 22, 2021, and Democratic Senators' Motion for Summary Judgment, filed February 22, 2021 via Court Connect. All appearances are virtual and are as follows:

- Counsel, Stephen W. Tully, John A. Doran, Thomas P. Liddy, Joseph J. Branco, Joseph E. LaRue, and Emily Craiger are present on behalf of Plaintiffs/Defendants-in-Counterclaim Maricopa County; Clint Hickman, in his official capacity as Chairman of the Maricopa County Board of Supervisors; and Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, in their official capacities as Members of the Maricopa County Board of Supervisors, who are not present.
- Counsel, Thomas Basile and Kory Langhofer are present on behalf of Defendants/Plaintiffs-in-Counterclaim Arizona Senate President Karen Fann, who is present, and Senate Judiciary Committee Chairman Eddie Farnsworth, who is not present. General counsel for Arizona State Senate, Gregrey G. Jernigan, is also present.
- Counsel, James Barton, II, and Jacqueline Mendez Soto are present on behalf of Defendants Lupe Contreras, Andrea Dalessandro and Martin Quezada, in their official capacities as Members of the Arizona Senate Judiciary Committee, who are not present.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court outlines the pleadings reviewed in preparation for this hearing.

Oral argument is presented.

For the reasons stated on the record,

IT IS ORDERED taking this matter under advisement.

9:28 a.m. Matter concludes.

The Arizona Constitution requires the Arizona Commission on Judicial Performance Review to conduct performance evaluations of superior court judges. The Commission is asking for your help to evaluate Maricopa County Superior Court judges currently undergoing performance review. After your hearing, if the judge you are in front of is undergoing review, a survey will be emailed to you and you can take the survey online. The survey is conducted by the Docking Institute of Public Affairs at Fort Hays State University and is anonymous and confidential. Your participation in the review process is important! More information on Judicial Performance Review can be found at www.azjudges.info.

La Constitución de Arizona exige que la Comisión de la Evaluación del Desempeño Judicial realice evaluaciones de desempeño de los jueces de los tribunales superiores. La comisión pide su ayuda para evaluar a los jueces del Tribunal Superior del Condado de Maricopa a quienes

actualmente se les está evaluando su desempeño. Después de su audiencia, si el juez ante el cual comparece está sometido a una evaluación se le enviará por correo electrónico una encuesta que usted podrá tomar por Internet. La encuesta es realizada por el Docking Institute of Public Affairs de la Fort Hays State University y se mantiene anónima y confidencial. ¡Su participación en el proceso de la evaluación es importante! Para obtener más información sobre la evaluación del desempeño judicial, diríjase a www.azjudges.info.

LATER:

BACKGROUND

Maricopa County and the Maricopa County Board of Supervisors, in their official capacities (at times referred to collectively as the "County"), filed suit in CV2020-016840 asking the Court to declare that two legislative subpoenas issued to the Maricopa County Board of Supervisors (the "2020 subpoenas") were illegal and unenforceable. The 2020 subpoenas required production of numerous documents and electronic materials dealing with the November 2020 election.

Karen Fann ("Fann"), as President of the Arizona Senate, and Eddie Farnsworth ("Farnsworth"), as Chairman of the Arizona Senate Judiciary Committee, filed a Counterclaim seeking enforcement of the 2020 subpoenas. Fann and Farnsworth filed a Motion for Preliminary Injunction, asking the Court to enforce the 2020 subpoenas. After the Motion was filed, a notice of substitution was filed under Arizona Rule of Civil Procedure 25(d), stating that Warren Petersen ("Petersen"), the incoming Chairman of the Senate Judiciary Committee, was substituting for Farnsworth, who no longer held that position. (Fann and Petersen are, at times, referred to as the "Senators").

The Court considered the Motion for Injunctive Relief, the Response and the Reply, along with the arguments of counsel. The Court also considered the Amicus brief from the Attorney General of the State of Arizona and the Amicus brief filed by certain Republican Chairmen and House members. At a hearing held on January 13, 2021, the Court found that the dispute before the Court was moot, in light of the fact that the 2020 subpoenas were no longer enforceable.

The day before the January 13 hearing, Fann and Peterson issued two new subpoenas to the Board of Supervisors. Subpoenas were also issued to the Maricopa County Recorder and the Maricopa County Treasurer. (The subpoenas issued on January 12 are collectively referred to as the "Subpoenas.") The County filed CV2021-002092, asking the Court to declare that the Subpoenas were illegal and unenforceable.[1] Nonetheless, in response to the Subpoenas, the County

[1] CV2020-016840 and CV2021-002092 have been consolidated.

"quickly produced some 11.32 gigabytes of data" and commissioned two separate examinations of its tabulation machines, to ensure that they functioned properly during the November 2020 election.

The Subpoenas were served on the afternoon of January 12. The Subpoenas commanded appearances the next day, January 13, 202, at 9:00 a.m. The Chairman of the Board of Supervisors, Jack Sellers, Maricopa County Recorder Stephen Richer, and Maricopa County Treasurer John Allen appeared at the Senate at 9 a.m. They were ostensibly prepared to testify and to notify the Senators that they could not possibly produced all of the subpoenaed material in the time frame provided. The Subpoenas commanded production of some 2.1 million voted paper ballots, nine large Central Count Tabulators, 350 smaller Precinct Based Tabulators and other hardware and electronically stored information ("ESI"). There was no Senate hearing on January 13 and no testimony was taken. Despite the production of 11.32 gigabytes of data, the County has not provided all of the materials that were subpoenaed. Among other things, the County has not provided the Senators the ballots from the election.

The County later filed a request for injunctive relief. The County was concerned that the Arizona State Senate was going to hold County officials in contempt and possibly have them arrested. The Senate vote to hold the County officials in contempt failed by one vote, and the request for injunctive relief was withdrawn.

The Court has now been asked to issue an expedited ruling on the merits of the dispute. The County wants the Court to declare that the Subpoenas are illegal and unenforceable. The Senators ask the Court to rule that the Subpoenas are legal and enforceable. Specifically, the County has filed a Motion for Summary Judgment, and the Senators have filed a Motion for Judgment on the Pleadings. The Democratic Members of the Senate Judiciary Committee have also filed a Motion for Summary Judgment.[2] (The Democrat Members of the Senate Judiciary Committee are referred to as "Democrat Senators.") The parties agreed that there would be no responses. The Court has considered these various Motions and the arguments of counsel.

[2] The Court questions the standing of the Democrat Senators. It is not clear why they were named as defendants. As minority members, the Democrat Senators have no authority to issue subpoenas under A.R.S. § 41-1151, which provides that subpoenas can be issue by "the presiding officer of either house or the chairman of any committee." The Democrat Senators are not the target of the Subpoenas, so their standing to object is suspect. Nonetheless, the Court has considered the Motion filed by the Democrat Senators.

SCOPE OF THE RULING

The courts should generally be hesitant to enter the fray of political disputes between two other branches of government. The controversy between the Senators and the County is a highly charged political dispute.[3] Serious accusations have been made and emotions are raw.

The Senators believe that the County has snubbed the clear authority of the Senators to issue the Subpoenas. The County believes, on the other hand, that the Subpoenas are the result of continuing claims by supporters of former President Trump that the election was "stolen" and that this entire matter is a waste of time. The County firmly maintains that the Senators are abusing their powers and refusing to show proper deference to another branch of government.

This Court has no interest in the political dispute between these parties. This is a Court of law, not a Court of politics.

It is, however, an appropriate function for the Court to issue declaratory rulings on limited legal issues. As such, the Court will issue declaratory rulings on whether the Subpoenas are valid and have a proper legislative purpose, whether the Subpoenas violate separation of powers and whether the Subpoenas improperly seek production of materials protected by confidentiality statutes. Issuing such rulings is a proper and necessary exercise of the jurisdiction given to the Court in the Uniform Declaratory Judgment Act, A.R.S. § 12-1831 *et seq.*

It is, of course, not the Court's place to address the wisdom of the Subpoenas. The statutes of this State give the Senators the right to issue subpoenas and to enforce those subpoenas. This Court must follow the law.

It is regrettable that this matter has resulted in a highly bitter dispute between two branches of our government. The members of the County Board of Supervisors and the Senators are all dedicated public servants. This Court has urged these public servants to devote their time and energies to finding a mutually agreeable solution to this problem. They apparently have not done so. Our governmental officials should not be spending valuable resources on lawyers, "fighting" with another branch of government over what materials can be provided to another branch of government under a subpoena. Rather, the citizens expect their governmental officials to work cooperatively for the common good. It is highly unfortunate that that has not happened here. When government officials resort to "name calling" and threats, something has gone terribly wrong.

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[3] The political dispute initially arose out of the allegations by former President Trump and his allies that there was widespread fraud in the 2020 presidential election. The County accused the Senators of taking part in the purported effort of President Trump and his allies to "overturn" the 2020 election. President Biden is now in office and there clearly will be no "overturning" of the 2020 election.

This ruling decides only very narrow legal issues. This Court is not enforcing the Subpoenas. This Court has serious concerns about whether it has jurisdiction to enforce the Subpoenas and the Senators have not asked the Court to issue an order enforcing the Subpoenas. As such, this Court's ruling is a narrowly focused declaratory ruling.

VALIDITY OF THE SUBPOENAS

A.R.S. § 41-1151 authorizes "the presiding officer of either house or the chairman of any committee" to issue a subpoena. A.R.S. § 41-1151 *et seq.* provides a mechanism for the legislature to enforce the subpoenas and provides that a person who does not comply is guilty of a misdemeanor. A.R.S. §§ 41-1153, -1154. The statutes also authorize the Senate to find that a person who does not comply with a subpoena to be held in contempt. Moreover, a person who does not comply can be arrested by the sergeant-at-arms. A.R.S. § 41-1153.

Statutory Requirements

The Court first briefly addresses the County's argument that the Subpoenas do not comply with statutory requirements. The County argues that the Subpoenas are invalid because there was no actual hearing conducted on January 13.

The County claims that legislative subpoenas "must be tethered to a hearing." There is nothing in A.R.S. § 41-1151, however, that requires a hearing. Rather, the statute refers only to requiring "the attendance of the witness at a certain time and place." The Subpoenas did command that witnesses appear at a specific time and place. The fact that no actual hearing occurred did not invalidate the Subpoenas.[4] The fact that the Senators did not force the witnesses who appeared to testify did not render the Subpoenas a nullity. The County's argument that the Subpoenas are invalid because there was no hearing is inconsistent with the statute that authorized the issuance of the Subpoenas.

A.R.S. § 41-1154 requires that a witness produce material "upon reasonable notice." The Subpoenas were served less than 24 hours before the due date. The County, however, knew about the 2020 subpoenas and, therefore, knew for several weeks what materials the Senate was seeking. Moreover, the County has now had weeks to comply, and has, in fact, produced many of the requested materials. As such, while a "reasonable notice" objection might have been valid at the time, it is hardly valid now. Moreover, it appears as if the County is refusing to produce certain information, irrespective of whether it had reasonable notice. A party cannot use the lack of

[4] The Democrat Senators acknowledge that the legislature is authorized to issue subpoenas for documents, without requiring attendance of witnesses at a hearing. Democrat Senators' Motion at 4. As they point out in their Motion, A.R.S. § 41-1152 refers to "[t]estimony or evidence produced pursuant to this article," supporting the notion that evidence other than witness testimony can be the target of a legislative subpoena.

reasonable notice as a defense if it intends to not comply, irrespective of the notice provided. *See United States v. Bryan,* 339 U.S. 323, 333-34 (1950).

The County's argument that the Senate cannot subpoena electronically stored information ("ESI") or tangible objects, such as voting "machines", is also meritless. A.R.S. § 41-1154 addresses enforcement of legislative subpoenas. The County cites the portion of the statute that refers to production of "relevant books, papers or documents," and argues that ESI and machines are not books, papers or documents. The County ignores, however, the same portion of the statute, which refers to production of "any material." Clearly, ESI and machines constitute "material."

A.R.S. § 41-1154 clearly reflects the legislative intent that legislative subpoenas can demand production of "any material," in addition to "books, papers or documents." Moreover, the statute does not somehow immunize information from being subpoenaed simply because the information is electronically stored. In modern parlance, "documents" include electronically stored information. Indeed, when parties in litigation are producing "documents," they understand that documents include ESI. It is absurd to think that information that happens to be electronically stored and not kept on a piece of paper is not a "document" that can be subpoenaed.

Necessity of a Resolution

The County argues that the issuance of a legislative subpoena is dependent on an active investigation established by resolution. No Arizona authority so holds. Indeed, such a conclusion is contrary to the operative statute.

The Arizona legislature granted the authority to the presiding officer and committee chairmen in each chamber of the legislature to issue subpoenas. A.R.S. § 41-1151. This grant of authority to these officials is diametrically opposed to the County's position that there must be some resolution passed before a subpoena can be properly issued.[5] There is nothing in the statute

[5] The Arizona statute has no similar counterpart in federal law. It is true that Congress' constitutional subpoena power is vested in the body as a whole and delegation of that power to a committee must entail an authorizing resolution. *See, e.g., Trump v. Mazars USA, LLP,* 140 S. Ct. 2019 (2020); *Comm. on the Judiciary, U.S. House of Representatives v. Miers,* 558 F. Supp. 2d 53, 70-71 (D.D.C. 2008). Arizona legislative subpoenas, however, are not governed by the federal standards and rules for issuing congressional subpoenas. Arizona legislative subpoenas are not issued by the body as a whole and, therefore, require no "resolution." Indeed, the presiding officer of the Senate, the president, does not chair any committee. Yet, the statute gives that official the authority to issue a subpoena. This clearly indicates that no committee resolution is necessary.
Although *Buell v. Superior Court* involved a legislative investigation pursuant to a resolution, the Arizona Supreme Court did not hold that a resolution was required before a legislative subpoena could be issued. *Buell v. Superior Court,* 96 Ariz. 62 (1964). *Buell* concerned the power of the legislature to hold a lawyer in contempt for failing to comply with a legislative subpoena. It did not specifically address the requirements for issuance of such a subpoena. It certainly did not hold that a resolution was required before a subpoena could issue.

that requires an open formal investigation or a resolution, as a necessary precursor to the issuance of a subpoena.

The County further argues that the power to issue subpoenas is only held by the Senate as a corporate body, not by individual Senators. The argument again ignores the plain language of the statute, which expressly authorizes "the presiding officer of either house or the chairman of any committee" to issue subpoenas. A.R.S. § 41-1151. [6]

Accordingly, the Senators themselves, in their capacities as Senate president and committee chair, had the statutory power to issue subpoenas.[7] As long as the Subpoenas were issued for a proper legislative purpose and do not violate Constitutional protections, the Subpoenas are valid and enforceable.

It is not the Court's function to ascertain the wisdom of the Senators' decision to issue the Subpoenas or to determine if any attendant investigation is "justified." *See Senate Select Comm. on Ethics v. Packwood,* 845 F. Supp. 17, 20-21 (D.D.C. 1994) ("[T]his Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties.'") (citations omitted). Similarly, the Court is not in a position to determine whether some or all of the information being subpoenaed is "immaterial" to the inquiry being undertaken by the Senators. Indeed, materiality is arguably framed by the scope of the Subpoenas themselves.

Proper Legislative Purpose

The Arizona Supreme Court has held that "[i]t is within the powers of legislative committees to conduct investigations...and to issue subpoenas and to summon witnesses generally and punish them for contempt if they refuse to answer relevant questions or produce records." *Buell*, 96 Ariz. at 66.[8] A legislative subpoena is issued for a proper legislative purpose if "the

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The cases cited by the County from California and other states are not persuasive because they do not address the specific requirements of Arizona's legislative subpoena statutes. For example, in *Connecticut Indem. Co. v. Superior Court*, 3 P.3d 868, 810 (Cal. 2000), cited by the County, the statute in question, Cal. Gov. Code § 37104, states that subpoenas can be issued by "[t]he legislative body." A.R.S. § 41-1151 does not authorize the "legislative body" to issue subpoenas; only the presiding officers and committee chairs may do so. As such, California law is completely irrelevant.

[6] There is nothing in the record suggesting the Senators were acting outside their official capacities.

[7] Judge Warner did not rule that the Senators are not authorized, individually, to issue legislative subpoenas, as the County claims. The issue decided by Judge Warner was whether mandamus was a proper means of enforcing a legislative subpoena. *Fann v. Maricopa County*, No. CV2020-016904, Decision Order (Dec. 23, 2020). In fact, Judge Warner expressly stated that "A.R.S. § 41-1151 authorizes the presiding officer or a committee chair of either house of the Arizona Legislature to issue subpoenas." *Id.* at 1.

[8] During oral argument, the County admitted that the legislature has "broad powers of inquiry."

subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain v. Daughtery*, 273 U.S. 135, 177 (1927). If there is a conceivable legislative purpose, the court will presume that the purpose of the subpoena is proper. *Id.* at 178. So long as the subpoena can be construed to relate to a subject upon which legislation might be had, the subpoena is valid. *Id.* at 180.

The Subpoenas seek numerous pieces of data and information dealing with the November 2020 election. For purposes of this ruling, the Court finds that the Subpoenas were issued for a valid legislative purpose.

The Arizona Constitution entrusts the legislature with the power to enact "laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. The United States Constitution empowers the legislatures of the states to set the time, place and manner of elections. U. S. Const. art. 1, § 4, cl. 1. The states also determine the manner in which electors are chosen. U.S. Const. art. II, § 1, cl. 2.

The Senators state that they intend to use the data gathered under the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and competence of county officials in performing their election duties, with an eye to introducing possible reform proposals. This is a valid legislative purpose. Granted, there was no specific legislation pending before, or even being examined by, the Senate at the time the Subpoenas were issued. There does not, however, have to be actual legislation pending in order for a legislative subpoena to be issued for a proper purpose. A.R.S. § 41-1151 does not require pending legislation, or even a formal "investigation," before a presiding officer or committee chair can issue a subpoena.

Wilkinson v. United States, 365 U.S. 399 (1961), cited by the County, stated only that the existence of pending legislation was a factor to be considered in determining whether the subpoena was issued for a proper purpose. Further, in the absence of pending legislation, legislative investigations can appropriately determine whether other governmental agencies are properly performing their functions. *See McGrain,* 273 U.S. at 177-78 (Congressional investigation into whether the Attorney General and his assistants were performing or neglecting their duties).

The County contends that the Subpoenas were not issued for a proper legislative purpose because the Senators are allegedly seeking to re-adjudicate the presidential election. Indeed, the County argues that "Fann is attempting to perform a private recount[9] of the election" and that the Senators have no authority to "audit" elections. The County asks the Court to examine statements

[9] The Court does not know what the County means when it refers to a "private recount." A "private recount," whatever that is, would have no legal significance. The fact that the Senators might conduct a "private recount" does not negate the notion that there was a proper legislative purpose—investigating the need for election reform and examining possible legislation attendant thereto.

made by Senator Fann in order to ascertain the "true" purpose of the Subpoenas. Granted, Senator Fann has made public comments about concerns of "many voters" regarding the accuracy of the presidential election and the need to "audit" the election.[10] These comments, however, do not mean that the Subpoenas were not issued for a proper legislative purpose.[11]

If there is a conceivable proper purpose, the Court must construe the Subpoenas as valid. *Id.* at 180. There clearly is a proper legislative purpose here. Assessing electoral integrity is a proper legislative purpose. Examining potential legislative reforms to the electoral process is certainly a proper function of the State legislature.

This Court is not in a position to determine if the "real" purpose of the Subpoenas is to try to "overturn" the result of the election.[12] Even if one of the original purposes of the 2020 subpoenas was to see if the election could somehow be challenged, there still is a perfectly valid legislative purpose for the Subpoenas.[13] Accordingly, the Court finds that there was a proper legislative purpose.

SEPARATION OF POWERS

The County suggests that the Subpoenas could "usurp" the administration of elections and duties of County officials and the Secretary of State. Therefore, according to the County, the Subpoenas present separation of powers problems. The entire electoral infrastructure, however, is a legislative creation. The functions of County officials and the Secretary of State were the result of delegations by the legislature.[14]

Powers held by the counties are those delegated to the counties by the legislature. Ariz. Const. art XII, § 4; *see Assoc. Diary Prods. Co. v. Page*, 68 Ariz. 393, 395-96 (1949) ("The boards

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[10] The County's contention that the Senators are acting improperly in looking at the integrity of the 2020 election is somewhat ironic in light of the fact that the County itself just completed a "forensic audit" of the election.

[11] The Democrat Senators acknowledge that it is a proper purpose to use a legislative subpoena to "investigate election administration in general." The Democrat Senators insist, however, that it is not proper for the legislature to issue subpoenas to investigate the November 2020 election. An investigation of the 2020 election, however, clearly could be of assistance in investigating election administration and possible reforms.

[12] In light of the fact that the Electoral College has voted, Congress has confirmed the election, and President Biden has been sworn in, any purported attempt to "overturn" the result of the election now would clearly be futile.

[13] Indeed, the Senators acknowledge that one purpose of the 2020 subpoenas was to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome. Even though that might have been one purpose of the 2020 subpoenas, the goal of studying the result and trying to determine if legislation should be passed to improve the election process is still a valid purpose, sufficient to uphold the Subpoenas.

[14] The Arizona Constitution gives the legislature authority to define the powers and duties of the Secretary of State. Ariz. Cont. art. V, § 9. The duties of the Secretary of State are set out by in A.R.S. § 41-121, which duties include certifying election results. A.R.S. § 41-121(A)(6).

of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature."); *State v. Payne,* 223 Ariz. 555, 561, ¶ 15 (App. 2009).[15] Since the legislature delegated powers to the counties, it can certainly investigate modifying or improving those delegated powers.[16] It also has the power to investigate whether the County is properly discharging its delegated functions. *See McGrain*, 273 U.S. at 177-78.

The County's characterization of the Senators' argument as "bizarre" is premised on the notion that the real purpose of the Subpoenas is to "overturn" or "challenge" the election. A subpoena, however, cannot "overturn" an election. A subpoena simply demands production of information. Responding to the Subpoenas could hardly result in the "overturning" of the presidential election in Arizona.

If one assumes, as the Court must, that the Subpoenas were issued to examine potential election reforms, then it is evident the Subpoenas were not an attempt to "usurp" powers of the County and the Secretary of State. Subpoenaing materials from the County is not a usurpation of the County's powers. Rather, it is simply gathering of information.

Accordingly, the Subpoenas do not violate the separation of powers. As noted above, the counties have only such powers as delegated to them by the legislature. It is axiomatic that the legislature can take action, so long as it is acting within the scope of its legislative authority. Separation of powers issues are raised when one branch of government tries to usurp a power it has delegated to another branch. No such attempt has been made here.

CONFIDENTIALITY

The County also contends that the Subpoenas might threaten the "right to a secret ballot" and violate certain state statutes on confidentiality. The statute governing confidential voter information, however, permits access by any "authorized government official in the scope of the official's duties." A.R.S. § 16-168(F).

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[15] The statutes governing counties are set out in Title 11 of Arizona Revised Statutes. Chapter 2, Article 4 of Title 11 describes the powers and duties of the county boards of supervisors, which include the power to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. § 11-251(3).

[16] The County argues that "the Legislature gave the Executive Branch" authority to canvass and proclaim the results of the election. That is true. That does not prevent, however, the legislature from considering or passing legislation addressing the voting process or potentially revoking some of the authority delegated to the County or the Secretary of State. Indeed, the Arizona Constitution charges the legislature with the responsibility of ensuing the "purity" of elections and guarding against abuse. *See* Ariz. Const. art. VII, § 12.

Confidentiality statutes do not prevent ballots and associated materials from being provided to government officials. Rather, these statutes are intended to prevent disclosure of information to the public. All government officials are obligated to follow the law and comply with confidentiality statutes. This, of course, includes the Senators.

The County cites the Arizona Constitutional right to a "secret" ballot. Ariz. Const. art. VII, § 1. Absent unusual circumstances, however, it is impossible to tie any given ballot to the voter who completed the ballot. Moreover, producing information to government officials clearly does not deprive a voter of his or her right to a secret ballot. All government officials, including the Senators, clearly have a corresponding duty to maintain the secrecy of ballots that are provided to them.

The County even cites A.R.S. § 16-1018(4), which makes it unlawful to "[s]how[ ] another voter's ballot to any person after it is prepared for voting in such a manner as to reveal the contents[.]" This provision, however, obviously does not prohibit the showing of the ballot to government officials. Indeed, if that were the case, it would be illegal for any County official to "see" any ballot after it was prepared for voting. It is apparent that the word "person," as used in this statute, does not refer to government officials.[17]

When interpreting confidentiality statutes, the Court must "'apply constructions that make practical sense' rather than those that 'frustrate legislative intent'" *State v. Zeitner (Zeitner I)*, 244 Ariz. 217, 224, ¶ 27 (App. 2018), *aff'd* 246 Ariz. 161 (2018) (*Zeitner II*). The clear intent of the legislature in enacting these confidentiality statutes was to protect voters' rights to cast secret ballots. The legislature did not intend for these statutes to prevent it from having access to the materials it deemed necessary to fulfill its duty to oversee the election process.

[17] The County cites a number of other statutes that clearly have no application to the question of production of balloting materials to the legislature. For example, the County argues that A.R.S. § 16-1005(H) makes it "illegal to possess voted ballots even when it is unknown who cast them," Section 16-1005(H) prohibits the practice of "ballot harvesting." That statute was held unconstitutional by the Ninth Circuit in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *cert. granted,* 141 S. Ct. 222 (Mem) (Oct. 2, 2020). In any event, the ballot harvesting prohibition was not intended to prevent the legislature or other governmental bodies and officials from examining ballots and related materials. If that were the case, the County and its officials would not be permitted to possess and examine ballots.

Statutes such as §§ 16-624 and 625, operate as restrictions on access by the general public.[18] The statutes do not prohibit disclosure of voting information to another part of the government.[19]

During oral argument, counsel for the County focused on A.R.S. § 16-624 and argued that compliance with the Subpoenas would require the County to violate the law. The Court disagrees.[20]

Section 16-624(A) requires the "officer in charge of elections" to deposit the package containing ballots in a secure facility, managed by the County Treasurer, to be kept "unopened and unaltered" for a period of twenty-four months for federal elections. This statute, which imposes obligations on the "officer in charge of elections" and the County Treasurer, does not immunize the ballots from being subpoenaed, let alone from being subpoenaed by the legislature, acting in

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[18] The County argued that, under A.R.S. § 16-624, once paper ballots are sealed after a canvass, ballots can only be unsealed by court order for purposes of a court-ordered "recount." (County's Motion at pp. 3, 13.) The County seems to suggest that this is the only situation where the ballots can be unsealed. This is clearly not the case. Subsection of A of the statute states that, after a canvass is completed, the County Treasurer must keep the ballots for 24 months for federal elections. Subsection B provides that "irregular ballots" must be preserved for six months and "may be opened and the contents examined only upon on order of the court." Subsection D states that, in the case of a recount within six months, "the county treasurer may be ordered by the court" to deliver the ballots to the court. The County's argument suggesting that ballots can be opened only under situations specifically addressed in the statute is clearly wrong. The statute only specifically refers to a court order providing for opening the ballots in the narrow circumstances dealing with "irregular ballots" (subsection B). While the power of the Court to open ballots in recount situations under subsection D may be implied, the statute does not directly provide such authorization. In any event, it is clear that the Court has the inherent authority to order the opening of ballots in other situations. *See* discussion below in fn. 21. Similarly, the Senate, as a co-equal branch of government with broad subpoena powers, can subpoena ballots in situations not provided for in the statute itself.

[19] *Garner v. Cherberg*, 765 P.2d 1284 (Wash. 1988), is not controlling, nor is it persuasive. In *Garner*, the Washington Supreme Court quashed a legislative subpoena, which sought confidential records from the commission on judicial conduct pertaining to a particular judge. The court did not hold that the confidentiality rules precluded all legislative oversight, as indicated at the end of the decision where the court "invite[d] the Majority Leader of the Senate and the Speaker of the House of Representatives to join the Chief Justice of the Supreme Court to conduct such an in camera inspection of the Commission's investigation files on Judge Little to satisfy themselves of the objectivity of the report." *Id.* at 1290. In addition, that case did not involve the oversight of elections, which the Arizona legislature is Constitutionally empowered to oversee.

[20] The Court understands that, in addition to ballots, the County has also not produced various voting machinery and hardware. The confidentiality statutes cited by the County clearly provide no justification for withholding those materials.

its Constitutional role to ensure the "purity" of elections.[21] This statute simply does not create a privilege, justifying non-disclosure.[22]

In fact, the statutory requirement that ballots be maintained for twenty-four months itself suggests these materials may be responsive to, and subject to, compulsory process long after an election has been certified and any contest period has lapsed. The County certainly provides no other explanation as to why ballots are required to be maintained for such a long period of time. Common sense suggests that they are maintained because they may be relevant to a legislative investigation, or perhaps a lawsuit, and that they might be subpoenaed. *See Zeitner I*, 244 Ariz. at 224, ¶ 27. There is simply no suggestion from the statute itself, or from common sense, that the statute means that no one is entitled to see the ballots, let alone Senators who are considering ways to improve the electoral process.[23]

The County's argument could lead to absurd results. According to the County, any statute that imposes obligations on a person to do specific things with documents or information immunizes those documents or information from being subpoenaed. For example, a state statute could require state charted financial institutions to keep certain information confidential and "under lock and key." By further way of example, a state statute could require companies who do business with the State to keep certain information safely stored and confidential. Such statutes cannot, and do not, prevent the "confidential" material from being subject to subpoena.

If the County's argument is correct, that providing ballot materials would violate the law, then the County is itself violating the law presently. The County admits that it has not stored the ballots as provided for in § 16-624 because the ballots are still "under the custody and control of the Board of Supervisors." (County's Statement of Fact ¶ 88.) The County claims it has not stored the ballots with the County Treasurer as required "because of ongoing litigation." The County states that it will deposit the ballots in the Treasurer's vault, "as the law requires," only after litigation concludes. It is unclear why the County feels justified in violating the law simply because

[21] *See Democratic Party of Pima County v. Ford*, 228 Ariz. 545 (App. 2012) (noting that trial court had entered an order granting political party's public records request to gain access to ballot records required to be kept confidential under A.R.S. § 16-624). The public record request in *Ford,* which was approved by the court, certainly demonstrates that ballots may be subject to disclosure in circumstances other than those specifically identified in § 16-624(B) and (D), contrary to the County's assertion otherwise.

[22] Indeed, during oral argument, the County admitted that the relevant statutes do not render the material in question the confidential or privileged material of the County.

[23] The County's argument that the Senate's attempt to pass legislation specifically providing that ballot materials can be subpoenaed constitutes an admission that the current law does not provide for subpoenaing such materials is unconvincing. The Senators have firmly maintained that they have the power to subpoena these materials. A legislative attempt to clarify what could be seen as an ambiguity in the current law is hardly an admission by the Senators.

litigation is pending, but claims that it cannot violate the law by complying with the Subpoenas. [24] Complying with the Subpoenas would not violate the law.

The Senators had the power to issue the Subpoenas and have the statutory power to enforce those Subpoenas in the manner set forth in the statutes. The Subpoenas are, in essence, the equivalent of a Court order, requiring production of certain information. The County cannot avoid a subpoena based on statutes that require that the material being subpoenaed be kept confidential.

While a claim of privilege might, under certain circumstances, constitute a defense to a legislative subpoena, a claim of confidentiality does not.[25] The Senators, of course, are obligated maintain confidentiality of the materials turned over to them. Confidentiality, however, is not a basis for quashing the Subpoenas.[26]

CONCLUSION

The Court finds that that Subpoenas are legal and enforceable. There is no question that the Senators have the power to issue legislative subpoenas. The Subpoenas comply with the statutory requirements for legislative subpoenas. The Senate also has broad constitutional power to oversee elections. The Arizona legislature clearly has the power to investigate and examine election reform matters. Accordingly, the Senators have the power to subpoena material as part of an inquiry into election reform measures. As such, the Subpoenas have a proper legislative purpose.[27] The Subpoenas also do not violate separation of powers principles. Production of the subpoenaed materials would not violate confidentiality laws.

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[24] The ballot material could have been stored by the County Treasurer and retrieved, if it were determined that the materials were properly subject to subpoena.

[25] *See Zeitner II,* 246 Ariz. at 168, ¶ 28 (Arizona Supreme Court stated that the statutory physician-patient privilege "must yield to the State's interest in combatting fraud."); *Buell*, 96 Ariz. at 68-69 (finding claim of attorney-client privilege was defeated by legislature's need for subpoenaed materials in investigation of the Arizona Corporation Commission).

[26] This is not to say that the Court does not have concern about the confidentiality of the subpoenaed ballot information. The Elections Procedures Manual has carefully delineated provisions providing for the security of ballots. The Manual, however, simply cannot be reasonably read to prevent production of subpoenaed material to government officials, particularly State legislators who are constitutionally charged with ensuring election integrity. For example, Congress often investigates topics that involve highly confidential and sensitive information and subpoenas confidential and sensitive information. Congress, of course, is obligated to maintain the confidentiality of such materials. Similarly, the Senators certainly are obligated to maintain confidentiality of the subpoenaed materials here.

[27] The County has also argued that the Subpoenas are overly broad and unduly burdensome. The Court's function, however, is to simply determine if the Subpoenas were valid and had a proper legislative purpose. The Senators have broad discretion in determining what information is needed. The Court is in no position to determine if specific requests are unduly burdensome. Disagreements about the breadth and burdensomeness of the Subpoenas should be worked out between the Senators and the County and their counsel.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-016840 02/25/2021

The County's Motion for Summary Judgment is denied. The Senators' Motion for Judgment on the Pleadings is granted, to the extent consistent with this Order. The Democrat Senators' Motion for Summary Judgment is granted in part and denied in part, consistent with this Order.

The Court expressly finds that there is no just reason for delay and expressly directs entry of this Order as final partial judgment under Rule 54(b) of the Arizona Rules of Civil Procedure.

/s/ HON. TIMOTHY THOMASON

HONORABLE TIMOTHY THOMASON
JUDICIAL OFFICER OF THE SUPERIOR COURT

Exhibit 6

Exhibit 6

Arizona Senate Republicans Mar 31 2 min read

Arizona Senate hires auditor to review 2020 election in Maricopa County

Wednesday, March 31, 2021
FOR IMMEDIATE RELEASE

Arizona Senate hires auditor to review 2020 election in Maricopa County

(Phoenix, State Capitol) --- Arizona Senate leadership today announced it has hired a team of independent auditors to complete a comprehensive, full forensic audit of the 2020 election in Maricopa County, including a hand recount of all ballots.

After months of interviewing various forensic auditors, the Arizona Senate has found a qualified team consisting of Wake Technology Services, Inc., CyFIR, LLC, Digital Discovery, and Cyber Ninjas, Inc. to conduct the audit.

The team will be led by Cyber Ninjas, a cyber security company with a focus on application security, working across financial services and government sectors.

CyFIR is a digital security and forensics company specializing in enterprise incident response, computer forensics and expert witness support to litigation. Notable past engagements include the discovery of the Office of Personnel Management Breach in 2015 and forensic support to the largest individual bank fraud in the history of the IMF. As specialists supporting the highest levels of government and private industry, they are extremely familiar with responding to nation-state cyber activity, including Advanced Persistent Threats (APT).

Members of the Wake Technology Services group have performed hand-count audits in Fulton County, PA and in New Mexico as part of the 2020 General Election cycle. In addition, team members have been involved in investigating election fraud issues, dating back to 1994. In that 1994 case, this team member worked closely with the FBI during the investigation. Wake Technology Services team members also include intelligence analysts and fraud investigators from a variety of industries.

The audit will validate every area of the voting process to ensure the integrity of the vote. The scope of work will include, but is not limited to, scanning all the ballots, a full manual recount, auditing the registration and votes cast, the vote counts, and the electronic voting system. At the conclusion of the audit, the auditor will issue a report detailing all findings discovered during the assessment.

Senate leadership expects this audit to be done in a transparent manner with the cooperation of Maricopa County. "Our people need to be assured that the Senate and Maricopa County can work together on this audit, to bring integrity to the election process," said Senate President Karen Fann. "As Board Chair Sellers and County Recorder Richer wrote in the Arizona Republic
'a democracy cannot survive if its people do not believe elections are free and fair.' They also acknowledge a significant number of voters want the additional assurance that a full forensic audit might bring. I look forward to continued cooperation."

Because it is an independent audit, leadership will not be directly involved, and members do not expect to comment on any of the processes of the audit until the report is issued in about 60 days.

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Exhibit 7

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Statement of Work

This Statement of Work (the "Statement of Work") is effective as of as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas Inc., a Florida Corporation, ("Contractor"), and Arizona State Senate ("Client"), and is deemed to be incorporated into that certain Master Service Agreement dated March 31, 2021 (the "Master Agreement") by and between Contractor and Client (collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement").

1 Why Cyber Ninjas

Cyber Ninjas is a cyber security company with a focus on application security and ethical hacking. We perform work across the financial services and government sectors. Our expertise allows us to both understand complex technology systems, as well as understand how a malicious attacker could potentially abuse those systems to meet his or her own agenda. This allows us to effectively enumerate the ways a system could be exploited, and with our partners to fully review if that scenario did in fact occur. This is very different from the compliance focused way that election systems are typically evaluated.

Both our company and our partners have extensive experience working specifically with Dominion Voting Systems. In addition, our subcontractors and partners are adept at digital forensic acquisition, and on implementing ballot hand-counting procedures. Two of our team members authored a hand-count ballot process that has been utilized in audits in two states; and has further been perfected for transparency and consistency. This combination of skills, abilities, and experience is what uniquely qualifies our team for the outlined work.

2 Our Team

Cyber Ninjas will serve as the central point-of-contact and organizer of all work conducted over the course of this agreement. However, there are different teams involved in each phase of the outlined work. Each of these teams have specialities and experience within the outlined areas of their coverage. This expertise is highlighted below.

2.1 Registration and Votes Cast Team

The Registration and Votes Cast Team has worked together with a number of individuals to perform non-partisan canvassing within Arizona related to the 2020 General election in order to statistically identify voter registrations that did not make sense, and then knock on doors to confirm if valid voters actually lived at the stated address. This brought forth a number of significant anomalies suggesting significant problems in the voter rolls.

They will be continuing this work as part of this effort to validate that individuals that show as having voted in the 2020 General election match those individuals who believe they have cast a vote.

2.2 Vote Count & Tally Team - Wake Technology Services

Members of the Wake Technology Services group have performed hand-count audits in Fulton County, PA and in New Mexico as part of the 2020 General Election cycle. In addition, team members have been involved in investigating election fraud issues, dating back to 1994. In that particular case in 1994, this team member worked closed with the FBI during the investigation.

As part of these audits in 2020, the Wake Technology Services team has developed an in-depth counting process that reduces opportunities for errors. This counting process has been expanded to make it more robust, and more transparent. As a result, they will be leading all ballot hand-counting processes.

2.3 Electronic Voting System Team – CyFIR, Digital Discovery & Cyber Ninjas, Analysts

Digital Forensic Acquisition will be performed either by CyFIR or Digital Forensics, and the analysis work will be performed by Cyber Ninjas, CyFIR and a number of additional analysts, the identities and qualifications of whom shall be made available to Client upon request.

CyFIR is a digital security and forensics company and a subcontractor on the contract for DHS's Hunt and Incident Response Team (HIRT). As specialists for DHS, they are familiar with responding to nation-state cyber activity including Advanced Persistent Threats (APT).

3 General Provisions

3.1 Introduction. The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.34 of the Master Agreement shall control such conflict.

3.2 Services. Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, and any Schedules attached hereto.

4 Scope & Services Description

This Statement of Work outlines the proposed methodology and scope for a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona. This audit will attempt to validate every area of the voting process to ensure the integrity of the vote. This includes auditing the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results. The final report will attempt to outline all the facts found throughout the investigation and attempt to represent those facts in an unbiased and non-partisan way. The final report will not include factual statements unless the statements can be readily substantiated with evidence, and such substantiation is cited, described, or appended to the report as appropriate.

The following sub-sections provides additional details of what will be conducted at each stage of the audit.

4.1 Registration and Votes Cast Phase

During the Registration and Votes Cast Phase, it will be validated that Maricopa County properly registers who voted during an election, and that this system properly prevents duplicate voting. This will be performed on a minimum of three precincts.

Proposed scope of work:

- Review of Arizona's SiteBook system for checking in and tracking voters;
- Complete audit of a minimum of 3 precincts, based on statistical anomalies and precinct size;
- Analysis of existing research and data validating the legitimacy of voter rolls; and/or
- Comparing results against known lists of invalid voters (e.g. deceased voters, non-citizens, etc.).

This phase may help detect:

- Problems that could result in voters being able to vote more than once;
- Voters that voted but do not show in the list of those who voted;
- Voters who likely did not vote but showed as having voted;
- Potential invalid voters who cast a vote in the 2020 general election; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Individual ballots that are either wrong and/or invalid.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results; and/or
- Redacted spreadsheet of a list of those who voted in the target precincts.

4.2 Vote Count & Tally Phase

During the Vote Count & Tally Phase, the counts and tallies for votes and the voting machines will be validated. This will include a hand-tally and examination of every paper ballot.

Proposed scope of work:

- Physically inspecting and hand-counting of ballots in Maricopa County;
- Counting of the total number of provisional ballots;
- Capture of video footage of the hand-counting of ballots; and/or
- Scanning of ballots in Maricopa County
    - NOTE: Provisional ballots which still have signatures attached to them will be counted to be sure they match the expected numbers but will not be scanned nor will the contents be visible in video.

This phase may help detect:

- Counts that do not match the expected results;
- Ballots that are visually different and possibly fraudulent; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Destroyed or otherwise missing ballots

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Unedited camera footage of the counting of every ballot, provided that, absent express judicial approval, any such footage cannot be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot is visible or discernible; and/or
- Ballot images of every scanned ballot, provided that, absent express judicial approval, any such images cannot be released or published to any third party.

4.3 Electronic Voting System Phase

During the Electronic Voting System Phase the results from the electronic voting machines will be validated to confirm they were not tampered with. This will be done on all systems related to SiteBook with Maricopa data, as well as all Election Management System related machines besides the Ballot Marking Devices (BMD)'s utilized for accessibility.

Proposed scope of work:

- Forensic Images of Arizona's SiteBook System including the database server, as well as any client machines associated with Maricopa County;
- Forensic images captured of the Election Management System main server, adjudication machines, and other systems related to the Election Management System;
- Forensic images of all Compact Flash, USB drives, and related media;
- Inspection to identify usage of cellular modems, Wi-Fi cards, or other technologies that could be utilized to connect systems to the internet or wider-area-network;
- Review of the Tabulator Paper Tally print-outs;
- Reviewing the exports from the EMS for "Audit File", "Audit Images" and "CVR";
- Reviewing ballot images captured by the tabulators
- Reviewing forensic images for possible altering of results or other issues; and/or
- Reviewing of tabulator and other logs.

This phase may help detect:

- Problems where the tabulator incorrectly tabulated results;
- Problems where the tabulator rejected results;
- Issues where results may have been manipulated in the software;
- Issues with the improper adjudication of ballots; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Ballot images and AuditMark images showing how the tabulator interpreted the ballot for counting, provided that, absent express judicial approval, such images cannot be released or published to any third party;
- CVR Report as generated from the software; and/or
- Log Files from the Tabulators (Redacted if Dominion Desires).

4.4 Reported Results Phase

During the Reported Results Phase, results from all phases are compared against those expected results and those results which were publicly totalled as the official results to identify any inconsistencies.

Proposed scope of work:

- Results from various phases will be reviewed and tallied; and
- Results will be compared against the official, certified results.

This phase may help detect:

- Issues where result tallies were not properly transmitted to the official results; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results

5 METHODOLOGY

The following section outlines the proposed methodology utilized in the various phases of the audit. When appropriate, these sections may reference more detailed procedures. Such procedures are considered proprietary and the intellectual property of Cyber Ninjas, our subcontractors or our Partners and can be made available for review but are not explicitly part of this agreement.

5.1 Registration and Votes Cast Phase

During the "Registration and Votes Cast Phase", Contractor may utilize precincts that have a high number of anomalies based on publicly available voting data and data from prior canvassing efforts to select a minimum of three precincts to conduct an audit of voting history related to all members of the voter rolls. A combination of phone calls and physical canvassing may be utilized to collect information of whether the individual voted in the election. No voters will be asked to identify any candidate(s) for whom s/he voted. This data will then be compared with data provided from Maricopa County Board of Elections.

5.2 Vote Count & Tally Phase

The goal of the "Vote Count & Tally Phase" is to attempt to, in a transparent and consistent manner, count all ballots to determine the accuracy of all federal races, and to identify any ballots that are suspicious and potentially counterfeit. Ballots will be counted in a manner designed to be accurate, all actions are transparent, and the chain of custody is maintained.

5.2.1 Counting Personnel

Non-partisan counters will be utilized that are drawn from a pool of primarily former law enforcement, veterans, and retired individuals. These individuals will undergo background checks and will be validated to not have worked for any political campaigns nor having worked for any vendor involved in the voting process. These individuals will also be prevented from bringing any objects other than clothing items worn on their persons into the counting area or taking any objects out of the counting area.

5.2.2 Accurate Counting

Counting will be done in groups with three individuals independently counting each batch of ballots, and an individual supervising the table. All counts will be marked on a sheet of paper as they are tallied. If, at the end of the hand count, the discrepancies between counting personnel aggregate to a number that is greater than the margin separating the first and second place candidates for any audited office, the ballots with discrepant total from the Contractor's counting personnel will be re-reviewed until the aggregate discrepancies within the hand count are less than the margin separating the first and second place candidates.

5.2.3 Transparent Counting

All activity in the counting facility will be videotaped 24 hours a day, from the time that Maricopa County delivers ballots and other materials until the time that the hand count is complete and all materials have been returned to the custody of Maricopa County. Such videotaping shall include 24-hour video monitoring of all entrances and exits, as well as activity at the counting tables.

5.2.4 Chain of Custody

All movement with ballots, cutting of seals, application of seals, and similar actions will be appropriately documented and logged, as well as captured under video to be sure the custody of ballots is maintained at all times. Access to the counting area will be restricted to duly authorized and credentialed individuals who have passed a comprehensive background check, with mandatory security searches and ingress/egress logs whenever entering or exiting the counting area.

5.3 Electronic Voting System Phase

The proposed scope of the "Electronic Voting System Phase" is to confirm that the system accurately tallied and reported the votes as they were entered into the system and that remote access was not possible. All systems related to the voting will be forensically imaged, these machines will be booted up and checked for wireless signal usage, and the images will be reviewed to determine the accuracy of results and any indication of tampering.

5.3.1 Forensic Images

A digital forensics capture team will forensically capture all data on in-scope systems, utilizing industry best practices. This will create a digital copy of every single machine, Compact Flash Card, and USB drive in scope without altering the contents of the machines. Chain-of-custody documentation will be created to preserve these images in a manner sufficient to be utilized in a court-of-law.

5.3.2 Physical Analysis

The Election Management System equipment will be turned on and scanned with a wireless spectrum analysis tool to determine if the device is emitting any signals consistent with a known wireless frequency such as cellular, Bluetooth, WiFi or similar. Devices that show signs of emitting signals will be flagged and documented, and when possible without damaging the equipment; they will be physically inspected to determine the source of any detected signals.

5.3.3 Digital Analysis

The forensic images will be reviewed to validate reported totals from the tabulators, results stored within the Election Management System (EMS) Results Tally and Reporting software. These will be compared against the tabulator print-outs; and the machine will be checked for physical or digital tampering and any known ways of remote access to the machines.

5.3.4 Opportunity for Observation

Before commencing the imaging or analysis steps described above (except for the Digital Analysis process), the Contractor will work with Maricopa County to provide at least five (5) days advance notice to any vendors of Maricopa County whose products will be the subject of imaging, inspection, or analysis. Such vendors will be permitted the opportunity to attend and observe the Contractor's imaging or inspection of the vendors' products. The vendor will not be allowed to be present for the analysis of the captured images. Such vendors are third party beneficiaries of this provision and will have standing to challenge and secure injunctive relief against any denial of their right to observe the inspection of their products.

5.4 Reported Results Phase

During the Reported Results phase, results from all phases are compared to find differences between tallies or other anomalies. These results are then compared against data at the Secretary of State and Maricopa Board of Elections layers. Any inconsistencies will be reported and highlighted.

6 RESPONSIBILITIES

The following section outlines the key responsibilities for the proper execution of the Agreement between the Contractor and the Client for all outlined work within the scope.

6.1 Registration and Votes Cast Phase

Contractor Responsibilities

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

Client Responsibilities

- Arrange for a database export of SiteBook to be provided to the Client which includes all fields normally found in a publicly requested copy of the voter rolls, in addition to any other non-sensitive fields related to the data such as modifications or other time-stamps, voter history, last user edited, IP address of edit; or anything similar.

6.2 Vote Count & Tally Phase

Contractor Responsibilities

- Provide the proper personnel and equipment to execute all aspects of the phase including scanning, counting, the setup of equipment for recording of the counting, and the supervision of activities.
- Ensure that all onsite personnel follow any in-place COVID requirements.

Client Responsibilities

- Provide security of the building during the course of the engagement. This includes having sufficient security to prevent access to the building 24/7 during the entire time, including ensuring that safe working conditions can exist during the entirety of the audit;
- Provide electricity and access to the facilities and tables necessary for up to 120 people at a time following any current COVID requirements. This is estimated to be about 7,200 square feet;
- Provide access to all paper ballots from the November 2020 General Election within Maricopa County. This includes early voting, election day ballots, provisional ballots, spoiled ballots, printed unused ballots and any other ballot categories that are part of the 2020 General Election. For all ballots this should include the original hard copies of the ballots that were electronically adjudicated ballots.
- Provide a mechanism to allow for the proper equipment to be brought into the facility where the counting will take place.

- Full chain of custody documentation for all ballots from the point they were cast to the point where we gain access to the ballots, to the extent such documentation is in Client's possession.
- Purchase orders for all purchased ballots, or ballot paper, including counts of each, as well as delivery receipts of the quantity of ballots received, to the extent such documentation is in Client's possession.
- Full counts from any ballots printed on demand, as well as the location for which they were printed, to the extent such documentation is in Client's possession.
- Provide wired access to internet to be able to stream the counting video capture, provided that any such video footage must be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot shall not be visible or discernible.

6.3 Electronic Voting System Phase

Contractor Responsibilities

- Provide the proper personnel to execute all aspects of the phase including the capture of forensic digital images of all systems related to the Election Management System; and
- Ensure that all onsite personnel during the forensic capture follow any in-place COVID requirements.

Client Responsibilities

- Provide physical access to the EMS Server, Adjudication machines, ImageCast Central, ImageCast Precinct, ImageCast Ballot Marking Devices, SiteBook, NOVUS systems, and any other Election Management System equipment or systems utilized in the November 2020 General Election to the forensic capture team;
- Provide access to Compact Flash Cards, USB Drives, and any other media utilized in the November 2020 General Election for the forensic capture team to image;
- Provide electricity and sufficient access to the machines in scope in order to provide a team of up to 15 forensic capture individuals to work and boot up the systems;
- Provide any needed credentials for decrypting media, decrypting computer hard drives, the EMS machines, or other systems that may be required for a proper forensic capture of the machines;
- Provide the output of the "Audit File," "Audit Images," and CVR exports from the Dominion machines which includes all ballot images and AuditMark images of every ballot processed by the machines; and
    - NOTE: The above may be able to be captured from the forensic images; but Maricopa County assistance could be needed in identifying where the AuditMark files are located.
- Provide any needed technical assistance allowing all the above to be successfully captured.

6.4 Reported Results Phase

Contractor Responsibilities

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

Client Responsibilities

- Provide the official results per precinct for all counts associated with the November 2020 General Election.

7 DELIVERABLE MATERIALS

The primary deliverable for the Election Audit will be a report detailing all findings discovered during the assessment. The parties agree that the report is provided AS IS, without any promise for any expected results. Additional artifacts as collected during the work will also be provided, as outlined within the scoping details.

This final report will include:

- An executive summary outlining the overall results of the audit from the various phases;
- A methodology section outlining in detail the methodology and techniques utilized to capture and validate the results;
- Tables, charts, and other data representing the findings of the data;
- Appendices or attached files demonstrating all evidence utilized to come to the outlined conclusions (if applicable); and
- Recommendations on how to prevent any detected weaknesses from being a problem in future elections (if applicable).

In addition to the report, various anticipated artifacts for public consumption will be generated over the course of this work, as outlined under the "Scope of Work." Client will determine in its sole and unlimited discretion whether, when, and how the Contractor should release those resources to the public. This will include all videos, ballot images, and other data.

8 COMPLETION CRITERIA

Contractor shall have fulfilled its obligations when any one of the following first occurs:

- Contractor accomplishes the Contractor activities described within this Statement of Work, including delivery to Client of the materials listed in the Section entitled "Deliverable Materials," and Client accepts such activities and materials without unreasonable objections; or
- If Client does not object or does not respond to Contractor within seven (7) business days from the date that the deliverables have been delivered by Contractor to Client, such failure to respond shall be deemed acceptance by Client.

9 TERM / PROJECT SCHEDULE / LOCATION

The following table outlines the expected duration of the various proposed work outlined within the Agreement. Work will commence on a date mutually agreeable to both Contractor and Client according to a schedule which is outlined via email.

Each phase outlined below can be conducted simultaneously, with the exception of the Reported Results phase which must be completed at the end. Roughly an additional week of time at the conclusion of all phases is needed to complete and finalize reporting. Lead times before a phase can start as well as their duration can be found below. Faster lead times can potentially be accommodated on a case-by-case basis.

Service Name	Required Notice / Lead Time	Est. Duration in Days	Additional Details / Location
Registration and Votes Cast Phase	1 Week	20	This work will be done remotely.
Vote Count & Tally Phase	2-3 Weeks	20*	The entire time will be onsite at the location designated by the Client. Access will be required 4 days before the start to setup the space. *Race recounts as outlined in 5.2.2 may require the timeline to be extended beyond the listed days.
Electronic Voting System Phase	1-2 Weeks	35	It is estimated that 15 will be onsite. The remainder of the time will be remote. Review of location setup is requested the week prior to ensure proper workspace.
Reported Results Phase	Completion of Other Phases	5	This phase will be completed offsite. Final Report Delivered 1 Week After Completion

10 Fees / Terms of Payment

The following table outlines the costs associated with the proposed work. A third of the fees will be due at the execution of the contract. The remaining balance will be payable within 30 days from the completion of the audit.

Selected	Name	Price Each	Total
1	Maricopa County – Full Audit	$150,000	$150,000.00
		Total:	$150,000.00

11 Signature & Acknowledgement

THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client: Arizona State Senate

DocuSigned by:

By: Karen Fann, President
748DFF61BCF340B...

Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By: 

Douglas Logan

Title: CEO & Principal Consultant

Exhibit 8

Exhibit 8

Cyber Ninjas, Inc. Master Services Agreement

This Master Services Agreement (the "Master Agreement") is entered into as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"). Contractor and Client are referred to herein individually as a "Party" and collectively as the "Parties".

WHEREAS, Client desires to retain Contractor, and Contractor desires to provide to Client the consulting and/or professional services described herein; and

WHEREAS, Client and Contractor desire to establish the terms and conditions that will regulate all relationships between Client and Contractor.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1 SCOPE OF AGREEMENT

This Master Agreement establishes a contractual framework for Contractor's consulting and/or professional services as described herein. The Parties agree to the terms and conditions set forth in this Master Agreement and in any Statement of Work executed by the Parties referencing this Master Agreement. Each Statement of Work is incorporated into this Master Agreement, and the applicable portions of this Master Agreement are incorporated into each Statement of Work. The Statement(s) of Work and this Master Agreement are herein collectively referred to as the "Agreement."

2 STRUCTURE OF AGREEMENT.

2.1 Components of the Agreement. The Agreement consists of:

(a) The provisions set forth in this Master Agreement and the Exhibits referenced herein;
(b) The Statement(s) of Work attached hereto, and any Schedules referenced therein; and
(c) Any additional Statements of Work executed by the Parties pursuant to this Agreement, including the Schedules referenced in each such Statement of Work.

2.2 Statement(s) of Work. The Services (as defined in Article 4) that Contractor will provide for Client will be described in and be the subject of (i) one or more Statements of Work executed by the Parties pursuant to this Agreement, and (ii) this Agreement. Each Statement of Work shall be substantially in the form of, and shall include the set of Schedules described in, "Exhibit 1-Form of Statement of Work", with such additions, deletions and modifications as the Parties may agree.

2.3 Deviations from Agreement, Priority. In the event of a conflict, the terms of the Statements of Work shall be governed by the terms of this Master Agreement, unless an applicable Statement of Work expressly and specifically notes the deviations from the terms of this Master Agreement for the purposes of such Statement of Work.

3 TERM AND TERMINATION.

3.1 Term of Master Agreement. The Term of the Master Agreement will begin as of the Effective Date and shall continue until terminated as provided in Section 3.3 (the "Term").

3.2 Term of Statements of Work. Each Statement of Work will have its own term and will continue for the period identified therein unless terminated earlier in accordance with Section 3.4 (the "Service Term"). In the event that the Service Term on any applicable Statement of Work expires and Services continue to be provided by Contractor and received and used by Client, the terms and conditions of the Master Agreement shall apply until the Services have been terminated.

3.3 Termination of Master Agreement. Either Party may terminate this Agreement immediately upon written notice to the other Party if there is no Statement of Work in effect.

3.4 Termination of Statement of Work by Client. A Statement of Work may be terminated by Client, for any reason other than Contractor's breach, upon fourteen (14) days prior written notice to Contractor. In such event, (i) Contractor shall cease its activities under the terminated Statement of Work on the effective date of termination; and (ii) Client agrees to pay to Contractor all amounts for any amounts due for Services performed through the effective termination date. (iii) In the case of fixed price work whereby the effective date of termination is after Contractor has or will commence the Services, Client agrees to pay Contractor an amount that will be determined on a pro-rata basis computed by dividing the total fee for the Service by the number of days required for completion of the Services and multiplying the result by the number of working days completed at the effective date of termination. (iv) Client agrees to pay to Contractor all costs in full associated with equipment or other non-Service related costs that were incurred before the effective termination date.

3.5 Termination for Breach. Either party may terminate the Agreement in the event that the other party materially defaults in performing any obligation under this Agreement (including any Statement of Work) and such default continues un-remedied for a period of seven (7) days following written notice of default. If Client terminates the Agreement and/or any Statement of Work as a result of Contractor's breach, then to the extent that Client has prepaid any fees for Services, Contractor shall refund to Client any prepaid fees on a pro-rata basis to the extent such fees are attributable to the period after such termination date.

3.6 Effect of Termination. Upon termination or expiration of this Agreement and/or a Statement of Work: (i) the parties will work together to establish an orderly phase-out of the Services; (ii) Client will pay Contractor for any amounts due under the Agreement, including all Services rendered under the terminated Statement of Work up to the effective date of the termination; and (iii) each Party will promptly cease all use of and destroy or return, as directed by the other Party, all Confidential Information of the other Party except for all audit records (including but not limited to work papers, videotapes, images, tally sheets, draft reports and other documents generated during the audit) which will be held in escrow in a safe approved by the GSA for TS/SCI material for a period of three years and available to the Contractor and Client solely for purposes of addressing any claims, actions or allegations regarding the audit (the "Escrow"), provided that, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party claims arising out of or related to the subject matter of this Agreement.

4 SERVICES.

4.1 Definitions.

4.1.1 "Services" shall mean consulting, training or any other professional services to be provided by Contractor to Client, as more particularly described in a Statement of Work, including any Work Product provided in connection therewith.

4.1.2 "Work Product" shall mean any deliverables which are created, developed or provided by Contractor in connection with the Services pursuant to a Statement of Work, excluding any Contractor's Intellectual Property.

4.1.3 "Contractor's Intellectual Property" shall mean all right, title and interest in and to the Services, including, but not limited to, all inventions, skills, know-how, expertise, ideas, methods, processes, notations, documentation, strategies, policies, reports (with the exception of the data within the reports, as such data is the Client's proprietary data) and computer programs including any source code or object code, (and any enhancements and modifications made thereto), developed by Contractor in connection with the performance of the Services hereunder and of general applicability across Contractor's customer base. For the avoidance of doubt, the term shall not include (1) the reports prepared by Contractor for Client (other than any standard text used by Contractor in such reports) pursuant to this Agreement or any Statement of Work, which shall be the exclusive property of Client and shall be considered "works made for hire" within the meaning of the Copyright Act of 1976, as amended; and (2) any data or process discovered on or obtained from the Dominion devices that will be the subject of the forensic review.

4.2 Obligation to Provide Services. Starting on the Commencement Date of each Statement of Work and continuing during each Statement of Work Term, Contractor shall provide the Services described in each such Statement of Work to, and perform the Services for, Client in accordance with the applicable Statement of Work and the Agreement.

4.3 Contractor's Performance. Contractor will perform the Services set forth in each Statement of Work using personnel that have the necessary knowledge, training, skills, experience, qualifications and resources to provide and perform the Services in accordance with the Agreement. Contractor shall render such Services in a prompt, professional, diligent, and workmanlike manner, consistent with industry standards applicable to the performance of such Services.

4.4 Client's Obligations. Client acknowledges that Contractor's performance and delivery of the Services are contingent upon: (i) Client providing full access to such information as may be reasonably necessary for Contractor to complete the Services as described in the Statement(s) of Work including access to its personnel, facilities, equipment, hardware, network and information, as applicable; and (ii) Client promptly obtaining and providing to Contractor any required licenses, approvals or consents necessary for Contractor's performance of the Services. Contractor will be excused from its failure to perform its obligations under this Agreement to the extent such failure is caused by Client's delay in performing or failure to perform its responsibilities under this Agreement and/or any Statement of Work.

4.5 Location of Services. Contractor shall provide the Services at the site designated in the applicable Statement of Work.

4.6 Status Reports. Contractor shall keep Client informed of the status of the Services and provide Client with such status reports and other reports and information regarding the Services as reasonably requested by Client.

4.7 New Services. During the Term, Client may request that Contractor provide New Services for Client. New Services may be activities that are performed on a continuous basis for the remainder of the Term or activities that are performed on a project basis. Any agreement of the Parties with respect to New Services will be in writing and shall also become a "Service" and be reflected in an additional Statement of Work hereto or in an amendment to an existing Statement of Work hereunder.

4.8 Change of Services. "Change of Services" means any change to the Services as set forth in the Statement of Work that (i) would modify or alter the delivery of the Services or the composition of the Services, (ii) would alter the cost to Client for the Services, or (iii) is agreed by Client and Contractor in writing to be a Change. From time to time during the Term, Client or Contractor may propose Changes to the Services.

The following process is required to effectuate a Change of Services by either Party:

4.9 A Project Change Request ("PCR") will be the vehicle for communicating change. The PCR must describe the change, the rationale for the change, and the effect the change will have on the Services.

4.10 The designated project manager of the requesting Party will review any proposed change prior to submitting the PCR to the other Party.

4.11 Contractor and Client will mutually agree upon any additional fees for such investigation, if any. If the investigation is authorized, the Client project manager will sign the PCR, which will constitute approval for the investigation charges. Contractor will invoice Client for any such charges. The investigation will determine the effect that the implementation of the PCR will have on Statement of Work terms and conditions.

4.12 Upon completion of the investigation, both parties will review the impact of the proposed change and, if mutually agreed, a written addendum to the Statement of Work must be signed by both Parties to authorize implementation of the investigated changes that specifically identifies the portion of the Statement of Work that is the subject of the modification or amendment and the changed or new provision(s) to the Statement of Work.

4.13 End Client Requirements. If Contractor is providing Services for Client that is intended to be for the benefit of a customer of Client ("End Client"), the End Client should be identified in an applicable Statement of Work. The Parties shall mutually agree upon any additional terms related to such End Client which terms shall be set forth in a Schedule to the applicable Statement of Work.

4.14 Client Reports; No Reliance by Third Parties. Contractor will provide those reports identified in the applicable Statement of Work ("Client Report"). The Client Report is prepared uniquely and exclusively for Client's sole use. The provision by Client of any Client Report or any information therein to any third party shall not entitle such third party to rely on the Client Report or the contents thereof in any manner or for any purpose whatsoever, and Contractor specifically disclaims all liability for any damages whatsoever (whether foreseen or unforeseen, direct, indirect, consequential, incidental, special, exemplary or punitive) to such third party arising from or related to reliance by such third party on any Client Report or any contents thereof.

4.15 Acceptance Testing. Unless otherwise specified in an Statement of Work, Client shall have a period of fourteen (14) days to perform Acceptance Testing on each deliverable provided by Contractor to determine whether it conforms to the Specifications and any other Acceptance criteria (collectively as the "Acceptance Criteria") stated in the Statement of Work. If Client rejects the deliverable as non-conforming, unless otherwise agreed to by the parties, Contractor shall, at its expense, within fourteen (14) days from the date of notice of rejection, correct the deliverable to cause it to conform to the Acceptance Criteria and resubmit the deliverable for further Acceptance testing in accordance with the process specified in this Section 4.15. In the event that the deliverable does not conform to the Acceptance Criteria after being resubmitted a second time, Client, may at its option, (i) provide Contractor with another fourteen (14) days to correct and resubmit the deliverable or (ii) immediately terminate the Statement of Work and obtain a refund of any amounts paid for the non-conforming Services pursuant to the applicable Statement of Work.

5 FEES AND PAYMENT TERMS.

5.1 Fees. Client agrees to pay to Contractor the fees for the Services in the amount as specified in the applicable Statement of Work.

5.2 Invoices. Contractor shall render, by means of an electronic file, an invoice or invoices in a form containing reasonable detail of the fees incurred in each month. Upon completion of the Services as provided in the Statement of Work, Contractor shall provide a final invoice to Client. Contractor shall identify all taxes and material costs incurred for the month in each such invoice. All invoices shall be stated in US dollars, unless otherwise specified in the Statement of Work.

5.3 Payment Terms. All invoices are due upon receipt. Payment not received within 30 days of the date of the invoice is past due. Contractor reserves the right to suspend any existing or future Services when invoice becomes thirty (30) days past due. Client shall pay 1.5% per month non-prorated interest on any outstanding balances in excess of thirty days past due. If it becomes necessary to collect past due payments, Client shall be responsible for reasonable attorney fees required in order to collect upon the past-due invoice(s).

5.4 Taxes. The applicable Statement of Work shall prescribe the parties' respective responsibilities with respect to the invoicing and payment of state sales, use, gross receipts, or similar taxes, if any, applicable to the Services and deliverables to be provided by Contractor to Client. Client shall have no responsibility with respect to federal, state, or local laws arising out of Contractor's performance of any Statement of Work, including any interest or penalties.

6 PERSONNEL.

6.1 Designated Personnel. Contractor shall assign employees that are critical to the provision and delivery of the Services provided (referred to herein as "Designated Personnel") and except as provided in this Article 6, shall not be removed or replaced at any time during the performance of Services in a Statement of Work, except with Client's prior written consent.

6.2 Replacement of Designated Personnel by Contractor. Notwithstanding the foregoing, if any Designated Personnel becomes unavailable for reasons beyond Contractor's reasonable control or Designated Personnel's professional relationship with Contractor terminates for any reason,

Contractor may replace the Designated Personnel with a similarly experienced and skilled employee. In such event, Contractor shall provide immediate notification to Client of a change in a Designated Personnel's status.

6.3 Replacement of Designated Personnel by Client. In the event that Client is dissatisfied for any reason with any Designated Personnel, Client may request that Contractor replace the Designated Personnel by providing written notice to Contractor. Contractor shall ensure that all Designated Personnel are bound by the terms and conditions of this Agreement applicable to their performance of the Services and shall be responsible for their compliance therewith.

6.4 Background Screening. Contractor shall have performed the background screening described in Exhibit 2 (Background Screening Measures) on all of its agents and personnel who will have access to Client Confidential Information prior to assigning such individuals or entities to provide Services under this Agreement.

7 PROPRIETARY RIGHTS.

7.1 Client's Proprietary Rights. Client represents and warrants that it has the necessary rights, power and authority to transmit Client Data (as defined below) to Contractor under this Agreement and that Client has and shall continue to fulfil all obligations with respect to individuals as required to permit Contractor to carry out the terms hereof, including with respect to all applicable laws, regulations and other constraints applicable to Client Data. As between Client and Contractor, Client or a political subdivision or government entity in the State of Arizona owns all right, title and interest in and to (i) any data provided by Client (and/or the End Client, if applicable) to Contractor; (ii) any of Client's (and/or the End Client, if applicable) data accessed or used by Contractor or transmitted by Client to Contractor in connection with Contractor's provision of the Services (Client's data and Client's End User's data, collectively, the "Client Data"); (iii) all intellectual property of Client ("Client's Intellectual Property") that may be made available to Contractor in the course of providing Services under this Agreement.

7.2 License to Contractor. This Agreement does not transfer or convey to Contractor any right, title or interest in or to the Client Data or any associated Client's Intellectual Property. Client grants to Contractor a limited, non-exclusive, worldwide, revocable license to use and otherwise process the Client Data and any associated Client's Intellectual Property to perform the Services during the Term hereof. Contractor's permitted license to use the Client Data and Client's Intellectual Property is subject to the confidentiality obligations and requirements for as long as Contractor has possession of such Client Data and Intellectual Property.

7.3 Contractor's Proprietary Rights. As between Client and Contractor, Contractor owns all right, title and interest in and to the Services, including, Contractor's Intellectual Property. Except to the extent specifically provided in the applicable Statement of Work, this Agreement does not transfer or convey to Client or any third party any right, title or interest in or to the Services or any associated Contractor's Intellectual Property rights, but only grants to Client a limited, non-exclusive right and license to use as granted in accordance with the Agreement. Contractor shall retain all proprietary rights to Contractor's Intellectual Property and Client will take no actions which adversely affect Contractor's Intellectual Property rights. **For the avoidance of doubt and notwithstanding any other provision in this Section or elsewhere in the Agreement, all documents, information, materials, devices, media, and data relating to or arising out of the administration of the November 3, 2020 general election in Arizona, including but not limited to voted ballots, images of voted ballots, and any other materials prepared by, provided by, or originating from the Client or any political subdivision or governmental entity in the State of Arizona, are the sole and exclusive property of the Client or of the applicable political subdivision or governmental entity, and Contractor shall have no right or interest whatsoever in such documents, information, materials, or data.**

8 NONDISCLOSURE.

8.1 Confidential Information. "Confidential Information" refers to any information one party to the Agreement discloses (the "Disclosing Party") to the other (the "Receiving Party"). The confidential, proprietary or trade secret information in the context of the Agreement may include, but is not limited to, business information and concepts, marketing information and concepts, financial statements and other financial information, customer information and records, corporate information and records, sales and operational information and records, and certain other information, papers, documents, studies and/or other materials, technical information, and certain other information, papers, documents, digital files, studies, compilations, forecasts, strategic and marketing plans, budgets, specifications, research information, software, source code, discoveries, ideas, know-how, designs, drawings, flow charts, data, computer programs, market data; digital information, digital media, and any and all electronic data, information, and processes stored on Maricopa County servers, portable storage media and/or cloud storage (remote servers) technologies, and/or other materials, both written and oral. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the Receiving Party's possession at the time of disclosure; (ii) is independently developed by the Receiving Party without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the Receiving Party's improper action or inaction; or (iv) is approved for release in writing by the Disclosing Party.

8.2 Nondisclosure Obligations. The Receiving Party will not use Confidential Information for any purpose other than to facilitate performance of Services pursuant to the Agreement and any applicable Statement of Work. The Receiving Party: (i) will not disclose Confidential Information to any employee or contractor or other agent of the Receiving Party unless such person needs access in order to facilitate the Services and executes a nondisclosure agreement with the Receiving Party, substantially in the form provided in Exhibit 3; and (ii) will not disclose Confidential Information to any other third party without the Disclosing Party's prior written consent. Without limiting the generality of the foregoing, the Receiving Party will protect Confidential Information with the same degree of care it uses to protect its own Confidential Information of similar nature and importance, but with no less than reasonable care. The Receiving Party will promptly notify the Disclosing Party of any misuse or misappropriation of Confidential Information that comes to the Receiving Party's attention. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority; however, the Receiving Party will give the Disclosing Party prompt notice of any such legal or governmental demand and will reasonably cooperate with the Disclosing Party in any effort to seek a protective order or otherwise to contest such required disclosure, at the Disclosing Party's expense. For the avoidance of doubt, this provision prohibits the Contractor and its agents from providing data, information, reports, or drafts to anyone without the prior written approval of the Client. The Client will determine in its sole and unlimited discretion whether to grant such approval.

8.3 Injunction. The Receiving Party agrees that breach of this Article 8 might cause the Disclosing Party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, the Disclosing Party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.

8.4 Return. Upon the Disclosing Party's written request and after the termination of the Escrow, the Receiving Party will return all copies of Confidential Information to the Disclosing Party or upon authorization of Disclosing Party, certify in writing the destruction thereof.

8.5 Third Party Hack. Contractor shall not be liable for any breach of this Section 8 resulting from a hack or intrusion by a third party into Client's network or information technology systems unless the hack or intrusion was through endpoints or devices monitored by Contractor and was caused directly by Contractor' gross negligence or wilful misconduct. For avoidance of doubt, Contractor shall not be liable for any breach of this Section 8 resulting from a third-party hack or intrusion into any part of Client's network, or any environment, software, hardware or operational technology, that Contractor is not obligated to monitor pursuant to a Statement of Work executed under this Agreement.

8.6 Retained Custody of Ballots. The Client shall retain continuous and uninterrupted custody of the ballots being tallied. For the avoidance of doubt, this provision requires Contractor and each of its agents to leave all ballots at the counting facility at the conclusion of every shift.

8.7 Survival. This Section 8 shall survive for three (3) years following any termination or expiration of this Agreement; provided that with respect to any Confidential Information remaining in the Receiving Party's possession following any termination or expiration of this Agreement, the obligations under this Section 8 shall survive for as long as such Confidential Information remains in such party's possession.

9 NO SOLICITATION.

Contractor and Client agree that neither party will, at any time within twelve (24) months after the termination of the Agreement, solicit, attempt to solicit or employ any of the personnel who were employed or otherwise engaged by the other party at any time during which the Agreement was in effect, except with the express written permission of the other party. The Parties agree that the damages for any breach of this Article 9 will be substantial, but difficult to ascertain. Accordingly, the party that breaches this Article 9, shall pay to other party an amount equal to two times (2x) the annual compensation of the employee solicited or hired, which amount shall be paid as liquidated damages, as a good faith effort to estimate the fair, reasonable and actual damages to the aggrieved party and not as a penalty. Nothing in the Agreement shall be construed to prohibit either party from pursuing any other available rights or remedies it may have against the respective employee(s).

10 DATA PROTECTION

10.1 Applicability. This Article 10 shall apply when Contractor is providing Services to Client which involves the processing of Personal Data which is subject to Privacy Laws.

10.2 Definitions. For purposes of this Article 10:

(a) "Personal Data" means any information relating to an identified or identifiable natural person which is processed by Contractor, acting as a processor on behalf of the Client, in connection with the provision of the Services and which is subject to Privacy Laws.

(b) "Privacy Laws" means any United States and/or European Union data protection and/or privacy related laws, statutes, directives, judicial orders, or regulations (and any amendments or successors thereto) to which a party to the Agreement is subject and which are applicable to the Services.

10.3 Contractor's Obligations. Contractor will maintain industry-standard administrative, physical, and technical safeguards for protection of the security, confidentiality, and integrity of Personal Data. Contractor shall process Personal Data only in accordance with Client's reasonable and lawful instructions (unless otherwise required to do so by applicable law). Client hereby instructs Contractor to process any Personal Data to provide the Services and comply with Contractor's rights and obligations under the Agreement and any applicable Statement of Work. The Agreement and any applicable Statement of Work comprise Client's complete instructions to Contractor regarding the processing of Personal Data. Any additional or alternate instructions must be agreed between the parties in writing, including the costs (if any) associated with complying with such instructions. Contractor is not responsible for determining if Client's instructions are compliant with applicable law, however, if Contractor is of the opinion that a Client instruction infringes applicable Privacy Laws, Contractor shall notify Client as soon as reasonably practicable and shall not be required to comply with such infringing instruction.

10.4 Disclosures. Contractor may only disclose the Personal Data to third parties for the purpose of: (i) complying with Client's reasonable and lawful instructions; (ii) as required in connection with the Services and as permitted by the Agreement and any applicable Statement of Work; and/or (ii) as required to comply with Privacy Laws, or an order of any court, tribunal, regulator or government agency with competent jurisdiction to which Contractor is subject, provided that Contractor will (to the extent permitted by law) inform the Client in advance of any disclosure of Personal Data and will reasonably co-operate with Client to limit the scope of such disclosure to what is legally required.

10.5 Demonstrating Compliance. Contractor shall, upon reasonable prior written request from Client (such request not to be made more frequently than once in any twelve-month period), provide to Client such information as may be reasonably necessary to demonstrate Contractor's compliance with its obligations under this Agreement.

10.6 Liability and Costs. Contractor shall not be liable for any claim brought by Client or any third party arising from any action or omission by Contractor or Contractor's agents to the extent such action or omission was directed by Client or expressly and affirmatively approved or ratified by Client.

11 DATA RETENTION

11.1 Client's Intellectual Property and Confidential Information. All Client Intellectual Property and Client Confidential Information (to include Client Intellectual Property or Client Confidential Information that is contained or embedded within other documents, files, materials, data, or media) shall be removed from all Contractor controlled systems as soon as it is no longer required to perform Services under this Agreement and held in the Escrow. In addition, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party's claims arising out of or related to the subject matter of this Agreement.

12 REPRESENTATIONS AND WARRANTIES.

12.1 Representations and Warranties of Client. Client represents and warrants to Contractor as follows:

(a) Organization; Power. As of the Effective Date, Client (i) is a government entity in the State of Arizona, duly organized, validly existing and in good standing under the Laws of the State of Arizona, and (ii) has full corporate power to conduct its business as currently conducted and to enter into the Agreement.

(b) Authorized Agreement. This Agreement has been, and each Statement of Work will be, duly authorized, executed and delivered by Client and constitutes or will constitute, as applicable, a valid and binding agreement of Client, enforceable against Client in accordance with its terms.

(c) No Default. Neither the execution and delivery of this Agreement or any Statement of Work by Client, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order, or law to which Client is a Party or which is otherwise applicable to Client.

12.2 Representations and Warranties of Contractor. Contractor represents and warrants to Client as follows:

(a) Organization; Power. As of the Effective Date, Contractor (i) is a corporation, duly organized, validly existing and in good standing under the Laws of the State of Florida, and (ii) has full corporate power to own, lease, license and operate its assets and to conduct its business as currently conducted and to enter into the Agreement.

(b) Authorized Agreement. This Agreement has been, and each Statement of Work will be duly authorized, executed and delivered by Contractor and constitutes or will constitute, as applicable, a valid and binding agreement of Contractor, enforceable against Contractor in accordance with its terms.

(c) No Default. Neither the execution and delivery of this Agreement or any Statement of Work by Contractor, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order or law to which Contractor is a Party or that is otherwise applicable to Contractor.

12.3 Additional Warranties of Contractor. Contractor warrants that:

(a) The Services shall conform to the terms of the Agreement (including the Statement of Work);

(b) Contractor will comply with all applicable laws, rules and regulations in delivering the Services (including without limitation any privacy, data protection and computer laws);

(c) The Services shall be performed in a diligent and professional manner consistent with industry best standards;

(d) Contractor and its agents possess the necessary qualifications, expertise and skills to perform the Services;

(e) Contractor and all individuals handling Client Confidential Information are either U.S. citizens, or U.S. entities that are owned, controlled, and funded entirely by U.S. citizens.

(f) Services requiring code review will be sufficiently detailed, comprehensive and sophisticated so as to detect security vulnerabilities in software that should reasonably be discovered given the state of software security at the time the Services are provided;

(g) Contractor shall ensure that the Services (including any deliverables) do not contain, introduce or cause any program routine, device, or other undisclosed feature, including, without limitation, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, trojan horse, or trap door, that may delete, disable, deactivate, interfere with or otherwise harm software, data, hardware, equipment or systems, or that is intended to provide access to or produce modifications not authorized by Client or any known and exploitable material security vulnerabilities to affect Client's systems (collectively, "Disabling Procedures");

(h) If, as a result of Contractor's services, a Disabling Procedure is discovered by Contractor, Contractor will promptly notify Client and Contractor shall use commercially reasonable efforts and diligently work to eliminate the effects of the Disabling Procedure at Contractor's expense. Contractor shall not modify or otherwise take corrective action with respect to the Client's systems except at Client's request. In all cases, Contractor shall take immediate action to eliminate and remediate the proliferation of the Disabling Procedure and its effects on the Services, the client's systems, and operating environments. At Client's request, Contractor will report to Client the nature and status of the Disabling Procedure elimination and remediation efforts; and

(i) Contractor shall correct any breach of the above warranties, at its expense, within fourteen (14) days of its receipt of such notice. In the event that Contractor fails to correct the breach within the specified cure period, in addition to any other rights or remedies that may be available to Client at law or in equity, Contractor shall refund all amounts paid by Client pursuant to the applicable Statement of Work for the affected Services.

13 LIMITATION OF LIABILITY.

IN NO EVENT SHALL CONTRACTOR BE HELD LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL CONSEQUENTIAL, OR PUNITIVE DAMAGES ARISING OUT OF SERVICES PROVIDED HEREUNDER INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, BUSINESS INTERRUPTION, LOSS OF USE OF EQUIPMENT, LOSS OF GOODWILL, LOSS OF DATA, LOSS OF BUSINESS OPPORTUNITY, WHETHER CAUSED BY TORT (INCLUDING NEGLIGENCE), COSTS OF SUBSTITUTE EQUIPMENT, OR OTHER COSTS. If applicable law limits the application of the provisions of this Article 13, Contractor's liability will be limited to the least extent permissible.

EXCEPT FOR EACH PARTY'S INDEMNIFICATION OBLIGATIONS UNDER ARTICLE 15 AND NON-SOLICITATION OBLIGATIONS UNDER ARTICLE 9, LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE TOTAL OF THE AMOUNTS PAID AND PAYABLE TO CONTRACTOR UNDER THE STATEMENT OF WORK(S) TO WHICH THE CLAIM RELATES. THE ABOVE LIMITATIONS WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY.

14 DISCLAIMER OF WARRANTIES.

EXCEPT AS EXPRESSLY SET FORTH HEREIN, CONTRACTOR MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO ANY OF THE SERVICES PROVIDED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, OR SUITABILITY OR RESULTS TO BE DERIVED FROM THE USE OF ANY SERVICE, SOFTWARE, HARDWARE, DELIVERABLES, WORK PRODUCT OR OTHER MATERIALS PROVIDED UNDER THIS AGREEMENT. CLIENT UNDERSTANDS THAT CONTRACTOR'S SERVICES DO NOT CONSTITUTE ANY GUARANTEE OR ASSURANCE THAT THE SECURITY OF CLIENT'S SYSTEMS, NETWORKS AND ASSETS CANNOT BE BREACHED OR ARE NOT AT RISK. CONTRACTOR MAKES NO WARRANTY THAT EACH AND EVERY VULNERABILITY WILL BE DISCOVERED AS PART OF THE SERVICES AND CONTRACTOR SHALL NOT BE LIABLE TO CLIENT SHOULD VULNERABILITIES LATER BE DISCOVERED.

15 INDEMNIFICATION.

"Indemnified Parties" shall mean, (i) in the case of Contractor, Contractor, and each of Contractor's respective owners, directors, officers, employees, contractors and agents; and (ii) in the case of Client, Client, and each of Client's respective members, officers, employees, contractors and agents.

15.1 Mutual General Indemnity. Each party agrees to indemnify and hold harmless the other party from (i) any third-party claim or action for personal bodily injuries, including death, or tangible property damage resulting from the indemnifying party's gross negligence or wilful misconduct; and (ii) breach of this Agreement or the applicable Statement of Work by the indemnifying Party, its respective owners, directors, officers, employees, agents, or contractors.

15.2 Contractor Indemnity. Contractor shall defend, indemnify and hold harmless the Client Indemnified Parties from any damages, costs and liabilities, expenses (including reasonable and actual attorney's fees) ("Damages") actually incurred or finally adjudicated as to any third-party claim or action alleging that the Services performed or provided by Contractor and delivered pursuant to the Agreement infringe or misappropriate any third party's patent, copyright, trade secret, or other intellectual property rights enforceable in the country(ies) in which the Services performed or provided by Contractor for Client or third-party claims resulting from Contractor's gross negligence or wilful misconduct ("Indemnified Claims"). If an Indemnified Claim under this Section 15.2 occurs, or if Contractor determines that an Indemnified Claim is likely to occur, Contractor shall, at its option: (i) obtain a right for Client to continue using such Services; (ii) modify such Services to make them non-infringing; or (iii) replace such Services with a non-infringing equivalent. If (i), (ii) or (iii) above are not reasonably available, either party may, at its option, terminate the Agreement will refund any pre-paid fees on a pro-rata basis for the allegedly infringing Services that have not been performed or provided. Notwithstanding the foregoing, Contractor shall have no obligation under this Section 15.2 for any claim resulting or arising from: (i) modifications made to the Services that were not performed or performed or provided by or on behalf of Contractor; or (ii) the combination, operation or use by Client, or anyone acting on Client's behalf, of the Services in connection with a third-party product or service (the combination of which causes the infringement).

15.3 Client Indemnity. Client shall defend, indemnify and hold harmless the Contractor Indemnified Parties from any Damages actually incurred or finally adjudicated as to any third-party claim, action or allegation: (i) that the Client's data infringes a copyright or misappropriates any trade secrets enforceable in the country(ies) where the Client's data is accessed, provided to or received by Contractor or was improperly provided to Contractor in violation of Client's privacy policies or applicable laws (or regulations promulgated thereunder); (ii) asserting that any action undertaken by Contractor in connection with Contractor' performance under this Agreement violates law or the rights of a third party under any theory of law, including without limitation claims or allegations related to the analysis of any third party's systems or processes or to the decryption, analysis of, collection or transfer of data to Contractor; (iii) the use by Client or any of the Client Indemnified Parties of Contractor's reports and deliverables under this agreement; and (iv) arising from a third party's reliance on a Client Report, any information therein or any other results or output of the Services. Notwithstanding the foregoing or any other provision of this Agreement, Client shall have (i) no indemnification obligations other than defense costs in connection with any third-party claim, action or allegation arising out of or relating to Contractor

Indemnified Parties' statements or communications to the media or other third-parties; and (ii) no indemnification obligations in connection with any third-party claim, action or allegation arising out of or relating to Contractor Indemnified Parties' material breach of this Agreement.

15.4 Indemnification Procedures. The Indemnified Party will (i) promptly notify the indemnifying party in writing of any claim, suit or proceeding for which indemnity is claimed, provided that failure to so notify will not remove the indemnifying party's obligation except to the extent it is prejudiced thereby, (ii) allow the indemnifying party to solely control the defence of any claim, suit or proceeding and all negotiations for settlement, and (iii) fully cooperate with the Indemnifying Party by providing information or documents requested by the Indemnifying Party that are reasonably necessary to the defense or settlement of the claim, and, at the Indemnifying Party's request and expense, assistance in the defense or settlement of the claim. In no event may either party enter into any third-party agreement which would in any manner whatsoever affect the rights of the other party or bind the other party in any manner to such third party, without the prior written consent of the other party. If and to the extent that any documents or information provided to the Indemnified Party would constitute Confidential Information within the meaning of this Agreement, the Indemnified Party agrees that it will take all actions reasonably necessary to maintain the confidentiality of such documents or information, including but not limited to seeking a judicial protective order.

This Article 15 states each party's exclusive remedies for any third-party claim or action, and nothing in the Agreement or elsewhere will obligate either party to provide any greater indemnity to the other. This Article 15 shall survive any expiration or termination of the Agreement.

16 FORCE MAJEURE

16.1 Neither party shall be liable to the other for failure to perform or delay in performance of its obligations under any Statement of Work if and to the extent that such failure or delay is caused by or results from causes beyond its control, including, without limitation, any act (including delay, failure to act, or priority) of the other party or any governmental authority, civil disturbances, fire, acts of God, acts of public enemy, compliance with any regulation, order, or requirement of any governmental body or agency, or inability to obtain transportation or necessary materials in the open market.

16.2 As a condition precedent to any extension of time to perform the Services under this Agreement, the party seeking an extension of time shall, not later than ten (10) days following the occurrence of the event giving rise to such delay, provide the other party written notice of the occurrence and nature of such event.

17 INSURANCE

During the of the Agreement Term, Contractor shall, at its own cost and expense, obtain and maintain in full force and effect, the following minimum insurance coverage: (a) commercial general liability insurance on an occurrence basis with minimum single limit coverage of $2,000,000 per occurrence and $4,000,000 aggregate combined single limit; (b) professional errors and omissions liability insurance with a limit of $2,000,000 per event and $2,000,000 aggregate; Contractor shall name Client as an additional insured to Contractor's commercial general liability and excess/umbrella insurance and as a loss payee on Contractor's professional errors and omissions liability insurance and Contractor's employee fidelity bond/crime insurance, and, if required, shall also name Client's End Customer. Contractor shall furnish to Client a certificate showing compliance with these insurance requirements within two (5) days of Client's written request. The certificate will provide that Client will receive ten (10) days' prior written notice from the insurer of any termination of coverage.

18 GENERAL

18.1 Independent Contractors-No Joint Venture. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other nor may neither bind the other in any way, unless authorized in writing. The Agreement (including the Statements of Work) shall not be construed as constituting either Party as partner, joint venture or fiduciary of the other Party or to create any other form of legal association that would impose liability upon one Party for the act or failure to act of the other Party, or as providing either Party with the right, power or authority (express or implied) to create any duty or obligation of the other Party.

18.2 Entire Agreement, Updates, Amendments and Modifications. The Agreement (including the Statements of Work) constitutes the entire agreement of the Parties with regard to the Services and matters addressed therein, and all prior agreements, letters, proposals, discussions and other documents regarding the Services and the matters addressed in the Agreement (including the Statements of Work) are superseded and merged into the Agreement (including the Statements of Work). Updates, amendments, corrections and modifications to the Agreement including the Statements of Work may not be made orally but shall only be made by a written document signed by both Parties.

18.3 Waiver. No waiver of any breach of any provision of the Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof.

18.4 Severability. If any provision of the Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, and such provision shall be deemed to be restated to reflect the Parties' original intentions as nearly as possible in accordance with applicable Law(s).

18.5 Cooperation in Defense of Claims. The parties agree to provide reasonable cooperation to each other in the event that either party is the subject of a claim, action or allegation regarding this Agreement or a party's actions taken pursuant to this agreement, including, but not limited to, providing information or documents needed for the defence of such claims, actions or allegation; provided that neither party shall be obligated to incur any expense thereby.

18.6 Counterparts. The Agreement and each Statement of Work may be executed in counterparts. Each such counterpart shall be an original and together shall constitute but one and the same document. The Parties agree that electronic signatures, whether digital or encrypted, a photographic or facsimile copy of the signature evidencing a Party's execution of the Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.

18.7 Binding Nature and Assignment. The Agreement will be binding on the Parties and their respective successors and permitted assigns. Neither Party may, or will have the power to, assign the Agreement (or any rights thereunder) by operation of law or otherwise without the prior written consent of the other Party.

18.8 Notices. Notices pursuant to the Agreement will be sent to the addresses below, or to such others as either party may provide in writing. Such notices will be deemed received at such addresses upon the earlier of (i) actual receipt or (ii) delivery in person, by fax with written confirmation of receipt, or by certified mail return receipt requested. A notice or other communication delivered by email under this Agreement will be deemed to have been received when the recipient, by an email sent to the email address for the sender stated in this Section 19.7 acknowledges having received that email, with an automatic "read receipt" not constituting acknowledgment of an email for purposes of this section 19.7.

Notice to Contractor:

Cyber Ninjas Inc
ATTN: Legal Department
5077 Fruitville Rd
Suite 109-421
Sarasota, FL 34232

Email: legal@cyberninjas.com

Notice to Client:

Arizona State Senate
Attn: Greg Jernigan
1700 W. Washington St.
Phoenix, AZ 85007
gjernigan@azleg.gov

18.9 No Third-Party Beneficiaries. The Parties do not intend, nor will any Section hereof be interpreted, to create for any third-party beneficiary, rights with respect to either of the Parties, except as otherwise set forth in an applicable Statement of Work.

18.10 Dispute Resolution. The parties shall make good faith efforts to resolve any dispute which may arise under this Agreement in an expedient manner (individually, "Dispute" and collectively "Disputes"). In the event, however, that any Dispute arises, either party may notify the other party of its intent to invoke the Dispute resolution procedure herein set forth by delivering written notice to the other party. In such event, if the parties' respective representatives are unable to reach agreement on the subject Dispute within five (5) calendar days after delivery of such notice, then each party shall, within five (5) calendar days thereafter, designate a representative and meet at a mutually agreed location to resolve the dispute ("Five-Day Meeting").

18.10.1 Disputes that are not resolved at the Five-Day Meeting shall be submitted to non-binding mediation, by delivering written notice to the other party. In such event, the subject Dispute shall be resolved by mediation to be conducted in accordance with the rules and procedures of the American Arbitration Association , and mediator and administrative fees shall be shared equally between the parties.

18.10.2 If the dispute is not resolved by mediation, then either party may bring an action in a state or federal court in Maricopa County, Arizona which shall be the exclusive forum for the resolution of any claim or defense arising out of this Agreement. The prevailing party shall be entitled to an award of its reasonable attorneys' fees and costs incurred in any such action.

18.10.3 Governing Law. All rights and obligations of the Parties relating to the Agreement shall be governed by and construed in accordance with the Laws of the State of Arizona without giving effect to any choice-of-law provision or rule (whether of the State of Arizona or any other jurisdiction) that would cause the application of the Laws of any other jurisdiction.

18.11 Rules of Construction. Interpretation of the Agreement shall be governed by the following rules of construction: (a) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires, (b) the word "including" and words of similar import shall mean "including, without limitation," (c) the headings contained herein are for reference purposes only and shall not affect in any way the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Master Service Agreement to be effective as of the day, month and year written above.

Accepted by:

Client

By: DocuSigned by: Karen Fann, President
748DEF61BCE340B...

Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By: Douglas Logan

Title: CEO & Principal Consultant

EXHIBIT 1. FORM OF STATEMENT OF WORK

This Statement of Work (the "Statement of Work") is effective as of as of the _____ day of _____, 20__ (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"), and is deemed to be incorporated into that certain Master Service Agreement dated the 31 day of March, 2021 (the "Master Agreement") by and between Contractor and Client(collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement".

1 GENERAL PROVISIONS

1.1 Introduction. The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.4 of the Master Agreement shall control such conflict.

1.2 Services. Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, [and any Schedules attached hereto].

2 SCOPE & SERVICES DESCRIPTION

3 TECHNICAL METHODOLOGY

4 DELIVERABLE MATERIALS

5 COMPLETION CRITERIA

6 FEES / TERMS OF PAYMENT

The charges for the Services are: $_____ to be paid as follows:

[$_____ upon execution of the Agreement and $_____ upon completion of the Services]. Invoicing and terms of payment shall be as provided in Article 5 of the Agreement.

7 TERM/PROJECT SCHEDULE

8 SIGNATURE & ACKNOWLEDGEMENT

THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client:

By:_____

_____

Title:_____

Accepted by:

Contractor: Cyber Ninjas, Inc.

By:_____

Douglas Logan

Title: CEO & Principal Consultant

EXHIBIT 2. BACKGROUND SCREENING MEASURES

The pre-employment background investigations include the following search components for U.S. employees and the equivalent if international employees:

- 10-Year Criminal History Search – Statewide and/or County Level
- 10-Year Criminal History Search – U.S. Federal Level
- Social Security Number Validation
- Restricted Parties List

Criminal History – State-wide or County:

Criminal records are researched in the applicant's residential jurisdictions for the past seven years. records are researched through State-wide repositories, county/superior courts and/or lower/district/municipal courts. Generally, a State-wide criminal record search will be made in states where a central repository is accessible. Alternately, a county criminal record search will be conducted and may be supplemented by an additional search of lower, district or municipal court records. These searches generally reveal warrants, pending cases, and felony and misdemeanor convictions. If investigation and/or information provided by the applicant indicate use of an aka/alias, additional searches by that name must be conducted.

Criminal History – Federal:

Federal criminal records are researched through the U.S. District Court in the applicant's federal jurisdiction for the past seven years. This search generally reveals warrants, pending cases and convictions based on federal law, which are distinct from state and county violations. The search will include any AKAs/aliases provided or developed through investigation.

Social Security Trace:

This search reveals all names and addresses historically associated with the applicant's provided number, along with the date and state of issue. The search also verifies if the number is currently valid and logical or associated with a deceased entity. This search may also reveal the use of multiple social security numbers, AKAs/aliases, and additional employment information that can then be used to determine the parameters of other aspects of the background investigation.

Compliance Database or Blacklist Check:

This search shall include all of the specified major sanctioning bodies (UN, OFAC, European Union, Bank of England), law enforcement agencies, regulatory enforcement agencies, non-regulatory agencies, and high-profile persons (to include wanted persons, and persons who have previously breached US export regulation or violated World Bank procurement procedures including without limitation the lists specified below:

A search shall be made of multiple National and International restriction lists, including the Office of Foreign Asset Control (OFAC) Specially Designated Nationals (SDN), Palestinian Legislative Council (PLC), Defense Trade Controls (DTC) Debarred Parties, U.S. Bureau of Industry and Security Denied Persons List, U.S. Bureau of Industry and Security Denied Entities List, U.S. Bureau of Industry and Security Unverified Entities List, FBI Most Wanted Terrorists List, FBI Top Ten Most Wanted Lists, FBI Seeking Information, FBI Seeking Information on Terrorism, FBI Parental Kidnappings, FBI Crime Alerts, FBI Kidnappings and Missing Persons, FBI Televised Sexual Predators, FBI Fugitives – Crimes Against Children, FBI Fugitives – Cyber Crimes, FBI Fugitives – Violent Crimes: Murders, FBI Fugitives – Additional Violent Crimes, FBI Fugitives – Criminal Enterprise Investigations, FBI Fugitives – Domestic Terrorism, FBI Fugitives – White Collar Crimes, DEA Most Wanted Fugitives, DEA Major International Fugitives, U.S. Marshals Service 15 Most Wanted, U.S. Secret Service Most Wanted Fugitives, U.S. Air Force Office of Special Investigations Most Wanted Fugitives, U.S. Naval Criminal Investigative Services (NCIS) Most Wanted Fugitives, U.S. Immigration and Customs Enforcement (ICE) Most Wanted Fugitives, U.S. Immigration & Customs Enforcement Wanted Fugitive Criminal Aliens, U.S. Immigration & Customs Enforcement Most Wanted Human Smugglers, U.S. Postal Inspection Service Most Wanted, Bureau of Alcohol, Tobacco, and Firearms (ATF) Most Wanted, Politically Exposed Persons List, Foreign Agent Registrations List, United Nations Consolidation Sanctions List, Bank of England Financial Sanctions List, World Bank List of Ineligible Firms, Interpol Most Wanted List, European Union Terrorist List, OSFI Canada List of Financial Sanctions, Royal Canadian Mounted Police Most Wanted, Australia Department of Foreign Affairs and Trade List, Russian Federal Fugitives, Scotland Yard's Most Wanted, and the World's Most Wanted Fugitives.

EXHIBIT 3. FORM OF NONDISCLOSURE SUBCONTRACT

Nondisclosure Agreement

1. I am participating in one or more projects for Cyber Ninjas, Inc., as part of its audit of the 2020 general election in Maricopa County, performed as a contractor for the Arizona State Senate (the "Audit").
2. In connection with the foregoing, I have or will be receiving information concerning the Audit, including but not limited to ballots or images of ballots (whether in their original, duplicated, spoiled, or another form), tally sheets, audit plans and strategies, reports, software, data (including without limitation data obtained from voting machines or other election equipment), trade secrets, operational plans, know how, lists, or information derived therefrom (collectively, the "Confidential Information").
3. In consideration for receiving the Confidential Information and my participation in the project(s), I agree that unless I am authorized in writing by Cyber Ninjas, Inc. and the Arizona State Senate, I will not disclose any Confidential Information to any person who is not conducting the Audit. If I am required by law or court order to disclose any Confidential Information to any third party, I will immediately notify Cyber Ninjas, Inc. and the Arizona State Senate.
4. Furthermore, I agree that during the course of the audit to refrain from making any public statements, social media posts, or similar public disclosures about the audit or its findings until such a time as the results from the audit are made public or unless those statements are approved in writing from Cyber Ninjas, Inc and the Arizona Senate.
5. I agree never to remove and never to transmit any Confidential Information from the secure site that the Arizona State Senate provides for the Audit; except as required for my official audit duties and approved by both Cyber Ninjas, Inc and the Arizona Senate.
6. I further understand that all materials or information I view, read, examine, or assemble during the course of my work on the Audit, whether or not I participate in the construction of such materials or information, have never been and shall never be my own intellectual property.
7. I agree that the obligations provided herein are necessary and reasonable in order to protect the Audit and its agents and affiliates. I understand that an actual or imminent failure to abide by these policies could result in the immediate termination of my work on the Audit, injunctive relief against me, and other legal consequences (including claims for consequential and punitive damages) where appropriate.

Signature: _____

Printed Name: _____

Date: _____

Exhibit 9

Exhibit 9

STATECRAFT
LAW • GOVERNMENT • CRISIS MANAGEMENT

649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078

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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

ARIZONA DEMOCRATIC PARTY, *et al.*, Plaintiffs, v. KAREN FANN, *et al.*, Defendants.	No. CV2021-006646 **SENATE DEFENDANTS' COMBINED MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION** (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

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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*

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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:

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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.

Exhibit 10

SETTLEMENT AGREEMENT,

The parties to this Settlement Agreement ("Agreement") are the Arizona Democratic Party ("ADP"), Supervisor Steve Gallardo in his individual capacity ("Gallardo"), Secretary of State Katie Hobbs in her official capacity ("Secretary"), the First Amendment Coalition of Arizona, Inc. ("FACA"), Senate President Karen Fann in her official capacity ("Fann"), Senator Warren Petersen in his official capacity ("Petersen"), Ken Bennett ("Bennett"), and Cyber Ninjas, Inc. ("CN"). ADP, Gallardo, the Secretary, and FACA may be referred to collectively hereafter as "Plaintiffs." Fann, Petersen, and Bennett may be referred to collectively hereafter as the "Senate Defendants." Fann, Petersen, Bennett, and CN may be referred to collectively hereafter as "Defendants." The parties may be referred to separately hereafter as a "Party" or collectively as the "Parties."

Recitals

1. On April 22, 2021, ADP and Gallardo filed an action in Arizona Superior Court (Maricopa County) against Defendants related to the conduct of an audit of the 2020 General Election results in Maricopa County, CV2021-006646 ("Litigation").

2. On April 27, 2020, FACA and the Secretary were permitted to intervene in the Litigation.

3. The Parties, in consultation with their respective counsel and in order to avoid additional litigation, have agreed to settle all claims against each other that have been in the Litigation.

The Parties affirm the accuracy of the foregoing recitals, and agree as follows:

Terms of Agreement

1. **Conduct of the Audit.** In exchange for the release provided in this Agreement, the Defendants agree as follows:

   a. Defendants have disclosed or will disclose the following policies or procedures for the audit, and CN warrants and represents that each of the following was in effect on or earlier than April 27, 2021 and will remain in place for the duration of the audit: all documents comprising "Exhibit D" originally lodged under seal with the Court on April 25, 2021, and all policies and procedures Defendants and their agents are using to conduct the audit. This includes training plans and documents to ensure that all workers understand and comply with all security procedures applicable to ballots and electronic voting systems, and forms utilized to conduct the audit, including chain of custody forms, tally sheets, and forms used to aggregate tallies.
   b. CN and their agents will not compare signatures on early ballot envelopes with signatures from the voter registration file. The Senate Defendants warrant

and represent that they are not currently comparing signatures on early ballot envelopes with signatures from the voter registration file, and will notify Plaintiffs within 48 hours of any decision to undertake such signature comparison and afford Plaintiffs 48 hours to respond to resolve any concerns. If the parties cannot resolve the issue in a mutually agreeable manner, Plaintiffs may seek emergency injunctive and/or declaratory relief in court to seek compliance with the law.

c. Defendants and their agents will not have pens with blue or black ink anywhere ballots are handled and will take reasonable precautions to prevent the alteration, damage, or destruction of any ballot during the conduct of the audit.
d. Security assurances: (i) Defendants and their agents will continue to have and abide by policies to ensure that Maricopa County voting systems are secured in a manner that prevents unauthorized access or tampering, including maintaining a detailed log of who accesses the machines; (ii) Defendants and their agents will continue to have and abide by policies to ensure that ballots are secured in a manner that prevents unauthorized access, including maintaining a detailed log of who accesses the ballots; (iii) Defendants and their agents will continue to have and abide by policies to ensure that electronic data from and electronic or digital images of ballots are secured in a manner that protects them from physical and electronic access, including unauthorized copying or transfer; (iv) Defendants and their agents will continue to have and abide by policies to ensure that voter information from the voter registration database, including digital images of voter signatures, are secured in a manner that protects them from physical and electronic access, including unauthorized copying or transfer.
e. Defendants and their agents will have and abide by policies to prevent the publication of scanned images of ballots without first securing a court order authorizing such publication.
f. Defendants and their agents will have and abide by policies to ensure that no provisional ballot envelope that was not verified by the County Recorder (and was therefore previously unopened) is opened.
g. Defendants and their agents will allow the news media to observe and report on the audit without signing up to participate in or volunteer at the audit, and on reasonable terms, including allowing the news media to use note pads and red or green pens. The news media is free to take still and video photography, except of ballots where the ballot markings can be ascertained by the naked eye or a zoom lens.
h. Defendants and their agents will permit observers designated in advance by the Secretary, not to exceed three designees per shift, to observe and monitor the audit, including processing of ballots and election equipment hardware, without the designees signing up as volunteer observers for the audit. Such observation and monitoring shall be permitted on reasonable terms, and observers will be permitted to use non-white note pads and red or green pens, including on the counting floor.

2. **Dismissal of Claims in the Litigation**. The Parties agree that they will stipulate to the dismissal of the Litigation with prejudice and with all parties to bear their own fees and costs upon the execution of this Agreement.

3. **Release**. Each Plaintiff releases Defendants from legal liability for all claims that were advanced by that Plaintiff in the Litigation. This release does not include any claim that is not currently pending in the Litigation or any claim that may arise in the future.

4. **No Admission of Fault**. By entering into this Agreement, the Parties do not admit any fault or liability, or lack thereof, related to the allegations or defenses made by any Party in the Litigation. This Agreement is a compromise of disputed claims.

5. **Public Release of Agreement**. This Agreement is not confidential and may be released or discussed in public by any Party.

6. **Knowing and Voluntary Agreement**. Each Party enters into this Agreement as a matter of free will and has not been pressured or coerced in any way into signing this Agreement. Each Party expressly represents and warrants that the persons signing below are authorized to execute this Agreement on the Party's behalf.

7. **Severability**. If any provision or part of any provision of this Agreement is held to be invalid or for any reason unenforceable by a court of competent jurisdiction, the remaining portions of this Agreement will remain in full force and effect to the maximum extent permitted by law.

8. **Modification/Waiver**. No modification, amendment or waiver of any of the provisions contained in this Agreement will be binding upon any Party hereto unless made in writing and signed by such party or by a duly authorized officer or agent of such Party.

9. **No Presumption Against Drafter**. This Agreement has been negotiated and prepared by all Parties and their respective counsel, and any rule of construction under which ambiguities are to be resolved against the drafter will not apply in interpreting this Agreement.

10. **Entire Agreement; Choice of Law**. This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties concerning the subject matter of this Agreement. No other agreements or understandings of any kind concerning the subject matter of this Agreement, whether express or implied in law or fact, have been made by the Parties to this Agreement. This Agreement will be construed in accordance with, and be governed by, the laws of the State of Arizona.

11. **Enforcement**. If there is a question or concern about Defendants' or their agents' compliance with any part of this Agreement, Plaintiffs and Defendants will make a

good faith effort to resolve the issue by mutual agreement. Within 48 hours of identifying a potential breach of this Agreement, Plaintiffs shall notify Defendants of the issue and afford the Defendants 48 hours to respond. If the parties cannot resolve the issue in a mutually agreeable manner, Plaintiffs may seek emergency injunctive and/or declaratory relief in court to seek compliance with the law, in addition to raising a claim for breach of contract. Any action to enforce the terms of this Agreement must be brought in Maricopa County (Arizona) Superior Court, and the Parties unconditionally and irrevocably consent to that court's exercise of personal jurisdiction over them in any such action. By entering into this Agreement, the Defendants do not waive or limit any argument or defense, including but not limited to legislative immunity or privilege. Likewise, Plaintiffs do not waive or limit their arguments that any such defenses, including immunity or privilege, do not apply to the Senate Defendants or their agents. In any action to enforce this Agreement (or any dispute otherwise arising out of this Agreement), the Parties agree to bear their own fees and costs.

12. **Counterparts**. This Agreement may be signed in counterparts, each of which will constitute an original, but all of which together will constitute one and the same instrument. The counterparts may be executed and delivered by facsimile or other electronic signature by any of the Parties to any other Party and the receiving Party may rely on the receipt of such document delivered by facsimile or other electronic means as if the original had been received.

13. **Signatures and Effective Date**. The Parties have executed this Agreement on the dates appearing below. This Agreement will become effective immediately upon its execution by all Parties.

ARIZONA DEMOCRATIC PARTY.

By: Charles Fisher
Its: Executive Director

5/4/21
Date

SUP. STEVE GALLARDO

Date

SECRETARY OF STATE KATIE HOBBS

By: Sambo "Bo" Dul
Its: State Elections Director

FIRST AMENDMENT COALITION OF ARIZONA, INC.

By: Daniel C. Barr
Its: Attorney

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Its: Executive Director

Date

SUP. STEVE GALLARDO

5-4-2021
Date

SECRETARY OF STATE KATIE HOBBS

By: Sambo "Bo" Dul
Its: State Elections Director

FIRST AMENDMENT COALITION OF ARIZONA, INC.

By: Daniel C. Barr
Its: Attorney

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Its: Executive Director

Date

SUP. STEVE GALLARDO

Date

SECRETARY OF STATE KATIE HOBBS

By: Sambo "Bo" Dul
Its: State Elections Director

FIRST AMENDMENT COALITION OF ARIZONA, INC.

By: Daniel C. Barr
Its: Attorney

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ARIZONA DEMOCRATIC PARTY.

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Its: Executive Director

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Date

SUP. STEVE GALLARDO

_____

_____

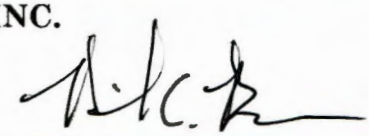
Date

SECRETARY OF STATE KATIE HOBBS

_____

By: Sambo "Bo" Dul
Its: State Elections Director

FIRST AMENDMENT COALITION OF ARIZONA, INC.



By: Daniel C. Barr
Its: Attorney

5/5/2021
Date

PRESIDENT KAREN FANN

Date

CYBER NINJAS, INC.

By: Doug Logan
Its: CEO

Date

5/5/2021
Date

SEN. WARREN PETERSEN

Date

KEN BENNETT

Date

Date

PRESIDENT KAREN FANN

President Karen Fann

May 5, 2021

Date

CYBER NINJAS, INC.

By: Doug Logan
Its: CEO

Date

Date

SEN. WARREN PETERSEN

5/5/21

Date

KEN BENNETT

Date

Date

PRESIDENT KAREN FANN

Date

SEN. WARREN PETERSEN

Date

CYBER NINJAS, INC.

By: Doug Logan
Its: CEO

05/05/2021
Date

Date

KEN BENNETT

Date

Date

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Date

SEN. WARREN PETERSEN

Date

CYBER NINJAS, INC.

By: Doug Logan
Its: CEO

Date

Date

KEN BENNETT

5/5/2021

Date

Exhibit 11

U.S. Department of Justice
Civil Rights Division

May 5, 2021

VIA EMAIL

The Honorable Karen Fann
President, Arizona State Senate
1700 West Washington Street, Room 205
Phoenix, AZ 85007

Dear Senator Fann:

I write regarding issues arising under federal statutes enforced by the United States Department of Justice that are related to the audit required by the Arizona State Senate for the November 2020 federal general election in Maricopa County. News reports indicate that the Senate subpoenaed ballots, elections systems, and election materials from Maricopa County and required that they be turned over to private contractors, led by a firm known as Cyber Ninjas.

The Department has reviewed available information, including news reports and complaints regarding the procedures being used for this audit. The information of which we are aware raises concerns regarding at least two issues of potential non-compliance with federal laws enforced by the Department.

The first issue relates to a number of reports suggesting that the ballots, elections systems, and election materials that are the subject of the Maricopa County audit are no longer under the ultimate control of state and local elections officials, are not being adequately safeguarded by contractors at an insecure facility, and are at risk of being lost, stolen, altered, compromised or destroyed.[1] Federal law creates a duty to safeguard and preserve federal election records. The Department is charged with enforcement of provisions of the Civil Rights Act of 1960, 52 U.S.C. §§ 20701-20706. This statute requires state and local election officials to maintain, for twenty-two months after the conduct of an election for federal office, "all records and papers" relating to any "act requisite to voting in such election…" *Id.* at § 20701. The purpose of

[1] *See, e.g.*, https://www.azfamily.com/news/investigations/cbs_5_investigates/security-lapses-plague-arizona-senates-election-audit-at-state-fairgrounds/article_b499aee8-a3ed-11eb-8f94-bfc2918c6cc9.html; https://www.azmirror.com/2021/04/23/experts-raise-concerns-about-processes-transparency-as-election-audit-begins/; https://tucson.com/news/local/arizona-senate-issues-subpoena-demanding-access-to-2-million-plus-ballots-cast/article_a426fc7b-60d8-5837-b244-17e5c2b2ddb4.html; https://www.azmirror.com/2021/02/26/judge-sides-with-senate-says-maricopa-must-turn-over-election-materials-for-audit/

these federal preservation and retention requirements for elections records is to "secure a more effective protection of the right to vote." *State of Ala. ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960*), aff'd sub nom. Dinkens v. Attorney General*, 285 F.2d 430 (5th Cir. 1961) (per curiam), *citing* H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959); *see also* Federal Prosecution of Election Offenses, Eighth Edition 2017 at 75 (noting that "[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes").[2]

If the state designates some other custodian for such election records, then the Civil Rights Act provides that the "duty to retain and preserve any record or paper so deposited shall devolve upon such custodian." 52 U.S.C. § 20701. The Department interprets the Act to require that "covered election documentation be retained either physically by election officials themselves, or under their direct administrative supervision." *See* Federal Prosecution of Election Offenses at 79. In addition, if the state places such records in the custody of other officials, then the Department views the Act as requiring that "administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access" such records. *Id*. We have a concern that Maricopa County election records, which are required by federal law to be retained and preserved, are no longer under the ultimate control of elections officials, are not being adequately safeguarded by contractors, and are at risk of damage or loss.

The second issue relates to the Cyber Ninjas' statement of work for this audit.[3] Among other things, the statement of work indicates that the contractor has been working "with a number of individuals" to "identify voter registrations that did not make sense, and then knock on doors to confirm if valid voters actually lived at the stated address." Statement of Work at ¶ 2.1. The statement of work also indicates that the contractor will "select a minimum of three precincts" in Maricopa County "with a high number of anomalies" in order "to conduct an audit of voting history" and that voters may be contacted through a "combination of phone calls and physical canvassing" to "collect information of whether the individual voted in the election" in November 2020. Statement of Work at ¶ 5.1. This description of the proposed work of the audit raises concerns regarding potential intimidation of voters. The Department enforces a number of federal statutes that prohibit intimidation of persons for voting or attempting to vote. For example, Section 11(b) of the Voting Rights Act provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote…" 52

[2] *See* https://www.justice.gov/criminal/file/1029066/download

[3] *See* https://www.washingtonpost.com/context/cyber-ninjas-statement-of-work/2013a82d-a2cf-48be-8e9f-a26bfd5143e5/

U.S.C. § 10307(b). Past experience with similar investigative efforts around the country has raised concerns that they can be directed at minority voters, which potentially can implicate the anti-intimidation prohibitions of the Voting Rights Act. Such investigative efforts can have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future.

We would appreciate your response to the concerns described herein, including advising us of the steps that the Arizona Senate will take to ensure that violations of federal law do not occur.

Sincerely,

Pamela S. Karlan
Principal Deputy Assistant Attorney General
Civil Rights Division
pamela.karlan@usdoj.gov

cc: Glenn McCormick, Acting United States Attorney for the District of Arizona
Mark Brnovich, Arizona Attorney General
Katie Hobbs, Arizona Secretary of State
Stephen Richer, Maricopa County Recorder

Exhibit 12

KAREN FANN
SENATE PRESIDENT
FIFTY-FIFTH LEGISLATURE
1700 WEST WASHINGTON, SENATE
PHOENIX, ARIZONA 85007-2844
PHONE: (602) 926-5874
TOLL FREE: 1-800-352-8404
kfann@azleg.gov
DISTRICT 1

COMMITTEES:
Rules, Chairman

Arizona State Senate

May 7, 2021

Pamela S. Karlan
Principal Deputy Assistant Attorney General
United States Department of Justice, Civil Rights Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Pamela.Karlan@usdoj.gov

Dear Ms. Karlan:

Thank you for your letter of May 5, 2021. I am confident I speak for the entire Arizona State Senate when I say that we share your commitment to protecting the integrity of election materials and safeguarding the constitutional rights of all Arizona voters. To that end, the ongoing audit of the November 2020 general election returns in Maricopa County are governed by comprehensive and rigorous security protocols that will fully preserve all physical and electronic ballots, tabulation systems, and other election materials.

As a preliminary matter, your stated concern that these records "are no longer under the ultimate control of state and local elections officials" is misplaced. As you know, state and local governments routinely enlist the services of outside private vendors to administer election-related functions that demand substantial manpower or other logistical resources; indeed, Maricopa County enlisted the help of private vendors in connection with printing, mailing, and processing the very materials at issue in the audit. In that vein, the Senate has similarly retained private vendors to assist in carrying out the audit. Questions of physical security, however, were expressly reserved for the Arizona State Senate in the prime vendor contract. And in practice, the Senate's appointed liaison, former Arizona Secretary of State Ken Bennett, is present at the audit site virtually every day, and is integrally involved in overseeing every facet of the audit including, most importantly for purposes of your letter, the security of the site and election materials. I am in regular communication with Secretary Bennett and remain fully apprised of all material developments in the audit.

After some early and well publicized challenges, the security protocols at the audit site have been made very strong. Ballots and electronic tabulation equipment are subject to continuous video surveillance (which is live streamed to the general public online) and are under the watchful eye of armed security personnel twenty-four hours a day. All means of ingress to the facility remain locked at all times and attended by security guards, and a security guard is posted immediately adjacent to the area in which ballots are stored. All ballot review and processing occurs within the

confines of a carefully documented chain of custody and, from the moment the counting began, all audit team members and observers alike have been strictly prohibited from bringing into the demarcated ballot processing area any electronic device or any instrument (*e.g.*, a blue or black ink pen) that could be used to spoliate ballots. More to the point, not a single ballot or other official election document has been destroyed, defaced, lost, or adulterated during the course of the audit, and we are confident that our strong security infrastructure has minimized to the greatest extent feasible the risk of any such breaches in the future. We are unaware of any significant security breach since the day the ballots were delivered; this is undoubtedly due to the thorough protocols implemented since that time. Upon the audit's completion, all voting materials and devices will be remitted to the custody of Maricopa County officials.

With respect to voter canvassing, the Senate determined several weeks ago that it would indefinitely defer that component of the audit. If and to the extent the Senate subsequently decides that canvassing is necessary to the successful completion of the audit, its vendor will implement detailed requirements to ensure that the canvassing is conducted in a manner that complies fully with the commands of the United States Constitution and federal and state civil rights laws. Specifically, persons conducting the canvassing:

- Will not select voters or precincts for canvassing based on race, ethnicity, sex, party affiliation, or any other legally protected status;
- Will not wear or display any badges, insignia, or other symbols suggesting, or make any statements implying, or refrain from correcting any apparent misunderstanding concerning, an affiliation with law enforcement, immigration enforcement, tax enforcement, or the military;
- Will not carry a firearm or other weapon when conducting canvassing;
- Will not ask any voter to identify any candidates for whom he or she voted;
- Will wear a brightly colored shirt identifying the individual as an employee of the Senate's retained vendor;
- Will clearly state at the beginning of the conversation that canvassed voters are not the subject of the investigation and that their participation in the canvass is entirely voluntary; and
- Will use a pre-approved, standardized script with non-leading questions.

If canvassing is necessary to complete the audit, we believe these protocols, which will be reinforced by thorough training programs, would permit the Senate to discharge its legislative oversight and investigation functions without compromising the rights or privacy of any voter.

Since the inception of the audit, I have emphasized the crucial importance of transparency and collaboration to its success. To that end, I am happy to provide any additional information and to continue a constructive dialogue with your office to advance our common objective of protecting the rights of voters and the integrity of our elections.

Thank you.

Karen Fann

Karen Fann, President
Arizona State Senate

Exhibit 13

AMERICAN OVERSIGHT

April 6, 2021

VIA EMAIL

Senator Karen Fann
Arizona State Capitol Complex
1700 W Washington Street
Phoenix, AZ 85007
kfann@azleg.gov

Re: Public Records Request

Dear Senator Fann:

Pursuant to the Arizona Public Records Law, A.R.S. §§ 39-121 et seq., American Oversight makes the following request for records.

On February 23, 2021, Maricopa County announced the results of an independent audit into its November 3 elections results, confirming that ballots were tabulated accurately and that voting equipment and software were secure.[1] Nevertheless, the Arizona State Senate has pursued an additional audit and recount, including the hand tabulation of more than two million votes. On March 31, 2021, Senate President Karen Fann announced that the audit team would be led by the firm Cyber Ninjas,[2] whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020 elections.[3]

American Oversight seeks records with the potential to shed light on the Senate's planned audit and recount of Maricopa County's election results, including whether or to what extent partisan political interests informed the selection of auditors. As explained more fully below, prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have begun contacting voters and reviewing ballots.

---

[1] Jen Fifield, *Maricopa County's 2020 Election Votes Were Counted Correctly, More County Audits Show*, Ariz. Republic (updated Feb. 23, 2021, 5:48 PM), https://www.azcentral.com/story/news/politics/elections/2021/02/23/maricopa-countys-election-audits-show-2020-votes-counted-correctly/4550644001/.
[2] Jeremy Duda, *Arizona Senate Hires a 'Stop the Steal' Advocate to Lead 2020 Election Audit*, AZ Mirror (updated Apr. 1, 2021, 10:18 AM), https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/.
[3] *Id.*

Requested Records

American Oversight requests that your office promptly produce the following records:

1. A complete copy (including any attachments) of any contract, amendment, memorandum of understanding, statement of work, or other written agreement in possession of Senator Karen Fann's office regarding external entities providing services relevant to the planned audit of Maricopa County's 2020 election results.

   This request should be interpreted to include, at a minimum, agreements with Cyber Ninjas, Wake Technology Services, CyFIR, and Digital Discovery ESI, as well as agreements with formal or informal advisors, consultants, legal counsel, or other contractors or lessors involved in the planning, preparation, or execution of the audit.

   Please provide all responsive records from November 3, 2020, through the date the search is conducted.

2. All records in possession of Senator Karen Fann's office pertaining to the selection of auditors, including but not limited to: solicitations for bids; records reflecting criteria for evaluating bids; complete copies of any bids received; or statements of rejection made to any bidders.

   Please provide all responsive records from November 3, 2020, through the date the search is conducted.

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as Cyber Ninjas itself has proposed to contact voters either by phone or in person to question their voting histories,[4] a step that has been described as "harassment and intimidation" of voters.[5] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the electoral process.

Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. The Statement of Work

[4] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.

[5] Bob Christie, *County Board to Senate: Find Another Spot to Recount Ballots*, Assoc. Press, Apr. 2, 2021, https://apnews.com/article/joe-biden-arizona-phoenix-elections-voting-23a34828e8dadd190fe2f02555559b30.

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- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

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We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight

AMERICAN OVERSIGHT

April 6, 2021

VIA EMAIL

Senator Karen Fann
Arizona State Capitol Complex
1700 W Washington Street
Phoenix, AZ 85007
kfann@azleg.gov

Re: Public Records Request

Dear Senator Fann:

Pursuant to the Arizona Public Records Law, A.R.S. §§ 39-121 et seq., American Oversight makes the following request for records.

On February 23, 2021, Maricopa County announced the results of an independent audit into its November 3 elections results, confirming that ballots were tabulated accurately and that voting equipment and software were secure.[1] Nevertheless, the Arizona State Senate has pursued an additional audit and recount, including the hand tabulation of more than two million votes. On March 31, 2021, Senate President Karen Fann announced that the audit team would be led by the firm Cyber Ninjas,[2] whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020 elections.[3]

American Oversight seeks records with the potential to shed light on the Senate's planned audit and recount of Maricopa County's election results, including whether or to what extent partisan political interests informed the selection of auditors. As explained more fully below, prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have begun contacting voters and reviewing ballots.

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American Oversight requests that your office promptly produce the following records:

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[1] Jen Fifield, *Maricopa County's 2020 Election Votes Were Counted Correctly, More County Audits Show*, Ariz. Republic (updated Feb. 23, 2021, 5:48 PM), https://www.azcentral.com/story/news/politics/elections/2021/02/23/maricopa-countys-election-audits-show-2020-votes-counted-correctly/4550644001/.
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[3] *Id.*

All records (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp) telephone call logs, calendar invitations, calendar entries, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) sent or received by Senator Karen Fann, anyone communicating on their behalf, such as a scheduler or assistant, or anyone serving as their Chief of Staff, regarding the planning or execution of the Arizona State Senate's audit of Maricopa County's elections results.

This request should be interpreted to include, but not be limited to, communications concerning: the Senate's decision to subpoena ballots and subsequent litigation; the bidding process for selecting an auditing team; the scope and conduct of the planned recount, including specific provisions such as hand counting ballots or questioning individual voters; the acquisition of confidential voter data or access to voter files; and/or discussion of alleged fraud as justification for the planned recount.

Please note that American Oversight does not seek, and that this request specifically excludes, the initial mailing of news clips or other mass-distribution emails. However, subsequent communications forwarding such emails are responsive to this request. In other words, for example, if Sen. Fann received a mass-distribution news clip email, that initial email would not be responsive to this request. However, if Sen. Fann forwarded that email to another individual with their own commentary, that subsequent message would be responsive to this request and should be produced.

Please provide all responsive records from November 3, 2020, through the date the search is conducted.

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as Cyber Ninjas itself has proposed to contact voters either by phone or in person to question their voting histories,[4] a step that has been described as "harassment and intimidation" of voters.[5] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the electoral process.

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Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. The Statement of Work executed by Cyber Ninjas contemplates that the auditors will be contacting individual voters to ask about their voting histories in the first phase of the audit process. That phase is expected to be completed within 20 days, after which point the auditors will begin reviewing paper ballots.[6] Disclosure of records after Cyber Ninjas has already begun handling ballots and contacting voters would be too late to prevent any potential harms resulting from those processes.

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Specified Entities:

1. Kory Langhofer, or anyone communicating from an email address ending in @statecraftlaw.com
2. Anyone communicating on behalf of Cyber Ninjas, including Doug Logan, or anyone communicating in an email address ending in @cyberninjas.com
3. Anyone communicating on behalf of Wake Technology Services, or anyone communicating from an email address ending in @waketsi.com
4. Anyone communicating on behalf of CyFIR, or anyone communicating from an email address ending in @cyfir.com
5. Anyone communicating on behalf of Digital Discovery, or anyone communicating from an email address ending in @digitaldiscoveryesi.com
6. Former Arizona Secretary of State Ken Bennett
7. Bobby Piton
8. Jovan Pulitzer
9. Anyone communicating on behalf of Allied Security Operations Group, including Russell Ramsland, James Keet Lewis III, or Colonel Phil Waldron

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Specified Entities:

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2. Ronna McDaniel, Drew Secton, Brian Seitchik, or anyone communicating from an email address ending in @gop.com, @rnchq.com, or @rdpstrategies.com
3. Anyone communicating from an email address ending in senate.gov or mail.house.gov
4. Representative Paul Gosar, Thomas Van Flein, Leslie Foti, or anyone communicating from an email address ending in @drpaulgosar.com
5. Representative Andy Biggs, Kate LaBorde, Caroline Brennan, or anyone communicating from an email address ending in @biggsforcongress.com
6. Rudolph Giuliani, or anyone communicating on his behalf (such as Jo Ann Zafonte, Christianne Allen, Beau Wagner, or anyone communicating from an email address ending in @giulianisecurity.com, giulianipartners.com, or gdcillc.com)
7. Joseph diGenova, Victoria Toensing, or anyone communicating from an email address ending in @digenovatoensing.com
8. Sidney Powell, or anyone communicating from an email address ending in @federalappeals.com
9. Jenna Ellis, or anyone communicating from an email address ending in @falkirkcenter.com or @thomasmore.org

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"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as Cyber Ninjas itself has proposed to contact voters either by phone or in person to question their voting

histories,[4] a step that has been described as "harassment and intimidation" of voters.[5] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the electoral process.

Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. The Statement of Work executed by Cyber Ninjas contemplates that the auditors will be contacting individual voters to ask about their voting histories in the first phase of the audit process. That phase is expected to be completed within 20 days, after which point the auditors will begin reviewing paper ballots.[6] Disclosure of records after Cyber Ninjas has already begun handling ballots and contacting voters would be too late to prevent any potential harms resulting from those processes.

Statement of Noncommercial Purpose

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's planned audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including whether or to what extent partisan political considerations influenced the senate's decision to pursue an additional audit, or guided the selection of the auditing team.[7]

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes

[4] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.
[5] Bob Christie, *County Board to Senate: Find Another Spot to Recount Ballots*, AP, Apr. 2, 2021, https://apnews.com/article/joe-biden-arizona-phoenix-elections-voting-23a34828e8dadd190fe2f02555559b30.
[6] *See supra*, note 4.
[7] *See supra*, notes 1 & 2.

materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[8]

Because this request is made for noncommercial purposes, American Oversight requests that any fees charged in connection with processing this request be limited to copying and postage charges, if applicable.[9] Please notify American Oversight of any anticipated fees or costs in excess of $100 prior to incurring such costs or fees.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

[8] American Oversight currently has approximately 15,680 page likes on Facebook and 106,100 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited Apr. 5, 2021); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited Apr. 5, 2021).

[9] A.R.S. § 39-121.01(D)(1); *see also Hanania v. City of Tucson*,128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980). Furthermore, because this request is for noncommercial purposes, additional fees provided for under A.R.S. § 39-121.03(A) are not applicable and should not be assessed.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not

understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight

AMERICAN OVERSIGHT

April 6, 2021

VIA EMAIL

Senator Karen Fann
Arizona State Capitol Complex
1700 W Washington Street
Phoenix, AZ 85007
kfann@azleg.gov

Re: Public Records Request

Dear Senator Fann:

Pursuant to the Arizona Public Records Law, A.R.S. §§ 39-121 et seq., American Oversight makes the following request for records.

On February 23, 2021, Maricopa County announced the results of an independent audit into its November 3 elections results, confirming that ballots were tabulated accurately and that voting equipment and software were secure.[1] Nevertheless, the Arizona State Senate has pursued an additional audit and recount, including the hand tabulation of more than two million votes. On March 31, 2021, Senate President Karen Fann announced that the audit team would be led by the firm Cyber Ninjas,[2] whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020 elections.[3]

American Oversight seeks records with the potential to shed light on the Senate's planned audit and recount of Maricopa County's election results, including whether or to what extent partisan political interests informed the selection of auditors. As explained more fully below, prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have begun contacting voters and reviewing ballots.

Requested Records

American Oversight requests that your office promptly produce the following records:

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[1] Jen Fifield, *Maricopa County's 2020 Election Votes Were Counted Correctly, More County Audits Show*, Ariz. Republic (updated Feb. 23, 2021, 5:48 PM), https://www.azcentral.com/story/news/politics/elections/2021/02/23/maricopa-countys-election-audits-show-2020-votes-counted-correctly/4550644001/.
[2] Jeremy Duda, *Arizona Senate Hires a 'Stop the Steal' Advocate to Lead 2020 Election Audit*, AZ Mirror (updated Apr. 1, 2021, 10:18 AM), https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/.
[3] *Id.*

All electronic communications (including emails, email attachments, text messages, messages on messaging platforms, such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp) between (A) Senator Karen Fann, anyone communicating on their behalf, such as a scheduler or assistant, or anyone serving as their Chief of Staff, and (B) any of the individuals or entities listed below:

Specified Entities:

1. Maricopa County Board of Supervisors Chairman, Jack Sellers
2. Board Vice Chairman, Bill Gates
3. Supervisor Clint Hickman
4. Supervisor Steve Chucri
5. Supervisor Steve Gallardo
6. Tom Liddy
7. Steve Tully
8. Maricopa County Elections Director, Scott Jarrett
9. Maricopa County Elections Director, Reynaldo Venezuela
10. Anyone communicating from an email address ending in @eac.gov

Please provide all responsive records from November 3, 2020, through the date the search is conducted.

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as Cyber Ninjas itself has proposed to contact voters either by phone or in person to question their voting histories,[4] a step that has been described as "harassment and intimidation" of voters.[5] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the electoral process.

Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. The Statement of Work executed by Cyber Ninjas contemplates that the auditors will be contacting individual voters to ask about their voting histories in the first phase of the audit process. That phase is expected to be completed within 20 days, after which

[4] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.

[5] Bob Christie, *County Board to Senate: Find Another Spot to Recount Ballots*, AP, Apr. 2, 2021, https://apnews.com/article/joe-biden-arizona-phoenix-elections-voting-23a34828e8dadd190fe2f02555559b30.

point the auditors will begin reviewing paper ballots.[6] Disclosure of records after Cyber Ninjas has already begun handling ballots and contacting voters would be too late to prevent any potential harms resulting from those processes.

Statement of Noncommercial Purpose

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's planned audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including whether or to what extent partisan political considerations influenced the senate's decision to pursue an additional audit, or guided the selection of the auditing team.[7]

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[8]

Because this request is made for noncommercial purposes, American Oversight requests that any fees charged in connection with processing this request be limited to copying and postage charges, if applicable.[9] Please notify American Oversight of any anticipated fees or costs in excess of $100 prior to incurring such costs or fees.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain

[6] *See supra*, note 4.
[7] *See supra*, notes 1 & 2.
[8] American Oversight currently has approximately 15,680 page likes on Facebook and 106,100 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited Apr. 5, 2021); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited Apr. 5, 2021).
[9] A.R.S. § 39-121.01(D)(1); *see also Hanania v. City of Tucson*,128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980). Furthermore, because this request is for noncommercial purposes, additional fees provided for under A.R.S. § 39-121.03(A) are not applicable and should not be assessed.

communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes

an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight

Exhibit 14

AMERICAN OVERSIGHT

April 9, 2021

VIA EMAIL

Cyber Ninjas
Attn: Doug Logan
5077 Fruitville Road
#109-421
Sarasota, FL 34232
legal@cyberninjas.com
dlogan@cyberninjas.com
sales@cyberninjas.com

Re: Public Records Request

To Whom It May Concern:

The Arizona Public Records Law, A.R.S. §§ 39-121 et seq., applies to any public organization or agency "supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." A.R.S. § 41-151.18. Arizona Senate President Karen Fann recently announced that the Senate had retained your company, Cyber Ninjas, to conduct an audit of the November 2020 election results from Maricopa County.[1] The work performed pursuant to that contract is therefore subject to the provisions of the Arizona Public Records Law, which requires you to promptly produce records to any member of the public who requests access to them. *See* A.R.S. § 39-121.01(E).

American Oversight seeks records with the potential to shed light on Cyber Ninjas' role in the Senate's planned audit of Maricopa County's election results, including regarding the anticipated or actual costs of the audit, the direct canvassing of voters or handling of confidential voter information, and other relevant communications. As explained more fully below, prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors begin contacting voters and reviewing ballots.

Requested Records

American Oversight requests that Cyber Ninjas promptly produce the following records:

[1] Bob Christie, *CEO of Firm Eyeing Ballots Appeared to Make Political Posts*, AP, Mar. 31, 2021, https://apnews.com/article/joe-biden-arizona-elections-phoenix-dcb5478736188723b405a26e5b7031fc.

1. Complete copies (including any attachments) of any contract, sub-contract, amendment, memorandum of understanding, or other written agreement in possession of Cyber Ninjas related to the planning, preparation, or execution of the audit, including but not limited to: leases for spaces used to recount ballots; contracts with third-party security or transportation; vendor contracts; or contracts with any formal or informal advisors, consultants, or counsel.

2. Any project plans or other documents detailing the steps or procedures to be followed in each phase of the audit, including but not limited to: plans for the accessing, storing, and handling of confidential voter information, voting equipment, or voting software; methodology for comparing the expected and final results; or other privacy or security protocols.

3. Records sufficient to show a breakdown of the projected costs of Cyber Ninjas' involvement in the Senate's audit of Maricopa County's November 3, 2020 election results, including any cost estimates submitted to the Senate during the procurement process, justifications for the specified $150,000 value of the contract,[2] or other documents reflecting the budget for the audit.

4. Records sufficient to identify the precincts to be included in the "Registration and Votes Cast Phase" of the audit and the underlying justification for the selection of those precincts.

5. Any scripts or other guidelines or protocols for contacting individual voters by phone, in person or electronically.

Please provide all responsive records from February 1, 2021, through the date the search is conducted.

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect how the process is conducted. The public has a legitimate interest in the manner in which the audit is conducted, as Cyber Ninjas itself has proposed to contact voters either by phone or in person to question their voting histories,[3] a step that has been described as "harassment and intimidation" of voters.[4]

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[2] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.

[3] *Id.*

[4] Bob Christie, *County Board to Senate: Find Another Spot to Recount Ballots*, AP, Apr. 2, 2021, https://apnews.com/article/joe-biden-arizona-phoenix-elections-voting-23a34828e8dadd190fe2f02555559b30.

Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. The Statement of Work executed by Cyber Ninjas contemplates that the auditors will be contacting individual voters to ask about their voting histories in the first phase of the audit process. That phase is expected to be completed within 20 days, after which point the auditors will begin reviewing paper ballots.[5] Disclosure of records after Cyber Ninjas has already begun handling ballots and contacting voters would be too late to prevent any potential harms resulting from those processes.

Statement of Noncommercial Purpose

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's planned audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including the costs to taxpayers of a second audit into the November 3, 2020 election results, the measures being taken to protect confidential voter information, and the extent to which voters may be contacted by phone or in person.

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[6]

Guidance Regarding the Search & Processing of Requested Records

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- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or

[5] *See supra*, note 2.

[6] American Oversight currently has approximately 15,500 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited Apr. 8, 2021); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited Apr. 8, 2021).

Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding government business. Do not exclude records regarding government business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by your organization before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your organization can decrease the likelihood of costly and time-consuming litigation in the future.

Exhibit 15

AMERICAN OVERSIGHT

April 30, 2021

VIA EMAIL

Norm Moore
Senate Public Records Attorney
400 W Congress, Ste. 201
Tucson, AZ 85701
nmoore@azleg.gov

Re: Public Records Request

Dear Senate Public Records Attorney:

Pursuant to the Arizona Public Records Law, A.R.S. §§ 39-121 et seq., American Oversight makes the following request for records.

On February 23, 2021, Maricopa County announced the results of an independent audit into its November 3 elections results, confirming that ballots were tabulated accurately and that voting equipment and software were secure.[1] Nevertheless, the Arizona State Senate has pursued an additional audit and recount, including the hand tabulation of more than two million votes. On March 31, 2021, Senate President Karen Fann announced that the audit team would be led by the firm Cyber Ninjas,[2] whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020 elections.[3] While the announcement claimed that "Senate leadership expects this audit to be done in a transparent manner with the cooperation of Maricopa County,"[4] the public does not yet have access to basic information about the conduct of the audit.[5]

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[1] Jen Fifield, *Maricopa County's 2020 Election Votes Were Counted Correctly, More County Audits Show*, Ariz. Republic (updated Feb. 23, 2021, 5:48 PM), https://www.azcentral.com/story/news/politics/elections/2021/02/23/maricopa-countys-election-audits-show-2020-votes-counted-correctly/4550644001/.
[2] Jeremy Duda, *Arizona Senate Hires a 'Stop the Steal' Advocate to Lead 2020 Election Audit*, AZ Mirror (updated Apr. 1, 2021, 10:18 AM), https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/.
[3] *Id.*
[4] AZSenateRepublicans (@AZSenateGOP), Twitter (Mar. 31, 2021, 2:07 PM), https://twitter.com/AZSenateGOP/status/1377321595518083074/photo/1.
[5] Jerod MacDonald-Evoy, *Judge Rejects Call for Secret Election Audit Hearing from Auditors, Senate Republicans*, AZ Mirror (Apr. 28, 2021, 8:24 AM), https://www.azmirror.com/2021/04/27/judge-rejects-call-for-secret-election-audit-hearing-from-auditors-senate-republicans/?eType=EmailBlastContent&eId=19cfc01a-a092-4be0-abd6-4a95d066663f.

Cyber Ninjas has attempted to keep procedural documents regarding protecting voter privacy out of public view even as the hand counting of ballots is already in process.[6]

American Oversight seeks records with the potential to shed light on the Senate's audit of Maricopa County's election results, including plans to protect the security of confidential voter information, paper ballots, and election equipment. As explained more fully below, prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have finished reviewing ballots and handling election equipment.

Requested Records

American Oversight requests that your office promptly produce the following records:

1. Complete copies (including any attachments) of any contract, sub-contract, amendment, memorandum of understanding, or other written agreement related to the execution of the audit of the 2020 election results being conducted by Cyber Ninjas, including the lease for use of the Veterans Memorial Coliseum; any contracts with third-party security and transportation; and any agreements regarding the recruitment and training of volunteers to assist in the audit.

2. Project plans or other documents detailing the steps or procedures to be followed in "Vote Count & Tally Phase" and "Electronic Voting System Phase" of the audit,[7] including plans for the accessing, storing, and handling of physical ballots, confidential voter information, voting equipment, and voting software.

3. Records provided to the Senate sufficient to show a breakdown of the projected costs of the audit, including justifications for the specified $150,000 value of the contract,[8] or other documents reflecting the budget for the audit.

4. Records identifying the precincts to be canvassed in the "Registration and Votes Cast Phase"[9] of the audit and any justification for the selection of those precincts.

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[6] Jeremy Duda, *Cyber Ninjas Releases Its Election Audit Policies After Court Order*, AZ Mirror (updated Apr. 29, 2021, 2:41 PM), https://www.azmirror.com/2021/04/29/cyber-ninjas-releases-its-election-audit-policies-after-court-order/.
[7] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.
[8] *Id.*
[9] *Id.*

5. Scripts or other guidelines or protocols to be used by the auditors for contacting individual voters by phone, in person or electronically during the "Registration and Votes Cast Phase"[10] of the audit.

Please provide all responsive records from February 1, 2021, through the date the search is conducted.

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as serious concerns exist with regard to protecting voter privacy, including the physical security of the facility where votes are being counted and the mishandling of paper ballots.[11] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the electoral process. Former Arizona Secretary of State Ken Bennett, who is acting as liaison between Cyber Ninjas and the Senate, encouraged the public to fund[12] the audit's estimated $2.8 million goal through a site which explicitly labels the operation as "the most in-depth Election Fraud Audit that has ever been performed."[13]

Disclosure of the requested records is only meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. Under the direction of Cyber Ninjas, more than 100,000 paper ballots have already been counted.[14] Disclosure of records after the recount has been completed would be too late to prevent any potential harms resulting from those processes.

Statement of Noncommercial Purpose

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[10] *Id.*

[11] Andrew Oxford, *Privacy of Voters Worries Judge as Arizona Senate's Count of November Ballots Continues*, AZ Central (Apr. 27, 202, updated 6:22 PM MST), https://www.azcentral.com/story/news/politics/elections/2021/04/27/arizona-audit-judge-concerned-voter-protections-during-recount/4855290001/.

[12] Rosalind S. Helderman & Josh Dawsey, A*s Trump Seizes on Arizona Ballot Audit, Election Officials Fear Partisan Vote Counts Could be the Norm in Future Elections*, Wash. Post (Apr. 29, 2021, 3:05 PM EDT), https://www.washingtonpost.com/politics/trump-arizona-recount/2021/04/29/bcd8d832-a798-11eb-bca5-048b2759a489_story.html.

[13] *About the Audit*, The America Project, (last visited Apr. 29, 2021), https://fundtheaudit.com/maricopa/.

[14] Maria Polleetta & Piper Hansen, *Here's What Happened at the Arizona Election Audit of Maricopa County Ballots*, AZ Central (Apr. 28, 2021, updated Apr. 29, 2021, 8:05 AM MST), https://www.azcentral.com/story/news/politics/arizona/2021/04/28/arizona-election-audit-what-happened-ballot-counting-april-28/4876185001/.

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including how the Senate's chosen contractors plan to protect the privacy of voters and maintain the security of confidential voter files and election infrastructure.[15]

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[16]

Because this request is made for noncommercial purposes, American Oversight requests that any fees charged in connection with processing this request be limited to copying and postage charges, if applicable.[17] Please notify American Oversight of any anticipated fees or costs in excess of $100 prior to incurring such costs or fees.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

[15] *See supra, notes 5 & 6.*

[16] American Oversight currently has approximately 15,690 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited Apr. 30, 2021); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited Apr. 30, 2021).

[17] A.R.S. § 39-121.01(D)(1); *see also Hanania v. City of Tucson*,128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980). Furthermore, because this request is for noncommercial purposes, additional fees provided for under A.R.S. § 39-121.03(A) are not applicable and should not be assessed.

- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight

Exhibit 16

Subject: RE: New Public Records Request
Date: Tuesday, May 4, 2021 at 9:28:10 PM Eastern Daylight Time
From: Norm Moore
To: Sara Creighton

EXTERNAL SENDER

Sara Creighton,

There are no more responsive documents to provide at this time because the Senate doesn't have custody, control or possession of any of the records requested.

If you have any more questions or need further clarification please contact me at your earliest convenience.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

From: Sara Creighton <sara.creighton@americanoversight.org>
Sent: Tuesday, May 4, 2021 10:13 AM
To: Norm Moore <NMoore@azleg.gov>
Cc: AO Records <records@americanoversight.org>
Subject: Re: New Public Records Request

Mr. Moore,

Thank you so much for your quick response with that document. As you indicated, that document appears to be responsive to part 1 of the records requested in request AZ-SEN-21-0609, which we submitted last Friday. Can you confirm whether you are still searching for any other records responsive to that request, or if this one document is the only document the Senate has access to that is responsive to that request?

I am taking your other questions about the Fann and Petersen requests back to our team, and we will follow up as soon as we can.

Thank you,
Sara Creighton

From: Norm Moore <NMoore@azleg.gov>
Date: Friday, April 30, 2021 at 4:21 PM
To: AO Records <records@americanoversight.org>
Subject: RE: New Public Records Request

EXTERNAL SENDER

Khahilia Shaw,

I am receipt in your latest public records request of today. Attached to this email is a copy of the lease that the Arizona State Senate entered into with the Arizona Exposition and State Fair regarding the lease of the Arizona Veterans Memorial Coliseum as requested in paragraph 1. of Requested Records. However, I do need to request some clarification regarding the previous public records requests particularly regarding Senator Eddie Farnsworth and President Karen Fann.

On April 9, you sent revised search terms regarding the 5 public records requests regarding former Senator Eddie Farnsworth. A number of search terms in those lists included wildcards. Following the receipt of your April 9 email, I sent you a follow-up email on April 13 explaining that wildcards can't be used in our system and asked how you would like to proceed. Also, in that email I also inquired whether you were seeking communications in which former Senator Farnsworth either sent an email or responded to an email or if you were seeking all communications involving those search terms even if former Senator Eddie Farnsworth didn't read or respond to those emails. Since I haven't received a response to those questions those requests have not yet been processed.

Last Friday, on April 23, I sent an email acknowledging receipt of the public records request regarding President Fann. In that email I indicated that I needed public records request 0472 because that specific request couldn't be located in the President's Office. Also, in that email I requested clarification if you were asking for all email communications sent to President Fann or her staff even if the email was never read or if you were interested in the emails in which President Fann or her staff either authored or responded to emails from the individuals and entities included in the search terms. Additionally, I requested search terms to be provided for request 0476 since there were general descriptions of what communications you are seeking but no specific search terms provided for conducting a search. I haven't received any responses to those questions so that request has also has not processed. Once I receive responses regarding the revised search terms for former Senator Farnsworth do you want me to use those revised search terms also for President Fann and her Administrative Assistants? Please advise.

I am in the process of checking with Senator Petersen's office for public records requests that your email of today indicated were sent to Senator Petersen. If those requests are the same as for President Fann and former Senator Eddie Farnsworth do you want me to use the revised search terms when I receive them from you? Please advise.

If there are responsive documents regarding any of the other items in your request I will send them to you.

In the meantime, if you have any questions or need further clarification please contact me.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

From: AO Records <records@americanoversight.org>
Sent: Friday, April 30, 2021 10:42 AM
To: Norm Moore <NMoore@azleg.gov>
Cc: Sara Creighton <sara.creighton@americanoversight.org>
Subject: New Public Records Request

Mr. Moore,

Thank you for following up on this; we really appreciate your flexibility in working with us on these requests. Attached to this email you will find a new request that we are submitting to you as the Senate Public Records Attorney seeking a much narrower set of specific documents related to the audit. We hope the narrow scope of this request will allow you to easily identify the responsive documents without requiring a time consuming electronic search. Because this request is more targeted and should take significantly less time to respond to, we would like to prioritize this request over completing the search and production for the remaining Fann, Petersen, and Farnsworth requests. We recognize this may delay your response on those earlier requests.

In light of the targeted nature of today's request, we would appreciate receipt of responsive records by Friday, May 7.

Please let me know if you have any questions or if you'd like to discuss.

Thank you,

Khahilia Shaw
Counsel
American Oversight
khahilia.shaw@americanoversight.org | 202.539.6507 | she/her
www.americanoversight.org | @weareoversight

From: Norm Moore <NMoore@azleg.gov>
Date: Friday, April 23, 2021 at 11:10 PM
To: Khahilia Shaw <khahilia.shaw@americanoversight.org>
Subject: 5 Public Records Requests regarding Senator Fann

EXTERNAL SENDER

Khahilia Shaw,

I apologize that you didn't receive confirmation earlier regarding the public records requests that were sent to President of the Arizona Senate Karen Fann on April 6, 2021. I am acknowledging the receipt of four of the public records requests as follows: 0465, 0468, 0476 and 0480. Could you please resend the request with your internal number 0472?

In your email of earlier today, you requested an estimate of how long a search for records might take. As you are aware, given the subject matter of these records requests, the vast number of individuals and entities that are included as search terms and that the requests also includes 3 staff members (her 2 Administrative Assistants and her Chief of Staff) in addition to President Fann, I would anticipate a vast number of results to be produced. As you know, the results generated from a search have to be reviewed and then potentially redacted. However, it is likely that in these particular requests many of these documents will be subject to legislative privilege, attorney-client privilege or both and therefore won't be released but it will still take a long time to review them. Until such time that I have some idea of the actual number of results that are generated from an electronic search of emails I won't be able to provide an estimate of how long it will take. I do have some questions below about the requests and the answer to those questions can either reduce or increase the amount of records to be produced.

I do have some questions regarding all of the requests in general and then some questions regarding specific requests. Regarding email communications are you asking for all email communications sent to President Fann or her staff even if the email was never read or are you interested in those emails in which President Fann or her staff either authored or responded to from the individuals or entities included in the search terms? Please advise. In request 0476 there are general descriptions of what communications you are seeking but no specific search terms provided for conducting a search? Please advise. I may have some other questions regarding 0472 after I have had the opportunity to read and review the request.

Regarding request 0465, you have already received the signed Master Service Agreement (MSA) and the signed Statement of Work (SOW) between the State Senate and Cyber Ninjas and the other proposals (not technically bids) from 3 other entities as requested. The Arizona Legislature is not subject to the Arizona Procurement Code in Title 41, Chapter 23, Arizona Revised Statutes so there are not specific requirements for solicitation of bids, evaluation of bids or statement of rejection made to any bidders. Are there specific terms you want to be used for the description of what you are seeking in paragraph 2.? Please advise.

If you have any questions or need further clarification please contact me at your earliest convenience.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

Sent from my iPhone

Begin forwarded message:

From: Khahilia Shaw <khahilia.shaw@americanoversight.org>
Date: April 23, 2021 at 9:24:27 AM PDT
To: Karen Fann <KFann@azleg.gov>
Subject: Re: Public Records Request (AZ-SEN-21-0465)

Good afternoon,

We are following up on the five Arizona Public Records requests listed below, which we submitted to your office on April 6. We would appreciate confirmation of receipt of these requests, as well as estimates on how long a search for records might take.

1. AZ-SEN-21-0465 (Contracts)
2. AZ-SEN-21-0468 (General Communications)
3. AZ-SEN-21-0472 (Communications with Contractors)
4. AZ-SEN-21-0476 (Communications with Specified Law Firms)
5. AZ-SEN-21-0480 (Communications with Maricopa County)

Thank you,

Khahilia Shaw
Counsel
American Oversight
khahilia.shaw@americanoversight.org | 202.539.6507 | she/her
www.americanoversight.org | @weareoversight

> **From:** Sarah Wishingrad <sarah.wishingrad@americanoversight.org> on behalf of AO Records <records@americanoversight.org>
> **Date:** Tuesday, April 6, 2021 at 3:40 PM
> **To:** <kfann@azleg.gov>
> **Subject:** Public Records Request (AZ-SEN-21-0465)
>
> Dear Public Records Officer:
>
> Please find attached a request for records under Arizona's Public Records Law.
>
> Sincerely,
>
> Sarah Wishingrad
> Pronouns: she/her
> Paralegal
> American Oversight
> records@americanoversight.org
> www.americanoversight.org | @weareoversight
>
> PRR: AZ-SEN-21-0465

Exhibit 17

AMERICAN OVERSIGHT

May 10, 2021

VIA EMAIL

Senate President Karen Fann
Arizona State Capitol Complex
1700 W. Washington Street
Phoenix, AZ 85007
kfann@azleg.gov

Senator Warren Petersen
Arizona State Capitol Complex
1700 W. Washington Street
Phoenix, AZ 85007
wpetersen@azleg.gov

Norm Moore
Senate Public Records Attorney
400 W. Congress, Ste. 201
Tucson, AZ 85701
nmoore@azleg.gov

Re: Public Records Request

Dear Senate President Fann, Senator Petersen, and Public Records Attorney Moore:

As you know, American Oversight has made several public records requests over the past month of you, other members (and former members) of the Arizona Senate, and the Arizona Senate more generally. We write today to clarify and supplement our prior requests, and to confirm the position that you have taken regarding the public's ability to access records reflecting what is happening at Veterans Memorial Coliseum.

The ongoing controversy related to the Arizona Senate's "audit" of the 2020 General Election results in Maricopa County has its origins in legislative subpoenas Senate President Fann and Senator Petersen issued. The legality of those subpoenas was litigated before Judge Timothy Thomason, who ultimately ruled that the subpoenas were issued for a valid legislative purpose.[1] On March 31, 2021, Senate President Fann announced that the audit team would be led by the firm Cyber Ninjas, whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020

[1] Jeremy Duda, *Judge Sides with Senate, Says Maricopa Must Turn over Election Materials for Audit*, AZ Mirror, Feb. 26, 2021, 2:38 PM), https://www.azmirror.com/2021/02/26/judge-sides-with-senate-says-maricopa-must-turn-over-election-materials-for-audit/.

elections.[2] The Arizona Senate then executed an agreement with Cyber Ninjas to perform the "audit"—and thus perform the public function of the "audit" itself—and committed $150,000 in public funds to pay Cyber Ninjas for its work.[3] The Arizona Senate also retained former Arizona Secretary of State Ken Bennett to serve as the Senate's representative and "liaison" to Cyber Ninjas and the "audit," which is also plainly a public function.

While your announcement claimed that "Senate leadership expects this audit to be done in a transparent manner with the cooperation of Maricopa County,"[4] the public does not yet have access to basic information about the conduct of the audit.[5] Cyber Ninjas has also attempted to keep procedural documents regarding protecting voter privacy out of public view, even as the hand counting of ballots is already in process.[6] Additionally, from prior correspondence with the Arizona Senate's public records attorney, Mr. Norm Moore, we understand that the Arizona Senate takes the position that documents and communications related to the conduct of the audit that are not in your physical possession but are held instead by Cyber Ninjas and/or Mr. Bennett are not public records (or are not within your custody, possession, or control) despite the fact that both Cyber Ninjas and Mr. Bennett are (a) serving as your contractors, (b) performing legislative and public functions, and (c) being paid with public funds.

Requested Records

To clarify our prior requests, and pursuant to Arizona's Public Records Law, American Oversight seeks the following public records that have the potential to shed light on the Senate's "audit" of Maricopa County's election results. Prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have finished reviewing ballots and handling election equipment. These requests are directed to Senate President Fann, Senator Petersen, and the Arizona Senate as a branch of the State, and your response must include documents in the physical possession of your agents and contractors, including Cyber Ninjas and Mr. Bennett, over whom you exercise control by agreement or contract:

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[2] Jeremy Duda, *Arizona Senate Hires a 'Stop the Steal' Advocate to Lead 2020 Election Audit*, AZ Mirror (Apr. 1, 2021, 10:18 AM), https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/.

[3] *Id.*

[4] AZSenateRepublicans (@AZSenateGOP), Twitter (Mar. 31, 2021, 2:07 PM), https://twitter.com/AZSenateGOP/status/1377321595518083074/photo/1.

[5] Jerod MacDonald-Evoy, *Judge Rejects Call for Secret Election Audit Hearing from Auditors, Senate Republicans*, AZ Mirror (Apr. 28, 2021, 8:24 AM), https://www.azmirror.com/2021/04/27/judge-rejects-call-for-secret-election-audit-hearing-from-auditors-senate-republicans/?eType=EmailBlastContent&eId=19cfc01a-a092-4be0-abd6-4a95d066663f.

[6] Jeremy Duda, *Cyber Ninjas Releases Its Election Audit Policies After Court Order*, AZ Mirror (Apr. 29, 2021, 2:41 PM), https://www.azmirror.com/2021/04/29/cyber-ninjas-releases-its-election-audit-policies-after-court-order/.

1. All communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp)) exchanged between former Secretary of State Ken Bennett and any party engaged in the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors, including but not limited to: Doug Logan or anyone communicating on behalf of Cyber Ninjas, Wake Technology Services, Digital Discovery, CyFIR, former state legislative candidate Liz Harris,[7] or any other individual or entity engaged in work on the audit.

2. Complete copies (including any attachments) of any contract, sub-contract, amendment, memorandum of understanding, or other written agreement related to the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors. Responsive documents to this portion of this request this request would include, but not be limited to, any leases for space to conduct the audit, including any lease agreement following the expiration of the existing lease agreement with the Veterans Memorial Coliseum on May 14, 2021; any contracts, or other formal or informal agreements, with third-party security, transportation, or lodging vendors or volunteers; any formal or informal agreements with third parties regarding the tabulation and aggregation of audit data; any formal or informal agreements with consultants, advisors, or counsel; and any formal or informal agreements regarding the recruitment and training of employees, contractors, or volunteers to participate in any phase of the audit.

3. All records reflecting the projected or actual costs of the audit, including but not limited to: records referencing the $150,000 value of the contract with the Arizona Senate;[8] records reflecting estimated costs or the budget for the audit, including any expenses beyond the specified $150,000; records reflecting the collection of external funding for the audit, such as agreements with fundraisers, any policies regarding external revenue collection, and all records of external financial or in-kind resource contributions; and copies of all invoices, requests for reimbursement, and payments made relating to the planning, preparation, or execution of the audit or associated litigation.

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[7] Andrew Oxford, *Auditors Won't Knock on Voters' Doors in Arizona Election Review, Senate President Tells DOJ*, AZ Central (May 7, 2021, 5:39 PM), https://www.azcentral.com/story/news/politics/arizona/2021/05/07/arizona-audit-plan-visit-voters-homes-dropped-fann-tells-doj/4996668001/ (explaining that Ms. Farris may either be directly involved in the audit or conducting similar work to the audit).

[8] Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121.

4. Any project plans or other documents detailing the steps or procedures to be followed in each phase of the audit,[9] including those following the expiration of the existing agreement with the Veterans Memorial Coliseum on May 14, 2021. Responsive documents to this portion of the request would include, but not be limited to, any projected timelines for the completion of the audit; organizational charts or other documents memorializing chains of custody; plans for the accessing, storage, and handling of physical ballots, confidential voter information, voting equipment, and voting software; explanations or analyses of investigative techniques, including but not limited to ultraviolet inspection, kinematic artifact detection, or analysis of paper fibers;[10] and procedures for the tabulation and aggregation of audit data.

5. Records relating to or referencing the "Registration and Votes Cast Phase"[11] of the audit, including records relating to work planned or completed in the "Registration and Votes Cast Phase," including but not limited to: records identifying the precincts to be canvassed and any justification for the selection of those precincts; logs or other records identifying those voters canvassed or selected for canvassing; any scripts or other guidelines, procedures, or protocols to be used by the auditors for contacting individual voters by phone, in person, or electronically; or agreements with any party regarding the recruitment and training of individuals to conduct canvassing.

The start date for these records is February 1, 2021.

Please consider this a standing request, the response to which should be updated promptly each time new information is added to any responsive records or new responsive records are created. *See W. Valley View, Inc. v. Maricopa Cty. Sheriff's Off.*, 216 Ariz. 225, 228 (App. 2007).

"Prompt" disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as serious concerns exist with regard to protecting voter privacy, including the physical security of the facility where votes are being counted and the mishandling of paper ballots.[12] Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the

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[9] *Id.*

[10] Jeremy Duda, *Governor Sidesteps Questions on Audit Amid Mounting Issues*, AZ Mirror (May 7, 2021, 7:44 AM), https://www.azmirror.com/blog/governor-sidesteps-questions-on-audit-amid-mounting-issues/.

[11] *See* Oxford *supra*, note 7.

[12] Andrew Oxford, *Privacy of Voters Worries Judge as Arizona Senate's Count of November Ballots Continues*, AZ Cent. (Apr. 27, 2021, 6:22 PM), https://www.azcentral.com/story/news/politics/elections/2021/04/27/arizona-audit-judge-concerned-voter-protections-during-recount/4855290001/.

electoral process. Mr. Bennett, the former Arizona Secretary of State acting as liaison between Cyber Ninjas and the Senate, encouraged the public to fund the audit's estimated $2.8 million goal through a website which explicitly labels the operation as "the most in-depth Election Fraud Audit that has ever been performed."[13]

Disclosure of the requested records is most meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. Under the direction of Cyber Ninjas, more than 200,000 paper ballots have already been counted.[14] Furthermore, the Senate's lease on the Veterans Memorial Coliseum will expire on May 14, 2021,[15] raising further concerns about the security of ballots and equipment after the Senate is required to vacate the facility. Disclosure of records after the recount has been completed would be too late to prevent any potential harms resulting from those processes. And in any event, we believe that all of the records requested above were already requested in our prior requests.

Please promptly notify us if you are taking the position that responsive records are either not public records or are not in your possession, custody, or control because they are in the physical possession of Cyber Ninjas and/or Mr. Bennett. Mr. Moore's prior correspondence implies this, but we wish to be sure of your position.

Statement of Noncommercial Purpose

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including how the Senate's

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[13] *About the Audit*, The America Project, (last visited May 10, 2021), https://fundtheaudit.com/maricopa/; *see* Rosalind S. Helderman & Josh Dawsey, A*s Trump Seizes on Arizona Ballot Audit, Election Officials Fear Partisan Vote Counts Could be the Norm in Future Elections*, Wash. Post (Apr. 29, 2021, 3:05 PM), https://www.washingtonpost.com/politics/trump-arizona-recount/2021/04/29/bcd8d832-a798-11eb-bca5-048b2759a489_story.html.

[14] Andrew Oxford, *Extending Arizona Ballot Recount Past May 14 Is 'Not Feasible,' State Fair Officials Say*, AZ Central (May 5, 2021, 12:48 PM), https://www.azcentral.com/story/news/politics/arizona/2021/05/05/arizona-audit-fair-official-says-extending-recount-not-feasible/4960234001/.

[15] Brahm Resnik, *Bamboo Ballots, Death Threats and An Ultimatum: What's Next for Arizona GOP's Election Audit?* 12 News (May 9, 2021, 4:12 PM), https://www.12news.com/article/news/politics/bamboo-ballots-death-threats-and-an-ultimatum-whats-next-for-arizona-gops-election-audit/75-0d06c079-89ad-439a-9d82-c55d8656e97c.

chosen contractors are protecting the privacy of voters and maintaining the security of confidential voter files and election infrastructure.[16]

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[17]

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Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages, and

[16] *See supra, notes 5 & 6.*
[17] American Oversight currently has approximately 15,690 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited May 10, 2021); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited May 10, 2021).
[18] A.R.S. § 39-121.01(D)(1); *see also Hanania v. City of Tucson*,128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980). Furthermore, because this request is for noncommercial purposes, additional fees provided for under A.R.S. § 39-121.03(A) are not applicable and should not be assessed.

transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.

- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight

Exhibit 18

Norm Moore <NMoore@azleg.gov>
Sent: Friday, May 14, 2021 7:16 PM
To: Khahilia Shaw <khahilia.shaw@americanoversight.org>
Cc: Wendy Baldo <wbaldo@azleg.gov>; Greg Jernigan <GJernigan@azleg.gov>; Sara Creighton <sara.creighton@americanoversight.org>; Roopali Desai <rdesai@cblawyers.com>
Subject: RE: Recent Records Requests

-External Sender-

Khahilia Shaw,

I am in receipt of your latest Public Records Request in which you state on page 2 is "to clarify our prior requests" and seeks a variety of public records in five enumerated paragraphs. Also, I did receive notification late last evening from Roopali Desai that the firm of Coppersmith Brockelman PLC has been retained by American Oversight. I was in email communication with Roopali Desai earlier this afternoon and did inform her that I was in the middle of a response to you and that I would copy her on the email. Additionally, we are currently scheduled to have a discussion about these requests this coming Monday, May 18 at 1:00 p.m.

My response today to the five enumerated paragraphs requesting a variety of records includes attached documents in the possession of the Arizona State Senate and is as follows:

1. If this portion of the request is seeking communications originally authored by Ken Bennett or sent as a response by him to an email that he received from someone outside the State Senate that is "any party" engaged in the planning, preparation or execution of the audit, President Fann or Senator Petersen would only have possession of any of those communications if they were copied on such a communication. Are you seeking those communications from President Fann or Senator Petersen or communications sent by Ken Bennett to any one else included in this paragraph in which the Senate does not have possession, custody or control? Please advise.

2. The Senate does not have in its possession, custody or control any contract, sub-contract, amendment, memorandum or understanding, or other written agreement between Cyber Ninjas and any of it subcontractors. Additionally, the Senate has no other agreements with third-party security, transportation or lodging vendors or volunteers or any other third party regarding the audit except for the agreement with Cyber Ninjas and the Arizona Exposition and State Fair for the use of space at its facilities and you already have received a copy of those documents. An amendment to the agreement between the Arizona State Senate ("Contractor") and the Arizona Exposition and State Fair ("Board") which was executed two days ago is attached.

3. The executed Master Service Agreement (MSA) and the Statement of Work (SOW) between the Arizona State Senate and Cyber Ninjas doesn't include specific funding for a particular part of the audit but it did require a specific amount to be paid within a certain number of days from the execution of the agreement. The amount of that payment and when it was paid by the Senate is attached. The Arizona State Senate doesn't have any agreements with fundraisers nor any records of external financial or in-kind resource contributions nor has the Senate received any donations from individuals or entities that have been deposited into the Senate's general fund.

4. Again, other than the agreement (MSA and the SOW) between the Senate and Cyber Ninjas which I sent previously and a copy of the settlement agreement which is my understanding you already possess, any other documents related to project plans or other documents detailing steps or procedures to be followed include an attached letter from Jordan Wolff, from Wilenchik and Bartness, Attorneys at Law, on behalf of Cyber Ninjas to legal counsel, Josh Bendor, for Secretary of State Hobbs, a letter from Joe LaRue of the Maricopa County Attorney's Office to Kory Langhofer, counsel representing the Senate, regarding routers and a letter from President Fann to the Jack Sellers, Chairman of the Maricopa County Board of Supervisors requesting the presence of county officials or employees at a hearing next Tuesday, May 18 at 1:00 p.m. in Senate Hearing Room 109 to discuss three specific issues.

5. The Senate does not possess any records relating to or referencing the "Registration and Votes Cast Phase" other than what may be referred to in the MSA and SOW and the attached letter that President Fann sent to the Department of Justice.

If you have any questions or need further clarification please contact me at your earliest convenience.

I look forward to your response.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

From: Khahilia Shaw <khahilia.shaw@americanoversight.org>
Sent: Monday, May 10, 2021 2:13 PM
To: Norm Moore <NMoore@azleg.gov>; Karen Fann <KFann@azleg.gov>; Warren Petersen <wpetersen@azleg.gov>
Cc: Sara Creighton <sara.creighton@americanoversight.org>
Subject: Recent Records Requests

Good Afternoon,

Please see the attached letter regarding our recent Public Records Requests.

Thank you,

Khahilia Shaw
Counsel

American Oversight
khahilia.shaw@americanoversight.org | 202.539.6507 | she/her
www.americanoversight.org | @weareoversight

Keith Beauchamp (012434)
Roopali H. Desai (024295)
D. Andrew Gaona (028414)
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Attorneys for Plaintiff

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

AMERICAN OVERSIGHT, Plaintiff, v. KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Committee on Judiciary; ARIZONA SENATE, a branch of the State of Arizona, Defendants.	No. **ORDER TO SHOW CAUSE** (Tier 2)

The Court, having read and considered Plaintiff's Application for Order to Show Cause and Verified Complaint, and good cause appearing,

IT IS HEREBY ORDERED that Defendants appear before this Court on _____, 2021, at _____ ___.m., courtroom _____, and show cause, if there be any, why the relief sought in Plaintiff's Verified Complaint in this matter should not be granted.

DATED this _____ day of May, 2021.

_____
Judicial Officer of the Superior Court

Keith Beauchamp (012434)
Roopali H. Desai (024295)
D. Andrew Gaona (028414)
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Attorneys for Plaintiff

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

AMERICAN OVERSIGHT, Plaintiff, v. KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Committee on Judiciary; ARIZONA SENATE, a branch of the State of Arizona, Defendants.	No. **APPLICATION FOR ORDER TO SHOW CAUSE** **(Expedited consideration requested)** (Tier 2)

Pursuant to Rule 4(c) of the Arizona Rules of Procedure for Special Actions and Rule 7.3 of the Arizona Rules of Civil Procedure, and for the reasons set forth in its Verified Complaint filed herewith, Plaintiff American Oversight respectfully requests that this Court promptly enter an Order to Show Cause requiring Defendants Karen Fann, Warren Petersen, and the Arizona Senate (collectively, "Senate Defendants") to show cause why the relief sought in the Verified Complaint should not be granted. A proposed form of order is submitted herewith.

This is a statutory special action brought under Arizona's Public Records Law, A.R.S. § 39-121, *et seq*. ("PRL"). American Oversight seeks records relating to the Senate Defendants' audit of the 2020 General Election results in Maricopa County, including the procedures and processes of the audit, costs, payments, and fundraising by third parties relating to the audit, and the overall integrity and decision making of the audit process. Also at issue are communications between the Senate Defendants' agents, including between liaison (Ken Bennett) and the contractor conducting the audit on the Senate's behalf (Cyber Ninjas, Inc.).

The public has a right to be informed about the actions being taken by those conducting the Senate's audit. The need for prompt disclosure of this information is particularly acute because the Senate Defendants, Mr. Bennett, and Cyber Ninjas have elected to make interim announcements about their findings even before the audit is complete. For example, approximately one week ago, the Senate's audit Twitter account reported that its audit team had discovered illegally deleted files, broken seals for the secure bags used to transport ballots, and improper documentation of the chain of custody for ballots. After wide public dissemination of this (mis)information, representatives from Cyber Ninjas and its subcontractor stated yesterday that these initial interim reports were inaccurate.

Yet the Senate Defendants broadly contend that records in the possession of Cyber Ninjas, Mr. Bennett, and other agents hired by the Senate to conduct this public function on behalf of the Senate using public funds are off limits to the public who seek to obtain them through records requests. Such a result would vitiate Arizona's Public Records Law.

In its Verified Complaint, Plaintiff seeks the production of public records that the Senate Defendants have wrongfully withheld based on the flawed legal theory that they can shield otherwise-public records from release and scrutiny by simply contracting out public functions (at public expense) to private third parties. As detailed in the Verified Complaint (incorporated herein by reference), the Senate Defendants' refusal to disclose these public records is inconsistent with both the plain language of Arizona's public records statute and the policy on

which that statute rests: to "open agency action to the light of public scrutiny" and "allow citizens '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, 302 ¶ 21 (1998) (citations omitted).

Rule 4(c) of the Arizona Rules of Procedure for Special Actions provides that "[i]f a show cause procedure is used, the court shall set a speedy return date." Plaintiff requests that the Court sign the proposed order to show cause submitted herewith and set a return hearing at its earliest convenience.

RESPECTFULLY SUBMITTED this 19th day of May, 2021.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai
Keith Beauchamp
Roopali H. Desai
D. Andrew Gaona

Attorneys for Plaintiff