ARIZONA SUPREME COURT

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; and the ARIZONA SENATE, a house of the Arizona Legislature,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP, in his official capacity as a judge of the Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

Arizona Supreme Court
No. CV-21-0197-PR

Arizona Court of Appeals, Div. One
No. 1 CA-SA 21-0141

Maricopa County Superior Court
No. CV2021-008265

Filed with the Written Consent of the Parties

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT COALITION OF ARIZONA, INC. & LEAGUE OF WOMEN VOTERS OF ARIZONA

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Table of Contents

Table of Authorities

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Introduction

In 1901, Arizona's territorial legislature enacted the Public Records Law, A.R.S. § 39-121, *et seq.* ("PRL"), opening the government to "public scrutiny" and "allow[ing] the public access to official records and other government information." *Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 7 (2009) (citations omitted). No surprise then that a decade later, Arizona's framers wrote a populist constitution that manifested "more distrust than confidence in the uses of authority." John D. Leshy, The Arizona State Constitution 14 (G. Alan Tarr, 2d ed. 2013) (citation omitted). From the beginning, transparency has been a pillar of this State's history.

Yet, a century later, the Arizona Senate seeks to keep hidden from taxpayers the information and records related to its "audit" of Maricopa County ballots in the November 2020 election, claiming that legislative immunity shields it from compliance with black-letter law. As the Court of Appeals correctly found, neither the Arizona Constitution nor the PRL require or justify that result. The Court of Appeals' narrow ruling is correct, clear, and consistent with this Court's precedents. This Court should decline special action jurisdiction.

Interests of *Amici Curiae*

The First Amendment Coalition of Arizona, Inc. is a non-profit corporation, whose members include the Arizona Broadcasters Association, the Arizona Cable Telecommunications Association, the Arizona Newspapers Association, the Society of Professional Journalists and the Arizona Press Club. Founded in 1981, the Coalition advocates for free press and free speech rights under the Arizona and federal constitutions and for government transparency through the vigorous enforcement of state and federal public access laws covering public records, governmental meetings, and court proceedings.

The League of Women Voters of Arizona ("LWVAZ") is an affiliate of The League of Women Voters of the United States, a nonpartisan grassroots organization. Formed in 1920, The League of Women Voters is dedicated to promoting policies that remove unnecessary barriers to full participation in the electoral process. Originally founded to serve and train women voters, LMVAZ now educates and advocates on behalf of all Arizonans, investing in voter training, registration, and civic engagement activities to ensure that the interests of all Arizonans are fully and fairly represented in the democratic process.

Argument

I. Legislative immunity does not apply to ministerial decisions about whether to comply with Arizona's Public Records Law.

Whether to comply with a public records request under Arizona law is a ministerial decision—not discretionary. The recipient of the request either responds appropriately, or she doesn't. The recipient either complies with the statute, or she violates it. Regardless of the underlying subject matter of the request, there are only two choices: follow the law, or don't.

Nothing about that dichotomy changes when the recipients of the request are legislators and a legislative body. Nothing about the identity of those recipients transforms an administrative decision into a legislative function. *See Mesnard v. Campagnolo in & for Cnty. of Maricopa*, 489 P.3d 1189, 1194, 1195 ¶¶ 14, 18 (Ariz. 2021) ("Not everything done by a legislator 'in any way related to the legislative process' is afforded absolute immunity as a legislative function . . . . In other words, we examine the act, not the actor." (citation omitted)). And, nothing about those recipients' decision to abide by or disregard the law implicates their legislative deliberations, communications, or activities. Petitioners' novel attempt to muddy that

reality and inject legislative immunity into this public records case is unfounded, providing no basis for special action jurisdiction.

The conduct at issue—responding to a legally-mandated public records request—is not a legislative function and is not "integral" to the legislature's "deliberative and communicative processes." *Id.* at 1193, 1194 ¶¶ 12, 15 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). The act of responding to the request has nothing to do with proposing, discussing, or passing legislation. Nor does it affect at all the Senate's ongoing "audit." The "audit" proceeds regardless of how Petitioners treat the public records request. Petitioners' response is completely unrelated to any legislative activity that immunity should attach to their decision not to comply.

As the request was directed at a legislative body and its members, of course the responsive *documents* will nearly always relate to legislative functions and communications. But the underlying substance of the information sought does not make the *act of responding* a legislative function. *See id.* at 1194 ¶ 13 ("It is the occasion of the speech, not the content, that provides the [immunity]." (quoting *Sanchez v. Coxon*, 175 Ariz. 93, 94 n.2, 97 (1993))).

In any event, Petitioners' legislative immunity argument is a distraction. The legislature does not need immunity to bypass the PRL. Rooted in federal common law, legislative immunity was a familiar principle when the framers convened at the Arizona Constitutional Convention in 1910. *See Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136-37 n.4 ¶¶ 15-16 (App. 2003). But, the PRL predated the legislature's constitutional immunity by nearly a decade. *See Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257 (1991). If the legislature had any concerns or doubts about how the latter immunity affected then-extant law, it could have amended the statute. But, in the 120 years since, the legislature has never exempted itself from the PRL's requirements.

To the contrary, for at least the last 46 years, the legislature has expressly *included* itself, without qualification or reference to immunity. "The 1975 amendments [to the PRL] define an officer [as including] 'any person elected or appointed to hold any elective or appointive office of any public body[.]'" *Carlson v. Pima County*, 141 Ariz. 487, 489-90 (1984) (quoting and discussing A.R.S. § 39-121.01(A)(1), (B)). Indeed, rather than contracting the law's scope, the legislature's 1975 amendments "broadened the category

of matters to which the public right of inspection applies." *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 540 (1991).

Given this history, it is disingenuous to conclude anything other than that the legislature has intentionally subjected itself to the PRL's mandate. *Cf. Harilson v. Lexington H-L Servs., Inc.*, 604 S.W.3d 290, 293 (Ky. Ct. App. 2019) ("By establishing a mechanism for seeking open records and providing for judicial review of adverse decisions of the Director and [Legislative Research Commission], the General Assembly waived legislative immunity under the facts before us.").

The legislature plainly knows how to exempt itself from statutes and craft statutory exemptions to the PRL.[1] *See State Comp. Fund v. Super. Ct. in & for Cnty. of Maricopa (EnerGCorp, Inc.)*, 190 Ariz. 371, 375 (App. 1997) ("The provision of one exemption in a statute implicitly denies the existence of other unstated exemptions."). If Petitioners want to avoid the transparency that the PRL protects, they can easily seek to do so through statute. But this

[1] *See*, *e.g.*, A.R.S. §§ 38-431.01, 38-431.08(A)(1), (3) (exempting "any political caucus of the legislature" and "conference committee of the legislature" from the Open Meeting Law); § 41-1279.05 (exempting from the PRL "[w]orking papers and other audit files maintained by the auditor general"); § 49-1403 (establishing privilege for audit reports under certain circumstances).

Court should not do for Petitioners what the legislature has declined to do for over a century. "[W]hat the Legislature means, it will say." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529 (1994) (quoting *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106 (1976)).

II. The Court of Appeals' narrow ruling does not justify special action jurisdiction.

The Court of Appeals faithfully applied this Court's precedents. And its narrow ruling creates no inconsistency or ambiguity in the law. This Court should reject Petitioners' sweeping arguments to the contrary.

The Court of Appeals' opinion rests solidly on a few simple, undisputed facts and established points of law. The Cyber Ninjas are Petitioners' agents, to whom Petitioners have delegated a core and delicate governmental function that is being conducted with public funds. Petitioners plainly have control and authority over their agents performing this critical governmental role. And, regardless of whether they choose to outsource their responsibilities, Petitioners have an obligation to "maintain all records . . . necessary or appropriate to maintain an accurate knowledge of their official activities." A.R.S. § 39-121.01(B). That should end the inquiry.

As the Court of Appeals discussed, Petitioners' ultra-technical "physical custody" argument finds no support in the law and is wholly inconsistent with both their statutory obligation to preserve public records and the reality of their relationship with Cyber Ninjas. Indeed, in multiple contexts, courts have recognized that legal "custody" includes constructive possession and is often more about control and legal rights and responsibilities than simple physical possession.

- *See, e.g.*, *State v. Reynolds*, 170 Ariz. 233, 235 n.2 (1992) (noting "the dictionary definition of custody: 'judicial or penal safekeeping: control of a . . . person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it . . .'" (first alteration in original) (quoting Webster's Third New International Dictionary 559 (3d ed. 1976)));

- *State v. Jackson*, 80 Ariz. 82, 84-85 (1956) ("'Custody' means a keeping, guarding, care, watch, inspection, preservation, or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. . . . 'Custody' is a commonly used term in guardian-ward, parent-child and other similar situations where one party has a varying degree of control over the other person." (citation omitted));

- *Forst v. Intermountain Bldg. & Loan Ass'n*, 49 Ariz. 246, 254-55 (1937) ("[I]n a conflict of jurisdiction . . . between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain

it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute[.]" (citation omitted));

- *State v. Ottar*, 232 Ariz. 97, 103 (2013) ("actual or constructive possession" both sufficient to impose criminal liability for controlled substance violation (citation omitted));

- *Hindsley v. Hindsley*, 145 Ariz. 428, 430 (App. 1985) ("'Custody of a child involves more than the right to be with the child.' . . . 'Custody' means a status embodying [certain] rights and responsibilities," including the "right and the duty to protect" the child. (citations omitted));

- *see also* A.R.S. § 13-105(34) (criminal definition of "Possess" distinguishing between "physical possession or otherwise . . . exercis[ing] dominion or control over property").

Without a specific definition in the PRL indicating different legislative intent, this Court should give "custody" its "usual and commonly understood meaning." *Bilke v. State*, 206 Ariz. 462, 464-65 (2003) (quoting *State v. Korzep*, 165 Ariz. 490, 493 (1990) (looking to dictionary definition and other courts' interpretations of term at issue)). Pursuant to their agency relationship with Petitioners, Cyber Ninjas are conducting Petitioners' core governmental function, under Petitioners' supervision and control, pursuant to Petitioners' instructions, and funded by Petitioners' constituents. Petitioners have the right and access to the documents that

Cyber Ninjas are developing, and the responsibility to oversee, maintain, and preserve those documents. Petitioners plainly have custody of those records within the meaning of the PRL.[2]

The Court of Appeals' clear and narrow application of existing law offers no basis for special action jurisdiction. The court carefully and repeatedly explained what this Court has already held: "Only documents with a substantial nexus to government activities qualify as public records." No. 1 CA-SA 21-0141, at 6, 9 ¶¶ 18, 24 (Ariz. Ct. App. Aug. 19, 2021) (quoting *Lake*, 222 Ariz. at 549 ¶ 8). Thus, contrary to Petitioners' exaggerations, the internal records of law firms, accountants, and IT vendors are not suddenly fair game under the PRL. The Court of Appeals said nothing of the kind and broke no new ground.

Finally, the Cyber Ninjas are not a mere "vendor" or private contractor offering office goods and support services. The Cyber Ninjas are an authorized agent of the Arizona Senate, performing a core governmental

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[2] Even assuming the legislative intent is not already clear, "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose" all support the Court of Appeals' reading. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991).

function that gives them control over ballots and voting infrastructure. The notion that Petitioners need not respond to a public records request regarding this sensitive, taxpayer-funded endeavor, merely because they aren't physically holding Cyber Ninjas' computers and file cabinets, offends every principle of transparency and responsible governance that prompted the passage of the PRL 120 years ago. That is not the law.

Petitioners cannot abdicate their responsibilities and then willfully turn their backs to keep the public in the dark. The Court of Appeals correctly disposed of this attack on the public's right to know what their representatives are doing, and this Court need not wade in.

Conclusion

Petitioners have discretion, and therefore immunity, in many of their legislative activities and functions. But whether to obey Arizona law is not one of them. The Court of Appeals' narrow decision faithfully applied this Court's precedents, and this Court should decline special action jurisdiction. But if this Court accepts review, it should affirm, reject Petitioners' baseless immunity defense, and leave amending the PRL to the legislature—if it truly wishes to do so.

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Respectfully submitted,

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