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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AMERICAN OVERSIGHT,

Plaintiff,

v.

KAREN FANN, *et al.*,

Defendants.

No. CV2021-008265

DEFENDANTS' MOTION TO DISMISS

(Assigned to the Hon. Michael Kemp)

Pursuant to Arizona Rule of Civil Procedure 12(b)(6), Defendants Karen Fann, in her official capacity as the President of the Arizona Senate; Warren Petersen, in his official capacity as the Chairman of the Senate Judiciary Committee; and the Arizona Senate respectfully move that the Court dismiss the Complaint in its entirety for failure to state a valid claim.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The "concept of the separation of powers is fundamental to constitutional

government as we know it," *Ahearn v. Bailey*, 104 Ariz. 250, 252 (1969), and is nowhere "more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988). Embedded within this constitutional axiom are two foundational corollaries.

First, "questions of the wisdom, justice, policy or expediency of a statute are for the legislature alone." *Giss v. Jordan*, 82 Ariz. 152, 159 (1957). Courts tasked with construing a statute must effectuate the text actually adopted by the people's elected representatives; they "are not authorized to supply words that would extend the scope of a statute beyond that intended by the legislature," *Calnimptewa v. Flagstaff Police Dept.*, 200 Ariz. 567, 570, ¶ 13 (App. 2001), in order to remedy some perceived drafting deficiency or to align the law with what the court divines to be some superseding policy objective. Second, in deference to the prerogatives of the coordinate branches, "courts refrain from addressing political questions." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶ 12 (2007).

Both principles independently dispose of the Plaintiffs' claims. The crux of this dispute is discrete and straightforward: private corporations that serve as vendors to the state government are not "public bodies" within the meaning of A.R.S. § 39-121.01(2). It follows that any documents in their possession, custody or control are outside the scope of the Arizona Public Records Act, A.R.S. § 39-121, *et seq.* (the "PRA").

And even if the Plaintiff were correct that the internal files of private contractors are somehow "constructive[ly]" those of the Arizona Senate, Compl. ¶ 82, it cannot enlist the judicial power to coerce the disclosure of what the Plaintiff itself posits are legislative records. The Arizona Constitution entrusts to each house of the Legislature plenary power to order its own internal procedures and affairs. *See* Ariz. Const. art. IV, pt. 2, §§ 8-10. As another division of this Court recognized, because statutory measures (such as the PRA) necessarily are subordinate to this constitutional function, allegations concerning the Legislature's compliance with them present nonjusticiable political questions. *See Puente v. Arizona State Legislature*, CV2019-014945, Minute Entry: Ruling on Motion to Dismiss (Nov. 5, 2020) (Mikitish, J.) (dismissing claims of alleged Open Meeting Law violations as

nonjusticiable).[1] Either way, the Plaintiff's claims founder.

FACTUAL BACKGROUND

Exercising the investigatory powers inherent in the legislative branch, the Arizona Senate is conducting an audit of voting equipment used and ballots cast in Maricopa County in connection with the November 3, 2020 general election (the "Audit"). *See* Compl. ¶¶ 24-26. Given the logistics entailed in such an undertaking, the Arizona Senate has retained the services of Cyber Ninjas, a for-profit Florida corporation, to serve as its primary vendor in carrying out the Audit. Cyber Ninjas in turn has engaged several subvendors, all of which are private companies. *See id.* ¶ 28.

Plaintiff American Oversight has submitted to each of President Fann, Chairman Petersen, the Arizona Senate, Senate Audit Liaison and former Secretary of State Ken Bennett, Cyber Ninjas, and Cyber Ninjas' subvendors several public records requests seeking essentially all documents relating to or concerning the Audit. *See id.* ¶¶ 56, 58-59, 61. The Defendants have produced, or will produce, to the Plaintiff any documents in the physical possession or physical custody of any of the Defendants or of Secretary Bennett[2] that are (1) responsive to the Plaintiff's public records requests; and (2) not protected from disclosure by any constitutional, statutory or common law privilege or confidentiality.

The Defendants do not, however, intend to obtain, review or produce any records that are in the physical possession or physical custody of Cyber Ninjas and/or one of its subvendors, but not in the physical possession or physical custody of any of the Defendants or of Secretary Bennett (hereafter, the "Disputed Records").

Whether and to what extent the Disputed Records are subject to the PRA—and

[1] A copy of Judge Mikitish's opinion is attached hereto as Appendix A. The action remains pending before Division One of the Arizona Court of Appeals.

[2] For largely the same reasons set forth in this Motion, the Defendants take the position that Secretary Bennett is not an "officer" within the meaning of A.R.S. § 39-121.01(A)(1). Nevertheless, in the interest of narrowing the scope of the parties' dispute, the Arizona Senate has agreed to produce to the Plaintiff responsive public records possessed by Secretary Bennett, subject to the withholding or redaction of privileged or confidential material.

whether and to what extent that issue is even justiciable—accordingly are the quetions now before this Court.

STANDARD OF REVIEW

The Court must dismiss any complaint that fails to state a claim upon which relief may be granted. *See* Ariz. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss, the Court will assume the complaint's factual allegations to be true, but will enter a judgment of dismissal if "the plaintiff should be denied relief as a matter of law given the facts alleged." *Hogan v. Washington Mut. Bank, N.A.*, 230 Ariz. 584, 586, ¶ 7 (2012).

ARGUMENT

I. The Records of Private Vendors Are Not Subject to the PRA

Condensed to its essence, the Plaintiff's argument appears to be that because the Audit is a governmental function, the Disputed Records are "public records" that presumptively must be disclosed, absent some particular claim of privilege, confidentiality, or undue burden. *See* Compl. ¶¶ 83, 86-90. This paralogism, however, evinces a misunderstanding of the PRA. The statute does not secure some disembodied "right" by any person to obtain any document that may be a "public record"—regardless of where or with whom it may be found. Rather, the PRA obligates two delimited classes of individuals and entities—to wit, "officers" and "public bodies"—to preserve and make available *their* "public records." *See* A.R.S. §§ 39-121, -121.01. It is at this interpretive juncture that the Plaintiff's claims dissipate; Cyber Ninjas and its subvendors are not "officers" or "public bodies," and hence the Disputed Records are not governed by the PRA.

A. The PRA's Plain Text Excludes Private Contractors

"To determine a statute's meaning, we look first to its text." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017); *see also State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003) ("[T]he best and most reliable index of a statute's meaning is the plain text of the statute."). Effectuating unambiguous statutory text is not merely one method of exegesis among others; it is superordinate to, and controlling over, all other interpretive rubrics, including unarticulated notions of legislative "intent" or normative public policy objectives. *See*

Estate of Braden ex rel. Gabaldon v. State, 228 Ariz. 323, 325, ¶ 8 (2011) ("When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute." (citation omitted)).

The Legislature did not leave to judicial conjecture what it meant by the term "public body" in the PRA; it said so with precision:

> "Public body" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and 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. § 39-121.01(A)(2).

No facet of this definition could conceivably encompass Cyber Ninjas. It is (or certainly should be) undisputed that Cyber Ninjas is not "this state" nor a "branch, department, board, bureau, commission, council or committee" of the state. Although the phrase "public organization" is nowhere specifically defined, the modifier "public" intrinsically excludes private business corporations. Indeed, even if any semantic ambiguity inhered in any isolated word in Section 39-121.01(A)(2), a contextual reading confirms that all the entities catalogued in this definitional provision are ***governmental*** bodies or instrumentalities. *See generally City of Surprise v. Arizona Corp. Comm'n*, 246 Ariz. 206, 211, ¶ 13 (2019) (stating that the canon of "[*n*]*oscitur a sociis*—a word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used—is appropriate when several terms are associated in a context suggesting the terms have some quality in common").[3] None of the terms in Section 39-121.01(A)(2) is so tensile that it can be plausibly stretched to encompass a private corporate vendor that was formed

[3] The term "public organization" most likely was intended to envelope entities created by cities, counties or other political subdivisions through intergovernmental agreements. *See generally* A.R.S. § 11-952.

independently of, and stands in an arms-length contractual relationship with, the state government. And because Cyber Ninjas is not a "public body," it follows that its individual officers, principals, employees, and subagents are not "officers." *See* A.R.S. § 39-121.01(A)(1) (defining an "officer" as an individual who occupies an elected or appointed position in a "public body").

The Plaintiff's position—*i.e.*, that private corporations serving as government contractors or vendors are "public bodies"—can be sustained only by interpolating into the PRA words that 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)). Private vendors acting as agents or service providers of government agencies simply are not "public bodies."

Case law confirms what the plain text independently ordains. *See Prescott Newspapers, Inc. v. Yavapai Cmty. Hosp. Ass'n*, 163 Ariz. 33 (App. 1989). There, the plaintiff argued that a non-profit corporation that had contracted with a special taxing district to administer a hospital was an "institution" or "instrumentality" of the latter, and hence a "public body" within the meaning of the Open Meeting Law. *See id.* at 38. The Court of Appeals disagreed, explaining—in reasoning that engrafts easily onto the interpretive question in this case—that the statute encompasses only entities "created by law as an organic constituent of the state or a political subdivision which functions as a concrete manifestation thereof." *Id.* at 39. While the non-profit corporation "can certainly be viewed as carrying out a function that could as well be undertaken by" the government itself, it nevertheless was "formed independently of the District and operates independently of it subject to the requirements of the [contract]," and thus maintained its legal identity as a private corporate entity, not a "public body." *See id.* Opinions of the Attorney General arising from similar contexts likewise have remained cognizant that a contractual or managerial relationship does not fuse a government institution and a private entity into a

single amalgamated "public body." *See generally* Ariz. Op. Atty. Gen. No. I00-009 (May 2, 2000) (advising that while charter school governing boards are "public bodies" within the meaning of the Open Meeting Law, the corporate boards of charter school operators are not).

Federal precedents are similarly instructive; documents created and maintained by private contractors of government agencies generally are not themselves "agency records" within the meaning of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See Forsham v. Harris*, 445 U.S. 169, 171 (1980) (holding that "written data generated, owned, and possessed by a privately controlled organization" that was a party to a federal grant agreement "are not 'agency records' within the meaning of [FOIA] when copies of those data have not been obtained by a federal agency subject to the FOIA"); *Rocky Mountain Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258, 1261 (10th Cir. 2018) ("In general, FOIA . . . does not apply to private companies [or] persons who receive federal contracts or grants . . . ." (quoting H.R. Rep. No. 112-689, at 5 (2012)); *State of Missouri, ex rel. Garstang v. U.S. Dept. of Interior*, 297 F.3d 745, 751 (8th Cir. 2002) ("Although the [non-profit corporation] and the [federal Fish and Wildlife] Service did have a mutually beneficial relationship, that relationship alone does not transform the private entity . . . into a federal agency.").

In short, the commands of the PRA extend only to "public bodies" that have "custody" of documents constituting public records. *See* A.R.S. §§ 39-121, -121.01. The internal documents of private companies engaged by a government agency in a business relationship on arms-length contractual terms lie beyond the statute's parameters.

B. The Legislature Never Intended to Expose Every Government Vendor's Internal Files to Public View

Because the PRA's definition of "public body" is facially unequivocal, the inquiry is at an end. *See State v. Griffin*, 250 Ariz. 651, ¶ 25 (App. 2021) (noting that "only if the plain text of the statute is ambiguous do we resort to other methods of statutory interpretation to determine the legislature's intent"). Cyber Ninjas and its subvendors are

not "public bodies," and thus their internal records are not subject to compulsory disclosure; the Plaintiff cannot overcome the conclusive force of the plain statutory text by appeals to hoary notions of "the public's right to know." Compl. ¶ 88. While imperatives of transparency certainly undergird the PRA, courts do not invoke amorphous aspirations to "go beyond the statute to contradict its clear import," *Prescott Newspapers*, 163 Ariz. at 40, or to distend statutory language beyond its plain meaning "simply because that's what must have been intended," *id.* at 38 (internal citation omitted); *see also State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 298, ¶ 28 (App. 2006) ("We do not disregard plain statutory language in favor of arguments about which of two competing legitimate public policies is preferable.").

And even if some surmised legislative intent were a relevant interpretive lodestar, there is good reason to conclude that the Legislature's exclusion of private contractors from the PRA was deliberate and prudent. State, county and municipal agencies rely on upon hundreds if not thousands of outside vendors to furnish an array of goods and services—ranging from IT equipment, to employee benefits management, to outside legal counsel—in virtually every facet of state government. Indeed, the state's largest county has effectively outsourced substantial components of its election administration infrastructure to two private corporations, Dominion Voting Systems and Runbeck Election Services.

While this putatively "non-partisan,"[4] Compl. ¶ 1, Plaintiff is singularly fixated on

[4] American Oversight, which somewhat ironically conceals its own funding sources from the public, was founded weeks after President Trump's inauguration by individuals "having deep ties to Democrats." Donovan Slack, *Legal Watchdog Launches to Hound Trump Agencies*, USA TODAY, Mar. 13, 2017, *available at* https://www.usatoday.com/story/news/politics/2017/03/13/new-legal-watchdog-seeks-trump-administration-records-sunshine-week/99034426/. Keeping Senator McCarthy's memory alive in this new era, the organization currently is busy blacklisting from America's private sector former public officials with whom it disagrees, *see* Ben Brody, *Watchdog Group to Track Hiring of Top Ex-Trump Aides*, BLOOMBERG NEWS, Jan. 26, 2021, *available at* https://www.bloomberg.com/news/articles/2021-01-26/watchdog-group-to-track-ex-trump-aides-entering-private-sector ("The Campaign Against Corporate Complicity was formed by two public-interest groups in Washington, American Oversight and Accountable.US, which specialize in public records requests and research. Although they call themselves non-partisan, they count significant staffing from Democratic and progressive groups and don't disclose funding.").

Cyber Ninjas and perceived Republican interests, the import of the ruling it seeks will not be so easily contained. If the Plaintiff prevails, then the internal emails, databases and other files of Dominion and Runbeck, the undersigned law firm, the Plaintiff's law firm,[5] and every other vendor of any state, county or local government agency or unit in Arizona will be swept under the auspices of the PRA, and each individual document in its possession that has a substantial nexus, *see Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 10 (2007), to its government contract will be presumptively subject to indefinite preservation and ultimately disclosure as a public record. Such a draconian recordkeeping regime may or may not be desirable as a policy matter, but it is not the framework the Legislature chose to codify in the PRA, and courts "are not at liberty to question the wisdom of that legislative decision." *Qasimyar v. Maricopa County*, 250 Ariz. 580, ¶ 31 (App. 2021).

II. The Indemnification Clause in Cyber Ninjas' Contract With the Senate Does Not Make Its Internal Files "Public Records"

The Complaint adumbrates what appears to be an argument that because Cyber Ninjas' indemnification agreement with the Senate obligates the former to cooperate with the Senate in the defense of third parties' claims, *see* Compl. ¶¶ 36, 81, the Senate has "actual, indirect, or constructive," *id.* ¶ 82, possession of those materials.[6] This theory is debilitated by at least three defects.

First, the indemnification clause affords the Senate the option of obtaining Cyber Ninjas' records only if and to the extent it is necessary to jointly defend against third party claims in litigation. It does not permit the Senate to demand *carte blanche* access to Cyber Ninjas' internal emails and files (not to mention those of Cyber Ninjas' subvendors) simply

[5] Coppersmith Brockelman PLC was engaged by the State as outside counsel to the Secretary of State in various matters and proceedings arising out of the administration of the 2020 election.

[6] Plaintiff also points to Cyber Ninjas' contractual obligation to "comply with all applicable laws," Compl. ¶¶ 37, 81, but this argument is an exercise in circularity. Whether the PRA in fact is "applicable" to Cyber Ninjas is the very question in dispute; a generic covenant to follow the law does not resolve the antecedent question of *what* law actually applies.

to fulfill various public records requests. Further, a special action—the vehicle prescribed by the PRA, *see* A.R.S. § 39-121.02(A), and adopted by the Complaint—cannot be employed to compel a public official to exercise a wholly discretionary contractual option. *See generally Sensing v. Harris*, 217 Ariz. 261, 263, ¶ 6 (App. 2007) ("Because a mandamus action is designed to compel performance of an act the law requires, '[t]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus.'" (citations omitted)).

Second, and more to the point, the PRA "applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Forsham*, 445 U.S. at 186 (discussing FOIA). As the Tenth Circuit explained when rejecting the notion that a federal agency's contractual right to procure certain documents from a third party organization rendered those materials subject to FOIA, "it does not matter that the [agency] could possess the documents by requesting them from [the counterparty]." *Rocky Mountain Wild*, 878 F.3d at 1263. Rather, legal "control" of records attaches when "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* (internal citation omitted); *see also Anderson-Barker v. Superior Court*, 31 Cal. App. 5th 528, 539–40, 242 Cal. Rptr. 3d 724, 732–33 (2019) (remarking that plaintiff "has cited no legal authority supporting the proposition that an agency's right to access the records of a private entity constitutes a form of constructive possession," adding that the "mere fact that [the agency] can 'access' the data does not equate to a form of possession or control. To conclude otherwise would effectively transform any privately-held information that a state or local agency has contracted to access into a disclosable public record. Nothing in the text or history of the [California Public Records Act] suggests it was intended to apply so broadly").

Arizona courts have embraced this obvious proposition. Unpersuaded by the argument that the TPC Scottsdale's internal files relating to its agreement with the City of Scottsdale were public records, the Court of Appeals recently explained:

> To qualify as a "public record," a document must be in the possession and control of a public official . . . . Stuart argues on appeal, as he did in the new trial proceedings, that the City had an "obligation" to obtain and keep these documents. But section 6.1.12 of the [agreement] only establishes the City's *right* to receive the records from TPC; it does not create an *obligation* for the City to keep and hold such records. In sum, we find no error in the superior court's ruling that the records were not in the City's possession and that the City had no obligation to keep and release the documents.

Stuart v. City of Scottsdale, 1 CA-CV 18-0154, 2020 WL 7230239, at *9 (App. Dec. 8, 2020);[7] *see also Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 540, ¶ 22 (App. 2008) (indicating that county had responsibility to search potentially responsive public records "it may have maintained in its possession," but not records it already had transferred to another county's sheriff's office).

In short, the Senate's hypothetical and unexercised right to obtain certain of Cyber Ninjas' internal records under certain limited (and inapplicable) circumstances does not transmute the Senate into the "custodian" of all the Disputed Records, within the meaning of A.R.S. § 39-121.

Third, if the Plaintiff is correct that Cyber Ninjas' agency relationship with the Senate renders its internal records those of the Senate itself, then its Complaint fails to present any justiciable dispute, for reasons discussed next.

III. The Senate's Compliance with the PRA Is a Nonjusticiable Question

Because the plain text of the PRA disposes of the Plaintiff's claim, the Court need not venture onto constitutional terrain. *See generally State v. Gomez*, 212 Ariz. 55, 60, ¶ 28 (2006) (commenting that the court will "construe statutes, when possible, to avoid constitutional difficulties").

But even if the Court were to indulge the notion that Cyber Ninjas' internal records, by virtue of its vendor status, effectively are those of the Senate itself, this lawsuit then

[7] A copy of the memorandum decision in *Stuart*, which the Defendants cite as a persuasive authority pursuant to Ariz. Sup. Ct. R. 111(c)(1)(C), is attached hereto as Appendix 2.

confronts a more intractable obstacle. That the Senate and its members are a "public body" and "public officers," respectively, within the meaning of the PRA does not answer the subsidiary question of ***who*** may permissibly enforce the PRA's ostensible mandates against them. While normally the court's remedial powers are a fixed premise of any cognizable claim, this presupposition disintegrates when the judiciary is asked to coerce a coordinate branch in the conduct of its own meetings and recordkeeping. Another division of the Court recognized this engrained distinction in holding that, although the terms of the Open Meeting Law undoubtedly apply to the Legislature, a dispute controverting the "legislature's compliance with [it] is a nonjusticiable political question." Appendix 1 at p. 7. The *Puente* court's reasoning—which derived from a long lineage of textual and precedential authority—extends in equal force to the PRA.

A. Overview of the Political Question Doctrine

There are certain disputes that, while nominally presenting questions of law, are so innately entwined with institutional 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," *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 incursions 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).

B. The Retention and Disclosure of Legislative Documents Are Controlled Exclusively by the Legislative House

No statute can supersede each legislative house's constitutional right and responsibility to govern its own records and proceedings. Article IV, Part 2, Section 8 of the Arizona Constitution entitles each house of the Legislature to "determine its own rules of procedure." Section 9 provides that each house may order its own proceedings "in such manner and under such penalties as each house may prescribe," and Section 10 envisages the maintenance of "journals" recording the house's actions. The aggregate import of these provisions is that responsibility for the operations of each legislative house—to include its investigatory and recordkeeping functions—are vested entirely, exclusively and indefeasibly in that body (subject, of course, to any other limitations prescribed by the Constitution itself).

In this vein, the Arizona Supreme Court—considering a cognate grant of authority in the context of Senate impeachment trials, *see* Ariz. Const. art. VIII, pt. 2, § 1—observed, in words that resonate here,

> The Constitution wisely leaves impeachment trial procedures and rules to the Senate. Absent a clear constitutional mandate, we refuse to usurp the Senate's prerogatives in this area. Article 3 of the state Constitution prohibits judicial interference in the legitimate functions of the other branches of our government. We will not tell the legislature when to meet, what its agenda should be, what it should submit to the people, what bills it may draft or what language it may use. The separation of powers required by our Constitution prohibits us from intervening in the legislative process.

Mecham v. Gordon, 156 Ariz. 297, 302 (1988).

It is no answer to say that the Legislature is included in the catalogue of "public bodies" to which the PRA applies, *see* A.R.S. § 39-121.01(A)(2). "A statute or rule,

of course, 'cannot circumvent or supplant . . . constitutional requirements.'" *Fragoso v. Fell*, 210 Ariz. 427, 431, ¶ 13 (App. 2005) (internal citation omitted). The provisions of the PRA necessarily are subordinate to, and subsumed into, each legislative house's constitutional prerogative to order its own proceedings.

For precisely this reason, courts in several other states have held that disputes concerning the legislature's compliance with the jurisdiction's public records act (or equivalent enactments) are nonjusticiable. *See Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 503 (Iowa 1996) ("The senate's decision to keep the records in question confidential falls within the constitutionally-granted power of the senate to determine its rules of proceedings. Due to the existence of a textually demonstrable constitutional commitment of the issue to the senate, neither the judiciary, nor the department of general services, a department of the executive branch, hold the power to interfere with or contradict those procedures." (internal citations omitted)); *Citizens Action Coal. of Indiana v. Koch*, 51 N.E.3d 236, 242 (Ind. 2016) (construing public records act to apply to the Legislature but finding that its application to actual documents to present non-justiciable political question, reasoning that "to define for the legislature what constitutes its own work product, and to then order disclosure of such documents, would indeed be an interference with the internal operations of the General Assembly"); 16A AM. JUR. 2D CONSTITUTIONAL LAW § 286 ("The authority of a state legislature is plenary and its extent is limited only by the express or implied restrictions on it contained in or necessarily arising from the state constitution itself.").[8]

[8] *See also Hughes v. Speaker of the N.H. House of Reps.*, 876 A.2d 736, 744, 746 (N.H. 2005) ("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 . . . ."); *Ex parte Marsh*, 145 So. 3d 744, 751 (Ala. 2013) ("Because the Alabama Constitution gives the legislature the authority to establish its own procedural rules and because the Open Meetings Act must yield to the Alabama Constitution, the legislature's alleged violation of the Open Meetings Act or Rule 21 in this case is not justiciable. It is not the function of the judiciary to require

Animating this principle is a concern not only with preserving an interbranch equilibrium, but also vindicating constitutional privileges intrinsic to the legislature itself. Even assuming that the Thirty-Second Legislature wished to bind itself to the PRA when defining the term "public body," *see* 1975 Ariz. Session Laws ch. 147, § 1 (S.B. 1338), the intent of one iteration of the Legislature did not—and could not—abridge the institution's sovereign power to control the conduct of its own proceedings. *See generally Higgins' Estate v. Hubbs*, 31 Ariz. 252, 264 (1926) (rejecting "an attempt by one Legislature to limit or bind the acts of a future one. That this cannot be done is, of course, undoubted. The authority of the Legislature is limited only by the Constitution itself."); *see also Mayhew*, 46 S.W.3d at 770 ("[E]ven if the Legislature intended to bind itself when it passed the Sunshine Law, the act would not bind a subsequent General Assembly.").

To be clear, the Arizona Senate is committed to rigorous transparency and to

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the legislature to follow its own rules."); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 339-40 (Alaska 1987) ("[B]ecause the constitution commits to the legislature the authority to provide for its own rules of procedure, and because the question of whether a legislative committee meeting or caucus meeting shall be open or closed falls within this grant of authority, we regard the question whether the Legislators have violated the Open Meetings Act or [a legislative rule] to be nonjusticiable."); *Moffitt v. Willis*, 459 So.2d 1018, 1021 (Fla. 1984) (deeming nonjusticiable claims arising out of alleged "secret meetings" of legislators, observing that "a judicial determination of this matter hinges on the meaning of legislative committee meeting and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rulemaking prerogative"); *Coggin v. Davey*, 211 S.E.2d 708, 710–11 (Ga. 1975) ("We do not believe that it can reasonably be argued that the House or Senate cannot pass an internal operating rule for its own procedures that is in conflict with a statute formerly enacted. We therefore hold that the 'Sunshine Law' is not applicable to the Legislative branch of the government and its committees."); *Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001) (even assuming that legislature was within the scope of the open meetings law, "[b]inding the Legislature with procedural rules passed by another General Assembly would violate [the state constitution's] grant of the right to the Legislature to determine its own 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)).

honoring the directives of the PRA. Indeed, the Defendants have already produced hundreds of records to the Plaintiff and are working assiduously to process many more. For the reasons set forth above, their reluctance to commandeer the internal files of private corporate vendors is impelled by a respect for the PRA, not a desire to flout it. Nevertheless, if the Court should conclude that the Arizona Senate does in fact have "custody," A.R.S. § 39-121, of the Disputed Records, then the question of whether and to what extent such legislative records are subject to public disclosure devolves to the plenary discretion vested in the Arizona Senate by Article IV of the Arizona Constitution. The PRA does not, and could never, abrogate this foundational attribute of legislative sovereignty.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action in its entirety and with prejudice on the grounds that (1) the Disputed Records are not subject to the PRA, or, in the alternative, that (2) claims concerning the Defendants' compliance with the PRA are nonjusticiable political questions because whether and to what extent legislative documents are subject to public disclosure is textually committed to the Arizona Senate by Article IV, Part 2, §§ 8-10 of the Arizona Constitution.

RESPECTFULLY SUBMITTED this 9th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 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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