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

**IN AND FOR THE COUNTY OF MARICOPA**

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| PHOENIX NEWSPAPERS, *et al.*<br>Plaintiffs,<br>v.<br>ARIZONA STATE SENATE, *et al.*,<br>Defendants,<br>and<br>CYBER NINJAS, INC.,<br>Real Party in Interest. | LC2021-00180-001<br>(Assigned to the Hon. John Hannah)<br><br>**REPLY IN SUPPORT OF SENATE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** |

Defendants Arizona State Senate, Karen Fann in her official capacity as President of the Arizona State Senate, Warren Petersen, in his official capacity as Chairman of the Arizona Senate Committee on the Judiciary, and Susan Aceves, in her official capacity as the Secretary of the Arizona State Senate (collectively, the "Senate Defendants") respectfully submit this Reply in support of their Motion for Judgment on the Pleadings.

Preliminarily, it bears noting that the Court of Appeals has stayed the ruling of Judge Kemp's division in the *American Oversight* litigation, upon which the Plaintiffs rely heavily. The Court of Appeals has expedited its consideration of the Senate Defendants' special action petition, and an oral argument has been set for August 18.[1]

## I. <u>Cyber Ninjas Is Not Subject to the PRA, and the Senate Defendants Do Not Have Custody of the Disputed Records</u>

Vanquishing a strawman, the Response declares that "'the nature and purpose' of the documents, *not* the place where they are kept, determines their status as public records." Response at 4. But the fact that a given document—residing wherever or with whomever—may qualify as a "public record" is only one element of a *prima facie* claim under the Arizona Public Records Act, A.R.S. § 39-121, *et seq.* (the "<u>PRA</u>"). The PRA provides only that "[p]ublic records and other matters ***in the custody of any officer*** shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121 [emphasis added]. In other words, that a document bearing a substantial nexus to Arizona governmental functions exists somewhere on Earth does not confer a judicially enforceable entitlement to access it. Rather, Plaintiffs may assert PRA claims against only (1) an "officer" or "public body" that (2) has "custody" of the alleged public record. As explained at length in the Senate Defendants' and Cyber Ninjas' respective submissions, the latter is a private, Florida corporation—not a "public body" or "officer" of the State of Arizona. For its part, the Senate does not have "custody"—*i.e.*, possession—of the records in dispute.

Struggling to avert the inescapable import of plain statutory text, Plaintiffs float four interpretive trial balloons, all of which quickly deflate.

### A. Personnel of Private Contractors Are Not Public Employees

First, Plaintiffs argue that because public employees' work-related documents are subject to the PRA, *see Lunney v. State*, 244 Ariz. 170 (App. 2009), there is "no good reason why a government contractor . . . should be treated differently from a government employee

[1] A copy of the Court of Appeals' order is attached hereto as <u>Exhibit 1</u>.

performing the same governmental function." Response at 5. The "good reason," however, derives from an engrained distinction between employees and independent contractors that pervades numerous facets of the law, including the PRA. Almost by definition, employees of government agencies are "officers" of "public bodies," and thus *per se* within the scope of the PRA. Indeed, the statutes governing most lawsuits against the State or other public entities recognize that the term public "employee" "does not include an independent contractor." A.R.S. § 12-820(1). More fundamentally, the legal and operational independence that denotes the relationship between an independent contractor and its principal generally precludes imputing the actions or decisions of the former to the principal. *See generally Lee v. M & H Enterprises, Inc.*, 237 Ariz. 172, 175, ¶ 12 (App. 2015) (noting that, subject to certain specific exceptions, an employer is not vicariously liable for the torts of an independent contractor). In short, there is no basis in even fundamental common law precepts—and certainly not in the text of the PRA—for equating private companies and their personnel to the employees of government agencies.

**B. The PRA Does Not Cover "Custodians" Who Are Not Officers or Public Bodies**

Second, Plaintiffs birth a new theory that the PRA actually applies to any "custodian" of a public record—regardless of who he, she, or it might be—relying on scattered appearances of that term in A.R.S. §§ 39-121.01 and 39-121.03. *See* Response at 9. But courts do not dissect particular statutory words in hermetic isolation. To the contrary, "statutes relating to the same subject or having the same general purpose, *i.e.*, statutes that are in *pari materia,* 'should be read in connection with, or should be construed with other related statutes, as though they constituted one law.'" *Pinal Vista Prop., L.L.C. v. Turnbull*, 208 Ariz. 188, 190, ¶ 10 (App. 2004) (quoting *State ex rel. Larson v. Farley,* 106 Ariz. 119, 122 (1970)); *see also State v. Sweet*, 143 Ariz. 266, 270 (1985) ("It is an accepted rule of statutory construction that when 'determining the intent of the legislature, the court may consider both prior and subsequent statutes *in pari materia.*'" (internal citation omitted)). Here, the crux of the PRA is plain and simple: "Public records and other matters in the



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custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. An "officer," in turn, is a constituent component of a "public body," to which the PRA applies. *See* A.R.S. § 39-121.01(A)(1)-(A)(2). Thus, the eminently more sensible contextual construction is that the term "custodian" refers not to a new and inchoate class of PRA respondents, but rather to the specific "officer" or "public body" that possesses the particular public record(s) at issue.[2]

### C. The MSA's Discretionary Cooperation Clause Does Not Confer Legal "Custody" of Cyber Ninjas' Internal Documents

Third, Plaintiffs contend that the Senate Defendants have "custody" of Cyber Ninjas' internal records because section 18.5 of the Master Services Agreement ("MSA") provides that the parties will cooperate and share documents with each other in the common defense of claims "regarding this Agreement or a party's actions taken pursuant to this Agreement." *See* Response at 6.

There are at least three defects in this argument. As an initial matter, it is not at all clear how a PRA claim constitutes a claim "regarding [the MSA] or [Cyber Ninjas'] actions taken pursuant to the [MSA]."

Second, the argument relies in large part on circularity. The cooperation clause commits Cyber Ninjas to "providing information or documents needed for the defense of [the] claims, actions or allegation." But what, exactly, are those "needed" documents? The Senate, the beneficiary of the cooperation clause, believes that Cyber Ninjas' internal files concerning the 2020 election audit are not "needed for the defense" of Plaintiffs' PRA claims because such materials are outside the scope of the statute. Put another way, the cooperation clause is relevant only if one presupposes that the Senate has an obligation to produce Cyber Ninjas' records pursuant to the PRA in the first place and hence "need[s]"

[2] Further, a corollary of Plaintiffs' bizarre interpretation is that *any* private individual or entity that may happen to be a "custodian" of a document that happens to constitute a public record can be hauled into court on a PRA claim. *See infra* Section II.

the documents "for the defense of [the PRA] claims;" it does not independently establish "constructive custody" (whatever that is).

Third, and most fundamentally, this theory suffers from the same defect that afflicts Plaintiffs' reliance on similar verbiage in the MSA's indemnification clause—namely, these provisions embody discretionary rights of the parties that either may choose to invoke (or not invoke) to further its own interests. They do not confer obligations *vis-à-vis* third parties, and their exercise cannot be compelled by a mandamus order. *See Welch v. Cochise County Bd. of Supervisors*, 250 Ariz. 186, ¶ 32 (App. 2020) ("Discretionary acts may not be controlled through mandamus.").

Cooperation clauses are common components of indemnification arrangements, including most insurance policies. They simply serve to facilitate information sharing at the option and for the benefit of the parties, *see generally Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 136 (1987) ("A cooperation clause . . . is used to protect the insurer's right to a fair adjudication of the insured's liability and to prevent collusion between the insured" and third party claimants); they certainly do not render an indemnifying party (*e.g.*, an insurer) the *ipso facto* legal "custodian" of the indemnitee's private records.

**D. The Senate "Maintains" Necessary Records of Its Own Activities**

Finally, Plaintiffs doggedly cite A.R.S. § 39-121.01(B), which states that " [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." But the Complaint never alleges that the Senate Defendants do ***not*** maintain basic recordkeeping. To the contrary, the Senate indisputably implemented years ago an institutional email system that allows for the storage and retrieval of all Members and staff personnel's official email accounts. Indeed, the Senate has produced and will continue to produce non-privileged public records derived from these repositories.



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Instead, Plaintiffs attempt to transmute Section 39-121.01(B) into an open-ended directive that requires public bodies to act as roving monitors, fetching and collating from various private vendors any and every document that might constitute a "public record." No court has ever adopted such an untenable construction of this provision. Rather, it denotes only that government agencies cannot systematically destroy or dispossess themselves of records of their activities. To that end, if it were alleged that Cyber Ninjas were merely a sham entity contrived to divert public records outside the scope of the PRA, then Plaintiffs' claims might have some merit. *Compare Rocky Mountain Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258, 1263 (10th Cir. 2018) ("For the requested materials [of a private contractor] to constitute 'agency records,' the [government] must also have controlled the materials at the time of the [Freedom of Information Act] request. 'By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." (emphasis in original; citations omitted)), *with Montgomery v. Sanders*, 3:07-CV-470, 2008 WL 5244758, at *4 (S.D. Ohio Dec. 15, 2008) (recognizing that "government-controlled" corporations—*i.e.*, entities directly managed by the government—may be subject to FOIA). But no textual or precedential authority supports the novel notion that Section 39-121.01(B) requires government agencies to confiscate and produce pursuant to the PRA the internal files of *bona fide* private vendors standing in arms-length contractual relationships with the government.

## II. Plaintiffs' Attempt to Confine Their Theory of the PRA's Scope to Just Cyber Ninjas—But Not Other Government Vendors—Is Disingenuous and Unworkable

Make no mistake: the theory Plaintiffs champion will expose to public view the internal communications and documents of *all* government contractors and vendors, to the extent such materials have a substantial nexus to their government engagement. Plaintiffs first deride this truism as "nonsense," Response at 11—evidently oblivious to the irony that they had unabashedly embraced precisely this proposition just a few pages earlier. *See* Response at 9 (declaring that "[b]y its terms, the Public Records Law applies not only to



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public bodies and officers but also to 'custodians' of public records," adding that a "custodian" may be a "contractor or other person who is not an 'officer' as defined by the statute"). Perhaps realizing belatedly the far limb onto which they had wandered, Plaintiffs then pivot to assuring the Court that its conception of the PRA will not extend to "typical" or "run-of-the-mill government contractors." Response at 12.

Whatever this distinction means—and one can be sure that it will align conveniently with Phoenix Newspapers' ideological and editorial proclivities—it springs purely from the brow of the Plaintiffs; it has no textual, precedential or logical nexus to any words that actually are codified in the PRA.[3] Either the PRA encompasses the relevant internal records of private government contractors—or it does not; courts cannot contrive designations of "typical" and "untypical" government contractors to selectively target those vendors they deem deserving of greater scrutiny.

## III. Legislative Immunity Cannot Be Abrogated by Statute, and Insulates the Defendants from Non-Monetary Relief

Plaintiffs proffer three arguments in an attempt to pierce the constitutionally imposed "absolute bar," *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136, ¶¶ 15-16 (App. 2003), of legislative immunity. All three fall flat.

### A. The Release or Withholding of Public Records Is a Legislative Function

Plaintiffs posit that the release of public records pursuant to the PRA is merely an "administrative" act, and hence eludes legislative immunity. *See* Response at 14. This contention, however, flies in the face of the Arizona Supreme Court's square holding that then-Speaker Mesnard "performed a legislative function" when disclosing legislative

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[3] Even if it were founded in the law, Plaintiffs' novel dichotomy makes little practical sense. Plaintiffs suggest that a "typical" government contractor is one that "provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer." But by what rubric, exactly, does one define the relevant "service"? For example, Cyber Ninjas provides its consulting "services" to public and private clients alike. By contrast, if "services" is defined narrowly to include only the specific tasks performed for the government client (here, counting ballots and analyzing tabulation devices), then Plaintiffs' standard will necessarily ensnare numerous "typical" government contractors. For example, a construction company provides its services to both public and private customers—but paves freeways or builds courthouses only for government clients.

records. *Mesnard v. Campagnolo*, -- Ariz. --, 489 P.3d 1189, at 1195-96, ¶ 22 (2021). If a decision *to* release a legislative document is insulated from subsequent judicial second-guessing, then it follows necessarily that a decision *not* to divulge a legislative record is likewise a legislative function enveloped by legislative immunity.

**B. The PRA Does Not Extinguish Legislative Immunity**

Next, citing Judge Kemp's (subsequently stayed) ruling, Plaintiffs assert that the Senate Defendants cannot be immune from PRA claims because the terms of the statute encompass the Legislature. *See* Response at 14. But statutory directives are always and intrinsically subordinate to constitutional commands. Even if it had wished to do so, one iteration of the Legislature could never have abridged the institution's sovereign prerogatives. *See 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.").

Further, even if the PRA somehow curtailed the Senate's legislative immunity (and it did not), the body's individual officers and members—the persons to whom the Court would have to direct any order and who would carry out such commands—retain the protection. Legislative immunities and privileges are personal to each individual legislator occupying his or her office at any given moment in time; they cannot be preemptively waived decades in advance by one incarnation of the institution. *See generally* Wright & Miller 26A FED. PRAC. & PROC. EVID. § 5675 (1st ed.) ("The speech or debate privilege belongs to the legislator whose legislative act is involved in the evidence."); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) ("The privilege is a personal one and may be waived or asserted by each individual legislator.").

**C. Legislative Immunity Is Not Confined to Tort Claims for Damages**

Citing *State ex rel. Brnovich v. Arizona Board of Regents*, 250 Ariz. 127, 476 P.3d 307 (2020), Plaintiffs announce that legislative immunity is inapplicable because they do not seek monetary damages for tortious injuries. Plaintiffs' effort to distend one paragraph



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from the *Brnovich*'s opinion into a novel reconceptualization of legislative immunity, however, ultimately fails.

The United States Supreme Court and virtually every Circuit court to have addressed the question have spoken uniformly: state legislators' immunity from damages claims "is equally applicable to . . . actions seeking declaratory or injunctive relief." *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 725-26, 733 (1980); *see also Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 9 (2d Cir. 1980) (holding in the context of a legislative investigation that state legislators are immune from "for injunctive relief as well as damages based on their activities within the traditional sphere of legislative activity"); *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 252 (3d Cir. 1998) (acknowledging that "in fact the Supreme Court in *Consumers Union* did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative"); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990) ("The [legislative] immunity granted is immunity from suit and applies whether the relief sought is money damages or injunctive relief."); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) ("Legislators' immunity is absolute and extends to injunctive as well as to damages suits." (internal citation omitted)); *Church v. Missouri*, 913 F.3d 736, 753 (8th Cir. 2019) (dismissing on legislative immunity grounds suit seeking prospective relief); *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010) ("This [legislative] immunity extends both to claims for damages and claims for injunctive relief."); *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005) ("[W]e hold that the legislator defendants in the instant official capacity suit for prospective relief are entitled to absolute immunity."); *cf. League of Women Voters of Pa. v. Commonwealth*, 177 A.3d 1000, 1006 (Pa. Commw. Ct. 2017) (quashing subpoenas to legislators, explaining that "the Court lacks the authority under the Speech and Debate Clause of the Pennsylvania Constitution to compel the production of the documents sought"); *Fla. House of Representatives v. Expedia, Inc.*, 85

So. 3d 517, 520 (Fla. Dist. Ct. App. 2012) (quashing on legislative privilege grounds subpoena to legislator seeking testimony).[4]

Arizona courts have never signaled any intention to repudiate this established conception of legislative immunity. To the contrary, the Court of Appeals articulated Arizona's cognate immunity in terms that drew directly from the federal case law. *See Fields*, 206 Ariz. at 136-37, ¶¶ 15-17. And—notably—the Supreme Court approvingly cited these same formulations in both *Brnovich* and *Mesnard. See Brnovich*, 476 P.3d at 314, ¶ 28; *Mesnard*, 489 P.3d at 1193, ¶ 12. If the court had wished to renounce the federal framework and fashion a new, much more constrained theory of immunity (and its subsidiary privilege) unique to Arizona—and thereby overrule *Fields*—it surely would have said so.

In this vein, the single paragraph in *Brnovich* upon which Plaintiffs rely is best understood as implicitly reflecting the distinction between constitutional and common law immunities. The Board of Regents undisputedly is not a component of the Arizona State Legislature, and thus facially outside the scope of the Speech or Debate immunity enshrined in Article IV, Part 2, Section 7.[5] The upshot is that any legislative immunity presumptively shielding the Board of Regents would be a product of common law or statute,[6] and thus subject to abrogation by the Legislature, as the court found. *See generally Williams v. DeKalb County*, 840 S.E.2d 423, 435 (Ga. 2020) ("While some immunities for members of the General Assembly are provided in our constitution, legislative immunity for local officials arises from statutes or from common law. An immunity conferred by statute or common law may be abrogated by statute."). The legislative immunity that envelopes the

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[4] Because a special action is by its nature a vehicle for seeking prospective relief, for purposes of legislative immunity there is no material distinction between claims seeking an injunction and claims seeking a writ of mandamus.

[5] By contrast, Article XI, Section 5, which established the Board of Regents, does not codify any express immunity.

[6] *See* A.R.S. § 15-1621(F) (providing qualified immunity for members of the Board of Regents).

actual legislative branch, by contrast, is of constitutional provenance and its protections accordingly are plenary and permanent. *See Mesnard*, 489 P.3d at 1193, ¶ 12.

## CONCLUSION

For the reasons stated herein and in the Motion, the Plaintiffs' Complaint fails to state any valid or redressable claim for relief. The Senate Defendants accordingly are entitled to judgment on the pleadings in their favor, pursuant to Ariz. R. Civ. P. 12(c).

RESPECTFULLY SUBMITTED this 17th day of August, 2021.

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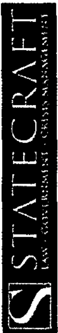

## CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I filed the attached document with the Clerk's Office and served a copy of the foregoing to the following counsel of record via email and first class mail:

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By:
Thomas Basile

Exhibit 1

IN THE

# COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 08/11/2021
AMY M. WOOD,
CLERK
BY: KLE

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| 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; the ARIZONA SENATE, a house of the Arizona Legislature,<br><br>Petitioners,<br><br>v.<br><br>THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,<br><br>Respondent Judge,<br><br>AMERICAN OVERSIGHT,<br><br>Real Party in Interest. | Court of Appeals<br>Division One<br>No. 1 CA-SA 21-0141<br><br>Maricopa County<br>Superior Court<br>No. CV2021-008265 |

**ORDER GRANTING STAY REQUEST, SETTING ORAL ARGUMENT**

The Court, Acting Presiding Judge Maria Elena Cruz, Judge Michael J. Brown, and Judge Jennifer B. Campbell participating, has reviewed Petitioner's petition for special action and emergency motion for stay. The Court held a telephonic hearing with attorneys Kory Langhofer and Thomas Basile representing the Petitioners; attorneys Keith Beauchamp and Roopali H. Desai representing Real Party in Interest, American Oversight. After consideration,

**IT IS ORDERED** granting the request to stay the superior court's order to produce public records entered on August 2, 2021.

**IT IS FURTHER ORDERED** accelerating Petitioners' deadline for reply in this matter to Monday, August 16, 2021 by 5:00 p.m.

**IT IS FURTHER ORDERED** setting oral argument for **Wednesday, August 18, 2021 at 2:00 p.m.** before Department D, Courtroom #2, State Courts Building, 1501 West Washington, Phoenix, Arizona.

**IT IS FURTHER ORDERED** each side shall have twenty minutes to present oral argument.

**REPLY IS REQUESTED.** Included with this order is a Return Receipt form. The Court requests that you acknowledge receipt on this form and return it to the Clerk of the Court of this Division. Please advice of any change in name of firm or address.

___/s/_______________
MARIA ELENA CRUZ,
Acting Presiding Judge