ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

FANN *et al.* v. KEMP;
AMERICAN OVERSIGHT, real party in interest
CV-22-0018-PR

PARTIES:

Petitioner: Senate President Karen Fann, Senate Judiciary Committee Chairman Warren Petersen, and the Arizona Senate (collectively the "Senate")

Respondent: Hon. Michael Kemp, Maricopa County Superior Court

Real Party in Interest: American Oversight

Amicus Curiae: Phoenix Newspapers Inc.

FACTS:

In March 2021, the Senate initiated an audit which concerned approximately 2.1 million Maricopa County ballots cast during the November 2020 general election. The Senate contracted with Cyber Ninjas Inc ("CNI") to serve as the primary vendor for the project. CNI ultimately delivered its audit report to the Senate, which then released the report to the public and conducted a public hearing outlining the report's findings and conclusions.

Meanwhile, American Oversight presented requests to the Senate and CNI for production of public records relating to the audit. When the Senate refused to produce most of the requested records, American Oversight filed a complaint under the public records law ("PRL") to compel disclosure of the documents, including those in the possession or custody of CNI and its contractors.

The Senate filed a motion to dismiss American Oversight's complaint asserting in part that legislative immunity barred the lawsuit. The superior court denied the motion to dismiss and ordered the Senate to produce the documents. The Senate filed a special action in the Court of Appeals arguing that it was not required under the PRL to produce the requested documents. The Court of Appeals accepted jurisdiction and held that the Senate defendants "as officers and a public body under the PRL, have a duty to maintain and produce public records related to their official duties. This includes the public records created in connection with the audit of a separate governmental agency, authorized by the legislative branch of state government and performed by the Senate's agents." *Fann v. Kemp*, 1 CA-SA 21-0141, 2021 WL 3674157, at *4 (App. Aug. 19, 2021), review denied (Sept. 14, 2021).

The Senate hired a third party to review and upload a "massive repository of records." The review included searching the personal cell phones of Senator Fann, as well as audit liaisons Ken Bennett and Randy Pullen. The Senate then disclosed about 22,000 records but withheld 422 records on the grounds of legislative privilege and redacted another 272 for the same reason. The Senate also withheld another 402 records based in part on legislative privilege. According to the Senate's privilege log, the emails contain "internal legislative discussions regarding [the] audit," while the text messages refer to "communications re: legislative investigation and audit process."

American Oversight moved to compel the Senate to produce the withheld records and asked that the documents be submitted to the judge for an *in camera* review. The Senate objected. The superior court overruled the objection and ordered the Senate to produce the documents finding that (1) communications about the audit are not an integral part of the deliberative process regarding proposed legislation; (2) disclosure of documents with a substantial nexus to the audit would not impair the deliberative legislative process; (3) factual communications relating to procedures, protocols, practices, findings, or conclusions relating to the audit are not privileged, and (4) even if the legislative privilege applies, the Senate waived it by releasing many public statements, issuing its comprehensive report, and holding the public hearing.

The Senate filed a petition for special action in the Court of Appeals, which again accepted jurisdiction and issued an opinion substantially agreeing with the superior court. First, the Court of Appeals reasoned that the legislative privilege does not extend to cloak "all things in any way related to the legislative process," as explained in the case *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶¶ 17-18 (App. 2003). Rather, the privilege extends to matters beyond pure speech or debate in the legislature only when such matters are "an integral part of the deliberative and communicative processes" relating to proposed legislation or other matters placed within the jurisdiction of the legislature, and "when necessary to prevent indirect impairment of such deliberations" as outlined in *Gravel v. United States*, 92 S.Ct. 2614 (1972). The court found, "The legislator asserting the privilege has the burden to show that the *Gravel/Fields* framework is satisfied." Observing that an act is legislative when it reflects a "discretionary, policymaking decision that may have prospective implications," it found that the hearing "lacked the hallmarks of traditional legislation." Also, the privilege does not apply to "political" acts routinely engaged in by legislators, such as speech-making outside the legislative arena and performing errands for constituents or to the performance of "administrative" tasks.

The court concluded that only activities "done in the course of the process of enacting legislation" receive protection," and, therefore, "Because the Senate has made no attempt to show how confidential treatment of its communications relating to the audit was necessary to prevent indirect impairment of its legislative deliberations, it has necessarily failed to meet its burden of establishing that each of the records listed in the privilege log are shielded from public disclosure."

The Court of Appeals, however, disagreed with the superior court and determined there was no indication that the Senate had waived the privilege for every record related to the audit.

The Senate filed a petition for review in this Court and requested a stay of the order to produce public records it claimed were protected by legislative privilege, and the Court granted the stay pending further order.

ISSUES (as rephrased by the Court):

1. Did the Court of Appeals err in holding that the legislative privilege generally does not apply under the *Gravel/Fields* analytical framework to communications concerning the planning, execution, or results of the Audit, on the grounds that the Audit (a) does not relate to "pending legislation" or "other matters placed within the jurisdiction of the legislature," (b) is an "administrative" function, and/or (c) is "political"?

2. Did the Court of Appeals err in holding that a prima facie claim of legislative privilege requires affirmative evidence of legislative impairment?

3. What is the nature and extent of the information that must be provided in a privilege log to invoke legislative immunity; and what is the burden on the party seeking disclosure to trigger in camera review?