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Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

BY AND FOR THE COUNTY OF MARICOPA

PUENTE, an Arizona nonprofit corporation; MIJENTE SUPPORT COMMITTEE, an Arizona nonprofit corporation; JAMIL NASER, a resident of the State of Arizona; JAMAAR WILLIAMS, a resident of the State of Arizona; and JACINTA GONZALEZ, a resident of the State of Arizona,

Plaintiffs,

v.

ARIZONA STATE LEGISLATURE, a political subdivision of the State of Arizona,

Defendant.

Case No. CV2019-014945

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

(Assigned to the Honorable Connie Contes)

PRELIMINARY STATEMENT

Defendant argues that Arizona's Open Meeting Law ("OML")[1] does not apply to the Arizona Legislature—despite the fact that the statute explicitly includes the Legislature among the public bodies subject to the law. Defendant also argues that this Court may not adjudicate a case questioning Defendant's adherence to the OML—even though courts, since this Nation's founding, have been vested with the authority to decide what the law is. Acceptance of Defendant's demand that this Court avoid the straightforward questions presented in this case "would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits."[2]

Despite Defendant's repeated attempts to insulate itself from even modest scrutiny, none of its arguments divest this Court of its ability to remediate a violation of the OML. Invocation of the separation of powers doctrine, inclusion of constitutional doctrines inapposite to this case, and alarmist floodgates theories amount to nothing more than legal grandstanding—an attempt to confuse and complicate what is simple and straightforward. The Arizona State Legislature spoke clearly when it stated that "any person affected by an alleged violation" of A.R.S. § 38-431.07 could "commence a suit in the superior court . . . for the purpose of requiring compliance with, or the prevention of violations of, this article." Any such judicial intervention would be neither "sweeping" nor "invasive," but limited and appropriate.[3]

Critically, Defendant does not deny that a quorum of Committees of the Arizona State Legislature met on December 4th and 5th, 2019 during the American Legislative Exchange Council ("ALEC") States & Nation Policy Summit (hereafter "the Summit") meeting in Scottsdale, Arizona. Indeed, it tacitly admits as much by (wrongfully) claiming its members' participation at the Summit is protected. Having conceded the statute applies

[1] A.R.S. §§ 38-431, *et seq.*
[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).
[3] [Def. Mot. at 11].

to Defendant's activities as a matter of fact, Defendant has effectively conceded there can be no political question bar to judicial review as a matter of law. Neither the Supreme Court nor Arizona courts have ever found that judicial enforcement of statutory commands are political questions; and the principles of separation of powers Defendant loosely invoke actually require judges to interpret and enforce legislative enactments. This Court should refuse to entertain Defendant's political bluster and deny its Motion to Dismiss.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 4, 2019, Plaintiffs filed a Complaint, seeking Declaratory Judgment against the Arizona State Legislature for violating Arizona's OML. Plaintiffs asserted and Defendant implies that a quorum of five Legislative Committees attended the ALEC Summit in Scottsdale, Arizona in violation of the OML.

On January 23, 2020, Nihad Hidic, a process server hired by Plaintiffs, attempted to personally serve the Office of the Arizona Attorney General with the Complaint and Summons to effect service of process under Rule 4, Ariz. R. Civ. P. The Office of the Attorney General refused to accept service of the Complaint. On January 28, 2020, Gary Viscum, a process server hired by Plaintiffs, attempted to serve the President of the Senate and Speaker of the House. Both offices refused to accept service of process, and directed Mr. Viscum to Krystal Fernandez, Attorney for the Rules Office. Ms. Fernandez advised Mr. Viscum that "there is no such entity as the Arizona State Legislature."

On January 30, 2020, Plaintiffs sought and obtained an order from this Court authorizing alternative service pursuant to Rule 4.1(k), Ariz. R. Civ. P. Defendant was served via certified mail on February 21, 2020 and filed a Motion to Dismiss on March 19, 2020.

ARGUMENT

I. LEGAL STANDARD

Arizona courts assess the sufficiency of a claim under Arizona Rule of Civil

Procedure 8's notice pleading standard, which merely requires that the plaintiff provide a "short and plain statement of the claim" showing they are entitled to relief in order to "'give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved.'"[4]

On a motion to dismiss for failure to state a claim, this Court must assume the truth of the well-pled factual allegations and indulge all reasonable inferences.[5] Plaintiffs' Complaint contains more than sufficient factual allegations to place Defendant on notice of the type of litigation involved and support a cognizable legal claim that the Defendant violated the OML.

II. PLAINTIFFS NAMED AND SERVED THE PROPER PARTY.

Defendant first contends that dismissal is appropriate because Plaintiffs failed to name and serve the proper defendants. Boiled down, Defendant argues that the Arizona State Legislature cannot be a party to a suit. This proposition is demonstrably false.

The entity known as the "Arizona State Legislature" is sued routinely.[6] The Arizona State Legislature has also brought suit, acting as the plaintiff in the case *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014), *aff'd*, 135 S. Ct. 2652 (2015), where it described itself as "the elected-representative portion of the legislative authority of the State of Arizona" under Ariz. Const. art. IV, pt. 1 § 1.[7] Defendant's unprecedented request to find that the Arizona State Legislature is either non-existent or is a non-justiciable entity completely ignores existing case law and the Arizona State Legislature's own prior actions.

Defendant further argues that, because the Legislature consists of two chambers, it

[4] Ariz. R. Civ. P. 8; *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008) (en banc) (quoting *Mackey v. Spangler*, 81 Ariz. 113, 115 (1956)).
[5] *Cullen*, 218 Ariz. at 419.
[6] *See e.g., McLaughlin v. Bennett,* 225 Ariz. 351 (2010) (en banc); *United States v. State of Arizona*, No. CV 10-1413-PHX-SRB (D. Ariz. Apr. 5, 2011) (order granting motion of Arizona State Legislature to appear as intervenor-defendant).
[7] First Am. Compl. at 2, *Ariz. State Legislature*, 997 F. Supp. 2d 1047.

cannot exist as one whole. This argument is undercut by Ariz. Const. art. IV, pt. 1 § 1 and the Constitution's numerous references to the "Legislature" as a whole.[8] Moreover, the statute itself anticipates that the Legislature is sue-able for violations of the OML, as the Legislature is itself included in the definition of a "public body" subject to the open meeting requirements. The Arizona State Legislature is the proper party, and service was effectuated in accordance with this Court's order, dated February 6, 2020.

III. THE NARROW POLITICAL QUESTION DOCTRINE WAS NOT MEANT TO PRECLUDE ENFORCEMENT OF A DULY ENACTED STATUTE AGAINST THE STATE LEGISLATURE.

"The Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. Never."[9]

Arizona's OML explicitly provides that the "Legislature" is a public body subject to the law and states that the judiciary may adjudicate questions of a public body's violation of the OML. Defendant seeks to evade the command of a law it drafted and chose to apply to itself by invoking the political question doctrine. Its argument is confused.

First, what Defendant *actually* contends is that the OML is unconstitutional as applied to its concededly legislative activities. Yet, as the Supreme Court recently emphasized – adjudicating whether a statute can or cannot apply to certain conduct – is a "familiar judicial exercise."[10] This exercise reflects the fundamental obligation of the judiciary to "say what the law is."[11] Second, framed either as a legal or political question, the Arizona Constitution does not give this subset of legislators – not acting on behalf of the House body– the unfettered discretion to immunize their conduct from statutory provisions; and, whatever discretion the Constitution provides to the Arizona House to create rules of procedure, it is limited by its own terms to certain procedures that do not

[8] Ariz. Const. art. IV, pt. 1 § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives").
[9] *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring).
[10] *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2015).
[11] *Marbury v. Madison*, 5 U.S. at 177.

preclude compliance with the OML.

A. Separation of Powers Principles Compel, Rather than Discourage, The Judiciary to Interpret and Enforce a Duly Enacted Statute.

Defendant asks this Court to do what has ***never*** been done before: convert a statutory obligation into a political question and ignore the vehicle for judicial review built into the statute. The political question doctrine represents a "narrow exception" to the judiciary's constitutional duty to decide cases and controversies.[12] In the fifty years since *Baker v. Carr,* 369 U.S. 186 (1962), and despite numerous invocations, the Supreme Court has ordered a case dismissed on political question grounds ***only twice***.[13] The two most important factors in evaluating the possibility of 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."[14] A textual commitment that creates a political question must generally be total and unambiguous, so as not to displace the judiciary in a system of separation of powers.[15] And the two *Zivotofsky* factors are designed to capture the rare instance where the judiciary lacks constitutional authority or institutional competence to resolve the questions necessary to the dispute.[16]

Critically, there can be no separation of powers concern where the judiciary is tasked with interpreting a statute –as is the case here.[17] This is precisely what Justice Marshall meant when he wrote it is the "province and duty of the judicial department to say what the law is."[18] The law at issue here is the OML, and application of the OML to factual

[12] *Zivotofsky*, 566 U.S. at 195.
[13] *See El-Shifa Pharm. Indus. Co.*, 607 F.3d at 856 (Kavanaugh, J., concurring) (citations omitted).
[14] *Zivotofsky*, 566 U.S. at 195 (citations omitted).
[15] *See Powell v. McCormack,* 395 U.S. 486, 519 (1969).
[16] *See Zivotofsky*, 566 U.S. at 202-04 (Sotomayor, J., concurring).
[17] *See El-Shifa*, 607 F.3d at 856.
[18] *Marbury v. Madison*, 5 U.S. at 177. *Accord Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355 (2012).

allegations regarding Defendant's conduct, is "a familiar judicial exercise"— one that courts are constitutionally obligated to undertake.[19] In this case, Plaintiffs have a statutory right to attend Legislative meetings and the judiciary is the constitutionally empowered branch to ensure enforcement under the statute A.R.S. § 38-431.07(A). Other states concur.[20]

B. The Legislature's Authority to Develop Rules of Procedure is Not Unlimited and Does Not Preclude Compliance with OML.

Claiming unbridled authority to conduct its affairs however it sees fit, Defendant points to Article IV, Part 2, Section 8 of the Arizona Constitution, which, in the most general way, authorizes each house to "determine its own rules of procedure." Defendant also cites to Section 9, which provides:

> 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*** [emphasis added].

From this narrow conferral of authority, Defendant divines this maximalist principle: "all strictures governing legislative proceedings — to include denoting what constitutes a committee 'meeting' and even defining the term 'committee' itself — are the exclusive province of the legislative house."[21]

But, as the Supreme Court explained in *United States v. Nixon*, the mere assertion of

[19] *Zivotofsky*, 566 U.S. at 196. Indeed, in *Zivotofsky*, the Supreme Court unanimously rejected the position Defendant advances here. *Id*. at 201. There, the State Department argued that judiciary could not decide whether a federal statute permitting a Jerusalem-born individual's passport to be stamped "Israeli" was constitutional because regulation of passports was constitutionally delegated power to the Executive. *Id* at 198-99. The Supreme Court concluded that, despite the delicacy of the foreign relations question, the Court was fully empowered — indeed, obligated — to decide whether the State Department's action violated the federal statute at issue.

[20] *See, e.g. Wilkins v. Gagliardi*, 556 N.W.2d 171, 176 (Mich. Ct. App. 1996) ("[T]he court below and this Court are called upon first to construe the [Michigan Open Meetings Act] and its applicability to the Legislature in light of the commands of the constitution. Such a task is a clear judicial responsibility.").

[21] [Def. Mot. at 5].

an "intra-branch dispute" does not preclude judicial inquiry.[22] Justiciability does not depend on such a "surface inquiry."[23] The Court "must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[24]

Looking beyond Defendant's "surface inquiry" into Section 9 reveals it to be far more constrained than Defendant imagines. To begin, Sections 8 and 9 contemplate actions of a duly constituted and collective House *body*. The House, acting under normal rules, may create its own procedures, or "compel the attendance of absent members."[25] But, the Arizona state legislators who met together at the ALEC Summit were not acting in the fully constitutive manner these Sections contemplate; they were therefore not clothed with the full authority of the House, even as they undertook legislative functions. Further, the above-bolded clause in the Constitution, which Defendant believes gives it unlimited discretion, is necessarily limited to the preceding clauses, such that the House may "compel the attendance of absent members," in "any manner" the full House "prescribes"; it does not suggest the House may undertake any procedure it chooses related to any matter. Specifically, the clause does not provide that a quorum of several Legislative committees is granted the ability to meet, deliberate, and legislate behind closed doors without public scrutiny.

This text mirrors the text at issue in *Powell*.[26] In *Powell*, attempting to unseat Adam Clayton Powell, Jr. of his House seat because of financial misconduct allegations, the U.S. House of Representatives argued that pursuant to U.S. Const. art. I, § 5, the House maintained exclusive power "to judge the . . . qualifications of its own members."[27] The House claimed this power was plenary, and could relate to any qualification the House body

[22] 418 U.S. 683, 693 (1974).
[23] *Id*.
[24] *United States v. Interstate Commerce Commission*, 337 U.S. 426, 430 (1949).
[25] Ariz. Const. art. IV, pt. 2 § 9.
[26] 395 U.S. at 506
[27] *Powell*, 395 U.S. at 513.

thought relevant. The Court rejected that categorical assertion and held that the House only had power to determine qualifications specifically listed in the Constitution; that is, their discretion was limited to judging age, citizenship, and residency, set forth in Article I, § 2.[28] The Court in *Powell* made clear that while the Legislature maintains discretion to set rules and processes, this discretion is not absolute and is limited by the judiciary's textual reading and interpretation of the Constitution. Like the Supreme Court in *Powell*, the Court here is authorized to set the limits of the Legislature's discretion to ensure constitutional and statutory compliance.

Defendant's heavy reliance on *Mecham v. Gordon*, 156 Ariz. 297 (1988), is revealingly misdirected, as it involves the House's unambiguously plenary power under the impeachment clause. The Arizona Supreme Court explained that Arizona's Constitution, like the U.S. Constitution, has tasked the House with the ***total*** power to impeach duly elected officials.[29] Thus, the Court in *Mecham* refused to interfere in the internal workings of a Senate impeachment trial because the impeachment power, quite unlike the procedures power considered in *Powell*, is absolute.[30]

In contrast, where the power to set procedures and rules is not unlimited, the Supreme Court has made clear that the judiciary is authorized, and in fact mandated, to adjudicate abuses of power.[31] Therefore, in seeking dismissal, Defendant espouses an extraordinary and incorrect interpretation of the law that disregards and distorts federal and state precedent as set by *Zivotofsky* and *Powell*.

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[28] *Id.* at 522.
[29] Ariz. Const. art. 8, pt. 2, § 1; Ariz. Const. art. 8, pt. 2, § 2; U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").
[30] *Id*. at 229. ("[T]he word 'sole' indicates that this authority is reposed in the Senate and nowhere else.")
[31] *See Powell*, 395 U.S. at 506 (citing *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 199 (1880)) (judiciary may determine in appropriate cases whether the legislature has exercised its powers in conformity to the Constitution).

C. Defendant Misstates the Pleadings and the Applicable Law.

Defendant posits a series of arguments resting on one faulty premise: when a quorum of five legislative committees met in a private spa to deliberate on matters of public policy, they acted with the same vested interest granted to the Legislative body as a whole. This is not true. The constitution permits the Legislature as a whole to make legislative exemptions, and to decide on procedures and penalties. It does not empower legislators to usurp the power of the Legislative body as a whole to carry out their partisan and secretive agenda. Plaintiffs pled that quorums of five Legislative committees met during the ALEC conference in a way that was prohibited under the OML. Plaintiffs did not plead that a quorum of the entire Legislature met in a way that was prohibited by the OML.

D. Defendant Attempts to Weaponize the Political Question Doctrine to Skirt the Intent of the Open Meeting Law to Open Government Processes to Public Oversight Accountability.

Contrary to Defendant's insinuation, Def. Mot. at 8, the Arizona Legislature was clear when it said that the OML would definitively apply to its members acting in a legislative capacity: "[M]eetings [of legislative conference committees] shall be open to the public."[32] And, the express intent of the Legislature in passing the OML is to construe it broadly.[33] When passing the Arizona OML in 1962, the legislature stated: "It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly."[34] And in 1978, after a series of judicial opinions attempted to narrowly construe the statute, the Legislature reiterated its policy by adding A.R.S. § 38-431.09(A). ("[A]ny person or entity charged with the interpretations of this article shall construe this article in favor of open and

[32] A.R.S. § 38-431.08(A)(2).
[33] Ariz. Op. Att'y Gen. No. I83-128, 1983 WL 42773 at *2 (Nov. 17, 1983).
[34] 1962 Ariz. Sess. Laws, ch. 138 § 1; *see also* Ariz. Op. Att'y Gen. No. 75-7, at 1-2 (Aug. 19, 1975).

public meetings.").

Fundamentally, Defendant's reading of the OML subverts the long-established right of the public to observe the legislative process and understand what interests are influencing it. The OML wished to give the people of Arizona with the power to hold their public officials accountable. Courts have been adamant about protecting this right.[35]

IV. THE SUMMIT WAS NOT A POLITICAL CAUCUS OF THE LEGISLATURE.

Defendant next argues that the Summit meeting — despite being attended by out-of-state lawmakers and private interest groups—was a "political caucus" and is therefore exempt from Arizona's OML.[36] Defendant concedes that the term is not defined by the OML or case law, but suggests a "political caucus" is "a meeting of members of a legislative body who belong to the same political party or faction to determine policy with regard to proposed legislative action."[37] This definition is substantially similar to the definition of "caucus" provided by the Arizona State Legislature on its website: A "[c]aucus is a meeting of legislators of the same political party to consider legislation, policies and actions."[38]

The relevant meeting was not so limited. In addition to being attended by at least 26 Arizona legislators, the ALEC Summit brought together lawmakers from around the country, along with private individuals, corporations, ***and (ostensibly) members of both political parties***.[39] The inclusion of individuals from multiple political parties, alone, is enough to bring ALEC's Summit outside the bounds of the term "political caucus." But

[35] *See Renck v. Superior Court of Maricopa Cnty.*, 66 Ariz. 320, 326 (1947) (citing *Allen v. State*, 14 Ariz. 458, 467 (1913)) ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed. This is not a mere metaphor, that sounds pleasing to the ear, nor is it a maxim that may not have a concrete application; but it is a vital principle, adhered to in the formation of the government of this state.").

[36] [Def. Mot. at 9-10].

[37] *Id*. at 9.

[38] *Caucus Packets*, ARIZ. STATE LEGISLATURE, https://www.azleg.gov/caucus-packets/ (last visited May 3, 2020).

[39] ALEC describes itself as a "nonpartisan" organization. *See About ALEC*, AM. LEGISLATIVE EXCH. COUNCIL, https://www.alec.org/about/ (last visited May 3, 2020).

this Summit was also attended by hundreds of people from across the nation, including other state and federal lawmakers, corporate representatives, and lobbyists who are clearly not members of the Arizona State Legislature's Republican Caucus.

Indeed, if the term was defined so liberally, the exception would swallow the rule, and quorums of public bodies around the State would be permitted to meet in private and make decisions affecting the public, as long as that "quorum" were members of the same political party. It strains credulity to imagine that Arizona's OML, directed to prevent such conduct, would have contemplated such result.[40]

More importantly, the arguments advanced by Defendant illustrate the necessity of this suit. Boiled down, Defendant essentially proposes that ALEC is a part of the Arizona Republican Caucus. Such an idea is both absurd and contrary to the entire spirit of Arizona's OML, which long ago established the intent of Arizonans to open state government business to public scrutiny and to prevent public bodies from undertaking legal action in secret. For these reasons, Defendant's argument should be rejected.

V. PLAINTIFFS PROPERLY AND ADEQUATELY PLEAD FACTS TO SUPPORT THEIR CLAIM UNDER THE OPEN MEETING LAW AND THE BURDEN IS ON THE DEFENDANT TO SHOW THAT NO LEGAL ACTION WAS TAKEN IN VIOLATION OF THE STATUTE.

Plaintiffs have more than met Rule 8's notice pleading standard with factual allegations supporting all elements for an OML violation. Defendant argues otherwise, asserting that the "Complaint's allegations cannot support an inference of a 'legal action'."[41] In doing so, it asks this Court to ignore the factual allegations that the legislators and ALEC members comprised a quorum of five legislative committees in attendance at the Summit; factual allegations regarding past ALEC convenings; and the kind of legal action that has taken place at prior summits and was anticipated at the 2019 ALEC Summit.[42]

[40] *See State v. Estrada*, 201 Ariz. 247, 251 (2001) (en banc) (Arizona courts will not interpret a statute to yield absurd results).
[41] [Def. Mot. at 10].
[42] Compl. ¶¶ 30-55.

Arizona law is clear that the OML applies not only to final legislative actions, but also to "any discussions leading to formal decisions made by the public body."[43] Here, Plaintiffs have identified 26 ALEC members[44] who comprised a quorum of legislators from five Arizona State Legislative committees (collectively, the "Legislative Committees") – who they claim met to discuss matters of legal significance.[45] Plaintiffs claim that during the Summit state legislators and private participants from across the country convened, in part, to formulate "model bills" that would be introduced in Arizona.[46] As the first stage of policy formulations, Arizona law generally requires creation of these "model bills" to be conducted in sessions open to the public.[47] Yet, these deliberations were undertaken behind closed-doors and with the influence of unknown and democratically unaccountable interests who were presumably never disclosed to the Arizona electorate.[48] Moreover, Plaintiffs gathered all the evidence they are capable of gathering given the secretive nature of these meetings.

The Arizona Court of Appeals recognized that when meetings are conducted in secret—as is the case here—plaintiffs may not have all the "specific facts" needed to concretely prove an open meeting violation because it is "a circular impossibility."[49] In such a case, the Arizona Court of Appeals held that plaintiffs need only present evidence that supports a "reasonable inference" that a violation of the OML will occur or has occurred, and then the burden of proving such a violation did not occur shifts to the defendant.[50]

[43] Ariz. Op. Att'y Gen. No. I83-128, 1983 WL 42773 at *1 (Nov. 17, 1983) (Any citizen of Arizona is permitted "to witness all governmental policy-making activities, including any discussions leading to formal decisions made by the public body.").
[44] Elizabeth Whitman, *Arizona Republicans Flocked to Austin This Week for ALEC's Annual Conference*, PHOENIX NEW TIMES (Aug. 16, 2019), https://www.phoenixnewtimes.com/news/arizona-gop-lawmakers-alec-conference-austin-republicans-koch-11343739.
[45] Compl. ¶¶ 36-39.
[46] Compl. ¶¶ 40-48.
[47] Ariz. Op. Att'y Gen. No. I83-128, 1983 WL 42773 (Nov. 17, 1983).
[48] Compl. ¶¶ 49-55.
[49] *See Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 122 (Ct. App. 1995).
[50] *Id.*; *Globe Newspaper Co. v. Police Comm'r of Boston*, 648 N.E.2d 419, 424 (Mass. 1995)

Defendant concedes this point noting that the standard for pleadings is one in which "a reasonable inference may be drawn supporting an Open Meeting Law violation."[51] Plaintiffs here, relying on ample local and national reporting from past and present ALEC meetings, assert a "reasonable inference" that the OML was violated.[52]

VI. THE LEGISLATIVE PRIVILEGE DOES NOT PRECLUDE JUDICIAL REDRESS FOR A VIOLATION OF THE OPEN MEETING LAW.

Far from the "noxious[53] implications for First Amendment rights,"[54] the legislative privilege—a testimonial and evidentiary privilege—does not provide an independent basis to dismiss the complaint.[55]

This legislative privilege does not extend to cloak "all things in any way related to the legislative process."[56]

The privilege also does not apply to "political" acts routinely engaged in by legislators, such as meeting with constituents and speechmaking outside the legislative arena. *Id.* Likewise, as here, the privilege does not apply to attempts to influence legislative

("[A] government agency which refuses to comply with an otherwise proper request for disclosure has the burden of proving 'with specificity' that the information requested is within one of nine statutory exemptions to disclosure.").

[51] [Def. Mot. at 10].

[52] Compl. ¶¶ 39-45, nn. 9-14; *see Fisher*, 185 Ariz. at 122 (plaintiff could properly rely on media reports of an executive session to infer a violation of Arizona's OML).

[53] This Court should also consider whether a ruling in the Legislature's favor would greatly diminish First Amendment rights for the rest of us. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.,* 425 U.S. 748 (1976); *Kleindienst v. Mandel,* 408 U.S. 753 (1972); *see also Lamont v. Postmaster Gen.,* 381 U.S. 301 (1965). The First Amendment plays an important role in affording the public access to discussion, debate, and the dissemination of information and ideas, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and Arizonans demand just that.

[54] [Def. Mot. at 12].

[55] *In re Search of Elec. Commc'ns in the Account of chakafattah@gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 528 (3d Cir. 2015); *Bastien v. Office of Senator Ben Nighthorse Campbell,* 390 F.3d 1301, 1307 (10th Cir. 2004).

[56] *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 (Ct. App. 2003) (quotation omitted). Courts routinely look to see whether the action falls within the "sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). For example, legislative activity does not include actions that are political or administrative in nature. *United States v. Brewster*, 408 U.S. 501, 512 (1972).

activity, including closed-door political lobbying.[57]

VII. REMEDIES ARE APPROPRIATE.

In asserting that it would be "nugatory" for Plaintiffs to request that "all 'model bills' . . . be subject to the Requirements of the OML,"[58] Defendant attempts to pull focus away from the central question in this case– meetings of public bodies where "discussions, deliberations, considerations or consultations" are taking place about "matters which may foreseeably require final action or a final decision of the governing body."[59]

In doing so, Defendant ignores the plain language of the statute which requires that "[*a*]*ll* meetings of any public body shall be public . . . and *all* persons . . . shall be permitted to attend and listen to the deliberations and proceedings," and "[*a*]*ll* legal action . . . shall occur during a public meeting."[60] The Legislature *meant* all when it *wrote* all, and for good reason.[61]

Defendant cannot *ex post facto* legitimize a non-compliant meeting it was never authorized to hold by holding some perfunctory public recitation sometime thereafter.[62] This is precisely because private meetings withhold from public consumption vital

[57] *Brewster*, 408 U.S. at 513; *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Hartley v. Fine*, 595 F. Supp. 83, 87 (W.D. Mo. 1984), *aff'd*, 780 F.2d 1383 (8th Cir. 1985); *United States v. Jefferson*, 546 F.3d 300, 310 (4th Cir. 2008); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elecs.,* Case No. 11C5065, 2011 WL 4837508 at *10 (N.D. Ill. Oct. 12, 2011) (court held legislative privilege did not apply to "[c]ommunications between [legislators] and outsiders to the legislative process . . . includ[ing] lobbyists, members of Congress and the Democratic Congressional Campaign Committee").

[58] [Def. MTD 12].

[59] Ariz. Op. Att'y Gen. No. I78-285, 1978 WL 18920 at *3 (Dec. 21, 1978).

[60] A.R.S. § 38-431.01(A) (emphasis added).

[61] A.R.S. § 1-213 ("Words and phrases [in statutes] shall be construed according to common and approved use of the language").

[62] *See Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001); *Carter v. Smith*, 366 S.W.3d 414 (Ky. 2012); *Van Alstyne v. Hous. Auth. of Pueblo, Colo.*, 985 P.2d 97 (Colo. Ct. App. 1999); *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. Dist. Ct. App. 1998); *Scott v. Town of Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967), *aff'd*, 237 A.2d 297 (N.J. Super. Ct. App. Div. 1967); *Kramer v Bd. of Adjustment of Sea Girt*, 194 A.2d 26 (N.J. Super. Ct. Law Div. 1963); *Cf. Trico Elec. Coop. v. Ralston*, 67 Ariz. 358, 367 (1948) (corporation cannot ratify unlawful or *ultra vires* act).

information about potential legislative action, obfuscating statutory intent, stakeholder interests, financial incentives, and counter-considerations.

Even if the Legislature could legitimize the actions taken at its unlawfully-held meeting, Defendant fails to meet the requirements of the limited ratification exception.[63] To ratify an otherwise violative meeting under A.R.S. § 38-431.05(B), the entity must publish with sufficient notice "a clear statement that the public body proposes to ratify a prior action," "information on how the public may obtain a detailed written description of the action to be ratified," "a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action," including "minutes," among other requirements. Defendant does not offer any evidence that it met these requirements and does not even attempt to aver that it happened.[64] Defendant's ratification argument fails on this ground, as well.

CONCLUSION

At its core, this case is about transparency and a law enacted to ensure it, including through judicial review. A quorum of five Legislative Committees attended the Summit and deliberated in closed-door meetings, denying the public the opportunity to observe and review the deliberations about potential legislation that could affect their lives. This secretive process is precisely what the Open Meeting Law was enacted to prevent. For the foregoing reasons, Defendant's Motion to Dismiss should be denied.

DATED this 4th day of May, 2020.

[63] *See Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.,* 199 Ariz. 567, 569 (Ct. App. 2000), *as amended* (Mar. 22, 2001) ("Exceptions to the open meeting law 'should be narrowly construed in favor of requiring public meetings.'"); *see also* A.R.S. § 38-431.09.

[64] Defendant's argument that "[t]he Complaint does not—and could not—present even a single example of any bill introduced in the current legislative session that was debated and/or voted on in proceedings that did not comply with the OML," Def. MTD 12, cuts in Plaintiffs' favor. If this is true, then Defendant would still have conducted a noncompliant meeting but would have no evidence or even conjecture to support its contention that it was ever ratified. At a motion to dismiss stage, this Court must find for Plaintiffs on this ground.

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ORIGINAL of the foregoing filed electronically utilizing AZ Turbo Court this 4th day of May, 2020, which caused a copy to be electronically transmitted to:

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