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ARIZONA COURT OF APPEALS

DIVISION ONE

PUENTE, et al., Plaintiffs-Appellants, v. ARIZONA STATE LEGISLATURE Defendant-Appellee.	Court of Appeals Division One No. 1 CA-CV 20-0710 Maricopa County Superior Court No. CV2019-014945

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INTRODUCTION

Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution afford a duly constituted Legislature the ability to govern its day-to-day affairs within the halls of the Arizona Capitol Complex. Appellants do not dispute that; nor do they challenge it. This case is about twenty-six legislators, constituting quorums of several legislative committees, who attempted to legislate *ultra vires*, outside of the Capitol, in clear violation of the law. This limited grant of authority does not—and cannot—displace the role of the judiciary to remediate such a violation.

The Legislature may not "displace the OML entirely simply by enacting its own rules," Appellee's Brief at 7, any more than it can, for instance, displace the Arizona penal code through its authority to discipline members for disorderly behavior. *See* Article IV, Part 2, Section 11. This limited grant of authority does not insulate the Legislature and its members from our existing regulatory statutory framework: it is subject to the penal codes, the civil regulatory scheme, and likely certain state ethics and personnel rules as well.

Any ruling to the contrary would usher in the very separation of powers concerns the Legislature alleges it seeks to protect. It would exalt one branch of government over the other two. Defendant is no fool—it understands fully the import of such implications. Buttressed by the trial court's ruling that the Legislature is functionally exempt from the OML, is no wonder that it has recently

taken the position that the Judiciary cannot force its members to comply with the state's Public Records Act. *Am. Oversight v. Fann*, No. CV2021-008265 (Ariz. Super. Ct. July 15, 2021).[1] Defendant has contended in this separate case that "[t]he Arizona Constitution entrusts to each house of the Legislature plenary power to order its own internal procedures and affairs" to exempt itself from the Public Records Act entirely. Defs.' Mot. to Dismiss at 2, *Am. Oversight v. Fann*, No. CV2021-008265 (Ariz. Super. Ct. June 9, 2021). It is an unfortunate, but predictable consequence that flowed from the warrantless judicial abnegation below. The Legislature remains an equal—and not superior—branch of government, and this Court must order it to follow the law like everyone else.

ARGUMENT

I. The Limited Power Afforded the Full Legislature by Article IV, Sections 8 and 9 Does Not Render Legislative Activity Immune from Judicial Review of Violations of External Legal Constraints

A. A Mere Subset of the Arizona Legislature Cannot Invoke Constitutional Authority Solely Conferred Upon the Duly Constituted Legislative Body

Defendant's claim to an exclusive legislative prerogative rests on a fatally flawed premise. Any separation of powers dispute between co-equal branches of

[1] Howard Fischer, *Senate says lawmakers not subject to public record laws*, ARIZ. CAPITOL TIMES (June 18, 2021), https://azcapitoltimes.com/news/2021/06/18/senate-says-lawmakers-not-subject-to-public-record-laws/.

government must necessarily assume that each of those branches are acting with their fully delegated constitutional authority before such branch can assert supremacy over another. Section 8, upon which Defendant relies, states that "Each house . . . shall . . . determine its own rules," and Section 9 determines rules regarding when a duly constituted quorum—i.e. "the majority of the members of each house"—may adjourn. Whatever exclusive powers the Arizona Constitution may confer to the full House acting in a lawfully constitutive manner (and even then, as we argued in our Opening Brief, actions pursuant to such power would not be immune from judicial review under the OML), it does not confer boundless authority to Defendant, acting as a quorum of five legislative committees sitting in a private spa, to deliberate on matters of public concern covered by the OML. Defendant was effectively acting constitutionally *ultra vires*.

As a threshold matter, therefore, Defendant may not assert the authority the Constitution confers only on a duly constitutive legislative action in order to assert its minority legislative preference is superior to a bona fide constitutional duty of the judicial branch to interpret the OML in this case. The Arizona Constitution does not embolden legislators to usurp the power of the Legislature as a whole.

Defendant's cases do not say anything to the contrary. Defendant makes much ado about the *eight cases* in which state courts have held challenges to open meetings laws nonjusticiable. *See* Appellee's Br. at 20. However, in each of those

cases the alleged rule violations occurred *while the lawmakers were in session* and therefore operating *as properly constituted committees and subcommittees* in their usual places of gathering: the halls of government. *See Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (Congress "may set rules for the conduct of business *within the walls of the legislative chambers* . . . free from interference by the judiciary") (quotation omitted). Defendant's cases are thus each distinguishable.[2] *See generally Hughes v. Speaker of the N.H. House of Representatives*, 876 A.2d 736 (N.H. 2005) (conference committee deliberated privately in Speaker of House's office with Senate President); *Ex parte Marsh*, 145 So. 3d 744 (Ala. 2013) (joint conference committee began a public meeting in the capitol later than expected with already amended bill); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987) (members of the House and Senate Finance committees allegedly met in secret during session); *Moffitt v. Willis*, 459

[2] As will be addressed in Section I.C, any of these cases challenge the internal procedural rules themselves—not extrinsic legal statutes—and are thus further distinguishable. *See, e.g., Hughes v. Speaker of the N.H. House of Reps*, 876 A.2d 736 (N.H. 2005) (challenge to internal house rule); *Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984) ("They do not complain of or challenge any specific act or law promulgated by the legislature. Rather, the complaint is that the house and senate violated their own rules of procedure."). Likewise, *Mayhew v. Wilder* is distinguishable because, unlike this case, the Tennessee Open Meetings Act did "not specifically mention the General Assembly." *Compare* 46 S.W.3d 760, 769 (Tenn. Ct. App. 2001) *with* Ariz. Rev. Stat. § 38-431(6) ("'Public body' means the legislature").

So. 2d 1018 (Fla. 1984) (House and Senate committees meeting secretly in session); *Coggin v. Davey*, 211 S.E.2d 708 (Ga. 1975) (committee meetings that took place during General Assembly); *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996) (Senate general rules and administration committee promulgating rules in session); *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001) (secret meetings between House and Senate committees). Defendant's emphasis on these eight cases encapsulates perfectly the lot of their argument: taken together, the end-product appears to be a well-woven garb; a pull at a single string, however, will unravel the whole.

B. Defendant Fundamentally Misunderstands Appellants' Argument

Defendant presses to defend a power Plaintiffs do not directly challenge. Plaintiffs do not dispute that the law of separation of powers confers discretion on a duly constituted legislative body acting under properly conferred powers to make internal rules, and generally shields from judicial review internal legislative disputes about how to apply those rules. Internal rulemaking authority, however, is not a license to displace all law or legal constraint, including the extrinsic statutory commands under the OML that expressly covers Defendant's conduct. This fundamental misunderstanding of Plaintiffs position and the constrained nature of the political question doctrine infects Defendant's position.

It is well held that, on the one hand, where a plaintiff levies a challenge to a precise *internal legislative rule itself*, courts are reticent to reach a merits decision. This is the principle that Defendant relies upon in *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. 2012) and the seminal principle established in *United States v. Ballin*, 144 U.S. 1 (1892). But even by *Ballin's* express terms, the Legislature may not "*by its rules* ignore constitutional restraints or violate fundamental rights." *Id.* at 5 (emphasis added).[3] This is not a case in which, for instance, a legislator sought judicial intervention over discipline rendered by a legislative rules committee. *See, e.g.*, *Rangel v. Boehner*, 20 F. Supp. 3d 148, 168 (D.D.C. 2013), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015).[4] Plaintiffs' case is fundamentally different.

Plaintiffs do not ask this Court to resolve an intra-legislative dispute regarding the distribution of legislative power in the Constitution; they seek to enforce an external legal constraint as codified in the OML. Courts recognize that internal legislative rules can not only coincide with external constraint, but that in many

[3] Even then, courts have found certain claims justiciable—such as those challenging internal rules of procedure where "rights of persons other than members of Congress are jeopardized by Congressional failure to follow its own procedures." *Metzenbaum*, 675 F.2d at 1287; *see also Yellin v. United States*, 374 U.S. 109, 123 (1963); *Christoffel v. United States*, 338 U.S. 84, 90 (1949); *United States v. Smith*, 286 U.S. 6, 33 (1932).

[4] Again, even in those cases, that presentation would not necessarily render an action nonjusticiable. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 521 (1969). To the extent this Court believes that the legal challenge necessitates a review of whether the issue is textually committed to the Legislature, Appellants believe *Powell* controls. *See* Opening Br. at 16-20.

cases the internal rule must give way to an otherwise lawful statutory constraint. Defendant asserts, with scant authority, that statutes occupy a "lesser legal plane" than constitutional directive, Appellee's Br. at 4. That routine observation regarding the relative weight of legal norms is of no moment to the essential question here: whether the judiciary can review the legislature's compliance with a democratically enacted statute. The only manner in which the Court cannot is if it suspects a conflict between the statute's reach and constitutionally-delegated authority, which would counsel a remand to consider that issue in the first instance. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012).

C. Extrinsic Sources of Law Such as the OML Can—and Do—Constrain Legislative Conduct

The federal political question jurisprudence establishes that substantive statutes may regulate legislative conduct concurrent with internal house rules of procedure. *See, e.g., United States v. Diggs*, 613 F.2d 988, 1001 (D.C. Cir. 1979) ("The defendant clearly was tried not for violating the internal rules of the House of Representatives but for violating . . . false statements statutes [18 U.S.C. § 1001]."). Arizona courts are in accord with this principle. *See Chavez v. Brewer*, 222 Ariz. 309, 316 (Ct. App. 2009) ("judiciary has the authority to construe the statutory scheme . . . and declare what the law requires"). Congressional rules of procedure are but one source of regulation over the vast array of actions that occur

within the Legislature. The Open Meetings Laws, codified within the Arizona Revised Statutes, are another. Ariz. Rev. Stat. §§ 38–431, *et seq*. The Arizona criminal statutes, memorialized in Title 13 of the Arizona Revised Statutes, are a third. Defendant's argument that the OML, as a civil statute, occupies "a lesser legal plane" than constitutional directives, Appellee's Brief at 4, thus misses the mark entirely. Defendant does not suggest that, for instance, the house disciplinary rules could displace the Arizona criminal statutes for criminal conduct that took place during a legislative session. Nor could they. The two sources of rules can and do exist side-by-side, neither one failing to displace the other. The same is true of substantive civil statutes such as the OML. The federal jurisprudence on the political question doctrine has spoken definitively on this issue and will aid this Court. *See Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, ¶ 36 (2019) ("Though federal justiciability jurisprudence is not binding on Arizona courts, the factors federal courts use to determine whether a case is justiciable are instructive.").

This principle was made clear in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), where the D.C. Circuit held that a legislator could still be held criminally liable for a violation of federal laws even though his actions were also subject to the Rulemaking Clause of the U.S. Constitution, Art. I § 5, cl. 2. In that case, Daniel Rostenkowski, a former U.S. Congressman, brought an action

challenging his prosecution for misappropriation of congressional funds on grounds that the indictment violated, *inter alia,* the Rulemaking Clause, and thus the doctrine of separation of powers. 59 F.3d at 1294. Because the federal Rulemaking Clause provides that "each House may determine the Rules of its proceedings," Rostenkowski argued—like the Legislature does here—that this demonstrated a "constitutional commitment" to give the House the "power to interpret House Rules." *Id.* at 1304. He further argued that the Rulemaking Clause committed "solely to the House the interpretation of its Rules and the decision whether to discipline a member for their violation." *Id*.

The D.C. Circuit rejected this argument, observing that Rostenkowski's argument rested "upon the mistaken premise that the Government [sought to impose] liability upon him for violating the House Rules themselves." *Id.* at 1305. The Circuit court made a critical distinction, observing that although his actions as a legislator were indeed subject to the Rulemaking Clause, this did not exempt him from "various federal laws of general application," including the criminal laws. *Id.* The Court went on to hold the majority of counts[5] in the indictment were

[5] In *Rostenkowski*, certain counts in the Government's indictment depended upon showing that Rostenkowski had purchased items for his "personal" use. The House Rules spoke directly on this issue, though unhelpfully so. The Court reasoned that "while the House Rules certainly contemplate a line between the 'official' and the 'personal,' they do little to indicate where that boundary lies." *Rostenkowski,* 59 F.3d at 1306. Thus, the Court required interpretation of a House Rule, and held that if said Rule was sufficiently ambiguous, it could be considered nonjusticiable. *Id*. Conversely, where said rule requires no interpretation—i.e., it is "sufficiently

justiciable—which actually required interpretation and consideration of the House Rules to establish certain elements of the charges.

The fundamental principle animating the *Rostenkowski* holding is not cabined to criminal laws. In *Brown v. Hansen*, 973 F.2d 1118 (3d Cir. 1992), the Third Circuit considered the legitimacy of certain bills passed by the Virgin Islands Legislature. There, the appellate court considered whether a challenge to the passage of said bills under the legislature's own internal rules, as well as the Revised Organic Act of 1954, 48 U.S.C. §§ 1541 et seq. (1988)—a civil statute governing how bills are to be voted upon—was justiciable under the political question doctrine. *Id*. The court observed that "[i]f defendants' conduct here did not violate any constitutional *or statutory provision*, the question whether the legislature violated its own internal rules is nonjusticiable." *Id.* at 1122 (emphasis added). The appellate court thus signaled that it could adjudicate a challenge to legislative conduct so long as the challenge identified *some other regulation*, such as a statute like the Revised Organic Act. It concluded that, "[a]bsent a clear command from *some external source of law*, we cannot interfere with the internal

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clear that [a court] can be confident in [its] interpretation" —it *can* be considered justiciable. *Id.* However, even if the Government cites to ambiguous House Rules in an indictment, the case will be justiciable if the underlying charge is grounded in a *substantive federal statute* and a conviction *does not rely on an interpretation of the ambiguous rule*. *See United States v. Durenberger*, 48 F.3d 1239, 1245 (D.C. Cir. 1995).

workings of the Virgin Islands Legislature without expressing lack of the respect due coordinate branches of government." *Id.* (quotation omitted); *see also Payne v. Legislature of Virgin Islands*, No. ST-14-CV-528, 2015 WL 4457291, at *1 (V.I. Super. Ct. July 16, 2015). It is this principle of extrinsic regulatory coexistence that defeats Defendant's arguments.

This principle holds true even where there is direct overlap between provisions within the constitutionally empowered house rules and the congressionally enacted statutory scheme. In *United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994), the Department of Justice brought a civil action to hold U.S. Representative Charles Rose liable for failure to report various financial transactions under Section 706 of the Ethics Act, 2 U.S.C. § 706. Rose argued that the case was nonjusticiable because not only was there a tantamount House procedural rule governing nondisclosure, but the *entire* Ethics Act had been incorporated into the House Rules. *Id.* at 190. Accordingly, Rose argued—as did Rostenkowski—that under the federal Rulemaking Clause only the House could punish him for such violations. *Id.* The D.C. Circuit held that, although it was true that the House Rules did not displace the Ethics Act, "by codifying these requirements in a statute, Congress has empowered the executive and judicial branches to enforce them; in bringing this action, then, the DOJ was fulfilling its constitutional responsibilities, not encroaching on Congress's." *Id.* The same was

true in *Rostenkowski*, where reference to the "the House Rules [was] necessary and proper evidence to make" a showing that Rostenkowski misused funds for "*unauthorized purposes*." 59 F.3d at 1305. Thus, even where courts must look to *and interpret* House Rules to establish civil or criminal liability, the political question doctrine does not bar them from adjudicating liability under the extrinsic statutory claim itself. Many analogous federal cases are in accord. *See Durenberger*, 48 F.3d at 1245 (government entity cannot act unlawfully without "subjecting themselves to statutory liabilities"); *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) ("The edict that a congressman may use the Official Expenses Allowance only for 'official' expenses is not merely a House regulation. It is a statutory limit that Congress has imposed upon itself through the enactment of the annual appropriations acts."); *United States v. Bowser*, 318 F. Supp. 3d 154, 172-73 (D.D.C. 2018).

Here, the House Rules of Procedure do not bear on the Court's ability to decide whether the Legislature violated a substantive statute. Even if this Court were to consider whether the internal Arizona House Rules bear on the OML, those rules are plainly consistent with the statutory scheme: multiple legislative rules require that meetings be open to the public, consistent with the OML. *See* House

Rules 9.C.1; 9.C.2; 27.C; Rule 35.[6] The Rules are clear and unambiguous. This Court, however, need not rely on any House Rules because of a clear statutory directive mandating that all legislative meetings be open to the public, save exceptions not present here. *See* Ariz. Rev. Stat. § 38-431; *see also Durenberger*, 48 F.3d at 1245; *United States v. Schock*, No. 16-CR-30061, 2017 WL 4780614, at *6 (C.D. Ill. Oct. 23, 2017).

D. The OML Provides a Judicially Manageable Standard

This Court can dispense with Defendant's argument that there is not a judicially manageable standard in this case because Defendant continues to misconstrue the precise issue in this case. Whether the Legislature's conduct violated the express terms of the OML is plainly justiciable; whether this Court can adjudicate a dispute between legislators over the proper application of internal procedural rules is not. The judiciary has always maintained the ability to interpret a statute to determine whether a party has violated its express terms, a traditional and central function of the courts. *See United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990). The statute and legislative materials evince a clear intent to regulate the activities of the legislature. *See, e.g.*, Ariz. Rev. Stat. § 38-431.01(A)

[6] *Rules of the Ariz. House of Representatives*, 54th Legislature, 2019-2020, at 10, *available at* https://www.azhouse.gov/alispdfs/54th Legislature Rules as amended.pdf.

("*All meetings of any public body* shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings") (emphasis added); Ariz. Rev. Stat. § 38-431.09(A) ("public policy of this state that meetings of public bodies be conducted openly"); Ariz. Rev. Stat. § 38-431(6) ("'Public body' means the legislature"). To the extent there is overlap between the statute and constitutional power, or ambiguity within either, as in *Rostenkowski*, 59 F.3d at 1306, and *Rose*, 28 F.3d at 181, the judiciary is still well-positioned to render a merits decision. *See* Section I.A, *supra*.

Defendant misplaces reliance on *Mecham v. Gordon*, 156 Ariz. 297 (1988) ("*Mecham I*") to establish that challenges to the Legislature's rulemaking authority provides no judicially manageable standard. In *Mecham I*, the Arizona Supreme Court assessed the impeachment power, relying upon the federal analog as a guidepost. There, as Appellants urged in the Opening Brief at pages 30-36, the Court identified that the use of the word "sole" described an authority reposed in the legislative branch and nowhere else. *Id.* (citing *Nixon v. United States*, 506 U.S. 224, 229 (1993) and U.S. Const. art. 1, § 3, cl. 6). This intentional—and exceptional—modifier signals an exclusivity not found in either the Arizona or federal constitutional rulemaking provisions and fails to aid Defendant's argument. *See* Opening Br. at 30-36.

Arizona Independent Redistricting Comm'n v. Brewer ("*IRC*") illustrates this point clearly as well. 229 Ariz. 347 (2012). In *IRC*, then-Governor Jan Brewer removed one of five Chairpersons from the Redistricting Commission under her constitutionally delegated authority in Article 4, Part 2, Section 1(10) of the Arizona Constitution. *See id.* at 352. There, as here, the defendants asserted that this explicit grant of authority was total and exclusive so as to render the case nonjusticiable under the political question doctrine. *See id.* The Arizona Supreme Court rejected this argument for three reasons, all of which support Appellants' claims. First, citing to *Nixon*, it held that the absence of a definitive modifier such as "sole" indicated that the textual grant of authority rendered it neither "exclusionary [n]or mandatory." *Id.* Second, the Arizona Supreme Court observed that the impeachment power included "four important procedural checks to ensure a Senate trial's just outcome," which were not present in Section 1(10), and are not present to check the rulemaking authority. *Id.* Third, the Court found particularly persuasive the Framers' explicit decision to exclude the judiciary from the impeachment process, citing to its extensive discussion in THE FEDERALIST NO. 65 (Alexander Hamilton). *Id.* The same is true here, which Appellants described at length in the Opening Brief.[7]

[7] *See* Opening Br. at 17 n.7. The history underlying the legislative rulemaking power further distinguishes it from impeachment. Again, though the founders intentionally drafted the

Defendant's justiciability arguments all miss the mark. Courts have always retained the power to interpret statutes—even if they believe they infringe upon the Constitution, *Zivotofsky*, 566 U.S. at 196—and there would be nothing "unmanageable" about it. Even to the extent that this Court finds that, as a matter of law, the statute exempts the Legislature from notice and agenda requirements, the case may still proceed on grounds that the Legislature violated three key OML provisions. *See infra* Section II. After discovery and briefing, the trial court would have a readily available standard to adjudicate whether such violations occurred and, if so, whether remedies such as declaratory relief (declaring meeting unlawful), injunctive relief (voiding actions taken at unlawful meeting), and any other relief would be just and appropriate. *See* Ariz. Rev. Stat. § 38-431.07 (A).

Rulemaking Clause to afford the Legislature some autonomy over its internal affairs, it was not to exclude *judicial* review, but was instead "an attempt to exclude *the executive* from the legislature's deliberative process." Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine,* 78 CAL. L. REV. 1341, 1361 (emphasis added). The founders were primarily concerned with the "aggrandizement of the Legislative at the expense of other departments." THE FEDERALIST NO. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (Max Farrand ed., 1911) ("Experience had proved a tendency in our governments to throw all power into the Legislative vortex."). Needing to separate the executive and legislative was a key to separation of powers concerns to promote a free government, a noted feature of "well-ordered common-wealths," ensuring that those who make the laws also remain subject to them. *See* Samuel W. Cooper, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 363 (1994) (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 134-158 (C.B. Macpherson ed., 1980) (1690)). That concern remains present today.

E. *Zivotofsky* Mandates Judicial Review of an Assertion That the OML Unconstitutionally Infringes on Legislative Power

Appellants described at length how courts are to interpret an alleged conflict between a constitutionally delegated prerogative and a congressionally enacted statute by pointing to the U.S. Supreme Court's definitive opinion in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012). *See* Opening Br. at 36-39. The Supreme Court issued a clear doctrinal mandate: (a) if the statute infringes on a constitutionally delegated prerogative, "the law [itself] must be invalidated," or, (b) if "the statute does not trench on the [constitutionally delegated power]," the court must render a decision on the merits of the statutory claim. *Id.* at 196. The Supreme Court has consistently adhered to this framework. *See United States v. Munoz–Flores*, 495 U.S. 385, 394 (1990); *Morrison v. Olson*, 487 U.S. 654, 685 (1988); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *INS v. Chadha*, 462 U.S. 919, 941 (1983); *Myers v. United States*, 272 U.S. 52, 176 (1926). Many lower federal courts have also adhered to this directive. *See, e.g.*, *Jaber v. United States*, 861 F.3d 241, 248–49 (D.C. Cir. 2017) ("The Court was not called upon to impose its own foreign policy judgment on the political branches, only to say whether the congressional statute encroached on the Executive's constitutional authority. This is the wheelhouse of the Judiciary, and accordingly, it does not constitute a nonjusticiable

political question"); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 92 (D.D.C. 2016) ("When deciding the claim merely requires the court to engage in garden-variety statutory analysis and constitutional reasoning, it has authority to do so (i.e., the claim is justiciable)"); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993) (statute in question to be an unconstitutional infringement on the President's powers of diplomatic negotiation); *New York v. Mnuchin*, 408 F. Supp. 3d 399, 414 (S.D.N.Y. 2019).

In *El-Shifa*, the D.C. Circuit weighed whether to apply the political question doctrine to a challenge to President Clinton's bombing of a Sudanese pharmaceutical plant. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (*en banc*). Justice Kavanaugh, concurring in the judgment, wrote separately to address the political question doctrine, specifically invoking this framework. He began by observing that "[t]he Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never." *El-Shifa*, 607 F.3d at 856 (Kavanaugh, J., concurring) (emphasis in original). Judge Kavanaugh noted that "[t]here is good reason the political question doctrine does not apply in cases alleging statutory violations," concluding that an application of the political question doctrine would not actually "reflect benign deference to the political branches," as is often reasoned under the doctrine, but rather would "systematically favor one branch over the other." *Id*. at 857. The correct

framework, to him, was not the "backdoor use of the political question doctrine," but rather to address whether the "statute intrudes on the Executive's exclusive, preclusive Article II authority." *Id.* If it did, he reasoned, the court's job was to strike down the statute.

Although *El-Shifa* examined whether the particular statute infringed upon *executive* power, the same principles apply in this case. Here, to the extent this Court considers upholding the ruling on nonjusticiability, it must assess first whether the Legislature possesses "exclusive, preclusive" authority, by "confront[ing the issue] directly through careful analysis of [Arizona's] Article [IV]" *id*. at 857, and likely also by looking to its federal Constitutional Rulemaking analog, Art. I § 5, cl. 2. Only then can this Court make an informed decision as to whether the OML intrudes on that constitutional grant of authority, lest it "*sub silentio* expand [Legislative] power in an indirect, haphazard, and unprincipled manner." *Id*. The political question doctrine simply does not apply in this case.

II. The OML Does Not Contain a Provision That Engenders Its Own Obsolescence

Defendant contends that the OML contains a fatal exemption, a poison pill that certain members of the Legislature could swallow if they ever found themselves unwilling to abide by their own promulgated regulations. But the Legislature did not pass the OML without teeth; it passed the OML with the very

real intention of making sure that legislative meetings remain public. *See* Ariz. Rev. Stat. § 38-431.09(A). This Court must not interpret the OML out of existence.

In relevant part, § 38-431.08(D) provides that "[e]ither house of the legislature may adopt a rule or procedure pursuant to article IV, part 2, section 8, Constitution of Arizona, to provide an exemption *to the notice and agenda requirements* of this article . . ."[8] Ariz. Rev. Stat. § 38-431.08(D) (emphasis added). To this end, the Arizona House of Representatives enacted Rule 33(H), which directs that "*the meeting notice and agenda requirements* for the House, Committee of the Whole and all standing, select and joint committees and subcommittees shall be governed exclusively by these rules" (emphasis added). However, the OML is not so delimited. Aside from notice and agenda requirements, there are requirements governing, *inter alia*, meeting minutes and recordings, Ariz. Rev. Stat. § 38-431.01(B-D); publication, § 38-431.01(G); and, most importantly, as Plaintiffs averred in their Complaint, Exhibit 4,[9] ¶ 58, the fact that the meeting *actually be public* in the first place, § 38-431.01(A). The exemption cannot swallow the rule whole.

[8] As an initial matter, this exemption only applies to Section 8 of the Arizona Constitution, not Section 9. Therefore, with respect to its statutory interpretation argument, any reliance by the Legislature on Section 9 is misplaced.

[9] Exhibits 1-3 are attached to Plaintiffs'/Appellants' Opening Brief.

The plain language of the statute thus cabins the notice and agenda exemption *only to the notice and agenda provisions*. *State v. Christian*, 205 Ariz. 64, 66 (2003) ("the best and most reliable index of a statute's meaning is the plain text."). This Court must examine the OML "in context" to determine its meaning in a way that "effectuate[s] the legislature's intent." *Stambaugh v. Killian*, 242 Ariz. 508, 510 (2017). The OML's intent could not be more clear. Ariz. Rev. Stat. § 38-431.09(A) ("It is the public policy of this state that meetings of public bodies be conducted openly"); *see Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97 (1979) (stating policy to "open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret."); Ariz. Att'y Gen., Agency Handbook, 7.2.2, at 2 (Rev. 2018)[10] ("any uncertainty under the Open Meeting Law should be resolved in favor of openness in government).[11] Further in support is the fact that "exceptions to the open meeting law should be narrowly construed in favor

[10] Document *available at* https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_7.pdf.

[11] The caselaw has been unanimous on this point for decades. *See, e.g., Welch v. Cochise Cnty. Bd. of Supervisors*, 477 P.3d 110, 116 (Ct. App. 2020), *review granted* (Apr. 13, 2021); *Encanterra Residents Against Annexation v. Town of Queen Creek*, No. 2 CA-CV 2020-0002, 2020 WL 1157024, at *9 (Ariz. Ct. App. Mar. 9, 2020); *Tanque Verde Unified Sch. Dist. No. 13 of Pima Cnty. v. Bernini*, 76 P.3d 874, 879 (Ct. App. 2003); *Fisher v. Maricopa Cnty. Stadium Dist.*, 912 P.2d 1345, 1352 (Ct. App. 1995); *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 20 P.3d 1148, 1150 (Ct. App. 2000); *Prescott Newspapers, Inc. v. Yavapai Cmty. Hosp. Ass'n*, 785 P.2d 1221, 1230 (Ct. App. 1989) (Kleinschmidt, J., dissenting; *Cooner v. Bd. of Educ.*, 663 P.2d 1002, 1007 (Ct. App. 1982); *State v. Murphy*, 641 P.2d 268, 270 (Ct. App. 1982); *Carefree Imp. Ass'n v. City of Scottsdale*, 649 P.2d 985, 986 (Ct. App. 1982).

of requiring public meetings." *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 569 (Ct. App. 2000), *as amended* (Mar. 22, 2001). This limited exemption may not swallow the rule whole. Here, at the very least, this Court must construe the notice and agenda exemption narrowly to preserve the operative remainder of the statute. *See* Ariz. Rev. Stat. § 38-431.09(A) (OML charging Court, as an "entity charged with the interpretations of this article," to "construe this article in favor of open and public meetings."). However, as established in section I.C, *supra*, this Court can consider violations of a substantive statute such as the OML concurrent to the Legislature's respective procedural rules, even if the two sets of regulations overlap or are incorporated verbatim. *See, e.g.*, *United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994).

III. The Legislature's Own Rules Call on Political Caucuses to Follow the OML

This Court should likewise reject Defendant's political caucus argument. Because all 26 lawmakers are members of the Republican Party,[12] the Legislature reasons, their presence at the 2019 summit amounts to a protected internal caucus conversation. Appellee's Br. at 34–35 (citing Ariz. Rev. Stat. § 38-431.08(A)(1)).

[12] 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.

First, we now know that Arizona's 26 legislators were amongst 198 total registered legislators from 35 states across the country, hardly an internal Arizona caucus conversation.[13] Second, the 198 registered legislators were dwarfed by the 554 registered non-legislators, a large swath of whom were corporate lobbyists—again, far from Defendants' portrayal.[14]

Further, the scope of the caucus exemption is far from categorical under Arizona state law, particularly when read alongside the OML's presumption "in favor of open and public meetings." § 38-431.09(A). Finally, the Legislature, once again in their own rules, has limited what political caucuses may do outside the public eye *by binding their behavior to specific requirements in the OML*.

The OML does not define the term "political caucus." To aid its interpretation, the Legislature cites a 1983 opinion from the Office of the Attorney General of Arizona to argue that a caucus encompasses "a meeting of members of a legislative body who belong to the same political party." Appellee's Br. at 34 (quoting Ariz. Op. Atty Gen. No. I83-128 (R83-031) Nov. 17, 1983). The rest of that opinion, however, significantly undercuts Defendant's argument. Indeed, in

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[13] Nick Surgey, *Revealed: ALEC Meeting Registration list, State Legislators in the minority, many states unrepresented*, DOCUMENTED (Updated December 9, 2019), https://documented.net/2019/12/revealed-alec-dec2019-meeting-registration-list/.

[14] *Id.*

that same opinion, the Arizona Attorney General concluded that a public body cannot "affix the 'political caucus' label to its gatherings to avoid complying with the state's Open Meetings Law," because "no legitimate public interest" would be served. *Id.*

The Attorney General located this "legitimate public interest" ethos in the OML's declaration of public policy provision. Ariz. Rev. Stat. § 38-431.09(A). Because the OML commands such a broad reading in favor of open meetings, the Attorney General reasoned, the "exceptions and limitations [for political caucuses] should be construed narrowly." Ariz. Op. Atty Gen. No. I83-128 (R83-031), Nov. 17, 1983. This interpretation of the OML exemption did not foreclose all caucus behavior—however, the Attorney General suggested that permissible caucus activity under the OML was limited to discussions about "party policy with respect to a particular legislative issue." *Id.* Still, the Attorney General warned, party policy discussions could not be used to "reach a 'collective decision, commitment, or promise by members of the caucus'"—i.e. legal action under the OML's definition—"when that membership constitutes a quorum of the public body." *Id.* Put more succinctly: "A public body *may not use the political caucus as a means of taking legal action in secret*." *Id.* (Emphasis added). The Legislature's proposed interpretation would deliver a judicial imprimatur of approval over closed-door lobbying sessions, legitimizing the very conduct that the OML was designed to

prohibit, and would distort the express terms of the statute itself. *See State v. Estrada,* 201 Ariz. 247, 251 (2001) (Arizona courts will not interpret a statute in a way that yields "absurd" results).

IV. The Legislature is a Jural Entity and May Not Cloak Its Unlawful Activities Behind the Veil of Legislative Immunity

The Arizona State Legislature is a jural entity. It has the capacity to sue and be sued, and was a plaintiff in the case *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 576 U.S. 787 (2015), in which it described itself as "the elected-representative portion of the legislative authority of the State of Arizona." Appellant's Jurisdictional Statement, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314, 2014 WL 1712077 (Apr. 28, 2014). Courts around the country are in accord with this principle and the undersigned counsel have not identified a case to the contrary. *See, e.g., Selene v. Legislature of Idaho*, No. 1:21-CV-00021-DCN, 2021 WL 230040 (D. Idaho Jan. 22, 2021) (allowing suit against Idaho Legislature to proceed).

As an initial matter, legislative immunity is intended to shield individual officials from personal liability for their legislative acts. *State ex rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127, 476 P.3d 307, 314 (2020). "It has nothing to do with shielding governmental entities from challenges to claimed illegal actions." *Id.* (citing *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130,

136–38, 75 P.3d 1088, 1094-96 (Ct. App. 2003)). The doctrine is intended to "shield[] *individual legislators* from litigation challenging the substance of a decision, not the process by which it was made." *Hays Cnty. v. Hays Cnty. Water Plan P'ship*, 69 S.W.3d 253 (Tex. App. 2002). This alone defeats Defendant's claims.

Further, individual legislators are only constitutionally immune from civil liability arising out of any act "within their 'legitimate legislative sphere.'" Appellee's Br. at 30. Legislative immunity does not extend to cloak "all things in any way related to the legislative process."[15] *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. at 137, 75 P.3d at 1095 (quotation omitted). For example, legislative activity does not include actions that are political in nature, *United States v. Brewster*, 408 U.S. 501, 512 (1972), such as meeting with constituents and speechmaking outside the legislative arena. *Id.* The gravamen of Appellants' action alleges that nothing about the activity that took place on December 4, 2019 at the States & Nation Policy Summit at the Westin Kierland Resort & Spa in

[15] The Legislature's ultra vires activity bears directly on this test. Generally, the test may be at least "partly defined by the real or metaphorical walls of Congress," where discussions within the halls of Congress are protected but not those without. WRIGHT & MILLER, 26A FED. PRAC. & PROC. EVID. § 5675 (1st ed.); *Sanchez v. Coxon*, 175 Ariz. 93, 97, 854 P.2d 126, 130 (1993) ("It is the occasion of the speech, not the content, that provides the privilege"); *Metzenbaum v. Fed. Energy Regulatory Comm'n,* 675 F.2d 1282, 1287 (D.C. Cir. 1982) (Congress "may set rules for the conduct of business within the walls of the legislative chambers . . . free from interference by the judiciary") (quotation omitted).

Scottsdale could be considered "legitimate." The conduct alleged in the Complaint was, in essence, closed-door lobbying sessions with ALEC lobbyists in an attempt to circumvent the OML. It was thus neither (a) legitimate nor (b) purely legislative in nature. Immunity does not apply to closed-door political lobbying, which is, by definition, not "legislative." *See Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122 (9th Cir. 2012) ("When officials act outside their legitimate sphere of legislative authority, legislative immunity does not apply"); *accord Berlickij v. Town of Castleton*, 248 F. Supp. 2d 335, 343 (D. Vt. 2003).

Lastly, it is doubtful whether the Legislature can invoke the doctrine as a shield against the OML at all. *Hays Cnty. v. Hays Cnty. Water Plan P'ship*, 69 S.W.3d 253 (Tex. App. 2002). *Hayes County* is instructive on this issue. There, a group of Texans brought suit against the City Water Planning commission for a violation of the state Open Meetings Act. *See id.* There, as here, the Commission argued that it was immune from liability under the Act due to its legislative duties. *Id*. at 260. The appellate court began by observing that the entire doctrine was discordant with the aims of the Act, highlighting that "[t]he executive and *legislative decisions* of our governmental officials as well as the underlying reasoning must be discussed openly before the public rather than secretly behind closed doors," noting that the goal of the Act is to "provide openness at every stage of a governmental body's deliberations." *Id*. (internal quotation omitted). The court

concluded that "to hold that Hays County is protected by legislative immunity would potentially shield all governmental bodies from claims under the Open Meetings Act in direct opposition to the legislature's intent of fostering open government." *Id*. It would "effectively undermine the Act" entirely. *Id.* So too here.

CONCLUSION

The Legislature and its component members are not above the law. Although their internal rulemaking authority provides a necessary buffer from unwarranted judicial interference into intra-legislative pettifoggery, that is plainly not before this Court. The trial court erred in applying the political question doctrine, and this Court should reverse that decision. To the extent this Court believes that the OML encroaches into space constitutionally reserved for the Legislature, the United States Supreme Court has established that the proper mechanism would be to remand to the trial court in the first instance to consider its constitutionality.

DATED this 27th day of July 2021.

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