IN THE SUPREME COURT
STATE OF ARIZONA

PUENTE, an Arizona nonprofit corporation; MIJENTE SUPPORT COMMITEE, 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/Appellants, v. ARIZONA STATE LEGISLATURE, Defendant/Appellee.	Supreme Court Case No. CV-22-0069-PR Court of Appeals Division One No. 1 CA-CV 20-0710 Maricopa County Superior Court No. CV2019-014945

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF FACTS

On December 4, 2019, Plaintiffs-Appellees ("Plaintiffs") filed a Complaint asserting that members of the Arizona Legislature ("Defendant") violated Arizona's Open Meeting Law ("OML"), Ariz. Rev. Stat. §§ 38-431-431.09, when 26 Legislators constituting a quorum of five legislative committees planned to attend a Summit hosted by the American Legislative Exchange Council in which they would draft model bills. Ex. 1, Compl. p. 2, ¶ 4; p. 10, ¶ 38. The Defendant moved to dismiss these claims on grounds that a violation of the OML would task the judiciary into governing internal legislative house procedure and thus presented a nonjusticiable political question. Ex. 4, Def.'s Motion to Dismiss ("MTD") p. 4-5.

The trial court found the issue nonjusticiable and granted the Defendant's Motion to Dismiss on November 5, 2020. Ex. 5, Trial Court Decision ("TCD") p. 6. Plaintiffs timely appealed to the Arizona Court of Appeals, arguing principally that that there was no actual conflict between the obligations arising from the OML and the authority conferred by the Arizona Constitution upon the Legislature to conduct internal rulemaking, and because the claims present only a question of statutory interpretation which does not implicate intra-branch legislative disputes, judicial review is available. Ex. 3, Pls.' Opening Br. On February 15, 2022, the Court of Appeals ruled in Plaintiffs' favor holding, *inter alia*, that the case was justiciable and the OML did not conflict with any rule. *See* Court of Appeals Opinion ("Op.") p. 5, ¶ 13.

Plaintiffs respectfully request the Arizona Supreme Court affirm the Court of

Appeals ruling, vacating the Superior Court's judgment and remanding for proceedings consistent with its findings.

ARGUMENT

This appeal asks whether the judiciary can interpret the OML and ascertain whether Defendants' conduct violated its terms. As the U.S. Supreme Court observed, this is a "routine judicial function" and does not implicate the political question doctrine. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); Ex. 3, Pls.' Opening Br., p. 36-42. What Defendant essentially argues—and what should be decided upon remand following a conclusion by this Court that this case is justiciable—is that this duly enacted statute is unconstitutional as applied to the Defendants' purportedly plenary rulemaking authority. Courts, however, consistently find that statutes and rules can coexist in harmony and that—short of an irreconcilable conflict or engulfing the entire constitutional authority—no constitutional issue will arise. This brief will address, in order, why the trial court erred in holding that the political question doctrine barred judicial review in this case; why Defendant misinterprets and arrogates an issue not present; what this case *actually* presents and why this Court, like the Court of Appeals, can find that the statute and internal rule power can coexist; and why the extensive federal jurisprudence on these issues is in accord.

I. This Case Does Not Present a Nonjusticiable Political Question

Questions of law are reviewed *de novo*. ARIZ. R. SUP. CT. 59(j). Arizona has enshrined the separation of powers into its Constitution. ARIZ. CONST. art. III. The

political question doctrine, rare and disfavored,[1] flows from the basic principle of separation of powers. Political questions are "decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶ 11, 165 P.3d 168, 170 (2007) (en banc) (quotation omitted).

Though this case does not challenge any internal rule—or the rulemaking power itself—it bears repeating that the U.S. Supreme Court has never applied the political question doctrine to evade judicial review of a Congressional rulemaking issue; it has—without fail—held the opposite. *See Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable."). The trial court relied on the first two factors to dismiss Plaintiffs' complaint: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it." Ex. 5, TCD p. 5-7.

Not all constitutional delegations of authority are created equal. A textual

[1] The political question doctrine represents a "narrow exception" to the judiciary's constitutional duty to decide cases and controversies. In the fifty years since *Baker v. Carr*, 369 U.S. 186 (1962) the Supreme Court has ordered a case dismissed on political question grounds only twice. *See* Thomas M. Franck, Political Questions/Judicial Answers 61 (1992) ("Particularly in the Supreme Court, the political-question doctrine is now quite rarely used and may be falling into desuetude."). Further, as applicable here, "[t]he Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. Never." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring).

commitment that creates a nonjusticiable political question must be *total* and *unambiguous*, so as not to displace the judiciary in a system of checks and balances. *See Baker v. Carr*, 369 U.S. 186, 217-20 (1962). "There are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment." *Nixon v. United States*, 506 U.S. 224, 240 (1993) (Stevens, J., concurring). Arizona recognizes that whereas some enumerations of authority are near-total and absolute, such as the impeachment power under Ariz. Const. art. 8, pt. 2, § 1,[2] *see Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988), others are not, such as the Commission on Judicial Conduct's authority under Ariz. Const. art. 6.1, pt. 2, § 1 to initiate disciplinary proceedings, *see Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). Courts have not elevated internal house rules to this level of total, and unreviewable power, and have entertained challenges to the rulemaking authority.[3] *See Vander Jagt v. O'Neill*,

[2] Courts have reached consensus on the impeachment power, owing to the distinctive structure made explicit in the constitutional text and its historical underpinnings. Perhaps the clearest example is the federal impeachment power discussed in *Nixon*. Dispositive for the Court was the "language and structure" of U.S. CONST. art. I, § 3, cl. 6, specifically that "[t]he first sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else." 506 U.S. at 229; *see id.* at 230-31("the word 'sole" appears only one other time in the Constitution . . . [also for] Impeachment [in] Art. I, § 2, cl. 5."). Such a modifier can signal an intent to delegate absolute power to a coordinate political branch. *Id.*

[3] There is federal caselaw to suggest that a challenge to an internal house rule *itself* does not necessarily reach render the issue nonjusticiable. *See Yellin*, 374 U.S. at 114 ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable"); *Christoffel v. United States*, 338 U.S. 84, 86 (1948) (challenging House interpretation of quorum rule); *United States v. Smith*, 286 U.S. 6, 33 (1932) (challenging Senate interpretation of rule governing reconsideration of Senate vote). There is caselaw to suggest that courts routinely find challenges to constitutionally enumerated rules

699 F.2d 1166, 1173 (D.C. Cir. 1982) ("it is not evident why [courts] must treat congressional rules with 'special care,' . . . it simply means neither [courts] nor the Executive [ ] may tell Congress what rules [to] adopt.").[4]

The second factor in the political question analysis is whether there exists a "lack of judicially discoverable and manageable standards" that would prevent a court from reaching the merits of a particular case. *Baker*, 369 U.S. at 223. The U.S. Supreme Court has rarely used this test as a standalone basis for a non-justiciability ruling. *See State v. Maestas,* 244 Ariz. 9, 16, 417 P.3d 774, 781 (2018) (Bolick, J., concurring). At least one Arizona court has held that where a challenge to a statute is raised, "the judiciary has the authority to construe the statutory scheme . . . and declare what the law requires," even if it is alleged that the issue is committed to another branch of government. *Chavez v. Brewer*, 222 Ariz. 309, 316, 214 P.3d 397, 404 (Ct. App. 2009). The federal

justiciable where, as here, individual, private plaintiffs bring suit. *Smith*, 286 U.S. at 33 (where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one"); *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985) ("private plaintiffs may bring suit in a context less laden with separation-of-powers concerns.").

[4] Even assuming without conceding that the issue is textually committed, judicial review is still warranted. *See Vander Jagt*, 699 F.2d at 1173 ("judging from the cases . . . the 'textually demonstrable commitment' of an issue to the political branches apparently does not necessarily mean exclusive and final commitment to the political branches without judicial review.") (quoting Louis Henkin, *Is There A "Political Question" Doctrine?* 85 Yale L.J. 597, 605 n. 27 (1976); *Zivotofsky*, 566 U.S. at 196 (holding that though the issue might be "textually committed," it was still the judiciary's responsibility to determine the "constitutionality of [the] statute.").

jurisprudence[5] similarly recognizes that judicially manageable standards exist where a statute is challenged. *Schiaffo v. Helstoski*, 492 F.2d 413, 419 (3d Cir. 1974) ("Standards of statutory construction surely are judicially manageable").

II. Defendant Distorts the Separation of Powers and Ignores Parallel Regulatory Schemes

A. The Arizona Constitution Does Not Afford Defendant with Plenary Rulemaking Authority

Defendant's overwrought claim that subjecting alleged violations of a civil statute to judicial review would be tantamount to "conscript[ing]" the judiciary "into chaperoning individual legislators" is fanciful. Petition for Review p.1. Plaintiffs do not ask this Court to resolve an *intra*-legislative dispute regarding the distribution of constitutional power within the Legislature, which might present a political question; they seek to enforce an external legal constraint that is codified in a statute. This case thus sits outside the small circle of reasons judicial review of legislative rulemaking is prohibited. *See Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (not a "dispute over the content or effect of a House or Senate rule").

Taking its arguments together, Defendant essentially asserts that it usurped its own constitutional authority to pass internal rules of procedure when it codified the

[5] The federal courts have consistently recognized a class of controversies which clearly *do not* lend themselves to judicial standards. such as those concerning war or foreign affairs, *Baker*, 369 U.S. at 280-86, to formulate national policies, *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986), or matters governing the military, *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 844.

OML.[6] Ex. 6, Def.'s Answering Br. p. 1 ("both the OML and the Arizona Constitution commit to the legislative branch plenary control over the conduct of its own proceedings."). Thus, Defendant imagines that judicial application of the parallel requirements of the OML would somehow "enlist the Court in evaluating the internal legislative functions of 'determin[ing] . . . rules of procedure.'" Ex. 6, Def.'s Answering Br. p. 17. But this case does not ask the judiciary to "develop rules of behavior for the Legislative Branch," *United States v. Durenberger*, 48 F.3d 1239, 1245 (D.C. Cir. 1995), nor does it ask the Court to "interject itself into practically every facet of [a coordinate branch,]" as is required to trigger the separation of powers. *See id.* As the Court of Appeals correctly recognized, Op. p. 5, ¶ 13, this appeal

> does not require the Court to assess whether the Legislature acted reasonably in exercising its constitutional prerogative to enact those rules [, because] Plaintiffs do not allege that the Legislature failed to adopt a necessary procedural rule, seek to impose any such rules on the Legislature, or not allege that the legislators violated any rule either house adopted for itself. Instead, Appellants seek only to have the legislators comply with the Open Meeting Law, which the Legislature enacted and to which it expressly subjected itself. A.R.S. § 38-431.01(A).

[6] The Defendant appears to have argued that a violation of the OML was a nonjusticiable political question because procedural powers were granted to Defendant and therefore the separation of powers doctrine dictated that other branches of government could not intervene. Ex. 4, MTD p. 2. In reality, this was a smokescreen for Defendant's fundamental argument that the OML statute's provisions are at odds with Sections 8 and 9 of the Arizona Constitution. *Id.* ("Because the . . . 'OML' necessarily is subordinate to this constitutional prerogative, allegations concerning the Legislature's compliance with the OML are nonjusticiable political questions."). Because this as-applied challenge to the statute was not properly at the forefront of Defendant 's arguments, the trial court did not have full opportunity to render a correct decision under the proper legal framework.

Plaintiffs do not dispute that the Arizona Constitution directs that "[e]ach house" of Defendant "shall . . . determine its own rules of procedure." ARIZ. CONST. art. IV, pt. 2, § 8. But this grant of authority to develop intra-branch rules cannot displace the judiciary's authority to determine whether legislative conduct violates external constraints. Plaintiffs only ask that Defendant follow the plain provisions of the law to which it expressly subjected itself, a core judicial function. To the extent Defendant wishes to argue that application of the OML to its conduct violates the Arizona Constitution[7]—a claim foreclosed by the cases described below—the proper recourse would be to remand to the trial court. *See Zivotofsky*, 566 U.S. at 196.

B. Because Courts Have a Duty to Avoid Constitutional Conflicts, Courts Routinely Read Statutes and Procedural Rules in Harmony

This Court has on many occasions weighed whether a procedural rule conflicts with a legislative command. The analysis must begin with the "strong presumption supporting the constitutionality of any legislative enactment." *State v. Tocco*, 156 Ariz. 116, 119, 750 P.2d 874, 877 (1988) (in banc). Specific to purported conflicts between statutes and rules passed through constitutionally enumerated powers, this Court must interpret the relevant statute in order to avoid reaching a constitutional question. *Stillman v. Marston*, 107 Ariz. 208, 209, 484 P.2d 628, 629 (1971) (in banc) ("whenever

[7] *See Morrison v. Olson*, 487 U.S. 654, 685 (1988) (upholding a statute's constitutionality against a charge that it "impermissibly interfere[d] with the President's exercise of his constitutionally appointed functions"); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (finding a statute unconstitutional because it "intruded into the executive function").

possible our statutes are to be construed so as to be in harmony with our Constitution"). Specifically, this Court is to "recognize reasonable and workable statutory enactments that supplement rather than conflict with rules." *Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶ 8, 203 P.3d 483, 487 (2009) (quotation omitted). "Under the traditional separation of powers doctrine," a statute will be struck down only "if it conflicts with or tends to engulf. . . constitutionally vested rulemaking authority." *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, 982 P.2d 815, 817 (1999) (en banc) (quotation omitted).

Defendant maintains that its rulemaking power is wholesale, plenary, and categorically preemptive of *any* legislative or judicial constraint. But parallel or supplementary regulatory schemes are common in American jurisprudence—certainly so in Arizona. *See Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994) ("such permissive [constitutional] language seems to allow for parallel processes"). The prerogative to make discretionary, lawful rules governing intra-branch conduct does not displace the judicial duty to consider independent statutory violations.

The Arizona Constitution does not prescribe parliamentary procedures, create a committee system, set internal rules about attendance, conduct, quorum requirements, or delineate any other responsibilities necessary to operate an efficient lawmaking body. Instead, Article IV, Part 2, Section 8 and 9 of the Arizona Constitution affords the Arizona House and Senate the respective ability to establish these procedures on their own. What this limited grant of authority does not authorize is the unilateral power for a single legislative chamber to supersede the plenary legislative power and automatically

overrule the "single, finely wrought and exhaustively considered," *INS v. Chadha*, 462 U.S. 919, 951 (1983) path of bicameralism and presentment.

The constitutional enumeration that grants the Legislature the power to set internal operating rules exists next to the constitutionally enumerated "legislative power of the State." *Giss v. Jordan*, 82 Ariz. 152, 159, 309 P.2d 779, 784 (1957); *see* ARIZ. CONST. art. IV, pt. 1, § 1. At its essence, this crux of this case presents a straightforward question: what happens when there appears to be *general* subject matter overlap—rather than direct conflict—on issues broadly regulated by both a statute and a rule that was established through a constitutionally enumerated authority? *See Seisinger*, 220 Ariz. at 92, ¶ 26, 203 P.3d at 490 (The "determination of whether a rule and a statute conflict [] is mandated by fundamental concepts of separation of powers."). The existence of one needn't countermand the other; the separation of powers is not violated simply because the law and the rule purport to address similar issues. *See Jett,* 180 Ariz. at 119 ("we find that the City's charter—which merely authorizes a parallel process for removal of its magistrates from office—is not inconsistent with the Arizona Constitution.").

In its briefing to the Court of Appeals, the Legislature made this categorical contention: "a statute cannot circumscribe, or furnish a basis for judicial oversight of, a constitutional function of the Legislature." Ex. 6, Def.'s Answering Br. p. 19. The pronouncement is overbroad and indeed, unlimited. It is more precise to say that a statute cannot contravene, subvert, or abrogate a power that Constitution has completely and specifically committed to a co-equal branch of government. For

instance, it would be improper for the Legislature to pass a law contradicting the internal impeachment procedures set forth in the Constitution or authorizing this Court to oversee and reverse impeachment decisions; because the Constitution confers total impeachment power to the Legislature, that authority cannot be shared with the judicial branch. *See Mecham v. Ariz. House of Representatives*, 162 Ariz. 267, 268, 782 P.2d 1160, 1161 (1989); *Nixon*, 506 U.S. at 240 (Stevens, J., concurring). It is not improper, however, for the judiciary to undertake the power conferred to it by Arizona's penal and civil laws to discipline members of the Senate for internal conduct despite the clear and parallel constitutional grant of authority to the Senate to punish its own members. *See* ARIZ. CONST. art. IV, pt. 2, § 11; *Burton v. United States*, 202 U.S. 344, 369 (1906).

This Court has long established an applicable framework that harmonizes statutes and rules passed with constitutionally enumerated power with respect to the the judicial rulemaking authority. Arizona Constitution, Article 6, Section 5(5) grants the judiciary the "power to make rules relative to all procedural matters in any court." There too, has the judiciary described its constitutionally enumerated rulemaking powers as having been vested "exclusively" within the department. *See Seisinger*, 220 Ariz. at 88, ¶ 8, 203 P.3d at 486. Under this line of caselaw, courts routinely recognize that statutes and procedural rules can exist side-by-side, scrutinizing only where there is conflict and to what extent such a conflict is necessary to violate the separation of powers. *See id.* Although it is a different rulemaking authority, the caselaw provides a readily applicable and analogous framework. *Cf. Vander Jagt*, 699 F.2d at 1173

(authorization of rules power to Congress is "not analytically different" from many other constitutionally enumerated powers).

C. The OML Exists in Harmony with the House Rules

As described, *infra*, the judiciary should interpret statutes in a manner that would avoid a constitutional conflict. Here, properly construed, there is no actual conflict between the requirements of the OML to conduct legislative meetings in public and the constitutional delegation of authority to the legislature to make rules, or the substance of any of the rules themselves. The OML does not possess the level of incongruence required to render the statute invalid particularly in light of this Court's obligation to try to *avoid* any such conflict where a harmonious, constitutional reading is permissible. *See Phoenix of Hartford, Inc. v. Harmony Rests., Inc.,* 114 Ariz. 257, 258, 560 P.2d 441, 442 (Ct. App. 1977). As the Court of Appeals recognized, "Defendant has not cited, and our review of the procedural rules of each house has not revealed, any rule that conflicts with the Open Meeting Law." Op. p. 5, ¶ 14. Beginning with the essential requirement that qualified meetings actually remain *public*, there is harmony and complete accord. *Compare* Ariz. Rev. Stat. § 38-431.01(A) ("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") *with* Ariz. H. of Reps., 55th Leg., Rules 9.C.1, C.2 (meetings must be open to the public) and Ariz. H. of Reps., 55th Leg., Rule 27.C (gallery must be open to the public). The statute also facilitates public access by specifying certain requirements governing meeting minutes and recordings, Ariz. Rev.

Stat. § 38-431.01(B)-(D), and publication, § 38-431.01(G), which do not conflict with or undermine any procedural rule, either.[8] Though there is at times overlap, nowhere in the OML does there present a sufficiently "patent[] contradict[ion]" with a rule to deem the conflict irreconcilable.[9] *See State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (en banc) (declaring statute and rule incompatible where one established the exact opposite of the other).

The OML only concerns itself with guaranteeing some small modicum of public access to the Arizona government, to which Defendant acceded. *See* Ariz. Rev. Stat. § 38-431. The OML leaves to each house certain internal procedural mechanisms such as the order with which bills should be read,[10] who should introduce bills, resolutions, or

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[8] Further, that the statute states that "[e]ither house of the legislature may adopt a rule or procedure. . . to provide an exemption to the notice and agenda requirements of this article" cuts in favor of upholding the statute. Ariz. Rev. Stat. § 38-431.08(D). The carveout, read in conjunction with the corresponding house rule, Ariz. H. of Reps., 55th Leg., Rule 32(H), signifies that the statute was passed with constitutional limits in mind; it is cooperative, if not harmonious. *See Giss*, 82 Ariz. at 159, 309 P.2d at 783 ("Generally, every legislative act is presumed to be constitutional and every intendment must be indulged in by the courts in favor of validity of such an act."); Ariz. Att'y Gen. Op. No. I83-128 (R83-031), 1983 WL 42773 at *2 (Nov. 17, 1983) ("to construe [OML] broadly [pursuant to the direction in Ariz. Rev. Stat. § 38-431.09], the exceptions and limitations should be construed narrowly.")

[9] Courts that identify conflict between procedural rules and statutes move to a second inquiry, which states that a conflicting statute does not violate separation of powers if the statute is substantive rather than procedural. *Seisinger*, 220 Ariz. at 91, ¶ 24, 203 P.3d at 489. Instead, in deciding whether it is substantive, "[t]he ultimate question is whether the statute enacts, at least in relevant part, law that effectively 'creates, defines, and regulates rights.'" *Id.* at 93, ¶ 29, 203 P.3d at 491 (citation omitted). The OML plainly creates, defines, and regulates the public's right to participate in, and be informed by, the actions of its elected officials insofar as it relates to matters of public policy and law.

[10] *See, e.g.*, Ariz. H. of Reps., 55th Leg., Rule 7.

memorials,[11] or when a roll call should be taken.[12] The rules are as broad as the day is long—it is for this reason that the OML categorically does not "engulf" the internal house rules, either. The OML has a fundamentally different, and more limited purpose than house procedural rules: it seeks to establish and protect the state's public policy "that meetings of public bodies be conducted openly." *See* Ariz. Rev. Stat. § 38-431.09(A). The OML and the internal house rules are congruent with one another and exist in harmony, even if there appears to be some subject matter overlap between the two. *See Readenour v. Marion Power Shovel, a Div. of Dresser Indus., Inc.*, 149 Ariz. 442, 446, 719 P.2d 1058, 1062 (1986) (where statute "does not conflict with" but "supplements" rule, even when regulating the same issue, it is constitutional).

Observing that it is this Court's duty "to give a construction to a statute which will render it constitutional," *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981) (in banc), this Court should construe together the OML and respective internal house procedural rules to provide room for both. *See Phoenix of Hartford*, 114 Ariz. at 258, 560 P.2d at 442. The Court's "goal in statutory interpretation is to discern and implement the intent of the legislature" when it enacted the law. *State v. Ontiveros,* 206 Ariz. 539, 541, ¶ 8, 81 P.3d 330, 332 (Ct. App. 2003). Courts first look to the plain language of the statute as the best indicator of legislative intent. *Lear v. Fields*, 226 Ariz. 226, 232, ¶ 15, 245 P.3d 911, 917 (Ct. App. 2011). The

[11] *See, e.g.*, Ariz. H. of Reps., 55th Leg., Rule 8.
[12] *See, e.g.*, Ariz. H. of Reps., 55th Leg., Rule 9.

plain language of the statute reflects that Defendant "expressly chose to include itself [and its committees] within the definition of . . . public bodies subject to the open-meeting requirements," Op. p. 5, ¶ 15, and that "[i]t is the public policy of this state that meetings of public bodies be conducted openly." Ariz. Rev. Stat. § 38-431.09(A). As the Court of Appeals concluded, by "enacting a statute that expressly imposes open-meeting requirements on itself, [Defendant] implicitly and *necessarily* acceded to judicial enforcement of those requirements, even while it retained its authority under the Constitution to adopt other procedural rules." Op. p. 5, ¶ 15 (emphasis in original). This Court can construe the OML in harmony with the internal house rules and solidify Arizonans' right to participate in a free and open government. *See* Ariz. Rev. Stat. § 1-211(B) (Cardinal rule of statutory interpretation is that "[s]tatutes shall be liberally construed to effect their objects and to promote justice.").

III. The Consensus of Federal Caselaw Supports Plaintiffs' Conception of the Separation of Powers.

The extensive federal jurisprudence on the political question doctrine should aid this Court in reaching the correct result. *See Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, ¶ 36, 448 P.3d 890, 901 (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"); *see also Kromko*, 216 Ariz. at 192–93, ¶¶ 11–12, 165 P.3d at 170-71 (2007). The U.S. Supreme Court addressed the purported conflict between constitutionally enumerated internal rules powers and

statutes in *Burton v. United States*, 202 U.S. 344 (1906). There, a federal grand jury indicted Missouri Senator Joseph Burton on corruption charges in violation of a federal criminal statute. *Id.* at 358. Senator Burton responding by claiming that the statute could not govern conduct over which the constitution had delegated to the legislature. *Id.* at 364-67. He argued that applying the corruption statute to him—resulting in his automatic ouster from Congress—would (1) interfere "with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator . . . before his [ ] term expires," and (2) that it would infringe on the Senate's ability to discipline him . . [as] the sole judge of the qualifications of its members," and only a two-thirds majority of the Senate "may expel a Senator." *Id.* at 366.

The U.S. Supreme Court rejected Burton's arguments regarding the statute in no uncertain terms. The Court observed that though "the framers of the Constitution intended that each department should keep within its appointed sphere of public action, it was never contemplated that [the Senate's powers over its members] should, in any degree, limit or restrict the authority of Congress to enact such statute." *Id.* at 367. Although there was significant overlap between the delegations of authority and the statute, the Court emphasized that "there can be no reason why the government may not, by legislation, protect each department against . . . inefficiency in the management of public affairs," and that a legislator may not "claim [such] immunity." *Id.* at 368. In other words, it does no harm to the separation of powers doctrine to make officials follow the law. Many appellate courts have repeatedly held that one may not wield a

constitutionally authorized grant of authority as an aegis against the civil and criminal laws.[13] *See, e.g., United States v. Rostenkowski*, 59 F.3d 1291, 1305 (D.C. Cir. 1995); *United States v. Durenberger*, 48 F.3d at 1245; *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995); *United States v. Rose*, 28 F.3d 181, 190 (D.C. Cir. 1994); *Brown v. Hansen*, 973 F.2d 1118 (3d Cir. 1992); *United States v. Diggs*, 613 F.2d 988, 1001 (D.C. Cir. 1979). Many state examples are in accord. *See, e.g., Citizens Action Coal. of Ind. v. Koch*, 51 N.E.3d 236 (Ind. 2016); *Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Commw. Ct. 2001).

These cases collectively establish that constitutionally delegated grants of authority can be generally coextensive with a statute and regulate similar conduct. Coextensivity can move beyond overlap and into reference and even interdependence. A triplet of cases from the D.C. Circuit in which courts referenced—or even applied—certain internal house procedural rules to establish a statutory violation are instructive on this point. In each respective case, a legislator attempted to obstruct the application of a federal statute on grounds that it conflicted with a constitutionally authorized internal procedural rule, thus violating the separation of powers.

Rostenkowski involved the DOJ's attempts to prosecute former Congressman Dan Rostenkowski under federal fraud and embezzlement charges. 59 F.3d at 1304. At trial, the DOJ needed to establish that the funds which Rostenkowski diverted were

[13] At least one federal appellate court has suggested that an internal house rule may even be subordinate to a statute. *See Michel v. Anderson* 14 F.3d 623, 628 (D.C. Cir. 1994) ("if the statutes creating the delegate offices provided that the delegates would not vote . . . the House's rule providing that vote would be invalid.").

made for an "unauthorized purpose," which the D.C. Circuit concluded necessitated reference to the internal house rules. *Id.* It rejected Rostenkowski's argument that the rules barred the application of the statute and held that referencing the rules to establish a statutory violation did not violate the separation of powers. *Id.* at 1305.

In a similar scenario, *Durenberger* involved the criminal prosecution of Minnesota Senator David Durenberger on false claims charges for allegedly making materially false statements when he submitted certain reimbursement expenses. *See* 48 F.3d at 1245. To establish the necessary elements to convict Durenberger, the DOJ had to show that Durenberger was "untruthful" in his dealings, forcing the DOJ to reference the 1987–88 internal Senate travel regulations. *Id.* The court likewise rejected Durenberger's claim that applying the statute necessitated an intrusion into the legislative branch. *Id.*

Finally, in *Rose,* the DOJ brought charges against U.S. Representative Charles Rose III for violating the "Ethics in Government Act," despite having being essentially cleared by the House Committee on Standards of Official Conduct. *Rose*, 28 F.3d at 189-90. Rose charged unsuccessfully that because the House had actually adopted the relevant provisions of the Ethics in Government Act *directly into the House Rules*, the House's power to discipline its own members would supersede any separate statutory authority to discipline him. *Id* at 190.

In each of these cases, the D.C. Circuit painstakingly addressed why the separation of powers doctrine does not require the result that Defendant urges here, and expounds upon the damage to the doctrine such a result would cause—it could

place Defendant and its members above the law entirely. *See Rostenkowski*, 59 F.3d at 1305–06 ("if Rostenkowski's argument were accepted it would effectively insulate every Member of Congress from liability under certain criminal laws. Neither the Rulemaking Clause nor the doctrine of the separation of powers requires that result"); *Durenberger*, 48 F.3d at 1243-44 ("Durenberger's contentions thus amount to a claim that, as a former member of the Senate, he cannot be held to answer criminal charges when his liability depends on judicial usurpation of the Senate's exclusive right to formulate its internal rules"); *Rose*, 28 F.3d at 190 ("by codifying these requirements in a statute, Congress has empowered the [judiciary] to enforce them . . . the DOJ was fulfilling its constitutional responsibilities, not encroaching on Congress's.").

There is also evidence that issues thought to be quintessentially within the province of the internal rulemaking function can find their way into statutes. A prime example comes from the Confederation Congress, which put the U.S. Constitution into operation on March 9, 1789. Included was the Rules of Proceeding Clause, the federal analog to Arizona's internal rules of proceeding. *Compare* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ") *with* ARIZ. CONST. art. 4, pt. 2, § 8 ("each house, when assembled, shall determine its own rules of procedure."). Less than three months later, Congress passed its very first bill, the Oath Act, signed by President George Washington shortly thereafter. 1 Stat. 23 (1789). The Act, which still exists in large part today at 2 U.S.C. § 25 (2000), governs internal legislative conduct, mandating that before each Congressional session legislators must avow: "I do solemnly

swear that I will support the Constitution of the United States." In its current form, the Act still mandates who is to take the oath and when, who is to print the oath and to whom it shall be delivered, and where it is to be filed and recorded. It is revealing that the Confederation Congress thought that the very first piece of legislation should contain a mandate that could have been regulated easily and unilaterally under each chamber's respective rules power, but instead chose to memorialize it in a statute, one that still exists today. *Cf. Myers v. United States*, 272 U.S. 52, 174-75 (1926) (according "the greatest weight" to the opinions of the first Congress concerning its views of the constitutionality of legislation structuring the newly founded government).

This Court should not disrupt the fundamental understanding of separation of powers that dates back to the first days of the Republic.

Respectfully submitted,

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