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

RESPONSE TO DEFENDANT-APPELLEE'S PETITION FOR REVIEW

THE PEOPLE'S LAW FIRM, PLC
Stephen D. Benedetto (Ariz. Bar No. 022349)
Heather Hamel (Ariz. Bar No. 031734)
645 North 4th Avenue, Suite A
Phoenix, Arizona 85003
Telephone: (602) 456-1901
Facsimile: (602) 801-2834
[redacted]

THE CENTER FOR CONSTITUTIONAL RIGHTS
Angelo Guisado (admitted pro hac vice)
666 Broadway, 7th Floor
New York, New York 10012
Telephone/Facsimile: [redacted]

Attorneys for Plaintiffs/Appellants

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I. MATERIAL FACTS

On December 4 and 5, 2019, the American Legislative Exchange Council ("ALEC") hosted an event in Scottsdale, Arizona titled the "States and Nation Policy Summit" (the "Summit"). Exhibit 1, Complaint p. 2, ¶ 2. ALEC is a non-profit organization that invites corporate lobbyists and elected officials to deliberate, draft, and vote upon "model bills" that are then introduced in state legislatures across the country. *Id*. at 9, ¶ 30. Since 2010, ALEC's "model bills" have been introduced nearly 2,900 times in all fifty states and the United States Congress, with more than 600 of these model bills eventually becoming law. *Id*. at 9, ¶ 31.

ALEC and the legislatures it seeks to influence specifically design this legislative process to be hidden from public view. *Id*. at 9, ¶¶ 32-34. ALEC meetings are closed to the general public and its membership, sponsors, and agendas are kept secret. *Id*. The ALEC Summit in Scottsdale, Arizona was no different. *Id*. at 2-3, ¶¶ 2-6; p. 13, ¶ 50.

At this Summit, Plaintiffs allege that a group of twenty-six Arizona legislators[1]—who comprised a quorum of five Legislative Committees[2]—proposed, considered, and deliberated on several "model bills" that were then introduced in the Arizona Legislature. *Id*. at 13-14, ¶¶ 49-55. This first stage of policy formulation was conducted behind closed doors with the influence of unknown and democratically unaccountable interests, in violation of Arizona's Open Meeting Law, Ariz. Rev. Stat. §§ 38-431, *et seq*. ("OML"). *Id*.

To prevent the violation of Arizona's OML, Plaintiffs filed suit before the Summit concluded, asking for declaratory and injunctive relief. Three months later,

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[1] The twenty-six members in question are: Rep. John Allen, Rep. Nancy Barto, Rep. Leo Biasiucci, Rep. Shawna Bolick, Rep. Noel Campbell, Rep. Gina Cobb, Rep. Tim Dunn, Rep. John Filmore, Rep. Mark Finchem, Rep. Gail Griffin, Rep. John Kavanagh, Rep. Anthony Kern, Rep. Jay Lawrence, Rep. Becky Nutt, Rep. Tony Rivero, Rep. Bret Roberts, Rep. T.J. Shope, Rep. Bob Thorpe, Rep. Ben Toma, Rep. Kelly Townsend, Rep. Jeff Weniger, Sen. Karen Fann, Sen. Sylvia Allen, Sen. David Gowan, Sen. Frank Pratt, Sen. Sine Kerr, and Sen. Michelle Ugenti-Rita.

[2] The aforementioned twenty-six Arizona Senators and House Members comprise quorums of the following five Legislative Committees:

(1) Senate Natural Resources and Energy Committee (Sylvia Allen, David Gowan, Sine Kerr, and Frank Pratt);

(2) Senate Water and Agriculture Committee (Sylvia Allen, David Gowan, Sine Kerr, and Frank Pratt);

(3) House Appropriations Committee (Ben Toma, Bret Roberts, Anthony Kern, John Fillmore, John Kavanagh, and Regina Cobb);

(4) House Federal Relations Committee (Shawna Bolick, Kelly Townsend, Gail Griffin, and Mark Finchem); and the

(5) House Health and Human Services Committee (John Allen, Gail Griffin, Becky Nutt, Jay Lawrence, and Nancy Barto).

the Legislature filed a Motion to Dismiss, and the Maricopa County Superior Court heard oral argument on September 1, 2020. After oral argument, the Court issued a Minute Entry granting the Legislature's Motion, finding that the enforcement of Arizona's OML was a non-justiciable political question. The Arizona Court of Appeals reversed, finding that a straightforward application of statutory text and of the narrow political question doctrine "does not preclude judicial review of (Plaintiffs') claim that certain members of the Legislature violated Arizona's open meeting law." Exhibit 2, Court of Appeals Opinion ("Op.") p. 2, ¶ 1. That narrow decision, involving a straightforward application of statutory text to the particular facts of this case, sits at the core of the judicial function and does not merit this Court's review, particularly at this interlocutory stage of the proceedings.

The Legislature now asks this Court to ignore the plain language of Arizona's OML and overrule the Court of Appeals decision in *Puente v. Arizona State Legislature* so that it may try to shield its deliberative processes from public view. This Court should decline that invitation and render a decision affirming the principle that although the Constitution grants the Legislature the ability to manage its internal affairs, it does not displace the judiciary's ability to remediate violations of statutes governing legislators' conduct.

II. ISSUES PRESENTED FOR REVIEW

Did the Arizona Court of Appeals err when it held that: (a) the Legislature is subject to the plain text of the Open Meeting Law; and (b) that the judicial branch has the power to review the Legislature's compliance with the Law?

III. ARGUMENT

A. The Court of Appeals' Decision Does Not Warrant Further Review

Petitions for review are infrequently granted, but may be permitted when they present an important question on which "no Arizona decision controls the point of law in question," *4501 Northpoint LP v. Maricopa County*, 212 Ariz. 98, 100, 128 P.3d 215, 217, ¶ 9 (2006), where an important question is recurring, *e.g.*, *Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, 196, 273 P.3d 645, 648, ¶ 6 (2012), where the court of appeals erred in reaching an important or recurring question of law, or where there are conflicting decisions among the courts of appeals. Ariz. R. Civ. App. P. 23(d)(3).

This case does not meet these review standards. There is no error of law and—contrary to the Legislature's hyperbolic insistence that a grab bag of alleged interpretive errors raised risks a constitutional crisis—this case does not rise to the magnitude of statewide concern that would merit review. Rather, save certain exemptions that are premature at this time, this case centers on the straightforward application of plain statutory terms to the Legislature—a core and uncontroversial

judicial function—and whether judicial enforcement of statutory terms is justiciable in this instance. Far from threatening the functioning of the branches of Arizona government, as the Legislature seems to believe, the case instead presents garden-variety questions of statutory interpretation and justiciability. The decision implicates circumstances both narrow and rare.[3]

1. The Court of Appeals Committed No Error of Law

The Petition for Review presents two very limited questions: do the plain terms of the Arizona Revised Statutes apply to the legislature, and if they do, does the political question doctrine bar this court from applying them? The text of the Arizona Revised Statutes itself answers the former. *See* Ariz. Rev. Stat. § 38-431.01(A) ("All meetings of any public body shall be public meetings"); § 38-431(6) (defining "[p]ublic body" to include "the legislature"); Op. p. 5, ¶ 13. As to the latter, the Arizona Court of Appeals rejected the Legislature's invitation to entertain a premature and broadly-constructed invocation of the separation of powers, instead fulfilling the routine judicial function of applying a statutory prescription to a party's conduct. As the then-Judge Kavanaugh observed, "The Supreme Court has never applied the political question doctrine in a case involving alleged statutory

[3] The United States Supreme Court has ordered a case dismissed on political question grounds only twice. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (*en banc*) (Kavanaugh, J., concurring) (citations omitted).

violations. Never." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (*en banc*) (Kavanaugh, J., concurring) (citations omitted).

Despite the Legislature's protestations to the contrary, the Court of Appeals correctly recognized that Plaintiffs' claims did not challenge a discretionary, legislative procedural rule, let alone even implicate one. (*See also infra* Section B). There, the court correctly recognized that judicial review in this case seeks "only to have the legislators comply with the Open Meeting Law, which the Legislature enacted and to which it expressly subjected itself." Op. p. 5, ¶ 13. Thus, while recognizing that the Arizona Constitution grants the Legislature some discretion to govern its own internal proceedings, the court reached the unremarkable conclusion that internal legislative prerogatives are not disturbed by the plain directives of the statute. Op. p. 5, ¶ 15. ("the Legislature did not exempt itself when it enacted the Open Meeting Law."). Such a routine exercise of statutory interpretation does not warrant this Court's review.

2. The Interlocutory Posture of the Case Counsels Against Premature Review

This is an extremely fact-specific case, one which was brought before the operative actions at the December 4-5, 2019 Summit took place. The procedural posture of this case leaves unresolved on appeal a plethora of dispositive issues, including which bills were voted on, what facts could give rise to an official "legal action," which lawmakers were present at the conference, and whether quorums of

certain meetings occurred. Answers to any one of these issues of fact could resolve this case without investment of time by this Court to resolve asserted (if incorrect) constitutional questions. A remand to the trial court—which the Court of Appeals ordered—and subsequent discovery could not only resolve the issues below, it would also provide any future appellate court with a more complete record to address these outstanding factual issues. This conclusion is supported by the text of the statute and established precedent, and is hardly the sort of watershed decision that would warrant application of this Court's limited authority for review.

B. The Legislature's Political Question Arguments are a Red Herring

The Legislature presses this Court to entertain a hypothetical confrontation between two coequal political branches, asserting that the limited grant of authority for internal rulemaking insulates itself from judicial review over any and all conduct conceivably covered in the OML.[4] The internal house rules of procedure do not "preempt" the OML any more than they preempt the Arizona Criminal Code, which is to say not at all. The Court of Appeals refused to take this bait. The Legislature'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 ("Pet.") at 1. Plaintiffs do not

[4] As explained in the briefing below, this type of argument is properly understood not as a political question, but one that would place the entire constitutionality of the OML into dispute. *See* Exhibit 3, Plaintiff-Appellants' Opening Brief, pp. 36-39.

ask this Court to resolve an *intra*-legislative dispute regarding the distribution of constitutional power within the Legislature, which, in theory, might present a political question; they seek to enforce an external legal constraint as codified in the statute. This is a routine judicial exercise that does not implicate the narrow political question doctrine. *See Zivotofsky ex. rel Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Plaintiffs do not dispute that the Arizona Constitution directs each house of the Legislature to "determine its own rules of procedure." ARIZ. CONST. art. IV, pt. 2, § 8. Developing internal rules of procedure is simply not at issue in this case.[5] *See*

[5] Whatever powers Article IV, Part 2, Section 8 of the Arizona Constitution imbues upon the full House acting in a lawfully constitutive manner, it does not confer boundless authority to the Legislature, acting as a quorum of five legislative committees sitting in a private spa, to deliberate on matters of public concern covered by the OML. Whatever discretion the Constitution provides to the Arizona House to create rules of procedure, it 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. Though the Legislature takes pains to assert that the judiciary cannot encroach onto its *internal* affairs, *see* Pet. at 9, the December 4-5, 2019 Summit was anything but. In fact, as averred in Plaintiffs-Appellants' Reply Brief, the conference had 198 total registered legislators from 35 states across the country as well as 554 registered non-legislators. Nick Surgey, *Revealed: ALEC Meeting Registration List, State Legislators in the Minority, Many States Unrepresented*, DOCUMENTED (Dec. 6, 2019), https://documented.net/reporting/revealed-alec-meeting-registration-list-state-legislators-in-the-minority-many-states-unrepresented. There was nothing internal about it, and it was hardly the sort of intra-legislative activity contemplated in the grant of rulemaking authority. Article IV, Part 2, Sections 8 and 9 neither authorize the complete and unreviewable autonomy the Legislature believes they do, nor do they cloak the Legislature with the ability to shield rightfully public meetings from communal view.

Metzenbaum v. Fed. Energy Regulatory Comm'n, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (this is not a dispute "over the content or effect of a House or Senate rule"). This single factor alone distinguishes this case from the eight on which the Legislature relies. *See* Pet. at 10-11 (collecting cases challenging *internal* procedural rules). Nor can the grant of authority to develop intra-branch rules displace the judiciary's authority to determine whether legislative conduct violates external constraints imposed by duly enacted statute, including the extrinsic statutory commands under the OML that expressly cover the Legislature's conduct. The Legislature may not displace the external statutory constraints contained in the OML entirely, simply by enacting its own contradictory rules, any more than it can, for instance, displace the Arizona penal code through its authority to discipline members for disorderly behavior.[6] Regulatory schemes may be parallel, but distinct; the prerogative to make discretionary, lawful rules governing intra-branch conduct does not displace the judicial duty to consider violations of independent, statutorily enacted legal authority. Holding otherwise—and exempting the Legislature from a governing legislative mandate as the Legislature ultimately seeks to do—is the true threat to the separation of powers doctrine.

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[6] For instance, Article VI.I of the Arizona Constitution commits to the judiciary the standards by which judicial conduct is to be governed. Nowhere does it preclude additional, parallel, or contemporaneous discipline exacted through the Criminal Code, the civil code, or the Lawyer Regulation Department, for instance.

Federal courts have long supported this distinction, which the Legislature attempts to collapse. Courts have routinely distinguished between the application of a statute that may overlap with a legislative rule and a challenge to the precise internal legislative rule itself. *Compare United States v. Rostenkowski*, 59 F.3d 1291, 1305 (D.C. Cir. 1995)*, supplemented on reh'g denied*, 68 F.3d 489 (D.C. Cir. 1995) (Rostenkowski's argument rested "upon the mistaken premise that the Government [sought to impose] liability upon him for violating the House Rules themselves"), *with Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. 2012)*, aff'd*, 748 F.3d 1280 (D.C. Cir. 2014).

It is important to observe that to the extent the Legislature asserts that the OML overlaps with internal house procedural rules, this would not render the issue a political question. As the Court of Appeals observed, "the Legislature 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. In fact, though the OML contemplates broader meeting requirements in certain respects[7] than the internal procedural rules, the letter and spirit of both cases exist in harmony, especially with respect to the essential requirement that qualified meetings actually remain *public*.

[7] 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 p. 14 ¶ 58, the fact that the meeting actually be public in the first place, § 38-431.01(A).

See Ariz. H. of Reps. Rules 9.C.1; 9.C.2; 27.C; 35. Even in cases in which judges must interpret house rules of procedure to establish certain elements of a statute, courts have repeatedly found no separation of powers issue. *See Rostenkowski*, 59 F.3d at 1307-09; *United States v. Kolter*, 71 F.3d 425, 435 (D.C. Cir. 1995); *United States v. Durenberger*, 48 F.3d 1239, 1246 (D.C. Cir. 1995); *United States v. Rose*, 28 F.3d 181, 190 (D.C. Cir. 1994).

Ultimately, as the Court of Appeals recognized, the Legislature "expressly chose to include itself within the definition of . . . public bodies subject to the open-meeting requirements," and in doing so, "the Legislature implicitly and *necessarily* acceded to judicial enforcement of those requirements." Op. p. 5, ¶ 15 (internal citations omitted). History is a guide: in 1978, after a series of judicial opinions attempting to narrowly construe the statute, the Legislature reiterated its policy by adding Ariz. Rev. Stat. § 38-431.09(A): "It is the public policy of this state that meetings of public bodies be conducted openly." Decisions on this point have long been in accord. *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979) (in banc) (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), *available at* https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_7.pdf ("any uncertainty under the Open

Meeting Law should be resolved in favor of openness in government"). It is for these reasons the Court of Appeals correctly read the OML to conclude that the statute does not contain a provision that would engender its own obsolescence. Both the statute and the caselaw establish the same thing: the statute applies to the Legislature and it must follow the law like everyone else. *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].").

C. The OML's "Political Caucus" Exemption Does Not Apply

The Legislature argues that the Court of Appeals erred in ruling that the "political caucus" exception to Arizona's OML does not bar Plaintiffs' claims from going forward. As an initial matter, Plaintiffs can find no case in which a court defines a "political caucus" in conjunction with a challenge to an open meetings statute. What is more, without the benefit of discovery—to come on remand—this Court cannot identify who amongst the over 700 registered guests actually attended the Summit and to which political parties they swore allegiance.

On the merits, the Court of Appeals reached the correct decision when it held that no political caucus occurred. The "ordinary meaning of 'political caucus' encompasses, within its terms, 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." Op. p. 7, ¶ 22 (citing Ariz. Att'y Gen. Op. No. I83-128 (R83-031), 1983 WL 42773 at *1 (Nov. 17, 1983)). As cited below, the Summit was not a gathering solely to discuss "Republican party policy,"[8] but was rather a gathering of legislators who "met and collaborated in secret with scores of lawmakers from other states and hundreds of 'corporate lobbyists' to draft model bills." Op. p. 7, ¶ 23. In short, it was a closed-door conference where lobbyists gave legislators bills to rubber-stamp. The action was not a political caucus and plainly violated the law. Ariz. Att'y Gen. Op. No. I83-128, at *3 ("A public body may not use the political caucus as a means of taking legal action in secret."). 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, 34 P.3d 356, 360, ¶ 17 (2001) (en banc) (Arizona courts will not interpret a statute in a way that yields "absurd" results).

[8] The Legislature's argument ignores that reality includes more than this imagined zero-sum binary. Legislators can take legal action and conduct closed-door meetings with others in the room. It also ignores the Court of Appeals' reasoning for finding otherwise, which was that: "[t]he scope of permissible political caucus activity is limited to considering party policy, with respect to a particular legislative issue." Op. p. 7, ¶ 22 (quoting Ariz. Att'y Gen. Op. No. I83-128, at *3). Because Plaintiffs allege that the quorums of legislators who attended the ALEC conference drafted legislation, rather than deciding upon Republican Party policy, the "political caucus" exception does not apply.

D. *Fisher* Clearly Holds that the Burden is the Legislature's

Defendant argues that the Court of Appeals incorrectly inverted the burden of proof in this case. Beyond raising the kind of narrow error-correction the Supreme Court does not devote its limited resources to reviewing, the Legislature's claim is incorrect. As *Fisher v. Maricopa County Stadium District*, 185 Ariz. 116, 122, 912 P.2d 1345, 1351 (Ct. App. 1995) held over two decades ago, the burden of proving the need to permit a "closed-door executive session" "shifts to the defendant" when the moving party alleges that a violation arose under the OML. Plaintiffs allege (1) that a quorum of five legislative committees met in a closed-door meeting, and (2) deliberated on legislation (3) in violation of Arizona's OML. That is all Plaintiffs need assert to adequately plead a *prima facie* violation. *See id.* ("Requiring a plaintiff to plead and prove specific facts regarding alleged violations that are taking place in secret is a circular impossibility").

IV. CONCLUSION

For the foregoing reasons, the Court should not grant review of this case.

DATED this 16th day of May, 2022.

Respectfully submitted,

THE PEOPLE'S LAW FIRM, PLC

By /s/ Heather Hamel
Stephen D. Benedetto, Esq.
Heather Hamel, Esq.

THE CENTER FOR CONSTITUTIONAL RIGHTS

Angelo Guisado, Esq.

Attorneys for Plaintiffs/Appellants