**IN THE SUPREME COURT**

**STATE OF ARIZONA**

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| PUENTE, an Arizona nonprofit corporation; MIJENTE SUPPORT COMMITTEE, an Arizona nonprofit corporation; JAMIL NASER, an individual; JAMAAR WILLIAMS, an individual; and JACINTA GONZALEZ, an individual,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>ARIZONA STATE LEGISLATURE,<br><br>Defendant/Appellee. | No. _____<br><br>Court of Appeals No.<br>1 CA-CV 20-0710<br><br>Maricopa County Superior Court<br>No. CV2019-014945 |

# PETITION FOR REVIEW


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Defendant/Appellee Arizona State Legislature (the "Legislature")—through Karen Fann, President of the Arizona Senate, and Russell Bowers, Speaker of the Arizona House of Representatives—respectfully submits this Petition for Review.

## INTRODUCTION

Should the judiciary be conscripted into chaperoning individual legislators at private organizations' policy conferences and monitoring their conversations for compliance with the Arizona Open Meeting Law, A.R.S. § 38-431, *et seq.* ("OML")? The affirmative answer from a divided panel of the Court of Appeals is as dissonant with common sense as it is untethered from the OML and foundational separation of powers principles.

The Arizona Constitution entrusts to each legislative house the sovereign authority to "determine its own rules of procedure," ARIZ. CONST. art. IV, pt. 2, § 8, "in such manner and under such penalties as each house may prescribe," *id.* § 9. As courts in at least ***eight*** other states have recognized, this unqualified and indefeasible textual commitment of power to a coequal branch precludes claims arising under the state's equivalent of the OML, even if the statute purports to apply to the legislative branch. In ignoring this lineage of persuasive precedents, the Court of Appeals embraced at least four substantial errors of law, which its resulting published opinion promises will, if not emended by this Court, encumber elected representatives and the judiciary alike for years to come.

## STATEMENT OF THE ISSUES

1. Did the Court of Appeals err in finding the Plaintiffs' claims justiciable, even though the Arizona Constitution confers plenary authority on each house to determine and enforce its own rules of procedure, *see* ARIZ. CONST. art. IV, pt. 2, §§ 8–9?

2. Did the Court of Appeals err in holding that the Legislature's adoption of internal rules governing the meetings of each chamber and its committees does not exempt it from the OML, even though the OML allows that "[e]ither house of the legislature may adopt a rule or procedure . . . to provide an exemption" to its terms, *see* A.R.S. § 38-431.08(D)?

3. Did the Court of Appeals err in holding that the OML's exemption for meetings of a "political caucus of the legislature," A.R.S. § 38-431.08(A)(1), was inapplicable, even though all the legislators who allegedly attended the private conference at issue were members of the Republican caucus?

4. Did the Court of Appeals err in holding that the Legislature bears the burden of *disproving* the Plaintiffs' allegations that certain non-party legislators constituting a quorum of one or more committees violated the OML by attending a national private conference at which public policy issues might have been discussed?

## STATEMENT OF THE CASE

Solely for purposes of this Petition, the Legislature will assume the truth of the factual allegations set forth in the complaint filed by Plaintiffs/Appellants Puente, *et al.* (collectively, "Puente") in the Superior Court (the "Complaint").

On December 4, 2019, Puente initiated this action, seeking declaratory and injunctive orders to enforce the OML in connection with an upcoming private conference hosted by a third-party nonprofit organization, the American Legislative Exchange Council ("ALEC"), which Puente alleged would be attended by various Arizona legislators—all of whom were members of the Republican caucus—as well as by "legislators from around the country and private corporations." Index of Record ("IR") 1 at 9–11. The Complaint recited a litany of bills (some enacted more than a decade ago) that Puente insinuated trace their lineage to various ALEC proposals. *See id.* at 11–13. It did not, however, contain any allegations of any articulable "legal actions," *see* A.R.S. § 38-431(3), that occurred—or that Puente anticipated would occur—at the December 2019 ALEC summit. Rather, the Complaint vaguely averred that "[u]pon information and belief," attending legislators constituting a "quorum" of one or more legislative committees will "discuss, propose, and deliberate on" various unspecified "model bills" that might be subsequently introduced as legislation. *See id.* at 13.

On November 5, 2020, the trial court granted the Legislature's motion to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6), holding that Puente's claims presented nonjusticiable political questions. *See* IR 31.

On February 16, 2022, a divided panel of the Court of Appeals vacated the Superior Court's judgment, concluding that the Complaint pleaded justiciable *prima facie* claims under the OML. Judge Thumma dissented on the grounds that the meeting alleged in the Complaint would constitute a "political caucus" that is exempt from the OML's requirements, pursuant to A.R.S. § 38-431.08(A)(1). This timely Petition for Review follows.

## ARGUMENT

This Court exercises its discretion to review decisions of the Court of Appeals when, *inter alia*, (1) "no Arizona decision controls the point of law in question," or (2) "important issues of law have been incorrectly decided." A.R.C.A.P. 23(d)(3). Whether or to what extent the OML engenders judicially enforceable rights against the Legislature is a question of first impression imbued with constitutional dimensions and carrying significant import for the separation of powers. *See generally State v. Urrea*, 244 Ariz. 443, 445, ¶ 5 (2018) (granting review to resolve "an issue of statewide concern and first impression in Arizona"). Further, the Court of Appeals' decision propagates several consequential errors of law that derogate the OML's plain text, corrode the Legislature's constitutional authority to order its

own proceedings, and portend serious practical impediments and legal risks for Arizona legislators in the day-to-day conduct of their duties.

## I. Puente's Claims Are Nonjusticiable Because Article IV of the Arizona Constitution Textually Commits the Promulgation and Enforcement of Legislative Procedures Exclusively to Each House of the Legislature, Subject Only to Other Provisions of the Constitution Itself

The Arizona Constitution directs that "[e]ach house" of the Legislature "shall . . . determine its own rules of procedure," art. IV, pt. 2, § 8, and that "a smaller number" of individual legislators "may meet, adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may prescribe," *id.* § 9. The conduct of all legislative proceedings accordingly is vested solely and exclusively in the legislative branch, and there is no judicially manageable standard by which a court could assess the validity, application or enforcement of legislative procedures.

### A. Overview of the Political Question Doctrine

In fixating on whether the Legislature is subject to the OML, the Court of Appeals misunderstood the locus of this dispute. The crux of the case is not whether the OML by its terms applies to the Legislature; subject to certain important caveats (*see infra* Sections II, III), it does. Rather, the operative question is ***who*** enforces the OML in connection with the internal proceedings of the legislative branch.

The political question doctrine is founded in a recognition that when adjudication of a claim will entail incursions into the internal domain of the

legislature or executive, respect for those coequal branches necessitates dismissal. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Political questions are those that (1) "involve decisions that the constitution commits to one of the political branches of government," *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485, ¶ 7 (2006), or (2) are not resolvable by "judicially discoverable and manageable standards." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶ 11 (2007).

Both facets of the political question doctrine apply here.[1] By vesting in each legislative house a self-contained authority, unqualified by any articulated parameters or criteria, to "determine" its own rules of procedure in the "manner" it chooses, sections 8 and 9 of Article IV, Part 2 are "a classic example of a demonstrable textual commitment to another branch of government." *Rangel v. Boehner*, 20 F. Supp. 3d 148, 168–69 (D.D.C. 2013) (describing parallel congressional rulemaking authority in the federal Constitution), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015); *see also Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007) ("[T]he Constitution textually commits the question of legislative procedural rules to Congress. Thus, whether

[1] The political question rubric is, however, phrased in the disjunctive. *State v. Maestas*, 244 Ariz. 9, 12, ¶ 9 (2018). The Legislature thus need demonstrate the applicability of only one nonjusticiability criterion.

Congress decides to hold a hearing on legislation applicable to the general public is a non-justiciable political question beyond our power to review.").

Contrary to Puente's insistences otherwise, a ***statute*** (such as the OML) cannot supply a "standard" for adjudicating the exercise or enforcement of a superordinate ***constitutional*** provision. Any judicial role in policing the administration of legislative procedures must derive from the Constitution itself. *See Common Cause v. Biden*, 909 F. Supp. 2d 9, 28 (D.D.C. 2012) (dismissing as nonjusticiable a challenge to Senate rules promulgated pursuant to similar grant of legislative authority in the federal Constitution, noting that "Plaintiffs cannot identify any constitutional provision that expressly limits the authority committed to the Senate" to devise its own procedural rules); *see also Mesnard v. Campagnolo*, 251 Ariz. 244, ¶ 41 (2021) (Bolick, J., concurring) ("The 'courts possess power to review either legislative or executive action that transgresses identifiable textual limits,' but not where the Constitution places specific authority exclusively within the power of a political branch" (quoting *Nixon v. United States*, 506 U.S. 224 (1993))).[2]

[2] The cases cited by Puente below all affirmed the obvious proposition that nonjusticiability doctrines do not preclude courts from enforcing against the elected branches textual limitations found in the Constitution itself. *See, e.g.*, *Powell v. McCormick*, 395 U.S. 486 (1969); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *INS v. Chadha*, 462 U.S. 919 (1983). This case—which seeks to elevate a ***statute*** to a substantive constraint on an unqualified ***constitutional*** power—carries a different complexion.

### B. The Legislature Did Not and Cannot Divest Itself of Textually Committed Powers

The Court of Appeals effectively acknowledged that the Legislature's constitutional power to order its internal affairs cannot beget justiciable claims. *See* COA Op. ¶¶ 12–13. It salvaged the Complaint, however, by reasoning that there is no internal legislative rule "that conflicts with the Open Meeting Law," *id.* ¶ 14, and that by adopting the OML, "the Legislature implicitly and *necessarily* acceded to judicial enforcement of those requirements, even while it retained its authority under the Constitution to adopt other procedural rules," *id.* at ¶ 15. Two defects afflict this explanation.

#### 1. The Legislature's Rules Preempt the OML

As the Legislature pointed out to the Court of Appeals, Arizona House of Representatives Rule 32(H) in fact 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], thereby supplanting the OML entirely.[3] The Arizona Senate similarly has exercised its constitutional privilege to independently prescribe the

[3] The RULES OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF ARIZONA, FIFTY-FOURTH LEGISLATURE, are available at: https://www.azleg.gov/alispdfs/54leg/House/54rd_leg_rules_1st_session.pdf (last accessed Mar. 16, 2022).

rules that govern committee proceedings. *See* ARIZ. SENATE RULES, FIFTY-FOURTH LEGISLATURE, Rule 7.[4] And both houses have explicitly subordinated statutes to the Constitution *and* to the house's own internal rules in itemizing the hierarchy of authorities that govern parliamentary practice and procedure. *See* House Rule 29; Senate Rule 24. Puente's attempt to engraft the OML onto each house's internal rules is incompatible with the latter's constitutionally ordained status as the ***exclusive*** determinant of legislative procedures, cabined only by other provisions of the Constitution itself.

2. The Legislature Could Not Delegate Its Internal Rulemaking and Supervisory Powers to the Judiciary

At bottom, the Court of Appeals' finding of justiciability rests on the fallacy that one branch may abrogate and transfer to another branch all or some portion of a function textually committed to it by the Constitution. Few notions are as foreign to a regime of separated powers. "The roles of each branch of government in Arizona are . . . separate and distinct." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). Just as no branch may invade the province of another, neither can it voluntarily cede power entrusted to it by the Constitution. Otherwise, "the whole constitutional fabric might be undermined and destroyed." *Giss v. Jordan*, 82 Ariz.

[4] *Available at* https://www.azleg.gov/alispdfs/54leg/senate/RULES_2019_2020.pdf (last accessed Mar. 16, 2022).

152, 165 (1957) (observing that "[e]very positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person").

This intuitively obvious principle finds an illustrative encapsulation in *Fogliano v. Brain*, 229 Ariz. 12 (App. 2012). There, a voter-approved statute provided that a designated fund to finance Medicaid "shall be supplemented, as necessary by another available sources." *Id.* at 15, ¶ 2 (quoting A.R.S. § 36-2901.01(B) (2000)). Despite this peremptory command to the Legislature, the court deemed claims arising out of the statute to be nonjusticiable, reasoning that "[w]hether and how much money can be paid out of the state treasury is clearly committed by our Constitution to those acting in a legislative capacity" and must be "left to the Legislature, not the Judiciary." *Id.* at 20, ¶ 24. In other words, a statute cannot create judicially enforceable strictures on a plenary power vested in a coordinate branch. The Legislature can and does adhere to the OML. But the authority to decide whether, when and in what manner to implement its terms is lodged exclusively and irrevocably in each legislative house. *Cf. Meacham v. Gordon*, 157 Ariz. 297, 302 (1988) ("We will not tell the legislature when to meet, [or] what its agenda should be.").

It is for this reason that state courts nationwide have held that their legislatures' compliance with the jurisdiction's open meeting statute (or equivalent

enactment) is nonjusticiable. Considering allegations that non-public gatherings of certain legislators violated that state's open meeting law, the New Hampshire Supreme Court explained, in reasoning that resonates in this case,

> The legislature, alone, 'has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.' The same is true of statutes that codify legislative procedural rules. . . . We emphasize that the question before us is not whether the Right-to-Know Law applies to the legislature. By the statute's express terms, it does. The question before us is whether the legislature's alleged violation of the Right-to-Know Law is justiciable. We have concluded that this question is not justiciable . . . ."

*Hughes v. Speaker of the N.H. House of Reps.*, 876 A.2d 736, 744, 746 (N.H. 2005); *see also Ex parte Marsh*, 145 So. 3d 744, 751 (Ala. 2013); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 339–40 (Alaska 1987) ("[W]e regard the question whether the Legislators have violated the Open Meetings Act or [a legislative rule] to be nonjusticiable."); *Moffitt v. Willis*, 459 So.2d 1018, 1021 (Fla. 1984); *Coggin v. Davey*, 211 S.E.2d 708, 710–11 (Ga. 1975); *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496, 503 (Iowa 1996); *Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001); *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 440 (Wis. 2011). The Superior Court correctly heeded the reasoning of these tribunals, which vindicated bedrock separation of powers principles that transcend state-specific idiosyncrasies. This Court should do the same.

## II. The OML Expressly Allows the Legislature to Exempt Itself From the Statute's Requirements

Even if this action is justiciable, the OML's plain text disposes of Puente's claims. Although the Legislature is included in the catalogue of "public bodies" to which the OML presumptively applies, *see* A.R.S. § 38-431(6), the statute recognizes that "[e]ither house of the legislature may adopt a rule or procedure pursuant to [the Constitution], to provide an exemption to the notice and agenda requirements of this article," *id.* § 39-431.08(D). As recounted *supra* Section I.B.1, both houses have done just that.

The Court of Appeals responds that Puente "allege[s] violations of the statutory open-meeting requirement, not violations of the statute's notice or agenda provisions." COA Op. ¶ 19. But courts must construe the OML "as a whole." *State ex rel. Arizona Dept. of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, ¶ 9 (2004). The notice and agenda provisions of the OML are inseparable from the "open access" rubric; the latter is functionally futile if a meeting's very existence and purpose remain concealed. The more sensible distillation of Section 39-431.08(D)—as informed by Article IV—is that it recognizes the Legislature's incommutable authority to order its own internal affairs.

## III. The "Meeting" Alleged in the Complaint Qualifies as a "Political Caucus"

The dissent correctly recognized that Puente's claims also are foreclosed by the OML's exemption for meetings of a "political caucus of the legislature." A.R.S. § 38-431.08(A)(1). The majority responds that the legislators allegedly "collaborated in secret with scores of lawmakers from other states and hundreds of 'corporate lobbyists' to draft model bills," COA Op. ¶ 23, and hence did not act as a "political caucus." But this construction of the Complaint proves too much because it delineates a gathering that is not a "meeting" within the scope of the OML ***at all***.

Puente cannot have it both ways. If it is asserting that Republican Arizona legislators convened in their official capacities to evaluate specific potential bills, then that meeting would qualify as an exempt "political caucus." The presence of non-legislator third parties was superfluous because such individuals could not have effectuated any "legal action." Conversely, if the Complaint is read as limning a social or partisan gathering in which an agglomeration of individuals from the public, private and nonprofit realms (a few of whom are Arizona legislators) commingled in a private venue to discuss shared policy aspirations, then it has failed to allege a "meeting" of a "public body" governed by the OML, *see* A.R.S. § 38-431(4).

## IV. The Court of Appeals Improperly Shifted the Burden of Proof

Indulging Puente's failure to sufficiently plead a *prima facie* violation of the OML, the Court of Appeals held that when there is an alleged "closed-door meeting," "the burden of proof shifts to the public body to establish that it did not violate the Open Meeting Law." COA Op. ¶ 26. To be sure, a plaintiff cannot plead the substantive transpirations of closed meetings. But the Court of Appeals has distended that narrow, common-sense caveat into an outright inversion of the entire burden of proof regime in many (if not most) OML cases.

The defect pervading the Complaint is not merely that it does not detail the content of the ALEC conference, but rather that it does not adequately plead the existence of *any* cognizable "meeting" of *any* "public body" entailing *any* "legal action." *See* A.R.S. § 38-431. The Complaint simply posits that an assortment of Arizona legislators would be interspersed with hundreds of other individuals from across the country in the same approximate physical location during a three-day interval at a private event during which certain unspecified public policy projects might be discussed. *See* IR 1 at 13, ¶¶ 49–52. Indeed, the ALEC conference had not even occurred at the time the Complaint was filed; the Complaint's allegations advanced only conjecture.[5]

[5] It is highly doubtful that Puente could, consistent with its obligations under Ariz. R. Civ. P. 11, plead that a "meeting" entailing "legal action" ***actually*** occurred at the 2019 ALEC conference.

In short, the Complaint is devoid of any alleged facts denoting a discrete "meeting" of Arizona legislators acting in their official capacity to debate or vote on particular proposals that would be reified in actual legislation.[6] Even if these exiguous allegations could survive a motion to dismiss (and they cannot), they certainly do not require the Legislature to affirmatively prove that certain legislators—who, it bears emphasis, are independently elected public officers and not subject to the direction or control of the institution—did *not* violate the OML. Were it otherwise, any event (for example, a dinner, fundraiser, or happenstance encounter on the Capitol lawn) at which legislators comprising a given committee quorum happened to be present and at which public policy matters may have been a topic of conversation would *ipso facto* become a presumptive violation of the OML. This Court should not countenance such a distortion of the statute and dispensation from engrained burden of proof precepts.

## CONCLUSION

The Court should grant the Petition and vacate the judgment of the Court of Appeals.

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[6] Even assuming *arguendo* that ideas discussed at the ALEC summit served as an impetus for legislation, any such bill necessarily would have traversed the actual committee and floor proceedings of both legislative houses, which even Puente appears to concede complied with the OML.

RESPECTFULLY submitted this 16th day of March, 2022.

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