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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

The Open Meeting Law ("OML") reflects an important principle of this country's democratic values and Arizona's own commitment to transparency. In 1962, the Arizona Legislature adopted the OML to ensure that the public's business was conducted openly, and that the public would be able to attend and listen to the deliberations and proceedings. 1962 Ariz. Sess. Laws ch. 138, § 2. The OML is in place to protect the public from secret lawmaking, to promote accountability amongst public officials, to maintain integrity in the government, and to build a better-informed citizenry. This, in turn, strengthens the trust between the government and its citizens. It is now the "public policy of this state that meetings of public bodies be conducted openly." Ariz. Rev. Stat. § 38-431.09(A).

Arizona has long favored an open government and informed citizenry. *Arizona Newspapers Ass'n v. Superior Court In & For Maricopa Cnty.*, 143 Ariz. 560, 564, 694 P.2d 1174, 1178 (1985) (in banc). This sentiment is codified in the operative provisions of the OML: "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." Ariz. Rev. Stat. § 38-431.01(A). The statute explicitly includes the Arizona Legislature amongst those entities to whom the OML applies. *See* Ariz. Rev. Stat. § 38-431(6) ("'Public body' means the legislature"). Yet, certain members of the legislature seek to evade the clear

mandate of this law in order to conduct public business – affecting lives of Arizonans – in de facto secrecy, when held in vacation resorts and paid for by the American Legislative Exchange Council ("ALEC") at an annual policy summit. ALEC leverages secrecy, power, and influence to advance its legislative agenda at closed-door meetings across the country, including Arizona.

Plaintiffs-Appellants brought this case to protect the rights established under the OML not only on their own behalf, but to vindicate the rights of all Arizonans. Plaintiffs-Appellants represent some of the most marginalized populations in Arizona: mixed-status immigrants and Black, Latinx, and Palestinian people. In fact, named-Plaintiff-Appellant Puente was founded over ten years ago in response to anti-migratory state law SB1070 that was drafted at an ALEC meeting similar to the one Plaintiffs-Appellants contest today. SB 1070, 49th Leg., 2d Sess. (Ariz. 2010). These individuals and groups are fundamentally and intimately affected by the laws that are discussed outside of the intended public space the OML guarantees. Arizonans deserve better.

The trial court's decision to dismiss Plaintiffs' case on grounds that it presented a nonjusticiable political question could potentially render the proceedings of the Legislature completely outside the scope of the OML, despite its express terms to include it. It would sanction the practice of legislating-in-secret, a stark rebuke to Arizona's clear mandate otherwise. *See Karol v. Bd. of Educ. Trs.*,

122 Ariz. 95, 97, 593 P.2d 649, 651 (1979) (state policy to "open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret."). It is imperative that the OML be enforced against secret caucus meetings such as those that take place at the ALEC Summit. Like all Arizonans, but particularly in the case of the politically engaged and civic-minded Plaintiffs-Appellants here, it is essential that this Court ensure that the lawmaking processes of the Arizona Legislature be made public. This access is a right guaranteed by the OML, and one which is well worth protecting.

STATEMENT OF FACTS AND THE CASE

On December 4, 5, and 6, 2019, ALEC hosted an event in Scottsdale, Arizona that it called the "States and Nation Policy Summit" (the "Summit"). Complaint at p. 2, ¶ 2.

ALEC is a non-profit organization founded in 1973 in Chicago, Illinois. *Id.* at 9, ¶ 30. The organization unites corporate lobbyists and federal, state, and local elected officials to deliberate, draft, and vote upon "model bills" that are then introduced in state legislatures across the country. *Id.* 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. Several of ALEC's "model bills" have passed—*verbatim*—in Arizona's State Legislature, including the now-infamous SB 1070, a law created at

an ALEC conference in 2009 and passed by the Arizona Legislature in 2010. *Id*. at 11-12, ¶ ¶ 40-45; *see also* Arizona's HB 2577, 47th Leg., 2d Sess. (Ariz. 2006) and HB 2751, 48th Leg., 1st Sess. (Ariz. 2007).

This method of legislating is specifically designed to be hidden from public view. Complaint at 9, ¶ ¶ 32-34. ALEC meetings are closed to the general public. *Id*. at 9, ¶ 34. ALEC's membership, sponsors, and convening agendas are hidden from view. *Id*. at 9, ¶ 32. And State ALEC chairs are required to sign "loyalty oaths" to the organization, agreeing to "put the interest of [ALEC] first." *Id*. at 9, ¶ 33.

The ALEC Summit in Scottsdale, Arizona was no different. *Id*. at 2-3, ¶¶ 2-6; p. 13, ¶ 50. Lawmakers gathered to discuss potential legislation and this meeting was not open to the general public, nor were any minutes or records of the proceedings made available. *Id*. at 13, ¶ 50. At this Summit, Plaintiffs-Appellants allege that a group of twenty-six Arizona legislators[1]—who comprised a quorum of

[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.

1 five Legislative Committees[2]—proposed, considered, and deliberated on several
2 "model bills" that were introduced in the Arizona Legislature. *Id*. at 13-14, ¶¶ 49-
3 55. This first stage of policy formulations was conducted behind closed-doors with
4 the influence of unknown and democratically unaccountable interests in violation of
5 Arizona's OML, Ariz. Rev. Stat. §§ 38-431, *et seq*. *Id*.
6
7 Plaintiffs filed suit on December 4, 2019, to prevent the violation of
8 Arizona's OML. Four months later, Defendant filed a Motion to Dismiss, and the
9 Maricopa County Superior Court set oral argument on September 1, 2020. After
10 oral argument, the Court issued a Minute Entry granting Defendant's Motion to
11 Dismiss, finding that the enforcement of Arizona's OML was a non-justiciable
12 political question. After this ruling, members of the Arizona Legislature sought to
13 restrict public access to the Legislature. This trend may continue should the Court
14 find that Arizona's OML cannot be enforced against that public body.
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19 [2] The aforementioned twenty-six Arizona Senators and House members comprise quorums of the following five Legislative Committees:
20 (1) Senate Natural Resources and Energy Committee (Sylvia Allen, David Gowan, Sine Kerr, and Frank Pratt);
21 (2) Senate Water and Agriculture Committee (Sylvia Allen, David Gowan, Sine Kerr, and Frank Pratt);
22 (3) House Appropriations Committee (Ben Toma, Bret Roberts, Anthony Kern, John Fillmore, John Kavanagh, and Regina Cobb);
23 (4) House Federal Relations Committee (Shawna Bolick, Kelly Townsend, Gail Griffin, and Mark Finchem); and the
24 (5) House Health and Human Services Committee (John Allen, Gal Griffin, Becky Nutt, Jay Lawrence, and Nancy Barto).
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PROCEEDINGS BELOW

Although Defendant's Motion briefed a number of grounds for dismissal, the trial court focused on its political question arguments. The Defendant argued in its papers—and during oral argument—that "no statute can supersede each legislative house's constitutional right and responsibility to govern its own proceedings." *See* Exhibit 1, Defendant's Motion to Dismiss at 5. The Defendant posited that Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution present an ironclad, unbroachable constitutional delegation to the Legislature. Section 8 of the Arizona Constitution states that each house of the Legislature may "determine its own rules of procedure." Section 9 provides that the "majority of the members of each house shall constitute a quorum to do business, but a smaller number may meet, adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may prescribe." The Defendant further suggested that Ariz. Rev. Stat. § 38-431.08(D), which 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," exists as proof that the Legislature may exempt itself from the OML entirely. Exhibit 1 at 5-6. Plaintiffs rejected this interpretation, arguing that, though the Arizona Constitution grants the Legislature the ability to manage its internal affairs, it does not and could not hold total autonomy over its

1 procedural rules, citing established United States Supreme Court caselaw to that
2 end. Plaintiffs' Opposition at 6-9.

3 The trial court agreed in principle with Defendant's main argument,
4 holding—with only a few paragraphs of analysis—that the constitutional language
5 to which the Defendant cited rendered the case nonjusticiable under the political
6 question doctrine. Exhibit 2, Trial Court Decision at 6-7. Specifically, the court
7 held that the case evidenced a "textually demonstrable . . . commitment" to the
8 Legislature to manage its own affairs under the applicable standard. *Id.* at 5-6.
9 Addressing the other prong of the political question doctrine—whether the case can
10 be resolved by judicially manageable standards—the court dedicated all of two
11 sentences to its analysis. *Id*. at 6. The trial court referred to the "Legislature's
12 plenary authority" in determining its own rules of procedure to erroneously
13 conclude that there appears to be no judicially manageable standard. *Id.*

14 Due in part to misleading and oversimplified arguments from the Defendant,
15 the trial court failed to fully grasp the complexity of the issue at hand before
16 rendering its decision. The Defendant *appears* to have argued that a violation of
17 the OML was a nonjusticiable political question because procedural powers were
18 granted to the Legislature and therefore the separation of powers doctrine dictated
19 that other branches of government could not intervene. Exhibit 1 at 2. In reality,
20 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.[3] *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. The Court need not address the statutory argument on this appeal, however (though Appellants demonstrate below that the relevant statutory terms do not conflict with the Arizona Constitution); it need only address the jurisdictional question resolved by the trial court, and, finding that the case is justiciable, remand for consideration of the merits of the as-applied challenge.

ISSUE ON APPEAL

The Legislature posits that it is empowered to exempt itself from the OML because Article IV, Part 2, Sections 8 and 9 grant it complete and unreviewable autonomy over its internal affairs. In essence, the Legislature alleges that it doesn't have to follow the law if it doesn't want to, and that the Arizona Constitution gives

[3] The Defendant also cites to *Fragoso v. Fell*, 210 Ariz. 427, 431, ¶ 13, 111 P.3d 1027, 1031 (Ct. App. 2005) ("A statute or rule, of course, 'cannot circumvent or supplant . . . constitutional requirements.'") which further reveals Defendant's underlying argument that this was an as-applied challenge to the OML. Exhibit 1, Defendant's Motion to Dismiss at 6.

it that power. This is properly understood as an as-applied attack on the constitutionality of the OML itself. Though Defendant disputes this framing, its strident objections do not defeat this jurisprudential reality. As the U.S. Supreme Court held in clear terms, "[t]o resolve [t]his claim, the Judiciary must decide if [the] interpretation of the statute is correct, and whether the statute is constitutional." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Under this recalibration, Defendant carries the burden to demonstrate that the OML is unconstitutional as applied, a burden that it cannot carry.

This case thus presents the issue as to whether a constitutionally delegated prerogative is alleged to conflict with a statutory right. However, this Court need not rule on the constitutionality of the OML at all, because the U.S. Supreme Court has already addressed this precise issue. *See Zivotofsky*, 566 U.S. 189. There, the Court disposed 8-1 of a similar justiciability argument, holding that a review of such a case is a "familiar judicial exercise." *Id.* at 196. Many, many other courts have also held that the political question doctrine does not bar such a challenge. This jurisprudence is consistent with historical background of the separation of powers and the vast scholarship in this area, as this brief details. Thus, though this case presents two questions of law, this Court need answer only one:

Is this case justiciable?

We submit that the answer is plainly yes and, if this Court agrees, ask that this Court remand the case to the trial court for further proceedings.

STANDARD OF REVIEW

Arizona appellate courts review a trial court's motion to dismiss under Rule 12(b)(6) *de novo*. *Conklin v. Medtronic*, *Inc.*, 245 Ariz. 501, 504, 431 P.3d 571, 574 (2018); *Coleman v. City of Mesa*, 230 Ariz. 352, 355, 284 P.3d 863, 866 (2012) (en banc). A Rule 12(b)(6) dismissal is only appropriate where, as a matter of law, "plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman*, 230 Ariz. at 356, 284 P.3d at 867. Courts also apply *de novo* review to issues related to statutory interpretation. *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, ¶ 11, 482 P.3d 390, 392 (2021); *Nicaise v. Sundaram*, 245 Ariz. 566, 567, ¶ 6, 432 P.3d 925, 926 (2019).

ARGUMENT

I. **The Trial Court Erred in Applying the Political Question Doctrine**

> "[F]or many years, our nation—with surprising consensus—has relied on the judiciary to remedy longstanding flaws in the political system which impede equal participation in the governmental process." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1982).

The Defendant pressed the trial court to answer the same essential question raised in *Baker v. Carr*: "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that

branch exceeds whatever authority has been committed." 369 U.S. 186, 211 (1962). As the U.S. Supreme Court remarked, it "is itself a delicate exercise in constitutional interpretation." *Powell v. McCormack*, 395 U.S. 486, 521 (1969). Though the issue is nettlesome, it is not impossible to dethorn.

Rigorous and careful judicial inquiry will reveal that this case is justiciable, because the separation of powers, from which the political question doctrine stems, *Baker*, 369 U.S. at 217, demands that the judiciary remain an ineluctable check on the Legislature's rulemaking power. The 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.") (collecting cases). An examination of this jurisprudence, along with the history and scholarship on legislative rules of procedure, reveal that the trial court's political question conclusion was in error.

The political question doctrine has early roots in American jurisprudence, dating back at least to *Luther v. Borden*, 48 U.S. (7 How.) 1, 35-36 (1849) and likely *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[4] It is a rare and

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[4] Scholars have often described Marbury as the source of the modern political question doctrine, stating that "Marbury itself contains the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches." *See* Rachel E. Barkow, *More Supreme than Court? The Fall of*

infrequently applied doctrine.[5] In fact, in the fifty years since *Baker* and despite numerous invocations, the Supreme Court has only ordered a case dismissed on political question grounds twice.[6] The Supreme Court's seminal decision *Baker v. Carr* sets out the six criteria under which a court can render a case nonjusticiable under the political question doctrine. *See* 369 U.S. at 217. The trial court relied on the first two factors to dismiss Plaintiffs' complaint: (1) "a textually demonstrable

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the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 239 (2002).

[5] The scholarship is consistent on this point. *See, e.g.*, John H. Ely, War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath 55 (1993) ("[I]t's doubtful that [the political question doctrine] even exists any more (at least at the Supreme Court level)."); 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."); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. Rev. 405, 406 (1984) ("[T]he invocation of the political question doctrine appears to have nearly fallen into desuetude; only once in the past two decades has the Court decided that an issue raised a nonjusticiable political question."); *see also Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984), *vacated on other grounds sub nom. Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) ("Recent cases raise doubts about the contours and vitality of the political question doctrine, which continues to be the subject of scathing scholarly attack.")

[6] Since Baker, there have been at least twenty cases in which the Supreme Court has considered whether the "political question doctrine" precluded the Court from adjudicating the case before it. Of those, the Supreme Court has dismissed **only two cases** as ostensibly nonjusticiable as political questions - *Gilligan v. Morgan*, 413 U.S. 1 (1973), which involved questions regarding the kind of training the Ohio National Guard should implement; and *Nixon v. United States*, 506 U.S. 224 (1993), which involved whether the U.S. Senate had properly "tried" an impeachment of a federal judge.

constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it." *Id*.; Exhibit 2 at 5-7. In Arizona, these two tests, though in "tension," are often addressed together. *State v. Maestas*, 244 Ariz. 9, 16, 417 P.3d 774, 781 (2018) (Bolick, J., concurring). This brief will address them in turn.

A. The Separation of Powers Doctrine Does Not Support the Trial Court's "Textual Commitment" Reasoning

1. *Except in Exceptional Cases, Legislative Rulemaking Is Judicially Reviewable*

Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution grant the Arizona Legislature the ability to manage its internal affairs. Below, the Defendant urged—and the trial court agreed—that this grant demonstrates a "textually demonstrable constitutional commitment of the issue to a coordinate political branch," and that such a commitment renders the case nonjusticiable. Exhibit 2, at 6. On the basis of Arizona House of Representatives Rule 32(H), which sets the "exclusive[]" "notice and agenda requirements for the House," and Arizona Senate Rule 7 of the Fifty-Fourth Legislature which purports to do the same, the Defendant argued that "no statute can supersede each legislative house's constitutional right and responsibility to govern its own proceedings." Exhibit 1 at 5. The legal question that must be examined is not whether the House or Senate procedural rules

delegate the "exclusive" authority to set internal procedural rules, but whether the Constitution does. Long settled precedent dictates that it does not.

Defendant-Appellee's broad reading of the constitutional grant of authority, which it argues constitutes a "textually demonstrable commitment" under the applicable standard, suggests that the Legislature can make any and all rules regardless of context or countervailing interests. But to engage in such a "delicate exercise in constitutional interpretation" *Powell*, 395 U.S. at 521, courts must assess first what constitutes a "textually demonstrable constitutional commitment" in the first place. *Baker v. Carr*, 369 U.S. 186, 217 (1962). A textual 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 id.* Two U.S. Supreme Court cases provide a useful valence on this point: *Nixon v. United States*, 506 U.S. 224, 238 (1993), which found a nonjusticiable textual commitment to the legislature and *Powell*, 395 U.S. at 548, which found none.

There are few examples of clear and absolute commitments to coordinate political branches. Even though "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. at 240 (White, J., concurring), *Nixon* presents the clearest – and necessarily limited – example of such a commitment. There, the Supreme Court examined Art. I, § 3, cl. 6 of the U.S. Constitution, which states that the "Senate

shall have the sole Power to try all Impeachments," to determine if that "sole" delegation of power was subject to judicial review. *Id.* at 229, 240-41. The *Nixon* Court engaged in a searching constitutional analysis, carefully parsing historical material from the Constitutional Convention, among other sources. *See id.* at 229-237. The Court concluded that although the impeachment power was judicial in nature, evidence indicated that the Framers believed it belonged exclusively to the Senate and not to the courts, and that it was an important political check on the judicial branch. *Id.* at 234-35.

Dispositive for the Court was the "language and structure" of Art. I, § 3, cl. 6, which it deemed "revealing." *Id.* at 229. The *Nixon* Court observed 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." *Id.* 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 distinctive modifier can signal an intent to delegate absolute power to a coordinate political branch. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches" under Art. I, § 8, cl. 16 and Art. II, respectively) (emphasis in original); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (Art. I, § 1 grants Congress sole authority to legislate). There

is no textual or historical indication in the case at bar, as there was in *Nixon*, that would counsel a different result. *See Nixon*, 506 U.S. at 241 ("The Framers' sparing use of 'sole' is thought to . . . give the Senate exclusive interpretive authority over the Clause."). To the contrary, and as described below, the jurisprudence suggests that delegations of authority over legislative procedural rules are not "textually committed" to the Legislature so as to displace judicial review.

On the other end of the spectrum sits *Powell v. McCormack*, in which the Supreme Court considered whether Art. I, § 5 of the U.S. Constitution granted the House total and exclusive authority to determine the "qualifications" of its own members, or whether it was subject to judicial review. 395 U.S. at 521. There, as here, the Court was tasked with assessing whether such an explicit constitutional delegation—or "textual commitment"—would breach the walls of the separation of powers. *Id.* The *Powell* Court made clear that while the Legislature maintains discretion to set rules and processes, this discretion is not absolute and is limited by the judiciary's textual reading and interpretation of the Constitution. *Id*. at 526. It specifically held that the House only had power to assess those qualifications specifically listed in the Constitution: that is, its discretion was limited to judging age, citizenship, and residency, set forth in Article I. *Id*. at 550. Ultimately,

leaning on historical evidence[7] and constitutional analysis, *Powell* not only made clear that the case was justiciable, it concluded that while the Legislature maintains

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[7] *Powell* carefully scrutinized Art. I, § 5 and its historical underpinnings to better inform its decision. The Court looked beyond the text of Art. I, § 5 to examine "the reign of Henry IV (1399-1413)," archival material from English Parliament dating back to 1553, historical material leading up to the Constitutional Convention in 1787, discussion post-Ratification, and even the Force Act of 1870. As history was essential to the Court's determination in *Powell,* so too should it assist the panel here. *Id.* at 513 n.35 (rejecting the argument that "it would have been 'unthinkable' to the Framers of the Constitution for courts to review the decision of a legislature to exclude a member"). During the founding, the Framers explicitly considered the issue presented here—during early debates, the framers raised separation of powers concerns that focused on conflict between the legislative and *executive branches*, not the legislative and *judicial branches*. *See* Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 Cal. L. Rev. 1341, 1361 (1990). A primary concern was that the executive, if given the power to control the legislature's procedural rules, would succeed in dominating it. James E. Castello, *Comment, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 Cal. L. Rev. 491, 533-34 (1986). The founders sought to avoid the same problems encountered at the King's Bench—a domineering and tyrannical influence over law-making—and wanted to "insulat[e] the judiciary and particularly the legislature from executive manipulation." Gordon S. Wood, The Creation of the American Republic 157 (1969).

This concern eventually generated the limitation on the delegation of authority to the Legislature to draft its own procedural rules. So while it is true that the founders intentionally drafted the 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." Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine,* 78 Cal. L. Rev. at 1361 (emphasis added). The scholarship is in agreement on this point. *See* Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 Geo. L.J. 323, 377-78 (2009). Critically, this does not—and could not—extend to the judiciary, because courts are already unempowered to interfere with the legislative process. "Once the legislature's authority to create rules is established, no additional separation of

discretion to set rules and processes, this discretion is not absolute and is limited by the judiciary's textual reading and interpretation of the Constitution. *Id.* at 548. That is the case here.

The trial court's fundamental error was to assume that, by mere dint of inclusion into Article IV of the Arizona Constitution, the Legislature's procedural rules became judicially unreviewable. That is not so. Although Article IV, Part 2, Sections 8 and 9 allow the Legislature *as a whole constitutive body* the ability to manage its day-to-day affairs, they do not provide that a mere subset of several Legislative committees has that same constitutive power, including the power to meet, deliberate, and legislate behind closed doors without public scrutiny. To begin, Section 8 very broadly allows the House to "determine its own rules of procedure." Although facially a broad grant of authority, it hardly possesses the kind of pinpoint intention that signals total, unreviewable autonomy as in *Nixon*. It does not indicate the clear intent to remove the judiciary as a check on the legislature as it must, given the extensive caselaw on this issue. *Yellin v. United States*, 374 U.S. 109, 114 (1963) (collecting cases). Further, the trial court relied on

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powers rationale exists for excepting rules promulgated under the rulemaking clause from the long-accepted process of judicial review." Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine,* 78 Cal. L. Rev. at 1361-62.

Section 9, which provides that "the majority of the members of each house shall constitute a quorum to do business, but a smaller number may meet, adjourn from day to day, and compel the attendance of absent members, in *such manner and under such penalties as each house may prescribe*." Exhibit 3, Transcript of Oral Argument at 10 (emphasis added). Although Defendant argued below that this grant provides the Legislature total autonomy over its duly held meetings, it is necessarily limited to the preceding clauses, such that the House may "compel the attendance of absent members," in "any manner" the full House "prescribes"; it does not suggest the House may undertake any procedure it chooses related to any matter. This Court's textual reading and interpretation of Article IV, Part 2, Sections 8 and 9, as the U.S. Supreme Court did in *Powell*, should allow it to conclude that though the Legislature the ability to manage its day-to-day affairs, that ability—power, even—does not render it total, absolute, or exclusive.

Under close inspection, this case does not present the same kind of textual commitment seen in *Nixon*, instead aligning much more closely with *Powell*. But not only is *Powell* hardly[8] the only case on Appellants' side of the textual

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[8] Although Defendant-Appellee's spate of cases holding that challenges to open meeting laws were nonjusticiable appeared to persuade the trial court (*see* Exhibit 2 at 7), a more careful inquiry into the totality of jurisprudence actually tilts in Appellants' favor. A surplusage of decisions have reached the merits of cases where, as here, individual Plaintiffs brought a challenge to an internal procedural

commitment issue, the issue itself needs further illumination. As one legal scholar observed,

> Judging from the cases, even 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, but only the kind of commitment found, say, in the grants to Congress in Article I, § 8; the courts consider daily whether the political branches exercise power textually committed to them with due respect for constitutional limitations or prohibitions."

Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 Yale L.J. 597, 605 n. 27 (1976).

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rule or something tantamount. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969) (challenge to House's ability to exclude individual from serving House term); *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (challenge to federal statute did not conflict with House powers vested under Origination Clause); *Yellin v. United States*, 374 U.S. 109, 123 (1963) (challenge to House's application of rule governing when a witness will be interrogated in executive session); *Christoffel v. United States*, 338 U.S. 84 (1949) (challenge to House's interpretation of its quorum rule); *United States v. Smith*, 286 U.S. 6 (1932) (challenge to Senate's interpretation of its rule governing reconsideration of Senate vote); *Davids v. Akers,* 549 F.2d 120 (9th Cir. 1977) (challenge to appointments to standing committees); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (challenge to Alabama Accountability Act that appeared to conflict with legislature's "internal rules or procedures"); *Common Cause/Pa. v. Pennsylvania*, 710 A.2d 108 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000) (challenge to vehicle act argued to conflict with General Assembly internal procedural rules); *Pa. AFL-CIO v. Pennsylvania*, 691 A.2d 1023, 1033 (Pa. Commw. Ct. 1997) (challenge to labor and insurance act argued to conflict with General Assembly internal procedural rules); *Wilkins v. Gagliardi*, 556 N.W.2d 171, 176 (Mich. Ct. App. 1996) (open meeting law claim held justiciable).

Vander Jagt v. O'Neill, a D.C. Circuit case interpreting House procedural rules, discussed at length what "textually demonstrable commitment" actually means in practice and supports Appellants' reading. 699 F.2d 1166 (D.C. Cir. 1982). There, Republican congressional members sued Democratic House leadership for allegedly providing them with fewer seats on certain House committees than they were proportionally owed. *Id*. Defendants moved to dismiss, arguing that because the internal House rules of procedure limited committee membership, a challenge to the allocation of committee seats was essentially a challenge to those rules. *See* Art. I, § 5, cl. 2 ("the Constitution confers upon the House the power 'to determine the Rules of its Proceedings'"). As here, the district court dismissed the complaint on political question grounds, finding that "[t]his textual commitment of the issue to the House would oust the Court's jurisdiction." 699 F.2d at 1172.

Although the D.C. Circuit upheld the district court's dismissal, it sharply rejected its interpretation of the political question doctrine as applied to the House rules of procedure. The D.C. Circuit observed that although some decisions had in the past taken "special care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch," it concluded emphatically that "it is not evident why we must treat congressional rules with 'special care,' or with more than the customary deference we show other legislative enactment." *Id*. at 1173

(citation omitted). Following this recalibration, *Vander Jagt* clarified the "textually demonstrable commitment" standard originating in *Baker*. The Court first took care to reject past practices that had exalted the phrase as a "*talismanic label*," wholly rejecting the idea that this language immunized the Legislature from judicial review. *Id.* at 1174 (citing *Baker*, quotations omitted, emphasis added). It held definitively that the "textually demonstrable commitment" phrase "simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt."[9] *Id.* at 1173. The D.C. Circuit instead advised that courts approach these issues on a "case-by-case inquiry," noting "that the best way to translate those concerns into principled decisionmaking is through the discretion of [a court] to grant or to withhold injunctive or declaratory relief." *Id.* at 1174. That is Appellants' ask here.

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[9] There is a scholarly consensus on this point. *See* Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 Geo. L.J. at 378 ("As several other scholars have suggested, 'plausibly the best reading' of [the rulemaking Clause] is that its purpose is not to insulate the legislative process from judicial review, but rather to establish 'cameral autonomy'—the authority of each house to enact procedural rules, independent of the other house and of Congress as whole").

2. *Separation of Powers Principles Mandate that Courts Review Alleged Statutory Violations*

Plaintiffs seek a judicial order that legislators abide by the legislative commands of the OML, a classic judicial function in a system of separation of powers. Indeed, "The 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). To Appellants' knowledge, the Arizona Supreme Court has not, either. Adjudicating the constitutionality of a Congressional act remains an indispensable role of the judiciary. *See Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."). This is true even in the realm of international affairs, where courts have been historically most reluctant to engage in the uncomfortable work of adjudicating which branch has what power over foreign policy. *See, e.g., id.* at 230. The trial court cannot abdicate its clear and pronounced duty of judicial review in these cases. *See El-Shifa Pharmaceutical Industries Co.*, 607 F.3d at 851 (Ginsburg, J., concurring) ("Under *Baker v. Carr* a statutory case generally does not present a non-justiciable political question because the interpretation of legislation

is a recurring and accepted task for the federal courts.") (internal quotation omitted).

Plaintiffs ask the Court to review Defendants' conduct—legislators meeting in private to conduct public affairs—as against a statutory command set forth in the OML. Though the Constitution delegates some authority over its internal affairs, this does not present a nonjusticiable issue. The Supreme Court faced a similar issue definitively in *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 196 (2012). There, the Plaintiff, a U.S. citizen born in Jerusalem, sought to have "Israel" listed as his place of birth on his passport under a statute, the Foreign Relations Authorization Act, 116 Stat. 1350 § 214. Secretary of State Clinton argued, and the D.C. Circuit agreed, that although the statute indeed granted him this right, the political question doctrine barred the court from reaching the merits of the case, because "[r]esolving [Zivotofsky's] claim on the merits would necessarily require the Court to decide the political status of Jerusalem," reasoning that the Constitution gives the Executive the "exclusive power to recognize foreign sovereigns." *Id.* at 193-94.

In *Zivotofsky*, the D.C. Circuit concluded—as the trial court did in this case—that adjudicating this statutory right would necessarily draw the judiciary into an area in which another branch of government is said to have exclusive and unreviewable authority. *Id.* There, as on appeal, Secretary of State argued that

"there is 'a textually demonstrable constitutional commitment'" to the President of the sole power to recognize foreign sovereigns, and thus the case was not justiciable.

The Supreme Court disagreed, reversing 8-1, basing its holding on the clear mandate to review Zivotofsky's statutory claim. *See id.* at 196 ("the existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide Zivotofsky's claim."). As Justice Roberts, writing for the Court, observed:

> The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Id. As will be explained *infra* in Section I.C.1, the reason the judicial exercise is familiar is because these types of challenges are properly interpreted as attacks on the constitutionality of the statute itself. As here, it remains judicial duty to make this determination, and it cannot refrain from doing so simply because the issue has political implications. *Id.*

3. Courts Review Individual Rights Claims

In addition to the principle establishing that the political question doctrine does not constrain courts where an individual asserts a statutory right, another distinguishing principle emerges. Courts consistently reach the merits of individual

rights and fundamental rights cases. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1982) (collecting cases). In the realm of individual rights, judicial power is at its maximum. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("the Court has repeatedly adjudicated separation-of-powers claims brought by people acting in their individual capacities."); *Doe v. McMillan*, 412 U.S. 306, 326 (1973) ("We always have recognized the 'judicial power to determine the validity of legislative actions impinging on individual rights'"). This is true in Arizona as well. *See, e.g., State v. Maestas*, 244 Ariz. 9, 16, 417 P.3d 774, 781 (2018) (Bolick, J., concurring) ("especially where vindication of individual rights is concerned, we should not adopt prudential doctrines that restrict access to the courts or judicial resolution of constitutional issues without careful consideration."). This principle is most clearly illuminated where plaintiffs are private citizens and not, say, members of the legislature engaging in a protracted intrabranch quarrel. *See, e.g., Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985).

Marbury is instructive on this point as well, establishing that "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 19. This distinguishable principle had served as a lodestar for many courts grappling with political doctrine questions. As one leading scholar divined,

Marbury presents "one structural characteristic for courts to use in deciding whether a constitutional question presents a political question: Does it involve an individual right, or does it involve a more general question of political judgment and discretion?" Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. at 254.

The Supreme Court had further opportunity to memorialize this principle in *United States v. Smith*, 286 U.S. 6 (1932). There, the U.S. Senate was set to appoint George Smith to the Federal Power Commission, only to have a change of heart over the appointment seemingly overnight. *Id.* at 28. This forced Smith to challenge the procedures governing reconsideration of Senate votes, an issue which appeared plainly within the province of the Senate's internal rules. *See generally Smith*, 286 U.S. 6. The decision set down an important precedent: private individuals such as *Smith* should have their day in court, holding that where "construction to be given to the rules affects persons *other than members of the Senate*, the question presented is of necessity a judicial one." *Id.* at 33; *see also* Miller, *Justiciability of Legislative Rules*, 78 Cal. L. Rev. at 1351 (discussing *Smith,* noting that "when the dispute involved more than merely intra-legislative squabbling, the Court readily assumed a more intrusive role") (emphasis added).

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Courts reliably discern between a private citizen plaintiff and an elected or appointed official plaintiff when determining justiciability.[10] *Compare Smith*, 286 U.S. 6 (1932), *Christoffel v. United States*, 338 U.S. 84 (1949) (private individual's challenge to House quorum in which he was a witness held justiciable), and *Yellin*, 374 U.S. 109 (1963) (private individual's challenge to House interrogation held justiciable) *with Metzenbaum v. Fed. Energy Regulatory Comm.*, 675 F.2d 1282 (D.C. Cir. 1982) (congressional members' challenge to rulemaking clause held nonjusticiable), *Hastings v. United States Senate*, *Impeachment Trial Comm.,* 716 F. Supp. 38 (D.D.C. 1989) (federal judge's challenge to impeachment proceeding held nonjusticiable), and *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990) (same). This distinguishing principle was made clear in *Gregg v. Barrett*, 771 F.2d

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[10] The dissent in *Abood v. League of Women Voters of Alaska*, which dealt with a challenge to a house procedural rule, made this clear. 743 P.2d 333, 344–45 (Alaska 1987). There, Justice Compton observed:

> Whereas in *Malone* and *Abood* the controversy was between members of the legislature, who were parties to the rule making and enforcement proceedings, in *Smith* the affected person was other than a member of the [United States] senate and unable to personally participate in rectifying the wrong done him. So it is in the current case. The affected persons are not members of the legislature and in fact their interests are at odds with the legislature. Their only recourse is to the courts which, as *Smith* suggests, should not decline to decide these disputes.

Id.

539 (D.C. Cir. 1985), where the D.C. Circuit, after noting separation of powers concerns, dismissed Congressional plaintiffs' claims but did not for those of the private plaintiffs. *See id.* at 546 ("an important reason to withhold equitable relief for congressional plaintiffs is the possibility that other, private plaintiffs may bring suit in a context less laden with separation-of-powers concerns.").

Here, a number of Arizonans, by themselves and through nonprofits, challenge the Legislature's practice of governing-in-secret, a rebuke of hallmark democratic principles. They allege that this practice violates their right as Arizonans to an open government. *See State v. Maestas*, 244 Ariz. 9, 17, 417 P.3d 774, 782 (2018) (Bolick, J., concurring) ("For as the opening words of our Declaration of Rights proclaim: 'A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.' Ariz. Const. art. 2, § 1."). As in all of the foregoing cases, the legislative entity here attempts to shield its conduct from judicial review, citing a constitutional grant of authority which it alleges offers complete and unreviewable autonomy. And yet, in none of the foregoing cases did that constitutional grant of authority render the case nonjusticiable. The reality remains that an overwhelming number of courts have reached the merits of similar cases, and for good reason: the judiciary remains an indispensable check on the legislative rulemaking power.

B. <u>The Standard is Judicially Manageable</u>

Even if the trial court correctly concluded that Article IV constitutes a "textually demonstrable commitment to a coordinate political branch"—which Appellants have shown to be otherwise—it still would not render the issue nonjusticiable. One factor among many 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 v. Carr*, 369 U.S. 186, 223 (1962). The United States Supreme Court has rarely used this test as a standalone basis for a non-justiciability ruling. *See Maestas*, 244 Ariz. at 16, 417 P.3d at 781 (Bolick, J., concurring) (citing *Vieth v. Jubelirer*, 541 U.S. 267 (2004)). At oral argument, the Defendant stated that "[t]he constitution says the legislature will meet in such manner and under such penalties that each house may prescribe. There's not a standard for the Court to apply. The standard is whatever each house may prescribe. That means this is not justiciable." Exhibit 3 at 10. The trial court agreed, holding that there "appears to be no judicially manageable standard for determining what should be included in those legislative rules of procedure," positing that "a reasonable person could imagine a broad range of rules of procedure a Legislature might adopt to meet the specific needs of each house and its committees and its members." Exhibit 2 at 6.

The trial court's two-sentence surmise must be rejected on a number of grounds. First, the court cannot rely upon the Legislature's *ipse dixit*; the Court cannot merely accept a litigant's suggestion that the Court perform its constitutional role and develop standards as part of its duty of judicial review. As Justice Bolick of the Arizona Supreme Court stated of the judicially manageable standards test recently,

> '[i]f it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution.' *Id.* Constitutional limits 'can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'

Maestas, 244 Ariz. at 15, 417 P.3d at 780 (Bolick, J., concurring) (quoting *The Federalist No. 78*, Alexander Hamilton, 429-430). Indeed, Justice Bolick's concurrence in *Maestas* has called its ongoing application—particularly in a case such as this one—into question. *See* 244 Ariz. at 16, 417 P.3d at 781 ("But the prudential requirement, which avoids constitutional interpretation and enforcement, seems at odds with any constitution that establishes individual rights and limits governmental powers").

Courts do not decline to hear cases merely because the questions are exceedingly difficult or complicated. *See Zivotofsky ex rel. Zivotofsky v. Clinton*,

566 U.S. 189, 205 (2012) (Sotomayor, J., concurring). The Ninth Circuit stressed that the focus of this *Baker* factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (quotations omitted). *Baker*, focusing on the need for a "case-by-case inquiry," emphasized the "necessity for discriminating inquiry into the precise facts and posture of the particular case,"[11] reasoning that it is impossible to find "resolution by any semantic cataloguing." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

In the present case, the Court has the distinct and well-established tool of statutory interpretation to consider whether (a) the Legislature violated the participation of a quorum of each of the legislative committees at the ALEC summit, or (b) whether the OML itself is even constitutional as applied to the Legislature. Courts have been clear in establishing that statutory interpretation is a traditional and central function of the courts. *U.S. v. Munoz-Flores,* 495 U.S. 385, 395 (1990) ("The Government concedes, as it must, that the 'general nature of the

[11] And even if a "workable standard . . . has not yet emerged, [it] does not mean that none will emerge in the future." *Vieth v. Jubelirer*, 541 U.S. 267, 270 (2004) (Kennedy, J. concurring).

inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function.'"); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). This potential conflict is steeped in precedent.

In *Powell*, the Court ruled that judicially manageable standards existed to adjudicate the extremely complicated question of whether the House had the power to exclude the Congressman-elect under the Constitution. *Powell v. McCormack*, 395 U.S. 486, 549 (1969). The Court made clear that while the Legislature maintains discretion to set its rules and procedures to exclude members of the House, for example, this discretion is not absolute and is limited by the judiciary's role as the textual interpreter of the Constitution. *Vander Jagt* is in accord. There, the D.C. Circuit explained that they have always had the power to review congressional operating rules despite any reluctance to do so in the past. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1172–73 (D.C. Cir. 1982). The court stressed that review of congressional rules is meant to be equally deferential, but no more so, than the review of most other legislative actions. *Id.* at 1172. So too here.

Conversely, the U.S. Supreme Court has consistently recognized a class of controversies which clearly do *not* lend themselves to judicial standards. *Baker v. Carr,* 369 U.S. 186, 280-81 (1962). Such controversies include those conflicts concerning war or foreign affairs. *Id.* at 281-86. As the Supreme Court later held in

Japan Whaling, "[t]he Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)). The D.C. Circuit agreed in *El-Shifa*, noting that "in military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well- founded." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010). In those cases, "the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.* at 843 (quotation omitted).

Even in areas in which the judiciary is traditionally loathe to interfere, however, many courts reach merits determinations. For example, an especially vexing case involving an international corporation and "Nazi coercion" is instructive. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). There, the Eleventh Circuit held that although the case presented serious concerns about international foreign policy interests and international comity concerns, "federal courts adjudicate claims against foreign corporations every day and can consider in their decisions." *Id.* at 1237. The trial court, like all courts, can

consider a challenge to a statute. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

This case is not one in which courts traditionally lack competence. As the compendium of Appellants' cases suggest, the judiciary is capable of deciding whether the OML conflicts with the Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution. The trial court concluded that, given the broad deference afforded to the Legislature over internal affairs, that the judiciary simply must wash its hands with the decision. *See* Exhibit 2 at 7 ("Imagine a broad range of rules of procedure a Legislature might adopt to meet the specific needs."). This reversible error ignores the fact that (1) courts can and must review statutes for constitutionality; (2) the judiciary is well-equipped to adjudicate an alleged statutory violation; and (3) that the Legislative rules of procedure do not actually conflict with the OML at all, *see infra* Section II.B (House Rule 9.C.1 and 9.C.2 both mandate that meetings have to be open to the public and that meetings have to take place at regularly scheduled times). A violation of the OML does not undermine the Legislature's ability to handle its own affairs—it only means that it has to follow the law like everyone else. The task is relatively straightforward and mandated by established caselaw. *See, e.g., Zivotofsky*, 566 U.S. at 196; *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1172–73 (D.C. Cir. 1982).

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C. The Supreme Court's Ruling in *Zivotofsky* Controls

1. *Zivotofsky and the Separation of Powers Doctrine Counsel A Reversal of the Trial Court's Nonjusticiability Holding and This Court Should Issue a Remand*

Defendant raised two objections to the application of the OML to their private policy meetings: (1) as described above, that Plaintiffs claims present a political, not legal question, so that the judiciary has no role to play in evaluating the Legislature's actions; and (2) as described below, because of an asserted total legislative prerogative to set its own rules, it would be unconstitutional for the OML to apply to the particular activities challenged by Plaintiffs. Although Defendant's counsel asserted under direct questioning at oral argument that it was *not* squaring a constitutional challenge to the OML as-applied to the Legislature, that is precisely what it is arguing. *See* Exhibit 3 at 24. The caselaw on this point is incontrovertible.

The Supreme Court has established how to handle an alleged conflict between a constitutionally-delegated prerogative and a statute in *Zivotofsky*, 566 U.S. 189 (2012).[12] To the Supreme Court, a clear, binary proposition existed: (a) if

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[12] *Zivotofsky* is hardly the only Supreme Court decision to apply this framework. *See, e.g., Myers v. United States*, 272 U.S. 52, 176 (1926) (finding a statute unconstitutional because it encroached upon the President's removal power); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (finding a statute unconstitutional because it "intruded into the executive function"); *Morrison v. Olson*, 487 U.S. 654,

the statute infringed to the constitutionally delegated prerogative, "the law [itself] must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim" or, (b) if "the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated." *Id.* at 196. As the Court observed, "the only real question for the courts is whether the statute is constitutional." *Id*. at 197. As Justice Sotomayor reasoned, "[r]esolution of that issue is not one 'textually committed' to another branch; to the contrary, it is committed to this one." *Id*. at 208 (Sotomayor, J., concurring).

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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"). In *INS v. Chadha*, 462 U.S. 919 (1983), Chadha, a student who had overstayed his visa, obtained a suspension of deportation from an immigration court. The House of Representatives, owing to its power under § 244(c)(2) of the INA, 8 U.S.C. § 1254(a)(1), vetoed the suspension and ordered the immigration court to reopen deportation proceedings. *Id.* at 928. Chadha moved to terminate his deportation proceedings on the ground that § 244(c)(2) is unconstitutional. *Id*. The House argued that the case presented a political question as a challenge to Congress' authority under the Naturalization Clause, U.S. Const. art. I, § 8, cl. 4, and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18., which it alleged infringed upon its "unreviewable authority over the regulation of [noncitizens]." *Id.* at 940-41. The Supreme Court disagreed, reminding the House that only the courts can decide the constitutionality of a statute. *See id.* at 941 ("if this turns the question into a political question virtually every challenge to the constitutionality of a statute would be a political question.").

The Supreme Court's decision in *Zivotofsky* counsels this Court on how to evaluate these arguments. In addition to establishing that the applicability and constitutionality of a statutory provision is always a legal, and not political question, it explains that once the court decides there is no political question and the judiciary is competent to evaluate the merits of Plaintiffs claims, it should remand to the lower court for it to evaluate a Defendant's secondary, as-applied merits challenge rather than address it in the first instance on appeal. *Id*. at 201. After finding that there was no political question over the asserted textual commitment of foreign relations power, the Court remanded with instructions to determine the legal question presented, which was whether the relevant legislative action violated the Constitution, (namely, the Executive Branch's foreign relations power). *Id*.

This Court should remand as well. As the end of the *Zivotofsky* opinion noted, "[i]n particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." *Id*. That is because, as the Court noted, it was "without the benefit of thorough lower court opinions to guide our analysis of the merits," ruling that appellate courts are courts "of final review and not first view." *Id.* Indeed, resolution of Zivotofsky's claim—as the claim in the instant case—"demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition

powers." *Id*. Such an involved constitutional inquiry should have the full benefit of lower court consideration before an appellate panel can rule on the issue. And that is precisely what happened in *Zivotofsky*: after full briefing, the D.C. Circuit carefully considered the textual and historical implications of the statute and constitutional powers that were alleged to conflict. *See Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). There, the D.C. Circuit held the statute unconstitutional, *see id.* at 200, which the Supreme Court agreed with in *Zivotofsky II*, ruling that based on the constitutional delegation to the President which it found to be "exclusive," the power to recognize foreign states resides in the President alone. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015).

2. *Failure to Follow Zivotofsky Would Undermine the Judiciary's Power and Lead to Absurd Results*

The judiciary's role is either to interpret the rule according to normal principles of statutory interpretation, or to determine whether the rule is constitutional—a routine judicial exercise. This is precisely what Justice Marshall meant when he wrote it is the "province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The judiciary remains an indispensable check on the actions of the other two branches of government, particularly where, as here, individuals seek redress of statutory

rights. Where courts abdicate this "province and duty," the bedrock of the separation of powers begins to crack.

The trial court's summary disposition of a complex and involved constitutional question, deferring to Defendant's sweepingly broad interpretation, undermines the fundamental role and power of the judiciary. This Court must not sanction a decision that concluded in one page that this case was nonjusticiable.[13] Exhibit 2 at 6. The breadth of the Defendant's argument, which the trial court accepted with alacrity, would lead to absurd results. Specifically, the supposition that the "OML necessarily are subordinate to, and subsumed into, each legislative house's constitutional prerogative to order its own proceedings," and the trial court's decision affirming it, presents enormous danger to the judiciary's role as a check on the legislative branch.

It's also wrong. The Arizona Constitution does not grant the legislative branch absolute autonomy over its rules of procedure. Nor could it. Although Article IV, Part 2, Sections 8 and 9 allow the Legislature the right to set the times at which it meets and to decide how many present legislators constitute a quorum, it

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[13] To its credit, the trial court was hardly alone in underestimating the rigor such an inquiry entails; the question has vexed even the most esteemed jurists. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 208 (2012) (Sotomayor, J., concurring) ("In two respects, however, my understanding of the political question doctrine might require a court to engage in further analysis beyond that relied upon by the Court").

would not allow the Legislature, for instance, the ability to pass rules that would prohibit women legislators from committee membership, that would prohibit Black legislators from speaking on the floor, or that would violate the Arizona criminal codes. Though the Constitution affords the Legislature the right to manage its day-to-day affairs, this right does not absolve the Legislature from following the law. That includes the OML.

Further, the trial court failed to engage with the possibility that the Legislative rules of procedure and the OML could coexist in harmony. A counterfactual is instructive on this point. Take, for instance, a hypothetical presenting similar facts to Preston Brooks' infamous caning of Charles Sumner, which occurred on the U.S. Senate floor in 1856. Had Arizona's rules of procedure been in place, the Legislature would have been well within its right to punish Preston Brooks under Article IV, Part 2, Section 11 of the Arizona Constitution, which provides that "Each house may punish its members for disorderly behavior." However, no court would accept the proposition that the Legislature would maintain the complete and sole discretion to punish Senator Brooks. The criminal codes would prescribe the ability to prosecute him for assault and battery at minimum, and any argument to the contrary would be laughed out of court. The two would plainly exist side-by-side.

This Court must render a decision stating that although the Constitution grants the Legislature the ability to manage its affairs, it does not displace the judiciary's ability to remediate violations of statutes governing the Legislature's conduct. "In this case, determining the constitutionality of [the statute] involves deciding whether the statute impermissibly intrudes upon [ ] powers [vested] under the Constitution." *Zivotofsky*, 566 U.S. at 196. That is the case here. This Court can issue that decision and remand to the trial court to answer the constitutional validity of the OML. In the event it is not so inclined, and seeks to reach the weighty constitutional issue underlying Defendant's argument, we brief that analysis below.

II. <u>Defendant Asserts An As-Applied Challenge to the OML</u>

During oral argument Defendant maintained that it was not challenging the constitutionality of the OML, explicitly declining to claim its challenge as one as-applied. Exhibit 3 at 5. The reality, however, is that this is *precisely* its argument. Defendant maintains that Plaintiffs cannot seek redress of OML violation because, even if the Legislature did conduct secretive, closed-door meetings, the Legislature can hold meetings as it sees fit, owing to its authority vested under Article IV, Part 2, Sections 8 and 9. As discussed *supra*, once the Court determines, as it should, that there is no political question in this case, it should remand to the district court to resolve this as-applied merits challenge to the statute's application. Should this Court wish to reach the merits challenge as part of this appeal, however, it should

find that, based on Defendants' heavy burden and on frameworks set down by well-established precedent, that the OML does not violate the Arizona Constitution.

A. <u>Defendant Cannot Carry its Heavy Burden</u>

Defendant's dismissal motion thus thrusts into spotlight the question as to whether Plaintiffs' challenge to the OML runs afoul of Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution. Arizona appellate courts review the constitutionality of statutes *de novo*. *State v. Holle*, 240 Ariz. 300, 302 ¶ 8, 379 P.3d 197, 199 (2016). An "as applied" challenge assumes the standard is otherwise constitutionally valid and enforceable, but argues it has been applied in an unconstitutional manner to a particular party. *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). The Legislature's actions violate the explicit text, legislative intent, and spirit underlying the OML.

In Arizona, such a constitutional attack upon a statute triggers several "cardinal rules." *Giss v. Jordan*, 82 Ariz. 152, 158, 309 P.2d 779, 783 (1957). The first is a "strong" presumption in favor of a statute's constitutionality, such that the challenging party bears the burden of proving its unconstitutionality. *See Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977) (in banc); *Doty-Perez v. Doty-Perez*, 245 Ariz. 229, 233, 426 P.3d 1208, 1212 (Ct. App. 2018). Indeed, "[a]n act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be

upheld unless it is clearly unconstitutional." *State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) (in banc); *accord Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

Further, the Legislature is presumed to pass laws with the Constitution in mind. Arizona jurisprudence remains steadfast in the belief that "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." *Giss*, 82 Ariz. at 158, 309 P.2d at 783*; see State v. Arevalo*, 249 Ariz. 370, 381, 470 P.3d 644, 655 (2020) (Bolick, J., concurring). The U.S. Supreme Court is in accord with this presumption of constitutionality, although in Arizona "it is [even] more pronounced here than at the national level." *See Arevalo*, 249 Ariz. at 378, 470 P.3d at 652; *accord United States v. Morrison*, 529 U.S. 598, 607 (2000). In Arizona, "it is still the case that 'courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.'" *Arevalo*, 249 Ariz. at 381, 470 P.3d at 655 (2020).

Courts may "consider either the legislature's stated goal or any hypothetical basis for its action," in evaluating a statute's proper scope. *State v. Lowery*, 230 Ariz. 536, 541, ¶ 15, 287 P.3d 830, 835 (Ct. App. 2012); *see also State v. Tyau*, 250

Ariz. 659, ¶ 18, 483 P.3d 281, 287 (Ct. App. 2021). This Court can divine the legislature's stated goal from numerous sources, including the text of the OML and its history. In 1962, the Arizona Legislature adopted the OML to ensure that the public's business was conducted openly, and that the public would be able to attend and listen to the deliberations and proceedings. 1962 Ariz. Sess. Laws ch. 138, § 2. In 1978, "after a series of court opinions narrowly construing the Open Meeting Law," the Legislature reiterated its policy by adding Ariz. Rev. Stat. § 38-431.09. Ariz. Att'y Gen., Agency Handbook, 7.2.2, at 1 (Rev. 2012), *available at* https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_7.pdf. That section of the OML reads: "It is the public policy of this state that meetings of public bodies be conducted openly." Ariz. Rev. Stat. § 38-431.09(A). As the Attorney General, in his Arizona Agency Handbook for State officers, boards, and agencies, has emphasized, "any uncertainty under the Open Meeting Law should be resolved in favor of openness in government. Any question whether the Open Meeting Law applies to a certain public body likewise should be resolved in favor of applying the law." Ariz. Att'y Gen., Agency Handbook, 7.2.2, at 2.

This provision can leave no uncertainty about the Legislature's goals. And, where language is unambiguous, it is normally conclusive, absent clear legislative

intent to the contrary. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983) (in banc); Ariz. Op. Att'y Gen. No. I97-012, 1997 WL 566675 at *2 (Aug. 18, 1997). *See Walls v. Ariz. Dep't of Pub. Safety,* 170 Ariz. 591, 594, 826 P.2d 1217, 1220 (Ct. App. 1991) (in interpreting a statute, legislative intent controls and a pragmatic construction is required if a technical construction would lead to an absurdity). The Legislature spoke clearly when it drafted Ariz. Rev. Stat. § 38-431.01(A) requiring that "*[a]ll* 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). That includes the Legislature. *See* Ariz. Rev. Stat. § 38-431(6) ("'Public body' means the legislature"). And, although the Defendant suggested that Ariz. Rev. Stat. § 38-431.08(D), which 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," exists as proof that the Legislature may exempt itself from the OML entirely, this is belied by well-heeled principles of statutory construction. Defendant's broad reading of the constitutional grant of authority would essentially read itself out of the OML entirely. Courts have repeatedly rejected this maneuver. *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979) (in banc); *Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353

(Ct. App. 1995) (exemptions to the Open Meeting Law must not be interpreted so broadly as to frustrate the Open Meeting Law); Ariz. Op. Att'y Gen. No. I97-012, 1997 WL 566675 at *3 ("Based on the Legislature's intent, we will promote open meetings by interpreting A.R.S. § 33-1804 in a way that prohibits attempts to frustrate the statute's purpose."). If the OML states that it intended to subject the Legislature to its provisions, this Court must honor that request. *Johnson v. Superior Court In & For Cnty. of Pima*, 158 Ariz. 507, 509, 763 P.2d 1382, 1384 (Ct. App. 1988) ("the law requires us to give it such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.)

Despite the constitutional prerogative granting the Legislature the power to manage its internal affairs, the OML was passed and drafted with the actions alleged in the complaint in mind. Arizona passed the OML specifically to outlaw this kind of backdoor legislative dealmaking, specifically "to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Karol*, 122 Ariz. at 97, 593 P.2d at 651. The OML is plainly rationally related to this purpose. Arizonans, through their duly elected Legislature, consecrated the right to have an open government in the OML. They did not intend for it to be toothless, and this Court must remediate any violations of that right, especially in light of the numerous legal mechanisms that tilt in Appellants favor. This includes the potential constitutional conflict. *Giss v. Jordan*, 82 Ariz. 152, 159,

309 P.2d 779, 783 (1957) ("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."). Indeed, as the Arizona Supreme Court considered just last year, "[a]s public officials, legislators have all taken an oath to the constitution, courts should assume as a matter of comity that they have acted in accordance with the oath; and that without such a presumption, courts might transgress upon the legislature's powers on the basis of policy disagreements. *State v. Arevalo*, 249 Ariz. 370, 379, 470 P.3d 644, 653 (2020) (Bolick, J., concurring). Allowing the Defendant to continue would subvert the spirit, letter, and force of the OML, and would exempt entirely from the law an entity specifically named and identified.

B. The OML Does Not Conflict With Legislative Procedural Rules

Even if this Court were to decide that the Legislature has total autonomy over its procedural rules, enforcing Arizona's OML against the Legislature in this case does not undermine this ability. To start, the Legislature explicitly drafted and passed the OML, and decided to include itself in the number of public bodies required to comply with the law, *see* Ariz. Rev. Stat. § 38-431(6), and plainly intended to outright ban the practice of governing in secret. *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). This Court, in reviewing the OML, has a "primary goal in interpreting statutes . . . to ascertain and give effect to

the intent of the legislature." *Maricopa Cnty. v. Kinko's Inc.*, 203 Ariz. 496, 500, 56 P.3d 70, 74 (Ct. App. 2002).

Second, Defendant did not point to a single Legislative procedural rule that conflicts with the OML, as it must to carry its weighty burden under the constitutional framework. *See Doty-Perez v. Doty-Perez*, 245 Ariz. 229, 233, 426 P.3d 1208, 1212 (Ct. App. 2018). Indeed, multiple legislative rules mandate that meetings be open to the public, consistent with the OML. House Rules 9.C.1 and 9.C.2 both mandate that meetings be open to the public and take place at regularly scheduled times.[14] Likewise, Rule 27.C requires that the House gallery be open to the public, and Rule 35 dictates the same for all meetings of political party caucuses.[15] Indeed, a review of these rules does not reveal any conflicts with the OML whatsoever. Thus, enforcing the OML against the Legislature in this instance does not undermine its rules of procedure or its ability to create rules of procedure—to the contrary, it establishes harmony. *Stillman v. Marston*, 107 Ariz. 208, 209, 484 P.2d 628, 629 (1971) (in banc) ("whenever possible our statutes are to be construed so as to be in harmony with our Constitution").

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[14] 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.

[15] *Id*. at 24, 30.

Arizona courts have held that where, as here, there is no contradiction between the Constitution and relevant statutes, the two must be read in a manner to give meaning to both. *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 733 (1885); *Roberts v. Spray*, 71 Ariz. 60, 70, 223 P.2d 808, 815 (1950) (statutes and the Constitution "are to be construed together"); *Haag v. Steinle*, 227 Ariz. 212, 215, 225 P.3d 1016, 1019 (Ct. App. 2011) ("If there are two possible interpretations of a statute, courts will adopt the interpretation that is consistent with the Constitution rather than the one that renders the enactment unconstitutional."). Because the OML and Legislative procedural rules are consistent and complementary, the Court should read the two together, rather than refusing to apply the OML to the Legislature.

Third, as we set out in Section I.A.1, *supra*, the reading of exclusive legislative prerogative is misguided. Defendant's broad reading of the constitutional grant of authority suggests the Legislature can make any and all rules regardless of context or countervailing interests. But constitutional reference does not automatically exalt a clause beyond the reach of the separation of powers; courts must engage in an exacting scrutiny before concluding whether to grant a coequal branch of government unreviewable power.

As we argued, above, the issue at bar presents a case much more like *Powell* than *Nixon*. Like *Powell*, Arizona courts are authorized to set the limits of the Legislature's discretion to ensure constitutional and statutory compliance. *Brewer v. Burns*, 222 Ariz. 234, 238, 213 P.3d 671, 675 (2009) (en banc) ("the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine."). Arizona understands this principle well. It delegates clear, absolute, and exclusive authority to various government entities in at least three portions of its Constitution: to (1) the independent redistricting commission to decide whether the Arizona Attorney General or other counsel will represent the state in the legal defense of a redistricting plan, Ariz. Const. Art. IV, Part 2, Section 1 (20); (2) the House of Representatives for impeachment proceedings, Ariz. Const. Art. VIII, Part 2, Section 1; and (3) the corporation commission to issue certificates of incorporation to companies in the state and to foreign corporations to do business in the state, Ariz. Const. Art. XV, Section 5. Although Article IV, Part 2, Sections 8 and 9 of the Arizona Constitution allow the Legislature to handle its day-to-day affairs, they do not grant the Legislature the same types of unreviewable power as the Arizona Constitution does over impeachment, for example. *See Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988). Defendant is wrong on this issue as well.

CONCLUSION

For all of the foregoing reasons, this Court should hold that the trial court's decision dismissing Plaintiffs' complaint on nonjusticiability grounds was in error, and remand to the trial court for further proceedings. In the alternative, should this Court choose to reach the constitutional issue, we ask that this Court uphold the OML as applied to the Legislature.

DATED this 14th day of May 2021.

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Certificate of Service

Plaintiffs Puente *et al.*, through their respective undersigned counsel, certifies that on May 14, 2021, they e-filed a Copy of their Opening Brief utilizing AZ Turbo Court, which caused a copy of the foregoing to be electronically transmitted to:

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A copy of the foregoing was also delivered to opposing counsel via US Postal Service.

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