IN THE SUPREME COURT

STATE OF ARIZONA

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, Plaintiffs/Appellants, v. ARIZONA STATE LEGISLATURE, Defendant/Appellee.	No. CV-22-0069-PR Court of Appeals No. 1 CA-CV 20-0710 Maricopa County Superior Court No. CV2019-014945

SUPPLEMENTAL BRIEF OF DEFENDANT/APPELLEE ARIZONA STATE LEGISLATURE

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com
STATECRAFT
LAW · GOVERNMENT · CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
Counsel for the Arizona State Legislature

TABLE OF CONTENTS

INTRODUCTION 1

I. Puente's Claims Are Not Justiciable Because the Constitution's Rulemaking Clauses Textually Commit to Each House the Full and Exclusive Authority to Implement and Enforce Rules Governing Legislative Meetings 2

A. Overview of the Political Question Doctrine 2

B. The Nonjusticiability of Puente's OML Claims Results From the Rulemaking Clauses Themselves, Not Any Specific Legislative Rule 5

C. The Nonjusticiability of Puente's Claims Does Not Infringe or Impair the Judicial Power 8

1. A Statute Cannot Revoke or Qualify a Constitutional Commitment of Authority to a Single Branch 9

2. The Nonjusticiability of Puente's Claims Does Not Prevent Judicial Enforcement of Constitutional Rights and Limitations 11

II. The OML's Exemption for Legislative Proceedings Aligns the Statute with the Rulemaking Clauses 13

III. The Complaint Alleges, at Most, a Meeting of a Political Caucus 14

IV. The Legislature Does Not Bear the Burden of Proving the Absence of an OML Violation 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Ariz. Indep. Redistricting Comm'n v. Brewer, 229 Ariz. 347 (2012) 3,4
Armer v. Armer, 105 Ariz. 284 (1970) 15
Bank of Am. Nat. Tr. & Sav. Ass'n v. Maricopa Cnty, 196 Ariz. 173 (App. 1999) 15
City of Prescott v. Town of Chino Valley, 166 Ariz. 480 (1990) 17
Common Cause v. Biden, 909 F. Supp. 2d 9 (D.D.C. 2012) 6
Consejo de Desarrollo Economico de Mexicali v. United States, 482 F.3d 1157 (9th Cir. 2007) 4
El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) 9
Fisher v. Maricopa Cnty. Stadium Dist., 185 Ariz. 116 (App. 1995) 17
Fogliano v. Brain, 229 Ariz. 12 (App. 2011) 10
Forty-Seventh Legislature v. Napolitano, 213 Ariz. 482 (2006) 3, 6
Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2018) 9, 10
Kromko v. Arizona Bd. of Regents, 216 Ariz. 190 (2007) 3, 4
Mecham v. Ariz. House of Representatives, 162 Ariz. 267 (1989) 4, 6
Mecham v. Gordon, 156 Ariz. 297 (1988) 4, 6, 12
Rangel v. Boehner, 20 F. Supp. 3d 148 (D.D.C. 2013) 4, 11
Renck v. Superior Court of Maricopa Cnty., 66 Ariz. 320 (1947) 14
State v. Maestas, 244 Ariz. 9, 12 (2018) 2
State v. Youngblood, 173 Ariz. 502 (1993) 8
United States v. Ballin, 144 U.S. 1 (1892) 6, 11
United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995) 12
Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012) 11

Statutes & Constitutional Provisions

A.R.S. § 38-431 ..... 1, 19
A.R.S. § 38-431.03 19
A.R.S. § 38-431.05 ..... 17, 18
A.R.S. § 38-431.08 ..... 1, 2, 13, 14, 15, 17
Ariz. Const. art. IV, pt. 2, §§ 8, 9 ..... 2, 3, 5, 7, 11, 13

Other Authorities

16A AM. JUR. 2D CONSTITUTIONAL LAW § 282 7
Ariz. Op. Atty. Gen. I83-128 (R83-031) 15, 16
BLACK'S LAW DICTIONARY (11th ed. 2019) 8

Rules

Ariz. Senate Rules, Fifty-Fourth Legislature, Rule 7 8
Ariz. House of Representatives Rule 32(H) 7

Defendant/Appellee Arizona State Legislature—by and through Karen Fann, President of the Arizona Senate and Russell Bowers, Speaker of the Arizona House of Representatives—respectfully submits this Supplemental Brief, pursuant to the Court's order of August 25, 2022 granting the Legislature's Petition for Review.

Plaintiffs/Appellants' (collectively "Puente") allegations that certain Republican legislators comprising a quorum of one or more committees convened at the conference of a private organization, the American Legislative Exchange Council ("ALEC"), in violation of the Open Meeting Law, A.R.S. § 38-431, *et seq.* ("OML"), do not state a valid and justiciable claim upon which relief could be granted. The Court accordingly should reverse the Court of Appeals' judgment and affirm the trial court's dismissal of the Complaint.

INTRODUCTION

A statute cannot operate as a judicially enforceable constraint on a discretionary constitutional power that is vested exclusively in the legislative branch. For this reason alone, the Court of Appeals' opinion is unsustainable. At least three additional flaws in the Court of Appeals' reasoning, however, furnish independent grounds for reversal. First, even if claims alleging violations by the Legislature of the OML were justiciable, the statute itself extinguishes such a cause of action in practice because it explicitly subordinates itself to the Legislature's internal rules in the governance of legislative business. *See* A.R.S. § 38-431.08(D). Second, as Judge Thumma recognized, the facts pleaded in Puente's Complaint delineate, at most, a "political caucus of the legislature"

that the OML exempts from its mandates. *See id.* § 38-431.08(A)(1). Finally, the Court of Appeals erroneously inverted foundational evidentiary axioms, foisting on the Legislature the burden of proving that certain members of the body did ***not*** violate the OML.

ARGUMENT

I. Puente's Claims Are Not Justiciable Because the Constitution's Rulemaking Clauses Textually Commit to Each House the Full and Exclusive Authority to Implement and Enforce Rules Governing Legislative Meetings

The Arizona Constitution textually entrusts to each legislative house an unqualified authority to order its own proceedings—to include whether, when and in what manner to notice and open to public observation meetings of the house or its committees. *See* Ariz. Const. art. IV, pt. 2, §§ 8, 9 (the "Rulemaking Clauses"). As a statutory enactment, the OML could never divest from a legislative house all or any portion of these internal institutional functions and assign their enforcement to a coordinate branch.

A. Overview of the Political Question Doctrine

A "non-justiciable political question is presented when 'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *State v. Maestas*, 244 Ariz. 9, 12, ¶ 9 (2018) (citations omitted); *see also Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351, ¶ 17 (2012) (characterizing the two facets of the political question doctrine as "disjunctive" but "interdependent"). "The federal political

question doctrine flows from the basic principle of separation of powers and recognizes that some decisions are entrusted under the federal constitution to branches of government other than the judiciary. Arizona courts refrain from addressing political questions for the same reasons." *Kromko v. Arizona Bd. of Regents*, 216 Ariz. 190, 192, ¶ 12 (2007) (citation omitted). Accordingly, a finding of nonjusticiability does not imply a disposition of any substantive constitutional claim; rather, it embodies the judiciary's abnegation of the power to decide certain questions that the Constitution subsumes into another branch's discretionary prerogatives. *See Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485, ¶ 7 (2006).

In assessing whether a claim is foreclosed as a political question, the starting point is, of course, the operative constitutional text. Article IV, Part 2, Section 8 of the Arizona Constitution directs that "[e]ach house" of the Legislature "shall . . . determine its own rules of procedure." The adjacent provision elaborates 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. Thus, each legislative "house" is wholly and exclusively responsible for structuring and superintending its meetings and those of its constitutive committees. Put another way, both the formulation ***and*** the enforcement of internal legislative procedures are committed to each legislative house; by its terms, this power is neither divisible nor delegable. *See Mecham v. Gordon*, 156 Ariz. 297, 302 (1988) ["*Mecham I*"] ("The Constitution wisely

leaves impeachment trial procedures and rules to the Senate."); *Kromko*, 216 Ariz. at 193, ¶ 13 (holding that "decisions about setting university tuition are constitutionally entrusted to branches of government other than the judiciary").

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

Similarly, the Rulemaking Clauses do not prescribe any articulable qualitative standards or limitations by which a court could gauge the sufficiency of a legislative rule or procedure. *See Mecham v. Ariz. House of Representatives*, 162 Ariz. 267, 268 (1989) [*"Mecham II*"] (holding that as long as a legislative house has adhered to constitutional requirements in conducting impeachments, "this Court has no jurisdiction to review the proceedings in the legislature"); *contrast Ariz. Indep. Redistricting Comm'n*, 229 Ariz. at 353, ¶ 29 (finding claim justiciable where "the Constitution provides clear, comprehensible standards" outlining permissible grounds for removing public officer). The constitutional grant of authority—"in such manner and under such penalties as each house may

prescribe," art. IV, pt. 2, § 9—is phrased in terms that are innately discretionary and that elude any judicially devisable extrinsic, non-constitutional benchmarks.

B. The Nonjusticiability of Puente's OML Claims Results From the Rulemaking Clauses Themselves, Not Any Specific Legislative Rule

Recognizing the plenary and exclusive character of the legislative autonomy secured by the Rulemaking Clauses, the Court of Appeals acknowledged that "no constitutional provision sets forth a standard for evaluating the adequacy or proprietary of the rules of procedure either house has adopted." COA Op. ¶ 13. It held, however, that unless and until a legislative house adopts a rule that actually "conflicts" with the OML, it has "*necessarily* acceded to judicial enforcement of [the OML's] requirements." COA Op. ¶¶ 14–15.[1] This paralogism encapsulates the error at the heart of the Court of Appeals' analysis. The nonjusticiability of Puente's OML claims derives from the Rulemaking Clauses ***themselves***—not the existence, absence or terms of any particular legislative rule.

In inquiring whether there was a discernible "conflict" between the OML and any identifiable legislative rule, the Court of Appeals proceeded on the wrong analytical plane. The controlling question in a justiciability analysis is whether a claim "involve[s] decisions

---

[1] Curiously, Puente overtakes even the Court of Appeals in its derogation of the Rulemaking Clauses. Whereas the Court of Appeals acknowledged that a contrary legislative rule could supersede the OML, Puente doggedly insists that "[t]he Legislature may not displace the external statutory constraints contained in the OML entirely, simply by enacting its own contradictory rules." Response to Pet. for Review at 9. This bizarre proposition—positing that a constitutional power can be subordinated to a statute—inverts the essential structure of republican government.

that the constitution commits to one of the political branches of government." *Forty-Seventh Legislature*, 213 Ariz. at 485, ¶ 7. When (as here) it does, the inquiry is at an end. Whether or how the elected branch exercised this discretionary authority is not only irrelevant, it is precisely the judicial inquiry that the political question doctrine precludes.

Stated another way, it is the Constitution's ***grant*** of plenary rulemaking power to the Legislature—not the Legislature's ***use*** of that power—that renders Puente's OML claim nonjusticiable. *See Mecham I*, 156 Ariz. at 301 (constitutional grant of impeachment power to legislative houses implies that "'no other tribunal should have any jurisdiction' of impeachment matters"); *Mecham II*, 162 Ariz. at 268 ("What constitutes 'high crimes, misdemeanors or malfeasance' is not to be determined by our inquiry, for the impeachment process is designed as a legislative inquest." (internal citation omitted)); *see also United States v. Ballin*, 144 U.S. 1, 5 (1892) (commenting that the congressional "power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to the exercised by the house, and, [unless it violates some other constitutional provision], absolute and beyond the challenge of any other body or tribunal"); *Common Cause v. Biden*, 909 F. Supp. 2d 9, 29 (D.D.C. 2012) (rejecting as nonjusticiable challenge to Senate's filibuster procedure, explaining that "Plaintiffs' argument is that the [Senate filibuster rule] 'conflicts' with [certain] constitutional provisions . . . but Plaintiffs do not assert—nor can they—that any of these provisions expressly limits the Senate's power to determine the rules of its proceedings").

For a court to determine (whether pursuant to the OML or otherwise) that a putative legislative "meeting" is in some way unlawful or deficient inescapably would entail a judicial arrogation of the legislative house's singular authority to "determine its own rules of procedure," Ariz. Const. art. IV, pt. 2, § 8, and to order such meetings "in such manner and under such penalties as [it] may prescribe," *id.* § 9.

It is for precisely this reason that eight other states have agreed that parallel provisions in their own constitutions—not the content of any particular legislative rule—render nonjusticiable claims alleging violations of the jurisdiction's OML equivalent. *See* Pet. For Review at 10–11 (collecting cases); *see also* 16A AM. JUR. 2D CONSTITUTIONAL LAW § 282 ("Courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, and is not subject to judicial review unless the legislative procedure is mandated by the constitution.").

Further, even if the Court of Appeals' premise—*i.e.*, that justiciability is dependent on the substance of specific legislative rules—were correct, its conclusion remains wrong. The Legislature has, in fact, adopted internal rules that supplant the OML. Most notably, House of Representatives Rule 32(H) has at all times relevant directed 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].[2] *See generally* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "exclusive" to mean "limited to a particular person, group, entity, or thing"). The Arizona Senate likewise has implemented a comprehensive and self-contained set of directives to govern committee proceedings. *See also* Ariz. Senate Rules, Fifty-Fourth Legislature, Rule 7.[3] Thus, even if the nonjusticiability analysis were dependent upon the enactment of legislative rules displacing the OML (and it is not), that prerequisite has been discharged in any event.

C. The Nonjusticiability of Puente's Claims Does Not Infringe or Impair the Judicial Power

A recognition that the Constitution devolves to each legislative house sole authority to manage its meetings and to enforce any attendant strictures (whether originating in statute or in legislative rules) is entirely consistent with this Court's role as the "final arbiter" of Arizona law. *See State v. Youngblood*, 173 Ariz. 502, 506 (1993). Struggling to resist this truism, Puente advances a skein of arguments intermixing justiciability precepts, constitutional interpretation, statutory construction, and application of legislative rules. Its reasoning dissipates, however, upon closer examination.

---

[2] 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.

[3] *Available at* https://www.azleg.gov/alispdfs/54leg/senate/RULES_2019_2020.pdf.

1. A Statute Cannot Revoke or Qualify a Constitutional Commitment of Authority to a Single Branch

Puente asserts that "the grant of authority to develop intra-branch rules [cannot] displace the judiciary's authority to determine whether legislative conduct violates external constraints imposed by a duly enacted statute," Response to Pet. For Review at 9, and contends that this case implicates only "the routine function of applying a statutory prescription to a party's conduct," *id.* at 5. This line of argument in many ways distills the crux of the parties' dispute; it is incorrect because it relies on the fallacy that a statute can somehow abridge or reassign a function that the Constitution lodges exclusively and indefeasibly in one branch.

The Legislature could not deputize the courts to examine ostensible legislative meetings and penalize legislators for neglecting procedural mandates (whether originating in statute or internal rule), even if it wanted to do so. To the contrary, "a statute providing for judicial review does not override" the maxim that courts "refrain from deciding political questions." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc). The D.C. Circuit's opinion in *Jaber v. United States*, 861 F.3d 241 (D.C. Cir. 2018), illuminates this principle. There, the plaintiffs sought a declaratory judgment that a U.S. drone strike in Yemen violated (among other laws) two federal statutes. While acknowledging that the U.S. Constitution largely commits the conduct of foreign affairs and military strategy to the Executive Branch, the plaintiffs argued that successive

presidential administrations had effectively codified self-imposed constraints on this authority in a series of official memoranda and other pronouncements. *See id.* at 249. The court disagreed, explaining that these presidents "may have laid out the legal rules they understood to govern their conduct, but they did not concede authority to the Judiciary to enforce those rules. Nor could they." *Id.* This jurisdictional bar derived not from the statutes or regulatory guidance the plaintiffs sought to enforce, but rather from the Constitution itself; "courts are not constitutionally permitted to encroach upon Executive powers, even when doing so may be logistically, if not constitutionally, manageable." *Id.*

Similarly, the Court of Appeals—implicitly relying on the same premise that a constitutionally committed power cannot be divested by statute—likewise agreed that a voter-initiated statute mandating certain appropriations could not confine the Legislature's constitutionally secured discretion over expenditure decisions. *See Fogliano v. Brain*, 229 Ariz. 12, 20, ¶ 24 (App. 2011) (holding that decision of whether and how to carry out the statutory directive "is, under our Constitution, left to the Legislature, not the Judiciary").

In short, a statute cannot "undo" the Constitution's textual commitment of a discretionary prerogative to another branch. It is for the relevant house—and it alone—to determine whether any ostensible committee meeting occurred at the ALEC summit and to decide in what "manner" such meeting should have been conducted, and what (if any) "penalties" redound to the participating legislators. Ariz. Const. art. IV, pt. 2, § 9. The

Rulemaking Clauses allot no portion of this power to the judiciary, and no statute can divest what the Constitution dispenses.

2. The Nonjusticiability of Puente's Claims Does Not Prevent Judicial Enforcement of Constitutional Rights and Limitations

Puente proclaims that a finding of nonjusticiability in this case would unleash a "true threat to the separation of powers doctrine," conjuring fevered hypotheticals of the Legislature attempting to "displace the Arizona penal code" through its rulemaking power. Response to Pet. For Review at 9. This argument evidences a misapprehension of the scope and purpose of the political question doctrine. Notwithstanding Puente's attempt to confound them, claims arising out of the Legislature's conformance to a statute (such as the OML) are fundamentally distinct from disputes implicating the Legislature's adherence to the Constitution itself. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (determining whether a statute is constitutional "is a familiar judicial exercise").

Thus, were Puente (or anyone else) to challenge a legislative rule or practice as exceeding the scope of the Rulemaking Clauses or transgressing some other provision of the Constitution, any such claims would be judicially cognizable. *See Rangel*, 20 F. Supp. 3d at 169 (agreeing that "[t]he House may not, by enacting and enforcing its own rules of procedure, violate another constitutional provision or an individual's rights under the Constitution," but adding that "the exercise of its discretion under the [Rulemaking] Clause is otherwise boundless"), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015); *see also Ballin*, 144 U.S. at

6 (noting that a house "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained"). In the same vein, Puente's assertion that the Legislature may not through its rulemaking power exempt legislators from, *e.g.*, the penal code, misses the boat. Legislators undisputedly are subject to the same "laws of general application," *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), that govern all citizens.[4]

But as Puente itself acknowledges, the validity or constitutionality of the Legislature's internal rules are "not at issue in this case." Response to Pet. For Review at 8. Rather, Puente seeks a judicial evaluation of alleged legislative proceedings relative to an extrinsic, non-constitutional benchmark—thereby traversing the boundary separating cognizable constitutional disputes from nonjusticiable political questions. *See Mecham I*, 156 Ariz. at 302 (explaining that while a court "does have the power to ensure that the legislature follows the constitutional rules on impeachment," it cannot otherwise review or apply "impeachment trial procedures and rules" devised by the Senate).

In sum, the Rulemaking Clauses textually commit internal legislative proceedings (to include the conduct of putative committee meetings) wholly and exclusively to each

---

[4] Legislators are, however, immune from criminal or civil liability for actual legislative acts. *See* Ariz. Const. art. IV, pt. 2, § 7; *Mesnard v. Campagnolo*, 251 Ariz. 244 (2021).

legislative house. The terms of these procedures and any "penalties," Ariz. Const. art. IV, pt. 2, § 9, for insufficient compliance are for the relevant house—and it alone—to determine.[5] The OML, as a statutory enactment, cannot dislodge and delegate to another branch all or any portion of this uniquely legislative responsibility.

II. The OML's Exemption for Legislative Proceedings Aligns the Statute with the Rulemaking Clauses

The OML itself obviates questions of justiciability by expressly acceding to the Legislature's constitutional authority "to provide an exemption to the notice and agenda requirements of this article." A.R.S. § 38-431.08(D). Puente counters that effectuating this provision implies that the OML "would engender its own obsolescence." Response to Pet. For Review at 12. But this tenuous reasoning conflates the ***existence*** of a procedural directive with its ***enforcement***. The OML is of course facially and presumptively applicable to the Legislature; both houses have for decades consistently and scrupulously

[5] In this vein, Puente's declamation that the Rulemaking Clauses do not "give th[e] subset of legislators" who allegedly attended the ALEC summit "the unfettered discretion to immunize their conduct from statutory provisions," Response to Pet. For Review at 8 n.5, is something of a *non sequitur*. No one has asserted an "immunity" from the OML. If, in fact, particular legislators did violate the OML or some other procedure governing house meetings, the house itself will evaluate the "manner" of such proceedings, and the "penalties" (if any) for misconduct, *see* Ariz. Const. art. IV, pt. 2, § 9. And the same nonjusticiability precepts that bar Puente's claims would similarly preclude individual legislators from relitigating any such disciplinary measures in court. *See Rangel*, 20 F. Supp. 3d at 168–69.

ensured that legislative proceedings (including committee and caucus meetings) are timely noticed, open to the general public, and even livestreamed to the world on the Internet.

But in a regime of separated powers dispersed among three independent departments of government, "[f]or any one of these to police or supervise the operations of the others strikes at the very heart and core of the entire structure." *Renck v. Superior Court of Maricopa Cnty.*, 66 Ariz. 320, 326 (1947). When, as here, the OML intersects with a discretionary constitutional prerogative that is exclusive to the legislative branch, decisions as to whether or in what manner to incorporate and enforce the statutory provision must "come[] from within that branch itself or from the people to whom all public officers are responsible for their acts." *Id.* Section 38-431.08(D)'s exemption does not in any sense nullify the OML, but rather simply devolves its enforcement to the relevant legislative house—precisely as the Rulemaking Clauses direct.

III. The Complaint Alleges, at Most, a Meeting of a Political Caucus

Even if Puente's claims were justiciable and eluded Section 38-431.08(D)'s delegation of enforcement to the legislative house, its Complaint remains deficient. If the "meeting" it alleges occurred it all, it was exempt from the OML as a "political caucus of the legislature," pursuant to A.R.S. § 38-431.08(A)(1). Although the term is not defined by statute, the Court of Appeals panel appeared to unanimously adopt the Attorney General's formulation of a "political caucus" as "a meeting of members of a legislative body who belong to the same political party or faction to determine policy with regard to

proposed legislative action." Ariz. Op. Atty. Gen. I83-128 (R83-031), 1983 WL 42773 (Nov. 17, 1983). As Judge Thumma recognized, "[i]t is undisputed that the 26 legislators named in the complaint 'are members of the Republican Party,'" and Puente "concede[s] that any meetings by the required number of these individuals at the [ALEC] Summit was a political caucus." COA Op. ¶ 33 (Thumma, J., concurring in part and dissenting in part).

Belatedly realizing the import of its own allegations, Puente test drives two rationales for evading the political caucus exemption. Neither is viable. First, Puente argues that "[w]ithout the benefit of discovery . . . this Court cannot identify who amongst the over 700 registered guests actually attended the Summit and to which political parties they swore allegiance." Response to Pet. For Review at 12. But on this score, Puente is constrained by its own Complaint, which expressly identifies the individual legislators—Republicans, all—whom it alleges attended the conference. *See* IR 1 at 10–11, 13 (¶¶ 37–38, 49); *see also Armer v. Armer*, 105 Ariz. 284, 288 (1970) ("Parties are bound by their pleadings and evidence may not be introduced to contradict or disprove what has been admitted or asserted as fact in their pleadings."); *Bank of Am. Nat. Tr. & Sav. Ass'n v. Maricopa Cnty*, 196 Ariz. 173, 176, ¶ 11 (App. 1999) ("Judicial admissions bind a party in a case to the allegations made in its pleading, absent an amendment to the pleading."). The partisan affiliations (if any) of third parties who are not public officers—and hence are not subject to the OML—is immaterial.

Second, borrowing from the Court of Appeals' majority opinion, Puente contends that the ALEC conference "was not a gathering solely to discuss 'Republican party policy,'" but also included the "draft[ing]" of "model bills" alongside "scores of lawmakers from other states and hundreds of corporate lobbyists." Response to Pet. For Review at 13. But this distinction is diaphanous to the point of being illusory. A legislative caucus meeting about a political party's "policy" positions "with regard to proposed legislative action," Ariz. Op. Atty. Gen. I83-128 (R83-031), is integrally intertwined with—if not inseparable from—discussions about potential or pending bills.

More fundamentally, Puente and the Court of Appeals majority's argument is debilitated by an intrinsic inconsistency. Puente's insistence that "[l]egislators can take legal action and conduct closed-door meetings with others in the room," Response to Pet. For Review at 13 n.8, extends in equal measure to political caucuses; the presence of third parties does not conceptually or legally preclude Arizona legislators belonging to the same political party from "determin[ing] policy with regard to proposed legislative action." Ariz. Op. Atty. Gen. I83-128 (R83-031). Conversely, if the presence of non-legislator third parties prevents the alleged gathering from qualifying as a political party caucus, it likewise was not a meeting of a "public body," either.

An internally consistent and more logically sound construction of the OML would hold that its application pivots on the party affiliation and activities of the participating public officers—not the presence, absence or other characteristics of third parties.

Evaluated through this lens, the Complaint depicts, at most, a meeting of a political party caucus of the legislature, within the meaning of A.R.S. § 38-431.08(A)(1).

IV. The Legislature Does Not Bear the Burden of Proving the Absence of an OML Violation

Although they compel the dismissal of this action, nonjusticiability principles and the OML's own express exemptions obscure more engrained deficiencies in Puente's Complaint, which does not allege that any particular "public body" took any identifiable "legal action" in contravention of the OML. *See* A.R.S. § 38-431.05(A). To be sure, application of Rule 12(b)(6) in OML cases must be tempered by the practical impediments that encumber plaintiffs who necessarily cannot allege with specificity the transpirations of closed-door meetings. *See Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 122 (App. 1995).

The Court of Appeals, however, transmuted this modest allowance into an outright dispensation from the burden that all civil plaintiffs incur to properly plead every element of a *prima facie* claim. According to the Court of Appeals, whenever a party alleges a violation of the OML "during a closed-door meeting," "the burden of proof shifts to the public body to establish that it did not violate the [OML]." COA Op. ¶ 26. That is not—and never has been—this Court's construction of the OML. As the Court has made clear, "the burden of proving a violation of the open meeting law generally is on the party asserting the violation." *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 486 n.4

(1990). Contrary to the Court of Appeals' misconstruction of it, *City of Prescott* held only that a public body that affirmatively invokes the OML's exemption for executive session proceedings, *see* A.R.S. § 38-431.03, must demonstrate its proper application. It never licensed a broader burden shifting when (as here) an OML plaintiff fails to adequately allege the elements of a *prima facie* claim.

A facially valid cause of action under the OML must posit a discrete "legal action" that occurred at a "meeting" of a "public body." *See* A.R.S. § 38-431.05. The Complaint does not adequately plead any of these three constitutive attributes. A "legal action' is "a collective decision, commitment or promise made by a public body pursuant to the constitution . . . and the laws of this state." *Id.* § 38-431.05(3). Puente states summarily that 26 Republican legislators "will convene at the Summit to discuss, propose, and deliberate on a number of 'model bills' that will impact public policy and likely be introduced in the Arizona State Legislature," IR 1 at 13 (¶ 51). But it does not delineate even in general terms (such by refencing certain subject matter areas) what these "model bills" entailed or which (if any) were actually introduced during the legislative session.

More importantly, the alleged legal action must embody a "collective" act or decision by the "public body" pursuant to some antecedent source of legal authority. Although legislative committees are definitionally public bodies under the OML, the Complaint does not allege ***which*** committees allegedly took ***which*** legal actions; the

statutorily required nexus between the "public body" and the "legal action" is entirely absent.[6]

Finally, a "meeting" must feature "the gathering . . . of a quorum of the members of a public body." A.R.S. § 38-431(4). While the Complaint identifies legislators whom it alleges attended the ALEC conference and the committees on which they serve, it does not depict any discernible meeting—*i.e.*, a convocation of specific permutations of legislators constituting a quorum of a specific committee and acting in their capacity as such.[7] Indeed, Puente derides the ALEC Summit as "closed-door lobbying sessions," Response to Pet. For Review at 13, at which certain individual Arizona legislators mingled with an assortment of citizens, activists, advocates, and government officials from across the country. But this characterization tellingly illuminates the dispositive defect afflicting the Complaint; such a gathering simply is not a "meeting" of a "public body" within the meaning of the OML.

---

[6] Committees in both chambers can take legal action only with respect to introduced bills that the presiding officer has assigned to them. *See* Ariz. House of Reps. Rule 8(J); Ariz. Senate Rule 2(J). Because the Complaint does not allege that either the Speaker or the Senate President ever referred any identifiable "model bill" to any of the committees that ostensibly were present at the ALEC Summit, such committees could not have taken any "legal action" in any event.

[7] To the extent Puente maintains that the Complaint does allege that particular committees actually convened at ALEC, the Legislature reserves the right to probe on any remand what actions Puente undertook to discharge its obligations under Arizona Rule of Civil Procedure 11 prior to making such factual representations to the Court.

In short, the Court of Appeals distended what had been a flexible application of traditional pleading standards to accommodate the exigencies of OML claims into an extra-statutory upending of the burden of proof framework that controls OML litigation. To the extent it finds that Puente's claims are justiciable, the Court should correct this consequential error.

CONCLUSION

For the reasons stated herein and in the Petition for Review, the Court should reverse the decision of the Court of Appeals and affirm the trial court's dismissal of this action pursuant to Arizona Rule of Civil Procedure 12(b)(6).

RESPECTFULLY SUBMITTED this 28th day of September, 2022.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Attorneys for Defendant-Appellee