IN THE SUPREME COURT
STATE OF ARIZONA

STEVE MONTENEGRO, et al. Plaintiffs / Appellants, v. ADRIAN FONTES, et al. Defendants / Appellees, And KRIS MAYES, et al. Intervenor-Defendants / Appellees.	Supreme Court No. CV-24-0166 PR Court of Appeals, Division One No. 1-CA-CV 24-0002 Maricopa County Superior Court No. CV2023-011834

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICUS

The Goldwater Institute is well known to this Court as a Phoenix-based public policy foundation dedicated to advancing principles of individual liberty, limited government, and property rights. Through its Scharf-Norton Center for Constitutional Litigation, it often represents parties in this Court or appears as amicus curiae, particularly in cases involving the separation of powers, *see, e.g.,* *Sun City Home Owners Ass'n v. Arizona Corp. Comm'n*, 252 Ariz. 1 (2021), and standing, *see, e.g.,* *Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415 (2014). Moreover, the Institute is currently representing plaintiffs in a separate, but related challenge to the constitutionality of Prop 211. *See* *Center for Arizona Policy v. Ariz. Sec'y of State*, No. CV 24-0295-PR (Ariz. filed Dec. 9, 2024) (pending). Institute scholars have also published extensive research about the law of standing and other constitutional issues related to this case. *See* Timothy Sandefur, *The "Mandatory" Clauses of State Constitutions*, 60 Gonzaga L. Rev. 157 (forthcoming, 2025)[1]; Jon Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, Goldwater Inst. (Aug. 5, 2015). The Institute participated as amicus in this case at the Petition stage, and believes its policy expertise and litigation experience will aid the Court in considering the merits.

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4874766.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals committed an elementary error in holding that Petitioners lack standing to challenge Section 16-974(A)(8). It said that Subsection (A)(8) does not *by itself* cause Petitioners' injury, but instead that it injures them only in conjunction with other laws—and therefore that Petitioners' injury is not fairly traceable to that Subsection, which means they lack standing. Pet. APP0015 ¶¶ 48-49. But the "traceability" requirement of standing does not require Petitioners to show that Subsection (A)(8) "standing alone" harms them. *Id.* ¶ 48. Instead, it is enough that this Subsection plays *some role* in harming them—which it plainly does. *O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2715 (2024).

Subsection (A)(8), in combination with other laws, gives the Commission virtual *carte blanche* to exercise lawmaking and executive powers. It allows the Commission to "[p]erform *any* other *act* that *may assist* in implementing this chapter" (emphasis added)—an astonishingly broad grant of power, and one that deprives the Legislature of authority to legislate in any way that might be "inconsistent" with whatever act the Commission might, in its limitless discretion, choose to take. That certainly tramples on the Legislature's authority in ways that give it standing to sue. *Cf. Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 486–87 ¶¶ 14-18 (2006).

Finally, even aside from those issues, the Arizona Constitution's Mandatory Clause (Ariz. Const. art. II § 32) gives Petitioners standing, because this case concerns objective, explicit constitutional rules regarding the lawmaking process and Petitioners are the appropriate parties to raise those issues in court. *Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013).

ARGUMENT

I. The Court of Appeals' "traceability" analysis was fallacious.

The Court of Appeals' holding that Petitioners lack standing to challenge Section 16-974(A)(8) resulted from a fallacious analysis. It said that Subsection (A)(8) does not "*by itself*" intrude on the legislature's authority, but only does so in conjunction with other laws (specifically, Section 16-974(D) and Article IV, pt. 1, § 1(6)(C) of the Constitution (the so-called "Voter Protection Act" (VPA))). *See* Pet. APP0015 ¶ 48 (emphasis added). But that's not how the standing analysis works. The proper question is only whether the harm the plaintiff complains of is "fairly traceable"[2] to the action or statute being challenged, *not* whether that harm is *solely attributable* to the action or statute. Thus, even if Subsection (A)(8) only harms

[2] *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 7 (2005); *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 378-79 ¶ 20 (App. 2008); *see also Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 18 (2003) (describing federal standing requirements).

Petitioners because of its interaction with those other laws, Petitioners have still satisfied the fair-traceability requirement.

Federal courts—which, of course, work under a stricter standing limitation than this Court does—have explained that "fair traceability" parallels, but is more lenient than, ordinary causation analysis. *See* *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984); *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994). And the causation standard does *not* require a plaintiff to prove that her harm is "solely attributable" to the complained-of act. Instead, causation is satisfied if the plaintiff shows that the complained-of act "in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without [it] the injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546 (1990) (citation omitted).

That means "[t]here may be more than one cause of an injury." *Ritchie v. Krasner*, 221 Ariz. 288, 299 ¶ 32 (App. 2009). A plaintiff's injury is *caused by* some action or statute even if the latter "contributed 'only a little' to the plaintiff's injuries." *Dupray v. JAI Dining Servs. (Phoenix), Inc.*, 245 Ariz. 578, 584 ¶ 17 (App. 2018).

Thus even if the Court of Appeals was right that Subsection (A)(8) only harms Petitioners in conjunction with Subsection (D), or only in conjunction with the VPA, Petitioners have still shown that their injury is caused by—and is

therefore "fairly traceable" to—Subsection (A)(8), and that means they have standing to challenge it.

Actually, the federal "fair traceability" requirement is *more lenient* than the proximate causation standard. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014), the U.S. Supreme Court said that "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Accord, Bennett v. Spear*, 520 U.S. 154, 168 (1997). More simply, "the traceability requirement is less stringent than proximate cause." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019); *accord, O'Handley*, 62 F.4th at 1161; *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir.2009); *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008).

So even under the more demanding federal standing test, "fair traceability" is satisfied as long as "it is possible to draw a causal line" between the complained-of act or statute and the plaintiff's injury, "even if [that line] is one with several twists and turns." *O'Handley*, 62 F.4th at 1161–62. And given that Arizona's standing rules are *less* demanding than the already-lenient federal standard, *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24 (1998), it follows that the Court of Appeals erred in concluding that Petitioners failed to prove traceability just because Subsection

(A)(8) harms Petitioners in conjunction with other laws.[3] The fact that Subsection (A)(8) is a "substantial factor" in harming Petitioners is enough to show fair traceability. *Barrett v. Harris*, 207 Ariz. 374, 381 ¶ 26 (App. 2004). And that means Petitioners have standing to challenge it.[4]

II. Subsection (A)(8), combined with other laws, deprives the Legislature of its lawmaking authority to an indefinite degree.

A. This is not actually a *delegation* at all—it is a *transfer* of legislative power.

In holding that Subsection (A)(8) does not injure Petitioners, the Court of Appeals relied on a flawed analogy. It likened Subsection (A)(8) to statutes

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[3] The Court of Appeals' holding can also be viewed in terms of redressability—i.e., that a judgment finding Subsection (A)(8) invalid would not cure the complained-of injury. But even if viewed this way, the decision below is still legally incorrect. In *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310 (1st Cir. 2012), the plaintiffs argued that two Puerto Rico statutes governing the construction industry were preempted by a federal statute. The defendants argued that they lacked standing, because they would still be subject to the limitations of the federal statute even if the two Puerto Rico statutes were invalidated, and consequently would "gain nothing" from a favorable ruling. *Id.* at 317. The court rejected that argument. The plaintiff "need only show that a favorable ruling could *potentially* lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Id.* at 318 (emphasis added). Likewise here, a ruling that Subsection (A)(8) is invalid would lessen the injury.

[4] In fact, *all* Legislative standing cases *necessarily* involve the challenged law operating *in conjunction with* other laws. No law operates in a vacuum, so any time the Legislature is injured, it will necessarily be due to the interaction of the challenged law with other laws. In *Napolitano*, for example, the line-item veto inflicted a harm on the Legislature only *in conjunction with* other constitutional rules (such as the rule that a bill can only become a law if it receives the required number of votes and is signed by the Governor). 206. Ariz. 520.

whereby the Legislature delegates authority to the executive branch, and concluded that since those don't nullify legislative power, neither does Subsection (A)(8). *See* Pet. APP0014-15 ¶¶ 46, 48.

But that is nothing like the law at issue here. In a true delegation case, where the Legislature delegates power to an executive agency, it still retains *all* its lawmaking power. That is proven by the fact that it could undo the delegation the next day, if it chose, or even abolish the agency entirely.[5] Those are the very reasons why courts have allowed such delegations. *Cf. In re E.B.*, 330 N.W.2d 584, 588 (Wis. 1983) ("since the legislature could delegate power, it could also take it back. Therefore, the legislature did not offend the separation of powers doctrine … ."). The theory behind cases allowing delegation is that such delegations are constitutional *only* because they do *not* involve giving away lawmaking power.

[5] This *must* be true, because "the legislative power is inalienable." *Roberts v. State*, 253 Ariz. 259, 270 ¶ 43 (2022). It can only delegate the responsibility to "fill in the details," not to make law. *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971). This is the logically necessary consequence of two things: *first*, the Constitution's Separation of Powers Clause, Ariz. Const. art. III, explicitly confines the lawmaking power to the legislative branch, and therefore implements the principle that the Legislature exists "to make laws, and not to make legislators." John Locke, *Second Treatise* § 141, *in Two Treatises of Civil Government* 409 (Peter Laslett, rev. ed. 1963) (1690). Second, the "anti-entrenchment" principle forbids the Legislature from tying the hands of future legislatures indefinitely, as the court below acknowledged. Pet. APP0022 ¶ 75.

But that's not true here. The delegation to the Commission in Section (A)(8) is effectively *carte blanche* authority. It entitles the Commission to "[p]erform *any* other act that *may assist* in implementing this chapter." Words like "may" and "assist" and "any" are, of course, extremely broad. "'Any' means all [or] every." *Boyd v. Bell*, 68 Ariz. 166, 179 (1949). "'[M]ay' indicates permissive intent." *L.H. v. Vandenberg*, 535 P.3d 46, 49 ¶ 10 (App. 2023). And "'[a]ssist' means 'to give support or aid to, especially in some undertaking or effort.'" *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362 (1974) (citation omitted). This phrase is therefore shockingly comprehensive: it empowers the Commission not just to enforce the law, but to take whatever actions it thinks—in its sole discretion—could possibly provide any kind of help toward enforcement.

Combined with the VPA, such a breathtakingly broad scope of authority ties the Legislature's hands in ways totally unlike the ordinary delegation scenario. To use a hypothetical example, if the Commission were to exercise its authority under Subsection (A)(8) to buy a fleet of airplanes for its employees to use flying about the state to investigate potential infractions of the statute, and the Legislature—thinking this economically wasteful—were to block the purchases, the VPA would likely stand in the way, on the theory that the Legislature's action failed to advance Subsection (A)(8)'s purpose of empowering the Commission to do whatever it thinks "may assist" in implementing the statute. *Cf. Cave Creek Unified Sch. Dist.*

v. Ducey, 231 Ariz. 342, 352 ¶¶ 30-31 (App. 2013), *aff'd*, 233 Ariz. 1 (2013) (legislation that "effectively" hinders initiative is barred by the VPA).

Or suppose the Commission were to try to deputize private citizens to enforce its rules, by sending them letters allowing them to use its (virtually limitless) subpoena powers.[6] If the Legislature were to try to halt this by passing a law confining the subpoena power to public officials, that would likely run afoul of the toxic combination of the VPA and Subsection (A)(8).

Or suppose the Commission were to issue "guidance letters," "substantive policy statements," or similar sub-regulatory documents[7] to define statutory terms or to threaten enforcement in ways the Legislature thinks improper.[8] If the

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[6] This is not entirely a hypothetical example. In March 2023, the Commission tried to adopt a rule which would not only have allowed it to give its subpoena power to private individuals, but would have allowed *those private parties* to *also* give that subpoena power to still *other* private parties. Fortunately, that proposal was blocked by the Governor's Regulatory Review Council (GRRC). *See* GRRC Attorney Memorandum re. Citizens Clean Election Commission, Mar. 7, 2023 at 420. But that was an attempted *rule*. Under Subsection (A)(8), nothing is to stop the Commission from doing the same thing through some sub-regulatory *ipse dixit*, like a commission or a mere letter.

[7] The use of "guidances" and similar sub-regulatory devices to implement policy, instead of legislation or the public rulemaking process, is a disturbing recent trend. Such documents are sometimes called "regulatory dark matter," because they are so obscure that they escape the notice of even sophisticated actors—yet they implement policy. *See* Clyde Wayne Crews, Jr., *Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter,"* Competitive Enterprise Institute (Dec. 2015).

[8] This is also not a hypothetical scenario. In 2022, the Department of Public Safety issued what it called a "substantive policy statement"—not a rule—empowering it to inspect certain vehicles which it has no statutory authority to inspect. (The

Legislature were to try to block this, by ordering the Commission to desist, and to operate exclusively under the Administrative Procedure Act (APA)'s rulemaking process, that, too, would likely be barred by the VPA in combination with the Commission's *carte blanche* Subsection (A)(8) power.

In fact, the Legislature *did* try to make the Commission obey the APA,[9] and Respondents acknowledge that one purpose of Subsection (D) was to eliminate that democratic accountability and make the Commission exempt again. *See* Response to Petition for Review at 7-8. If, therefore, this Court leaves the lower court's holding invalidating Subsection (D) undisturbed, but leaves Subsection (A)(8) in place, that will create a perverse incentive encouraging the Commission to abuse sub-regulatory "guidance letters" and "substantive policy statements" instead of adopting actual rules under the APA's public procedures. If the Legislature *can* pass laws limiting the Commission's "rules," Pet. APP0023 ¶ 80, the Commission will naturally seek some route other than rulemaking—that is, it will exploit its (A)(8) power, instead, to do things that don't qualify as rules or enforcement actions, and are therefore both easier to do *and* exempt from Legislative oversight.

"substantive policy statement" is identified as Policy No. CVETFD-1, 28 *Ariz. Admin. Reg.* 2499-2501 (Sept. 23, 2022).) The Department chose to proceed in that manner in order to avoid complying with the notice-and-comment rulemaking procedure. The matter has been placed on the agenda of the Governor's Regulatory Review Council for an upcoming meeting. (Attorney Memorandum Petition (Feb. 4, 2025) at 1528.)

[9] H.R. Con. Res. 2007, 53rd Leg., 2d Reg. Sess. (Ariz. 2018).

Of course, that would only further insulate the Commission from democratic accountability—which is the Commission's goal.

In short, the extreme breadth of the power conferred by Subsection (A)(8), combined with the extreme entrenchment imposed by the VPA, means this is not actually a *delegation* case at all. Properly understood, "delegation" means a superior deputizing a subordinate to take actions to serve the superior's will. But the combination of Subsection (A)(8) and the VPA make clear that the Commission is *not* a subordinate; it is a rival lawmaking body (and a rival executive, too, since it can "perform any … act," not just adopt rules). And this rival is at least arguably superior to the Legislature itself.[10] Subsection (A)(8) and the VPA entitle the Commission not only to write rules but to do any "act" that "may"—not "will," but "may"—"assist" in the implementation of the statute, and to block the Legislature from taking actions inconsistent with that blank check on power. This is therefore not a delegation, but a *transfer* of lawmaking power.

That, in turn, is unconstitutional, because "the people may not exercise their lawmaking authority in a way the Legislature cannot," Pet. APP0021 ¶72, and "[t]he lawmaking power vests solely in the Legislature." *Rios v. Symington*, 172

[10] This is why the "Voter Protection Act" is so mis-named. It does not, in fact, protect voters at all, but deprives voters of the right to ask their representatives to change laws in the future.

Ariz. 3, 5–6 (1992).[11] At a minimum, this shows that Petitioners are, indeed, injured and therefore that they have standing to challenge Subsection (A)(8) no less than Subsection (D).

Even if the statute does not make the Commission superior to the Legislature, but just creates two rival lawmaking bodies, that, too, gives Petitioners standing. Under the doctrine known as "competitive injury," federal courts have held that when the government acts in a way that "authorizes allegedly illegal transactions that will almost surely cause [plaintiff] to lose business, there is no need to wait for injury from specific transactions to claim standing." *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995); *accord*, *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996). By the same principle, Subsection (A)(8), combined with the VPA, effectively authorizes the Commission to act as a rival legislature in Arizona—which it almost surely will do. That is enough to give Petitioners standing. They need not wait, as the Commission claims,[12] for the Commission to engage in any specific lawmaking "transaction."

[11] The people can, of course, always pass a *constitutional amendment* to take legislative powers away from the Legislature, but they cannot do so by statute, because the Constitution—which gives those powers to the Legislature—must take precedence.

[12] Combined Response to Amicus Briefs (Amicus Resp.) at 11.

B. Petitioners are not required to show that the legislative power is wholly nullified to prove injury.

The Court of Appeals correctly held Subsection (D) unconstitutional because it "nullifies legislative power whenever the Commission enacts a rule or pursues an enforcement action." APP0023 ¶ 79. But it held otherwise with respect to Subsection (A)(8), because that Subsection doesn't wholly "nullify" the lawmaking power; the Legislature could still pass laws, even if the Commission can adopt what are, in effect, laws (and perform "any" other "act" that it thinks "may assist" in the implementation of the statute). APP0015 ¶ 48.

But total nullification is not the only way to show injury. There was no total nullification of lawmaking authority in *Napolitano*, *supra*, and the Legislature had standing there. When the Governor argued that the Legislature was not injured by the line-item veto, because it could still override that veto, this Court found that argument illogical because forcing the Legislature to go through the process of overriding a veto was *itself* an injury—so that could not deprive the Legislature of standing to sue over the interference with its lawmaking authority. 213 Ariz. at 487 ¶¶ 15-17.

The point is made clear by a simple hypothetical: imagine a statutory initiative forbidding the Legislature from adopting any law except on a Tuesday. That would obviously interfere with legislative business to such a degree as to

constitute an injury for standing purposes, despite the fact that the Legislature could still pass laws on Tuesdays.

The Court of Appeals was therefore misled when it rejected Petitioners' standing on the grounds that "delegating authority does not, standing alone, nullify legislative power. … [W]hen the Legislature delegates, it can still legislate, including on subjects falling within the delegation." APP0015 ¶ 48. It erred in regarding this as a delegation, when it is instead the wholesale transfer of legislative power. It erred in holding that anything short of "nullification" fails to state a legally cognizable injury. And it erred in concluding that the Legislature can "still legislate." In fact, any laws the Legislature might pass within the enormously wide category of matters that "may assist" in the implementation of the act would be subject to the VPA's "inconsistency" prohibition, which would not be the case but for Subsection (A)(8).

Another remark the court made, although tangential, is suggestive of the source of its error. It said that the Legislature "retains lawmaking power … when *the people* delegate authority to the executive branch." APP0015 ¶ 48. But that is not true when the people give the executive branch the *lawmaking authority*. When that happens—as in this case—it violates the Constitution, because the people are bound by the Arizona Constitution when adopting statutory initiatives, *Fann v. State*, 251 Ariz. 425, 434 ¶ 24 (2021), and the Constitution gives the

lawmaking authority to the Legislature. Thus, for example, if the people were to pass a statute giving the Governor power to appropriate money and incur debt—which are quintessentially legislative powers, *Rios*, 172 Ariz. at 6; *Le Febvre v. Callaghan*, 33 Ariz. 197, 204 (1928)—that would interfere with the Legislature's lawmaking power, and would entitle it to sue. (It would also be unconstitutional.)

The Court of Appeals' remark suggests that it lost sight of the critical distinction between a mere statute and a constitutional amendment. The voters can, of course, adopt *constitutional amendments* to create new legislative bodies, or give the executive branch more powers.[13] But the law at issue here is a mere statute, and must therefore conform to the Constitution. That Constitution creates only one lawmaking body. While the people may delegate authority to different branches, they may not give an entity power to do, in effect, *whatever it likes*—legislative, executive, judicial, and anything in between—thereby depriving the people's representatives of the duty and authority to make law for Arizona. The Court of Appeals acknowledged this principle when dealing with Subsection (D). There is no difference with respect to Subsection (A)(8).

III. The Mandatory Clause gives Petitioners standing.

Finally, the Mandatory Clause gives Petitioners standing. Ariz. Const. art. II § 32. That clause provides that "[t]he provisions of this Constitution are

[13] Within, of course, the limits of the federal Constitution.

mandatory, unless by express words they are declared to be otherwise." It was adopted after a spate of nineteenth century cases held that the procedures for lawmaking were merely advisory and not binding. *See* Sandefur, *supra*, Courts had employed a variety of rules, such as the "enrolled bill rule" or the *argumentum ab inconvenienti* to hold that constitutional specifications for how a bill becomes a law were only binding on the consciences of legislators, and not actually enforceable in court. *Id.* at 195-204. These courts held that violations of such rules as the single-subject rule or the rule that a bill be read in the legislature at least three times did not render a statute invalid. *See, e.g., Pim v. Nicholson*, 6 Ohio St. 176, 179 (1856); *State v. Bank of Tennessee*, 64 Tenn. (5 Baxt.) 101, 219 (1875). During the wave of constitutional revision that climaxed with the Arizona Constitution of 1912, several states adopted Mandatory Clauses to overturn such rulings and ensure that constitutional rules, *especially* those governing lawmaking, were actually enforced by courts.

The Clause is not solely applicable to the legislative branch, however. It also binds the judiciary. The Supreme Courts of California and Washington, which also have Mandatory Clauses, have explained that it means "*all* branches of government are required to comply with [the Constitution's] terms," *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 342–43 (Cal. 2002) (emphasis added), and that courts have an "affirmative duty" to "go to any length within the limits of

judicial procedure, to protect … constitutional guaranties." *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 86 (Wash. 1978).

Excessive judicial deference—including the implementation of procedural rules that block legitimate plaintiffs from bringing their disputes before the courts—violates the Clause by rendering the Constitution's language unenforceable, and thus relegating it again to the status of merely "directory" or "advisory." That risk is particularly acute with respect to constitutional provisions governing the lawmaking procedure, such as the Separation of Powers Clause (art. III) or the clause vesting the Legislature with the lawmaking power (art. IV pt. 1 § 1). It is in the nature of these clauses that, if legislatures cannot enforce them, they might go unenforced because nobody can challenge violations of them. Therefore, while courts should be "prudent" about staying within their proper limits, they also should not employ standing doctrines in ways that prevent the Constitution's mandates from being effectuated.

In *Shurtleff*, *supra*, the Utah Supreme Court applied "public interest standing" to permit plaintiffs to challenge the constitutionality of certain statutes under the single-subject and clear-title rules in that state's constitution. Those rules govern the lawmaking process, and, combined with the Mandatory Clause, are enforceable by courts. The court applied a two-part test for standing. *First*, the plaintiffs were "appropriate," because they had "the interest necessary to

effectively assist the court in developing and reviewing all relevant legal and factual questions." 299 P.3d at 1111 ¶ 34 (citation omitted). *Second*, the single-subject and clear-title rules were "explicit and mandatory constitutional provision[s] dealing primarily with questions of form and process," rather than with policy matters. *Id.* at 1110 ¶ 31. That meant it did not step outside the proper judicial boundary to allow the plaintiffs to sue.

The same is true here. This case concerns the powers of the Legislature, which are transferred to the Commission by the challenged statute. Nobody has more of an interest in those powers than the Legislature itself, which obviously is effectively represented here. And that transfer of power violates the Constitution's explicit and mandatory rules governing how laws are made. This, again, militates in favor of Petitioners' standing.

Respondents characterize *Shurtleff* as tantamount to *waiving* standing. Amicus Resp. at 11. That is false. The Utah Supreme Court did *not* waive standing. Quite the opposite: the two-part test *Shurtleff* employed limits standing in manageable ways that respect the separation of powers. It does not allow just anybody to sue. In fact, the *Shurtleff* court, using that test, found that plaintiffs *lacked* standing to bring some of their claims. *See* 299 P.3d at 1110–11 ¶¶ 33-37. As for Respondents' recommendation that this Court simply wait for the

Commission to abuse its power before resolving the matter, *see* Amicus Resp. at 11, the Court should reject that suggestion. *El Paso Nat. Gas Co.*, 50 F.3d at 27.

CONCLUSION

The judgment with respect to Section 16-974(D) should be *affirmed*. In all other respects, it should be *reversed*.

Respectfully submitted _____, 2025 by:

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