ARIZONA COURT OF APPEALS

DIVISION ONE

BEN TOMA, et al.

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.

Defendants/Appellees,

and

KRIS MAYES, et al.

Intervenor-Defendants/Appellees.

Court of Appeals
Division One
No. 1 CA-CV 24-0002

Maricopa County
Superior Court
No. CV2023-011834

ANSWERING BRIEF

Mary R. O'Grady (011434)
Eric M. Fraser (027241)
Sarah P. Lawson (036436)
OSBORN MALEDON, P.A.
2929 North Central Ave., Ste. 2000
Phoenix, Arizona 85012
(602) 640-9000
mogrady@omlaw.com
efraser@omlaw.com
slawson@omlaw.com

Attorneys for Defendant/Appellee Arizona Citizens Clean Elections Commission

Craig A. Morgan (023373)
Shayna Stuart (034819)
SHERMAN & HOWARD LLC
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
(602) 240-3000
cmorgan@shermanhoward.com
sstuart@shermanhoward.com

Attorneys for Defendant/Appellee Adrian Fontes, in his official capacity as the Arizona Secretary of State

Alexander W. Samuels (028926)
Nathan T. Arrowsmith (031165)
Luci D. Davis (035347)
ATTORNEY GENERAL
2005 North Central Avenue
Phoenix, Arizona 85004
(602) 542-3333
Alexander.Samuels@azag.gov
Nathan.Arrowsmith@azag.gov
Luci.Davis@azag.gov

Attorneys for Intervenor/Appellee
Attorney General Kris Mayes

David Kolker (pro hac vice)
Tara Malloy (pro hac vice)
Elizabeth D. Shimek (pro hac vice)
CAMPAIGN LEGAL CENTER
1101 14th Street, NW, Suite 400
Washington, DC 20005
(202) 736-2200
dkolker@campaignlegalcenter.org
tmalloy@campaignlegalcenter.org
eshimek@campaignlegalcenter.org

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
Daniel J. Adelman (011368)
Chanele N. Reyes (034898)
352 East Camelback Road, Suite 200
Phoenix, Arizona 85004
(602) 248-8850
danny@aclpi.org
chanele@aclpi.org

Attorneys for Intervenor/Appellee
Voters' Right to Know

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes & Rules

Other Authorities

INTRODUCTION

With 72% voting in favor, Arizonans overwhelmingly approved Proposition 211, a voter initiative designed to shed light on "dark money"—political spending on elections where the source of funds is obscured. Two Arizona legislators seek to preliminarily enjoin *all* of Prop. 211, claiming that two narrow provisions facially violate the separation of powers, the nondelegation doctrine, and the Voter Protection Act.

The superior court did not abuse its discretion in denying that broad request. Plaintiffs are unlikely to succeed on the merits of their claims because they lack standing and Prop. 211 properly assigns the Citizens Clean Elections Commission run-of-the-mill implementation and enforcement authority. Nor can Plaintiffs meet the other requirements for a preliminary injunction. Even if their claims could succeed, their discrete attacks do not justify enjoining all of Prop. 211 because the challenged statutory provisions are severable. This Court should affirm.

FACTS & CASE

I. The People passed Prop. 211 to make campaign funding more transparent.

Prop. 211 was enacted because "the People of Arizona have the right to know the original source of all major contributions used to pay, in whole or in part, for campaign media spending." [APP-189, § 2(A).] The express purpose of Prop. 211 is to "stop 'dark money,'" meaning "the practice of laundering political contributions, often through multiple intermediaries, to hide the original source." [*Id.*, § 2(C).]

To accomplish this purpose, Prop. 211 requires a "covered person" to disclose the original source of donations that exceed $5,000 and are used to engage in "campaign media spending." A.R.S. §§ 16-971(1)-(2), (7), 16-973(A). This disclosure requirement is narrowly targeted: a "covered person" means only those individuals and entities that spend more than $50,000 on statewide campaigns, or $25,000 on other campaigns. A.R.S. § 16-971(7). "Campaign media spending" means activities to influence elections, including advocating for or opposing a candidate, referendum, or political party. A.R.S. § 16-971(2)(a). It includes spending on related activities like polling and data analytics, but it excludes several activities like spending on

news stories or nonpartisan activities to encourage voter registration. A.R.S. § 16-971(2)(b).

To comply with Prop. 211, a covered person must gather information about the original source of contributions used for campaign media spending. A.R.S. § 16-973(D). Once that spending exceeds the applicable $50,000 or $25,000 threshold, a covered person must file a report with the Secretary of State. A.R.S. § 16-973(A). Donors can avoid this potential disclosure under Prop. 211's opt-out provision, which requires donors to be informed that their contributions may be used for campaign media spending and to be "given an opportunity to opt out of" their donations being used for that purpose. A.R.S. § 16-972(B); *see* A.R.S. § 16-971(18)(a).

The Commission is responsible for implementing and enforcing Prop. 211. A.R.S. § 16-974(A). The Commission can adopt rules, initiate enforcement actions, impose civil penalties, and perform other acts that may assist in implementing Prop. 211. A.R.S. §§ 16-974(A)-(B), 16-977(C). The Commission has promulgated thirteen rules so far. A.A.C. R2-20-801 to -813.

II. Two legislators challenge voter-approved Prop. 211.

Ben Toma, Speaker of the Arizona House of Representatives, and Warren Petersen, President of the Arizona Senate, acting in their official

capacities, sued the Commission and the Secretary of State. [APP-022.] The Arizona Attorney General and Voters' Right to Know, a political action committee, intervened. [IR-15; IR-36.]

The operative complaint asserts four facial constitutional challenges to Prop. 211 and three of the Commission's rules. [APP-022–41.] Although Plaintiffs directly attack only two statutory provisions, A.R.S. § 16-974(A)(8) and (D), they moved for a preliminary injunction to completely enjoin all of Prop. 211 and the Commission's rules. The superior court denied that motion, finding that Plaintiffs are not likely to succeed on the merits of their claims, including because they lack standing, and failed to satisfy the other requirements for preliminary relief. [APP-010, ¶¶ 23-25; APP-012–014, ¶¶ 5-12, 27.] Plaintiffs appealed. [APP-019.]

ISSUES

1. Do Plaintiffs have standing to challenge the validity of a voter-approved initiative and three Commission rules on the legislature's behalf when the legislature did not vote to authorize the suit, and Plaintiffs allege no concrete institutional injury, only legal conclusions?

2. In addition to the Commission's seven specific implementation and enforcement powers, A.R.S. § 16-974(A)(8) authorizes the Commission

to perform other acts "that may assist in implementing" Prop. 211. Does that common delegation of authority violate the separation-of-powers and nondelegation doctrines?

3. To protect the Commission's independence, A.R.S. § 16-974(D) exempts its rulemaking from "the approval of or any prohibition or limit imposed by" the Governor's Regulatory Review Council, the Administrative Rules Oversight Committee, and the Attorney General. Does that exemption violate the separation of powers or Voter Protection Act?

4. As the body charged with implementing and enforcing Prop. 211, may the Commission properly issue administrative opinions, exercise prosecutorial discretion, and promulgate rules?

5. Did the superior court abuse its discretion in finding that Plaintiffs failed to establish the other requirements for preliminary relief?

STANDARD OF REVIEW

The Court "review[s] a trial court's order granting or denying an injunction for a clear abuse of discretion." *Kromko v. City of Tucson*, 202 Ariz. 499, 501, ¶ 4 (App. 2002). Legal issues, including standing, are reviewed de novo. *Id.*; *Karbal v. Ariz. Dep't of Revenue*, 215 Ariz. 114, 116, ¶ 6 (App. 2007).

ARGUMENT

I. The Court must reject Plaintiffs' flawed interpretations of Prop. 211 to address both standing and the merits.

Plaintiffs claim A.R.S. § 16-974(A)(8) violates the separation of powers and nondelegation doctrine, and § 16-974(D) violates the separation of powers and the Constitution's Voter Protection Act ("VPA"). But both Plaintiffs' alleged injuries (at 50) and their legal theories of unconstitutionality rely on their incorrect legal conclusions about what § 16-974(A)(8) and (D) mean. The Court, however, is not bound to accept these legal theories as true when determining whether Plaintiffs have met their burden to establish standing. *See Karbal*, 215 Ariz. at 117 n.6 (stating that a court is "not bound by [a plaintiff's] allegations" when standing relies on "a legal question"); *see, e.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (stating a "plaintiff may [not] rely on a bare legal conclusion to assert injury-in-fact" and only factual allegations are entitled to assumption of truth when evaluating standing).

Consequently, as Plaintiffs agree (at 14), Defendants begin with the statutory text and the principles of interpretation and constitutional avoidance that must inform the Court's analysis.

A. A.R.S. § 16-974(A)(8) authorizes the Commission to perform run-of-the-mill executive agency functions.

Plaintiffs first challenge A.R.S. § 16-974(A)(8). This section specifies the agency's powers under Prop. 211, all of which relate to implementing and enforcing the proposition:

> A. The commission is the primary agency authorized to implement and enforce this chapter. The commission may do any of the following:
>
> 1. Adopt and enforce rules.
>
> 2. Issue and enforce civil subpoenas ….
>
> 3. Initiate enforcement actions.
>
> 4. Conduct fact-finding hearings and investigations.
>
> 5. Impose civil penalties for noncompliance ….
>
> 6. Seek legal and equitable relief in court as necessary.
>
> 7. Establish the records persons must maintain to support their disclosures.
>
> 8. Perform any other act that may assist in implementing this chapter.

A.R.S. § 16-974(A).

In context, and using established principles of interpretation, subsection (A)(8) authorizes the Commission to do "other act[s]" that are consistent with those specified in (1)-(7), so long as those acts "may assist"

with "implementing" Prop. 211. Implementing a statute falls squarely within the domain of an executive agency.

First, the Court should consider the "preamble, purpose clause, or recital[.]" Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012). Here, the first sentence in A.R.S. § 16-974(A) frames the substance and scope of the Commission's power in terms of implementation and enforcement. The powers that follow in (A)(1)-(8) all flow from the Commission's defined role as "the primary agency authorized to implement and enforce this chapter." A.R.S. § 16-974(A).

The enumerated powers in (A)(1)-(7) further limit the delegation in (A)(8). "Under the *ejusdem generis* canon of statutory interpretation, general words [that] follow the enumeration of particular classes of persons or things should be interpreted as applicable only to the persons or things *of the same general nature or class*." *Metzler v. BCI Coca-Cola Bottling Co. of L.A., Inc.*, 235 Ariz. 141, 145, ¶ 18 (2014) (emphasis added). This principle applies with particular force "when a drafter has tacked on a catchall phrase [after] an enumeration of specifics," as the voters did in (A)(8). Scalia & Garner at 199. Here, the statute follows that very structure: (A)(8) provides a more general, or "catchall," authority that appears only after seven more specific powers

in (A)(1)-(7). Thus, the Commission's actions under § 16-974(A)(8) must be "of the same general kind or class" as those listed in (A)(1)-(7)—i.e., for implementation or enforcement.

None of the Commission's enforcement and implementation functions are unusual. *See, e.g.*, A.R.S. § 4-112(B)-(G) (enforcement authority of the State Liquor Board and Department of Liquor Licenses and Control); § 23-107(A)(1), (2) (authorizing the Industrial Commission to "[a]dminister and enforce all laws for the protection … of employees"); § 32-3253(A)(8), (9) (authorizing the Board of Behavioral Health Examiners to conduct "investigations" and "disciplinary actions pursuant to … board rules").

The authority delegated in (A)(8) is common. For instance, a municipal improvement district can "provide an appropriate procedure" for "any other act … which *may* become necessary *or proper* to carry out the intent and purpose of" certain statutes. A.R.S. § 48-558(A) (emphases added). The Department of Transportation may "enter into contracts, execute any agreements … and do *any other act* necessary *or appropriate* to carry out the purposes of this article." A.R.S. § 28-7673(D) (emphases added). And the Corporation Commission "may" require public service corporations to do "*any other act* which health or safety requires." A.R.S.

§ 40-336 (emphasis added); *see also* APP-013, ¶ 25 (superior court order listing examples of similar text, including authorizations of acts that are "convenient," "useful," or "desirable").

Nothing in (A)(8) or the rest of § 16-974(A) permits the Commission to modify Prop. 211, enlarge its own power, or otherwise act outside its narrow mandate to implement Prop. 211. As explained below (Argument §§ III.A.1, III.B), clear principles guide how the Commission satisfies that mandate.

B. To protect the Commission's independence, A.R.S. § 16-974(D) partially insulates its rulemaking from oversight.

Plaintiffs also challenge A.R.S. § 16-974(D), which insulates the Commission from some types of oversight:

> The commission's rules and any commission enforcement actions pursuant to this chapter are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official.

Without this provision, the Commission's rules would be subject to oversight by the Governor's Regulatory Review Council ("GRRC"), the Administrative Rules Oversight Committee ("AROC"), and the Attorney General. This oversight is not constitutionally required; other statutes provide similar exemptions. *See, e.g.*, A.R.S. § 41-1057(A) (exemptions from GRRC's review); § 41-1005 (list of bodies exempted from GRRC's and

AROC's review); § 41-1046(A) (exempting § 41-1005 list from AROC's oversight).

Subsection (D) likewise establishes the Commission's general independence when implementing Prop. 211 by exempting the Commission's rulemaking from oversight by these three actors. Although the statute does not identify those entities by name, the text, context, and history confirm this interpretation.

Subsection (D) identifies conduct (approving, prohibiting, or limiting the Commission's rules and enforcement actions), followed by a description of actors located in different parts of government. For that text to make sense, it must identify entities or officials that otherwise would have such oversight over the Commission; those are GRRC, AROC, and the Attorney General. [APP-012, ¶ 9.]

GRRC is the *executive* body that, absent exemptions, reviews and approves agency rules and can "require" an agency to "propose an amendment or repeal" a rule. A.R.S. § 41-1056(E). AROC is the *legislative* body with "oversight over any rules," with limited exceptions. A.R.S. §§ 41-1046(A)-(B) (ten of AROC's eleven members are appointed by the legislative leadership), 41-1047; *see State ex rel. Woods v. Block*, 189 Ariz. 269, 276 (1997)

(council was "a legislative body" in part because legislative leadership "appoint[] the controlling majority of the voting members"). And the Attorney General is an elected *official* who has authority to "review rules that are exempt pursuant to § 41-1057." A.R.S. § 41-1044. Thus, subsection (D) insulates the Commission's rulemaking and enforcement actions from oversight by GRRC, AROC, and the Attorney General.

The history of Prop. 211 confirms this interpretation. The publicity pamphlet told voters that the Commission would be "the primary agency to implement and enforce this act." [APP-224, ¶ 7.] *See Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 351 (App. 2013) ("*Cave Creek I*") (relying on publicity pamphlet), *aff'd*, 233 Ariz. 1 (2013) ("*Cave Creek II*"). By exempting the Commission's rulemaking and enforcement decisions from such oversight, subsection (D) makes that true. Indeed, the Citizens Clean Elections Act originally exempted the Commission's rulemaking from Arizona's Administrative Procedure Act ("APA"), but that exemption was removed in 2018. *See* H.R. Con. Res. 2007, 53rd Leg., 2d Reg. Sess. (Ariz. 2018) (removing rulemaking exemption in A.R.S. § 16-956(C)). With Prop. 211, voters simply put it back and reinforced the Commission's independence from GRRC, AROC, and the Attorney General.

Contrary to Plaintiffs' interpretation, § 16-974(D) does not refer to "the legislature" or "legislation." It does not prohibit the legislature from legislating.

C. Courts must adopt a constitutional construction of a statute if possible.

Bedrock constitutional avoidance principles confirm that § 16-974(A)(8) and (D) are constitutional. If "there is a plausible way to construe [a statute] in a constitutional manner," a court "need not hold it unconstitutional." *State v. Burbey*, 243 Ariz. 145, 149, ¶ 17 (2017). Rather, courts will "interpret a statute in a way that preserves its constitutionality." *Id.* Most recently, the Arizona Supreme Court adopted a "clarification [that] mean[t] that the statute [at issue was] not vague on its face," even when a constitutionally problematic interpretation was available. *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258-60, ¶¶ 17-19, 27 (2023). These avoidance principles apply to both the standing and merits analyses. Otherwise, a plaintiff could contrive an "injury" by urging an unconstitutional interpretation of a law to artificially implicate himself—even if that reading were unreasonable or avoidable.

That's exactly what Plaintiffs attempt here. They cannot prevail unless the Court adopts an unreasonable construction of § 16-974(A)(8) and (D) designed to render them unconstitutional. Plaintiffs ask (at 15-16) this Court to conclude that § 16-974(A)(8) allows the Commission to act capriciously, without regard to the limits and standards in Prop. 211, and no matter how attenuated those actions would be to Prop. 211's implementation. They also ask (at 16-18) this Court to conclude that § 16-974(D) purports to restrict the legislature's authority more than the VPA. According to Plaintiffs, it is more reasonable to believe the voters engaged in a futile effort to override the Constitution by statute, than to adopt a reading of § 16-974(D) that poses no constitutional problem.

These arguments defy the text, precedent, and common sense. The Court should adopt the more reasonable statutory interpretations above and, for the following reasons, reject Plaintiffs' contrived standing theory and claims on the merits.

II. Plaintiffs lack standing.

This case is the first of its kind in Arizona. Plaintiffs (purportedly on behalf of the legislature) seek to strike down an initiative that the People passed with their own lawmaking power. They assert standing to do so

based solely on their legal conclusion that voters unconstitutionally exercised their legislative power. If accepted, Plaintiffs' standing theory would let the legislature into court on terms available to no other plaintiff, dramatically expanding the legislature's (and Plaintiffs' own) power. And it would allow the legislature to attack voter-approved laws through the courts when the Constitution prohibits the same attack through legislation.

This Court should reject that theory under the settled test for standing when, as here, individual legislators assert claims that belong to the legislature as a whole. Specifically, Plaintiffs cannot show (1) an institutional injury to the legislature, nor (2) that the legislature authorized Plaintiffs to bring this case on its behalf. *Bennett v. Napolitano*, 206 Ariz. 520, 525-27, ¶¶ 21-29 (2003); *Dobson v. State ex rel., Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 122, ¶ 10 (2013) (stating that "the legislators [in *Bennett*] had not alleged a particularized injury and had not been authorized to act on behalf of their respective chambers"). On that basis alone, the Court should affirm.

A. Standing is paramount here because Plaintiffs seek to achieve judicially what they cannot do legislatively.

Arizona courts have "a rigorous standing requirement" that "a plaintiff must allege a distinct and palpable injury." *Fernandez v. Takata Seat*

Belts, Inc., 210 Ariz. 138, 140, ¶ 6 (2005) (citation omitted). Although standing raises only "questions of prudential or judicial restraint," courts consider cases "without such an injury 'only in exceptional circumstances….'" *Id.* (citation omitted). Importantly, "concern over standing is particularly acute" when courts are asked to "resolv[e] political disputes," such as when "legislators challenge [executive branch] actions." *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 486, ¶ 12 (2006) (citation omitted).

Those same concerns and others are present here, where legislators are seeking to undo what the People chose. Under Arizona's Constitution, the People and the legislature "share lawmaking power" as coordinate parts of the legislative branch. *Cave Creek II*, 233 Ariz. at 4, ¶ 8 (citation omitted); *see* Ariz. Const. art. 4, pt. I, § 1(1). Moreover, the VPA imposes "heightened constitutional restrictions" on the legislature's power to amend or supersede voter-approved laws, and thereby "fundamentally 'altered the balance of power between the electorate and the legislature.'" *Cave Creek II*, 233 Ariz. at 4, 6, ¶¶ 9, 17 (citation omitted).

The VPA prevents the legislature from repealing Prop. 211. Ariz. Const. art. 4, pt. I, § 1. But Plaintiffs' suit attempts to dodge that protection and accomplish the same result here. Because this is essentially an *intra-*

branch dispute about the voters' exercise of legislative power, the Court should hold Plaintiffs firmly to their standing burden. *See Forty-Seventh Legislature*, 213 Ariz. at 486, ¶ 12.

B. The legislature did not authorize this case.

Starting with the second prong, the legislature must authorize Plaintiffs to sue and "obtain relief on [its] behalf." *Bennett*, 206 Ariz. at 527, ¶ 29; *see Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 419, ¶ 16 (2014) (observing same). Plaintiffs relegate this requirement to a footnote (at 49 n.15), relying on broadly worded House and Senate rules that say Plaintiffs can assert "any claim" on behalf of their chambers.

Plaintiffs cite no case supporting that a general, open-ended authorization suffices here. Indeed, courts have seemingly treated it as a given that legislator-plaintiffs must obtain approval for a *particular* action. *See Bennett*, 206 Ariz. at 527, ¶ 29 (plaintiffs had "not been authorized by their respective chamber to maintain *this action*"); *Forty-Seventh Legislature*, 213 Ariz. at 487, ¶ 16 ("*Bennett* [held] that four … legislators could not bring *an action* … 'without the benefit of legislative authorization.…'"); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (plaintiffs had "not been authorized to represent their respective Houses of Congress *in this action*") (emphases added).

Only a specific authorization confirms that, consistent with general standing principles, the court truly has the legislature before it, and not just individual legislators purporting to represent the legislature's interests. *See Bennett*, 206 Ariz. at 527, ¶ 29. Otherwise, "a single legislator, perceiving a 'separation-of-powers injury' to the legislature as a whole," could bring such an action even if "the majority of the legislature … perceives no injury at all." *Morrow v. Bentley*, 261 So.3d 278, 294 (Ala. 2017).

It is undisputed here that the legislature did not vote to authorize this case. Instead, Plaintiffs rely on nearly limitless rules that do not contemplate any specific facts, claim, or even subject-matter. Those rules tell a court nothing about the legislature's position in this or any other particular case. Indeed, the broad text in the rules allows Plaintiffs to bring any case they want based entirely on their individual choices.

Requiring the legislature to approve specific litigation asserted on its behalf imposes no real burden; indeed, the legislature has done so before. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (citing the "authorizing votes in both [legislative] chambers"). And democratic considerations weigh heavily here. Voters are entitled to

hold their elected officials accountable for litigation decisions, especially when that litigation targets a law the voters overwhelmingly approved.

In sum, without any sort of specific vote, the boundless rules render the authorization requirement meaningless. Plaintiffs should not be able to proceed without the Court, parties, and public knowing that the legislature in fact wants to pursue this novel case. If Plaintiffs really are representing the legislature's views, securing a yes-vote will be a light lift.

C. Plaintiffs establish no institutional injury to the legislature.

Even if the legislature had authorized this suit, Plaintiffs would still lack standing because they identify no institutional injury. Plaintiffs argue (at 49-50) that Prop. 211 harms the legislature by restricting its power to legislate and by unconstitutionally delegating legislative authority to the Commission. These assertions fail because Plaintiffs allege no concrete harm, only flawed legal conclusions; neither Prop. 211's delegations nor the Commission's rules harm the legislature; and even assuming Plaintiffs articulate an injury-in-fact, it is speculative and unripe.

1. A.R.S. § 16-974(D) does not injure the legislature.

Plaintiffs lack standing to attack A.R.S. § 16-974(D) because they identify no "injury resulting from the putatively illegal conduct," only

speculative illegal conduct based on an erroneous statutory construction. *Sears v. Hull*, 192 Ariz. 65, 70, ¶ 23 (1998). No individual can establish standing that way; Plaintiffs and the legislature are no different.

The "threshold question in any constitutional challenge to a statute" is whether the plaintiff has identified some palpable harm flowing from "the operation of the statute." *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 349 (App. 1992). A plaintiff cannot "argue that they have standing to challenge the constitutionality of [statutes] on grounds that the statutes violate [the constitution]." *Sears*, 192 Ariz. at 70, ¶ 23. Rather, "a plaintiff must allege injury *resulting from* the putatively illegal conduct." *Id.* (emphasis added). *See, e.g.*, *Dobson*, 233 Ariz. at 122, ¶¶ 11-13 (analyzing standing for facial claim and finding commissioners alleged individual injuries based on the "material change" in treatment of their votes); *State v. Seyrafi*, 201 Ariz. 147, 149, ¶ 4 n.5 (App. 2001) (finding plaintiff had standing to assert facial challenge because he owned the properties at issue).

"Merely alleging an institutional injury is not enough" when legislators assert standing on behalf of a legislature, either. *State ex rel. Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 512 (6th Cir. 2019). An actual and "concrete institutional injury" is still required, which can include

"interference with a legislative body's specific powers, such as its ability to subpoena witnesses, or a constitutionally assigned power," *id.*, or vote nullification. *E.g.*, *Raines*, 521 U.S. at 824-26 (discussing vote nullification that conferred standing in prior case); *cf. Biggs*, 236 Ariz. at 419-20, ¶¶ 16, 19 (minority voting bloc "alleged [their] votes were effectively nullified").

Prop. 211 does not, as Plaintiffs claim (at 49-40), "disrupt[] the legislative process" by "regulating campaign finance and election conduct," thereby limiting "the Legislature's otherwise plenary power." It's not Prop. 211, but rather "the VPA's constitutional limitations [that] qualify the legislature's otherwise plenary authority," *Cave Creek II*, 233 Ariz. at 6, ¶ 19, which is true every time the voters approve any law.

And Plaintiffs plead no facts that, if true, establish a concrete harm to the legislature from § 16-974(D) in particular. Rather, the sole basis for their standing is their erroneous *legal conclusion* about the statute's meaning. For instance, Plaintiffs say (at 49-50) the legislature is injured because Prop. 211 "bar[s] [it] from … exercising its constitutional legislative power to regulate elections and campaign media spending." But that purported injury simply restates and assumes Plaintiffs' legal arguments about what § 16-974(D) means (*e.g.*, at 2-3, 23, 25). Thus, Plaintiffs rely improperly on "a bare legal

conclusion [about what the statute means] to assert injury-in-fact." *Maya*, 658 F.3d at 1067-68. But when evaluating standing, this Court does not accept such legal conclusions as true. *See id.*; *Karbal*, 215 Ariz. at 117 n.6.

Instead, the Court must decide the threshold question of statutory interpretation. This case is thus easily distinguishable from other cases in which the meaning of a challenged law was not disputed, even though the legality of the law's impact was. For example, in *Forty-Seventh Legislature*, the legislature challenged the Governor's authority to item veto part of a bill. 213 Ariz. at 484-85, ¶¶ 2-6. The parties disputed the legality of that veto, but the actual effect on the legislature that conferred standing was undisputed: the veto meant that the legislature's ability "to have the votes of a majority given effect [was] overridden." *Id.* at 486-87, ¶¶ 14-15. Similarly, in *Independent Redistricting Commission*, the legislature challenged Prop. 106 under the federal Elections Clause. 576 U.S. at 792. No one disputed Prop. 106's legal meaning; it changed the legislature's power to control redistricting. Thus, the legislature had standing because it could no longer take a specific action that it could have done before. *Id.* at 793.

Here, however, there is no difference between the alleged injury—that Prop. 211 constrains the legislature in certain ways—and Plaintiffs'

preferred statutory interpretation, which is disputed. Because Plaintiffs' interpretation of § 16-974(D) is incorrect as a matter of law, and Plaintiffs plead no other palpable injury to the legislature, they lack standing.

2. The legislature is not injured by A.R.S. § 16-974(A)(8) or the Commission's rules.

Plaintiffs assert (at 49-50) that Prop. 211's delegations of authority to the Commission in § 16-974(A)(8) and the Commission's rulemaking under that authority injure the legislature. This argument fails for several reasons.

To start, Plaintiffs err in suggesting that a delegation by voters is inherently suspect. "The legislative power of the people is as great as that of the legislature." *Cave Creek II*, 233 Ariz. at 6, ¶ 15 (citation omitted); *accord Molera v. Reagan*, 245 Ariz. 291, 294, ¶ 9 (2018) (same); *see* Ariz. Const. art. 22, § 14. The legislature has broad discretion to delegate power to administrative agencies. *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205-06 (1971). No less than the legislature, the People have an equal "prerogative to set public policy … through statute" (at 24). *Cf. Cave Creek II*, 233 Ariz. at 6, ¶ 19. The legislature cannot be harmed simply because voters exercise that power. And the legislature is not affected, much less harmed, by the

sheer fact that the Commission has authority to implement Prop. 211 under § 16-974(A)(8).

Relatedly, Plaintiffs identify no palpable injury from the three rules they challenge as violating the separation of powers. [APP-037–040; APP-065–067.] (*See* Argument § III.E.) The legislature is not a regulated party under the rules: it is not constrained or affected in any way by the Commission issuing advisory opinions (under R2-20-808) or interpreting and implementing the statutory text (R2-20-801, 803(E)).

Nor does any and every alleged "excursion by an administrative body beyond the legislative guidelines" confer standing on the legislature as Plaintiffs claim (at 49 (quoting *Cochise Cnty. v. Kirschner*, 171 Ariz. 258, 261-62 (App. 1992))). The lone case Plaintiffs cite for that proposition involved no legislators, nor did it say that alleged agency overreach constitutes a per se institutional injury. *See id.* at 259. The passage from which Plaintiffs quote merely discussed how agencies "must exercise [their] rule-making authority within the grant of legislative power." *Id.* at 261 (citation omitted). That general statement of administrative law does not establish an injury here.

3. Any alleged injury is not imminent and therefore unripe.

For a case to be justiciable, a plaintiff must be "seeking judicial relief from actual or threatened injuries." *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 420, ¶ 11 (2022). When a plaintiff has not already incurred a "distinct and palpable" injury, the standing question is "whether an actual controversy [otherwise] exists" because the plaintiff has a "real and present need" to resolve the case to avoid imminent harm. *Id.* at 424-25, ¶¶ 29-30. Here, even assuming Plaintiffs identify an institutional injury, this case is not ripe because Plaintiffs have not shown any "threatened injury [that] is 'certainly impending,' or [that] there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see Mont. Env't Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (characterizing ripeness "as standing on a timeline" (citation omitted)).

Plaintiffs' "speculative fear" does not merit declaratory relief. *See Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986). They do not identify specific legislation they want to pass, or even describe subject matter on which they want to legislate that Prop. 211 prohibits. And neither Prop. 211 nor the Commission's rules "regulate" the legislature such that a "threat of

enforcement" can "create an actual controversy" in the traditional sense. *In re Estate of Stewart*, 230 Ariz. 480, 484, ¶ 12 (App. 2012).

Curiously, Plaintiffs argue (at 53-54) in the alternative that no injury requirement exists at all. They mischaracterize precedent to provide an "independent basis to establish standing" that does not require actual or imminent harm. *Id.* at 53. But the caselaw does not say that. An "actual controversy" exists precisely because a plaintiff identifies harm from the challenged conduct—existing or imminent injury is what "giv[e]s the plaintiff a personal stake in the controversy's outcome." *Karbal*, 215 Ariz. at 116, ¶ 7; *see also, e.g.*, *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 378, ¶ 19 (App. 2008) (plaintiff failed to "explain[] what direct effect or injury resulted from the Defendants' activities or why such harm was imminent").

Indeed, Plaintiffs' cited cases (at 53) all confirm that harm is required. For instance, in *Mills*, the plaintiff had an "actual [controversy with the Board]" as to some claims because the Board investigated him, determined he was violating the law, and the constitutionality of the challenged statutes thus affected whether the Board could "prevent [Mills] from continuing to work as an engineer without registering." *Mills*, 253 Ariz. at 424-25, ¶ 30. But as to one claim, "an actual controversy [did] not exist" because "the

Board [had] not initiated formal proceedings," and thus *Mills* was "not affected by the Board's adjudicative processes." *Id.* at 425, ¶ 31; *see also Brush & Nib Studio, LC v. City of Phx.*, 247 Ariz. 269, 279-80, ¶¶ 35, 39 (2019) (plaintiffs "face[d] a real threat of being prosecuted for violating the [challenged] Ordinance").[1]

Plaintiffs' assertions of unconstitutional usurpation are purely abstract right now. Indeed, the ripeness inquiry is especially salient here given that the harm Plaintiffs purportedly fear flows from *their own* flawed reading of what Prop. 211 means.

D. Prudential considerations reinforce standing's importance.

Plaintiffs argue (at 55) that standing should be waived because this "is [a case] about confining the branches to their proper limits." More accurately, this is a case about Plaintiffs trying to create a new end-run around the VPA and impose limits on the People's legislative power. This makes a strict standing requirement more important, not less.

[1] *See also Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 225, ¶¶ 19-20 (2022) (plaintiffs had standing because the challenged law affected them in their home county); *Fann v. State*, 251 Ariz. 425, 432, ¶¶ 12, 14 (2021) (plaintiffs were injured once they "became subject to the tax").

Plaintiffs then argue (at 56) it would be "absurd[]" to deny standing because "Defendants do not dispute that Plaintiffs would have been able to raise the same arguments had they intervened under A.R.S. § 12-1841(D) in [other Prop. 211 litigation]." But in the statement Plaintiffs cite from a hearing before the superior court, defense counsel was simply arguing that Plaintiffs' delay in bringing their case negated their assertions of irreparable harm. [APP-495:9–496:25.] That statement was not a concession about Plaintiffs' standing here or in any other case to bring any particular claim.

Had Plaintiffs intervened in other Prop. 211 litigation under § 12-1841 solely to express a different view about existing claims, their standing would not have been at issue given that other plaintiffs would be required to establish standing. But, if Plaintiffs had intervened in those cases to assert *new* claims like those here, *see* Ariz. R. Civ. P. 24(c)(1)(B), Defendants would have disputed their standing. Plaintiffs' right to intervene under § 12-1841 does not lessen the legislature's burden to establish standing. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) ("An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction.").

Given the circumstances here, the Court must apply a rigorous standing requirement, but the implications of Plaintiffs' unprecedented theory are not confined to this case. There is no limiting principle if Plaintiffs have standing simply by asserting that Prop. 211 infringes the legislature's power. The same purported "injury" would exist whenever the voters approve a law containing a delegation, and any time an agency promulgates rules Plaintiffs don't like. That expansive conception of institutional harm would give Plaintiffs a pass into court on terms available to no one else and gouge a loophole in the VPA's protections.

The Court should reject these sweeping arguments, hold that Plaintiffs lack standing as a matter of law, and affirm the superior court on this basis.

III. Plaintiffs are unlikely to succeed on the merits.

The superior court correctly denied a preliminary injunction because Plaintiffs failed to prove: (1) a "strong likelihood" of success on the merits, (2) "[t]he possibility of irreparable injury," (3) the "balance of hardships" favors them, and (4) "[p]ublic policy favors the injunction." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

Plaintiffs have "an admittedly difficult feat" to show a strong likelihood of success on their facial challenges. *State v. Wein*, 244 Ariz. 22,

31, ¶ 34 (2018). "Facial challenges are disfavored" because they seek to "prevent[] laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008).

For a facial challenge, Plaintiffs must "establish that no set of circumstances exists under which [the statutes and rules] would be valid." *Stanwitz v. Reagan*, 245 Ariz. 344, 349, ¶¶ 19-20 (2018) (citation omitted). Speculation about how the statute and rules "might operate unconstitutionally under some conceivable set of circumstances is insufficient." *Id.* (citation omitted).

Courts diligently adhere to this "no set of circumstances" requirement in facial challenges, which "corresponds to [the] practice of construing ambiguous statutes, when possible, in a way that preserves the statute's constitutionality." *Petition Partners*, 530 P.3d at 1148-50, ¶¶ 17-19, 27. These principles apply equally to "laws enacted through initiatives" and challenges to administrative rules. *State v. Bonnewell*, 196 Ariz. 592, 594, ¶ 5 (App. 1999); *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 24-25 (App. 1994). And they apply to separation-of-powers challenges. *See John Doe Co. v. C.F.P.B.*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).

A. Plaintiffs' separation-of-powers claim is unlikely to succeed.

Plaintiffs' separation-of-powers claim (at 21-27) attacks two statutory provisions: A.R.S. § 16-974(A)(8) and § 16-974(D). [APP-054–055.]

The Constitution establishes a separation of powers, Ariz. Const. art. 3, but "an unyielding separation of powers" has never been required in our "complex government, and some blending of powers is constitutionally acceptable." *Andrews v. Willrich*, 200 Ariz. 533, 535, ¶ 7 (App. 2001). A violation occurs only when there is a true "usurpation by one department of the powers of another department on the specific facts and circumstances presented." *J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984) (citation omitted).

To evaluate a separation-of-powers claim, courts consider "(1) the essential nature of the power being exercised; (2) the legislature's [here, the voters'] degree of control in the exercise of that power; (3) the [voters'] objective; and (4) the practical consequences of the action." *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593, ¶ 14 (2017) (citations omitted); *accord Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 523-24, ¶ 30 (2000).

Taking A.R.S. § 16-974(A)(8) and § 16-974(D) in turn, neither facially offends the Constitution.[2]

1. A.R.S. § 16-974(A)(8) respects the separation of powers.

The superior court correctly found that A.R.S. § 16-974(A)(8) does not facially violate the separation of powers. [APP-014, ¶ 27.]

The first *Brnovich* factor is satisfied because the Commission exercises "essentially executive functions" by "implementing the law." 242 Ariz. at 593, ¶ 14. Under § 16-974(A), the Commission adopts and enforces rules, issues and enforces subpoenas, and conducts fact-finding hearings and investigations. These are "acts necessary to carry out the legislative policies and purposes [that Prop. 211] declared" and thus are "administrative" and executive in nature. *Brnovich*, 242 Ariz. at 593, ¶ 14 (citation omitted).

Second, § 16-974(A) puts these executive functions in the Commission's control—meaning an executive body is exercising executive functions, a strong indicator of constitutionality. *See id.*, ¶ 15 (the fact that

[2] Although Plaintiffs cite (*e.g.*, at 14) § 16-974(A)(1) (which authorizes the Commission to "[a]dopt and enforce rules"), they do not develop a direct argument to challenge (A)(1). Moreover, Plaintiffs acknowledge (at 25 n.4) that voters can lawfully authorize agencies "to implement a statute by filling in details through administrative rulemaking."

"neither the requesting legislator(s) nor the legislature … controls the 'exercise' of the executive branch's investigative and enforcement power" supported constitutionality).

Third and fourth, voters passed Prop. 211 with the "objective" to shine a light on dark money, and the "practical consequences" of the authority delegated to the Commission is to shine that light. *See id.*, ¶ 14. Prop. 211 was passed to establish and enforce disclosure requirements, "not to coerce, control, or interfere with" legislative authority. *Id.*, ¶ 16. Thus, all four *Brnovich* factors confirm that Prop. 211 authorizes the Commission to perform typical administrative duties [APP-013, ¶¶ 22, 25], creating a "blending of powers" within "constitutionally acceptable" bounds. *Andrews*, 200 Ariz. at 535, ¶ 7.

Plaintiffs don't address the factors. They simply declare (at 22) that § 16-974(A)(8) "permits the Commission to wield unchecked legislative power." But as explained (Argument §§ I.A, III.B), that's not true. Plaintiffs urge an unreasonable construction, divorced from text and context, designed to render the statute unconstitutional. Properly applying the constitutional-avoidance doctrine, the superior court correctly rejected Plaintiffs' construction in favor of a far more reasonable, constitutional one.

Moreover, in addition to the qualifications and limitations in § 16-974(A)(1)-(7) that inform the interpretation of (A)(8), Prop. 211 as a whole confirms the proper construction. Prop. 211 has a targeted purpose with specific provisions to guide and cabin the Commission's exercise of authority. These include thorough definitions (§ 16-971); detailed instructions regarding a covered person's obligations (§ 16-972); disclosure requirements and exceptions (§ 16-973); and more.

In sum, the Commission's powers ultimately "are limited to voter education and enforcement." *Myers*, 196 Ariz. at 523, ¶ 29. These "declared policies and fixed primary standards … validly confer on [the Commission] the power to prescribe rules and regulations to promote the spirit and purpose of [Prop. 211] and its complete operation." *DeHart v. Cotts*, 99 Ariz. 350, 351 (1965); *see Hamilton v. State*, 186 Ariz. 590, 595 n.6 (App. 1996) (stating that "the scope of [an executive agency's] authority to regulate may be expressly stated or implied from the statutory scheme").

Consistent with the separation of powers, voters can use their lawmaking power to "allow [an executive] body to fill in the details of legislation already enacted." *Mines Supply*, 107 Ariz. at 205. Such delegations "are normally sustained as valid." *Id.* In addition, "it is settled

that the separation of power[s] … does not prohibit the legal consequences expressed in the law from taking effect upon the ascertainment of a fact, state of facts or contingency to be determined by an administrative agency." *Sw. Eng'g Co. v. Ernst*, 79 Ariz. 403, 415 (1955).

The Constitution allows the Commission to exercise fact-bound discretion to determine what acts "may assist in implementing" Prop. 211. A.R.S. § 16-974(A)(8). That is simply an executive body exercising typically executive functions. Indeed, the legislature has recognized elsewhere that "an agency may use its own experience, technical competence, specialized knowledge and judgment in the making of a rule." A.R.S. § 41-1024(D). According to Plaintiffs, though, when the People make the same determination, they violate the separation of powers.

At bottom, Plaintiffs' facial challenge relies on speculation (at 22) that the Commission will act unreasonably and arbitrarily "to take any action" that only "possibly relates to Prop 211's implementation." But Plaintiffs cannot meet their burden by resorting (at 26-27) to imaginary as-applied "examples" of Prop. 211's implementation. *Stanwitz*, 245 Ariz. at 349, ¶¶ 19-20; *see also Sw. Eng'g*, 79 Ariz. at 412 ("Merely because the possibility exists that there may be an arbitrary and capricious use of power … is not

sufficient reason to entertain a presumption that the power granted will be so exercised."). This is exactly the type of "speculation" that makes facial challenges "disfavored." *Wash. State Grange*, 552 U.S. at 450.

To the contrary, under the "no set of circumstances" standard, *Stanwitz*, 245 Ariz. at 349, ¶¶ 19-20, a single constitutional application of § 16-974(A)(8) defeats a facial challenge. There are many. Under (A)(8), for example, which goes beyond merely promulgating regulations (at 25 n.6), the Commission could create a reporting and disclosure database, or develop public educational materials. No one could seriously dispute that both would "assist in implementing" Prop. 211. This ordinary agency action would not threaten the legislature's power—or even require legislative authorization. These examples defeat a facial challenge.

Plaintiffs' cited authorities (at 23) don't help them. In *Hernandez v. Frohmiller*, 68 Ariz. 242, 254 (1949), the statute expansively required a civil service board to "regulate all conditions of employment in the state civil service" and provided no standards for the exercise of that power. *Id.* at 254. Here, however, § 16-974(A)(8) limits the Commission's actions to those that "may assist in implementing this chapter," which is filled with such standards. Likewise, *Roberts v. State*, 253 Ariz. 259 (2022) adds nothing.

There, the Court said "the legislature may properly delegate power to implement a statute so long as it plainly authorizes the executive agency to do so." *Id.* at 268, ¶ 34. That is what § 16-974(A)(8) authorizes the Commission to do: "implement[]" a single law requiring more campaign finance disclosure.

Having exhausted their arguments related to the claims they *did* bring, Plaintiffs assert (at 24) that § 16-974(A)(8) "exacerbates" other separation-of-powers problems because it "authorizes the Commission to exercise executive and quasi-judicial powers." Plaintiffs effectively concede (at 24), however, that they have no standing to assert such claims on behalf of the executive or judiciary, and they cannot avoid the consequences of this barrier with an "exacerbation" argument.

Plaintiffs cite (at 24) *Horne v. Polk*, 242 Ariz. 226 (2017), but *Horne* confirms that "[a] single agency may investigate, prosecute, and adjudicate cases." *Id.* at 230, ¶ 14 (2017) (citation omitted). Moreover, "agencies are free under Arizona law to generate their own processes regarding initiation, investigation, and prosecution of charges or complaints." *Id.* at 234, ¶ 27.

The Commission is an agency, not a single person acting as both prosecutor and adjudicator, as *Horne* warned against. *Id.* Contrary to

Plaintiffs' attack (at 24) on the Commission as a new "unelected super-branch," the Commission had authority, like many agencies, to adopt and enforce rules and impose penalties well before Prop. 211. *See* A.R.S. § 16-956(A)(2), (6)-(7), and (B). In terms of administrative law, there's nothing new or nefarious about Prop. 211 in general or § 16-974(A)(8) in particular.

In sum, this facial challenge fails: § 16-974(A)(8) has constitutional scope, and the Commission must be permitted to act within that scope.

2. A.R.S. § 16-974(D) respects the separation of powers.

Plaintiffs' separation-of-powers claim also fails as to § 16-974(D), which exempts the Commission's rules and enforcement actions from the "approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official"—meaning, GRRC, AROC, and the Attorney General, who otherwise have such oversight under the APA. (*See* Argument § I.B, above.)

Here too, the *Brnovich* factors prove § 16-974(D) constitutional. *See* 242 Ariz. at 593, ¶ 14. First, the "nature of the powers being exercised"—rulemaking—is quintessentially what administrative agencies do. Second, § 16-974(D) does not vest control over the Commission's rulemaking in the legislative branch; it insulates one part of the executive (the Commission)

from others (GRRC and the Attorney General) and from a legislative body (AROC) whose review is not constitutionally required.

Third and fourth, part of the voters' objective in passing Prop. 211 was to give the Commission independence from outside political pressures so it can effectively enforce Prop. 211's disclosure requirements in a non-partisan manner. [APP-224, ¶ 7.] The practical effect of § 16-974(D) is to bolster that independence by exempting the Commission's rules from review in the political branches.

Here, the Commission's rulemaking, like any other, is limited to its statutory mandate and delegated authority—the first and ultimate legislative check. *Ferguson v. Ariz. Dep't of Econ. Sec.*, 122 Ariz. 290, 292 (App. 1979). And a party with standing could ask a court to review the authority for, and substance of, those rules—a judicial check. Exempting the Commission's rules from additional review and approval by other executive and legislative actors—who may be subject to the very political pressures voters sought to insulate the Commission from—simply does not constitute an "usurpation by one department of the powers of another department." *J.W. Hancock Enter., Inc.*, 142 Ariz. at 405.

Plaintiffs' challenge to § 16-974(D) thus hinges on their erroneous assertion (at 23) that the statute "divests the Legislature of its constitutional lawmaking authority." For the reasons discussed above (Argument § I.B), the Court should not conclude that the voters, in an absurd and futile move, purported to strip away the legislature's lawmaking powers by statute in a short subsection about rulemaking. *Cf. Nayeri v. Mohave Cnty.*, 247 Ariz. 490, 494, ¶ 16 (App. 2019) (court presumes "that the legislature 'did not intend an absurd result'" (citation omitted)). No reason or authority supports adopting that irrational construction in this facial challenge when a more reasonable alternative is available. *E.g.*, *Burbey*, 243 Ariz. at 149, ¶ 17.

Plaintiffs say (at 16-17) that because of the phrase "legislative governmental body or official," § 16-974(D) purports to restrain the legislature from legislating to prohibit or limit the Commission's rulemaking or enforcement actions. But when the voters intended to refer to the legislature in Prop. 211, they did so expressly. *See* A.R.S. § 16-978(A) ("Nothing in this act prevents the legislature …."). Courts "presume that … [using] different language within a statutory scheme [evidences] the intent of ascribing different meanings and consequences to that language." *Workers for Responsible Dev. v. City of Tempe*, 254 Ariz. 505, 511, ¶ 21 (App.

2023) (citation omitted); *see* Scalia & Garner at 170 (same). Moreover, that section (A.R.S. § 16-978) directly addresses future legislative activity. Its title is "Legislative, county and municipal provisions." If voters wanted to limit the legislature's power to legislate, they would have done so there.

Plaintiffs arrive at their construction (at 16-17) by plucking words from the statute one by one—"any," "legislative," and "body"—and applying dictionary definitions in a vacuum. But myopic literalism is not textualism: "the good textualist is not a literalist." Antonin Scalia, *A Matter of Interpretation* 24 (1997); *see* Scalia & Garner 356 (similar). Arizona courts interpret statutes "according to the plain meaning of the words in their broader statutory context." *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286, ¶ 31 (2023). Plaintiffs' artificial reading ignores the context of subsection (D), which pertains to rulemaking and enforcement actions, not a constitutional amendment regarding legislation. That's

because Plaintiffs' construction is designed to create a constitutional conflict, not avoid one.[3]

Plaintiffs also claim (at 25 n.5) that exempting the Commission from the APA "*exacerbates*" the claimed constitutional issues. But Plaintiffs expressly "do not dispute" (n.5) that APA exemptions are common and constitutional. Their exacerbation theory makes no sense.

In sum, the superior court correctly rejected Plaintiffs' interpretation, holding that "Prop. 211 does not restrict the Legislature from passing laws." [APP-011, ¶ 7.]

B. Plaintiffs' nondelegation claim against § 16-974(A)(8) is unlikely to succeed.

Plaintiffs' nondelegation claim (at 27-33) challenges only § 16-974(A)(8). This claim is based on the same flawed construction and theory as Plaintiffs' separation-of-powers claim and fails for the same reasons.

---

[3] For example, Plaintiffs' word-by-word, hyperliteral approach would have "cold war" mean any wintertime war. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1826 (2020) (Kavanaugh, J., dissenting) (giving this and other examples). That is not how courts construe statutes. "When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning." *Id.*

"[T]he legislature may properly delegate power to implement a statute so long as" the statute "plainly authorizes" the agency to do so. *Roberts*, 253 Ariz. at 268, ¶ 34. A statute delegating authority to an administrative agency is constitutional if it provides a "basic standard, *i.e.*, a definite policy and rule of action which will serve as a guide for the administrative agency." *Mines Supply*, 107 Ariz. at 205-06. Courts do not require the statute to "lay down in advance an exact mathematical formula to which the designated administrative agency must adhere." *Sw. Eng'g*, 79 Ariz. at 412, 419.

As explained above (Argument §§ I.A, III.A.1), § 16-974(A) authorizes the Commission to implement and enforce Prop. 211 through the specifically enumerated actions in (A)(1)-(7) and a general grant of authority in (A)(8) to "perform any other act that may assist in implementing this chapter." That latter delegation in (A)(8) is informed and limited by the preceding powers in § 16-974(A), as well as Prop. 211's narrow focus and specific requirements. Section 16-974(A)(8) is an ordinary delegation "to fill in the details." *Mines Supply*, 107 Ariz. at 205. The superior court thus properly found that "Prop. 211 provides clear purposes and directives," not "unfettered authority," to the Commission. [APP-013, ¶¶ 23, 26.] Plaintiffs make three arguments in response.

First, they fault (at 29) the superior court for following precedent and applying a presumption of constitutionality "when the challenged law is alleged to violate the separation of powers." But Plaintiffs are not entitled to an inverse presumption that their assertions of unconstitutionality are correct. And it's not just that presumption that proves Plaintiffs' interpretation of the statute wrong—it's the plain text, surrounding statutory context, and precedent (Argument § I.A).

Given that Plaintiffs' facial claims and interpretation of § 16-974(A)(8) rests on hypotheticals about what the Commission *might* do, a presumption of constitutionality makes even more sense. "Merely because the possibility exists that there may be an arbitrary and capricious use of power legitimately delegated under the statute is not sufficient reason to entertain a presumption that the power granted will be so exercised." *Sw. Eng'g*, 79 Ariz. at 412. That must be so, otherwise Plaintiffs' same argument could "be made any time an agency or board is vested with the least amount of discretion, no matter how specific the statutory guidelines are." *Lake Havasu City v. Mohave Cnty.*, 138 Ariz. 552, 560 (App. 1983) (rejecting nondelegation challenge to statute).

Plaintiffs' authorities (at 29) do not undermine the presumption. *Petition Partners* addressed only individual "fundamental rights, such as free speech or freedom of religion"—rights not at issue here. 255 Ariz. at 254, ¶ 14. Their out-of-circuit case (*N.L.R.B. v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 646 (4th Cir. 2013)) merely reflects an unelaborated dictum expressing doubt.

Second, Plaintiffs protest (at 30) that § 16-974(A)(8) gives the Commission *too much* authority, urging the Court to tamp down the voters' policy determination. But "there is no real constitutional prohibition against the delegation of a *large measure of authority* to an administrative agency for the administration of a statute" and "to fill in the details of legislation already enacted." *Mines Supply*, 107 Ariz. at 205 (emphasis added). The question is one of qualitative standards, not quantitative power.

Third, Plaintiffs argue (at 30-33) that the voters can only authorize the Commission to take actions that are strictly "necessary" to implement Prop. 211. But a necessity standard is not required, only a "basic standard, i.e., a definite policy and rule of action which will serve as a guide for the administrative agency." *Id.* at 205-06.

Moreover, Plaintiffs' argument again imposes a double standard on voters. The legislature has delegated authority to various bodies using far looser and more subjective standards than "necessary," such as what's convenient, proper, appropriate, desirable, or advisable. *E.g.*, A.R.S. § 9-462.06(C) ("necessary or convenient"); 15-1482 (4) ("necessary or convenient"); 30-124(A) ("may be necessary, convenient or advisable"); 36-782(F) ("reasonable efforts to assist"); 41-5853(B)(2)-(6), (10) ("necessary or convenient," "necessary or proper," "any other action that is necessary or appropriate"); 36-1420(A) ("necessary, convenient or desirable"); 48-5304(9) ("proper or necessary"); 45-1709(8)-(9) ("necessary or convenient"); 28-368(A) ("necessary, useful or convenient").

Plaintiffs try to brush off (at 31-32) these many examples as having "a necessity qualifier." But each of these statutes uses "necessary" in the *disjunctive* and not as an absolute requirement. *E.g.*, *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 197, ¶ 18 (2016) ("When two disjunctive terms modify the same action, each possibility must make sense standing alone.").

The Supreme Court has already upheld delegations of authority to "take action necessary *or* desirable to carry out the provisions of [the statute]," *State v. Williams*, 119 Ariz. 595, 598 n.3 (1978) (emphasis added). If

an agency can determine what is "desirable to carry out" a statute, then the Commission can determine what will "assist in implementing" Prop. 211. A.R.S. § 16-974(A)(8). No constitutionally significant difference exists between those two. Plaintiffs cite no authority supporting their magic-words test. Most of the cases they cite (at 27-33) *uphold* the challenged statute under a nondelegation attack. *E.g.*, *Mines Supply*, 107 Ariz. at 205-06; *Sw. Eng'g*, 79 Ariz. at 414; *Lake Havasu City*, 138 Ariz. at 558-59. Indeed, in Arizona, delegations "are normally sustained as valid." *Mines Supply*, 107 Ariz. at 205.

Plaintiffs also mistakenly fault (at 32) the superior court for "failing to acknowledge Prop. 211's similarity" to the statute in *State v. Marana Plantations, Inc.*, 75 Ariz. 111 (1953). The statute there, however, authorized the Board of Health to "formulate general policies affecting the public health" and delegated "unrestrained power to regulate." *Id.* at 115. Same with *Hernandez v. Frohmiller*, which gave the executive agency power to enact "unrestrained regulation of all conditions of employment" in the state civil service. 68 Ariz. at 254. By contrast, § 16-974(A)(8) does not authorize the Commission to dictate general policies or exercise unrestrained power; the

Commission can only implement Prop. 211, which addresses the narrow topic of disclosing campaign media spending.

For these reasons, Plaintiffs' nondelegation attack on § 16-974(A)(8) is unlikely to succeed.

C. Plaintiffs' "VPA claim" against § 16-974(D) is unlikely to succeed.

Plaintiffs' so-called "VPA claim" (at 33-35) attacks only § 16-974(D). The VPA expressly limits the legislature's power with respect to voter-approved initiatives. The legislature cannot repeal voter-approved initiatives. Ariz. Const. art. 4, pt. 1, § 1(6)(B). And the legislature can amend such an initiative only if the amendment "furthers the purpose[]" of the law, and is passed by three-fourths of the members in each chamber. Ariz. Const. art. 4, pt. 1, § 6(C). The VPA's "principal purpose … is to preclude the legislature from overriding the intent of the people." *Cave Creek I*, 231 Ariz. at 347, ¶ 9, *aff'd*, 233 Ariz. at 1.

Plaintiffs' claim rests entirely on their erroneous construction of the statute as prohibiting legislation that the VPA would permit. As discussed above (Argument § I.B), A.R.S. § 16-974(D) does not prevent the legislature from legislating—it applies to *rulemaking* oversight. Prop. 211 does not

amend the VPA. To the contrary, Prop. 211 expressly accommodates the legislature's option under the VPA to enact legislation that furthers the purpose of the initiative, explaining that "[a]dditional or more stringent disclosure requirements for campaign media spending further the purposes of this chapter." A.R.S. § 16-978(A) (part of Prop. 211). Plaintiffs' VPA claim is unlikely to succeed.

D. Even if Plaintiffs are likely to prevail on the merits, severance, not a complete injunction, is the appropriate remedy.

Even if the Court finds § 16-974(A)(8) and (D) unconstitutional, the superior court still did not err in refusing to enjoin all of Prop. 211. The voters expressly made Prop. 211 severable:

> The provisions of this act are severable. If any provision of this act … is held to be unconstitutional, the remainder of this act … shall not be affected by the holding.

[APP-223, § 4.] Prop. 211 is principally devoted to requiring the disclosure of the original sources of funds used for campaign media spending [APP-223, § 4], and Prop. 211 can fully operate and serve that purpose without the challenged provisions.

To determine whether to sever a statutory provision, (1) a court asks "whether the valid portion, considered separately, can operate

independently and is enforceable and workable," and (2) if it is, a court will uphold the law "unless doing so would produce a result so irrational or absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other." *Randolph v. Groscost*, 195 Ariz. 423, 427, ¶ 15 (1999); *see also Myers*, 196 Ariz. at 522-23, ¶¶ 22, 24. Both elements are satisfied here.

Even without § 16-974(A)(8) and (D)—a small fraction of the Act—Prop. 211's numerous other provisions detail what the law requires and how it is enforced. Prop. 211 extensively defines the Act's relevant terms (§ 16-971); prescribes how donors must be notified that their donations may be used for campaign spending and publicly disclosed (§ 16-972); describes the information that big campaign spenders must report (§ 16-973); prohibits structured transactions designed to evade the law (§ 16-975); specifies the penalties for violations of the Act (§ 16-976); and establishes a citizen complaint and Commission investigation process (§ 16-977). None of those provisions hinge on the statutory text Plaintiffs challenge here.

Thus, as a facial matter, severing § 16-974(A)(8) would have zero effect on Prop. 211's requirements and workability, and little effect on Prop. 211's enforceability. Prop. 211's core disclosure requirements would remain. And

the Commission would retain the specific powers to implement and enforce the law listed in (A)(1)-(7), including rulemaking, which Plaintiffs do not attack in and of itself (at 25 n.4).

The same is true if the Court severed the exemptions for the Commission's rulemaking in § 16-974(D). Adding rulemaking oversight back into the mix would not substantively constrain the Commission's mandate to ensure compliance with Prop. 211's disclosure provisions. Eliminating the rulemaking oversight exemptions would make a *procedural* difference only, and a marginal one at that given that parties with standing may already seek judicial review of Commission activity.

In sum, even if the Commission's regulations were subject to review and approval on the front-end (without § 16-974(D)), and even if the Commission were unable to promulgate certain rules that wouldn't be authorized under § 16-974(A)(1)-(7) (without (A)(8)), Prop. 211's disclosure

requirements would remain fully intact and fully enforceable under the Act's other core provisions.[4]

To escape that conclusion, Plaintiffs first try (at 36 & n.11) to double back and expand their challenges to (A)(1)-(7) for severability purposes, newly seeking the broader relief of striking down all of § 16-974(A) for the "avoidance of doubt." That's improper, outside their pleadings, and not how any of this works—severability, statutory construction, constitutional avoidance, or judicial restraint.

Plaintiffs rely (at 37-38) on *Fann v. State*, 251 Ariz. 425 (2021). But there, severability was impossible because striking down the offending provision would lead to the absurd result that 85% of the funds raised by an unconstitutional tax would be permanently sequestered. *Id.* at 437, ¶¶ 39-41. Nothing comparable would occur here, where covered persons would continue to report the sources of election spending and the Commission

[4] Even if the Commission were entirely unable to promulgate certain regulations, the Commission could develop the law on a case-by-case basis. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance with the Board's discretion").

would continue to enforce Prop. 211, even if small aspects of the Commission's authority or independence were modified.

Plaintiffs also claim (at 38) that if the Commission were unable to enforce Prop. 211 and collect penalties, this "would leave Prop. 211 without a single funding source in violation of the revenue source rule." But even if the Court were to limit the Commission's "executive" functions, this would not violate article 9, § 23 of the Arizona Constitution. The Act provides a funding source that does not rely upon civil penalties for violations of Prop. 211. *See* A.R.S. § 16-976(C) (providing that "additional surcharge of one percent shall be imposed on civil and criminal penalties" collected by state to finance Citizens Clean Elections Fund).

For these reasons, it is neither absurd nor irrational to conclude that the voters would have passed Prop. 211's key disclosure requirements and enforcement mechanism, even if the Commission's had slightly less administrative authority and independence in its rulemaking. Accordingly, if the Court enjoins § 16-974(A)(8) and (D), it should sever them and leave the rest of Prop. 211 fully operational.

E. Plaintiffs are unlikely to succeed on their challenge to the Commission's rules.

Plaintiffs challenge three of the Commission's rules, R2-20-808, R2-20-801, and R2-20-803(E), based solely on separation-of-powers grounds. [APP-037 to APP-040; APP-065 to APP-067 (raising solely separation-of-powers grounds).]

Plaintiffs lack standing to challenge the rules (Argument § II), and the rules are constitutional.

1. Consistent with the separation of powers, the Commission can issue advisory opinions.

The Commission's rule creating an advisory-opinion process, R2-20-808, is constitutional. Administrative agencies frequently provide advisory opinions, opinion letters, or other advice and individual interpretation. *See* Charles H. Koch, Jr. & Richard Murphy, 2 Admin. L. & Prac. § 5:17 (3d ed.) ("Agencies also act through advice and individual interpretation."). Advisory opinions "avoid expenditure of enforcement resources" while still allowing "citizens who want to avoid trouble to bring their conduct into line with the agency's views." *Id.* Agencies often issue advisory opinions to "clarify the meaning and applicability of statutes and regulations to given sets of circumstances." Christopher J. Climo, *A Laboratory of Regulation: The*

Untapped Potential of the HHS Advisory Opinion Power, 68 Vand. L. Rev. 1761, 1777 (2015); *see also Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 902-03 (9th Cir. 2023) (discussing persuasive value of Department of Labor advisory opinion); *Catskill Dev., L.L.C. v. Park Place Ent. Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (discussing opinion letter issued by National Indian Gaming Commission).

Here, the Commission is entitled to "establish rules for the complete operation and enforcement of" Prop. 211 under A.R.S. § 16-974(A). *Joshua Tree Health Ctr., LLC v. State*, 255 Ariz. 220, 223, ¶ 12 (App. 2023) (citation omitted). Because the Commission has this authority, it also necessarily has authority to fill in the details of its rules through adjudications and advisory opinions. *See Mines Supply*, 107 Ariz. at 205. Ultimately, "[a] statute's silence on an issue does not mean the agency lacks authority to act. Rather, an agency can take actions reasonably implied from the statutory scheme as a whole." *Joshua Tree*, 255 Ariz. at 223, ¶ 12 (citation and quotation marks omitted).

Legislatures do not provide advisory opinions, and the Commission's decision to implement Prop. 211 by providing a voluntary advisory opinion process does not infringe on the legislature's authority. Moreover, agencies

unquestionably have prosecutorial discretion. 1 Admin. L. & Prac. § 3:10 ("Agencies also have nearly absolute authority to refuse to undertake an investigation."). Legislatures do not enforce laws and have no occasion to exercise prosecutorial discretion. By issuing advisory opinions, an agency can streamline the enforcement process by essentially preannouncing its prosecutorial discretion. This permits "citizens who want to avoid trouble to bring their conduct into line with the agency's views." 2 Admin. L. & Prac. § 5:17. The superior court thus properly determined that the Commission "exercis[ing] its prosecutorial discretion … [to] not enforce the Act against someone who follows [an] advisory opinion" does not violate the separation of powers. [APP-014, ¶ 31.]

Plaintiffs primarily argue (42-45) that the Commission cannot issue advisory opinions without express statutory authorization. They cite no authority that would require an express authorization for advisory opinions when an agency already has rulemaking and enforcement power. Plaintiffs point (at 43) to the fact that some other agencies have statutory authorization. But the fact that some agencies have express authority does not mean that it's required.

Plaintiffs criticize (at 42) the superior court's reliance on *Joshua Tree* because (1) "the challenged law involved a specific statutory authorization"; (2) the case is "at odds with the Arizona Supreme Court's recent instruction in *Roberts*"; and (3) *Joshua Tree* "relied on caselaw pre-dating… § 12-910(F)."

First, the "specific statutory authorization" the Court found sufficient in *Joshua Tree* said the agency "may make and amend rules necessary for the proper administration and enforcement of the laws." *Joshua Tree*, 255 Ariz. at 223, ¶ 13 (quoting A.R.S. § 36-136(G)). The Commission's statutory authority—to "[a]dopt and enforce rules"—is essentially the same. A.R.S. § 16-974(A)(1).

Second, *Roberts* says nothing about advisory opinions. Its "plainly authorizes" requirement applies only to an agency exercising "legislative power … on major policy questions." *Roberts v. State*, 253 Ariz. 259, 268, ¶ 30 (2022). Plaintiffs' facial challenge does not allege any major policy questions embedded in R2-20-808. This regulation creates a *process*; it does not contain any *substantive* interpretations of Prop. 211's disclosure requirements.

Third, A.R.S. § 12-910(F) has no bearing here. It eliminates deference to an agency's "previous determination" on an issue, not the scope of the agency's authority; and it applies only in narrow contexts, including "[i]n a

proceeding brought by or against the regulated party"—i.e., not here. A.R.S. § 12-910(F).

Plaintiffs also mistakenly argue (at 44) that this rule removes a voter's right to bring a civil action under A.R.S. § 16-977. That section authorizes a "qualified voter" to file a complaint with the Commission, which then determines whether the complaint "states the factual basis for a violation." A.R.S. § 16-977(B). If the Commission takes no action at that stage based on an advisory opinion, the voter who filed the administrative complaint can still "bring a civil action" in court. A.R.S. § 16-977(C). The court will review the Commission's decision "de novo," and except for small penalties, the Commission cannot rely on "prosecutorial discretion" at that stage. *Id.* Consequently, and contrary to Plaintiffs' argument, an advisory opinion will not eliminate a voter's statutory right to "bring a civil action" in court. *Id.*

Moreover, even if Plaintiffs were right on these minor points, that still would not establish a separation-of-powers violation—their only basis for challenging the rule.

2. R2-20-801 abides the separation of powers.

Under the separation-of-powers doctrine, the legislature (or here, the voters) "possesses the lawmaking power," but can exercise this power by

"allow[ing] another body to fill in the details of legislation already enacted." *Mines Supply*, 107 Ariz. at 205. This often involves filling in statutory gaps or resolving statutory ambiguities. "[A]dministrative bodies may make rules and regulations supplementing legislation for its complete operation and enforcement as long as such rules and regulations are within the standards set forth in the legislative act." *Gutierrez v. Indus. Comm'n*, 226 Ariz. 1, 5, ¶ 15 (App. 2010), *aff'd* 226 Ariz. 395 (2011).

For R2-20-801, the Commission invoked this authority to clarify two statutes. First, A.R.S. § 16-971(2)(a)(vii) states that the definition of "campaign media spending" includes "[1] Research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity [2] conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision." (Bracketed numbers added.) The statute does not specify the degree of required relationship between the activities in parts [1] and [2]. R2-20-801(B) resolves this ambiguity, or fills in this gap, by requiring the degree to be "specifically":

> For purposes [of] A.R.S. § 16-971(2)(a)(vii), research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or

> in conjunction with any of the other activities described in A.R.S. § 16-971(2)(a) shall not be considered campaign media spending unless these activities are *specifically* conducted in preparation for or in conjunction with those other activities.

R2-20-801(B) (emphasis added). In other words, instead of just having to be "conducted in preparation for or in conjunction with" (A.R.S. § 16-971(2)(a)(vii)), an activity has to be "*specifically* conducted in preparation for or in conjunction with" (R2-20-801(B) (emphasis added)). Under the rule, expenses incurred primarily for one purpose, but which may also have some limited use in developing campaign ads, would not need to be reported as campaign media spending. The rule properly "determine[s] the state of facts upon which the law intends to make its action depend." *Mines Supply*, 107 Ariz. at 205. The superior court correctly held that the rule "does not redefine" the statutory term, but rather "clarifies" it. [APP-014, ¶ 28.]

Plaintiffs suggest (at 45) that R2-20-801(B) adds a *mens rea* requirement. It does not. Nothing in the rule establishes a required *mens rea*. Plaintiffs rely not on the rule's text, but instead on the Commission's brief below, which used the phrase "specific intent." [APP-089.] But the brief below did not use that phrase as a *mens rea* term of art; it merely referred to the

specificity requirement in R2-20-801(B), because the word "specifically" is the only difference between R2-20-801(B) and A.R.S. § 16-971(2)(a)(vii).

Second, A.R.S. § 16-972(D) allows a covered person to request the identity and amounts of certain upstream donors who transferred over $2,500. A donor must inform a covered person of the identity of persons who contributed "original monies *being transferred*" and thus implies that a donor need not reveal the identity of sources of monies in its possession that are not being transferred. (Emphasis added.) To clarify any potential ambiguity in this provision, the Commission's rule states that such requests concern only the transactions "up to the amount of money being transferred to the requesting person." R2-20-801(C). In other words, if Person A received $50,000 contributions each from Persons B, C, D, and E ($200,000 total), and then Person A contributed $30,000 to a covered person, the covered person could request the identity of the donors, but only up to the $30,000 being transferred (not all $200,000 received by Person A). This rule "fill[s] in the details of legislation already enacted," which is appropriate for agency rulemaking and does not violate the separation of powers. *Mines Supply*, 107 Ariz. at 205.

Moreover, Plaintiffs' claims on the rules are limited to the separation-of-powers arguments they raised below. [APP-062 to APP-067.] The two cases they cite (at 46) do not show that the Commission usurped a legislative function when promulgating rules to clarify statutes. Fundamentally, the implicit premise of Plaintiffs' argument is that if an agency's rules are not a 1:1 exact match with the statute, then they violate the separation of powers. But that makes no sense. If agency rules had to match a statute exactly, then there would be no point in giving an agency rulemaking power. That simply is not the law in Arizona.

3. R2-20-803(E) abides the separation of powers.

With R2-20-803(E), the Commission again sought to clarify a statutory ambiguity or gap. A.R.S. § 16-972(B) requires donors to "be given an opportunity to opt out of having the donation used or transferred for campaign media spending." It requires covered persons to "[i]nform donors that they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing within twenty-one days after receiving the notice." A.R.S. § 16-972(B)(2).

The statute does not say what happens after the 21-day period. The Commission resolved that statutory gap or ambiguity by specifying that

covered persons "may make subsequent written notices" with additional opt-out periods after the 21-day period, R2-20-803(D), and that "[a] donor may request to opt out at any time after the initial notice period and the covered person must confirm the opt out to the donor in writing no later than 5 days after the request and *subsequently* that donor shall be treated as having opted out by the covered person," R2-20-803(E) (emphasis added).

By doing so, the Commission "fill[ed] in the details of legislation already enacted." *Mines Supply*, 107 Ariz. at 205. Plaintiffs agree (at 46) that "Prop. 211 says nothing about what happens when that [21-day] time period lapses." The superior court correctly held that the rule "clarifies that covered entities may provide further notices to opt out after their original one, [and] that a donor may opt out after the initial notice period." [APP-014, ¶ 29.] The court rejected Plaintiffs' argument that "R2-20-803(D) and (E) unlawfully change the statute." [APP-014, ¶ 29.] Accordingly, it held that "[t]hese rules do not change the opt-out regime—they simply clarify other options available to donors and covered persons." This does not violate the separation of powers.

Plaintiffs claim (at 47) that the rule "has the 'effect of altering the legal rights, duties and relations' of persons subject to Prop. 211, which is

fundamentally legislative." (Citing *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).) But altering legal rights, duties, and relations is not an exclusively legislative prerogative. Almost any government action, from a judicial opinion, to an administrative rule, to a criminal prosecution, has the "effect of altering the legal rights, duties and relations" of people. *Chadha* itself provides little support to Plaintiffs—it involved a one-house veto over an executive immigration decision, which implicated bicameralism and the Presentment Clauses. *Id.* at 947-59.

By contrast, under settled law in Arizona, an administrative agency has the power "to fill in the details of legislation already enacted." *Mines Supply*, 107 Ariz. at 205. That's what the Commission did.

4. The Court may disregard Plaintiffs' request for heightened standards.

Plaintiffs ask the Court (at 40-41) to apply "an appropriate level of scrutiny" to their challenge to the Commission's rules. Plaintiffs do not identify what, exactly, the "appropriate level of scrutiny" would be, but implicitly suggest that the Court should apply more scrutiny than normal.

Citing (at 41) *W. Va. v. E.P.A.*, 142 S. Ct. 2587, 2613 (2022), Plaintiffs claim "[q]uestions of vast 'political significance' demand greater statutory

clarity." To get to vast political significance, Plaintiffs ramp the level of abstraction far above the challenged rules, to the level of campaign media and free speech. But this is a *facial* challenge about three narrow rules. Plaintiffs have not demonstrated, for example, that the difference between "conducted in preparation for or in conjunction with" versus "*specifically* conducted in preparation for or in conjunction with" has "vast public importance." Indeed, although Plaintiffs argue that using the word "specifically" unconstitutionally usurps legislative power, they do not even offer a single example of a situation that would be covered by A.R.S. § 16-971(2)(a)(vii) but not by R2-20-801(B). This case does not trigger the "major questions doctrine," which Plaintiffs do not even name.

Rather, the proper standard of review for this Court is to "indulge all rational presumptions in favor of the validity of the administrative action and … not invalidate such action unless its provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate." *Ariz. Cannabis Nurses Ass'n v. Ariz. Dep't of Health Servs.*, 242 Ariz. 62, 68, ¶ 16 (App. 2017) (citation and quotation marks omitted).

IV. Plaintiffs have not satisfied the other requirements for a preliminary injunction.

Plaintiffs cannot show a possibility of irreparable harm without relief, nor that the balance of hardships and public policy weigh in favor of granting the injunctive relief. *Shoen*, 167 Ariz. at 63.

A. Plaintiffs do not face irreparable harm.

When a plaintiff's "likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 12, ¶ 17 (App. 2023) (citation omitted). "A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).

Here, the superior court correctly found that Plaintiffs have not shown the legislature will face irreparable harm without preliminary relief. [APP-015, ¶ 35.] The generalized harm Plaintiffs assert (at 57)—injury to the legislature's "lawmaking power"—is not irreparable in any concrete or immediate sense, nor is it the type of harm preliminary injunctions address. Further demonstrating the lack of any actual harm to the legislature, Plaintiffs "waited nine months after the 2022 election [when Prop. 211 was

passed] to bring this litigation," and the superior court found they "presented no credible evidence explaining the nine-month delay." [APP-015, ¶¶ 33-34.]

Plaintiffs (at 59-60) say they delayed suing to "conserve taxpayer resources and to avoid unnecessar[y]" litigation because another case filed shortly after Prop. 211's enactment raised a separation-of-powers claim. But Plaintiffs also assert nondelegation and VPA violations here, and Plaintiffs knew the superior court dismissed the separation-of-powers claim in the other case on June 21, 2023. [APP-322-37.] Still, they waited 55 days to seek a preliminary injunction (on August 15), and did not file their "restated" motion until September 19, more than a month after that. [APP-046.]

The superior court correctly distinguished between "personal constitutional rights," which "may presumptively create irreparable harm," and harms stemming from "alleged violations of structural provisions of the Constitution, like separation of powers," which do not. [APP-015, ¶ 35.] *See John Doe*, 849 F.3d at 1135 (A "'violation of separation of powers' by itself is not invariably an irreparable injury.").

Contrary to Plaintiffs' assertions, cases finding irreparable harm based on "a violation of a constitutional right alone … are limited to cases

involving *individual rights*, not the allocation of powers among the branches of government." *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020) (emphasis added). Their cited cases (at 57) all concern individual rights, not structural provisions, and therefore do not help them.

For instance, in *County of Santa Clara v. Trump*, 250 F.Supp.3d 497 (N.D. Cal. 2017), the county plaintiffs were "currently suffering irreparable injury" because they were "obligated to take steps to mitigate the risk of losing millions of dollars in federal funding" and were experiencing coercion from a federal executive order. *Id.* at 536-37. Similarly, in *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009), the irreparable harm was that the plaintiffs had to choose between "adher[ing] to the various unconstitutional provisions" at issue or "give up their business." Nothing like those financial and coercive harms is present here.

Plaintiffs also rely (at 58) on *State v. Prentiss*, 163 Ariz. 81, 84 (1989), and *Mecham v. Gordon*, 156 Ariz. 237, 300 (1988), but neither case involved a preliminary injunction or analyzed the possibility of irreparable harm to the challenger of a statute. In sum, as with other aspects of their case, the alleged "irreparable harm" to the legislature is not concrete and does not go beyond relying on unreasonable legal assertions.

B. The balance of hardships favors Defendants, and public policy favors maintaining the status quo.

Where "the likelihood of success on the merits is weak, the showing of irreparable hardship must be stronger," unless the plaintiff can establish serious questions going to the merits and that the balance of hardships tips sharply in their favor. *Flagstaff*, 255 Ariz. at 12, ¶¶ 14, 17 (citation omitted). For the reasons discussed, Plaintiffs' facial challenges fail to raise any serious questions on the merits, nor does the balance of hardship tip "sharply" in their favor—not even close.

As the superior court found, the balance of hardships weighs strongly in Defendants' favor because "the Court must consider the hardship to the 1.7 million voters who voted for Prop. 211." [APP-015, ¶ 39.] With Prop. 211, the voters declared an unambiguous goal to increase transparency in campaign media expenditures in Arizona elections. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("The public interest may be declared in the form of a statute."). An injunction "would prevent the People's legitimate exercise of legislative authority from being given effect and would prevent voters from learning the sources of money behind large-

dollar election advertising," which is "a hardship to the public." [APP-015, ¶ 39.]

Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). [APP-015, ¶ 40 (quoting same).] That is just as true when the laws that voters pass are prevented from taking effect. [APP-015, ¶ 42.] As the superior court properly found, this Court too "should give due weight to the serious consideration of the public interest in this case that has already been undertaken" by the People in passing Prop. 211. *Stormans, Inc.*, 586 F.3d at 1140.

Plaintiffs downplay (at 61) the hardship to the voters, asserting that "donors must already abide by some disclosure requirements imposed by existing law." But if the voters agreed that existing law was sufficient to achieve the transparency they sought, they would not have passed Prop. 211. This is but another example of Plaintiffs simply second-guessing the voters' exercise of their lawmaking power.

Plaintiffs assert (at 61) that the Commission cannot suffer harm from an injunction of an unconstitutional law, but those "arguments are obviously

premised on [their] view of the merits." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The People's enactments are entitled to the same presumption of constitutionality as are the legislature's. *Bonnewell*, 196 Ariz. at 594, ¶ 5. And Plaintiffs "cannot suffer harm" from the Court "merely … read[ing] a statute as required to avoid constitutional concerns." *Id.* Thus, the balance of hardships and public policy tip sharply in favor of construing § 16-974(A)(8) and (D) in a constitutional light and allowing the law that passed with 72% of the vote to remain in effect.

ARCAP 21

Appellees request fees under A.R.S. § 12-348.01.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of February, 2024.

OSBORN MALEDON, P.A.

By /s/ Eric M. Fraser
Mary R. O'Grady
Eric M. Fraser
Sarah P. Lawson
2929 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
Attorneys for Defendant/Appellee
Arizona Citizens Clean Elections
Commission

SHERMAN & HOWARD LLC

By /s/ Craig A. Morgan (w/permission)
Craig A. Morgan
Shayna Stuart
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Attorneys for Defendant/Appellee
Adrian Fontes, in his official capacity as
the Arizona Secretary of State

ATTORNEY GENERAL

By /s/ Luci D. Davis (w/permission)
Alexander W. Samuels
Nathan T. Arrowsmith
Luci D. Davis
2005 North Central Avenue
Phoenix, Arizona 85004
Attorneys for Intervenor/Appellee
Attorney General Kris Mayes

CAMPAIGN LEGAL CENTER

By /s/ David Kolker (w/permission)
David Kolker
Tara Malloy
Elizabeth D. Shimek
1101 14th Street, NW, Suite 400
Washington, DC 20005

Daniel J. Adelman
Chanele N. Reyes
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
352 East Camelback Road, Suite 200
Phoenix, Arizona 85004

Attorneys for Intervenor/Appellee Voters' Right to Know