ARIZONA COURT OF APPEALS

DIVISION ONE

CENTER FOR ARIZONA POLICY, INC., et al. Plaintiffs/Plaintiffs, v. ARIZONA SECRETARY OF STATE, et al. Defendants/Appellees, and ARIZONA ATTORNEY GENERAL, et al. Intervenor-Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 24-0272 Maricopa County Superior Court No. CV2022-016564

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INTRODUCTION

In 2022, 72% of Arizona voters approved the Voters' Right to Know Act ("Prop. 211" or "the Act"), a citizens' initiative that requires entities making significant expenditures in Arizona elections to disclose their large donors.

Plaintiffs sued, claiming that the Act was facially unconstitutional, violating free speech, private affairs, and separation of powers protections in the Arizona Constitution. Relying on decades of case law upholding campaign finance disclosures, the trial court rejected Plaintiffs' facial free speech challenge because the Act advances important government interests and is both substantially related and narrowly tailored to those interests. The trial court also rejected Plaintiffs' private affairs challenge, concluding that election contributions are not "private" affairs under the meaning of the Arizona Constitution. It dismissed Plaintiffs' separation of powers claim for lack of standing.

The trial court granted Plaintiffs leave to file an as-applied free speech challenge. Because Plaintiffs wholly failed to plead a "reasonable probability that disclosure of its contributors' names [would] subject them to threats, harassment, or reprisals from either Government officials or

private parties," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010)), the trial court also dismissed that claim.

Plaintiffs now repeat on appeal the same constitutional challenges rejected below. But the trial court's rulings should not be disturbed. Its holdings on the facial challenges are consistent with decades of case law and the plain text of the Arizona Constitution. And the trial court correctly dismissed Plaintiffs' as-applied claim when they failed to allege facts establishing a "reasonable probability" that disclosure would result in threats, harassment, or reprisals.

For similar reasons, the trial court also did not abuse its discretion in denying Plaintiffs' two requests for a preliminary injunction. The trial court properly denied Plaintiffs' renewed request in the absence of likelihood of success on the merits.

Prop. 211 was enacted to ensure that voters get the information they need to make informed decisions and meaningfully exercise their right to participate in government—rights the framers enshrined in the Arizona Constitution. By challenging Prop. 211's disclosure requirements, Plaintiffs seek to undermine the purpose of the Constitution. So, they cannot also seek protection in it. The Court should reject Plaintiffs' attempt to circumvent the

will of the voters and intent of the framers and affirm the dismissal of Plaintiffs' claims.

STATEMENT OF FACTS AND CASE*

I. Overview of Prop. 211.

In 2022, Arizona voters overwhelmingly passed Prop. 211 to "establish[ ] that the People of Arizona have the right to know the original source of all major contributions used to pay … for campaign media spending." Prop. 211, § 2(A) (APP005). Specifically, Prop. 211 targets the use of dark money in Arizona—a practice the Act describes as "laundering political contributions, often through multiple intermediaries, to hide the original source." *Id.*, Prop. 211, § 2(A),(C) (APP005).

Dark money refers to financial donations made to influence elections where the original donor is not subject to any disclosure requirements. As the trial court explained, dark money is often created when "individuals or corporations donate to [§ 501(c)(4)] non-profit corporation[s]" which do "not have to disclose [their] donors," and then the "C4" nonprofit "donates to an

* Selected record items cited are included in the separate Appendix, cited by page numbers (e.g., APP044). Other record items are cited with "IR-" followed by the record number.

independent expenditure committee ("IEC")." IR-116, 6/21/23 Ruling at 2 (APP029) (quoting D. Cantelme, *Arizona's Campaign Finance Laws are Teetering*, Ariz. Att'y, March 2015, at 36); *see also* David R. Berman, *Dark Money in Arizona: The Right to Know, Free Speech and Playing Whack-a-Mole*, Morrison Inst. for Pub. Pol'y 3-4 (2014) (explaining the frequent occurrence of dark money in Arizona).

Prop. 211 targets this practice by requiring large spenders to file reports disclosing their large donors. The Act includes provisions that allow donors to opt out or prevent disclosure if there is a risk of harm. And it imbues the Citizens' Clean Elections Commission (the "Commission") with authority to implement and enforce the Act.

A. The Act covers large spenders and their large donors.

Prop. 211 requires disclosures from "covered persons." That term includes "any person [or entity] whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than $50,000 in statewide campaigns or more than $25,000 in any other type of campaigns." A.R.S. § 16-971(7)(a).

Once an individual or entity hits that threshold and qualifies as a "covered person," the person or entity must disclose donors who have directly or indirectly donated more than $5,000 and who have not opted out of having their funds used for campaign spending. A.R.S. § 16-973(A)(6); *see also* A.R.S. § 16-971(18) (defining "traceable monies").

"[I]ndividuals who spend only their own personal monies" or "organizations that spend only their own business income" are not subject to disclosure. A.R.S. § 16-971(7)(b)(i), (ii). Likewise, political action committees and political parties that receive less than $20,000 from any one person in an election cycle and all candidate committees are not subject to the Act. *Id.* § 16-971(7)(b)(iii), (iv).

B. The Act addresses campaign media spending.

The Act's disclosure thresholds are only relevant if the covered person is engaging in "campaign media spending." The Act defines that term to mean money to pay for a *public* communication that:

> (1) "expressly advocates for or against the nomination, or election of a candidate."
>
> (2) "promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate."

> (3) "refers to a clearly identified candidate within ninety days before a primary election until the time of the general election … in the jurisdiction where the candidate's election is taking place."
>
> (4) "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum."
>
> (5) "promotes, supports, attacks or opposes the recall of a public officer."

A.R.S. § 16-971(2)(a)(i)-(v).

Campaign media spending also includes "[a]n activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity." A.R.S. § 16-971(2)(a)(vi). In addition, "research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with [campaign media spending as defined in (i)-(vi)]" qualifies. A.R.S. § 16-971(2)(a)(vii).

The Act expressly excludes from disclosure spending monies or accepting in-kind contributions to disseminate bona fide media news and editorials, as well as nonpartisan voter engagement. *See* A.R.S. § 16-971(2)(b)(i)-(ii).

C. The Act requires disclosure reports.

Within five days of reaching Prop. 211's disclosure thresholds, a covered person must file a report with the Secretary of State that discloses the identity[1] of each "donor of original monies[2] who contributed, directly or indirectly, more than $5,000 … *for campaign media spending* during the election cycle to the covered person." A.R.S. § 16- 973(A) (emphasis added). Covered persons must also disclose the identity of "each person that acted as an intermediary and that transferred … traceable monies[3] of more than $5,000 from original sources to the covered person." A.R.S. § 16-973(A)(7). The report obligations are re-triggered each time a covered person spends an additional $50,000 on statewide elections or $25,000 on other elections. A.R.S. § 16-973(B).

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[1] For an individual, identity means "the name, mailing address, occupation and employer of the individual" and for an entity, it means "the name, mailing address, federal tax status and state of incorporation, registration or partnership, if any." A.R.S. § 16-971(10).

[2] "Original monies" means business income or an individual's personal monies. A.R.S § 16-971(12).

[3] "Traceable monies" means "(a) Monies that have been given, loaned or promised to be given to a covered person and for which no donor has opted out of their use or transfer for campaign media spending pursuant to § 16-972; (b) Monies used to pay for in-kind contributions to a covered person to enable campaign media spending." A.R.S. § 16-971(18).

All disclosure reports are public and subject to perjury. A.R.S. § 16-973(H). The Act, however, allows donors to opt out of having their money spent on disclosable spending and allows for certain donors to be excepted from disclosure requirements. A.R.S. §§ 16-972(B), -973(F).

To provide the covered person the information needed to comply with the Act's disclosure requirements, the Act requires that donors of more than $5,000 who have not opted out of having their funds used for campaign media spending provide the covered person with the identity of each person that directly or indirectly contributed more than $2,500 to the donor. A.R.S. § 16-973(D); *see also* A.R.S. § 16-971(19) (defining "transfer records").

1. The Act allows donors to opt out of disclosure.

Before a covered person may use a donor's money for campaign media spending, the donor "must be notified in writing that the monies may be so used and must be given an opportunity to opt out of having the donations used or transferred for campaign media spending." A.R.S. § 16-972(B). Thus, donors have a 21-day period to opt out from disclosable campaign media spending. *Id.* § 16-972(B)(2). The covered person must also inform donors that unless they opt out "information about donors may have to be reported … for disclosure to the public." A.R.S. § 16-972(B)(1). If the donor

does not opt out, then the contribution is considered "traceable monies" subject to reporting requirements. A.R.S. § 16-971(18).

2. The Act excepts disclosure in certain cases.

Under Prop. 211, a donor's identity will not be disclosed if "the identity of an original source … is otherwise protected from disclosure by law or a court order." A.R.S. § 16-973(F). It also excepts donors from disclosure if they "demonstrate[] to the satisfaction of the [C]ommission that there is a reasonable probability that public knowledge of the original source's identity would subject the source or the source's family to a serious risk of physical harm." *Id.*

D. The Act provides the Commission authority to implement and enforce the Act.

Under Prop. 211, the Commission is authorized to implement and enforce the Act—it may adopt and enforce rules, issue subpoenas, and impose penalties for noncompliance, among other things. A.R.S. § 16-974(A).

Prop. 211 also directed the Commission to establish disclaimer requirements for covered persons. *Id.* § 16-974(C). The Act specifies that "[p]ublic communications by covered persons shall state, at a minimum, the

names of the top three donors who directly or indirectly made the three largest contributions of original monies during the election cycle to the covered person." *Id.*

Consistent with its rule-making authority under the Act, the Commission determined that the disclaimer requirement applies only to the top three donors of more than $5,000 who have *not* opted out:

> Public communications by covered persons shall state the names of the top three donors who directly or indirectly made the three largest contributions of original monies in excess of $5,000 for the election cycle and who have not opted out pursuant to A.R.S. § 16-972 or a rule of the Commission during the election cycle … at the time the advertisement was distributed for publication, display, delivery, or broadcast.
>
> In the event a donor otherwise subject to disclosure pursuant to this section is protected under A.R.S. § 16-973(F) the disclaimer shall omit that donor's identity.

Ariz. Admin. Code R2-20-805 (B).

II. The trial court dismissed Plaintiffs' initial complaint and denied their preliminary injunction request.

Following Prop. 211's enactment, Plaintiffs sued, asserting that the Act was facially unconstitutional under Arizona's free speech and private affairs clauses. IR-1, Compl. ¶¶ 76-77, 81-83 (APP073-74, 075). They also asserted the Act violated Arizona's separation of powers clause (Ariz. Const. art. III)

because it gave the Commission rulemaking and enforcement authority. IR-1, Compl. ¶¶ 91-92 (APP076).

Plaintiffs sought to preliminary enjoin the entire Act. IR-3, 12/15/22 Plaintiffs' Mot. for Prelim. Inj. In support of this request, Plaintiffs attached four declarations, one from each Plaintiff—Center for Arizona Policy, Inc. ("CAP"), Arizona Free Enterprise Club ("FEC"), Doe I, and Doe II—that described each Plaintiff's fears of what might occur from disclosure under Prop. 211. *See* IR-3, Exs. 1-4 (APP102, 109, 116, 119). The Commission, Voters' Right to Know, the Attorney General and the Secretary of State (collectively, the "Defendants") moved to dismiss the complaint and opposed the preliminary injunction. After oral argument, the trial court dismissed Plaintiffs' claims and denied Plaintiffs' motion for a preliminary injunction. *See* IR-116, 6/21/23 Ruling at 15-16 (APP042-43).

With respect to Plaintiffs' free speech claim, the trial court followed Arizona and federal precedent and applied exacting scrutiny. *See id.* at 7-8 (APP034-35). It found that the Act "is substantially related to sufficiently important government interests" and "is narrowly tailored" to those interests and thus, satisfied exacting scrutiny. *Id.* at 12 (APP039). It also found that the Act did not violate Arizona's free speech clause, but rather

aligned with the clause's plain text and historical purpose to ensure "pure elections, to prevent[] corporate influences, and to publiciz[e] sources of campaign funds." *Id.* at 13 (APP040).

With respect to Plaintiffs' private affairs claim, the trial court again examined the clause's plain text and historical purpose. *Id.* at 14 (APP041). It found that "[g]iven [the clause's] context, and the narrow construction of the clause to date, … election contributions are not 'private affairs.'" *Id.* (APP041).

Finally, the trial court analyzed Plaintiffs' separation of powers claim, noting that Plaintiffs failed to allege a particularized harm or a harm caused by a separation of powers violation. *Id.* at 15 (APP042). It therefore dismissed Plaintiffs' claim for lack of standing. *Id.* (APP042).

After finding that Plaintiffs failed to state free speech or private affairs claims, and finding that Plaintiffs lacked standing on their separation of powers claim, the trial court denied Plaintiffs' preliminary injunction request. *Id.* (APP042). Plaintiffs did not appeal from the denial of their preliminary injunction motion even though such orders are immediately appealable pursuant to A.R.S. § 12-2101(A)(5)(b).

III. The trial court dismissed Plaintiffs' Amended Complaint and renewed preliminary injunction request.

During oral argument, "as a surprise to both the [c]ourt and Defendants," Plaintiffs argued their initial complaint contained an as-applied free speech challenge. *Id.* (APP042). The trial court granted Plaintiffs narrow leave to amend their complaint to plead an as-applied challenge, explicitly noting that the standard for such challenges was a "reasonable probability that disclosure of its [donors'] names [would] subject them to threats, harassment, or reprisals." *Id.* (APP042) (citing *Citizens United*, 558 U.S. at 367).

Plaintiffs filed an Amended Complaint, and later a Renewed Motion for Preliminary Injunction. IR-157 (APP188). Defendants moved to dismiss the Amended Complaint, IR-134–38, and conducted discovery concerning the renewed preliminary injunction motion. After argument, the trial court dismissed Plaintiffs' Amended Complaint. *See* IR-199, 2/28/24 Ruling at 15 (APP058).

In denying Plaintiffs' motion, the trial court considered declarations attached to the Amended Complaint. In president Cathi Herrod's declaration on behalf of CAP, a 501(c)(3) organization that engages in

campaign media spending, she alleged that "several donors have expressed concerns about confidentiality and potential reprisals." *See* IR-121, Ex. 1 C. Herrod Decl. 1 at ¶ 16 (APP156). Ms. Herrod detailed instances in which she and other CAP staff received messages with rude or insulting language in response to the policy positions advanced by CAP. *Id.* at ¶ 20 (APP157). The trial court found that CAP's "conclusory allegations, without any supporting facts, are insufficient to state a claim" and that its claims regarding donor harassment were "speculative." IR-199, 2/28/24 Ruling at 7, 11 (APP050, 054) (quoting *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008)).

FEC, a 501(c)(4) organization that engages in campaign media spending, provided declarations from Scot Mussi, its president and Executive Director. IR-121, Ex. 2 S. Mussi Decl. 1 at ¶ 2 (APP170). Mr. Mussi stated that FEC's staff had been subjected to "harassment and intimidation." *Id.* at ¶ 16 (APP172). He avowed, however, that no "menacing conduct" has been directed at any of FEC's donors. *Id.* at ¶ 17 (APP173). Finally, FEC expressed "fears" that the Commission would retaliate against the organization because FEC takes adversarial positions to the Commission. *Id.* at ¶ 20 (APP173).

The trial court found that FEC's allegations, even if assumed true, were "highly speculative" and failed to state an as-applied claim regarding donor disclosure. IR-199, 2/28/24 Ruling at 12-13 (APP055-56). It also found FEC's claims regarding possible harassment or retaliation by the Commission were "unsupported by any factual allegations." *Id.* at 12 (APP055).

Doe I, an anonymous Plaintiff, is a public figure who makes donations in support of public policy issues. IR-128, Doe I Decl. 2 at ¶ 9 (APP179). Doe I discussed his[4] concerns that, due to the "retaliatory tactics" of opponents, individuals may cease donating to issues he supports if their names were disclosed. *Id.* ¶ 10 (APP179). He did not allege that he has personally experienced any harassment or retaliation in response to the disclosure of his name in connection with his public policy positions. *See* IR-199, 2/28/24 Ruling at 14 (APP057). Because of this, and because Doe I's concerns related not to himself but to "nonparty … organizations," the trial court dismissed Doe I's as-applied challenge. *Id.* (APP057).

[4] This brief refers to Doe I and Doe II with male pronouns for ease of reference, not to imply their gender.

Doe II is also an anonymous Plaintiff who donates to various advocacy organizations in Arizona. IR-129, Doe II Decl. at ¶¶ 3, 7, 8 (APP185). He speculated that publicly disclosing his contributions "will lead to harassment, retaliation, and other harms to me and possibly my employer." *Id.* at ¶ 12 (APP186). But like Doe I, Doe II did not allege that he has personally experienced any harassment or retaliation. IR-199, 2/28/24 Ruling at 14 (APP057). The trial court found that Doe II's declaration presented "conclusory" allegations and failed to allege "any facts demonstrating" that he faced a reasonable probability of harm from disclosure. *Id.* 8, 14 (APP051, 057).

The trial court found that Plaintiffs failed to state an as-applied free speech claim because they failed to allege facts establishing a reasonable probability of harm resulting from Prop. 211. *Id.* at 15 (APP058). The trial court also denied the renewed request for a preliminary injunction. *Id.* (APP058). Plaintiffs timely appealed that order.

ISSUES

1. Did the trial court correctly dismiss Plaintiffs' facial free speech challenge to Prop. 211 under the Arizona Constitution?

2. Did the trial court correctly dismiss Plaintiffs' as-applied free speech challenge to Prop. 211 under the Arizona Constitution?

3. Did the trial court correctly dismiss Plaintiffs' facial private affairs challenge to Prop. 211 under the Arizona Constitution?

4. Did the trial court correctly rule that Plaintiffs lacked standing to assert their separation of powers claim?

5. Did the trial court properly deny Plaintiffs' renewed request for a preliminary injunction when they failed to demonstrate a likelihood of success on the merits?

STANDARD OF REVIEW

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). "In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Id.* at 356, ¶ 9. Although "well-pleaded material allegations of the complaint are taken as admitted," "conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417 (App. 1989).

The grant or denial of a preliminary injunction is within the sound discretion of the trial court. *City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 11, ¶ 12 (App. 2023). The Court of Appeals will not disturb that decision absent an abuse of that discretion. *Id.*

ARGUMENT

Plaintiffs lodge both facial and as-applied challenges under the free speech clause. Their facial free speech challenge fails because Prop. 211 satisfies exacting scrutiny—the standard applied by both Arizona and federal courts to campaign finance disclosure regulations. And the specific provisions Plaintiffs challenge are neither overbroad nor vague. Plaintiffs' as-applied free speech claim similarly lacks merit because their conclusory and speculative allegations fail to establish a "reasonable probability" that they would suffer threats, harassment, or reprisals from Prop. 211's disclosure requirements.

Plaintiffs also challenge the Act under the private affairs clause of the Arizona Constitution. But nothing in the text, case law, or contemporaneous history suggests that campaign disclosures are private affairs. Finally, Plaintiffs have suffered no injury from their purported separation of powers claim and therefore lack standing to bring that claim.

Given Plaintiffs' deficient claims, the trial court did not abuse its discretion in denying their renewed request for a preliminary injunction to enjoin the entire Act. Plaintiffs are unlikely—indeed unable—to succeed on the merits. This Court should affirm.

I. The trial court correctly dismissed Plaintiffs' facial challenge because the Act does not violate Arizona's free speech clause.

Prop. 211's required campaign funding disclosures do not violate Arizona's free speech clause (Ariz. Const. art II, § 6). Facially, Plaintiffs contend (at 14) that Prop. 211 is unconstitutional because Arizona's free speech clause is more protective than the First Amendment. But nothing in the Arizona Constitution gives Plaintiffs more protection here at the expense of the Act. If anything, the Arizona Constitution would require less scrutiny, but in any event the Act satisfies the exacting scrutiny standard federal and Arizona courts apply because it serves important government interests and is narrowly tailored to serve those interests.

A. The Arizona Constitution did not preclude the voters from adopting Prop. 211.

1. Courts generally subject campaign finance disclosure requirements to "exacting scrutiny."

The trial court correctly concluded that Prop. 211, a campaign finance disclosure statute, must satisfy the "less stringent exacting scrutiny"

standard. *Comm. for Just. & Fairness v. Ariz. Sec'y of State's Off.* ("*CJF*"), 235 Ariz. 347, 355-56, ¶ 32 (App. 2014); *see also Citizens United*, 558 U.S. at 366-67 (applying exacting scrutiny to disclosure requirement). Exacting scrutiny applies because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. Disclosures "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *CJF*, 235 Ariz. at 356, ¶¶ 32-33; *accord Citizens United*, 558 U.S. at 366 (same).

2. The Arizona Constitution requires a standard no greater than exacting scrutiny.

The exacting scrutiny standard requires "a substantial relation between the disclosure requirement and a sufficiently important government interest." *CJF*, 235 Ariz. at 356, ¶ 33 (cleaned up). The disclosure regime must be "narrowly tailored to the government's asserted interest." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021). The Arizona Constitution requires nothing more than exacting scrutiny in this context.

(a) The Arizona Constitution does not permit anything more than exacting scrutiny in this context.

Plaintiffs concede (at 17) that exacting scrutiny *is* the proper standard for federal free speech challenges to disclosures. Nevertheless, they claim (at 18) that the Arizona Constitution requires strict scrutiny because the text of Arizona's free speech clause is broader than the First Amendment, expressly protecting the freedom to write and publish. But their desire for a different standard finds no support in the Arizona Constitution.

Textually, their argument fails. Arizona's free speech clause provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6. But Prop. 211 "do[es] not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366, writing, or publishing on any subject. Nothing in the text of Arizona's Constitution therefore suggests that it provides more protection than the federal constitution in this context.

Other provisions of Arizona's Constitution—which embrace electoral disclosures like those found in Prop. 211—confirm this conclusion, including those that:

> (1) require that "all campaign contributions to, and expenditures of campaign committees and candidates for public office" be publicized, Ariz. Const. art. VII, § 16,
>
> (2) prohibit corporations from making "any contribution of money or anything of value for the purpose of influencing any election," *id.* art. XIV, § 18, and
>
> (3) direct the legislature to enact "laws to secure the purity of elections and guard against abuses of the elective franchise," *id.* art. VII, § 12.

As the trial court correctly reasoned, these provisions make "it unlikely that the same framers somehow envisioned that Arizona's Free Speech clause would reach the disclosures at issue"— let alone *prohibit* such disclosure requirements more than a century later. *See* IR 116, 6/21/23 Ruling at 13 (APP040). Prop. 211 is not only consistent with but further reinforces the Arizona Constitution's pro-disclosure regime.

In an effort to escape this common-sense conclusion, Plaintiffs suggest (at 20) that Arizona's constitutional history was narrowly concerned only with direct contributions to campaigns or candidates. But neither article VII, § 16 (corporate contributions) nor article VII, § 12 (ensuring purity of elections) are so limited. Indeed, the founders were concerned with "fight[ing] corruption and undue influence" in elections, and it is against this backdrop that the framers adopted these provisions. John D. Leshy, *The*

Arizona State Constitution 16 (2d. ed. 2013). In view of Arizona's constitutional framework, Arizona's clause cannot be read to prevent disclosures about election spending, such as those in Prop. 211. If anything, the Arizona Constitution suggests that an even lesser form of scrutiny may apply to Prop. 211.

Moreover, there is nothing "illogical" about using exacting scrutiny even if Arizona's free speech clause provides more protection than its federal counterpart (in some contexts). (*See* Op. Br. at 18.) Plaintiffs' argument confuses the scope of protection provided by a free speech clause with the appropriate level of judicial review to assess violations. A state's free speech clause could expressly protect less than the federal constitution, yet always require strict scrutiny. Or it could expressly protect more (such as speaking, writing, and publishing), and always require less scrutiny. Logically, the two have nothing to do with each other.

Instead, the level of scrutiny courts apply to both the Arizona and federal constitutions depends on the severity of the burden on the associated right. *See, e.g.*, *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 409, ¶ 42 (2020) ("Restrictions imposing a 'severe burden' are subject to strict scrutiny and must be narrowly tailored to advance a

compelling state interest."); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'"); *Citizens United*, 558 U.S. at 366 (applying exacting scrutiny to disclosure requirements because they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking" (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136, 201 (2003)).

Here, there is little or no burden on speech because Prop. 211 prevents no one from speaking about anything. *See CJF*, 235 Ariz. at 356, ¶ 33 (applying exacting scrutiny to disclaimer requirements). For all these reasons, the Arizona Constitution cannot justify ignoring the decades of settled law instructing that the Court should not apply any standard greater than exacting scrutiny.

(b) Prop. 211 is not a content-based speech regulation.

Hoping to get to strict scrutiny for other reasons, Plaintiffs assert (at 18) that the Act is a content-based regulation because it only applies to speech concerning elections. But this argument likewise ignores federal and Arizona case law repeatedly affirming that campaign-related disclosure

requirements "do not prevent anyone from speaking." *CJF*, 235 Ariz. at 356, ¶ 33 (quoting *Citizens United*, 558 U.S. at 366). Prop. 211 only applies based on whether donations and campaign media spending exceed certain monetary thresholds; it does not regulate communicative content and it imposes no limits on speech.

Faced with similar regulations, courts have consistently rejected arguments that disclosure requirements are content-based restrictions requiring strict scrutiny. *See Gaspee Project v. Mederos*, 13 F.4th 79, 93 (1st Cir. 2021) (noting the plaintiff in *Citizens United* advanced this argument, but nevertheless, the Supreme Court applied exacting scrutiny); *see also Buckley v. Valeo*, 424 U.S. 1, 66 (1976) ("compelled disclosure" of election contributions serves "governmental interests sufficiently important to outweigh the possibility of infringement").

Contrary to Plaintiffs' suggestion (at 19), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) does not indicate otherwise. That case involved a blanket ban on anonymous campaign literature. *McIntyre* itself acknowledged that mandatory "election-related disclosures" (i.e., like those in Prop. 211) were a "far cry from [the] compelled self-identification on all election-related writings" at issue in that case. *Id.* at 355. Moreover, even

after finding the ban on anonymous campaign literature content-based, *McIntyre* applied exacting scrutiny, *not* strict scrutiny. *Id.* at 345-46. Prop. 211 does not "flatly ban anonymous political speech" as Plaintiffs' contend (at 19); it requires disclosures "to a small subset of campaign finance spending." *Gaspee Project*, 13 F.4th at 93. If anything, *McIntyre* confirms exacting scrutiny applies.

* * * *

The Court should decline Plaintiffs' invitation to upend decades of jurisprudence applying exacting scrutiny to campaign disclosures. The text and purpose of Arizona's Constitution require doing so, and the Arizona Supreme Court has "often relied on federal case law in addressing free speech claims under the Arizona Constitution." *Brush & Nib Studio, LC v. City of Phx.*, 247 Ariz. 269, 282, ¶ 46 (2019). Indeed, as Plaintiffs' acknowledge (at 18 n.5), this Court has already applied exacting scrutiny to disclosure requirements challenged "under the United States and Arizona constitutions," *CJF*, 235 Ariz. at 356, ¶ 35. It should do so again here.

B. The Act satisfies exacting scrutiny.

Exacting scrutiny requires (1) "a substantial relation between the disclosure requirement and a sufficiently important government interest,"

and (2) that the disclosure regime be "narrowly tailored to the government's asserted interest." *Bonta*, 594 U.S. at 607-08; *accord CJF*, 235 Ariz. at 356, ¶ 33 (same). The Act satisfies exacting scrutiny.

1. The Act is substantially related to important governmental interests.

Prop. 211 meets the first requirement of exacting scrutiny—a substantial relation to a sufficiently important government interest. As the trial court acknowledged, decades of precedent recognize the important government interests related to campaign funding disclosures, including:

1) The informational interests of voters.
2) Deterring corruption by permitting voters to assess whether donors receive post-election favors.
3) Ensuring election integrity.

IR-116, 6/21/23 Ruling at 8-9 (APP035-36). *See, e.g., Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *Buckley*, 424 U.S. at 66-68 (noting disclosure requirements "provide[] the electorate with information, . . . deter actual corruption, . . . [and] are an essential means of gathering the data necessary to detect violations"); *CJF*, 235 Ariz. at 360, ¶ 48 (same). And the government has a compelling reason

to promote those interests. *Buckley*, 424 U.S. at 67-68 ("[D]isclosure requirements, as a general matter, directly serve substantial governmental interests."); *see also Citizens United*, 558 U.S. at 368 (disclosures permit the people to evaluate election arguments). These interests are not only important but have been recognized as "essential." *Buckley*, 424 U.S. at 14-15 (discussing informational interests). Indeed, as noted above, the framers of Arizona's Constitution adopted provisions expressly addressing these interests. *See* Ariz. Const. art. VII, §§ 12, 16; art. XIV, § 18.

Prop. 211 exists "to protect and promote rights and interests guaranteed by the First Amendment of the United States Constitution and also protected by the Arizona Constitution, to promote self-government and ensure responsive officeholders, to prevent corruption and to assist Arizona voters in making informed election decisions by securing their right to know the source of monies used to influence Arizona elections." Prop. 211 § 2(B) (APP005). Its informational, anti-corruption purposes are important governmental and public interests. IR-116, 6/21/23 Ruling at 9 (APP036) (explaining that "[c]ourts consistently recognize that the government's interests at issue are extraordinarily strong").

Plaintiffs do not contest (at 22) that the State has these important interests. Instead, they suggest (at 21) that Prop. 211 fails to serve them because it also applies to 501(c)(3) organizations that do not directly donate to candidates. But voters have an "important" and "compelling" interest in knowing who spends on ballot measures that will govern their lives. *No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu*, 85 F.4th 493, 505 (9th Cir. 2023). "An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010). This is especially true in Arizona, where "the most constant thread running through the Arizona Constitution is the emphasis on democracy, on popular control expressed primarily through the electoral process[,] . . . captured in its best-known innovations—the initiative, referendum, and recall." Leshy, *supra* 14. Accordingly, this informational interest encompasses who is influencing campaigns, even if that influence does not take the form of a direct campaign contribution.

2. The Act is narrowly tailored to the government interests it advances.

Prop. 211 also satisfies the second requirement of the exacting scrutiny standard—its disclosure regime is "narrowly tailored to the government's asserted interests." *See Bonta*, 594 U.S. at 608. Accordingly, the Act's disclosure requirements "need not reflect the least restrictive means to achieve the [government's] goals" so long as they "achieve a reasonable fit." *Gaspee Project*, 13 F.4th at 88. In the context of a facial challenge, courts determine overbreadth (i.e., a lack of narrow tailoring) by considering whether "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 594 U.S. at 615. In this case, the trial court correctly found that Prop. 211 does not suffer from any lack of tailoring or overbreadth that would license it to strike down any of the voter-approved provisions.

(a) Prop. 211 narrowly focuses on large donors with exceptions and opportunities to opt out.

Prop. 211 takes a narrow approach by focusing on large donors. Only those who spend $50,000 or more on campaign media spending for statewide campaigns or $25,000 or more for other campaigns are subject to the Act's disclosure requirements. A.R.S. § 16-973(A). Further, only those

who donate $5,000 or more must be disclosed. *Id.* § 16-973(A)(6). Decisively, this figure is *five times* as high as the $1,000 threshold for the donor disclosure upheld in *Citizens United,* 558 U.S. at 366-67; *see* 52 U.S.C. § 30104(f)(2).

Moreover, Prop. 211 stacks upon the narrow large-donor focus exceptions and opportunities to opt out of disclosure. A donor can prevent an organization from using his funds for campaign media spending by opting out. *See* A.R.S. § 16-972(B), (C). And donors who believe disclosure would subject the source or their family to a serious risk of physical harm may take steps to avoid disclosure. *Id.* § 16-973(F). These provisions are not illusory; they operate to inform voters of the original source of monies used for campaign media spending, while minimizing the impact on associational interests just as the Supreme Court has instructed.

(b) Plaintiffs lack of tailoring/overbreadth arguments miss the mark.

Plaintiffs lodge a number of tailoring/overbreadth arguments (at 26-34), but none withstand scrutiny.

i. Plaintiff's strict scrutiny complaints.

In their argument section discussing the inapplicable "strict scrutiny" standard, Plaintiffs contend (at 23) that the Act's "two main elements" are

not "targeted to any purported interests in informing voters, preventing fraud, or enforcing law." Not so.

First, Plaintiffs argue (at 23-24) that the Act's top three donor disclaimer requirement (*see* A.R.S. § 16-974(C)) is "arbitrary" by speculating that Prop. 211 might require a covered person to include a donor in a disclaimer even if that donor opted-out. In fact, the Commission, in exercising its implementation authority, clarified that disclaimers only include donors "who have not opted out pursuant to A.R.S. § 16-972 or a rule of the Commission." A.A.C. R2-20-805. Plaintiffs' argument exemplifies why facial challenges, which often rest on speculation, are disfavored. *See Wash. State Grange*, 552 U.S. at 450–51 ("Facial challenges are disfavored for several reasons," including that they "often rest on speculation[,] . . . run contrary to the fundamental principle of judicial restraint, . . . [and] threaten to short circuit the democratic process").

Second, Plaintiffs argue (at 24) that the Act is "overbroad" because it requires the disclosure of any $5,000+ donor, regardless of whether that donor earmarked his donations for campaign media spending. (*See also* Op. Br. at 30 (complaining about $5000+ disclosure requirement)). But Prop. 211 explicitly requires that a donor be (1) notified in writing that his money may

be used for campaign media spending, (2) given a 21-day opportunity to opt out, and (3) told that, if he does not opt out, his identity may be disclosed. A.R.S. § 16-972(B). In fact, covered persons "may make subsequent written notices" with additional opt-out periods even after the 21-day period has lapsed. A.A.C. R2-20-803(D). Donors have ample notice of disclosure and opportunities to opt out.

Plaintiffs ignore all this to suggest that Prop. 211's disclosure requirements will inadvertently encompass unaware donors who did not intend for their funds to be used on campaign media spending. But Prop. 211's notice requirements prevent that, even though not constitutionally required to do so. *Cf. Gaspee Project*, 13 F.4th at 88 (disclosure "requirements need not reflect the least restrictive means to achieve the [government's] goals" so long as they "achieve a reasonable fit."); *accord Bonta*, 594 U.S. at 608 (exacting scrutiny does not require "the least restrictive means of achieving" government interest).

Third, Plaintiffs take issue (at 25-26) with the spending thresholds of the Act, essentially arguing they are underinclusive because the Act does not regulate those who spend an amount under the Act's thresholds. This argument proves too much because it would apply regardless of where the

line was drawn. Moreover, Prop. 211 need not "address all aspects of a problem in one fell swoop." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (cleaned up). "[T]he First Amendment imposes no freestanding underinclusiveness limitation." *Id.*

ii. Plaintiffs' exacting scrutiny challenges.

Plaintiffs contend (at 26-32) that Prop. 211's disclosure requirements also lack sufficient tailoring to pass "exacting scrutiny." Notably, in doing so they invoke (at 28) their right to "freely associate"—a right that would *not* warrant more protection under the Arizona Constitution because it not listed in the text of Arizona's free speech clause.

Plaintiffs assert (at 31) that CAP, FEC, and the Doe Plaintiffs have non-physical (e.g., reputational and economic) fears regarding Prop. 211 that are not addressed by § 16-973(F). To support this "facial challenge," Plaintiffs improperly invoke allegations made in connection with their amended as-applied complaint and information from discovery. *See, e.g.*, Op. Br. at 29-31 (citing the second version of declarations and deposition testimony). None of this was before the trial court when it considered Plaintiffs' facial challenge. *Cf. GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App.

1990) (declining to consider transcripts on appeal that were not part of the record when the trial court granted summary judgment).

Moreover, Plaintiffs' references are misleading and taken out of context. For example, Plaintiffs discuss (at 31) a death threat received by Doe I. But Doe I received that threat while serving as a public official in Arizona—it has no relation to election disclosures. Doe I Dep. Tr. 14:12-16:11 (APP295-97).[5]

So even when assumed to be true, these fears do not support a finding that the law is *facially* unconstitutional. "[P]ublic disclosure of contributions" may "deter some individuals who otherwise might contribute." *Buckley*, 424 U.S. at 68. But "a facial challenge cannot succeed unless a plaintiff shows that donors to a substantial number of organizations will be subjected to harassment and reprisals." *Bonta*, 594 U.S. at 617; *accord Gaspee Project*, 13 F.4th at 92 ("Generally speaking, facial challenges leave no room for particularized considerations."). As the trial court recognized, allegations of potential harm from two organizations and two individuals

[5] Plaintiffs' deposition transcripts were filed under seal. *See* IR-192-193.

are "insufficient to support a facial challenge." IR-116, 6/21/23 Ruling at 10 (APP037).

iii. Plaintiffs' categorical tailoring and overbreadth challenges.

Apparently recognizing that the specific provisions they complain about pass constitutional muster, Plaintiffs also launch (at 33) a "categorical" overbreadth challenge. But if the specific provisions they complain about are "narrowly tailored to an important government interest," they cannot be categorically overbroad. In fact, to lodge an overbreadth challenge of this nature, Plaintiffs were required to show that the Act was unconstitutional in a "substantial number of its applications" to sustain their facial challenge. *Bonta*, 594 U.S. at 617-18. But Plaintiffs did not even attempt to meet this burden. The Court may accordingly make quick work of Plaintiffs' "categorical" facial overbreadth challenge.

Contrary to Plaintiffs' suggestion (at 33), *Bonta* does not help their cause. In *Bonta*, a California regulation required charities to disclose donations over $5,000 to the state, purportedly to prevent fraud. 594 U.S. at 602, 612. Yet, the state never used the information collected to open an investigation. *Id.* at 613. The Supreme Court held that collection of data for

mere administrative convenience did not satisfy exacting scrutiny. *Id.* at 614-15. *Bonta* is not a campaign finance disclosure case and did not implicate the important government interests related to such disclosures.

In sum, as the trial court properly recognized, "in case after case the government's interests in campaign disclosures have prevailed." IR-116, 6/21/23 Ruling at 11 (APP038). (*See* Argument § I.B.1.) In this case too, Prop. 211 easily satisfies exacting scrutiny—it serves important government interests and is substantially related and narrowly tailored to those interests. The Court should affirm.

C. The Act is not vague.

Plaintiffs further criticize Prop. 211 (at 34-39) as "impermissibly vague." A facial vagueness claim must fail if the law is valid "in the vast majority of its intended applications." *Hill v. Colo.*, 530 U.S. 703, 733 (2000) (citation omitted); *accord State v. Burke*, 238 Ariz. 322, 327, 329, ¶¶ 10, 17 (App. 2015) (vagueness challenge rejected for failing to "show that under no set of circumstances is the statute constitutional"). "[H]ypothetical situations . . . will not support a facial attack." *Hill*, 530 U.S. at 733 (citation omitted).

Plaintiffs do not even attempt to argue that the Act is invalid in the vast majority of its intended applications. Instead, they contend that two

parts of Prop. 211 are unconstitutionally vague. First, they attack (at 34) the definition of campaign media spending, which is defined to include "research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted *in preparation for or in conjunction with* [the actions described in A.R.S. § 16-971(2)(a)(i)-(iv)]." A.R.S. § 16-971(2)(a)(vii) (emphasis added). Plaintiffs argue (at 36) the words "in preparation for or in conjunction with" are vague. In support, they pose (at 36-37) hypothetical questions regarding what this phrase could mean, speculating that it may require disclosure for expenditures not related to public communications.

As discussed above, "hypothetical situations . . . will not support a facial attack." *Hill*, 530 U.S. at 733. Moreover, when read in context, the phrase is not vague. The Act specifies that when activities are conducted in preparation for or in conjunction with one of the specifically enumerated actions under § 16-971(2)(a)(i)-(vi), such activities are considered campaign media spending. Prop. 211 is primarily focused on public communications.

See A.R.S. § 16-971(2)(a)(i)-(vi).[6] Funds can only be spent "in preparation for or conjunction with" campaign media spending if there has been a public communication. A person of ordinary intelligence can ascribe the phrase its common, ordinary meaning, read it in context, and by doing so, understand when it applies. *See Bird v. State*, 184 Ariz. 198, 203 (App. 1995) (explaining a statute is vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited).

Second, Plaintiffs contend (at 39) that the Act's disclaimer requirement in § 16-974(C) is vague because it fails to identify which donors will be disclosed. (*See* Argument § I.B.2.) But there is no "guessing game" about the meaning of this portion of the Act. Rather, the Commission implemented a rule that the disclaimer requirement for the top three donors does not apply to individuals who have opted-out. A.A.C. R2-20-805.

In sum, Prop. 211 targets large spenders and their large donors influencing elections through public communications. Plaintiffs'

[6] Outside of public communications, "[a]n activity … that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity" is also campaign media spending. A.R.S. § 16-971(2)(a)(vi).

allegations, if true, fail to demonstrate that the Act is not valid "'in the vast majority of its intended applications.'" *Korwin v. Cotton*, 234 Ariz. 549, 559, ¶ 30 (App. 2014) (quoting *Hill*, 530 U.S. at 733). This Court should affirm.

II. The trial court correctly dismissed Plaintiffs' as-applied challenge.

The trial court granted Plaintiffs leave to amend their complaint to assert as-applied challenges. IR-116, 6/21/23 Ruling at 15 (APP042). The court dismissed Plaintiffs' Amended Complaint because it likewise failed to allege facts which, taken as true, established a "reasonable probability" that threats, harassment, or reprisals—either to CAP and FEC or to the Doe Plaintiffs—would result from the Act's disclosure requirements. *See generally* IR-199, 2/28/24 Ruling (APP044-58).

A. As-applied challenges are subject to a high threshold.

To succeed, Plaintiffs must allege facts which, taken as true, establish a "reasonable probability" that threats, harassment, or reprisals will result from the Act's disclosure requirements. *Citizens United*, 558 U.S. at 367; *cf. Protectmarriage.com v. Bowen*, 752 F.3d 827, 840 (9th Cir. 2014) (holding "hypothetical plans and fears" of threats, harassment, or violence were not ripe). A simple preference for anonymity will not suffice. *See Buckley*, 424 U.S. at 71-72.

As-applied challenges in this context, therefore, have a high threshold and succeed in rare circumstances. *See, e.g.*, *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 462 (1958) (finding as-applied standard satisfied by "an uncontroverted showing" that revealing its members' identities exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility").

The Supreme Court has indicated that organizations should be given some "flexibility in their proof of injury" when making as-applied claims. *Buckley*, 424 U.S. at 74. Thus, an organizational showing of proof of a "reasonable probability" of threats, harassment, or reprisals "may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Id.* "New parties that have no history upon which to draw" may "offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.*

Still, such organizational challenges have been allowed sparingly. Either for organizations "having small constituencies and promoting historically unpopular and almost universally-rejected ideas,"

ProtectMarriage.com v. Bowen, 599 F.Supp.2d 1197, 1216 (E.D. Cal. 2009), or, in situations where "the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented," *Doe v. Reed*, 823 F.Supp.2d 1195, 1212 (W.D. Wash. 2011).

Tellingly, the three cases where the Supreme Court recognized as-applied challenges confirm that the trial court correctly dismissed this challenge. For example, the Supreme Court first allowed an as-applied challenge in *NAACP v. Alabama*, when a state government operating under Jim Crow laws attempted to obtain membership lists. There, the NAACP "made an uncontroverted showing" that revealing its members' identities exposed them to clear reprisals. 357 U.S. at 462. The NAACP also established that the state had sponsored its members' harassment. *Bonta*, 594 U.S. at 606.

In *Bates v. City of Little Rock*, 361 U.S. 516 (1960), the Supreme Court again allowed the NAACP to bring an as-applied challenge when it established that disclosure of its membership resulted in "threats of bodily harm." *Id.* at 522. In that case, the NAACP presented evidence that members received incessant phone calls day and night, had stones thrown at their homes, and received direct threats to their lives. *Id.* at 522 n.7.

Finally, in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), the Supreme Court allowed an as-applied challenge after the Socialist Workers Party ("SWP") established that disclosure resulted in "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office" and that multiple individuals were fired because of their SWP membership. *Id.* at 99. Like the NAACP, the SWP also established government involvement with the harassment. *Id.* at 99-100.

Outside scenarios like those in *Alabama*, *Bates*, and *Brown*, courts have routinely rejected organizational claims for as-applied challenges. *See, e.g.*, *Dole v. Loc. Union 375, Plumbers Int'l Union of Am., AFL-CIO*, 921 F.2d 969, 973 (9th Cir. 1990) (noting group was not "politically weak, politically unpopular, or politically disadvantaged"); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 542 (9th Cir. 2015) (rejecting as-applied challenge based on "conclusory statements" when the only "harassment" alleged was itself "protected political speech").

B. Plaintiffs failed to allege facts that would state an as-applied claim.

Even accepting Plaintiffs' allegations as true, the trial court found that Plaintiffs presented "conclusory allegations, without any supporting facts" to support their as-applied challenge. IR-199, 2/28/24 Ruling at 7-8, 11-15 (APP050-51, 054-58). The trial court acknowledged the importance of giving organizational plaintiffs "flexibility in proof," but correctly found that no Plaintiff alleged "facts demonstrating that they face a reasonable probability that disclosure of their donations will subject them to threats, harassment or reprisals." *Id.* at 8, 11, 13-15 (APP051, 054, 056-58). Accordingly, the Court should affirm the dismissal of Plaintiffs' as-applied claim.

1. CAP

In their Amended Complaint and supporting declarations, CAP contends that its disclosed donors will be exposed to "physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm." IR-120, Am. Compl. ¶ 97(c) (APP141). CAP maintains that the organization and its employees have experienced rude and vulgar emails, threats, and protests. IR-121, Ex. 1 C. Herrod Decl. 1 at ¶¶ 19-20 (APP157-58). But "CAP [did] not

assert[] any *facts* suggesting that *its donors* will be subjected to similar name calling and nasty comments if their donations to CAP are disclosed. Indeed, CAP [did] not identif[y] a single donor or supporter who has been subjected to harassment, reprisals, or threats of violence due to their association with CAP." IR-199, 2/28/24 Ruling at 9 (APP052) (emphasis added). Nor did it allege that its board members were subjected to harassment, reprisals, or threats even though their identities are disclosed on CAP's website. *Id.* at 9 (APP052). This is telling because CAP has been operating in Arizona for nearly 30 years. IR-121, Ex. 1 C. Herrod Decl. 1 at ¶ 6 (APP155). The instances of purported harassment experienced by CAP in the past arose in response to its public activities and communications, not in response to information about the group or its donors gleaned from disclosure reports.

Beyond these conclusory allegations, CAP raises a few specific instances—an attack on the offices of a Wisconsin anti-abortion group, and "reports of threats and violence associated with the marriage amendment debate," *id.*, Ex. 1 C. Herrod Decl. 2 at ¶ 19 (APP150-51)—but these too fail to constitute the kind of harassment that would entitle them to an exemption from campaign finance disclosures. To begin with, CAP does not even attempt to describe any connection between its election spending in Arizona

and the unfortunate Wisconsin attack. It also does not explain how the alleged harassment involving marriage amendment campaigns which occurred "in other states," not Arizona, has any connection to the Plaintiffs and issues raised in this case. *See* IR-121, Ex. 1 C. Herrod Decl. 2 at ¶16 (APP149).

CAP cites to these incidents because the Supreme Court has allowed new organizations "to offer evidence of reprisals and threats directed against individuals or organizations holding similar views" when they have no history of their own to offer. *Buckley*, 424 U.S. at 74. But CAP has nearly *30 years* of history; it is not a new group.

In sum, even if CAP has received twenty negative comments in its 29-year history, that does not compare to the "pervasive, persistent, or government-sanctioned harassment" found in the few successful as-applied claims. IR-199, 2/28/24 Ruling at 11 (APP054). CAP's conclusory, speculation about what might happen if its donors were disclosed is not sufficient. The *potential* for harassment is not the same as a *reasonable probability* of harassment—possibility does not mean probability. *See Chula Vista*, 782 F.3d at 542 (holding "conclusory statements that they feared that

they *might* be subject to harassment" were insufficient to state as-applied challenge).

The trial court properly dismissed CAP's claim and this Court should affirm.

2. FEC

FEC alleges that Prop. 211 will expose its donors to the same harms alleged by CAP. IR-120, Am. Compl. at ¶ 97(c) (APP141). But it too failed to offer any facts regarding reprisals against donors in its 17-year history and explicitly acknowledged the absence of any "menacing conduct" toward its donors. *See* IR-121, Ex. 2 S. Mussi Decl. 2 (APP167); *id.* at ¶ 17 (APP167). This is also telling because FEC has filed regular disclosure reports, including information about individual donors, since it established its political action committee in 2006. IR-199, 2/28/24 Ruling at 12 (APP055). *See Citizens United*, 558 U.S. at 370 (rejecting as-applied challenge because nonprofit had "been disclosing its donors for years and . . . identified no instance of harassment or retaliation").

Beyond conclusory allegations regarding potential future harm, FEC alleges a staffer's car was vandalized in retaliation for that staffer's public comments on the FEC's behalf at the legislature and that a staffer "received

threatening and obscene telephone calls" leading to a police report. IR-121, Ex. 2 S. Mussi Decl. 2 at ¶ 16 (APP167). But FEC's effort to link these acts to anything, much less "retaliation" for its political speech, is sheer speculation. And over a 17-year history, two incidents do not represent the pervasive, persistent, or government-sanctioned harassment found in successful as-applied claims.

FEC also alleged it was "concerned about the possibility of harassment or retaliation at the hands" of the Commission, with whom it alleges a "long and often-adversarial relationship." *Id.*, Ex. 2 S. Mussi Decl. 1 at ¶ 20 (APP173). As the trial court recognized, such "concerns" about "possible" retaliation, even when assumed true, are entirely theoretical and do not establish a reasonable probability that disclosure of FEC's donations will subject *its donors* to threats, harassment, or reprisals. IR-199, 2/28/24 Ruling at 14 (APP057).

In the absence of any factual allegations regarding past threats, harassment, or reprisals against FEC donors, the trial court found FEC's claim "highly speculative" and "insufficient" to establish an as-applied challenge. *Id.* at 12-13 (APP055-56). This Court should affirm.

3. The Doe Plaintiffs

Both Doe Plaintiffs express that they are concerned they will be subject to "harassment and retaliation" if their donations are disclosed, including the risk of "serious physical harm" and "economic, reputational, and other forms of harassment and retaliation." IR-120, Am. Compl. at ¶¶ 64, 70 (APP135, 136). They allege that disclosure of their identities will expose them to "physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm." *Id.* at ¶ 98(b) (APP142-43).

Aside from these boilerplate, conclusory statements, Doe I's declaration referenced a passionate policy debate in the state and alleged that opponents "seek[] to expose their donors, particularly larger corporate donors, to pillory and intimidate them publicly, or to leave them exposed for 'punishment' or manipulation by government officials." IR-128, Doe I Decl. 2 at ¶¶ 9-10 (APP179). Doe I raised concerns that such "retaliatory tactics" will cause donors to stop giving. *Id.* at ¶ 10 (APP179). Doe I did not, however, allege that he has personally experienced any harassment or retaliation. IR-199, 2/28/24 Ruling at 14 (APP057). Because of this, and because Doe I's concerns related not to himself but to "nonparty …

organizations," the trial court dismissed Doe I's as-applied challenge. *Id.* (APP057).

Doe II said even less than Doe I, raising only conclusory allegations that he is concerned public disclosure will "lead to harassment, retaliation, and other harms to [him] and possibly [his] employer because of [his] contributions." IR-129, Doe II Decl. at ¶ 12 (APP186). In light of this wholly conclusory pleading and failure to satisfy the reasonable probability standard, the trial court dismissed Doe II's as-applied challenge. IR-199, 2/28/24 Ruling at 14 (APP057).

Neither Doe alleged any facts demonstrating a reasonable probability that disclosure of their donations would subject them to threats, harassment, or reprisals. This Court should affirm the dismissals.

C. The trial court applied the correct standard in evaluating Plaintiffs' as-applied challenge.

Plaintiffs claim (at 41) that the trial court "invented" a new standard for as-applied claims by imposing a "minor or dissident party" requirement. Not so. The trial court merely recognized that Supreme Court precedent has historically allowed as-applied challenges for organizations in rare circumstances: "among the common threads of the cases sustaining an as

applied challenge … : disclosures affecting minor or dissident parties, where party members historically faced pervasive and severe harassment, involving state action or acquiescence." IR-199, 2/28/24 Ruling at 4 (APP047).

When discussing CAP's harassment allegations, the trial court noted that "CAP has not sufficiently alleged the type of pervasive, persistent, or government-sanctioned harassment of its members present in successful challenges. Nor does CAP does fit the description of a minor or dissident party." *Id.* at 11 (APP054). This is objectively true. CAP has passed "200 CAP measures" since 1996 and its financial statements show $3.9 million in annual revenue and $2.3 million in current assets for 2020 (the most recent year made available).[7] IR-121, Ex. 2 C. Herrod Decl. 2 at ¶¶ 13, 15, 17 (APP148-150). Likewise, FEC operates with a $1 million-plus budget and publishes evidence of political influence. IR-121, Ex. 2 S. Mussi Decl. 2 at ¶ 13 (APP166).

[7] CAP and FEC relied on their websites in their declarations and thus, the Court may consider these sources referenced in Plaintiffs' pleadings. Ariz. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

The court's reference to CAP's non-minor party status was also made in the context of CAP's inappropriate attempt to rely on harassment suffered by other organizations—something that is only permitted for new organizations with no established history. Later on in its ruling, however, the court clarified that "[b]ecause Plaintiffs have failed to allege sufficient facts that their donors will be subjected to threats and harassment, the Court *need not decide whether CAP and [FEC] are minor parties* or if they could otherwise assert an as applied challenge." IR-199, 2/28/24 Ruling at 14 n.16 (APP057) (emphasis added). Thus, contrary to Plaintiffs' argument (at 41-43), the trial court did not reject CAP and FEC's challenges after ruling that *only* minority parties may bring as-applied challenges. Instead, the trial court explicitly held that Plaintiffs "failed to allege sufficient facts" for an as-applied challenge to proceed. *Id.* at 14 (APP057).

Plaintiffs also claim (at 45-46) that the trial court "personally assess[ed] the weight, credibility, and severity of the factual evidence." Plaintiffs note (at 13 n.3) that the trial court cited deposition transcripts, submitted in connection with the renewed preliminary injunction briefing, in its discussion dismissing the Amended Complaint. It appears, however, that the trial court assumed the content of Plaintiffs' deposition testimony to be

true. *See, e.g.*, IR-199, 2/28/24 Ruling at 13 (APP056). This only benefited Plaintiffs—they were allowed to present additional context regarding their allegations to demonstrate the existence of a reasonable probability of threats, harassment, or reprisals. Still, they failed to meet their burden.

The record reflects that the trial court applied Arizona's pleading requirements and "limited [itself] to considering the well-pled facts and all reasonable interpretations of those facts." *Cullen*, 218 Ariz. at 420, ¶ 14. The trial court found that, even assumed true, CAP failed to allege that it has "been subjected to the kind of pervasive harassment and intimidation seen in" *Alabama*, *Bates*, and *Brown*. IR-199, 2/28/24 Ruling at 9 (APP052). "Rule 8 does not permit a trial or appellate court to speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen* 218 Ariz. at 420, ¶ 14 (quotation marks omitted). Plaintiffs' "mere conclusory statements [of possible harm] are insufficient to state a claim upon which relief can be granted." *Id.* at 419, ¶ 7. The Court should affirm.

III. The trial court correctly found that the Act does not violate Arizona's private affairs clause.

The private affairs clause provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz.

Const. art II, § 8. Plaintiffs advance a far-fetched interpretation of the clause and contend (at 48) that the Act runs afoul of this provision by requiring campaign funding disclosures. As the trial court found, this claim lacks merit. IR-116, 6/21/23 Ruling at 14 (APP041).

The Arizona Supreme Court has generally interpreted the private affairs clause to be "of the same general effect and purpose as the Fourth Amendment." *State v. Mixton*, 250 Ariz. 282, 290, ¶ 31 (2021) (quoting *Malmin v. State*, 30 Ariz. 258, 261 (1926)). It has not expanded the protections of the clause "beyond the Fourth Amendment, except in cases involving warrantless home entries" despite the broader wording of the clause. *Id.* (citation omitted).

To determine the meaning of "private affairs," courts look to the term's "natural, obvious, and ordinary meaning." *Mixton*, 250 Ariz. at 290, ¶ 33 (citation and internal quotation marks omitted). "Private" means "affecting or belonging to private individuals, as distinct from the public generally," "peculiar to one's self," "personal," "alone," "secret," "not public," "secluded," "unofficial." *Id.* at 290-91, ¶ 33 (quoting *Private*, Black's Law Dictionary (2d. ed. 1910) and *Private*, New Websterian Dictionary (1912)). Campaign contributions in support of public communications do not

constitute "private affairs" under the term's plain meaning. In fact, the very existence of Arizona's clause *requiring* disclosure of campaign contributions by corporations—enacted at the same time as the private affairs clause—strongly suggests that campaign contributions were not considered to be private information by the framers. *See* Ariz. Const. art. VII, § 16.

Against this backdrop, the trial court correctly found that "election contributions are not 'private affairs.'" IR-116, 6/21/23 Ruling at 14 (APP041). This makes sense—Prop. 211 requires that large donors be disclosed when their funds are used for "*public* communication[s]" constituting "campaign *media* spending." *See* A.R.S. §§ 16-971(2), (17) (emphases added). These actions are not "private" affairs.

Plaintiffs rely heavily (at 48) on *Mixton* to suggest that the private affairs clause was "especially" intended to protect financial information. But *Mixton* (which involved warrant requirements for internet protocol addresses and internet service providers) addressed this very idea—presented there by amicus relying on the same law review article that Plaintiffs rely upon here—and found that "the constitutional convention record is devoid of affirmative evidence of [the] sentiment" that the private

affairs clause was adopted in response to concerns regarding the disclosure of financial information. 250 Ariz. at 291, ¶ 35.[8]

Finally, the Court should disregard Plaintiffs' mistaken attempt (at 49-50) to invoke the *expressio unius* canon. The fact that the Constitution requires campaign contributions to be disclosed, Ariz. Const. art. VII, § 16, does *not* prohibit additional laws or define the full scope of authority on the topic. Our Supreme Court has firmly rejected the theory behind Plaintiffs' argument:

> "[The] whole power not prohibited by the state and Federal constitutions is retained in the people and their elected representatives . . . . We do not look to the (state) Constitution to determine whether the Legislature is authorized to do an act, *but only to see if it is prohibited*."

[8] Plaintiffs assert (at 48 n.9) that Washington, which has an identically-phrased clause, prohibits disclosure of financial transactions. They point to *State v. Miles*, 156 P.3d 864, 868–69 (Wash. 2007), which held that a person's bank records are private affairs under Washington law. However, the court there noted that separate Washington statutes historically protected bank records from unsupervised access and prohibited disclosing banking records. *Id.* In any event, bank records reveal much more comprehensive and detailed personal information than campaign disclosures and do not involve campaign media spending.

Earhart v. Frohmiller, 65 Ariz. 221, 224-25 (1947) (rejecting application of *expressio unius*) (emphasis added and quotations omitted). Article 7, Section 16 does not prohibit Prop. 211 or similar requirements.

Furthermore, the private affairs clause prevents the disturbance of one's private affairs "without authority of law." Ariz. Const. art II, § 8. Prop. 211 *is* law enacted by the voters of this state. Plaintiffs can claim no legitimate expectation of privacy in their campaign media spending and related donations that occur after voters approved Prop. 211. Requiring an act to have the "authority of law" protects against government officials "doing their jobs according to their own ideas of how to proceed . . . ." Johnson & Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 448 (2008). Prop. 211 avoids any such threat—it requires disclosing only specific information in limited situations.

For these reasons, the trial court properly dismissed the Plaintiffs' facial private affairs challenge. This Court should affirm.

IV. The trial court correctly found that Plaintiffs lacked standing to bring a separation of powers claim.

"[A]s a matter of sound judicial policy," the Arizona Supreme Court has "required persons seeking redress in the courts first to establish

standing, especially in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16 (2003). That is, a plaintiff must allege "a distinct and palpable injury" that is individualized and not shared with "a large class of citizens." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). The injury also must be caused by the alleged violation. *Id.* at 70-71, ¶¶ 17-28.

Absent standing, Arizona courts generally decline jurisdiction. *Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 14 (2005). Here, the trial court found that Plaintiffs lack standing because they failed to allege a particularized harm to them from the alleged separation of powers violation. IR-116, 6/21/23 Ruling at 15 (APP042). Thus, the trial court properly followed Arizona law and dismissed this claim.[9]

[9] In a separate case challenging Prop. 211, a panel of this Court recently confirmed that standing requires a plaintiff to show a direct injury that is traceable to the challenged law. *Toma v. Fontes*, No. 1 CA-CV 24-0002, slip op. at 13-14 ¶¶ 49-50 (Ariz. Ct. App. June 27, 2024) (concluding that legislative leaders lacked standing challenge to A.R.S. § 16-974(A)(8) and certain Commission rules because their alleged injury was instead traceable to § 16-974(D) and the Voter Protection Act). *Toma* bolsters the trial court's conclusion that Plaintiffs lack standing to raise a separation of powers claim.

On appeal, Plaintiffs still allege (at 53) only generalized fears concerning "unchecked enforcement actions that will come out of the Commission." They have not identified any allegedly *unconstitutional* authority that has been or will be exercised that will affect them personally, and they fail to allege a connection between a separation of powers violation and any purported injury to themselves. *See* IR-116, 6/21/23 Ruling at 15 (APP042) (Plaintiffs "complain that the Commission's enforcement of the Act is not subject to approval of other executive bodies. But nothing ties the alleged lack of oversight to any individualized harm."). Such speculation does not confer standing. *See Wright v. Serv. Emps. Int'l Union Loc.*, 503, 48 F.4th 1112, 1118 (9th Cir. 2022) (plaintiff cannot rely "on mere conjecture" about defendants' possible actions but must present "concrete evidence to substantiate [her] fears" (cleaned up)).

Lacking any individualized harm, Plaintiffs assert (at 54-55) that they have standing to enforce Article III because it is a "mandatory clause." They cite no Arizona case law in support of this theory, because, to Defendants' knowledge, no Arizona court has recognized such a theory. And the cases they cite do little to advance their argument. For example, Plaintiffs cite *Seattle School District No. 1 of King County v. State*, for the idea that a court has

a duty to enforce a mandatory clause like Article III and so, Plaintiffs suggest courts should waive standing requirements on claims regarding such clauses. But the court there was discussing its duty to protect individual constitutional rights (e.g., jury trial, due process, equal protection rights). 585 P.2d 71, 86 (Wash. 1978). Article III is not that type of provision. Regardless, even in that education-related case, the court still required particularized harm under its "liberalized" standing requirement. *Id.* at 82 (explaining the interests were not theoretical but involved actual financial constraints).

Likewise, in *Gregory v. Shurtleff*, a Utah court only allowed plaintiffs to bring a claim regarding a mandatory clause because they met Utah's requirements for "public interest" standing. 299 P.3d 1098, 1109 (Utah 2013). The court found that the plaintiffs were competent to present the issues and, importantly, that "the issues [were] unlikely to be raised if [plaintiffs were] denied [public-interest] standing" because no other plaintiff had emerged in the *six years* since the law was enacted. *Id.* at 1109-10. This is the first election cycle in which Prop. 211 will be in effect. There is no reason to believe that a valid claim regarding the Act could not be brought by a plaintiff with traditional standing.

Finally, Plaintiffs ask (at 56) this Court to waive standing based on Arizona case law. But this "exceptional" deviation taken for cases of "great public importance that are likely to recur," *Sears*, 192 Ariz. at 71, ¶ 25, is not appropriate here.

First, Plaintiffs argue (at 57) this Court should waive standing requirements to their Article III claim because the Act violates the free speech clause. As discussed above (*see* Argument § I.A), this Court has already recognized that campaign disclosures, such as Prop. 211, "do not prevent anyone from speaking." *CJF*, 235 Ariz. at 356, ¶¶ 32-33 (citation omitted). Regardless, this is no reason to waive standing for an Article III claim; Plaintiffs' free speech claim will be heard by this Court.

Next, Plaintiffs ask the Court (at 57-58) to waive standing because Prop. 211 allegedly violates separation of powers. For the reasons discussed below, it does not. And Plaintiffs have not alleged any connection between the alleged separation of powers violations and any concrete injury. Plaintiffs, in essence, ask for an advisory opinion, which Arizona "courts do

not issue." *Sears*, 192 Ariz. at 71, ¶ 24.[10] Finally, nothing suggests that the Commission's actions are likely to evade review in the future. Plaintiffs do not meet the bar for this Court to take the "exceptional" step of waving standing.

Moreover, Plaintiffs' claim fails on the merits. The Arizona Supreme Court has long made clear that Article III does not demand "an entire and complete separation of power of the three branches of government," a design which is neither desirable nor was intended by the framers. *Sw. Eng'g Co. v. Ernst*, 79 Ariz. 403, 414-15 (1955). The Legislature has broad authority to delegate "quasi-legislative" power to the executive to administer a statute. *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971); *accord Toma*, slip op. at 12, ¶ 46 (acknowledging the Legislature's "broad" discretion to "delegate authority to the executive branch"). And, under the Arizona Constitution,

[10] Plaintiffs attack (at 57 n.13) § 16-975 of the Act which is designed to prohibit persons from intentionally attempting to evade the Act's reporting requirements by structuring their transactions. This provision tracks a well-established banking law, 31 U.S.C. § 5324(a), which prohibits structured financial transactions to evade reporting requirements for financial institutions and has been upheld against a challenge of alleged constitutional vagueness. *See United States v. Davenport*, 929 F.2d 1169, 1172-73 (7th Cir. 1991).

"[t]he legislative power of the people is as great as that of the legislature." *Toma*, slip op. at 13, ¶ 47.

The scope of the delegation can be broad. "[B]arring a total abdication of their legislative powers, 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 . . ." *State v. Williams*, 119 Ariz. 595, 598 (1978). So long as the delegation is "defined with sufficient clarity to enable the [executive] to recognize its legal bounds," there is no constitutional harm. *3613 Ltd. v. Dep't of Liquor Licenses & Control*, 194 Ariz. 178, 183, ¶ 21 (App. 1999).

Plaintiffs challenge (at 50) the Act because it gives the Commission—a statutorily created body—what Plaintiffs characterize as legislative, executive, and quasi-judicial powers under § 16-974(A) and (D). The provisions challenged by Plaintiffs are, however, commonplace and constitutional. For example, under Prop. 211, the Commission may adopt and enforce rules. *See* A.R.S. § 16-974(A)(1). This is a routine function of agencies. *E.g.*, *Ariz. Mines Supply Co.*, 107 Ariz. at 205 (acknowledging agencies have "the power to adopt rules and regulations necessary to carry a law into effect"). Likewise, exempting the Commission's rules from the

Arizona Administrative Procedures Act (Title 41, Chapters 6 and 6.1) under § 16-974(D) violates no separation of powers principle.[11] And the Commission's enforcement actions *are* subject to judicial review; the Commission does not improperly exercise judicial power. *See* A.R.S. §§ 16-977(C), -974(B).

Plaintiffs have no standing to challenge the Act on this ground. Even if they did, Prop. 211 merely imbues the Commission with standard administrative powers, nothing more. This Court should affirm the dismissal of Plaintiffs' separation of powers claim.

V. The trial court properly denied Plaintiffs' preliminary injunction requests.

Although Plaintiffs could have immediately appealed the denial of their original preliminary injunction motion, A.R.S. § 12-2101(A)(5)(b), they did not. More than a year later, they now purport to appeal that denial along

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[11] Such exemptions are common. *E.g.*, A.R.S. § 3-109.03; A.R.S. § 3-525.08(C); A.R.S. § 5-601(E); A.R.S. § 20-1241.09(B); A.R.S. § 23-491.16(I); A.R.S. § 32-1974(H); A.R.S. § 32-3253(A)(4); A.R.S. § 36-2205(B). The Legislature itself has exempted the Commission from certain administrative steps otherwise required of agencies. *E.g.*, A.R.S. § 41-1039(E)(2)(c) (exempting the Commission and any other "board or commission established by ballot measure at or after the November 1998 general election" from a requirement to seek written approval from the governor before any rulemaking).

with the trial court's subsequent denial of the renewed preliminary injunction motion that Plaintiffs filed several months after their Amended Complaint. But the trial court (long ago) correctly denied both motions.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008). "A party seeking a preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief." *Fann v. State*, 251 Ariz. 425, 432, ¶ 16 (2021). "This is a sliding scale, not a strict balancing of factors." *Id.* Accordingly, "the movant can seek to prove one of two conjunctive pairings: (1) probable success on the merits and the possibility of irreparable harm, or (2) the presence of serious questions and the balance of hardships tipping sharply in the movant's favor." *City of Flagstaff*, 255 Ariz. at 12, ¶ 14 (citing *Fann*, 251 Ariz. at 432, ¶ 16).

Plaintiffs state (at 65) that their as-applied challenge entitled them to the extraordinary remedy of enjoining Prop. 211. For their evidence, Plaintiffs relied exclusively on the declarations attached to their complaints. As noted above, (*see* Argument § II), the trial court methodically examined

those declarations and correctly concluded that Plaintiffs failed to state a claim. *See generally*, IR-199 (APP044-58). The trial court therefore found that Plaintiffs were not just *unlikely* to succeed on the merits of their claim, but that they, in fact, *could not succeed* because they failed to state any claim upon which relief could be granted. Plaintiffs' inability to show any chance of success on the merits doomed their request from the start. *See City of Flagstaff*, 255 Ariz. at 12, ¶ 24 (failure to establish one factor in the conjunctive pairings is dispositive and renders determining other factors unnecessary and premature).

But even setting aside Plaintiffs' failure to meet their burden on any of the preliminary injunction factors, the evidence gathered during discovery in connection with Plaintiffs' renewed motion further cemented that Plaintiffs failed to establish a likelihood of success or raise serious questions regarding the merits (i.e., that CAP and FEC donors or the Doe Plaintiffs faced a reasonable probability of threats, harassment, or reprisals). For example, Ms. Herrod, testifying for CAP, could not identify any donor who contributed more than $5,000 who expressed concern about disclosure or expressed safety concerns with respect to attending CAP events. C. Herrod Dep. Tr. Vol. I at 24:12-17 (APP204); C. Herrod Dep. Tr. Vol. II at 92:4-13

(APP236). And while FEC alleged that a staff member had her "car vandalized at the legislature in retaliation for her engaging in public communications on FEC's behalf," IR-121, Ex. 2 S. Mussi Decl. 1 at ¶ 16 (APP172), Mr. Mussi admitted in his deposition that he had no basis for connecting the "keying" of the staffer's car with her work on behalf of FEC at the legislature. S. Mussi Dep. Tr. at 116:8-117:3 (APP281-82). Meanwhile, Doe I explicitly testified that he was not worried about his own reputation, and only feared that nonparty organizations may lose donations due to Prop. 211. Doe I Dep. Tr. at 56:17-25; 59:1-11 (APP300, 301). And Doe II admitted that his concerns about disclosure were not likely to occur but were simply "possible." Doe II Dep. Tr. at 51:1-3 (APP309).

Finally, contrary to Plaintiffs' assertions (at 65), by dismissing both their facial and as-applied claims, the trial court necessarily found Plaintiffs did not establish the existence of a constitutional injury to demonstrate irreparable harm.

Plaintiffs criticize (at 59) the trial court for not listing the preliminary injunction factors in its ruling. Although the trial court did not re-address the factors after its findings on the motion to dismiss, its rulings necessarily address the preliminary injunction factors. The trial court's rulings

demonstrate in great detail why Plaintiffs' claims were not likely to succeed and that Plaintiffs did not plead a reasonable probability of threats, harassment, or reprisals. The trial court therefore did not abuse its discretion in denying the preliminary injunction motions. The trial court's rulings allow this Court to review the trial court's decision-making process regarding those factors. *See Miller v. Bd. of Supervisors of Pinal Cnty.*, 175 Ariz. 296, 299 (1993) ("[F]indings and conclusions permit an appellate court to examine more closely the basis on which the trial court relied in reaching the ultimate judgment.").

Plaintiffs also allege (at 62) that the trial court made an erroneous finding of fact by determining that CAP and FEC "allege[d] no facts to support their allegations of harassment and intimidation" and that "[t]he Doe Plaintiffs' claims are also deficient." But, as the trial court explained in the preceding paragraphs, the allegations in the Amended Compliant were not *factual*, but conclusory; "conclusory allegations, without any supporting facts, are insufficient to state a claim." IR 199, 2/28/24 Ruling at 7 (APP050) (citing *Cullen*, 218 Ariz. at 419, ¶ 7). The trial court did not make an erroneous finding of fact in properly characterizing the Amended Complaint.

Plaintiffs contend (at 63) that even if the trial court "applied an acceptable preliminary injunction standard" it still abused its discretion by making erroneous findings of facts and conclusions of law. Plaintiffs do not expand on this argument, and this drive-by reference is insufficient to show an abuse of discretion. *See* ARCAP 13(a)(7)(A) (argument section must contain "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention"). Moreover, as discussed above, the trial court did not err.

Finally, Plaintiffs ask this Court to reverse and remand with an order to enter a preliminary injunction,[12] claiming that they "need not satisfy the standard for injunctive relief" if they show the Act is unlawful. Opening Br. at 64-65 (quoting *Ariz. Pub. Integrity All. v. Fontes ("AZPIA")*, 250 Ariz. 58, 64, ¶ 26 (2020)). Not so. The Arizona Supreme Court has confirmed the traditional four-factor test applies. *Fann*, 251 Ariz. at 432, ¶ 16 (listing factors required for preliminary injunction). Indeed, the Court of Appeals recently

[12] Of course, if the Court finds that the renewed preliminary injunction ruling is insufficiently detailed or was otherwise improper, the proper remedy is to remand the case to the trial court for further consideration of the renewed preliminary injunction request.

rejected a similar argument in a different case. *See City of Flagstaff*, 225 Ariz. at 11, ¶ 10 (reversing preliminary injunction and holding that the superior court erred in concluding that "a plaintiff showing a violation of a statute need not show a balance of hardships favoring it").

The Court should affirm the trial court's denial.

CONCLUSION

For the reasons above, this Court should affirm the dismissal of Plaintiffs' complaint and the denial of their request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 29th day of July, 2024.

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