**ARIZONA SUPREME COURT**

BEN TOMA, et al.

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.

Defendants/Appellees,

and

KRIS MAYES, et al.

Intervenor-Defendants/Appellees.

Arizona Supreme Court
No. 24-0166-PR

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

Maricopa County
Superior Court
No. CV2023-011834

# RESPONSE TO PETITION FOR REVIEW


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## INTRODUCTION

At this stage, this case is very narrow. The only questions are (1) whether legislators have standing to challenge the People's statutory delegation to an agency of the unremarkable power to "[p]erform any other act that may assist in implementing this chapter," and (2) whether the Court of Appeals correctly applied the severability framework.

Although the petition frames this case as a battle between the branches, that's not what the petition actually presents. Rather, the petition presents a narrow slice of an interlocutory appeal over facial challenges to snippets of a statute. It challenges neither any action by the Arizona Citizens Clean Elections Commission, nor any major delegation likely to be abused.

Although Prop. 211 is a significant enactment designed to facilitate transparency in political spending on elections, the petition does not address those disclosure requirements or raise any other issues that warrant review.

## BACKGROUND

Prop. 211 was enacted because 72% of Arizona voters decided that "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." 2022 Ariz. Legis. Serv. Prop. 211 § 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 these goals, the Act "empower[s] the [Commission] and individual voters to enforce its disclosure requirements" and imposes "significant civil penalties" for violating those requirements. *Id.* § 2(D); Op. ¶ 5.

Plaintiffs did not attack those disclosure requirements. Instead, they targeted two narrow snippets of Prop. 211: A.R.S. § 16-974(A)(8) and § 16-974(D). Section 16-974(A) establishes the Commission's powers to implement and enforce the Act. After listing several specific powers (e.g., adopt rules, issue subpoenas, impose penalties), the statute includes an ordinary catch-all provision granting authority to "[p]erform any other act that may assist in implementing" Prop. 211. A.R.S. § 16-974(A)(8).

Separately, § 16-974(D) was intended to restore the Commission's rulemaking independence after it had flip-flopped between being exempt and non-exempt from oversight in recent years.[1] Now, under § 16-974(D),

[1] *See* H.R. Con. Res. 2007, 2d Reg. Sess. (Ariz. 2018) (amending § 16-956(C) to remove the Commission's rulemaking exemption).

the Commission's rules and enforcement actions "are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official." *Id.*

Plaintiffs (the Speaker of the House of Representatives and President of the Senate) sued the Commission and the Secretary of State, and the Attorney General and Voters' Right to Know intervened. [IR-15; IR-36.] Plaintiffs claim that § 16-974(A)(8) violates the separation of powers and nondelegation doctrines, and that § 16-974(D) violates the separation of powers and the Voter Protection Act ("VPA"). They also challenged three administrative rules (which are not the subject of any independent arguments in the petition). [IR-40.]

Based on those limited challenges to § 16-974(A)(8) and § 16-974(D), Plaintiffs sought to invalidate the entire initiative and moved for a preliminary injunction to enjoin all of Prop. 211 and three Commission rules. [IR-47.] The superior court denied the motion. [IR-110.]

Plaintiffs appealed. The Court of Appeals held that Plaintiffs lacked standing to challenge § 16-974(A)(8) and to directly attack the administrative rules, a ruling not challenged in the petition. Op. ¶¶ 45-50. But the court found that Plaintiffs do have standing to challenge § 16-974(D). Op. ¶¶ 40-

44. On the merits, the court held that § 16-974(D) was unconstitutional in part. It reasoned that one undefined term—"legislative governmental body"—has the effect of preventing "the Legislature from passing any law prohibiting or limiting the Commission's rules or enforcement actions." Op. ¶ 80. In other words, § 16-974(D) (as interpreted by the Court of Appeals) purports to prohibit the Legislature from legislating on certain issues.[2]

The Opinion then held that the offending phrase in § 16-974(D) was severable, after applying the undisputed severability framework for voter initiatives. Op. ¶¶ 81-85. Accordingly, the court issued a preliminary injunction barring Defendants "from enforcing § 16-974(D) to prohibit the Legislature from passing legislation prohibiting or limiting the Commission's rules or enforcement actions." Op. ¶ 92. Defendants do not seek review of that narrow preliminary injunction here.

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[2] Defendants have consistently agreed that if the statute actually barred the Legislature from legislating, then it would be unconstitutional in that respect. *See* Op. ¶ 68. The dispute below was about statutory interpretation, not the Constitution. Namely, Defendants argued that the voters did not (absurdly) intend § 16-974(D) to strip the Legislature of any legislative power. Instead, in context, the phrase "legislative governmental body" means entities like the Legislature's Administrative Rules Oversight Committee (a non-legislating entity).

## ISSUES

1. Are Plaintiffs likely to succeed in showing they have standing to facially challenge the People's delegation of power in A.R.S. § 16-974(A)(8)?

2. Is the invalid portion of A.R.S. § 16-974(D) severable from the rest of Prop. 211?

## REASONS TO DENY THE PETITION

### I. The standing issue does not warrant review.

#### A. The only standing issue narrowly concerns § 16-974(A)(8).

On the standing issue, the only question at this stage is whether Plaintiffs have standing to challenge A.R.S. § 16-974(A)(8). Although the petition (at 8-10) suggests the Court of Appeals took too narrow a view of the claims, Plaintiffs' litigation decisions narrowed the dispute.

Below, Plaintiffs challenged three things: (1) § 16-974(A)(8), (2) § 16-974(D), and (3) three administrative rules.

At this stage, the standing question on § 16-974(D) is gone because the Court of Appeals found standing for that challenge, and Defendants have not sought review of that decision. Op. ¶¶ 40-44.

The standing question on the rules is also not before this Court because the petition does not seek review of the adverse ruling below (Op. ¶¶ 51-55).

The petition explains "the independent constitutional challenges [to the rules] are not at issue here," but argues that the rules "are derivatively unconstitutional" if the statutory rulemaking authority is found unconstitutional. Pet. at 10 & n.1.

That leaves § 16-974(A)(8). Plaintiffs insist (at 8) that they "challenged all of § 16-974(A), not just (A)(8)," citing only their complaint. But in Plaintiffs' preliminary injunction briefing below, Plaintiffs never advanced separate arguments that any portion of § 16-974(A), other than (A)(8), is unconstitutional. [IR-47 (PI motion); COA Opening Br.]

Below, as here, Plaintiffs tried to claim that § 16-974(A) gives the Commission "executive and quasi-judicial powers," but they simultaneously disclaimed any such challenge, explaining that "Plaintiffs are not challenging these provisions on behalf of the executive and judicial branches." COA Opening Br. at 24. Below, as here, Plaintiffs' characterization of other portions of § 16-974(A) are rhetorical gloss, not substantive constitutional challenges.

In sum, the Court of Appeals correctly focused on § 16-974(A)(8). Plaintiffs' suggestion (at 8-9) that the Court of Appeals took too narrow a view of their case is a result of Plaintiffs' own litigation decisions.

### B. The narrow standing issue remaining does not warrant review.

#### 1. The People's delegation of authority is not an institutional injury to the Legislature.

The only remaining standing question is whether Plaintiffs have standing to challenge the voters' decision in § 16-974(A)(8) to give the Commission authority to "[p]erform any other act that may assist in implementing this chapter." That does not warrant review.

Subsection (A)(8) is an ordinary delegation of authority.[3] Just two years ago this Court reiterated that "the legislature may properly delegate power to implement a statute so long as it plainly authorizes the executive agency to do so." *Roberts v. State*, 253 Ariz. 259, 268, ¶ 34 (2022).

In addition, "[t]he legislative power of the people is as great as that of the legislature." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6, ¶ 15 (2013) (citation omitted); *accord Molera v. Reagan*, 245 Ariz. 291, 294, ¶ 9 (2018) (same); *see* Ariz. Const. art. 22, § 14.

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[3] *See, e.g.*, A.R.S. §§ 48-558(A) ("any other act … which may become necessary or proper to carry out the intent and purpose of" certain statutes); 28-7673(D) ("any other act necessary or appropriate to carry out the purposes of this article"); 40-336 ("any other act which health or safety requires").

Together, these principles mean the People may exercise their legislative power to delegate authority, as they did in Prop. 211. Op. ¶¶ 46-47. Plaintiffs do not invite the Court to revisit any of these fundamental principles (nor would this case be a proper vehicle for doing so, even if they had).

The only substantive question Plaintiffs raise is whether § 16-974(A)(8)'s delegation has a constitutional *scope*. But Plaintiffs lack standing on this question. The scope of a delegation the People have chosen using *their* legislative power does not automatically inflict an institutional injury on the Legislature. The People and the Legislature are co-equals in the same branch; the Legislature cannot assert an injury based on its disagreement with how the People chose to exercise their share of authority.

Put differently, the sheer fact that the People have delegated power is not a per se injury to the Legislature any more than the Legislature's decision to delegate power would be a per se injury to anyone else. An individual could not establish standing simply by pointing at a statute the Legislature passed and proclaiming it an unconstitutional delegation. That individual would need to identify an "injury resulting from the putatively illegal

conduct." *Sears v. Hull*, 192 Ariz. 65, 70, ¶ 23 (1998). So too here for the Legislature.

For good reason, the Court of Appeals had no trouble rejecting Plaintiffs' contrary theory. Op. ¶¶ 45-50. Plaintiffs' view treats the People's power as weaker than the Legislature's and would mark an unprecedented expansion of legislative standing.

The petition asserts only a *facial* challenge that does not directly challenge any specific Commission action under § 16-974(A)(8). Perhaps Plaintiffs may have standing in the future to challenge a particular Commission action if such an action ever causes an actual institutional injury to the Legislature. But that is not the case here.

Here, instead, the merits issue is solely whether the People had the right to delegate authority in § 16-974(A)(8). Even if the answer is "no," the delegation itself still does not cause an *institutional injury* to the Legislature. The Legislature is not affected, much less harmed, by the bare fact that the Commission is empowered to implement Prop. 211 under § 16-974(A)(8). Otherwise, the Legislature would have automatic standing any time it alleged that a voter-approved act—or even an act of a prior legislature—delegated too much power. That would nullify the standing requirement.

Plaintiffs' arguments obscure the limited nature and posture of this case. They claim (at 11) that an unconstitutional transfer of power causes an institutional injury. But they cite only *Hernandez v. Frohmiller*, 68 Ariz. 242, 254 (1949), which did not address institutional injury or standing and merely held that "neither the legislature nor the people can delegate to an administrative board the power to legislate." Even if a delegation were improper, it wouldn't automatically follow that the Legislature has standing to vindicate that claim.

Plaintiffs rely on *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006), claiming (at 12) that an institutional injury "results when another branch seizes or exercises legislative powers it cannot lawfully possess." But this petition is not about the Commission's actions or exercise of any power—it is about the *People's* exercise of their portion of the legislative power and whether they could enact § 16-974(A)(8) at all.

In particular, in *Forty-Seventh Legislature*, the Legislature challenged the Governor's authority to veto part of a bill, and it was undisputed that the veto meant that the legislature's ability "to have the votes of a majority given effect [was] overridden." 213 Ariz. at 486-87, ¶¶ 14-15. The case thus presented a specific legislative power that was arguably usurped by the

executive branch. Plaintiffs here articulate no comparable executive branch overreach, let alone one that has caused Plaintiffs actual harm.

Plaintiffs (at 13) turn to the Constitution's structure and emphasize the "exclusive" nature of the legislative power. But the People share in that "exclusive" power, and they are entitled to delegate authority to agencies just like the Legislature has thousands of times. The Constitutional structure does not mean that the Legislature itself suffers an injury whenever it disagrees with how the People exercise the same power.

**2. The Opinion addressed nullification because Plaintiffs argued nullification.**

In an effort to make this case look "review-worthy," Plaintiffs claim (at 13-14) that the Opinion holds "that legislative standing turns solely on 'nullification.'" Not so. The Opinion addresses nullification in response to the arguments Plaintiffs made in the Court of Appeals. There, Plaintiffs argued that Prop. 211 causes institutional injury "by [1] giving the Commission legislative power and [2] preventing the Legislature from passing laws conflicting with Commission rules or enforcement actions." COA Reply Br. at 13 (bracketed numbers added for clarity) (*accord* COA Opening Br. at 50). In other words, [1] delegation, and [2] nullification.

As to delegation, the Opinion explains that the Legislature may "delegate authority to the executive branch" (¶ 46) and that it "makes no difference" that "[t]he people made the delegation here" (¶ 47). Contrary to the petition's suggestion, therefore, the Opinion squarely addressed Plaintiffs' delegation argument.

The Opinion then addresses nullification (¶¶ 48-49) to rebut Plaintiffs' argument that Prop. 211 "prevent[s] the Legislature from passing laws." COA-Reply at 13. The Opinion correctly explains that § 16-974(A)(8) does not nullify anything—a holding Plaintiffs' petition does not challenge.

The Opinion is clear. No future litigants will be misled on either score.

### 3. The Opinion adequately addressed the "actual controversy" argument Plaintiffs made below, and the analysis does not warrant further review.

As for "actual controversy," the petition complains that the Opinion focuses on § 16-974(D). But that's what Plaintiffs' "actual controversy" argument focused on below. COA Opening Br. at 53-54. Although Plaintiffs make new arguments about § 16-974(A)(8) for the first time in this petition, the Opinion did not misapply the law and will not cause any future confusion by not addressing arguments not raised in that court. In any

event, Plaintiffs' new "actual controversy" argument merely rehashes their misguided institutional injury arguments about delegation.[4]

**4. The prudential factors do not warrant review.**

The Opinion correctly found that this case was not one of the "exceptional circumstances" where standing should be waived. Op. ¶ 55 (citing *Sears*, 192 Ariz. at 71 ¶ 25). Plaintiffs ask this Court to review that decision, but this Court has not waived standing in decades—and did so in none of the cases cited in the petition. This interlocutory appeal about a generic and common delegation is not the case to start.

Moreover, this is not the type of case in which denying standing would make the issue unreviewable. If the Commission ever exercises its authority under § 16-974(A)(8) in an allegedly unconstitutional manner, a regulated or otherwise affected party will very likely have standing to challenge it. Indeed, this is how non-delegation challenges arise all the time. There is no

[4] Although this section references "the rules" (at 14), the petition elsewhere (at 10 n.1) clarifies that Plaintiffs' challenge to the rules derives from their challenge to the enabling statutes, and Plaintiffs do not elaborate about the "actual controversy" triggered by the otherwise-unchallenged rules.

reason to create special standing rules for the Legislature that would apply to no other plaintiff.

## II. The severability issue does not warrant review.

The petition's second issue, concerning severability of § 16-974(D), does not warrant review because it merely seeks interlocutory error correction. This Court has already definitively addressed how to analyze severability in voter initiatives. *See Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522-23, ¶¶ 23-25 (2000); *Randolph v. Groscost*, 195 Ariz. 423, 427, ¶ 15 (1999). The Opinion faithfully applied this settled framework. Op. ¶¶ 81-85. The petition does not invite this Court to clarify this settled law or contend that the supposed severability errors are widespread.

The petition first says (at 16) that Plaintiffs argued "§ 16-974(D) is *facially* unconstitutional and cannot be severed." But the Court of Appeals found only one unconstitutional application: "prohibit[ing] the Legislature from passing" laws. Op. ¶ 80. The court thus properly exercised its discretion to fashion a temporary equitable remedy that matched that unconstitutional application: Defendants cannot "prohibit the Legislature from passing legislation." Op. ¶ 92. *See Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331 (App. 1995) ("An injunction is an equitable remedy, which

allows the court to structure the remedy so as to promote equity between the parties."). Although Plaintiffs sought broader relief, they did not show a likelihood of success on the merits for enjoining *all* of Prop. 211 because they failed to "establish that no set of circumstances exists under which [the statute] would be valid." *Stanwitz v. Reagan*, 245 Ariz. 344, 349, ¶ 19 (2018).

Plaintiffs further claim (at 16) that the Opinion "rewrite[s] the statute because it "does not entirely strike § 16-974(D), or even any specific language." Not so. Plaintiffs' arguments about "tinker[ing]" with the statute misunderstand the judicial role and the relief awarded. The Court of Appeals could not enjoin the *constitutional* applications of § 16-974(D) (like exempting the Commission's rules from the Governor's Regulatory Review Council), so it properly tailored the injunction to the limited violation.

Second, the petition (at 16-17) claims the Opinion misapplies the test on whether the valid portion of the law is "workable." Here, too, the Opinion properly focused on the narrowness of Plaintiffs' success: Plaintiffs' successful attack merely confirmed that the Legislature may pass laws. That's it. But, of course, any legislation must comply with the VPA, so the Legislature cannot undo Prop. 211.

The question then is whether the rest of Prop. 211 is workable after confirming that the Legislature can still pass laws. The Opinion correctly concluded it is workable. Prop. 211 is about campaign finance disclosure, and *all* of Prop. 211's substantive provisions about campaign finance disclosure remain valid and workable, and not subject to legislative repeal. For example, the Legislature cannot change the required disclosures, penalties, or anything else in the Act. "[T]he Act's core will remain—its disclosure requirements will still be enforceable." Op. ¶ 84.

Plaintiffs claim (at 17) the rest of Prop. 211 is unworkable because the "stated principal purpose" is the non-partisan nature of the Commission. As a threshold matter, Plaintiffs' own citation disproves the assertion about what the "principal purpose" is. The quoted phrase is literally the *last sentence* of the document. The cited document confirms that the "principal" purpose (i.e., the first or most important purpose) is to give Arizona voters "the right to know who is trying to influence an Arizona election using paid,

public communications."[5] The document then references the substantive requirements, including the monetary thresholds for reporting. It says nothing about an exemption from legislative oversight. The challenge to § 16-974(D) affects none of this.

Even if the non-partisan nature of the Commission were the principal purpose, the result is the same. Plaintiffs claim (at 17) that "[a]n informed electorate would not have adopted Prop 211 without political insulation." But the Commission's non-partisan composition was already set by a voter-protected statute (A.R.S. § 16-955), not subject to legislative repeal. Moreover, Plaintiffs offer not a single allegation of fact to suggest that the overwhelming majority of voters who chose to shine light on millions of dollars of "dark money" election spending would have voted against Prop. 211 without the specific exemption from Commission oversight at issue here.

Third, Plaintiffs claim (at 18) "the Opinion gives undue weight" to the severability clause. The Opinion applied settled law, under which an

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[5] https://web.archive.org/web/20221022105834/https://apps.arizona.vote/info/assets/33/0/BallotMeasures/I-02-2022%20Superseded%20by%20I-04-2022.pdf

"express severability clause [dictates] that all doubts are to be resolved in favor of severability." *Myers*, 196 Ariz. at 523, ¶ 25. The petition protests (at 18) that "[s]uch clauses do not alter the severability analysis." True enough. But *Myers* confirms that a presumption of severability must resolve "all doubts" when the voters express that intention in a severability clause.

The petition cites (at 18) *Fann v. State*, 251 Ariz. 425, 440, ¶ 51 (2021), but that case does not help Plaintiffs: *Fann* simply restates that the severability clause is not alone dispositive. The Court of Appeals heeded that principle here. The Opinion correctly recognized and faithfully applied the ordinary severability test, without giving undue weight to the severability clause over other considerations. Op. ¶¶ 83-85.

This garden-variety application of the settled severability framework does not warrant review.

## ARCAP 21

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

## CONCLUSION

The Court should deny the petition.

RESPECTFULLY SUBMITTED this 27th day of September, 2024.

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**CERTIFICATE OF COMPLIANCE**

1. This certificate of compliance concerns:

☐ A brief, and is submitted under Rule 14(a)(5)

☐ An accelerated brief, and is submitted under Rule 29(a)

☐ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

☒ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

☐ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief/motion for reconsideration/petition or cross-petition for review to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,437 words.

The document to which this Certificate is attached ☒ does not, or ☐ does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

RESPECTFULLY SUBMITTED this 27th day of September, 2024.

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**CERTIFICATE OF SERVICE**

I certify that on September 27, 2024, the Response to Petition for Review, the Certificate of Compliance and this Certificate of Service were electronically filed with the Clerk's Office, and pursuant to ARCAP 4(f), a copy was e-served via AZTurboCourt to:

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