ARIZONA SUPREME COURT

STEVE MONTENEGRO, et al.

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.

Defendants/Appellees,

and

KRIS MAYES, et al.

Intervenor-Defendants/Appellees.

Arizona Supreme Court
No. CV-24-0166-PR

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

Maricopa County
Superior Court
No. CV2023-011834

SUPPLEMENTAL BRIEF OF ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, ADRIAN FONTES, AND VOTERS' RIGHT TO KNOW

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ISSUES PRESENTED

1. Do the Legislative Leaders have standing to challenge § 16-974(A) and the rules flowing from that delegation?

2. Is § 16-974(D) severable from Prop. 211?

INTRODUCTION

Under Arizona law, legislators must demonstrate a particularized institutional injury or actual controversy to challenge executive actions. The People's delegation of authority to the Clean Elections Commission (the "Commission") under A.R.S. § 16-974(A) causes no such injury because it operates alongside—not in place of—the Legislature's constitutional authority to regulate campaign finance consistent with the Voter Protection Act ("VPA").

The settled severability framework requires courts to preserve the valid portions of voter initiatives if the law remains workable. Section 16-974(D)'s legislative bar can be severed while preserving Prop. 211's core disclosure requirements and enforcement mechanisms, effectuating the voters' intent to ensure transparency in campaign media spending.

ARGUMENT

I. Plaintiffs lack standing to challenge A.R.S. § 16-974(A) and the rules.

A. Plaintiffs have not alleged an institutional injury.

The Legislature suffers an institutional injury when an injury is felt by "the legislature as a whole." *Bennett v. Napolitano*, 206 Ariz. 520, 527 ¶ 29 (2003). As explained in Defendants' response to the Petition (at 12) and the Opinion (¶¶ 46-47), the People and the Legislature can constitutionally delegate legislative power to the executive branch. Delegation of legislative power alone does not cause actual injury or violate the Constitution. What Plaintiffs challenge here is the scope of the delegation. But even if A.R.S. § 16-974(A) has an unconstitutional scope as Plaintiffs allege, they have no standing to challenge that provision because they have suffered no injury from the People's delegation or the Commission's rules.

Regardless of the scope or source of a delegation, the Legislature can still enact laws, including on areas within the delegated subject matter. That's precisely what the VPA permits for voter-enacted propositions like Prop. 211. The Legislature cannot repeal Prop. 211, but it can still regulate campaign finance consistent with Prop. 211's purpose. *See* Ariz. Const. art. 4, pt. 1, § 6(B)-(C).

Plaintiffs' theory that they have standing any time they allege legislative power is unconstitutionally transferred to or exercised by another branch would allow standing any time a party files a lawsuit and asserts an interest in the case, eviscerating the standing requirement. But the Court has already rejected this theory of standing. *Ariz. Sch. Bds. Ass'n, Inc. v. State* ("*ASBA*"), 252 Ariz. 219, 224 ¶ 18 (2022) (disapproving of "proposition that an organization has standing to challenge the constitutionality of a statute if it merely demonstrates that the contested statute drained its resources or frustrated its mission" (citation omitted)); *accord Sears v. Hull*, 192 Ariz. 65, 69-70 ¶¶ 16-17 (1998) ("generalized harm" insufficient to confer standing). Here, Plaintiffs' purported injury is not the People's delegation under § 16-974(A) or the Commission's rules, it's their ability to freely legislate on campaign finance. But that restriction comes from the VPA, which they don't challenge. As the Opinion correctly found (¶ 49), Plaintiffs' harm, if any, is attributable to the VPA, not the People's delegation or Prop. 211.

This Court's precedent underscores the need for direct, particularized injury to legislative power to show institutional injury—not just abstract concerns about the proper allocation of authority. For example, in *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006), the Legislature claimed

that the Governor exercised her veto power in an unconstitutional manner. *Id.* at 487 ¶ 15. The Court found that the Legislature had standing there because it "sustained a direct injury to its authority to make and amend laws by a majority vote" as a result of the Governor's veto. *Id.*

This case is different. Unlike *Forty-Seventh Legislature*, this case is not about a specific exercise of power that has caused any direct or cognizable harm.[1] The Legislature has not sustained a direct injury to its authority because it can still pass laws regulating campaign finance and the Commission's rules are still subject to legislative oversight.

The Opinion properly held that "no matter how it might be construed," § 16-974(A) "is not causing 'a direct injury to [the Legislature's] authority to make and amend laws'" and "[n]one of the three rules regulate the Legislature." (Op. ¶¶ 49, 52.) Plaintiffs have suffered no actual injury. They therefore lack standing to challenge this provision and the rules.

[1] Plaintiffs have confirmed that in this Court they do not advance any "independent constitutional challenges" to the Commission's rules, but merely contend that rules promulgated under A.R.S. § 16-974(A)'s authority are "derivatively unconstitutional." Pet. at 10 & n.1.

B. Plaintiffs have not shown actual controversy.

Even in the absence of an actual injury, a plaintiff's claims are justiciable where an actual controversy exists between the parties. *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 424 ¶ 29 (2022). An actual controversy exists when a plaintiff faces a threat of harm that curtails his activities. *Id.* No actual controversy exists here.

In cases where this Court has found actual controversies sufficient to confer standing, the plaintiffs were directly affected by the challenged provision or statute. *See ASBA*, 252 Ariz. at 225 ¶ 20 (county residents had standing to challenge statute preventing county from adopting regulations to mitigate COVID-19); *Mills*, 253 Ariz. at 424-25 ¶ 30 (actual controversy based on board's investigation and findings that plaintiff violated the law and had a "real and present need" to know if the statute could constitutionally require him to register with the board); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279-80 ¶¶ 35, 39 (2019) (plaintiffs "face[d] a real threat of being prosecuted for violating the Ordinance"). Meanwhile, this Court has declined to find actual controversy on a nondelegation claim where the agency had not initiated formal proceedings, the plaintiff was not

affected by the adjudicative process, and the plaintiff's claim was speculative. *Mills*, 253 Ariz. at 425 ¶ 31.

Here, Plaintiffs face no threat of actual harm because the People's delegation of legislative power doesn't prevent the Legislature from regulating campaign finance, and the Commission's rules don't regulate the Legislature. Plaintiffs' claim is speculative and abstract. Moreover, as discussed above (§ I.A), any harm Plaintiffs purport to suffer from Prop. 211 is attributable to the VPA, not to the People's delegation.

No actual controversy exists here. Plaintiffs' claim is not justiciable.

C. Prudential factors don't support standing.

Although the Court is "not constitutionally constrained to decline jurisdiction based on lack of standing," *Sears*, 192 Ariz. at 71 ¶ 24, "[c]oncern over standing is particularly acute when … legislators challenge actions undertaken by the executive branch," *Bennett*, 206 Ariz. at 525 ¶ 20. That's because "[w]ithout the standing requirement, the judicial branch would be too easily coerced into resolving political disputes between the executive and legislative branches, an arena in which courts are naturally reluctant to intrude." *Id.* The Court will consider "the merits of a case in the absence of a particularized injury 'only in exceptional circumstances, generally in cases

involving issues of great public importance that are likely to recur.'" *Id.* at 527 ¶ 31 (quoting *Sears*, 192 Ariz. at 71 ¶ 24). Indeed, the Court's "reluctance" to waive the standing requirements reflects "the narrowness of this exception." *Id.* Prudential considerations do not support standing here.

This case involves a dispute over the People's choice to delegate power to the executive branch—precisely the kind of political dispute that this Court is "naturally reluctant" to review absent actual injury. *See id.* at 525 ¶ 20. Moreover, as discussed in the response to the Petition (at 18-19), this is not the type of case that would otherwise evade review. If a party subject to regulation believes the Commission has exercised its authority under A.R.S. § 16-974(A) in a way that violates the Constitution, that party will likely have standing to challenge that action. That's how nondelegation cases typically arise. Just because the Legislature doesn't have standing here doesn't mean that no party ever will. Nor is this dispute likely to recur, as the Petition contends. Pet. at 15.

The Opinion correctly declined to waive standing here. (Op. ¶ 55.)

II. The one application of A.R.S. § 16-974(D) that the Court of Appeals found unconstitutional is severable.

Apart from the substantive provisions mandating disclosure, Prop. 211 also included a minor provision exempting Commission rulemaking and enforcement activities from interference by certain bodies:

> The commission's rules and any commission enforcement actions pursuant to this chapter are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official. Notwithstanding any law to the contrary, rules adopted pursuant to this chapter are exempt from title 41, chapters 6 and 6.1.

A.R.S. § 16-974(D).

Rulemaking oversight is not constitutionally required (many agencies are already exempt), and Plaintiffs did not challenge the oversight exemption generally. Instead, they challenged one narrow application, contending that the provision blocks the Legislature itself from legislating.

Although Defendants disputed whether the voters actually intended to block the Legislature from legislating (as opposed to exempting oversight by the Legislature's Administrative Rules Oversight Committee and any similar body created by the Legislature), Defendants did not dispute that prohibiting the Legislature from legislating would be unconstitutional. Op. ¶ 68.

The Court of Appeals ruled that subsection (D)'s reference to "legislative governmental body" includes the Legislature itself, and therefore followed the uncontested view of the parties that it would be unconstitutional to "prohibit the Legislature from passing any law prohibiting or limiting the Commission's rules or enforcement actions." (Op. ¶¶ 56-80, 92.)

The result is that one narrow application of one minor subpart is unconstitutional: Section 16-974(D) cannot prohibit the Legislature from passing legislation.

Although that may seem like a landmark holding, it has essentially no practical effect because Defendants never claimed that § 16-974(D) did or could bar the Legislature from legislating, Defendants never enforced the statute in that manner, and it's hard to imagine how they could even try. The Court of Appeals issued a preliminary injunction, Op. ¶ 92, but the injunction bars Defendants from doing something they never contended they had the power to do and never threatened to do.

Plaintiffs want to leverage this holding to enjoin all of Prop. 211. Not just all of subsection (D), or all of § 16-974, but the entire enactment. They claim that the one unconstitutional application of subsection (D) cannot be

severed from the rest of the law, but that's demonstrably false under settled law.

More fundamentally, Plaintiffs fault the relief the Court of Appeals awarded, but they aren't entitled to broader relief. They brought a facial challenge, which requires showing that *all* of the statute's applications are unconstitutional. They have shown only one unconstitutional application: using § 16-974(D) to bar the Legislature from legislating. That is not enough to enjoin all of the many constitutional applications of Prop. 211 that do not rely on § 16-974(D), including all of the substantive provisions requiring disclosure and enforcement. The Court should not, and cannot, enjoin the broad scope of constitutional applications merely because one application of one minor provision is unconstitutional.

A. The Opinion properly applied the severability framework.

1. The valid parts of Prop. 211 can still operate.

After finding that § 16-974(D) cannot bar the Legislature from legislating, the Opinion properly applied the settled severability framework for voter initiatives. (Op. ¶¶ 83-85.) Under that framework, the Court first asks "whether the valid portion can operate without the unconstitutional provision." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522 ¶ 23

(2000). If so, the Court "will uphold it unless the result is so absurd or irrational that one would not have been adopted without the other." *Id.*[2]

By enjoining § 16-974(D) only as it applies to the Legislature, the Opinion left intact the constitutional applications of Prop. 211, which remain workable. Plaintiffs seek to enjoin *all* of Prop. 211, not just all of § 16-974(D), so the Court must consider whether the other provisions of Prop. 211 are operable. The vast majority of Prop. 211 concerns the substantive disclosure requirements and enforcement mechanisms. Even after finding one application of § 16-974(D) unconstitutional, the principal parts of the law remain intact. Large spenders and their large donors will still be disclosed—the central aim of Prop. 211. A.R.S. § 16-971(7). Donors may still opt out of disclosure. A.R.S. § 16-972(B). The Commission may still make rules and enforce them. A.R.S. § 16-974(A). Covered persons still must file disclosure reports and donors still must maintain records. A.R.S. § 16-973(A); A.R.S. § 16-972(D). The rest of the law works.

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[2] For statutes enacted by the Legislature, the Court applies a similar framework. *See State v. Patel*, 251 Ariz. 131, 140 ¶¶ 27-38 (2021) (severing subsection of statute because remaining valid provisions are "fully operable" and nothing suggests that the valid and invalid portions "are so intimately related that one would not have been enacted without the other").

Even as to § 16-974(D) in particular, the provision still limits oversight of the Commission by the Governor's Regulatory Review Council (an executive body), the Administrative Rules Oversight Committee (a legislative body), and the Attorney General (an executive official). Those applications of the law, which have not been challenged, are not unconstitutional and have not been enjoined.

Enjoining the lone unconstitutional application therefore doesn't affect the workability of the statute at all. The law operates the same as it did before the Opinion. At most, by enjoining § 16-974(D) as to the Legislature, "the Commission will be subject to some legislative oversight, but that can be said of most administrative agencies." Op. ¶ 84. In other words, the law "can operate without the unconstitutional provision," *Myers*, 196 Ariz. at 522 ¶ 23 (2000), because other administrative agencies already operate that way.

Moreover, other laws confirm that campaign-finance disclosure regimes are operable without legislative-oversight exemptions. For example, similar to Prop. 211, the City of Phoenix requires "disclosure of the original [and intermediary] source[s] of all major contributions used to fund an expenditure made for the purpose of influencing the result of a Phoenix election." Phx. City Code § 12-1552(B). Phoenix's ordinance does not

prohibit the Legislature from legislating under the ordinance. Similarly, federal law requires disclosure of contributors to persons who make electioneering communications. 52 U.S.C. § 30104(f)(2). This law also functions without a bar on legislation. Same with other states' disclosure requirements. *See* Alaska Stat. § 15.13.040(r) (requiring disclosure of donors and intermediaries who contribute $2,000 or more to independent expenditures). These laws demonstrate that a disclosure regime like Prop. 211 can function without the unconstitutional application of § 16-974(D).

2. Severing the unconstitutional application does not create absurd or irrational results.

Similarly, it is not "absurd or irrational" to conclude that the voters would have passed Prop. 211's key disclosure requirements and enforcement mechanisms, even without prohibiting the Legislature from legislating. *Myers*, 196 Ariz at 522 ¶ 23.

The voters expressly identified their purposes and intent in passing Prop. 211, which focuses on *disclosure* and *dark money*:

> A. This act establishes that the People of Arizona have the right to *know the original source* of all major contributions used to pay, in whole or part, for campaign media spending. This right requires the prompt, accessible, comprehensible and *public disclosure* of the identity of all donors who give more than $5,000 to fund campaign media spending

in an election cycle and the source of those monies, regardless of whether the monies passed through one or more intermediaries.

B. This act is intended 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.

C. By adopting this act, the People of Arizona affirm their desire to *stop "dark money,"* the practice of laundering political contributions, often through multiple intermediaries, to hide the original source.

D. This act empowers the Citizens Clean Elections Commission and individual voters to *enforce its disclosure requirements*. Violators will be subject to significant *civil penalties*.

2022 Ariz. Legis. Serv. Prop. 211, § 2 (emphases added).

In addition, the proposition's 100-word statement likewise focused on *dark money*, the monetary thresholds:

This Voters' Right to Know Act secures for every Arizona voter the *right to know* who is trying to influence an Arizona election using paid, public communications. Major contributors will no longer be allowed to *hide behind dark money* corporations. Anyone making independent expenditures of more than $50,000 on a statewide campaign or $25,000 on a local campaign must disclose the names of all *original sources* (the persons or corporations who earned the money) who contributed $5,000 or more. Citizens Clean Elections Commission, a non-partisan, voter established body will write and enforce the rules to implement this Act.

Prop. 211 Application for Serial Number Initiative Petition (emphasis added).

Allowing the Legislature to pass legislation (limited by the VPA) does not affect any of these objectives. It does not affect the substantive provisions requiring disclosure of the original source. It does not affect the anti-corruption and informational interests the voters identified. It does not affect the consequences on "dark money." It does not affect the civil penalties.

Nor does it affect the non-partisan nature of the Commission, A.R.S. § 16-955, alter its status as "voter established," A.R.S. § 16-940, or take away its rule-writing and enforcement powers, A.R.S § 16-956; A.R.S. § 16-974(A), as the Petition contends. It merely means that the Legislature may pass legislation.

It therefore would not have been "absurd or irrational" for the voters to have enacted Prop. 211 without the offending portion of § 16-974(D), or even to have enacted Prop. 211 without *any* of § 16-974(D). As the Opinion correctly recognized, "the Commission will be in the same situation as other agencies delegated authority through a VPA-protected measure." Op. ¶ 85.

Moreover, the Opinion's severance of § 16-974(D) is nothing like severance of the provisions at issue in *Fann*, as the Petition suggests. Pet. at 16. In *Fann*, this Court found several provisions creating a surcharge on high-income taxpayers unconstitutional. *Fann v. State*, 251 Ariz. 425, 430, 435 ¶¶ 3-4, 31 (2021). Applying the severability framework, the Court determined that the remainder of the statute was not workable because without the offending provisions, the statute had no authority to spend 85% of the funds raised by the tax. *Id.* at 437 ¶¶ 39-40. Instead, "hundreds of millions of tax dollars" would remain "perennially sequestered." *Id.* The Court also found the result of the residual provisions was "irrational or absurd" because the entire purpose of the initiative was to tax high-income earners to raise revenue for schools. *Id.* ¶ 41. And "a statutory provision resulting in tax revenues being impounded with no prospect of being spent is such a result." *Id.*

Here, the purpose of Prop. 211 is to disclose the original source of significant campaign media spending. All of Prop. 211's disclosure and enforcement provisions remain workable even if the Legislature can legislate, and even if the Commission is subject to some legislative oversight. By enjoining § 16-974(D) only as it applies to the Legislature, the Opinion left

the constitutional applications of subsection (D) and Prop. 211 intact. It didn't "rewrite [the statute] to save it," as the Petition asserts. Pet. at 16. The Opinion correctly held that § 16-974(D) is severable as to the Legislature.

B. Prop. 211's severability clause further supports the provision's severability.

Moreover, under settled law, where the voters have included an "express severability clause," then "all doubts are to be resolved in favor of severability." *Myers*, 196 Ariz. at 523 ¶ 25.

Prop. 211 contains an express and detailed severability clause, confirming that the voters wanted the remainder of Prop. 211 to remain in force:

> The provisions of this act are severable. If any provision of this act or application of a provision to any person or circumstance is held to be unconstitutional, the remainder of this act, and the application of the provisions to any person or circumstance, shall not be affected by the holding. The invalidated provision or provisions shall be deemed reformed to the extent necessary to conform to applicable law and to give the maximum effect to the intent of this act.

2022 Ariz. Legis. Serv. Prop. 211 § 4.

In light of the settled law on severability clauses, the Opinion correctly resolved all doubts in favor of severability. By including an express severability clause "the people expressed their desire to have the Act's

unchallenged provisions remain." Op. ¶ 85. The Opinion did not affect the remainder of Prop. 211 or the application of § 16-974(D) to other executive and legislative governmental bodies and officials, maximizing the voters' intent.

Prop. 211's express severability clause confirms that the offending application of § 16-974(D) should be severed.

C. The Opinion did not err in refusing to enjoin the entire statute.

The Opinion's refusal to enjoin the constitutional applications of § 16-974(D) and the remainder of Prop. 211 is also consistent with traditional limits on judicial authority. Plaintiffs brought a facial challenge, which requires them to establish that "no set of circumstances exists under which [the statute] would be valid." *Stanwitz v. Reagan*, 245 Ariz. 344, 349 ¶ 19 (2018). "[A] facial challenge, if successful, has the same effect as 'nullify[ing]' a statute." *Borden v. United States*, 593 U.S. 420, 448 (2021) (Thomas, J., concurring) (citation omitted). Despite establishing only one unconstitutional application of Prop. 211, Plaintiffs seek to enjoin the entire enactment.

As discussed above (§ II.A.1), Prop. 211 has many constitutional applications and a broad constitutional scope. The Court has the power to

enjoin enforcement of a law that conflicts with the Constitution (here, the application of a minor part of one subsection of Prop. 211 that could prohibit the Legislature from legislating). *See Borden*, 593 U.S. at 448 (Thomas, J., concurring). Consistent with the separation of powers, however, the Court "cannot … enjoin enforcement of a statute where enforcement would be lawful." *Id.*

This makes sense. If a court enjoins the *constitutional* applications of the statute, it requires the court to consider statutory provisions that no party has standing to challenge, which is "no more than an advisory opinion." *Id.* at 447. Plaintiffs do not have standing to challenge the other applications of § 16-974(D) or the substantive parts of Prop. 211, like the core requirement to disclose large spenders and donors. Those provisions—the great majority of Prop. 211—are not at issue. The Court should not enjoin constitutional provisions and constitutional applications of the law, in effect nullifying all of Prop. 211, when those provisions were not challenged in this case and Plaintiffs have no standing to challenge them.

The Opinion's limited injunction allowing the Legislature to legislate and permitting Legislative oversight is consistent with longstanding principles of judicial restraint and traditional standing requirements.

CONCLUSION

The Court should affirm the Court of Appeals and hold that (1) Plaintiffs lack standing to challenge A.R.S. § 16-974(A) and the rules; and (2) A.R.S. § 16-974(D) is severable.

RESPECTFULLY SUBMITTED this 27th day of January, 2025.

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