Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-011834 12/29/2023

HONORABLE TIMOTHY J. RYAN

CLERK OF THE COURT
J. Holguin
Deputy

BEN TOMA, et al.

BRETT W JOHNSON

v.

ADRIAN FONTES, et al.

CRAIG A MORGAN

DANIEL J ADELMAN
LUCI D DAVIS
JAMES DEMOSTHENES SMITH
JUDGE RYAN

MINUTE ENTRY

The Court has read and considered Intervenor's Motion to Dismiss Amended Complaint filed October 10, 2023, Attorney General's Motion to Dismiss Plaintiff's First Amended Complaint filed Octobe4 10, 2023, Plaintiffs' Consolidated Response to the Motions to Dismiss filed November 6, 2023, the Intervenor's Reply filed November 27, 2023, the Attorney General's Reply filed November 27, 2023, the joinder of the other Defendants, and the argument of counsel.

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa,* 230 Ariz. 352, 363, ¶46, 284 P.3d 863, 874 (2012). Instead, the narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient "to warrant allowing the [plaintiffs] to attempt to prove [their] case." *Id.* at 363, ¶46, 284 P.3d at 874 (emphasis added). Dismissal is permitted only when a "plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.,* 191 Ariz. 222, 224, ¶4, 954 P.2d 580, 582 (1998)

(emphasis added). Moreover, a motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true [*Acker v. CSO Chevira,* 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler,* 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966)], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, ¶2, 326 P.3d 335, 336 (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto–Owners Ins. Co*., 218 Ariz. 417, 419, ¶7, 189 P.2d 344, 346 (2008)].

Arizona follows a notice pleading standard, *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012), *quoting Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419 (2008). The purpose of a complaint is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen, id., quoting Mackey v. Spangler*, 81 Ariz. 113, 115 (1956). A complaint that states only legal conclusions, without supporting factual allegations, does not comply with Rule 8's notice pleading standard. *Cullen, id.* If a complaint does not comply with Rule 8, the defendant may move to dismiss for failure to state a claim. *Cullen, id.*; Ariz. R. Civ. P. 12(b)(6).

In ruling on a Rule 12(b)(6) motion to dismiss, the Court will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.,* 218 Ariz. 417, 419 (2008). The Court will grant the motion only if the plaintiff is not entitled to relief "under any facts susceptible of proof in the statement of the claim." *ELM Ret. Ctr., LP v. Callaway,* 226 Ariz. 287, 289 (App. 2010), *quoting Mohave Disposal, Inc. v. City of Kingman,* 186 Ariz. 343, 346 (1996). The Court will not "speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen, id.* at 420. Nor will the Court "accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.,* 211 Ariz. 386, 389 (App. 2005).

As a general policy matter, Rule 12(b)(6) motions to dismiss are not favored under Arizona law. *State ex. rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). That is especially true when such motions are based on pleading insufficiencies. *E.g., Cagle v. Carr,* 101 Ariz. 225, 227, 418 P.2d 381, 382 (1966); *see generally Rowland v. Kellogg Brown & Root, Inc*., 210 Ariz. 530, 533, ¶10, 115 P.3d 124, 127 (App. 2005) (reversing summary judgment for defendant and recognizing sufficiency of complaint despite "numerous technical deficiencies in the document"). Defendants' Motion to Dismiss is predicated on asserted factual deficiencies, namely 1) that Plaintiffs have not alleged sufficient facts to support that they have standing to bring the action, 2) that they have not alleged the suffering of a palpable institutional injury, 3) that the action should be dismissed a deficient facial challenge to Proposition 211, and 4) for various other reason set forth in their motions to dismiss, that there is no valid basis for bringing this action.

The more effective and efficient way to deal with the issue is through the mandatory disclosure process. *See e.g., State ex. rel. Corbin*, 136 Ariz. at 594, 667 P.2d at 1309 ("a motion to dismiss should be denied if it appears that other pretrial procedures will cure the defective pleading"). If disclosure (and any related discovery that may be warranted) fail to establish proof sufficient to meet a plaintiff's prima facie burden, then a motion for summary judgment would be warranted under the principle stated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and adopted in *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990), to wit, a party may move for summary judgment on the grounds that no admissible evidence exists to support a claim. And, "[i]f the party with the burden of proof on the claim . . . cannot respond to the motion by showing that there is evidence creating a genuine issue of fact . . ., then the motion for summary judgment should be granted." *Orme School*, 166 Ariz. at 310, 802 P.2d at 1009; *accord Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992) ("a defendant can obtain summary judgment when the plaintiff is unprepared to establish a prima facie case"); *see also Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 512 (2002*)*(recognizing that the "simplified notice pleading standard [for complaints] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims" (citation and internal quotation marks omitted)). While Plaintiffs appear to be on wobbly ground, summary judgment or trial would be the more appropriate testing grounds for whether their novel legal theories are factually supported.

IT IS ORDERED denying Defendants' Motions to Dismiss.

The Court has read and considered Plaintiffs' Restated and Supplemental Motion for Preliminary Injunction filed September 19, 2023, Arizona Citizens Clean Elections Commission's Response filed October 9, 2023, Arizona Secretary of State Adrian Fontes' Response filed October 10, 2023, Intervenor's Response filed October 10, 2023, Plaintiffs' Reply filed October 30, 2023, and the argument of counsel.

An injunction is an equitable remedy that allows the Court to structure a remedy that will promote equity between the parties. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635 (App. 2000) (citation omitted). "Equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies." *Id.*

A party seeking a preliminary injunction must establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. *Shoen v. Shoen,* 167 Ariz. 58, 63 (App. 1990). "The scale is not absolute, but sliding." *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. 407, 410 (2006). The moving party may establish either (a) probable success on the merits and the possibility of irreparable harm, or (b) the presence of serious

questions and that the balance of hardships tips sharply in the party's favor. *Id.* at 411; *see also Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 (App. 2009).

These principles generally do not allow the court to grant a preliminary injunction without some showing of a possibility of irreparable injury. Irreparable injury means "harm not remediable by damages if the requested relief is not granted." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). "However, even if some damages may be proved and recovered, injunctive relief may be appropriate if those damages are inadequate to address the full harm suffered." *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 73 (App. 2011).

The Court finds that Plaintiffs have not met their burden of proof on any of the four factors set forth above. In support of these findings, the Court make the following Findings of Fact and Conclusions of Law set forth below.

Findings of Fact

1. Plaintiff Ben Toma is the Speaker of the Arizona House of Representatives for the 2023-2024 legislative sessions.

2. Plaintiff Warren Petersen is the President of the Arizona State Senate for the 2023-2024 legislative sessions.

3. Plaintiffs claim to represent the interests of the Legislature. They do not assert claims based on any alleged encroachment on rights of the executive or judicial branches.

4. Plaintiffs rely on each chamber's general rules to support their standing to bring this suit. Arizona Senate Rule 2(N) and Arizona House Rule 4(K) both state, in part, that the Senate President and Speaker of the House may bring or assert claims on behalf of each chamber "arising out of injury to the [chamber's] powers or duties."

5. Defendant Arizona Citizens Clean Elections Commission is the "primary agency authorized to implement and enforce" under Proposition 211, also known as the "Voters' Right to Know Act" ("Prop. 211").

6. Defendant Adrian Fontes is the Arizona Secretary of State. Under A.R.S. § 16-973, the Secretary receives and retains information regarding donations used for campaign media spending (as defined in A.R.S. § 16-971(2)) and reports that information to the Commission. [FAC ¶ 14.]

7. Intervenor-Defendant Voters' Right to Know is a political action committee registered with the State of Arizona to support Prop. 211. VRTK drafted Prop. 211 and collected and gathered signatures to place the initiative on the November 2022 ballot. A.R.S. § 16-979(A) allows VRTK to intervene here as a matter of right.

8. Intervenor-Defendant Kris Mayes is the Arizona Attorney General. The Attorney General has an unconditional right to intervene pursuant to A.R.S. § 12-1841(D).

9. On November 8, 2022, Arizona voters passed Prop. 211 with 72% of the vote, or about 1.7 million votes.

10. The purpose of Prop. 211 is to disclose funding sources by providing Arizona voters with more information about who is spending money in Arizona's elections. To do so, Prop. 211 establishes new disclosure requirements related to campaign media spending, as provided under Prop. 211 § 2(C).

11. Prop. 211 requires a "covered person" (someone who spends more than the threshold amount on "campaign media spending") to disclose the original source of funds they are using on campaign media spending, as provided under A.R.S. § 16-971(1), (2), (7).

12. The Commission is responsible for enforcing Prop. 211. The Commission may adopt and enforce rules, initiate enforcement actions, impose civil penalties, and perform other acts that may assist in implementing Prop. 211 as covered under A.R.S. § 16-974(A).

13. The Commission's enforcement decisions under Prop. 211 are subject to judicial review as afforded under A.R.S. §§ 12-901 to 914, 16-957(B), 16-974(B), and 16-977(C).

14. The Commission's regulations to implement Prop. 211 are subject to judicial review.

15. The statewide canvass on December 5, 2022, confirmed that Prop. 211 passed with 72% of the vote.

16. The plaintiffs in other litigation challenged Prop. 211 and provided notice of their challenge to the Senate President and Speaker of the House on December 21, 2022. That litigation is *Center for Arizona Policy, Inc., et al. v. Arizona Secretary of State, et al.*, No. CV2022-

016564 (Maricopa Cnty. Super. Ct.) ("*CAP*"). The *CAP* plaintiffs also made a separation of powers challenge to Prop. 211. *CAP* is before Judge Scott McCoy.

17. Despite receiving notice of *CAP* in December 2022, Plaintiffs here never sought to intervene in that case.

18. Judge McCoy reviewed briefing and heard oral argument on the *CAP* plaintiffs' preliminary injunction motion and the *CAP* defendants' motions to dismiss. Judge McCoy denied that injunctive relief and granted the motions to dismiss in a Minute Entry filed June 22, 2023. Those plaintiffs brought only a facial challenge to Prop. 211. Thus, Judge McCoy granted those plaintiffs leave to amend to try to plead as-applied challenges to Prop. 211.

19. Plaintiffs filed their Complaint here on August 4, 2023—268 days after the election. Plaintiffs then filed a Motion for Preliminary Injunction on August 15, 2023.

20. Judge McCoy granted a motion to transfer this case to him under Maricopa County Local Rule 3.1(c). Plaintiffs then noticed Judge McCoy under Arizona Rule of Civil Procedure 42.1.

21. Plaintiffs filed their First Amended Verified Special Action Complaint on September 14, 2023. They filed their Restated and Supplemental Motion for Preliminary Injunction five calendar days later.

22. There is no competent evidence in the record explaining Plaintiffs' delay bringing this suit or their failure to intervene in *CAP*.

23. The Commission has not taken any enforcement action under Prop. 211.

24. Plaintiffs did not allege a specific injury to the Legislature that any Commission act allegedly caused.

25. Plaintiffs have not contended, nor is there sufficient evidence in the record, that any legislator hopes to run a bill in the 2024 session that may affect Prop. 211, much less evidence that a legislator is forgoing any legislative act because of supposed uncertainty about Prop. 211.

26. The Court held argument on the Motions to Dismiss and Preliminary Injunction on December 13, 2023.

Conclusions of Law

1. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (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). The Court applies a sliding scale in assessing these elements, such that a plaintiff must show either (1) *probable* success and the possibility of irreparable harm or (2) "the presence of serious questions" and a balancing of hardships sharply in favor of the plaintiff. *Id.* (citation omitted).

2. "Laws enacted by initiative, like acts of the legislature, are presumed constitutional. And where there is a reasonable, even though debatable, basis for the statute, we will uphold it unless it is clearly unconstitutional." *Id.* at 433 ¶ 23 (citations omitted).

3. Plaintiffs' claims are facial challenges, so Plaintiffs cannot succeed on the merits unless they show that no set of circumstances exist under which Prop. 211, or the regulations promulgated thereunder, could be lawfully applied. *Id.* at 433 ¶ 18. This is "an admittedly difficult feat." *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018). Facial challenges like Plaintiffs' are disfavored because they rely on premature interpretations of statutes and speculation about hypothetical situations. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008).

4. The purpose of a preliminary injunction is to preserve the status quo. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981). Because Prop. 211 has been the law in Arizona since December 2022, the preliminary injunction that Plaintiffs seek changes to the status quo, not preserve it.

5. Plaintiffs must plead a "particularized" and "institutional injury" to the Legislature they purport to represent. *E.g.*, *Biggs*, 236 Ariz. at 418 ¶¶ 10-12; *see also Bennett*, 206 Ariz. at 526-27 ¶¶ 24-29. Courts have found an institutional injury when plaintiffs alleged a challenged action nullified a legislature's vote or deprived the legislature of a specific power it otherwise had (i.e., redistricting). *See Forty-Seventh Legislature*, 213 Ariz. at 486-87 ¶¶ 14-15; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 792 (2014); *Raines*, 521 U.S. at 824-26 (discussing "vote nullification at issue in *Coleman*" that had supported standing). Plaintiffs allege nothing like that here.

6. As to their separation of powers claim (Count I), nondelegation claim (Count II), and VPA claim (Count III), Plaintiffs fail to allege how Prop. 211 harms or restrains the Legislature in any concrete way.

7. Prop. 211 does not restrict the Legislature from passing laws. Prop. 211 goes no farther than the Arizona Constitution.

8. Plaintiffs do not identify any specific oversight or approval authority belonging to the Legislature that Prop. 211 removed or otherwise affected.
9. The Court must read § 16-974(D) to preserve its constitutionality if at all possible. Defendants and intervenors offer a reasonable, constitutional construction of that provision—that "executive or legislative governmental body" refers to the Governor's Regulatory Review Council and the Administrative Rules Oversight Committee, respectively, and that "official" refers to the Attorney General.

10. Prop. 211 is a product of the People exercising and delegating their shared legislative authority. The People are constitutionally authorized to delegate legislative authority in the same way that the Legislature can. *See Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6 ¶ 15 (2013) ("'The legislative power of the people is as great as that of the legislature.' . . . 'Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative.'" (citations omitted)).

11. Under the Arizona Constitution, the Legislature is not empowered to repeal or detract from voter-approved measures based on its displeasure with those enactments. Displeasure with the voters' choices is not a palpable harm that allows the Legislature to do in courts what it cannot do through legislation.

12. Plaintiffs have not established that they are likely to succeed on the merits of their claims.

13. Article 3 of the Arizona State Constitution requires the three branches of government to be "separate and distinct." *Andrews v. Willrich*, 200 Ariz. 533, 535 ¶ 7 (App. 2001). But "an unyielding separation of powers is impracticable in a complex government, and some blending of powers is constitutionally acceptable." *Id.*

14. "The right is generally conceded to delegate to an administrative agency the power to adopt rules and regulations necessary to carry a law into effect." *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 204-05 (1971) (citation omitted).

15. Courts presume that when a legislative actor "uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language.'" *Workers for Responsible Dev. v. City of Tempe*, 254 Ariz. 505, 511 ¶ 21 (App. 2023) (citation omitted).
16. Prop. 211 does mention the Legislature in A.R.S. § 16-978(A) where it states that nothing in Prop. 211 "prevents the legislature . . . from enacting or enforcing additional or more stringent disclosure provisions for campaign media spending than those contained in this chapter."

17. The Court must "interpret statutory language in view of the entire text and consider the context." *Fann*, 251 Ariz. at 434 ¶ 25 (alterations and citation omitted). The Court must also "avoid interpreting a statute in a way that renders portions superfluous." *Id.* Indeed, the meaning of "legislative governmental body" cannot be "determined in isolation." *Id.* (citation omitted). The Court must consider the context in which that phrase is used.

18. A.R.S. § 16-974(D) states that 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."

19. "Official" in § 16-974(D) means executive officials like the Attorney General, who is tasked with review of certain exempt rules. *See* A.R.S. § 41-1044.

20. The Court looks to the plain text of A.R.S. § 16-974(A)(8), which authorizes the Commission to "[p]erform any other act that may assist in implementing this chapter."

21. The Court must presume that A.R.S. § 16-974(A)(8) is constitutional, *Fann*, 251 Ariz. at 433 ¶ 23, and must give it "a constitutional construction if possible," *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) (noting that the "'constitutional-doubt' canon rests 'upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature.'") (citation omitted).

22. A.R.S.§ 16-974(A)(8) is like other Arizona statutes delegating authority to administrative agencies.

23. A.R.S. § 16-974(A)(8) does not appear to give the Commission unfettered authority to create regulations outside the scope of Prop. 211.

24. Plaintiffs allege that Prop. 211 (A.R.S. § 16-974(D)) creates a separation of powers problem by excluding Commission rulemaking from some administrative oversight procedures. But no court has held that such exemptions are unconstitutional or violate separation of powers. 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).

25. Defendants and intervenors point the Court to several examples of delegations of authority to administrative agencies that do not hinge on "necessity," but rather whether something is alternatively convenient, proper, appropriate, desirable, or advisable. *E.g.*, A.R.S. § 9-462.06(C) (board of adjustment, "necessary or convenient"); § 15-1482 (4) (board of community college district, "necessary or convenient"); § 30-124(A) (Arizona power authority, "such steps as may be necessary, convenient or advisable"); § 36-782(F) (department of health services, "may use reasonable efforts to assist"); § 41-5853(B)(2)-(6), (10) (credit enhancement eligibility board, "necessary or convenient," "necessary or proper," "any other action that is necessary or appropriate"); § 36-1420(A) (public housing authority, city, town, or county, "necessary, convenient or desirable"); § 48-5304(9) (regional transportation authority board, "proper or necessary"); § 45-1709(8)-(9) (Arizona power authority, "necessary or convenient"); § 28-368(A) (director of department of transportation, "necessary, useful or convenient"). As an initial impression, § 16-974(A)(8), on its face, does not appear to be any broader than any of these delegations.

26. The text of Prop. 211 provides clear purposes and directives: it includes a thorough list of relevant definitions (§ 16-971); detailed prohibitions and direction regarding the obligation of a

"covered person" to maintain transfer records, prerequisites to transferring donor monies for campaign media spending, and notice and timing requirements related to the same (§ 16-972); detailed disclosure requirements and exceptions (§ 16-973); the powers and duties of the Commission (§ 16-974); a catch-all prohibition on evading the law, with examples of specific prohibited means (§ 16-975); direction on calculating penalties (§ 16-976); procedures for filing complaints, investigating allegations, and seeking judicial review (§ 16-977); a conflict of law provision clarifying the law's relationship to other state law (§ 16-978); and specifics regarding parties with a right to intervene and standing (§ 16-979).

27. Because delegations of authority to administrative agencies are "normally sustained as valid," *Ariz. Mines Supply Co.*, 107 Ariz. at 205, and because A.R.S. § 16-974(A)(1) and (8) can be read constitutionally, *Arevalo*, 249 Ariz. at 373 ¶ 9, Plaintiffs do not have a strong likelihood of succeeding on the merits of their nondelegation claim.

28. Under the definition in A.R.S. § 16-971(2)(a)(vii), campaign media spending includes "[r]esearch, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities" constituting public communications to influence elections. A.C.C. R2-20-801 does not redefine "campaign media spending"—it uses the statute's phrasing. The rule clarifies that such actions must be "specifically conducted in preparation for or in conjunction with" another form of campaign media spending.

29. A.R.S. § 16-972(B)(2) provides that covered entities must "[i]nform donors that they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing within twenty-one days after receiving the notice." Plaintiffs wrongly assert that A.A.C. R2-20-803(D) and (E) unlawfully change the statute. But A.C.C. R2-20-803(D) clarifies that covered entities may provide further notices to opt out after their original one; A.C.C. R2-20-803(E) clarifies that a donor may opt out after the initial notice period. These rules do not change the opt-out regime—they simply clarify other options available to donors and covered persons.

30. Agencies often provide advisory opinions, opinion letters, or other informal advice. They assist the regulated community. These actions do not cause an automatic separation of powers violation. The judiciary declines to give advisory opinions, *see, e.g.*, *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 23 (2022), and *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005).

31. Under the current statutory and regulatory framework, when the Commission informs a person who requests an advisory opinion that the conduct proposed is lawful, the Commission will exercise its prosecutorial discretion and not enforce the Act against someone who follows the advisory opinion. Exercising prosecutorial discretion is a uniquely executive branch function that does not affect the Legislature.

32. Nothing in Arizona law requires that Prop. 211 specifically permit advisory opinions. "A statute's silence on an issue does not mean the agency lacks authority to act. Rather, an agency can take actions reasonably implied from the statutory scheme as a whole." *Joshua Tree Health*

Ctr., LLC v. State, 529 P.3d 1228, 1231 ¶ 12 (Ariz. App. 2023) (quotation marks and citation omitted).

33. Plaintiffs waited nine months after the 2022 election to bring this litigation.

34. Plaintiffs presented no credible evidence explaining the nine-month delay between the 2022 election and when they sought a preliminary injunction.

35. Though an alleged violation of personal constitutional rights may presumptively create irreparable harm, alleged violations of structural provisions of the Constitution, like separation of powers, do not. *See, e.g.*, *Pro. Towing & Recovery Operators of Ill. v. Box*, No. 08 c 4096, 2008 WL 5211192, *12-13 (N.D. Ill. Dec. 11, 2008) (an asserted violation of Supremacy Clause did not create "a strong presumption of irreparable harm"); *Am. Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 432 (N.D.N.Y. 1989) (same).

36. "[T]he balance of hardships and public interest weigh against preliminary injunctive relief" where a claimant did not show probable success on the merits. *Feldman v. Ariz. Sec'y of State's Off.*, 208 F. Supp. 3d 1074, 1095 (D. Ariz. 2016).

37. "To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). The consequences of denying an injunction "must not be too remote, insubstantial, or speculative and must be supported by evidence." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating preliminary injunction).

38. Plaintiffs' allegation that the Commission may do something improper in the future is not something the Court considers on a facial challenge. Moreover, such a theoretical harm does not meet the standard for a preliminary injunction.

39. Moreover, the Court must consider the hardship to the 1.7 million voters who voted for Prop. 211. An injunction would prevent the People's legitimate exercise of legislative authority from being given effect and would prevent voters from learning the sources of money behind large-dollar election advertising; that is a hardship to the public.

40. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345,1351 (1977) (Rehnquist, J., in chambers).

41. "The public interest may be declared in the form of a statute." *Stormans, Inc.*, 586 F.3d at 1140 (citation and quotation marks omitted). Prop. 211 unambiguously declares the public interest of Arizona—the funding sources of election advertising should be disclosed. Plaintiffs' requested preliminary injunction is directly contrary to that stated public interest.

42. Additionally, there is a clear public interest in giving effect to legislative enactments adopted by Arizona voters.

43. The People of Arizona and the Legislature "share lawmaking power under Arizona's system of government." *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7

(2009). The People's "legislative authority is as great as the power of the Legislature." *Molera v. Reagan*, 245 Ariz. 291, 294 ¶ 9 (2018).

44. The Constitution, through the VPA, protects the People's legislative enactments from interference by the Legislature. Ariz. Const. art. IV, § 1(6)(B)-(C), (14). "[T]he principal purpose of the VPA is to preclude the legislature from overriding the intent of the people." *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 347 ¶ 9 (App. 2013).

45. The Legislature cannot repeal Prop. 211. *See* Ariz. Const. art. IV, § 1(6)(B).

46. The Court finds that granting Plaintiffs' requested injunction is contrary to the public interest and would harm the People by preventing the Commission from continuing to implement a voter-approved initiative. The public interest favors permitting the Commission and the Secretary to continue to implement Prop. 211 and preventing the Legislature from overriding Prop. 211.

47. The citizens of Arizona voted to receive more information about the sources of money trying to influence Arizona elections. The public interest weighs heavily in favor of protecting Arizona voters' constitutionally protected legislative authority, and their interests in being fully informed when choosing their representatives and voting on initiatives and referenda, as expressed in Prop. 211.

IT IS ORDERED denying Plaintiffs' Restated and Supplemental Motion for Preliminary Injunction.