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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-016564 06/21/2023

HONORABLE M. SCOTT MCCOY

CLERK OF THE COURT
T. DeRaddo
Deputy

CENTER FOR ARIZONA POLICY INC, et al.

SCOTT D FREEMAN

v.

ARIZONA SECRETARY OF STATE, et al.

ARIZONA SECRETARY OF STATE
1700 W WASHINGTON ST FL 7
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KATIE HOBBS
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JUDGE MCCOY

UNDER ADVISEMENT RULING

Plaintiffs' Verified Complaint alleges that Proposition 211, labeled the "Voters' Right to Know Act" (the "Act"), is facially unconstitutional. They seek a preliminary injunction prohibiting the Act's implementation. Defendants and Intervenors have moved to dismiss.

Having considered the briefing, all related filings, the oral argument of counsel, and the larger record in the case, the Court now denies the request for injunctive relief and grants the motions to dismiss with leave to amend.

I. Dark Money and Proposition 211 – An Overview

A. Dark Money

The Act targets dark money, which "refers to financial influences that affect the outcome of elections . . . without being subject to any campaign finance disclosure requirements."[1] The Act refers to dark money as "the practice of laundering political contributions, often through multiple intermediaries, to hide the original source." Prop. 211, § 2(C).

The process generally works like this:

> Individuals or corporations donate to a non-profit corporation recognized under Internal Revenue Code § 501(c)(4). A "C4" non-profit does not have to disclose its donors. The C4 in turn donates to an independent expenditure committee (IEC). No limits apply to how much an IEC can spend on campaigns. The IEC has to report the contribution *from* the C4, but not the contributions made *to* the C4. Thus, Dark Money turns dark.

D. Cantelme, *Arizona's Campaign Finance Laws are Teetering*, Ariz. Att'y, March 2015, at 36.

B. The Act

In the broadest terms, the Act requires disclosure of "the original source of all major contributions used to pay . . . for campaign media spending." Prop. 211, § 2(A). A more detailed description follows.

Who Must Disclose? "Covered persons," meaning "any person [or entity] whose total campaign media spending … in [a two-year] 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). "Covered person" does not include "individuals who spend only their own personal monies for campaign media spending" or "organizations that spend only their own business income for campaign media spending." A.R.S. § 16-971(7)(b)(i) & (ii).

[1] *A Shield for David and A Sword Against Goliath: Protecting Association While Combatting Dark Money Through Proportionality*, 133 Harv. L. Rev. 643, 643–44 (2019).

"Campaign media spending," in turn, is defined in part, as the spending of monies to pay for a public communication[2] that (i) "expressly advocates for or against the nomination, (sic) 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 and that is disseminated in the jurisdiction where the candidate's election is taking place"; and (4) "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum." A.R.S. § 16-971(2)(a)(i)-(iv). Campaign media spending also includes "research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described [within the definition of campaign media spending]." A.R.S. § 16-971(2)(a)(vii).

What Must A Covered Person Disclose? The Act requires that a covered person file an initial report with the Secretary of State "[w]ithin five days after first spending monies … totaling $50,000 or more during an election cycle on campaign media spending." A.R.S. § 16-973(A). The initial report must disclose, among other things, the name, mailing address, occupation and employer of each "donor of original monies who contributed, directly or indirectly, more than $5,000 of traceable monies or in-kind contributions for campaign media spending during the election cycle to the covered person." A.R.S. §§ 16-971(10), 16-973(A)(6). The Secretary of State will promptly make the report public. A.R.S. § 16-973(H).

Intermediaries. Donors acting as intermediaries may have disclosure obligations. The Act requires that any person donating more than $5,000 in "traceable monies"[3] to a covered person in an election cycle to inform the covered person of the identities of any other person that

[2] "Public communication" under the Act is defined as "a paid communication to the public by means of broadcast, cable, satellite, internet or another digital method, newspaper, magazine, outdoor advertising facility, mass mailing or another mass distribution, telephone bank or any other form of general public political advertising or marketing, regardless of medium." A.R.S. § 16-971(17)(a).

[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 section 16-972.
>
> (b) monies used to pay for in-kind contributions to a covered person to enable campaign media spending.

A.R.S. § 971(18).

"directly or indirectly" contributed more than $2,500 in "original monies"[4] to the donor and any intermediaries involved in transferring those original monies to the donor. A.R.S. § 16-972(D). The donor must provide this information in writing within ten days after receiving a written request from the covered person. *Id.*

Disclaimers. Section 16-974(C) mandates that the Commission establish disclaimer requirements for public communications by covered persons. Public communications by covered person must 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*. This disclosure may well apply to top donors who "opted out" of having their donations used for campaign media spending under § 16-972(B).

Enforcement. The Commission has the authority to implement and enforce the Act, including the power to "[a]dopt and enforce rules … [i]nitiate enforcement actions … [c]onduct fact finding hearings and investigations … [i]mpose civil penalties … [and] [p]erform any other act that may assist in implementing this chapter." A.R.S. § 16-974(A). 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," and any "rules adopted pursuant to this Chapter are exempt from Title 41, Chapters 6 and 6.1." A.R.S. § 16-974(D).

Section 16-976 provides for the imposition of civil penalties for violations of the Act. Section 5(C) of Prop 211 states that "[t]he rights established by this Act shall be construed broadly."

Avoiding Disclosure. The Act allows two paths for donors to avoid disclosure. First, donors may "opt out." Before a covered person may use donated money for campaign media spending, the donors must be given written notice that their donation may be used for campaign media spending and that information about them might have to be reported to "the appropriate government authority" in Arizona for public disclosure. A.R.S. § 16-972(B)(1). The notice must give donors an opportunity to "opt-out" of having their donations used for campaign media spending within 21 days of receiving notice. A.R.S. § 16-972(B)(2).

Original source donors can avoid disclosure a second way: By demonstrating to the Citizens Clean Election Commission (the "Commission") "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." A.R.S. § 16-973(F).

[4] "Original monies" means "business income or an individual's personal monies." A.R.S. § 19-971(12).

II. Plaintiffs' Verified Complaint

The Center for Arizona Policy ("CAP") is a nonprofit, tax-exempt, charitable organization. *See,* Verified Complaint, ¶ 7. An Internal Revenue Code § 501(c)(3) organization, CAP's mission is "to promote and defend foundational principles of life, marriage and family, and religious freedom." *Id*.

The Arizona Free Enterprise Club ("AFEC") also is a nonprofit, tax-exempt organization. *See*, Verified Complaint, ¶ 8. As an Internal Revenue Code 501(c)(4) organization, AFEC operates to promote the social welfare of the community by advocating for principles of free enterprise and pro-growth, limited government policies. *Id*.

In recent election cycles, both CAP and AFEC would be considered Covered Persons with donors who, in turn, would be subject to disclosure under the Act. CAP and AFEC attest that the Act will force them to self-censor their speech, experience diminished donations, or both.

Plaintiffs Doe I and Doe II, support these entities' missions and campaign-related speech but do not wish their identities to be disclosed. These donors are concerned they will be harassed, retaliated against or otherwise subjected to economic or physical harm. As a result, they may curtail or eliminate their donations to covered organizations.

Plaintiffs bring a facial challenge to the Act, alleging that it violates both their right to speak freely (Count I) and their right to undisturbed private affairs (Count II) under the Arizona Constitution. They also allege that the Act violates the Arizona Constitution's mandate of separation of powers (Count III).

III. Procedural Considerations

A. Enactments by Initiative

The Act became law through the initiative process. "Laws enacted by initiative, like acts of the legislature, are presumed constitutional." *Fann v. State*, 251 Ariz. 425, 433, ¶ 23 (2021). Plaintiffs bear a "heavy burden" to overcome that presumption. *Morgan v. Dickerson*, 253 Ariz. 207, 204, ¶ 6 (2022).

B. Motions to Dismiss

When addressing a motion to dismiss, "courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012). Dismissal is permitted only if "plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof." *Id.* ¶ 8 (citations and quotations omitted).

C. Facial Challenges to Constitutionality

As noted, Plaintiffs contend that Proposition 211 is facially unconstitutional.[5] "A facial challenge . . . claim[s] that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). "[F]acial challenges are disfavored because they often rest on speculation, run contrary to the fundamental principle of judicial restraint, and threaten to short circuit the democratic process." *Hightower v. City of Boston*, 693 F.3d 61, 76-77 (1st Cir. 2012) (cleaned up).

Because facial challenges are disfavored, "[t]o succeed . . . the challenger [normally] must establish that no set of circumstances exists under which the [statute] would be valid." *Stanwitz v. Reagan*, 245 Ariz. 344, 349, ¶ 19 (2018) (quotations and internal punctuation omitted). "In the First Amendment context, however, [courts] have recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

IV. Free Speech

Plaintiffs rely on Arizona's Free Speech Clause. *See*, Ariz. Const. Art. II, § 6 ("[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). Arizona's provision is broader than its federal counterpart, a subject explored in detail below.

The evolution of campaign finance disclosure laws, however, is more easily set forth by examining federal authorities. When "applying state constitutional provisions, federal constitutional jurisprudence addressing the issue at hand is always relevant because the United

[5] Among other things, Plaintiffs seek: (1) "a judgment declaring the Act unconstitutional and unlawful in its entirety; [and] (2) "a permanent injunction against Defendants prohibiting them from administering and enforcing the Act." Verified Complaint, at 19.

States Constitution sets the base-line for the protection of individual liberties." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 306, ¶ 171 (2019) (concurring opinion). Arizona courts routinely "rel[y] on federal case law in addressing free speech claims under the Arizona Constitution." *Id*. at 282, ¶ 46 (citations omitted). As a starting point, this Court will as well.

A. The Applicable First Amendment Standard of Exacting Scrutiny

The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is also the source of a related liberty – freedom of association. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others." *Bonta*, 141 S. Ct. at 2382.

The freedoms of speech and association intertwine in the political context. Put differently, "the First Amendment protects political association as well as political expression. The constitutional right of association stem[s] from the Court's recognition that [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam), *superseded by statute on other grounds*, *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93 (2003). For these and other reasons, courts frequently apply strict scrutiny to regulations of political speech. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010).

Campaign disclosure and disclaimer requirements, however, receive a lower level of scrutiny. "In the electoral context, both the Supreme Court and [other courts] have consistently applied exacting scrutiny to compelled disclosure requirements and on-advertisement disclaimer requirements." *No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu*, 62 F.4th 529, 538 (9th Cir. 2023), *citing Citizens United*.

The less rigorous standard applies because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, at 369. Disclosures "burden the ability to speak, [but] they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Comm. for Just. & Fairness v. Arizona Sec'y of State's Off.*, 235 Ariz. 347, 356, ¶¶ 32-33 (App. 2014), *quoting Citizens United*.[6]

[6] Plaintiffs' argument that the Court should apply strict scrutiny is unpersuasive. *See Bonta*, 141 S. Ct at 2383; *No on E*, 62 F.4th at 538 (rejecting compelled speech argument); *Gaspee Project*

B. Applying Exacting Scrutiny

1. Overview

Exacting scrutiny "requires the government to demonstrate a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 367. The law must also be narrowly tailored. *Bonta*, 141 S. Ct. at 2382. Applying exacting scrutiny, courts have held election disclosure regimes constitutional for many decades. *E.g.*, *Citizens United*, 558 U.S. at 367.

2. Whether Proposition 211 is Substantially Related to Sufficiently Important Governmental Interests

"Courts have long recognized the governmental interest in the disclosure of the sources of campaign funding." *No on E*, 62 F.4th at 553 (citations omitted). Both Arizona and Federal courts have identified at least three sufficiently important government interests:

1) The informational interests of voters. *Buckley*, 424 U.S. at 66-67.
2) Deterring corruption by permitting voters to assess whether donors receive post-election favors. *Id*. at 67.
3) Ensuring election integrity. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

See also, *Comm. For Just. & Fairness*, 235 Ariz. at 356, ¶ 48 (identifying same as justifying political committee registration and disclosure requirements).

As explained, the Act mandates the disclosure of original sources of campaign funds, which prevents cloaking actual contributors by using intermediaries:

> The interests in where political campaign money comes from and in learning who supports and opposes ballot measures extend beyond just those organizations that support a measure or candidate directly. [] The secondary-contributor requirement is designed to go beyond the ad hoc organizations with creative but misleading

v. Mederos, 13 F.4th 79, 95 (1st Cir. 2022), *cert. denied* 142 S. Ct. 2647 (2022) (same); *Smith v. Helzer*, 614 F. Supp. 3d 668, 682 (D. Alaska 2022) (rejecting argument that disclaimers are content-based restrictions requiring strict scrutiny).

names and instead *expose the actual contributors* to such groups.

No on E, 62 F.4th at 540–41 (emphasis added). The Court finds the Act is related to important government interests.

To withstand exacting scrutiny, though, the relationship must be *substantial*. In other words, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Bonta*, 141 S. Ct. at 2383.

Courts consistently recognize that the government's interests at issue are extraordinarily strong. The *Buckley* Court found the interests affected "*the free functioning of our national institutions*." *Buckley*, 424 U.S. at 14-15 (citation omitted) (emphasis added).[7] More recently, as another court put it: "[T]he election-law context is a breed apart, implicating the government's substantial interest in transparent elections — *the bedrock of our democracy*." *Gaspee Project,* 13 F.4th at 94. As such, "the State's interest in disclosure is ordinarily sufficient to survive exacting scrutiny." *McConnell,* 540 U.S. at 198.

Against these strong interests, the Court must balance Plaintiffs' free speech rights. For purposes of this motion to dismiss, Plaintiffs have established that the Act burdens their First Amendment freedoms. These burdens include:

- **Donations.** The entity Plaintiffs may lose donations, impacting their ability to engage in political speech. "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise

[7] Indeed, the Supreme Court has upheld campaign disclosures and disclaimers for decades. *Buckley*, 424 U.S. at 14-15 (upholding disclosure requirements for independent expenditures) (citations and quoted sources omitted); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United,* 558 U.S. at 365-66 (holding informational interest "foreclose[d] a facial attack" on additional campaign donor disclosure requirements); *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (applying exacting scrutiny to disclosure requirements in part because election fraud "*drives honest citizens out of the democratic process and breeds distrust of our government*.") (citation omitted); and *Citizens United*, 558 U.S. at 368-69 (emphasizing value of information about sources of speech shortly before elections).

contribute." *Buckley*, 424 U.S. at 68. Nonetheless, disclosure "certainly in most applications appear[s] to be the least restrictive means of curbing the evils of campaign ignorance." *Id*. at 68.

- **Freedom of Association.** The Act impacts Plaintiffs' freedom of association. Protected association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Bonta*, 141 S. Ct. at 2382.

  To be sure, "compelled disclosures may [sometimes] impose an unconstitutional burden on the freedom to associate in support of a particular cause." *McConnell*, 540 U.S. at 198. 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*, 141 S. Ct. at 2389. The record before the Court establishes that two organizations will be burdened. This is insufficient to support a facial challenge.

- **Anonymity.** Anonymous political speech, is "an honorable tradition of advocacy and of dissent" in this country – acting as "a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The Court recognizes the importance of "the First Amendment['s] [purpose]: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." ***Id*.** But the Court may not "ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (citation omitted).

- **Vagueness.** Plaintiffs also contend "campaign media spending" is vague. Application for Injunction, at 14-15. A facial vagueness claim must fail if the law is valid "in the vast majority of its intended applications"; hypothetical situations will not support a facial attack. *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)) (quotation marks omitted). In any event, Plaintiffs' challenge to three portions of the Act do not support a facial challenge of the *entire* measure based on vagueness. *See City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 110, ¶ 12 (App. 2001) ("We need not invalidate the entire Ordinance if the invalid portion can be severed from the remaining valid portions of the Ordinance.").

- **Overbreadth.** Similarly, to prevail on an overbreadth facial challenge, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *State v. Musser*, 194 Ariz. 31, 32 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)) (quotation marks omitted). "[F]acial challenges leave no room for particularized considerations and *must* fail as long as the challenged regulation has *any* legitimate application." *Gaspee Project*, 13 F.4th at 92 (rejecting challenge to Rhode Island election disclosure law) (emphasis added). Finally, as discussed in more detail below, the Act is narrowly drawn.

  The Court does not underestimate the importance of Plaintiffs' rights at issue. But in case after case the government's interests in campaign disclosures have prevailed over First Amendment challenges. *See e.g., Buckley, supra*; *McConnell, supra; Citizens United, supra; see also, No on E,* 62 F.4th at 540-41 (finding burdens on donations and freedom of association insufficient); *Smith v. Helzer*, 614 F. Supp. 3d 668, 680 (D. Alaska 2022) (finding disclosures seeking the "true source" of donor's funds neither overly burdensome nor requiring of "encyclopedic and prophetic knowledge" of disclosure laws). Those interests prevail here as well.

For all these reasons, the Court finds Proposition 211 is substantially related to sufficiently important government interests. The Act therefore passes this first test.[8]

3. Whether the Act is Narrowly Tailored

Finally, the law "must be tailored to the interest it promotes." *Bonta* 141 S. Ct. at 2383. It need not be, however, "the least restrictive means of achieving that end." *Id*. Here:

- The Act focuses on significant expenditures (campaign media spending over $50,000 or $25,000), depending on the election. A.R.S. § 16-973(A).
- If this threshold is crossed, only donors of $5,000 or more in an election cycle need be disclosed. A.R.S. § 16-973(A)(6), (G).
- A.R.S. § 16-973(F) exempts disclosures subjecting persons to serious physical harm.

[8] This is the test the State of California failed in *Bonta*, a facial challenge not involving elections or campaigns. There, the Court found the state established neither a sufficiently important interest nor narrow tailoring.

- Donors may also "opt out" of campaign spending. A.R.S. § 16-972(B), (C).

The Court finds the Act is narrowly tailored. It contains relatively significant financial thresholds before triggering disclosure obligations, allows opting out, and contains an exemption for persons subject to physical harm. Plaintiffs' criticisms of the tailoring would be more persuasive if this were a strict scrutiny case. In the exacting scrutiny context, they do not prevail. *See*, *No on E*, 62 F.4th at 544-45 (finding original source disclosure requirements narrowly tailored); *Gaspee Project*, 13 F.4th at 88-89 (same, with $1,000 threshold); *Smith v. Helzer*, 614 F. Supp. 3d at 690 (finding "true source" disclosure requirement narrowly tailored). *See also cf.*, *New Georgia Project, Inc. v. Carr*, No. 1:22-CV-03533-VMC, 2022 WL 17667828, at *18 (N.D. Ga. Dec. 14, 2022) (finding lack of narrow tailoring of law with no temporal limitation, $500 disclosure threshold, and no ability to opt out).

For all these reasons, the Act survives exacting scrutiny and does not violate the First Amendment.

C. Arizona's Free Speech Clause

Plaintiffs rely on Arizona's Free Speech Clause, which states 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. Arizona's clause, "by its terms, provide[s] greater speech protection than the First Amendment." *Brush & Nib,* 247 Ariz. at 282, ¶ 46.. Just how much greater is unclear, because "Arizona courts have had few opportunities to develop Arizona's free speech jurisprudence." *State v. Stummer*, 219 Ariz. 137, 142, ¶ 16 (2008). Notwithstanding this vacuum, the Court finds Arizona free speech clause does not prohibit the disclosures at issue.

When interpreting the Arizona Constitution, the Court strives to "effectuate the intent of those who framed the provision." *State v. Mixton*, 250 Ariz. 282, 289, ¶ 28 (2021) (citation omitted). If a clause is clear and unambiguous, employing other means of construction is unnecessary. *Id*. The Court may also consider the historical context when determining intent. *Id*.

Arizona's framers obviously intended citizens to speak freely. Numerous cases have recognized, however, that campaign-related disclosure requirements "do not prevent anyone from speaking." *Comm. For Just. & Fairness,* 235 Ariz. at 356, ¶ 33 (citations omitted).

Other constitutional provisions support disclosure requirements. First, Arizona's framers recognized at statehood the importance of information concerning the sources of money in

campaigns. In fact, Arizona's Constitution *required* the first Legislature to pass an election disclosure law to publicize "all campaign contributions to, and expenditures of campaign committees and candidates for public office." Ariz. Const. art. VII, § 16.

A second constitutional provision required "registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. A third prohibited "corporations, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action." Ariz. Const. art. XIV, § 18.

The framers thus established a constitutional commitment to pure elections, to preventing corporate influences, and to publicizing sources of campaign funds. The Court finds it unlikely that the same framers somehow envisioned that Arizona's Free Speech clause would reach the disclosures at issue.

Finally, examining case law from Washington buttresses this conclusion. Washington's Free Speech Clause is identical to Arizona's, yet campaign disclosure requirements there are the norm. *See e.g.*, *State v. Grocery Mfrs.' Ass'n*, 461 P.3d 334, 346, ¶¶ 42, 45 (Wash. 2020) (holding right to "receive information" is a "fundamental counterpart of the right of free speech."). Put differently, "the public . . . has the right to know who is lobbying for their votes." *Id.* ¶ 45. No case cited by Plaintiffs applies Washington's free speech clause in the fashion Plaintiffs urge here.

For all these reasons, the Court finds the Act violates neither the First Amendment nor Ariz. Const. Art. II, § 6.

V. Private Affairs

Plaintiffs also argue the Act violates the "Private Affairs Clause," Article II, Section 8, of the Arizona Constitution. That provision states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"Private Affairs" is undefined. Arizona courts therefore look to the term's "natural, obvious, and ordinary meaning," focusing on the meaning at the time the Constitution was adopted. *Mixton*, 250 Ariz. at 290, ¶ 33. "Private" means "affecting or belonging to private

individuals, as distinct from the public generally." *Id*. at 290-91, ¶ 33 (*quoting Private, Black's Law Dictionary* (2d. ed. 1910) and *Private, New Websterian Dictionary* (1912) ("peculiar to one's self; personal; alone; secret; not public; secluded; unofficial."). "Affairs" means "a person's concerns in trade or property; business*." Id.* (*quoting Affairs, Black's Law Dictionary* (2d. ed. 1910).

Since early statehood, the Arizona Supreme Court has noted that the Private Affairs Clause, "is of the same general effect and purpose as the Fourth Amendment." *Id*. at 290, ¶ 31 (*quoting Malmin v. State*, 30 Ariz. 258, 261 (1926)). While recognizing that the wording of Arizona's provision is broader than the Fourth Amendment, the Supreme Court has not expanded the protections of the clause much "beyond the Fourth Amendment, except in cases involving warrantless home entries*." Id.* (citation omitted).[9]

As discussed above, the Arizona Constitution recognized the immediate need for publicity of campaign donations in the service of "pure" elections, held free of inappropriate corporate influence. *See*, Art. VII, § 16 (requiring the first legislature to pass legislation regarding same); Art. XIV, § 18; Art. VII, § 12. Given this context, and the narrow construction of the clause to date, the Court finds that election contributions are not "private affairs."[10]

Having concluded that the Private Affairs Clause does not apply, the Court will dismiss this count without reaching Defendants' alternative arguments.

[9] The Arizona Supreme Court also found that the Private Affairs Clause encompassed an individual's right to refuse medical treatment. *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 215 (1987).

[10] Plaintiffs citations to cases from Washington does not help them. Arizona's clause was adopted verbatim from the Washington State Constitution. *Mixton*, 250 Ariz. at 290 ¶ 29 (*citing* Wash. Const. art. 1, § 7). But the cases interpreting the Washington provision cited by Plaintiffs have not expanded the private affairs clause beyond the Fourth Amendment protections. *See, e.g., State v. Jorden*, 156 P.3d 893, 896 (Wash. 2007) (prohibiting suspicionless search of hotel registry by sheriff where information sought revealed "intimate or discrete details of a person's life"); *State v. Miles*, 156 P.3d 864 (Wash. 2007) (agency issued administrative subpoena for banking records to pursue criminal charges); *Matter of Maxfield*, 945 P.2d 196, 199 (Wash. 1997) (utility employee told drug task force of unusual energy use at home).

VI. Separation of Powers

Plaintiffs argue that the Act violates the separation of powers clause in the Arizona Constitution because it gives the Commission, a statutorily created body, extensive new legislative, executive, and quasi-judicial powers. Plaintiffs assert the Act essentially elevates the Commission to an independent "Fourth Branch of Government" and gives the Commission the powers of all three branches without oversight.

Plaintiffs lack standing, however. To have standing, a plaintiff must allege "a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). The injury must be individualized to the plaintiff and cannot be shared with "a large class of citizens." *Id.* The injury also must be caused by the alleged violation. *Id.* at 70-71, ¶¶ 17-28. When standing is absent, Arizona courts generally decline jurisdiction. *Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 14 (2005).

Plaintiffs allege that they are "suffering, and will suffer in the future, irreparable harm . . . because governmental power is being exercised in violation of the separation of powers." Verified Complaint, ¶ 92. This is not particularized – all citizens experience the same harm. Nor do Plaintiffs allege a connection between a separation of powers violation and injury to themselves. To take one example, Plaintiffs complain that the Commission's enforcement of the Act is not subject to approval of other executive bodies. Verified Complaint, ¶ 87. But nothing ties the alleged lack of oversight to any individualized harm.

In short, Plaintiffs allege no particularized harm caused by the alleged separation of powers violation. As such, the Court will grant the Motions to Dismiss the separation of powers claim for lack of standing.

VII. Disposition

For all these reasons, the Court finds that Plaintiffs' facial challenge to the Act fails. Accordingly,

IT IS ORDERED granting the motions to dismiss.

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Preliminary Injunction.

Finally, the Court notes Plaintiffs maintained at oral argument that the Verified Complaint was also an as applied challenge to the Act's constitutionality. This came as a surprise to both the Court and Defendants. Nonetheless, Plaintiffs may be able to state a valid claim that the Act may not constitutionally be applied to them. *See Citizens United*, 558 U.S. at 367 (noting possibility of as applied challenge to facially valid law by groups demonstrating a

"reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.").

IT IS THEREFORE ORDERED granting Plaintiffs leave to file an amended complaint on or before July 7, 2023.