ARIZONA COURT OF APPEALS
DIVISION ONE

CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE I; DOE II; Plaintiffs/Appellants, v. ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISION, Defendants/Appellees, and, ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC, Intervenor-Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 24-0272 Maricopa County Superior Court No. CV2022-016564 **BRIEF OF AMICUS CURIAE ARIZONA CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF APPELLANTS** (Filed with the consent of the parties)

BRIEF OF AMICUS CURIAE ARIZONA CHAMBER
FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Arizona Chamber of Commerce and Industry (the "ACCI") is a non-profit organization that advocates for free-market public policies and works to ensure economic growth and prosperity for all Arizonans. Its membership includes businesses operating in Arizona that wish to speak with a common voice on a range of issues relating to the ACCI's broad purpose. Among other things, the ACCI engages in policy advocacy at the legislature and political advocacy relating to candidates and ballot propositions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The superior court erred by granting Appellees' motion to dismiss. The "Voters Right to Know Act" ("Prop 211" or the "Act") imposes heavy burdens on Arizonans' ability to speak freely by implementing onerous recordkeeping and disclosure requirements on anyone who meets certain spending thresholds for campaign media. Such burdens, along with the threat of harassment or reputational harm, chills Arizonans' speech. This chilling effect makes Appellants' facial challenge appropriate.

Arizona's free speech provision is, by its explicit terms, much more protective of speech than the First Amendment. It grants Arizonans a positive right to speak freely, a right that can only be curtailed *after* it is abused. Because this grant is broader than the First Amendment, strict scrutiny is appropriate when considering the Act's burdens on political speech.

Prop 211 cannot withstand strict scrutiny and should be struck down on its face. Laws are facially unconstitutional when their plausible potential consequences

preemptively silence protected speech. Central to this analysis is how well-tailored speech restrictions are to achieve the government's interest. Prop 211 is poorly tailored because it is both overbroad and underinclusive. In fact, it is not tailored at all. It categorically applies to all people who meet the spending requirements regardless of whether its requirements do anything to further any government interest in reducing corruption. It also excludes other spending that would have just as much need for transparency. The Court should strike down the Act.

ARGUMENT

The Court should recognize that Prop 211 violates the Arizona Constitution's guarantee that Arizonans can speak, write, and publish freely. Ariz. Const. art. II, § 6. Though it purports to regulate "dark money," it instead creates a collection of burdensome and confusing regulations for anyone—with a few strange exceptions—who wishes to engage in any meaningful campaign media spending during an election cycle.[1] These prerequisite recordkeeping and disclosure requirements "burden the ability to speak" on important political issues of our day. *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). The law also exposes contributors and donors to harassment and threats. *See* O.B. at 28-32; *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 616-17 (2021) (recognizing that the deterrent effect of disclosure on

[1] *See* Ariz. Sec'y of State, 2022 Publicity Pamphlet 227 (2022) Prop 211 also reserves legislative, county, and municipal authorities the power to enact and enforce additional or more stringent disclosure requirements and overrules any state law that may conflict with it. A.R.S. § 16-978.

exercising speech and association rights "span[s] the ideological spectrum"). Such burdens violate the Arizona Constitution.

I. Prop 211 creates burdensome recordkeeping and disclosure obligations for some entities who want to speak about elections.

Prop 211 creates a new regulatory scheme for "campaign media spending." *See* A.R.S. § 16-971 *et seq.* In general terms, these regulations are heavy recordkeeping and reporting obligations that hinge on how much a speaker spends on campaign media during an "election cycle"—the roughly two-year period between general election days in even-numbered years. *See* A.R.S. § 16-971(8). As explained below, the administrative and reporting burden on covered persons are substantial and penalties are severe.

a. Prop 211 implements expansive recordkeeping and disclosure obligations.

Prop 211's extensive recordkeeping and disclosure requirements apply to most entities and persons who meet certain spending thresholds for campaign media. *Id.* § 16-971(7)(a). They do not include, however, persons spending their own money on campaign media, organizations that spend only their own business income for campaign media spending, a candidate committee, or a political action committee ("PAC") that receives less than $20,000 in contributions during an election cycle. *Id.* § 16-971(7)(b). Business income includes money received by a person in the ordinary course of a person's business or membership or union dues that do not exceed $5,000 from any one person in a calendar year. *Id.* § 16-971(1).[2]

[2] A person cannot evade these requirements by structuring their contributions. *Id.* § 16-975.

"Campaign media spending" is a broad term with a few odd exceptions. It essentially includes any paid advertisement by means of any traditional or digital media, s*ee id.* § 16-971(17) (defining "public communication"), that advocates for or against a candidate, initiative, referendum, recall, or political party, *id.* § 16-971(2)(a)(i-vi). It also includes activities that are done to prepare for campaign media spending, such as research, design, production, polling, data analytics, mailing or social media list acquisition, or "any other activity" to prepare for public communications. *Id.* § 16-971(2)(a)(vii). The Act contains four carveouts for campaign media by news entities, nonpartisan voter registration and turnout efforts, publishing books or documentaries, and primary or nonpartisan debates between candidates or between proponents and opponents of initiatives or referenda. *Id.* § 16-971(2)(b).

Covered persons are subject to onerous recordkeeping and notice requirements. *See generally* A.R.S. § 16-972. Covered persons must also notify donors that their contributions may be used for campaign media spending and their names will be disclosed to the government for disclosure to the public. *Id.* § 16-972(B). Donors must have the opportunity to opt out within 21 days of receiving notice or give written consent for the money to be used. *Id.* § 16-972(C). Donors that contribute more than $5,000 to a covered person must inform the covered person of any other person that contributed $2,500 or more of traceable monies. *Id.* § 16-972(D). Donors must maintain these records for at least five years and make them available to the Citizens Clean Elections Commission for inspection. *Id.*

Prop 211 requires covered persons to file reports with the secretary of state disclosing the identity of many of its donors. *See id.* § 16-973. The identity of all donors, or "intermediar[ies]," who contributed $5,000 or more must be disclosed. *Id.* § 16-973(A)(6-7). Further, the report must contain the full name and office sought of any candidate or ballot proposition that a covered person's public communication supported, opposed, or merely "referenced." *Id.* § 16-973(A)(8). And it must identify any person who donated more than half of the covered person's funds during an election cycle. *Id.* § 16-973(A)(9). Only sources that can show a serious risk of physical harm can avoid being disclosed. *Id.* § 16-973(F). The disclosure report must be updated and filed with the secretary of state every time a covered person spends or receives an additional $25,000 for a statewide race or $15,000 for any other race. *Id.* § 16-973(B). These updated reports must be filed within three days of spending or receiving the funds. *Id.*

b. Prop 211 encourages aggressive enforcement.

Prop 211 creates an aggressive enforcement regime. The primary regulator is the Citizens Clean Elections Commission (the "Commission"), which is charged with implementing and enforcing the Act. *Id.* § 16-974(A). To do so, the Commission enjoys vast powers. It can adopt and enforce rules, issue and enforce subpoenas, initiate enforcement actions, conduct fact-finding hearings, impose civil penalties, seek additional relief in court, establish the records people must maintain to support their disclosures, and "perform any act that may assist in implementing" Prop 211. *Id.* § 16-974(A)(1-8). The Commission is additionally tasked with establishing disclaimer requirements for public communications by covered persons. *Id.* § 16-

974(B). These disclosures must include, at a minimum, 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.*

The penalties for violating Prop 211 are severe. The Act sets the minimum civil penalty to be "at least the amount of the undisclosed or improperly disclosed contribution" and caps the penalty as "not more than three times that amount." *Id.* § 16-976(A). Criminal penalties are also mentioned, though not explained. *Id.* § 16-976(C). Structuring penalties are calculated by the Commission determining the amount that "constitute[s] a structured transaction." *Id.* § 16-976(A).

By routing the proceeds directly back to the Commission, the act incentivizes steep fines. *Id.* § 16-976 (B). Further, any amount over what is necessary to implement and enforce Prop 211 can be kept and "used for other commission-approved purposes." *Id.* The Act imposes a one percent surcharge on all civil and criminal penalties, though the Commission can suspend the surcharge if it determines it can perform the actions required by Prop 211 without the additional surcharge. *Id.* § 16-976(C).

Prop 211 seems to invite political gamesmanship. Any voter in Arizona can file a complaint with the Commission against a person alleged to have violated the Act. *Id.* § 16-977(A). The Commission must investigate the allegations if the complaint, if true, states a factual basis for a violation of the Act. *Id.* § 16-977(B). If the Commission dismisses a complaint or takes no action within 90 days of receiving it, a complainant may file a civil action to compel the Commission to take enforcement action. *Id.* § 16-977(C). The Commission cannot claim prosecutorial

discretion for not investigating a complaint if the amount of a civil penalty could be greater than $50,000. *Id.* A complainant may be awarded its reasonable attorneys' fees if it prevails in a civil action. *Id.*

II. Appellants are correct that the Arizona Constitution offers more protection than the U.S. Constitution.

Appellants explain that the Arizona Constitution's free speech provision is broader than its federal corollary. O.B. at 16-22. Arizona case law is replete with statements that Article II, Section 6 of the Arizona Constitution provides "broader protections" than the First Amendment. *Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269, 282 ¶ 47 (2019) (listing cases). The provision includes both the right to speak freely and the right to not speak. *Id.* ¶ 48. With our broad state constitutional protection, Arizona courts should not apply the lower federal "exacting scrutiny" standard to these provisions. *See* O.B. at 16-22; *see also Ex parte Tucci*, 859 S.W. 2d 1, 5-6 (Tex. 1993) (holding Texas's similarly worded state constitution provision would not tolerate judicial restrictions on speech unless they "represent[ed] the least restrictive means" of preventing imminent and irreparable harm to the judicial process).

Moreover, the very terms of the Arizona provision are much different than the First Amendment and establish a positive right for Arizonans to speak "freely" rather than merely copying the First Amendment's constraint on government power. Ariz. Const. art. II, § 6; *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm.*, 160 Ariz. 350, 355 (1989). Arizona often protects rights found in the state constitution more broadly than their federal corollaries. Doing so is especially appropriate "where the

language is different" between Arizona's provisions and their federal counterpart. *State v. Mixton*, 250 Ariz. 282, 302 ¶ 94 (2021) (Bolick, J., dissenting) (listing cases where state constitutional provisions were more protective than their federal counterparts).[3]

Here, the language is starkly different:

- "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6.
- "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. Amend. 1.

The Arizona speech clause, unlike the First Amendment, grants a positive right for Arizonans to *freely* speak, write, and publish. There is also an added temporal element to the Arizona speech clause. The right can only be curtailed once it has been abused. Because the Arizona language is expansive our courts should construe it as written—and providing Arizonans more protection is appropriate here.

The sweeping language of Article II, Section 6 "indicates the Arizona framers' intent to rigorously protect freedom of speech." *State v. Stummer*, 219 Ariz. 137, 142 ¶ 14 (2008). The framers of the Arizona Constitution "had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or

[3] Indeed, independently construing the contours of state constitutional provisions is a proud tradition in Arizona. *See Turley v. State*, 48 Ariz. 61, 70-71 (1936) ("We have the right, however, to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the federal Constitution and the federal decisions based on that Constitution.").

other states to meet Arizona's needs." Rebecca White Berch, Megan K. Scanlon, and Jared L. Sutton, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L. J. 461, 468 (2012). The Arizona framers also adopted the free speech provision prior to the First Amendment's incorporation. *See McDonald v. City of Chicago*, 561 U.S. 742, 810 (2010) (noting that the right to free speech was incorporated against the states in *Gitlow v. New York*, 268 U.S. 652 (1925) Accordingly, the Arizona free speech clause stands on its own to protect from overzealous speech regulation, and its plain terms embrace an unencumbered view of speech rights.

The text reveals another important aspect of Article II, Section 6–the speech right cannot be curtailed until after it is abused. The clause says that people can freely speak but are responsible for *abusing* that right. That is to say, the "right to speak, write, and publish cannot be abused until it is exercised." *Phoenix Newspapers v. Superior Court*, 101 Ariz. 257, 259 (1966) (quoting *Dailey v. Superior Court of San Francisco*, 112 Cal. 94, 97 (Cal. 1896)).[4] Prop 211's recordkeeping and disclosure burdens exist prior to any evidence or finding that covered persons' speech is an abuse of their free speech rights.

This is not to say speech is entirely unlimited. Arizona's free speech clause does not protect against libel or defamation, for example. *See Yetman v. English*, 168 Ariz. 71 (1991). The Arizona Constitution also provides for disclosure of

[4] In *Phoenix Newspapers*, the Court noted that California and Texas, who share similar language to Arizona's free speech clause, also recognized this temporal element to the clause's guarantee. 101 Ariz. at 259.

contribution and expenditures for *candidates* and *campaign committees*. Ariz. Const. art. VII, § 16. Enjoining speech found to be unlawful after an adversarial hearing may also be constitutional. *See In re Marriage of Evilsizor Sweeney*, 237 Cal. App. 4th 1416, 1431 (Cal. App. 2015) (upholding injunction preventing a husband from publishing text messages after a judicial determination that his conduct constituted abuse under the California Constitution). Nothing in the Arizona Constitution, however, endorses disclosure and recordkeeping requirements for organizations that are not campaigns nor campaign committees and are not engaging in unlawful speech.

The Arizona Constitution does not tolerate Prop 211's prophylactic burdens on speech. Its requirements apply to covered persons regardless of whether they have "abuse[d]" their right to freely speak, write, and publish. The Act's regulatory scheme consists largely of preventative measures, requiring a covered person to make disclosures they would otherwise omit. It creates an administrative burden on people who want to speak, as they are required to keep detailed records of contribution and expenditures. It also requires donors to consider the disclosure requirements prior to deciding whether to speak. A reasonable person may decide to not to support an advocacy effort based on potential backlash about the side she supports. Requiring Arizonans to make such a calculation is repugnant to Arizona's promise of speaking, writing, and publishing freely.

Widely restricting speech, even anonymous speech, is not consistent with the values protected by Arizona's Constitution. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002) ("It is offensive—not

only to values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."). Prop 211 proponents cannot overcome its constitutional infirmities by pointing to its popularity with voters. By their very nature, constitutions "act as a check on majoritarian impulses by placing certain rights outside of the legislative process." *City of Cleveland v. State*, 157 Ohio St. 3d 330, 343 ¶ 53 (2019). Arizona's free speech provision, by its terms, is more protective of speech than the First Amendment. Accordingly, the Court should apply the most stringent test for constitutionality—strict scrutiny.

III. Legislation that chills speech should be struck down on its face.

Strict scrutiny requires the government to show that a law is "the least restrictive means of achieving a compelling state interest." *Bonta*, 594 U.S. at 607 (citations omitted). Appellees cannot meet this burden. In the context of speech, the mere existence of a law can exert a chilling effect on the exercise of it. *AZ Petition Partners LLC v. Thompson*, 530 P. 3d 1144, 1148 (Ariz. 2023). This chilling effect makes a law facially unconstitutional. *Id.*

Disclosure requirements are constitutionally suspect and must be narrowly tailored. *Bonta*, 594 U.S. 595, 610 (2021). "Broad and sweeping state inquiries into these protected areas [a person's beliefs or associations] . . . discourage citizens from exercising rights protected by the constitution." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (free association case quoted in *Bonta*). Accordingly, the Court will strike down laws that are "overbroad," those forbidding a substantial number of

constitutional applications in relation to its legitimate sweep, *United States v. Stevens*, 559 U.S. 460, 473 (2010), or "underinclusive," those placing strict limits on certain activities while allowing other activities that "create the same problem," *Bacon v. Woodward*, 2024 U.S. App. LEXIS 14756, __ F. 4th __ (9th Cir. 2024) (quoting *Reed v. Town of Gilbert*, 575 U.S. 155, 172 (2015)). Prop 211 is both.

Prop 211's claimed interest is to:

> 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

Ariz. Sec'y of State, 2022 Publicity Pamphlet 227 (2022). But there is no First Amendment or Arizona constitutional right to know other people's private associations or to know the source of monies used to influence elections. This leaves promoting self-government, ensuring responsive officeholders, and preventing corruption as the Act's justification. To the extent any of these qualify as compelling government interests, Prop 211's provisions are too poorly tailored to withstand constitutional muster.

a. Prop 211 is overbroad.

Speech restrictions are facially unconstitutional especially when a law is "overbroad." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving

the same basic purpose. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Prop 211's elaborate regulatory scheme requires recordkeeping and disclosures that do nothing to further the state's claimed interest.

Perhaps most obviously, the government's interest in preventing corruption is not furthered by treating candidates and initiative public communications the same. *See* A.R.S. § 16-973(A). The risk of corruption, or the appearance of corruption, is heightened when supporting or opposing candidates. *See e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (recognizing that large contributions to candidates to "secure political quid pro quo's from current and potential office holders" undermines the "integrity of our system"). It is only candidates who, after they win, may be compelled or pressured to fulfill a quid pro quo arrangement. The Arizona Constitutional already recognizes that risk. Ariz. Const. art. VII, § 16. Any risk of candidate corruption disappears when it comes to initiatives or referenda. There is no rational justification, let alone compelling governmental interest, in the public needing to know "who else" might support or oppose a straightforward initiative. Further, the risk of corruption concerning candidates is already minimized when it comes to organizations like PACs who are not allowed to coordinate with candidates anyway, and the Arizona Constitution allows more regulation of contributions to candidates and campaign committees.

Another egregious provision is the required disclosure for activities done to prepare for campaign media spending, including research, design, production, polling, data analytics, mailing or social media list acquisition, or "any other activity" to prepare for public communications. *See* § 16-971(2)(a)(vii). According to these plain terms, an organization that conducts any of those activities and then chooses not to speak would still have to disclose its spending. For example, an organization could conduct focus groups or polling to prepare for a public communication, but then ultimately decide not to engage on a candidate or issue. Any such disclosure does nothing to further a compelling government interest, but it does require the organization to provide information it would otherwise keep to itself.

The top three donor requirement is also problematic. *See* A.R.S. § 16-974(C). As explained in the opening brief, it may require disclosure of persons who opt out of campaign media spending but are still top three donors during that election cycle. O.B. at 6-7. Again, this provision does nothing to further a compelling government interest, but it does require an organization to disclose a private matter and expose a donor to harassment, violence, or reputational harm.

The Act tacitly admits that the threat of disclosure could result in real-world consequences by allowing donors *who can show a threat* of physical harm to avoid

disclosure. *See* A.R.S. § 16-973(F).[5] But there are other, less drastic, less intrusive ways to avoid corruption, promote self-government, and ensure responsive public officials. To merely list a few possible alternatives: the state could invest more in corruption investigations or provide incentives and protections for people that report or uncover it; it could also provide more resources for educating voters or waive the fee for submitting arguments into publicity pamphlets.

Prop 211 is overbroad and risks stifling protected speech. These concerns are amplified by the risk of significant financial penalties and the risk of citizen enforcement. The Court should recognize its legitimate risk to chilling lawful speech and hold it unconstitutional.

b. Prop 211 is underinclusive.

A law is underinclusive if it places strict limits on certain activities while allowing other activities that "create the same problem." *Bacon*, 2024 U.S. App. LEXIS 14756, at *18. Prop 211 has exceptions that undermine the government's purported interest. In addition to the monetary thresholds that Appellants discuss, O.B. at 25-26, the Act arbitrarily excludes from its reach certain organizations and activities.

[5] Again, much of Prop 211's regulations run counter to the Arizona Constitution's guarantee of Arizonans' right to speak freely and are then responsible for abusing that right. In the case of a person who fears for their physical safety, they must first prove that they fear for their physical safety before they can avoid disclosure.

For example, a primary or nonpartisan debate does not constitute campaign media spending. A.R.S. §16-971(b)(iv). If a candidate, however, created clips from the debate and placed them in advertisements on television or social media, that would constitute campaign media spending. Likewise, if an editorial board for a newspaper endorsed a candidate, that does not constitute campaign media spending. But if a PAC sent a link to that endorsement through a paid email list, that would count as campaign media spending. In the same way, a business spending its own income on an initiative that would benefit itself does not make it a covered person. A.R.S. § 16-971(7)(b)(ii). A PAC that does the same thing on behalf of a group of businesses, however, would be considered a covered person.

This poor tailoring is evidence of a facially unconstitutional law. The Court should recognize Prop 211's stifling of lawful speech and hold that it violates the Arizona Constitution.

CONCLUSION

For the reasons above, the Court should vacate the trial court's dismissal of Appellants' complaint. It should also hold that a preliminary injunction is appropriate, and enforcement of Prop 211 should be enjoined while this case proceeds to trial or summary judgment.

RESPECTFULLY SUBMITTED this 16th day of August, 2024.

By: */s/ Nate Curtisi*

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