IN THE SUPREME COURT
STATE OF ARIZONA

CENTER FOR ARIZONA POLICY, INC., et al., Plaintiffs/Appellants, vs. ARIZONA SECRETARY OF STATE, et al., Defendants/Appellees, ARIZONA ATTORNEY GENERAL, et al., Intervenors-Defendants/Appellees.	Arizona Supreme Court Case No. CV-24-0295-PR Arizona Court of Appeals Case No. 1 CA-CV 24-0272 A Maricopa County Superior Court Case No. CV2022-016564

PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF

Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Andrew Gould (013234)
Brennan A.R. Bowen (036639)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2555 East Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

The "Voter's Right to Know Act" (Act) is facially unconstitutional because donating to a nonprofit or speaking anonymously are protected speech, and compelling disclosure of personal information as the price of "freely speaking" not only chills free speech, but is also an unjustifiable intrusion into private affairs. Additionally, the court below erred in dismissing Petitioners' as-applied challenge because they are not required to conclusively prove that they suffered physical threats or violence to state an as-applied claim. In any event, Petitioners properly pleaded and indeed offered unrefuted evidence of a reasonable probability of substantial harassment and threats based on their protected speech activities.

I. The Act is facially unconstitutional under both Arizona's free speech and privacy clauses.

A. Depriving donors and nonprofits of confidentiality as the price of political participation violates freedom of speech.

1. Arizona's Constitution does not employ federal "tiers of scrutiny."

Arizona's Constitution provides 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. This Speak Freely Clause protects speech and association more than the First Amendment does. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281–82 ¶ 45 (2019).

Given the textual differences between Section 6 and the First Amendment, Arizona courts do not apply federal jurisprudential standards in "lockstep." Notably, this Court has never adopted the variable "tiers-of-scrutiny" invented by federal courts.[1] That makes sense. Arizona courts strive to apply the Constitution's terms according to "their meaning at the time the Constitution was adopted." *State v. Mixton*, 250 Ariz. 282, 290 ¶ 33 (2021). Arizona's Constitution was adopted in 1912.

[1] Even *Brush & Nib*, which considered tiers of scrutiny in detail, only did so in relation to the federal First Amendment. 247 Ariz. at 282, 291-93 ¶¶ 46-47, 94-104.

Federal "tiers of scrutiny" were not invented until the mid-1930s, in *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (which created rational-basis scrutiny), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (which provided that more demanding scrutiny might apply to certain types of rights).

True, Arizona courts sometimes borrow federal legal theories, but only with care, and to ensure that the state constitution provides greater protection than the federal. In *State v. Stummer*, 219 Ariz. 137, 142-46 ¶¶ 14-36 (2008), for example, this Court borrowed federal "exacting scrutiny" for certain speech-related cases, but "decline[d] to strictly apply the federal test because it is inconsistent with the broad protection of speech afforded by the Arizona Constitution." *Id.* at 144 ¶ 23. It therefore modified it to "more closely scrutinize" certain laws. *Id.*

Given Arizona's broader protection for speech rights, the standard of scrutiny applicable here should be at least strict scrutiny. **Arizona's Constitution acknowledges the legitimacy of only one category of speech-limitations: "being responsible for the abuse of that right."** Ariz. Const. art. II § 6. In other words, speech restrictions are constitutional *solely* where they punish or prevent "abuses" of speech.

"Abuses" include unprotected speech, such as defamation, threats, and obscenity, *see Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1245-47, ¶¶ 31-38 (Utah 2006) (providing thorough history of this constitutional provision), as well as efforts to prejudice a legal proceeding through publicity, *see, e.g., State ex. rel. Dorrien v. Hazeltine*, 143 P. 436, 439 (Wash. 1914), or the violation of content-neutral time, place, and manner restrictions—and perhaps other types of communication not at issue here. Restrictions on speech are unconstitutional, however, if they are not aimed at preventing or remedying "abuses." Given the importance of free speech rights, therefore, courts asked to determine whether a

challenged speech restriction is aimed at addressing an "abuse" should apply the most stringent and precise inquiry: strict scrutiny.

State v. Pierce, 158 N.W. 696 (Wis. 1916), is helpful here, as it appears to be the only case dating to Arizona's statehood period that applied a Speak Freely Clause in the context of campaign finance restrictions. There, the defendant spent money "investigating the governmental, political, and financial affairs of the state" and published the results to influence the election. *Id.* at 697-98. He was charged with violating a law prohibiting certain political expenditures. He argued that this violated Wisconsin's Speak Freely Clause, which was almost identical to Arizona's. The court agreed.

Noting that the Speak Freely Clause is "more definite and sweeping" than the First Amendment, it found that the statute made it illegal for "a man, or body of men, who are honestly convinced of the necessity of a change of policy in the state government" to "bring[] their views to the notice of the voters," and that "[i]f this be not an abridgment of freedom of speech, it would be difficult to imagine what would be." *Id.* at 698. While acknowledging the "admirable purposes" of preventing "corruption and coercion" in politics, the court concluded that the Speak Freely Clause did not allow the state to "deprive[]" people "of the right to … collect information … and endeavor … to put the issue as they see it before [their] fellow voters." *Id.* The court did not apply any tiers of scrutiny.

The breadth of this clause's protection, the importance (and vulnerability) of free speech, the need to ensure that state constitutional protections remain broader than federal protections, and the significant role played by nonprofit advocacy groups and the ballot initiative process all counsel in favor of applying the most stringent judicial scrutiny. *Cf. AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 257-58 ¶¶ 11-14 (2023) (stating these factors warranted stringent scrutiny). The

court below therefore erred in copying the "less rigorous standard [of] exacting scrutiny," from federal law. Op. ¶ 21.

When Arizona courts borrow a federal jurisprudential theory, they do so because it is "uniform and sound" and will lead to "predictability and stability." *Mixton*, 250 Ariz. at 288 ¶ 21 (citation omitted). But federal "exacting scrutiny" is the opposite: it's confusing, inconsistent, and poorly formulated. Some cases say it requires both that the government bear the burden and that the restriction be narrowly tailored—although it need not be the "least restrictive means." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021). It's unclear how something could be narrowly tailored *without* being the least restrictive means, since the test for narrowness is whether some other means would be less restrictive. *Cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 730 (1996) (finding a law "not narrowly tailored … since … there is no basis in the record establishing that [it] is the least restrictive means to accomplish [its] purpose."); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 128–130 (1989) (same). So, in other cases, the Court has said that exacting scrutiny *does* require the "least restrictive means." *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014).

In still other "exacting scrutiny" cases, the Court has said that the tailoring need *not* be narrow, only that there be "a 'substantial relation'" between the law and a "'sufficiently important' governmental interest," a formulation quite different than the standard formulas for any form of heightened scrutiny. *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (citation omitted). And yet other cases say that exacting scrutiny requires only that the state interest be unachievable by any "*significantly* less restrictive" means. *Janus v. AFSCME*, 585 U.S. 878, 894 (2018) (emphasis added). *How* significant remains unresolved. "[E]xacting scrutiny has gone from merely confusing to nearly unintelligible." Chemerinsky, *Tears of Scrutiny*, 57 Tulsa L. Rev. 341, 373 (2022).

For these reasons, federal judges have roundly criticized federal exacting scrutiny. Justices Blackmun, Stevens, Breyer, and Ginsburg (at least) expressed confusion over what it means. *See* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (citing their opinions). In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22 (2022), the Court refused to apply it at all. Calling it a "judge-empowering 'interest-balancing [method],'" the Court focused instead on history and tradition to determine what laws satisfy constitutional standards. Judge Newsom cited *Bruen* in a concurrence a month later to critique tiers-of-scrutiny analysis in speech cases. *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring). There are "so many standards, so many tests, so many factors," he wrote, that "it can all begin to feel a little, well, made up." *Id.*

2. Donations and anonymous speech are not "abuses."

Because Arizona's Constitution permits only one category of speech limitation—i.e., laws preventing or penalizing "abuses"—the proper inquiry is whether a challenged restriction prevents or penalizes an "abuse." In answering that question, this Court should apply the most stringent and precise inquiry—strict scrutiny. *Cf.* *AZ Petition Partners*, 255 Ariz. at 257 ¶ 12 ("the state must regulate in this area with great precision and an even hand … leaving little to nothing by way of subjectivity in enforcement.").

This Court presumes speech restrictions unconstitutional, *id.* at 258 ¶ 14, and requires the government to demonstrate *at a minimum* that (1) the potential harm of the speech in question is extremely[2] severe (i.e., there's a "compelling government

[2] To be "compelling," a government interest must be more than merely helpful or important; a compelling interest is something that "prevents a 'clear and present, grave and immediate' danger to public health, peace, and welfare," *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (citations

interest") and (2) that there's no way to prevent or punish that abuse that's less restrictive of legitimate speech ("narrow tailoring."). Because the restrictions at issue here focus on speech itself, *Stummer*'s admonition that courts must "more closely scrutinize" speech restrictions to ensure that they aim at preventing or penalizing "abuses" militates for greater protection here. 219 Ariz. at 144 ¶ 23.

But donating to nonprofits and speaking anonymously are not "abuses." They aren't unprotected speech, such as defamation, threats, obscenity, or any other recognized form of wrongful or punishable speech. Although the term "abuse" has not been precisely defined, Washington's Supreme Court declared in 1910 that speech is *not* an abuse if it is uttered "with good motives and for justifiable ends." *State v. Mays*, 107 P. 363, 364 (Wash. 1910).[3] Absent some unique proof of wrongdoing, therefore, **confidentially donating to a nonprofit, or supporting or opposing a ballot initiative, aren't "abuses" of speech.**

In fact, the framers of Arizona's Constitution regarded such activity as *protected* speech. *Cf. Pierce*, 158 N.W. at 698. They provided that the state *can* require a "general publicity" of "campaign contributions" to "committees and candidates *for public office*," Ariz. Const. art. VII § 16 (emphasis added)—which, by applying the *exclusio alterius* rule of statutory construction,[4] means that they did

---

omitted), or that is "indispensable to government existence or operation," *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 645 (Cal. 1994).

[3] Washington precedents are helpful because Arizona's "freely speak" clause is based on Washington's free speech provision. *See Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 355 (1989).

[4] The *exclusio alterius* rule holds that where the Constitution uses language that allows one thing but does not allow another thing, the authors of that language must have intended to *prohibit* the second thing. *See Sw. Iron & Steel Indus., Inc. v. State*, 123 Ariz. 78, 79 (1979). The court below rejected reliance on the rule, citing *Earhart v. Frohmiller*, 65 Ariz. 221, 225 (1947). But *Earhart* was concerned with the *misuse* of that rule in a way that would effectively require the legislature to show an "*express authorization* for … legislation." *Id.* at 224. That was a misapplication of the *exclusio alterius* rule because the state has a general police power, and need not show an express constitutional foundation for its acts. But *Earhart* acknowledged that it's

not allow the state to compel "publicity" of contributions and expenditures related to anything other than campaign committees and candidates "for public office." Speech supporting a ballot initiative or candidate is not a contribution to a campaign committee or candidate and therefore falls outside Article VII, § 16.[5] That also holds true for speech against (or "attack[ing]" or "oppos[ing]") a ballot initiative or candidate, which the Act also restricts. A.R.S. § 16-971(2)(a)(i), (ii), (iv)-(vi).[6] And *all* nonprofit organizations under 501(c)(3) of the federal tax code—including one of the nonprofit Plaintiffs here—are *already legally prohibited* from supporting candidates for public office; the other nonprofit (a 501(c)(4)) can only advocate for or against a candidate within boundaries set by the Internal Revenue Code. In short, Article VII § 16 does not permit a "general publicity" of the kind of activity in which these Petitioners engage.

Moreover, **the 1912 framers *expressly rejected* allowing the state to require disclosure for initiative campaigns.** At the Convention, Article VII, § 16, originated as Proposition 70, which would have allowed the legislature to "provid[e] for a general publicity . . . of all contributions of money . . . for the purpose of *influencing any . . . election*." *See* Goff, *The Records of the Arizona Constitutional Convention of 1910* at 64, 1179, 1385 (1991) (emphasis added). Proposition 70 would also have provided for a publicly accessible government list identifying "every person, firm, corporation, association, or committee" who made such a

---

not a misapplication of the rule to employ it in cases where legislative power is "restrained by the provisions of the Constitution," or where the state "is violating constitutional limitations." *Id.* (citations omitted). This case *does* involve such violations, so *Earhart*'s concerns about misusing the *exclusio alterius* rule are inapplicable. Moreover, the fact that the Constitutional Convention *expressly rejected* a proposal to allow the kind of disclosure mandate at issue here reinforces the *exclusio alterius* reading.

[5] If the Legislature can't do it, the voters can't. *See* Ariz. Const. art. XXII § 14.

[6] The Act even regulates speech that merely "refers to a clearly identified candidate," A.R.S. § 16-971(2)(a)((iii), which also falls outside Article VII, Section 16.

contribution. *Id*. at 1180. In other words, it would have done what the Act does now. (Actually, the Act goes even further). But the Convention *rejected* Proposition 70, and substituted the far more limited language of Article VII, § 16. *See id*. at 108, 116.

The provision they approved only lets the state mandate "publicity" of contributions and expenditures of "*campaign committees and candidates for public office*." Ballot initiatives, of course, are not "public offices." Yet this Act requires disclosure of information relating to contributions to, and expenditures of, nonprofit organizations, which support and oppose ballot initiatives. As for candidates or campaign committees for "public office," nonprofits are already legally prohibited from contributing to them. Yet the Act also applies to nonprofits that merely *refer to* candidates (without supporting or opposing them). Thus the Act contemplates exactly what the framers of Article VII, § 16, rejected—and goes far beyond what they allowed.

3. The Act is a content-based speech restriction that fails strict scrutiny.

A speech burden is content-based if it applies "because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In other words, "[if] an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it," it's content-based. *Id*. at 162.

Here, the Act is content-based because it only applies to the topic of political speech—specifically, speech that "advocates for or against the nomination, or election of a candidate"; "promotes, supports, attacks[,] or opposes" a candidate; "refers to a clearly identified candidate"; or "promotes, supports, attacks[,] or opposes … any state or local initiative or referendum" or "recall of a public officer." A.R.S. § 16-971(2). An enforcement officer would have to read the content of the speech in question to determine whether it's one of these things. The Act therefore

"regulates electioneering communications—indisputably a form of political speech." *Washington Post v. McManus*, 355 F. Supp.3d 272, 287 (D. Md. 2019). Further demonstrating the content-based nature of the speech regulation, the Act requires enforcers and regulated parties to determine whether the speech in question is "media" speech, which triggers the disclosure requirements.[7]

Just as the disclosure requirement in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995), was content-based, because it applied "only [to] those publications containing speech designed to influence the voters in an election need," so the Act is unconstitutionally content-based. And simply put, because the Act cannot satisfy the lower standard of exacting scrutiny, *infra*, it cannot satisfy strict scrutiny.

Additionally, the scheme flatly *bans* anonymous political speech—despite the fact that anonymous speech is constitutionally protected in Arizona. *Mixton*, 250 Ariz. at 298 ¶ 69.[8] The Act is therefore facially unconstitutional.

4. The Act also fails exacting scrutiny.

The Act also fails under federal-style exacting scrutiny, because it heavily burdens speech and associational rights and is insufficiently tailored. *See* Pet. at 11-17; COA Opening Br. at 26-32. The Court of Appeals erred when it upheld Prop 211's compelled disclosures of independent expenditures ("IEs") based on the government's purported interest in anti-corruption. Op. ¶¶ 20, 23-24, 28, 31-32. Simply put, the government's interest in preventing corruption cannot be used to compel IE disclosures. *Citizens United*, 558 U.S. at 357–58.

---

[7] They are further required to determine whether the cost to produce such "media" speech meets certain thresholds, making it apply to a particular category of media speech: electioneering communications of heightened interest.

[8] Anonymous speech is protected by the federal First Amendment, *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 108 ¶ 11 (App. 2007), and the Arizona Constitution protects speech more broadly than the First Amendment does. *Brush & Nib*, 247 Ariz. at 281 ¶ 45.

Additionally, the State's only remaining purported interest, "informing the electorate," is overbroad and not narrowly tailored. *See infra* § I.A.2. Prop 211 mandates disclosure of donors with virtually no connection to a covered person's "media spending," and, as a result, voters gain little if any information about a candidate or who is actually supporting them. Indeed, Prop 211 requires public disclosure of low-level intermediary donors who make charitable contributions to a 501(c)(3) even though these nonprofits are prohibited from supporting candidates, and even though the donors may never know about, much less intend to support, the message or viewpoint advanced by that organization. *See* *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1229, 1244 (10th Cir. 2023) (striking down similar language disclosing IE donors). The public learns virtually nothing from the public disclosure of such individuals.

5. The "informational interest" does not justify the Act, and is not applicable under the Arizona Constitution.

The "informational interest" theory is simply not contemplated by the Speak Freely Clause, since the only limitations on speech that the Clause considers legitimate are those relating to the prevention or punishment of "abuses" of speech. Speaking anonymously is not an abuse, *Mixton*, 250 Ariz. at 298 ¶ 69, and stripping people of their privacy as the price of supporting a particular policy position does not remedy an abuse.

Moreover, the Constitution expressly protects *privacy* in ways the federal Constitution does not. *See* Ariz. Const. art. II § 8. As discussed below (Section B), for the government to compel disclosure of information that a private citizen would legitimately prefer to keep confidential, simply to "inform" the public, necessarily and unconstitutionally disturbs that person's "private affairs." *Cf.* *Seeber v. Washington State Pub. Disclosure Comm'n*, 634 P.2d 303, 306 (Wash. 1981).

As noted above, while the Constitution contemplates a "general publicity"[9] of contributions to campaign committees or candidates for public office, this does *not* apply to *initiative* campaigns, which reinforces the point that the "informational interest" cannot warrant the Act's intrusions on speech and privacy.

Moreover, even if that weren't true, the "informational interest" does not apply in the context of ballot initiatives. The "informational interest" is one of only three state interests the U.S. Supreme Court has said will justify a disclosure mandate under the *federal* Constitution. (The others are preventing candidate corruption and preventing the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). These can't apply to ballot initiative campaigns, and are irrelevant here.) But the Court has never applied the "informational interest" theory to *initiative* campaigns. In fact, it has expressly declined to do so. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010). Nor has this Court ever done so.

There are good reasons for that: both the federal and state constitutions limit the degree to which the government can "inform" voters by stripping people of privacy rights. As *McIntyre* said, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." 514 U.S. at 348.

In *John Doe No. 1*, Justice Alito pointed out that the "informational interest" idea conflicts with "right[s] to privacy of belief and association," because there's no logical stopping point: if voters should be "informed" about who supports or opposes an initiative, then the state could also force speakers to "disclose all kinds of

[9] The use of the word "publicity" is significant. Publicity is the opposite of "private affairs." The fact that Article VII, Section 16, used the word "publicity" indicates that those things it does not expressly apply to—including financial support for initiative campaigns—remain "private affairs."

demographic information" such as their "race,[10] religion, political affiliation, sexual orientation, ethnic background, and interest group memberships." 561 U.S. at 207 (Alito, J., concurring). Such mandates would, of course, deter people from speaking or participating in policy discussions—i.e., chill speech.[11]

Mandatory disclosure can also be misleading. "Informing" voters may sound desirable, but *selectively* "informing" them, as the Act does, can actually manipulate them and distort the democratic process—which, as *Sampson v. Buescher*, 625 F.3d 1247, 1249, 1256-59 (10th Cir. 2010), explained, should focus on the *merits* of proposed initiatives, not *ad hominem* arguments about who funds what. In *Cook v. Gralike*, 531 U.S. 510 (2001), the state forced candidates to state prominently on the ballot whether they supported or opposed Congressional term limits. The U.S. Supreme Court found that this "disclosure" requirement distorted the democratic process: "by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen." *Id.* at 525 (cleaned up). *Accord, Anderson*, 375 U.S. at 402-03. Similarly, disclosure mandates can distract voters by focusing on *ad hominem* arguments about who funds which side of a campaign, instead of the merits of the proposed initiative. *See also Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (finding that mandatory disclosure provided information of "negligible" value and thus failed to help voters).

---

[10] This example might seem extreme, but in *Anderson v. Martin*, 375 U.S. 399 (1964), a Louisiana law that did just that: required candidates to state their race next to their names on the ballot, purportedly to "inform" voters. *Id*. at 403. The Court said the actual consequence was to "direct[] the citizen's attention to [one] single consideration," thereby "influenc[ing] the citizen to cast his ballot" a particular way. *Id.* at 402. That was unconstitutional.

[11] For a thorough discussion of why federal "informational interest" theory cannot apply here, see Plaintiffs/Appellants' Response to the City of Phoenix's Amicus Brief in the Court of Appeal at 4-17.

The chilling effect of disclosure mandates tends to outweigh any "informational" value they provide. This Court should decline to adopt this federal theory into Arizona speech jurisprudence.

6. The Act is unconstitutionally vague.

The Act is unconstitutionally vague because it infringes on free speech and association rights by not clearly defining what expressive activities fall under it. *See* Pet. at 20; COA Opening Br. at 34-39. The Court of Appeals upheld the definition statute of Prop 211—A.R.S. § 16-971(2)(a)—which defines "[c]ampaign media spending" to include every action performed *in conjunction with* actions comprising *campaign media spending*. No one knows what this means. It is unconstitutionally vague. *Wyoming Gun Owners*, 83 F.4th at 1237 (striking down similar disclosure language as vague).

7. The Act is overbroad.

The Act's lack of tailoring is categorical and overbroad because a substantial number of its applications would be unconstitutional in relation to the claimed governmental interest. *See* Pet. at 14-17; COA Opening Br. at 32-34. Specifically, Prop 211 applies to *all* activities "in **conjunction** with" campaign media spending (A.R.S. § 16-971(2)(a)(vii)), effectively encompassing every activity tangentially related to influencing an election. *See Silk v. Blodgett*, 1 CA-CV 22- 0506, 2023 WL 3591158, at *3 ¶ 15 n.1 (Ariz. App. May 23, 2023).

B. The Act is a facially unconstitutional intrusion into "private affairs."

The Constitution guarantees that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II § 8. This prohibits, *inter alia*, intrusions into a person's "financial dealings," "business records," "tax information," etc. *Mixton*, 250 Ariz. at 291-92 ¶¶ 35-36; *see also State v. Miles*, 156 P.3d 864, 867-89 ¶ 11 (Wash. 2007).

Forcing a person to place her name, address, phone number, occupation, and employer's identity on a publicly accessible government list if she donates over a certain dollar amount to a nonprofit that then speaks about a ballot initiative or a candidate is plainly an intrusion into her private affairs—an intrusion that puts her at risk of ostracism, violence, and other forms of retaliation. *See, e.g.,* *Bonta*, 594 U.S. at 604.

The court below rejected Petitioners' Private Affairs Clause argument on the theory that "donors who consent to dedicate their money to campaign communications acknowledge that, under the Act, their identities will be made public." Op. ¶ 65. But that's begging the question. By that logic, the government could intrude on a person's most intimate affairs by simply forcing her to sign an acknowledgement that the state is doing so! That can't be "authority of law." Donors may "acknowledge" that the state is violating their privacy rights, but they aren't *consenting* to it.

The court also asserted, by pure *ipse dixit,* that "[d]onors to organizations that receive money from private individuals to use in making public declarations on government policy positions can hardly be engaging in a 'private affair.'" *Id.* On the contrary, *Mixton*, "embrace[d] the principle of anonymous speech" with respect to public policy matters, "and recognize[d] its inestimable contribution to our liberty," specifically citing the anonymously written *Federalist Papers*, which were certainly "public declarations on government policy positions." 250 Ariz. at 298 ¶ 69. Anonymous *financial* support for political pamphlets was also commonplace at the founding,[12] and in 1912.[13] The court below simply offered *no* justification for

[12] Alexander Hamilton and Thomas Jefferson secretly financed partisan newspapers. Ferling, *Jefferson and Hamilton: The Rivalry that Forged a Nation* 221–22 (2013).
[13] Much of the funding for Arizona's female suffrage ballot initiative in 1912 was anonymously donated. *See* *Forty-Fourth Annual Report of the National American Woman Suffrage Association* 42 (1912).

its declaration that a person automatically waives her privacy rights when supporting a political position or nonprofit organization—and that conclusion cannot be reconciled with protections of privacy.

Washington's court of appeals recently provided a helpful explanation of how facial challenges work with respect to the Private Affairs Clause. In *Kitcheon v. City of Seattle*, No. 85583-2-I, 2024 WL 5040630 (Wash. App. Dec. 9, 2024) (unpublished), it found a city ordinance facially unconstitutional because it lacked guidelines that would "connect" the city's intrusions into private matters "to health and safety concerns." *Id.* at *13. It said an "indiscriminate and standardless" authorization to rifle through someone's personal belongings was facially unconstitutional. *Id.* "Lawful authority," of course, means "a valid warrant or warrant exception." *Id.* at *11.

Here, the Act forces people to make their names, addresses, phone numbers, and employer information public when they donate to nonprofits that support or oppose ballot initiatives, with no effort at tailoring to make sure such disclosure is connected to any risk of corruption, and without even showing that the disclosure of this information will actually inform voters. *Cf. Unsworth*, 556 F.3d at 1033. In fact, *even where a person may have tried to exercise her "opt out" option*, her information is still liable to disclosure. *See* A.R.S. § 16-972(B). The only exception the Act recognizes is where the victim can prove that "there is a reasonable probability that public knowledge of [her] identity would subject [her] or [her] family to a *serious* risk of *physical harm*." *Id.* § 16-973(F) (emphasis added).[14] Without rules to—at a minimum—tailor the disclosure mandate to the achievement

[14] Thus even *definitive* proof of a risk of vandalism, non-employment, or even a threat of "minor" physical violence ("serious" is not defined) would not satisfy the exemption.

of important public purposes, the Act's blanket anti-privacy rule is facially unconstitutional.

II. Dismissal of Petitioners' as-applied challenge was improper.

As described in the Petition (at 19),[15] Plaintiffs allege numerous instances of conduct that *Citizens United* and *Buckley* recognize as 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." *Citizens United*, 558 U.S. at 367 (cleaned up). Plaintiffs easily met the pleading standard for an as-applied chilled-speech claim.

But the lower court dismissed these allegations, and the evidence Petitioners offered to prove them, primarily because the threats and harassment were not directed to the nonprofit Plaintiffs' confidential donors. Op. ¶ 61 ("Not one incident of actual donor harassment was alleged."). It also shrugged off the evidence because the threats were not true "fighting words," *id.* ¶ 51, the reasons underlying the harassment were speculative, *id.* ¶ 57, and the lack of allegations related to harassment of publicly known donors to PACs the nonprofit Plaintiffs formed. *Id* ¶ 55.[16] But these aren't the standards. Instead, the Court of Appeals effectively introduced a new, unprecedentedly high bar for chilled-speech challenges.

Buckley said that evidence supporting a chilled-speech claim "may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *See* 424 U.S. at 74. "A pattern of threats or specific manifestations of public hostility may be sufficient." *Id.* Moreover, "[n]ew parties that have no history upon which to draw

[15] See also COA Opening Br. at 40-47.

[16] These PACs are not parties and are not mentioned in the pleading—which demonstrates how the Court of the Appeals and the trial court did not assume the truth of Plaintiffs' allegations, as is required, but improperly weighed the evidence instead.

may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.*

Here, the evidence fits squarely under *Buckley*. It relates primarily to harassment against the nonprofit Plaintiffs, *see* App. to COA Answering Brief, AAPP130, 133 ¶¶ 39, 52; APP192-93, but also includes evidence that groups taking positions on similar controversial matters have suffered harassment, *id.* The Amended Verified Complaint does not allege evidence of harassment of their confidential donors, including the individual Plaintiffs, because their confidentiality has so far shielded them from it. The Act, of course, strips that protection away. But in any event, the individual Plaintiffs are not required to make such allegations. *Buckley*, 424 U.S. at 74.

Courts have never required a plaintiff to prove that his own speech *specifically* was suppressed or inhibited by past, direct experience with harassment. If that were required, the government could "escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity," which would be "unjust." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Instead, a plaintiff only needs to show that the government's actions would deter *a person of ordinary firmness* from speaking. *Id.*[17]

This is "an objective standard," which asks *not* whether the plaintiff *actually* suffered retaliation or chose to self-censor, but whether a reasonable person *would*, self-censor, *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)[18]—or, similarly,

[17] *Accord, Poole v. Cnty. of Otero,* 271 F.3d 955, 960 (10th Cir. 2001); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002); *Thaddeus–X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (en banc); *Agosto–de–Feliciano v. Aponte–Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989); *Wray v. Greenburg*, 646 F. Supp.3d 1084, 1103-04 (D. Ariz. 2022).

[18] Because this is an objective standard, "an unusually determined plaintiff [who] persists in his protected activity" can still successfully challenge the constitutionality of government's actions on chilling grounds. *Mendocino Envtl.*, 192 F.3d at 1300. Thus the plaintiffs in *Bossardet v. Centurion Healthcare,* No. CV-21-00179-TUC-

whether the Act "might well result in fewer contributors willing to support [the organizations'] advocacy." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1279 (10th Cir. 2016).

That standard is easily met here. The Act broadly strips donors of their ability to donate confidentially to nonprofits that engage in issue advocacy or that communicate about ballot questions (even those who contributed as little as $2,500 in "original monies" over a two-year period). *See* A.R.S. § 16-972(D); *see also Bonta*, 594 U.S. at 617 (where the disclosure is not narrowly tailored to a proven and important government interest the as-applied plaintiff's burden is slight).[19]

Contrary to the decision below, plaintiffs in cases like these cannot be forced to prove that they themselves have actually suffered retaliation to prevail. That's partly because plaintiffs cannot predict the future. Political trends change over time, so what seems like an ordinary political opinion today might later become "politically incorrect" anathema, and incur retaliation and violence.

For example, in 2014, Brendan Eich, CEO of the software company Mozilla, was forced to resign when it was discovered that he had donated money to support a California ballot initiative banning same-sex marriages *six years* earlier. Newton, *Outfoxed: How Protests Forced Mozilla's CEO to Resign in 11 Days*, The Verge (Apr. 3, 2014). During the 1950s "Red Scare," some people suffered retaliation for having aided the U.S.S.R. a decade before (when it was America's wartime ally). Bernstein, *The Red Menace, Revisited*, 100 Nw. U. L. Rev. 1295, 1299 (2006). More recently, owners of Tesla products, some purchased years earlier, have suffered

---

RM, 2024 WL 4534618, at *39 (D. Ariz. Mar. 27, 2024); *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1054 (9th Cir. 2019); *Wray*, 646 F. Supp. 3d at 1104; and other cases prevailed on their chilled-speech claims even though they continued to speak.

[19] *See further Williams*, 815 F.3d at 1279 ("We would expect some prospective contributors to balk at producing their addresses or employment information. And … lost contributions might affect their ability to advocate.").

harassment and vandalism in retaliation for Elon Musk's political activities in 2025. Campa, *Tesla's Fall from Green Darling to Protest Target*, Los Angeles Times, Mar. 19, 2025, at A8.

Research indicates that these forms of retaliation are effective. A 2020 poll shows that Americans are increasingly likely to censor themselves out of fear of reprisals, and that between 20 and 30 percent of respondents would support firing a business executive who donates to a campaign with whom the respondent disagrees. Brown, *Is Giving to Biden or Trump Grounds for Getting Fired?*, Reason (Jul. 24, 2020).

These are additional reasons why courts don't require plaintiffs alleging a chilling effect to prove that they *specifically* suffered retaliation, or experienced it within any specific timeframe, or even that they were actually dissuaded from speaking. *See NRA v. City of L.A.*, 441 F. Supp.3d 915, 941 (C.D. Cal. 2019) (pleading must only show a plausible connection between government action and suppressive conduct and "[t]here is no requirement for a showing of actual suppression of protected speech"). Rather, the question is whether a person of *ordinary firmness* would hesitate to express herself under the circumstances. *Mendocino Envtl.*, 192 F.3d at 1300 (citation omitted).

The Court of Appeals' opinion never mentioned that the nonprofit Plaintiffs allege that confidentiality is *essential* for their donors, and that without it they will have fewer resources available to engage in issue advocacy. APP130-34 ¶¶ 37-38, 42-45, 50-51, 56-59. Likewise, the confidential-donor Plaintiffs allege that they support organizations that engage in issue advocacy, but will curtail their speech to avoid disclosure. APP135-36 ¶¶ 62-65, 67-71. Their pleading shows why those beliefs are reasonable; it alleges numerous instances of threats, harassment, and retaliation—experienced by the nonprofit Plaintiffs and others publicly engaged in hot-button policy issues of the day.

The Court of Appeals erred, therefore, in affirming the dismissal of Petitioners' as-applied free speech claim.

CONCLUSION

The Act fails textbook federal-style strict and exacting scrutiny, and it is unconstitutionally vague and overbroad. It also intrudes on private affairs, and violates the separation of powers. In answer to the Court's query regarding federal tiers of scrutiny, they are inappropriate under Arizona's Constitution, which is textually different and, because of that, more protective than its federal analog. Speaking anonymously is not an "abuse" of speech. Neither is donating to a political cause one believes in. When the government attempts to intrude upon protected speech, it must prove that the potential harm is severe and unpreventable in any other way. In effect, the Court should apply an analysis at least as rigorous as federal strict scrutiny to ensure that government restrictions on speech are addressing "abuses." The Act fails all these tests and is facially unconstitutional. Even if the Act is not, the lower court misapplied the as-applied analysis. Petitioners need not prove actual or imminent harm, only that disclosure risks future retaliation or harm—something they have shown, consistent with *Buckley*. The Court should also reverse because the Act violates the Private Affairs Clause and the separation of powers.

The judgment should be *reversed*.

Respectfully submitted this 10th day of June 2025 by:

/s/ *Andrew Gould*
Andrew Gould (013234)
Brennan A.R. Bowen (036639)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

/s/ *Scott Day Freeman*
Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

IN THE SUPREME COURT
STATE OF ARIZONA

CENTER FOR ARIZONA POLICY, INC., et al., Plaintiffs/Appellants, vs. ARIZONA SECRETARY OF STATE, et al., Defendants/Appellees, ARIZONA ATTORNEY GENERAL, et al., Intervenors-Defendants/Appellees.	Arizona Supreme Court Case No. CV-24-0295-PR Arizona Court of Appeals Case No. 1 CA-CV 24-0272 A Maricopa County Superior Court Case No. CV2022-016564

CERTIFICATE OF COMPLIANCE

Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Andrew Gould (013234)
Brennan A.R. Bowen (036639)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2555 East Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Plaintiffs/Appellants

Pursuant to the Court's Order dated May 21, 2025, I certify that the body of the attached Plaintiffs/Appellants' Supplemental Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and does not exceed 20 pages, excluding table of contents and table of authorities.

Respectfully submitted this 10th day of June 2025 by:

/s/ *Scott Day Freeman*
Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

Andrew Gould (013234)
Brennan A.R. Bowen (036639)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

IN THE SUPREME COURT
STATE OF ARIZONA

CENTER FOR ARIZONA POLICY, INC., et al., Plaintiffs/Appellants, vs. ARIZONA SECRETARY OF STATE, et al., Defendants/Appellees, ARIZONA ATTORNEY GENERAL, et al., Intervenors-Defendants/Appellees.	Arizona Supreme Court Case No. CV-24-0295-PR Arizona Court of Appeals Case No. 1 CA-CV 24-0272 A Maricopa County Superior Court Case No. CV2022-016564

CERTIFICATE OF SERVICE

Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Andrew Gould (013234)
Brennan A.R. Bowen (036639)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2555 East Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Plaintiffs/Appellants

The undersigned certifies that on June 10, 2025, she caused the attached Plaintiff/Appellants' Supplemental Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

Mary R. O'Grady
Eric M. Fraser
Allie Karpurk
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
mogrady@omlaw.com efraser@omlaw.com akarpurk@omlaw.com
Attorneys for Defendant/Appellee
Arizona Citizens Clean Elections Commission

Craig A. Morgan
Shayna Stuart
TAFT STETTINIUS & HOLLISTER LLP
2555 East Camelback Road, Suite 1050
Phoenix, Arizona 85016
cmorgan@taftlaw.com
sstuart@taftlaw.com
Attorneys for Defendant/Appellee
Arizona Secretary of State Adrian Fontes

Daniel J. Adelman
Chanele N. Reyes
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
352 East Camelback Road, Suite 200
Phoenix, Arizona 850040
danny@aclpi.org
chanele@aclpi.org

Tara Malloy
Elizabeth D. Shimek
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
dkolker@campaignlegalcenter.org
tmalloy@campaignlegalcenter.org
eshimek@campaignlegalcenter.org
Attorneys for Intervenor-Defendant/Appellee
Voters' Right to Know

Kris Mayes
ATTORNEY GENERAL
Alexander W. Samuels
Nathan Arrowsmith
Kathryn E. Boughton
2005 North Central Avenue
Phoenix, Arizona 85004
Alexander.samuels@azag.gov
Nathan.arrowsmith@azag.gov
Kathryn.Boughton@azag.gov
Attorneys for Intervenor-Defendant/Appellee
Arizona Attorney General Kris Mayes

Nate Curtisi
ARIZONA CHAMBER OF COMMERCE AND INDUSTRY
100 N. 7th Avenue, Suite 120
Phoenix, Arizona 85007
ncurtisi@azchamber.com
Attorney for Amicus Curiae
Arizona Chamber of Commerce and Industry

Kory A. Langhofer
Thomas J. Basile
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
kory@statecraftlaw.com
tom@statecraftlaw.com
Attorney for Amicus Curiae Arizona Women of Action

Dominic E. Draye
Derek Shaffer
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 800
Phoenix, Arizona 85016
drayed@gtlaw.com
Attorneys for Amici Curiae Americans for Prosperity and Americans for Prosperity Foundation

Brett W. Johnson
Tracy Olson
Ryan P. Hogan
Charlene A. Warner
SNELL & WILMER L.L.P.
One East Washington Street, Suite 2700
Phoenix, Arizona 85004-2202
bwjohnson@swlaw.com
tolson@swlaw.com
rhogan@swlaw.com
cwarner@swlaw.com
Attorneys for Amici Curiae Ben Toma and Warren Petersen

Deryck Lavelle
Dustin S. Cammack
OFFICE OF THE PHOENIX CITY ATTORNEY
200 West Washington, Suite 1300
Phoenix, Arizona 85003-1611
law.civil.minute.entries@phoenix.gov
Attorneys for Amicus City of Phoenix

/s/ *Kris Schlott*
Kris Schlott, Paralegal