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, vs. ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants/Appellees, ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC, Intervenor-Defendants-Appellees.	Arizona Court of Appeals Case No. CA-CV 24-0272 Maricopa County Superior Court Case No. CV2022-016564

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

"Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The ability to speak anonymously—and thereby express a viewpoint without fear of reprisal—is rooted in our constitutional system of government. Without the work of the pseudonymous authors of the *Federalist Papers*, our nation may have never adopted the U.S. Constitution, nor codified an individual's right to freedom of speech.

Flouting this tradition, in November 2022, special interest groups successfully peddled Proposition 211, the so-called "Voters' Right to Know Act" ("Prop 211" or the "Act"), which deprives people of the right to this anonymity and violates constitutional protections for speech and privacy. Prop 211 is an intrusive ballot initiative that forces parties engaged in "Campaign Media Spending" to disclose qualifying donors—or the organization's top three donors, regardless of whether they otherwise qualify—with only illusory exceptions for qualifying donors to avoid compelled disclosure of their name, mailing address, occupation, and employer. Compounding the issue, Prop 211 gave the Clean Elections Commission (the "Commission") extremely broad executive,

legislative, and judicial powers to enforce the Act. These expansive powers are devoid of any oversight by the People or elected officials.

Specifically, Prop 211 compels organizations that engage in certain public communications—whether pure issue advocacy or discussions regarding the election of a candidate—to disclose the identities of "original sources" of contributions (whether monetary or in-kind) used to fund those communications. The Act establishes a complex set of rules that include vague terms and definitions, onerous notice requirements, different thresholds for money and other contributions, and arbitrary carveouts for unions and newspapers. *See* A.R.S. §§ 16-971 through -979.

Consequently, donors to political organizations and causes, who have historically maintained their privacy and avoided retaliation for their political speech and expression, are now confronted with a dilemma. These donors can (1) continue to donate, sacrifice their anonymity if Prop 211's low thresholds are exceeded, and face retaliation from political opponents; (2) limit their donations; or (3) "opt out" their donations from campaign activities to maintain their privacy, avoid retaliation, and thereby render themselves incapable of

expressing their views and advancing the political causes they would otherwise support. But in reality, Arizona donors only have two options because the third, "opt-out" option prevents donors from expressing their views and still exposes donors to the possibility of public disclosure. Prop 211 mandates disclosure of an organization's top three donors even if the donors "opted out" their donations from going toward campaign activities. Thus, regardless of the path selected, donors will be irreparably harmed by Prop 211.

Prop 211's effect, therefore, is to chill speech and silence individuals and organizations seeking to engage in protected political speech. This government action violates Plaintiffs' rights and all Arizonans' rights to "freely speak" under the Arizona Constitution's broad free speech guarantee. *See* Ariz. Const. art. II, § 6. It also violates their constitutionally guaranteed right to maintain their "private affairs," *id.* art. II, § 8, and their right to a system of government founded upon the principle of separation of powers, *id.* art III.

Despite Prop 211's flagrant constitutional violations, the trial court dismissed Plaintiffs' facial and as-applied constitutional

challenges. The trial court also denied Plaintiffs' then-pending motions for preliminary injunctions, without specifying any basis for dismissal.

Worse still, the trial court dismissed Plaintiffs' as-applied challenge despite Plaintiffs proffering declarations and transcripts evidencing the real possibility of threats they faced under Prop 211's disclosure regime. Instead of assuming the truth of these factual allegations and indulging all reasonable inferences—as is required at the motion-to-dismiss stage—the trial court discounted Plaintiffs' allegations and evidence and dismissed Plaintiffs' claims.

Nonetheless, Plaintiffs have adequately stated claims for which relief may be granted and have demonstrated a strong likelihood of success on their preliminary injunction requests. Consequently, Plaintiffs ask this Court to (1) vacate the trial court's dismissal of their claims and denial of their preliminary injunction motions, and (2) remand with an order to enter a preliminary injunction while the case proceeds to trial or summary judgement.

STATEMENT OF THE CASE AND FACTS

I. PROP 211'S COMPELLED DISCLOSURE REGIME.

The Act requires "Covered Persons," *i.e.*, a person or entity who spends more than $50,000 on "Campaign Media Spending" in a "statewide campaign" (or $25,000 for all other campaigns), to publicly disclose their top three donors, as well as all other donors who donated more than $5,000 towards the so-called Campaign Media Spending. *See* A.R.S. § 16-971, *et. seq*. Prop 211 defines "Campaign Media Spending" as any "Public Communication" that "expressly advocates for or against the nomination[] or election of a candidate"; "promotes, supports, attacks or opposes a Candidate within six months preceding an election involving that candidate"; "refers to a clearly identified Candidate within ninety days before a primary election"; and "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum." *Id*. § 16-971(2).

In essence, the Act broadly defines Campaign Media Spending as a public communication about *anything* that will be on the ballot during an election cycle. This even includes "*[r]esearch, design*, production, polling, *data analytics*, mailing or social media list acquisition or *any*

other activity conducted in preparation for or in conjunction with any of the activities described [above]." *Id.* § 16-971(2)(vii) (emphasis added). This is astonishingly broad.

Within this context, "Covered Persons" expending more than $50,000 on anything within this extremely broad category of (constitutionally protected speech) activities must disclose their top three donors, and all other donors who donated more than $5,000, to the Secretary of State, who in turn, releases those donors' personal information to the public. *See id.* §§ 16-973(A); -971(10); -974(C). That information includes the donors' name, mailing address, occupation, and employer. *Id.* § 16-971(10).

Although the Act allows a donor to "opt out" of having his money used for campaign media spending, the donor still risks having his personal information disclosed. *See id.* § 16-972(B). This is the case because Section 16-974(C) does *not* carve out an exception for donors who "opts out." Thus, a person who donates to an organization and opts out of campaign media spending could nonetheless be disclosed if (1) that organization spent more than $50,000 on campaign media spending, and (2) that person is one of the top three donors to the

organization. The only exception to disclosure is if the original source of the donation can demonstrate that "there is 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." *Id.* § 16-973(F) (emphasis added).

To enforce Prop 211, the Act grants the Commission extensive power, including authority 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 [Prop 211]." *Id.* § 16–974(A).

In other words, the Commission sets the rules regarding Prop 211 (legislative), enforces those rules (executive), and judges the interpretation of those rules and parties' behavior regarding those rules (judicial). This plenary power comes without any oversight mechanisms because the Commission is "not subject to *any* other executive or legislative governmental body or official"—and because any "rules adopted pursuant to this Chapter are *exempt* from Title 41, Chapters 6 and 6.1." *Id.* § 16-974(D) (emphasis added).

II. PLAINTIFFS-APPELLANTS.

Plaintiffs consist of two private organizations, the Center for Arizona Policy ("CAP") and the Arizona Free Enterprise Club ("Free Enterprise"), as well as individual Plaintiffs Doe I and Doe II.

The Center for Arizona Policy ("CAP") is a nonprofit, tax-exempt, charitable organization that is organized under Internal Revenue Code § 501(c)(3). *See* 6/21/2023 Ruling, IR.116 at ep.5[1]. CAP's mission is "to promote and defend foundational principles of life, marriage and family, and religious freedom." *Id.*

The Arizona Free Enterprise Club ("Free Enterprise") is a nonprofit, tax-exempt organization operating as an Internal Revenue Code 501(c)(4) organization. *Id.* Free Enterprise promotes the social welfare of the community by advocating for principles of free enterprise and pro-growth, limited government policies. *Id.*

Both CAP and Free Enterprise—as the trial court recognized—would be considered (for recent election cycles) "Covered Persons" with donors who, in turn, would be subject to disclosure under the Act. *Id.* Thus, the Act has forced both CAP and Free Enterprise to self-censor

[1] Electronic page number is referred to as ep. ##.

their speech. And both CAP and Free Enterprise face the real possibility of retaliation, threats, violence, loss of economic opportunities, and diminished social standing as a result of Prop 211's compelled disclosure requirements. *Id.* at ep.8–11.

Plaintiffs Doe I and Doe II support CAP's and Free Enterprises' missions and campaign-related speech but do not want their identities disclosed. *Id.* at ep.5. Like CAP and Free Enterprise, these donors have well-founded concerns that they will be harassed, retaliated against or otherwise subjected to economic or physical harm as a result of their names, mailing addresses, occupations, and employers being publicly disclosed under Prop 211. *Id.* As a result, they will curtail or eliminate their donations to covered organizations, such as CAP and Free Enterprise. *Id.*

III. PROCEDURAL POSTURE.

On December 15, 2022, Plaintiffs filed a verified complaint arguing, *inter alia*, that Prop 211 was both facially unconstitutional and unconstitutional as applied to them under the Arizona Constitution's Free Speech Clause. The Defendants moved to dismiss under Ariz. R.

Civ. P. 12(b)(6). After oral argument, the trial court granted the motion to dismiss but allowed Plaintiffs to file an amended complaint.[2]

Plaintiffs filed their amended verified complaint and again moved for a preliminary injunction. Despite declarations from all Plaintiffs describing the harms they each already faced because of their views, their fears going forward, and—most importantly—the fear of their respective donors if their identities are disclosed, Defendants again moved to dismiss. The trial court granted the second motion to dismiss and denied Plaintiffs' motion for a preliminary injunction.

Plaintiffs timely appealed.

[2] The trial court incorrectly believed that Plaintiffs did not assert an as-applied challenge in their original Complaint, so it granted leave for Plaintiffs to expressly do so in their amended complaint.

STATEMENT OF THE ISSUES

(1) Did the trial court err in dismissing Plaintiffs' *facial* free speech challenge to Prop 211's compelled disclosure regime under the Arizona Constitution?

(2) Did the trial court err in dismissing Plaintiffs' *as-applied* free speech challenge to Prop 211's compelled disclosure regime under the Arizona Constitution?

(3) Did the trial court err in dismissing Plaintiffs' *facial* private affairs challenge to Prop 211's compelled disclosure regime under the Arizona Constitution?

(4) Did the trial court err in denying Plaintiffs' preliminary injunction motions?

(5) Did the trial court err in dismissing Plaintiffs' *facial* separations of powers challenge to Prop 211's compelled disclosure regime under the Arizona Constitution?

STANDARD OF REVIEW

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶7 (2012). And "[d]ismissal is appropriate under Rule 12(b)(6) only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Id.* at 356 ¶8 (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶4 (1998)) (cleaned up).

Moreover, "Arizona follows a notice pleading standard." *Id.* ¶9 (quoting *Cullen v. Auto–Owners Ins. Co.*, 218 Ariz. 417, 419 ¶6 (2008)). To determine whether a "complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Id.*

ARGUMENT

The trial court's rulings warrant reversal. *First*, the trial court misapplied First Amendment jurisprudence and improperly dismissed Plaintiffs' facial challenges. The trial court failed to recognize that the Arizona Free Speech Clause features broader protections than the First Amendment and further prohibits Prop 211's compelled disclosure

regime. The trial court also failed to give effect to the Arizona Constitution's Private Affairs Clause.

Second, the trial court misapplied the motion-to-dismiss standard when it improvidently weighed the evidence, failed to "assume the truth" of Plaintiffs' allegations, and ultimately dismissed Plaintiffs' claims. Plaintiffs satisfied—and exceeded—the pleading requirements by attaching declarations[3] to their amended complaint. Yet the trial court incorrectly acted by rejecting Plaintiffs' well-pleaded facts and improperly dismissing the claims.

Third, the trial court erred by denying Plaintiffs' requested preliminary injunctions without any basis. Plaintiffs established—for both their facial and as-applied challenges—that they were likely to succeed on the merits of their constitutional challenges and, as a matter of law, that they satisfied the remaining factors. Nonetheless, the trial court reversibly erred in denying the preliminary injunction motions without analysis or legally sufficient justification.

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[3] Plaintiffs' deposition testimony was also before the Court during the consolidated Motion to Dismiss and Preliminary Injunction Hearing, and the Court considered both the declaration and the deposition transcripts as evidenced by the Court February 29 Ruling. *See generally* IR. 199.

I. THE ACT'S DISCLOSURE REQUIREMENTS FACIALLY VIOLATE THE FREE SPEECH GUARANTEES OF THE ARIZONA CONSTITUTION.

Arizona's Constitution provides broad free speech protections: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6. This includes "greater speech protection" than that provided by the federal First Amendment. *Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 282 ¶46 (2019). And it "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 282 ¶48. Section 5 further provides that "[t]he right … of the people peaceably to assemble for the common good, shall never be abridged." Ariz. Const. art. II, § 5. Both rights—and the burdening of them—are directly implicated by the Act, which should accordingly face strict scrutiny.

A. Facial Challenge Standards Are Lower In The Free Speech Context.

Ordinarily, "[t]o succeed on a facial challenge, the challenger must establish that no set of circumstances exists under which the statute would be valid." *Stanwitz v. Reagan*, 245 Ariz. 344, 349 ¶19 (2018) (cleaned up) (citation omitted). Thus, in the usual circumstance, "[t]he fact that the statute might operate unconstitutionally under some

conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* (cleaned up) (citation omitted).

However, this case presents free speech challenges that do not reflect the usual circumstances. "In the First Amendment context," courts recognize "'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*, 594 U.S. 595, 615 (2021) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)) (internal quotation marks omitted); *see also AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258 ¶ ¶17–20 (2023) ("[I]n a typical facial challenge, we require the challenger to demonstrate that under no set of circumstances can the law be enforced in a constitutional manner . . . But that requirement may be relaxed in the First Amendment context because the law's mere existence, and the penalties for violating it, can exert a 'chilling' effect on the exercise of First Amendment rights.").

Prop 211 cannot survive this second type of facial challenge.

B. The Disclosure Requirements Cannot Survive The Appropriate Level Of Judicial Review In Arizona: Strict Scrutiny.

1. Arizona's Broader Free Speech Clause Mandates Strict Scrutiny Review.

The Arizona Free Speech Clause is more protective than its federal counterpart and, consequently, this Court should apply strict scrutiny to content-based speech restrictions, like the one at issue here.

Federal law and Arizona law both recognize that courts subject content-based laws to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); *Brush & Nib*, 247 Ariz. 292 ¶96 ("Content-based laws must satisfy strict scrutiny.") (citing *Reed*, 576 U.S. at 171). For example, laws that burden political speech (and thus are based on the content of the speech) are subject to strict scrutiny. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). The government must then show that the requirement is "the least restrictive means of achieving a compelling state interest." *Bonta*, 594 U.S. at 607 (citation omitted).

However, the U.S. Supreme Court has carved out a narrow exception to that rule for the First Amendment. Even though compelled disclosure laws in the electoral context "burden the ability to speak" on

political matters, the Supreme Court nonetheless subjects such requirements to a lower "exacting scrutiny" test, which evaluates whether a substantial relationship exists between the disclosure requirement and a sufficiently important governmental interest. *Citizens United*, 558 U.S. at 366–67. Plaintiffs do not, therefore, dispute that for *federal* "First Amendment challenges to disclosure requirements in the electoral context[,]" a lesser form of scrutiny applies. *Doe v. Reed*, 561 U.S. 186, 196 (2010).[4]

[4] Justice Thomas has repeatedly and cogently criticized the abnormal disclosure-requirement carveout. *See Bonta*, 594 U.S. at 619 (Thomas, J., concurring) ("[T]he bulk of our precedents…require application of strict scrutiny to laws that compel disclosure of protected First Amendment association.") (quotation marks omitted). And commentators have noted the unwieldiness as well. *See, e.g.*, R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207, 232 (2016) ("Exacting scrutiny is, however, largely empty. There is in particular a lack of internal test structure, of internal differentiation, of mediating elements, of internal cues as to application, and of substantive guiding or directive principles."). Such criticism is no surprise; strict scrutiny is the more natural of the two options for laws targeting political speech. Indeed, the Supreme Court itself has apparently recognized this need, bulking up exacting scrutiny recently in order to protect First Amendment rights, though stopping short of overturning *Buckley* on exacting scrutiny. *See Bonta*, 594 U.S. at 634 (Sotomayor, J., dissenting) ("The Court now departs from this nuanced approach in favor of a 'one size fits all' test. Regardless of whether there is any risk of public disclosure, and no matter if the burdens on

Nonetheless, the Arizona Supreme Court has never applied the "exacting scrutiny" standard of review to a compelled disclosure requirement.[5] Rather, it has followed traditional understandings of the application of strict scrutiny to content-based laws. *See Brush & Nib*, 247 Ariz. 292 ¶96. Indeed, it would be illogical for this Court to apply the First Amendment's *lower* "exacting scrutiny" standard, because the Arizona Free Speech Clause is *more* protective than its federal counterpart. Since Arizona courts have long recognized that Arizona's Free Speech Clause contains "greater speech protection" it warrants a *higher* standard of review. *Brush & Nib*, 247 Ariz. at 282 ¶46. That higher standard of review is strict scrutiny.

Prop 211 burdens political speech by regulating speech on the basis of election-related content. The burdened speech includes the type

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associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored.").

[5] A previous panel of this Court once employed "exacting scrutiny" when analyzing Arizona disclosure requirements, pulling from the federal standard, *Comm. for Justice & Fairness (CJF) v. Ariz. Sec'y of State's Office*, 235 Ariz. 347, 355–66 ¶¶32–35 (App. 2014), but that panel made pains to note that that plaintiff "provide[d] no argument that our analysis of the issues presented here under the Arizona Constitution should differ from that used by courts under the United States Constitution." *Id.* at 103 n.15. Here, to the contrary, Plaintiffs do argue that the analysis should differ.

of 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 for referendum" or "recall of a public officer." A.R.S. § 16-971(2). The Act therefore "regulates electioneering communications—indisputably a form of political speech." *See Wash. Post v. McManus*, 355 F. Supp. 3d 272, 287 (D. Md. 2019) (citing *Wis. Right to Life*, 551 U.S. at 481).

Further demonstrating the content-based nature of the speech regulation, the Act requires both the regulators and the regulated parties to determine whether the speech in question is "media" speech, which in turn triggers the disclosure requirements. Additionally, the scheme flatly bans anonymous political speech.

This is analogous to the content-based, compelled disclosure statute in *McIntyre*, which compelled disclosure of the names of pamphlet distributors for "only those publications containing speech designed to influence the voters in an election need." 514 U.S. at 345; *see also Brush & Nib Studio*, 247 Ariz. at 292 ¶100 (citing *Riley*, 487 U.S. at 795) ("When a facially content-neutral law is applied by the

government to compel speech, it operates as a content-based law.") Here, only the campaign media speech "designed to influence voters in an election" is subject to the Act's disclosure requirements. Thus, Prop 211 is a content-based speech restriction subject to strict-scrutiny review.

However, the trial court failed to apply strict scrutiny to Prop 211 and erred by grounding its analysis in inapposite precedent. In applying "exacting scrutiny" review, the trial court opined, "Arizona's framers recognized at statehood the importance of information concerning the sources of money in *campaigns*." 6/21/2023 Ruling, IR.116 at ep.12–13 (emphasis added). The trial court emphasized that early Arizona laws regulated money in *campaigns* and stated that this fact must support the constitutionality of compelled disclosure requirements like those in Prop 211. Yet, this logic and historical analysis are fatally flawed.

The trial court failed to recognize that Arizona laws historically compelled disclosure requirements for donor contributions to *campaigns* and *candidates*—not for money contributed to *non-candidates* and *non-campaign* organizations. Prop 211 involves the latter. Indeed, as a 501(c)(3) nonprofit organization, Plaintiff CAP is flatly prohibited under

federal law to engage in *any* campaign activity whatsoever, and does not do so.

Thus, contrary to the trial court's anachronistic analysis, Prop 211 introduces highly restrictive political speech regulations that lack any historical predecessors or analogues in Arizona history.

The trial court's flawed historical and legal analysis further undermines its application of the "exacting scrutiny" standard. In fact, the core purpose of federal campaign spending laws is preventing corruption by the *campaigns* and *candidates*. *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976). This rationale, however, does not hold for donors who are donating to 501(c)(3) nonprofits, like CAP, or to PACs. Indeed, the reason PACs are allowed to spend more than candidates and campaigns is that the corruption concerns are lessened, and the free speech concerns are heightened. *Id.* at 47. This distinction between the interests (and spending limits) of PACs and candidates and campaigns is enforced by the strict prohibition on PACs coordinating with campaigns. *Id.*

What's more, with issue advocacy by nonprofits, like CAP, there is no possibility of corruption or the appearance of corruption because

there are no contributions to candidates. The corruption-interest-based limitation on donating to candidates does not exist for donations to PACs that, by law, cannot coordinate with candidates and for donations to 501(c)(3) nonprofits, like CAP, that cannot donate to candidates. As the donor's proximity to the candidate wanes, the free speech concerns become more important.

Given these distinctions—and the Arizona Free Speech Clause's broader and more protective coverage—strict scrutiny is the proper standard of a review in this case. With federal First Amendment jurisprudence marred by inconsistency and confusion, Arizona courts should apply the more consistent and speech-protective approach aligned with the Arizona Constitution's text and intent. In sum, content-based speech restrictions warrant strict scrutiny review.

2. The Act's disclosure requirements fail strict scrutiny.

Plaintiffs acknowledge the state's general interests in having an informed electorate and avoiding corruption. "But the precise contours of that interest are important—'[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.'" *No on E v. Chiu*, 85 F.4th 493, 526–27 (9th Cir. 2023) (VanDyke, J., dissenting from denial of rehearing en banc) (quoting *McIntyre*, 514 U.S. at 348). For example, to actually justify a burden on First Amendment rights, disclosure requirements must actually "help[] voters understand who is speaking in a political advertisement." *Id.*

The two main elements of the Act's disclosure requirements are not tailored or targeted to any purported interests in informing voters, preventing fraud, or enforcing laws.

First, the required disclosure of an entity's top-three donors is arbitrary and incompatible with the state's purported interests. The requirement compels disclosure of "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." A.R.S. § 16-974(C). This disclosure requirement also applies to donors who "opted out" from campaign media spending under Section 16-972(B).

Consequently, this disclosure requirement could compel an entity to produce the donor information about three donors who have not contributed a single dollar to campaign media spending. This, obviously, is not tailored to the goal of informing voters about who is

funding *electioneering communications*. Further, a less restrictive means is readily apparent: require disclosure of the top donors who earmarked funds for electioneering communications. The top-three donor disclosure requirement fails under strict scrutiny review.

Second, and similarly, the disclosure of *all* donors over the $5,000 threshold who give to an organization that later spends in campaign media is overbroad. It is true that some courts have found laws requiring disclosure of donors who *specifically earmarked* donations for electioneering communications tailored to informational interests. *See, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 797–98 (10th Cir. 2016) (finding disclosure requirements narrowly tailored under *Citizens United* in part because the regulated parties needed "only disclose those donors who have specifically earmarked their contributions for electioneering purposes"). It does stand to reason, as the U.S. Supreme Court held, that compelled disclosure of donors who expressly earmarked funds for "electioneering communications" is a relatively close fit with the public's "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369 (finding BCRA's Section 201, which requires disclosure statements from

persons spending on electioneering communications, tailored to informational interests).

But here, the Act's scheme is dispositively different from those in *Indep. Inst.* and *Citizens United*. The Act requires disclosure of donors who *did not* earmark funds for campaign media spending—and may never have intended that their donations be used for campaign media spending—but whose funds were *later used* by an organization for campaign media spending (including for the mere *preparation* of advertisements). In other words, the Act does not "help[] voters understand who is speaking in a political advertisement." *No on E*, 85 F.4th at 526–27 (VanDyke, J., dissenting from denial of rehearing en banc). This fact alone—that the Act could have but did not target electioneering earmarking—dooms the Act's disclosure requirements under strict scrutiny's least-restrictive-means requirement.

Third, the spending thresholds render the Act simultaneously arbitrary and improperly tailored. The Act compels disclosure of the name, mailing address, occupation, and employer information of all donors who give more than $5,000 over a two-year cycle to an organization that spends more than $50,000 in campaign media

spending that cycle. A.R.S. § 16-973(A)(6). The Act is not narrowly tailored because it does not "aim[] squarely at the conduct most likely to undermine" the purported government interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). If the interest were to inform voters of who spends on elections, the $5,000 threshold fails to inform voters of those who fund campaign media spending under $5,000. The same logic applies to the $50,000 threshold for the organization itself—it is unclear why voters have no interest in the donors of organizations that spend $49,999 on electioneering communications. The monetary discrimination, likewise, is not aimed directly at anticorruption, anti-fraud, or investigation interests, because those interests do not just apply to organizations and donors over the respective thresholds. It follows that the untailored thresholds fail the least-restrictive-means test *a fortiori*.

C. The Act's Disclosure Requirements Also Fail The Stringent Requirements Of Exacting Scrutiny.

Were this Court to follow the federal approach of exacting scrutiny, the Act's restrictions still must fall. Exacting scrutiny "has real teeth" and "require[s] narrow tailoring for every single disclosure regime." *Bonta*, 594 U.S. at 636 (Alito, J., concurring); *id.* at 2399

(Sotomayor, J., dissenting). Courts require "the strength of the governmental interest [to] reflect the seriousness of the actual burden on First Amendment rights[]," because of the "deterrent effect on the exercise of First Amendment rights that arises as an inevitable result of the government's conduct in requiring disclosure." *Id.* at 607 (majority op.) (citing *Buckley*, 424 U.S. at 65) (quotation marks omitted).

"A substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored"—rather, the regime must still be truly narrowly tailored. *Id.* at 609. Narrowness is "crucial where First Amendment activity is chilled," because "First Amendment freedoms need breathing space to survive." *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

In *Bonta*, the Supreme Court identified a "dramatic mismatch" between California's disclosure regime and the alleged interest in investigating fraud, because the regime required the disclosure of nearly all charities' top donors, their names, contributions, and addresses, even though there was no evidence that such intrusive and overly inclusive data-gathering helped the government's anti-fraud investigation and enforcement. *Id.* at 612. The Court concluded that the

underlying state interest was "administrative convenience," *i.e.*, having "every charity's information close at hand, just in case." *Id.* at 614–15. The heavy burden imposed on speakers was so disproportionate to that burden that it failed First Amendment review. *Id.*

Here, the Act also fails to satisfy exacting scrutiny review because it heavily burdens free speech and is insufficiently tailored. *First*, it seriously burdens constitutional speech and association rights. *Buckley*, 424 U.S. at 64; *see also No on E*, 85 F.4th at 518 (VanDyke, J., dissenting from denial of rehearing on banc) ("Compelled disclosure of anonymous associations and compelled formation of association are both uncomfortable reminders of the ugly history of majoritarian groups forcing the disclosure of culturally unpopular minority associations," and place "burdens [on] the associational rights of political speakers and their contributors").

The right to "freely associate" has long been recognized in American courts, which have observed that "privacy in group association may . . . be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (hereafter *Alabama*).

Compelled disclosure requirements may "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations." *Id*. at 463. Donors are driven away and experience "widespread burden[s]" on their "associational rights" when they face, for example, threats, protests, stalking, and violence as a result of supporting groups they agree with. *Bonta*, 141 S. Ct. at 617–18.

Here, Plaintiffs have adduced facts of numerous instances and types of protests and chilling fears they experience. Cathi Herrod, testifying about the work of Plaintiff CAP, recounted CAP donors' fears of harassment, retaliation, reputational harm, and physical harm if their names were ever exposed. Herrod Decl. 1 ¶18, IR.3 at ep.23–24. She and CAP directly received threatening phone calls, emails, and social media messages, *e.g.*, "I will make it my personal mission to bury every single one of you." *Id.* at ep.24 ¶20; Herrod Decl. 2 ¶18, IR.121, Ex. 1 (under seal). The FBI was also involved due to the seriousness of the threats. Herrod Depo. Tr. 2, at 90:14-91:3, IR.182, Ex. 22 (under seal). The severity of these threats compelled CAP to hire armed security for multiple fundraising dinners, and these dinners drew

additional protests. *Id.* at 61:10–17; 63:16–20; 68:21–69:7. At CAP's headquarters, the organization ensures its name is not listed on the building, especially since the building has already been vandalized. *Id.* at 83:20–85:15.

In other words, CAP has received these threats and harassment due to its work. And as a result of Prop 211, CAP has been forced to adjust its operations, including not accepting more than $5,000 from donors, not spending on campaign media as defined in Prop 211, and otherwise not getting involved in the same capacities it would. *Id.* at 100:12–101:8; 117:21–118:23.

Similarly, Scot Mussi, speaking for Plaintiff Free Enterprise, reported that Free Enterprise's donors fear physical, economic, and reputational harm. Mussi Decl. 1 ¶21, IR.3 at ep.4–5. Free Enterprise's staff has received threatening calls and messages and experienced vandalization. Mussi Decl. 2 ¶16, IR.121, Ex. 2 (under seal). Additionally, both Doe Plaintiffs, who are donors, reported fear of harassment, retaliation, and employment issues due to contributions, grounded in attempts by political opponents to expose donors to political targeting. Doe 1 Decl. 1 ¶13, IR.182, Ex. 26 (under seal), 9; Doe 2 Decl.

1 ¶12, IR.182, Ex. 27 (under seal). Doe I, for example, reported receiving a credible death threat. Doe 1 Dep. Tr. at 15:7-16:11, IR.182, Ex. 24 (under seal).

In a futile attempt at narrow tailoring, the Act establishes an illusory exception for donors who can demonstrate that "there is 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) (emphasis added). However, this narrow exception fails to mitigate any free speech burdens or concerns—namely, harms that are more than "physical."

As exemplified here, there are countless threats and forms of harassment that could violate free speech rights but that may otherwise fall short of "serious risk of physical harm."[6] Such threats still impermissibly burden free speech rights, and the Act's arbitrary

[6] In *Shelton v. Tucker*, the U.S. Supreme Court found a disclosure mandate requiring school employees to identify the organizations to which they donated violated the First Amendment, solely because of the potential *reputational* harm to the teachers—no risk of "physical" harm was suggested. *See* 364 U.S. 479, 486 n.7 (1960). The disclosure mandate, the Court said, "'makes for caution and timidity in [the teachers'] associations,'"—a chill that made a dramatic mismatch with the state's legitimate interests. *Id.* at 487, 490 (citation omitted).

carveout—which effectively *raises* the standard for challenging free speech restrictions—cannot dictate otherwise. The absurdity and arbitrariness of this standard is clearly demonstrated in this case, where a trial court judge—on a motion to dismiss—*acknowledged* the existence of threats, but then proceeded to weigh the facts himself and determine that they were not serious enough to warrant protecting free speech. Thus, the so-called exception fails to save the Act from falling under the exacting scrutiny standard.

In sum, the Act's disclosure requirements are not sufficiently tailored to justify the serious burdens they place on free speech activity. There is a "dramatic mismatch" between the onerous disclosures and the actual interests of the government. As in *Bonta*, it seems more that administrative convenience—having the information of all these individuals "close at hand, just in case"—is the main motivation for the Act's overly broad regime. But that is not enough. Under exacting scrutiny, the Act's disclosure provisions must be struck down.

D. The Disclosure Requirements' Lack Of Tailoring Is Categorical And Overbroad.

The Act's disclosure provisions are overbroad for the same reasons identified in Section I.C, thereby establishing the basis for a facial

challenge. "In the First Amendment context," the U.S. Supreme Court has "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." *Bonta*, 594 U.S. at 615 (citation and quotation marks omitted). In *Bonta*, the Court applied exacting scrutiny in the overbreadth context, concluding that the "lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id*.

As in *Bonta*, the lack of tailoring in the Act is "categorical—present in every case." *Id*. The Act is riddled with untailored and overbroad provisions, including the top-three donor disclosure, the disclosure of donors whose money flows to the preparation of campaign ads (earmarked or not), and the arbitrary disclosure thresholds. The overregulation of speech and chilling of anonymous speech applies to all who would be involved in politics in Arizona.

Additionally, "the potential chilling effect is readily apparent on the [Act's] face." *AZ Petition Partners*, 530 P.3d at 535 ¶19. As noted in Section I.C, the Act places myriad chilling threats on donors, such as

physical harm, verbal threats, fears of legal liability, loss of donors, and loss association. The "mere existence" of the disclosure requirements thus exerts a "chilling effect on the exercise of First Amendment Rights." *Id*. at 534 ¶18; *see also Tucker*, 364 U.S. at 486–87.

E. The Act Is Impermissibly Vague.

A law is unconstitutionally vague if reasonable people cannot tell what speech is prohibited and what is permitted. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning and differ as to its application"); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (same). Vague laws fail to provide citizens with fair notice and can lead to selective prosecution based on a government agency's views or politics. Ultimately, vague laws result in unjust punishments. *See Pope v. Illinois*, 481 U.S. 497, 515 (1987) ("The Court has repeatedly recognized that the Constitution 'requires that a penal statute define the criminal offense with sufficient definiteness . . . and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

Because of these dangers, when "a statute 'interferes with the right of free speech or association, a more stringent vagueness test should apply.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)); *see also Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 281 (1961) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech."). Arizona courts have also recognized this more stringent test. *See, e.g.*, *State v. Tocco*, 156 Ariz. 110, 113 (App. 1986) (stating the same rule in the reverse construction: that "where no fundamental or first amendment right is being implicated by a constitutional challenge to a statute on the basis of vagueness, a less stringent standard of review applies").

1. "In Preparation for or in Conjunction with"

Pursuant to the more stringent vagueness standard, the Court should strike down those portions of the Act that are vague. The Act contains many vague provisions that require citizens to "guess at [their] meaning and differ as to [their] application." *Connally*, 269 U.S. at 391.

For example, the Act defines "Campaign Media Spending" as including "[r]esearch, design, production, polling, data analytics, mailing or social media list acquisition or *any other activity conducted in preparation for or in conjunction with* any of the activities described in [Section16-971(2)(a)(i)-(vi)]." A.R.S. § 16-971(2)(a)(vii) (emphasis added).

In addition to being overbroad, the terms "in preparation for" or "in conjunction with" are undefined, thereby granting plenary discretion to the Commission to interpret and enforce these vague provisions. Citizens are then left to guess: how far in advance would the preparation need to be for the campaign media spending?

Would preliminary Google searches count as research "in preparation for" campaign media spending? What about efforts to hire someone who is going to help with *potential* campaign media spending; would paying a talent acquisition specialist count? What about paying for ad space for potential hires? If Section 16-971(2)(a) includes "data analytics," it seems CAP and Free Enterprise must disclose donors if they are merely tracking proposed legislation or a candidate, even if they never put out any public communications or other form of media

related to a candidate, public officer, initiative or referendum. Perhaps even a generic fundraiser would fall under the "in preparation for or in conjunction with" prong of campaign media spending if some of the funds were going to campaign media spending.

The problem with language like "in preparation for or in conjunction with" is that it does not define what is prohibited. *See Village of Hoffman Estates*, 455 U.S. at 495 n.7 ("[T]he complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to imprecise but comprehensible normative standards, but rather in the sense that no standard of conduct is specified at all." *Id.* (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971))). Because no standard of conduct is specified for actions that are "in preparation for or in conjunction with," both CAP and Free Enterprise stated in their depositions that they would avoid any activity remotely close to campaign media spending to avoid having to disclose their donors. Herrod Tr. 2 at 100:12–101:8, 117:21–119.5, , IR.182, Ex. 22 (under seal); Mussi Decl. 2 ¶ ¶10–11, IR.121, Ex. 2 (under seal); *see also Village of Hoffman Estates*, 455 U.S. at 494 n.6 ("The Court has long recognized that ambiguous meanings cause

citizens to '*steer far wider of the unlawful zone*' . . . than if the boundaries of the forbidden areas were clearly marked." (emphasis added) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964))).

Because the prohibited conduct is not outlined clearly, the Act is unconstitutionally vague. *See, e.g.*, *id.* at 498 (stating that vague laws "trap the innocent" and allow for "arbitrary and discriminatory applications" (quoting *Grayned*, 408 U.S. at 108–09)). Therefore, the Court should strike the Act as impermissibly vague, or alternatively, strike Section 16-971(2)(a)(vii) from the Act.

2. Top Three Donors

The Act is also unconstitutionally vague because it fails to identify which donors will be publicly disclosed. The U.S. Supreme Court has consistently emphasized that if citizens must "guess" at a statute's meaning or how it will be applied, it is unconstitutionally vague, especially in situations where constitutional free speech or free association rights are concerned. *See Connally*, 269 U.S. at 391. Nonetheless, the Act has introduced a guessing game into the world of donor disclosure requirements.

Section 16-974(C) requires that "public communications by covered persons . . . 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." This requirement applies even if the donor originally "opted out" of having his money used for campaign media spending. *See* A.R.S. § 16-972(B). That is because Section 16-974(C) does not tie the disclosure of donors to contributions made "for campaign media spending." One might expect the Act to require covered persons to disclose the top three donors who contributed during the election cycle *for campaign media spending*. But the Act does not do that. Instead, it manufactures a guessing game in which "opt out" donors cannot know whether their information will be publicly disclosed or not.

That kind of guessing, without any prior notice or any logical tie to campaign media spending, does not pass the constitutional muster of the First Amendment's stringent vagueness standards. Therefore, Section 16-974(C)'s requirement must be struck down.

II. THE ACT'S DISCLOSURE REQUIREMENTS ALSO VIOLATE THE FREE SPEECH GUARANTEES OF THE ARIZONA CONSTITUTION AS APPLIED TO PLAINTIFFS HERE.

Regardless of the standard of review, to establish the potential chilling effect of Prop 211, Plaintiffs' offered evidence "need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74; *see also Citizens United*, 558 U.S. at 367; *CJF*, 235 Ariz. at 359 ¶45 (applying reasonable probability standard to as-applied challenge under the United States and Arizona Constitutions).

The offered "[p]roof 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." *Buckley*, 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 may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.*

Plaintiffs here did provide sufficient evidence to satisfy—and exceed—this standard of proof, but the trial court improvidently embarked on a fact-finding mission that is not proper at the motion to dismiss stage. The trial court misapplied the law and improperly weighed the evidence in this case. Disregarding well-established federal and state court precedent, the court invented a warped new standard for determining which parties can bring free speech challenges and which cannot.

According to the trial court, a party must be a "minor or dissident party" to properly challenge a disclosure requirement that infringes upon free speech rights. 2/28/2024 Ruling, IR.199 at ep.11. In so holding, it introduced a new element—and an unprecedentedly heightened the standard—for free speech challenges. *Id.* at 4, 11 ("Nor does CAP fit the description of a minor or dissident party."). The trial court's ruling is manifestly improper.

Federal and Arizona precedents do not limit constitutional injuries to any privileged class, or wax and wane based on prevailing political winds. Cases like *Alabama*, 357 U.S. 449, highlight extreme examples of constitutional injuries caused by government-imposed

disclosures, but they do not establish any evidentiary threshold before a claim can be brought or maintained.[7]

The U.S. Supreme Court highlighted this principle in *Bonta* when it stated that cases like *Alabama* "involved this chilling effect in its *starkest* form"— notably, not its "only form." 594 U.S. at 606 (emphasis added). Indeed, it went on to cite *Tucker*, 364 U.S. at 486, to note that disclosure requirements can chill associational activities "'[e]ven if there [is] no disclosure to the general public.'" *Id.* at 616. *Bonta* also observed that *Alabama* had not precisely identified the review standard, and that, going forward, that standard would be exacting scrutiny, which

[7] Nor would it be possible to do so, anyway, because nobody can predict *today* whether advocacy of some political position or other will be deemed anathema by some group or other in the future, and thus incur retaliation against those who supported that view years from now. For example, when California's Prop 8 (same-sex marriage) was on the ballot in 2008, opposition to it was considered an ordinary political opinion. But in the years that followed, donors to the "no" campaign had their personal information publicly disclosed—and faced retaliation that included not only vandalism and physical violence, but the loss of their jobs. *See* Thomas Messner, *The Price of Prop 8*, Heritage Foundation (Oct. 22, 2009) https://www.heritage.org/marriage-and-family/report/the-price-prop-8; Jon Swaine, *Mozilla CEO Brendan Eich Resigns in Wake of Backlash to Prop 8*, The Guardian, (Apr. 3, 2014) https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8. There is no telling what political position that a donor takes *today* may incur retaliation years from now.

under federal law "is triggered by 'state action which may have the effect of curtailing the freedom to associate,' and by the 'possible deterrent effect' of disclosure." *Id.* (quoting *Alabama*, 357 at 460–61).

Thus, *Bonta* establishes that Plaintiffs' right to speak and associate freely cannot be infringed—regardless of Plaintiffs' majority or minority status. *Alabama* and similar cases may highlight the extent of constitutional violations in particular circumstances, but those authorities do not place any restrictions on Plaintiffs' rights and do not depend upon Plaintiffs' status. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010) (directing the district court to enter a protective order regarding the compelled disclosure of petitioner's internal communications noting that *Alabama* speaks to the degree of the First Amendment interest asserted, not the existence of a violation); *AFLCIO v. FEC*, 333 F.3d 168, 176 (2003) (upholding associational rights challenge because disclosure of names of volunteers, members, and employees would make it more difficult for the organization to recruit future personnel).

In sum, the trial court manufactured and applied an erroneous legal standard to Plaintiffs' as-applied challenge. Under the correct

standard, Plaintiffs have properly stated a claim and sufficiently demonstrated a strong likelihood of success on the merits. In fact, they have proffered extensive evidence of harassment, retaliation, reputational harm, physical harm, economic hardship, and reasonable fear. *See* Herrod Decl. 1 ¶ ¶18, 20, IR.3 ep. 23–25; Herrod Depo. Tr. 2 at 61:10–17; 63:16–20; 68:21–69:7; 83:20–85:15; 90:14–91:3; 100:12–101:8; 117:21–118:23, IR.182, Ex. 22 (under seal); Mussi Decl. 1 ¶ ¶16, 21, IR.3 ep. 30–32; Doe 1 Decl. 1 ¶ ¶13, 9, IR.182, Ex. 26 (under seal); Doe 2 Decl. 1 ¶12, IR.182, Ex. 27 (under seal); Doe 1 Dep. Tr. at 15:7–16:11, IR.182, Ex. 24 (under seal). To cite some examples, the threatening and harassing communications sent to CAP include

- "Sooner or later, you will die, and some of us pray it is sooner . . . ."
- "You are a cancer that will soon be sliced out of our nation's sick body. I will make it my personal mission to bury every single one of you. . . . The great people of this state will make sure that you burn so that we can rebuild this state from the ashes of all you dead white zombies. I'm sure going to have a lot of fun ripping you apart and burying your legacy of hate."
- "Go f*** yourself and I hope you die of cancer. RIP b****"

- "I know that I, and many, many others, will do everything it takes to marginalize your vulgar and loathsome organization from affecting any more lives."
- "You both [referring to Herrod and former Senator Nancy Barto] deserved to be sued until you have to live like homeless twits in the AZ desert."
- "It would be great if you, Cathy and the other kooks in your crazy cult pack up and leave our state."
- "Get the f*** out of Arizona."
- "I love to watch people like you squirm."

Herrod Decl. 1 ¶20, IR.3, ep.24–25.

After acknowledging this litany of evidence, the trial court—with a motion to dismiss pending before it—took the unprecedented step of personally assessing the weight, credibility, and severity of the factual evidence. For example, it opined that "[s]uch name calling, offensive comments and criticism are certainly rude" but "[m]any of the comments . . . are protected speech. And twenty or so nasty comments in nearly thirty years of public advocacy does not demonstrate that CAP itself has been subjected to threats, harassment, and reprisals." 2/28/2024 Ruling, IR.199 at ep.9. In practice this means that Plaintiffs must wait until the doxxing of themselves, their donors, and their

members increases in frequency and violent severity before it is constitutionally actionable.

Moreover, the trial court also factually determined that Herrod's need to call the police and FBI, coupled with the FBI's subsequent responsiveness, actually undercuts, instead of bolsters, the real possibility of harm that CAP and its employees and members face. *Id.* at ep.10.[8] It is unclear why or how the trial court reached this erroneous conclusion, but the point is that it improperly weighed, disparaged, and dismissed Plaintiffs' allegations and evidence. That was egregious, reversible error, because the trial court is required to "assume the truth

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[8] The trial court apparently concluded there was no free speech violation because law enforcement attempted to protect CAP from physical threats and death threats. That *might* make sense if CAP was alleging that the *police* were retaliating against it or failing to protect it. *See Doe v. Reed*, 561 U.S. at 215 (Sotomayor, J., concurring) ("Case-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner . . . [that] poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control."). But that is not the claim made here.

Moreover, Arizona's Free Speech Clause, unlike its federal counterpart, contains no state action requirement. *See Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 373 (App. 1988) ("[N]o state action is required for Arizona's free speech provisions to apply."). This is significant because it blocks any recourse to the excuse offered by defendants in, *e.g.*, *Alabama*, that the retaliation speakers feared was merely a matter of "private community pressures." 357 U.S. at 463.

of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman*, 230 Ariz. at 355 ¶7. Thus, the trial court erred in dismissing Plaintiffs' as-applied challenge.

III. THE ACT VIOLATES THE PRIVATE AFFAIRS CLAUSE OF THE ARIZONA CONSTITUTION.

Article II, Section 8 of the Arizona Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Although the Private Affairs Clause is usually raised and interpreted in criminal cases similar to the federal Fourth Amendment jurisprudence, *see, e.g.*, *State v. Mitchem*, 256 Ariz. 104, 108 ¶16 (App. 2023), Arizona courts have also applied it in other areas of law, *see Dep't of Child Safety v. Lang*, 254 Ariz. 539 (App. 2023) (mental health of minors); *Morgan v. Dickerson*, 253 Ariz. 207 (2022) (right of press to juror names); *Canas v. Bay Ent., LLC*, 252 Ariz. 117 (App. 2021) (right of publicity); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350 (1989) (privacy in subscriptions); *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 215 (1987) (right to refuse medical treatment).

When interpreting Arizona's Constitution, courts seek "to 'effectuate the intent of those who framed the provision.'" *State v.*

Mixton, 250 Ariz. 282, 289 ¶28 (2021) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994)). In interpreting the Private Affairs Clause, courts look to its "natural, obvious, and ordinary meaning." *Id.* at 290 ¶33 (internal marks & citation omitted).

This Clause prohibits, among other things, government efforts to investigate a private organization's financial dealings; to compel the disclosure of an organization's financial records, books, and files; and to compel the public disclosure of tax information or other sensitive information, especially financial. *Id.* at 291 ¶¶34–35; *see also* Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723, 729–36 (2019) (detailing how Clause was motivated by concerns over compelled disclosure of finances, newspaper subscribers, etc.).

At the time the Clause was written, information relating to the financial support of ballot initiative campaigns, financial support of organizations other than campaign committees, or financial support of charitable organizations that engage in speech on matters of public concern, was generally considered a private affair.[9]

[9] The Clause was taken word-for-word from Washington's constitution. *Compare* Wash. Const. art. I, § 7. Washington chose broader language

The sole and explicit exceptions are outlined in Article VII, Section 16, of the Arizona Constitution and include "campaign contributions to, and expenditures of campaign committees and candidates for public office." Simple in its rationale, this exception addresses the concerns of so-called "dark money" going directly to *campaigns* and *candidates*. *See Citizens United*, 558 U.S. at 319 ("[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."). And the fact that this one exception exists is strong evidence that the Private Affairs Clause shields anything not covered by that exception. *Cf. State v.*

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than the Fourth Amendment because of controversies at the time regarding the powers of governments, legislatures, and courts to inspect the papers and records relating specifically to financial transactions. *See generally* Johnson & Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 434–36, 508 (2008). Arizona incorporated this Clause relatively close in time, and because of similar concerns. *See generally* Goff, ed., *The Records of the Arizona Constitutional Convention of 1910*, at 1293 (1991). The applicability of those concerns to the Act here cannot be overstated. What's more, Washington courts have interpreted their version of the Clause to prohibit compulsory disclosure of financial transactions. *State v. Miles*, 156 P.3d 864, 867–69 (Wash. 2007).

Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 299–300 (1914) (applying *expressio unius* reading to Constitution).

The rationale and concerns underlying Article VII, Section 16 differ significantly from those involved here. Plaintiffs CAP and Free Enterprise are neither campaign committees nor candidates. In fact, CAP is *prohibited by law* from engaging in *any* candidate or candidate campaign activity, and both CAP and Free Enterprise are legally prohibited from coordinating with campaigns or candidates. Because of this distinction, the *expressio unis* rule applies with great force: the private financial information of organizations that are neither campaign committees nor candidates, and do not make campaign contributions, are "private affairs" protected by the Private Affairs Clause. *See Mountain Tel. & Tel. Co.*, 160 Ariz. at 357 n.13 (individuals could raise a Private Affairs Clause claim if they were forced, when subscribing to unpopular views, to put their names on a public list that would allow the general public to review); *see also* Sandefur, *supra* p. 48, at 731 n.47 (noting concern at time of Constitution's framing over laws requiring disclosure of names of newspaper subscribers).

Thus, contributions to organizations that engage in issue advocacy or candidate support are private affairs. They are private financial decisions related to speech in support of, or in opposition to, matters that people ultimately vote on—in secret. *See* Ariz. Const. art. VII, § 1 ("All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved.").

IV. PLAINTIFFS HAVE STANDING TO SUE UNDER ARIZONA'S SEPARATION OF POWERS CLAUSE

The trial court erred in dismissing Plaintiffs' *facial* separation of powers challenge to the Act. The Act grants the Commission extensive power, including authority 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 [Prop 211]." A.R.S. § 16-974(A).

Thus, the Commission exercises legislative, executive, and judicial power—without oversight. Indeed, the Commission is "*not* subject to *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) (emphasis added). In effect, the

Act makes the Commission a new, independent "Fourth Branch of Government," in direct violation of the Separation of Powers Clause in Article III of the Arizona Constitution.

Our Constitution contains one of the strongest Separation of Powers Clauses in the Country. It provides as follows:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Ariz. Const. art. III; *see also State v. Block,* 189 Ariz. 269, 275 (1997) ("Nowhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed than in Arizona." (quoting *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988)).

Indeed, the Arizona Supreme Court has relied on the Separation of Powers Clause to invalidate statutorily created bodies similar to the Committee. *See e.g.*, *Block*, 189 Ariz. at 278 ("A.R.S. § 41-401, as amended, is unconstitutional because it violates the article III separation of powers clause of the Arizona Constitution. Accordingly, as presently constituted, [Arizona Constitutional Defense Council] (CDC)

and its members have no authority to act to carry out their stated purposes or to expend public money to do so.")

Here, the trial court incorrectly ruled that Plaintiffs lack standing to sue under the Separation of Powers Clause. While it correctly recited the standard for standing, it reached the incorrect conclusion that they lacked "individualized" injuries. *See* 6/21/2023 Ruling, IR.116 at ep.15 ("To have standing, a plaintiff must allege 'a distinct and palpable injury[,]' . . . The injury must be individualized to the plaintiff and cannot be shared with 'a large class of citizens.'") (citing *Sears v. Hull*, 192 Ariz. 65, 69 ¶16 (1998)).

Plaintiffs have alleged distinct, palpable, and individualized injuries. *First*, given the broad and undefined tripartite powers of the Commission, Plaintiffs and their donors face a credible threat of enforcement via the unchecked enforcement actions that will come out of the Commission. Thus, CAP and Free Enterprise have already been forced to allocate time and funding to compliance and legal resources—and/or to refrain from speaking all together out of fear of the Commission's enforcement actions. Thus, CAP and Free Enterprise

have suffered real injury because they have refrained from speech that would subject them to the Act.

The trial court said this was "not particularized" because "all citizens experience the same harm," 6/21/2023 Ruling, IR.116 at ep.15, but non-donor citizens and non-donor organizations will *not* experience the harms inflicted by Prop 211. Thus, all citizens *do not* experience the same harm. Absent the new (seemingly limitless) powers conferred on the Commission, Plaintiffs would not have suffered these harms; and as a direct and proximate result, Plaintiffs are suffering, and will continue to suffer, irreparable harm due to the employment of the Commission beyond the bounds of the Separation of Powers Clause.

Second, the Arizona Constitution specifically provides that its provisions "are mandatory, unless by express words they are declared to be otherwise." Ariz. Const. art. II, § 32. This Clause was adopted to overturn nineteenth century court precedents that had held constitutional provisions to be "directory"—meaning, non-enforceable by

private citizens—such as the "single-subject" rule,[10] the "special law" clause,[11] and, of course, the separation of powers.[12]

Courts in other states with Mandatory Clauses have held that they impose a "judicially enforceable affirmative duty" to "go to any length within the limits of judicial procedure, to protect . . . constitutional guaranties." *Seattle School District No. 1 of King County v. State*, 585 P.2d 71, 85–86 (Wash. 1978); *see also State Bd. of Ed. v. Levit*, 343 P.2d 8, 19 (Cal. 1959); *Spackman v. Bd. of Educ.*, 16 P.3d 533, 535–37 (Utah 2000).

And this means plaintiffs have standing to "enforce an explicit and mandatory constitutional provision dealing primarily with questions of form and process," such as the separation of powers clause. *Gregory v. Shurtleff,* 299 P.3d 1098, 1110 (Utah 2013). If a plaintiff is "appropriate," meaning she has an "interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions," and if "the issues [are] unlikely to be raised if the

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[10] Deemed "directory" in *Washington v. Page*, 4 Cal. 388 (1854).
[11] Deemed "directory" in *State v. Boone Cnty. Ct.,* 50 Mo. 317, 323 (1872).
[12] Deemed mandatory under the "mandatory and prohibitory" clause in *Johnson v. City of Great Falls*, 99 P. 1059, 1060 (Mont. 1909).

party is denied standing," *id.* at 1109 (citations omitted), she may bring suit, pursuant to the Mandatory Clause. The Plaintiffs here easily meet that test.

Third, even if Plaintiffs lack traditional standing, this Court should still exercise its discretion to permit Plaintiffs to litigate this issue of "great public importance." The Arizona Supreme Court has long recognized "as a matter of discretion," courts can "waive the requirement of standing . . . in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." *Sears*, 192 Ariz. at 71 ¶25. For example, in *Rios v. Symington*, the Supreme Court permitted jurisdiction notwithstanding the existence of "potential standing issues." 172 Ariz. 3, 5 n.2 (1992) (involving the President of the Senate's action challenging the constitutionality of the line-item veto).

Likewise, in *Goodyear Farms v. City of Avondale*, the Supreme Court considered the merits of the petitioners' action without addressing whether they had standing to challenge the validity of a municipal annexation ordinance. 148 Ariz. 216, 217 n.1 (1986) (deciding whether an Arizona statute about municipal annexation violated the

Constitution's equal protection clause). And in *State v. B Bar Enterprises*, it permitted appellants to assert a privacy claim alongside a due process claim even though they lacked standing to assert the privacy claim. 133 Ariz. 99 (1982) (appellant owners of "massage parlors" challenged a public nuisance law based on right to sexual privacy and on procedural and substantive due process grounds).

As in these other exceptional cases, Plaintiffs' case presents "exceptional circumstances" and involves "issues of great public importance that are likely to recur." *Sears*, 192 Ariz. at 71 ¶25. In fact, it presents multiple issues of great public importance.

First, the Act flagrantly violates the free speech rights of Arizonans, which, in itself, reflects an issue of great public importance. The issue is likely to recur because the Act mandates recurring disclosures (which violate free speech rights) in every election cycle.

Second, this case presents fundamental questions of the separation of powers and the unconstitutional empowerment of a government entity with taxpayer funding.[13] If the Act is permitted to

[13] Some of Prop 211's more egregious separations of powers violations directly affect the *judiciary's* authority. For example, Prop 211 provides:

create an independent fourth branch of government, then the precedent will be set that new branches of government can be created in violation of the Separation of Powers Clause with impunity. Thus, it is of "great public importance" for Plaintiffs to litigate the merits.

V. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' REQUESTED PRELIMINARY INJUNCTIONS.

A. The Trial Court Abused Its Discretion.

The trial court improperly denied Plaintiffs' two requests for preliminary injunctions. *See* 6/21/2023 Ruling, IR.116 at ep.15; 2/28/2024 Ruling, IR.199 at ep.15. In both rulings, it abused its discretion in applying the law, and made clearly erroneous factual

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"A person may not structure or assist in structuring, or attempt or assist in an attempt to structure any solicitation, contribution, donation, expenditure, disbursement or other transaction to evade the reporting requirements of this chapter or any rule adopted pursuant to this chapter." A.R.S. § 16-975.

Further, structuring transactions to ensure that a company, campaign, or committee is legally exempt from the scope of a certain law is a core function of practicing law as an election attorney. However, the Arizona Supreme Court "has long recognized that . . . 'the practice of law is a matter exclusively within the authority of the Judiciary.'" *In re Creasy*, 198 Ariz. 539, 541 ¶ 6 (2000) (citation omitted); *see also State Bar of Ariz. v. Lang*, 234 Ariz. 457, 461 ¶15 (App. 2014) ("The Arizona Constitution gives our supreme court exclusive authority to regulate the practice of law in Arizona.").

findings. These rulings warrant reversal and entry of a preliminary injunction on remand.

"Granting or denying a preliminary injunction is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion." *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 ¶9 (1999). However, "[m]ixed findings of fact and law are reviewed de novo." *Id.* ¶10.

An abuse of discretion exists if the trial court (1) "applied the incorrect substantive law or preliminary injunction standard"; (2) "based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction"; or (3) "applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion." *McCarthy W. Constructors v. Phx. Resort Corp.*, 169 Ariz. 520, 523 (App. 1991).

While only one form of abuse is required for reversal, the trial court has achieved the rare trifecta in this case. *First*, it applied the incorrect preliminary injunction standard: it rejected Plaintiffs' preliminary injunction motions without applying—or even mentioning—the standard of review for a preliminary injunction. *See*

6/21/2023 Ruling, IR.116 at ep.15 (stating "IT IS FURTHER ORDERED denying Plaintiffs' Motion for Preliminary Injunction" but not referencing any preliminary injunction standard); 2/28/2024 Ruling, IR.199 at ep.15 (same).

In fact, the word "preliminary injunction" appears just twice in the trial court's 6/21/2023 ruling: once in the introduction ("[Plaintiffs] seek a preliminary injunction"), IR.116, ep.1, and again at the end when the trial court denied the preliminary injunction. *Id.,* ep.15. Shockingly, the ruling is completely devoid of a proper preliminary injunction standard and analysis. Instead, the court seemingly utilized the motion to dismiss standard to review the preliminary injunction motions. This is a clear abuse of discretion.

To be sure, the court did not skirt or moot the preliminary injunction ruling because the word "moot" (or any comparable principle) does not appear in either ruling. Rather, the trial court explicitly based its denials on its own legal and factual analysis: "**For the reasons discussed below**, Plaintiffs' declarations also fail to allege sufficient facts to support their claims. **For these reasons**, the Court will grant the Motions to Dismiss and **deny the Renewed Motion for**

Preliminary Injunction." 2/28/2024 Ruling, IR.199 at ep.8 (emphasis added). Indeed, the Court's as-applied ruling is replete with references to the deposition transcripts*, see generally id.*, which were not attached to the Amended Complaint, but were a *part of the briefing regarding the Preliminary Injunction Motion*. The court also concluded there were insufficient grounds for injunctive relief by issuing orders explicitly denying both preliminary injunction motions. Thus, in addressing the preliminary injunction requests, and the evidence provided in briefing related to those requests, the Court simply misapplied the law.

Second, and as another independent ground for reversal, the trial court relied on a "clearly erroneous finding of fact" that was material to its denial of Plaintiffs' preliminary injunctions. Here, Plaintiffs not only pleaded sufficient facts to support their claims, but also supplied additional declarations and demonstrated a strong likelihood of success on the merits.

The trial court's rulings extensively detailed the threats, fears, and harassment endured by Plaintiffs. *See* 02/28/24 Ruling, IR.199 at ep.7 ("Both Doe Plaintiffs claim they are concerned they will be subject to 'harassment and retaliation' if their donations are disclosed,

including the risk of 'serious physical harm' and 'economic, reputational, and other forms of harassment and retaliation.' . . . They allege that disclosure of their identities will expose them to 'known and recognized harms, including physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm.'); *see id.* ("CAP and AFEC both claim that the Act will curtail donations. . . . Both assert that they have experienced 'harassment and other harms because of their public communications' and that their donors will be exposed 'to the same or worse harms, including physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm.'). *Id.*

Yet, in the next paragraph, it improperly concluded that "CAP and AFEC allege no facts to support their allegations of harassment and intimidation" and that "[t]he Doe Plaintiffs' claims are also deficient." *Id.* The court relied on this clearly erroneous finding of fact to deny Plaintiffs' requests for preliminary injunctions. That was an abuse of discretion.

And *third*, even assuming the court "applied an acceptable preliminary injunction standard," its decision has resulted in an abuse of discretion due to its improper factual analysis and conclusions.

For each of these independent reasons, the court abused its discretion. Thus, its rulings warrant reversal and entry of a preliminary injunction on remand.

B. This Court Should Remand With An Order to Enter a Preliminary Injunction

Given the trial court's many abuses of discretion, this Court should reverse and remand with an order to enter a preliminary injunction. At this stage, Plaintiffs' claims have been improperly dismissed, and Plaintiffs have been subject to irreparable harm while their preliminary injunction has been sidelined since December 2022.

While the "one of the primary purposes of a preliminary injunction is to preserve the *status quo*," *Perez v. Perez*, No. 1 CA-CV 19-0593, 2020 WL 3443451, at *2 (Ariz. App. May 23, 2020) (citing *Cracchiolo v. State*, 135 Ariz. 243, 247 (App. 1983)), Plaintiffs have been *continuously* deprived of this relief—since December 2022—due to the trial court's multiple misapplications of law. Absent this Court's order of a preliminary injunction, Plaintiffs will continue to suffer irreparable

harm. They cannot endure another—third—erroneous ruling from the trial court while their rights are being infringed.

To prevail on a preliminary injunction motion, Plaintiffs must demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief." *Fann v. State*, 251 Ariz. 425, 432 ¶16 (2021). The test is a "sliding scale," wherein "'the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply'" in their favor. *Id.* (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶10 (2006)). Put differently, "[t]he greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Id.* (citation omitted).

And where, as here, a movant shows that an act is unlawful, the movant "need not satisfy the standard for injunctive relief." *Arizona*

Pub. Integrity All. v. Fontes, 250 Ariz. 58, 64 ¶26 (2020); *see also Burton v. Celentano*, 134 Ariz. 594, 596 (App. 1982) ("[W]hen the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor." (citation omitted)).

In any event, "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm," *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009), and the deprivation of a constitutional right, particularly freedom of speech, "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Plaintiffs made a strong showing of success on the merits of their claims—and, they have provided extensive evidence of Prop 211's unconstitutionality both facially and as applied under Arizona's Free Speech and Private Affairs Clauses. Because the Act is unconstitutional, Plaintiffs "need show neither irreparable injury nor a balance of hardship in [their] favor." *Burton*, 134 Ariz. at 596 (citation omitted). Consequently, the trial court clearly erred by denying Plaintiffs' requests for preliminary injunctions.

CONCLUSION

Therefore, this Court should (1) vacate the dismissal of Plaintiffs' claims, (2) vacate the denial of Plaintiffs' preliminary injunction motions, and (3) remand with an order to enter a preliminary injunction while this case proceeds to trial or summary judgement.

REQUEST FOR ATTORNEY FEES AND EXPENSES

Pursuant to A.R.S. § 12-348 and Arizona Rule of Civil Appellate Procedure 21(a), Plaintiffs-Appellants respectfully request the Court award its reasonable attorney fees and expenses incurred herein.

RESPECTFULLY SUBMITTED this 18th day of June 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing OPENING BRIEF OF APPELLANTS CENTER FOR ARIZONA POLICY, INC., ARIZONA FREE ENTERPRISE CLUB, DOE I and DOE II was e-filed with the Clerk of the Court of Arizona Court of Appeals, Division One via the Court's e-filing system on June 18, 2024, and that a copy was served via email on the same date to the following:

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