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' REPLY BRIEF

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I. INTRODUCTION.

Appellees disregard the fact that Prop 211 does *not* regulate disclosures for contributions to *candidates*, but rather compels disclosure of donations to *independent* PACs and nonprofit organizations like FEC and CAP.

This distinction is critical, because the primary basis for Prop 211—and all campaign disclosure laws—is to prevent bribery and corruption by *elected officials* who are beholden to large donors. But the United States Supreme Court has, for almost 50 years, treated disclosure of donations to independent organizations *very* differently than candidate disclosures, because donations to independent organizations like FEC and CAP, do not "pose dangers of real or apparent corruption comparable to those identified with large *campaign* contributions." *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). And in *Citizens United v. FEC*, 558 U.S. 310, 357 (2010), the Court went even further, stating, "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." This is especially true for 501(c)(3) organizations, like CAP, that *only* engage in issue advocacy, and are expressly prohibited by federal law from engaging in any candidate electioneering activities.

Next, Appellees re-write the test for an as-applied challenge, claiming Plaintiffs must show a threat of physical harm, as well as pervasive and repeated harassment

by the *government*. This test is a straw man created by Appellees to help them rebut Plaintiffs' retaliation claims. In truth, the Supreme Court's test is far broader, requiring that Plaintiffs "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 (emphasis added); *see also Citizens United*, 558 U.S. at 367; *Comm. for Just. & Fairness (CJF) v. Ariz. Sec'y of State's Off.*, 235 Ariz. 347, 359 ¶ 4 (2024) (applying reasonable probability standard to as-applied challenge under the United States and Arizona Constitutions). Plaintiffs have done just that, presenting extensive evidence of harassment, retaliation, reputational harm, physical harm, economic hardship, and reasonable fear.

The Attorney General asks this Court to close its eyes and ears to the current political division and acrimony in blatant ignorance bordering on delusion. To think that people do not face harassment and reprisals for donating to unpopular causes is to deny reality. Every day, Americans are faced with retaliation, intimidating, "doxing," and harassment that was unimaginable even ten years ago. *See, e.g.*, *Frankel v. Regents of the Univ. of California,* 2024 WL 3811250, at *1 (C.D. Cal. Aug. 13, 2024) ("In the year 2024, in the United States of America, in the State of California, in the City of Los Angeles, Jewish students were excluded from portions

of the UCLA campus because they refused to denounce their faith. This fact is so unimaginable and so abhorrent to our constitutional guarantee of religious freedom that it bears repeating, Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith. UCLA does not dispute this.").[1]

Another troubling thread in Appellees' briefing is the argument that forced disclosure of donors to independent organizations like FEC and CAP is not a big deal, because after all, Prop 211 is not censoring their speech. This is absurd. The Supreme Court has made it clear that money "enables speech." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring). As a result, when a law like Prop 211 discourages a person from donating to an organization to express their political views, it clearly chills their speech and diminishes their ability to speak. *Buckley*, 424 U.S. at 245. The Court also made clear that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [outright censorship]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

The Attorney General misleadingly presents Prop 211 as the solution to so-called "dark money" influencing elections. But in reality, Prop 211 *deprives* the

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[1] Pursuant to Ariz. Sup. Court R. 111(c), a copy of this decision is available at https://caselaw.findlaw.com/court/us-dis-crt-cd-cal/116482817.html.

people of the right to speak and violates constitutional protections for speech and privacy. Donors to political organizations and causes, who have historically maintained their privacy and avoided retaliation for their speech, are now forced to silence their speech or face the threat of retaliation. The retaliation evidence presented by Plaintiffs prove that here.

The Attorney General also misrepresents that Prop 211 "allow[s] donors to opt out or prevent disclosure if there is a risk of harm." AG's Brief, p. 15. But the "opt out" and "risk of harm" exceptions, are, in fact, illusory. Prop 211 mandates disclosure of an organization's top three donors even if those donors "opted out" their donations from going toward campaign media spending. § 16-974(C). And, like Appellees' manufactured as-applied test, Prop 211's "risk of harm" exception requires a heightened showing of "physical harm" to qualify for exemption, thus vitiating the well-established free speech protections against retaliatory threats, harassment, or reprisals. *Citizens United*, 558 U.S. at 370.

The Attorney General then misrepresents that "[t]he Act's disclosure thresholds are only relevant if the covered person is engaging in 'campaign media spending.'" AG Brief, p. 16. But in reality, the provisions of Prop 21 are so broad and vague that virtually all donors must be disclosed if they contribute more than $5,000.00 to an entity and that entity spends any resources toward actions

tangentially related to campaign media. It is difficult to fathom what is excluded under Prop 211.

In sum, Prop 211 violates all Arizonans' rights to "freely speak" under the Arizona Constitution's broad free speech guarantee. *See* Ariz. Const. art. II, § 6.

II. THE ACT'S DISCLOSURE REQUIREMENTS ARE OVERBROAD.

The Attorney General repeatedly confuses the standard for an overbroad restriction on speech with the general standard for facial constitutional challenges. *See e.g.*, AG Brief, p. 48 (arguing that Plaintiffs must prove there is "no set of circumstances" under which Prop 211 is constitutional).

This is the wrong standard. The Attorney General's standard is derived from *United States v. Salerno*, 481 U.S. 739, 745 (1987), but that standard does not apply to facial challenges under the First Amendment. Instead, under the overbreadth doctrine, a law restricting speech "may be overturned as impermissibly overbroad because a '*substantial number*' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258 ¶ ¶ 17, 18 (2023) (quoting *Americans for Prosperity Fndn. v. Bonta*, 594 U.S. 595, 615 (2021)) (emphasis added).

The main thrust of Appellees' argument is that Plaintiffs have not cited a "substantial" number of unconstitutional applications where the Act chills speech,

e.g., the only harm asserted is to Plaintiffs. VRTK Brief, p. 12; AG Brief, p. 46–47. But Appellees miss the mark. *Id.* The provisions of the Act are not limited to Plaintiffs; rather, they chill the rights of *every* Arizonan who wishes to express their political view anonymously by donating to PACs or nonprofit organizations like FEC or CAP.

A. The "Top Three" disclosure is overbroad and encompasses funds not contributed to campaign media spending.

By its terms, the Act requires that every public communication by a "covered person" must name the "top three donors" who, directly or indirectly, made the three "largest contributions." § 16-974(C). Given the breadth of this language, Plaintiffs, as well *any* donor to a PAC or independent organization, cannot know if he or she will run afoul this provision. Thus, virtually any donor to such an organization must self-censor and withhold their donation, or risk facing retaliation through the disclosure under Prop 211.

1. <u>The "Opt Out" Procedure in § 16-972(B) is Inapplicable and Does Not Narrow the Breadth of § 16-974(C).</u>

Both Appellees attempt to evade the clear overbreadth of the Act by claiming that § 16-972(B) "narrow[s]" the breadth of § 16-974(C) and "provide[s] control for donors" to opt out of campaign media spending. VRTK Brief, p. 37; AG Brief, p. 42–44.

However, in truth, opting out of disclosure with the Secretary of State under § 16-972(B) does not exempt a "top three donor" from public disclosure under § 16-974(C). Indeed, a comparison of the statutes shows that they address different disclosures.[2] *Infra* p. 18. Specifically, § 16-972(B) requires a "prompt[]" public disclosure and an "electronic submission" to the Commission via a disclosure a report containing *nine* categories of information that include, among other things, the donor's name, mailing address, occupation, and employer information. §§ 16-972(B); -973(A), (H). In contrast, § 16-974(C) requires only disclosure of the *names* of "top three donors" in an election cycle in the media broadcast itself.

2. The Plain Terms of § 16-974(C) Cannot Be Altered by R2-20-805(B).

Appellees' effort to narrow § 16-974(C) through R2-20-805(B), a regulation they claim allows "top three donors" to opt out through §16-972(B), is misplaced. AG Brief, p. 43; VRTK Brief, p. 41. Simply put, the plain terms of § 16-974(C) are unambiguous; as a result, Appellees cannot use the regulation to change or modify the plain terms of the statute. *Stambaugh v. Killian*, 242 Ariz. 508, 510 ¶ ¶ 10, 21

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[2] Both Appellees briefly cite A.R.S. § 16-973(F), a provision that has no bearing on the issue at hand. *See* VRTK Brief, p. 20; AG Brief, p. 20. Under subsection (F), a donor need not be disclosed if it is "protected from disclosure by law or a court order." That section has no application here.

(2017) (explaining that courts owe no deference to an agency's interpretation of an unambiguous statute); *Wade v. Ariz. Retirement System*, 241 Ariz. 559, 563 ¶ 21 (2017) (refusing to defer to an agency's interpretation when the legislature explicitly addressed the matter at issue); *see also* A.R.S. § 12-910(F) (requiring courts to decide all questions of law "**without deference** to any previous determination that may have been made on the question by the agency" (emphasis added)).

3. Appellees' Other Arguments as to § 16-974(C) Rest on Mischaracterized Precedent.

Appellees' final arguments as to § 16-974(C)—resting on mischaracterized Supreme Court precedent and out-of-jurisdiction cases—are easily dismissed.

Contrary to VRTK's contention, neither *Citizens United* nor *McConnell* are in tension with our analysis. VRTK Brief, p. 35–37. Unlike § 16-974(C), both of those cases addressed the disclosure limits of contributions applied to electioneering communications. *See Citizens United*, 558 U.S. at 365 (upholding disclosure requirements for donations to the costs of producing and airing an "express advocacy or electioneering communications"); *McConnell*, 540 U.S. at 194 (addressing disclosure requirements for a person who makes contributions for "direct costs of producing and airing electioneering communications"). That is not the case here, and this Court should not read into *Citizens United* or *McConnell* holdings that were neither discussed nor argued.

Additionally, this Court is not bound by the handful of VRTK's cherry picked out-of-jurisdiction cases, many of which did not involve an overbreadth argument or address earmarking. *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 122 (2d Cir. 2014) (addressing disclosure verbiage without considering earmarking for media-related spending); *Just. v. Hosemann*, 771 F.3d 285, 300, n. 10 (5th Cir. 2014) (addressing general disclosure requirement for $200 donations where plaintiffs did not bring action under "overbreadth theory"); *Worley v. Florida Secretary of State*, 717 F.3d 1238 (11th Cir. 2013) (addressing proper tailoring regarding other arguments—donation amounts and reporting requirements—but not earmarking).

Instead, this Court should follow the jurisdictions that have limited disclosure requirements to those who "speak" through public broadcast. *See Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (rejecting notion that all donors should be disclosed, regardless of whether they specified donations for media contributions); *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) (upholding Colorado provision requiring disclosure of donors who have specifically earmarked their contributions for electioneering purposes); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 190–92 (D. D.C. 2016) (upholding disclosure requirement limited to donors who contributed for the specific purpose of supporting the political advertisement).

B. Section 16-971(2)(a)(vii) is overbroad because it applies to activities unrelated to campaign media spending.

Courts do not hesitate to strike down disclosure statutes with overbroad definitions. *Perry v. Bartlett*, 231 F.3d 155, 161 (4th Cir. 2000) (striking down a disclosure statute as "overbroad" where it would apply disclosure requirements to actions outside the scope of "express advocacy" under *Buckley*); *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 193, ¶ 66 (Wis. 2015) (determining that the phrase "influencing an election" was overbroad).

Here, § 16-971(2)(a)(vii) defines "campaign media spending" to include any research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted *in preparation for or in conjunction with* campaign media spending. In addition to being vague, this definition encompasses almost any activity performed by campaigns.

Appellees have no answer to this. VRTK only offers that *other* words within § 16-971(2)(a) like "promote," "oppose," "attack," and "support" have been upheld, as has *other* language in § 16-971(2)(a)(iii). VRTK Brief, pp. 33–34. VRTK misses the point. None of those words nor Subsection (iii) are at issue here. Subsection (vii) is overbroad.

C. Section 16-973(F) provides too little protection and renders the Act overbroad.

The Act is also overbroad because it only excludes donors who show serious risk of "physical harm" under § 16-973(F). That is not the standard for a free speech violation. *Buckley*, 424 U.S. at 74. And to hold otherwise would suggest that Arizonans should suffer threats, reprisal, fear, and vandalism if they wish to exercise their right to speak.

Appellees do not refute this. Instead, casting Plaintiffs' declarations detailing death threats, harassment, vandalism as "speculative" or "hypothetical," the Attorney General takes issue with the fact that Plaintiffs are only "two organizations." AG Brief, p. 46. But there is no requirement (and the Attorney General has cited none) that a certain number of plaintiffs must establish a "substantial" number of unconstitutional applications. And such a requirement would be especially out of place here, where § 16-973(F), on its face, does not exempt *any* donor to *any* PAC or organization—thus exposing them to from harassment, threats, or reprisal.

III. THE ACT'S DISCLOSURE REQUIREMENTS ARE VAGUE IN A SUBSTANTIAL NUMBER OF APPLICATIONS.

On vagueness, the Attorney General again cites the wrong standard. AG Brief, p. 48 (citing "no set of circumstances" standard for facial challenges not brought

under the First Amendment). Instead, Plaintiffs need only show that a "substantial number" of applications are vague, compared to the statute's plainly legitimate sweep. *AZ Petition Partners LLC*, 255 Ariz. at 258 ¶ ¶ 17, 18. Plaintiffs have done so.

A. "In Preparation for or in Conjunction with" remains vague and undefined.

Appellees contend that "in preparation for" is sufficiently specific because donors know that "preparation" must eventually produce a public communication. VRTK Brief p. 39 (stating that no production costs are reportable where no public communication was made or disseminated); AG Brief p. 49 (to same effect).

Appellees miss the point. Section 16-971(2)(a)(vii) is vague because no one can understand what "preparation" includes. *State v. Ikeda*, 61 Ariz. 41, 46 (1943) (providing that a law is vague if "[people] of common intelligence must necessarily guess its meaning" or its terms are "left to conjecture, guess and reasonably different constructions."). Simply put, at what point does preparation begin and other tasks end? And contrary to VRTK's contention, there is nothing "hypothetical" or "imaginary" about this question. Section 16-971(2)(a)(vii), on its face, exposes *every* donation to disclosure for any activity that conceivably falls within the scope of media production.

As for the phrase "in conjunction with," Appellees give it little attention. And with good reason—the phrase is ambiguous and unintelligible. Absent a clear definition from the Act (and there is none for "conjunction with"), this Court looks to dictionary definitions. *Toma v. Fontes*, 2024 WL 3198827, at *10 ¶ 60 (App. June 27, 2024) (using the Merriam-Webster Dictionary to define language under the Act).[3] And just last year, this Court considered the same phrase — "conjunction with"— by applying a dictionary definition, which defined it as "in combination with" or "together with" and "companion[ed] [with]." *Silk v. Blodgett*, 2023 WL 3591158, at *3 ¶ 15, n.1 (App. May 23, 2023).[4]

Applying the same analysis here, the definition of campaign media spending is impossibly vague and overbroad; evidently it includes *every action* "combined" or "together with" the actions listed in § 16-971(2)(a). Indeed, virtually *any* discussion of policy issues could "combine[]" or perform "together with" research, design, data analytics, or the other activities laid out § 16-971(20(a)(i)–(vi). As a result, it comes as no surprise that courts have found similar language overly vague. *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (describing a

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[3] Pursuant to Ariz. Sup. Ct. R. 111(C), a copy of this decision is available here https://casetext.com/case/toma-v-fontes.

[4] Pursuant to Ariz. Sup. Ct. R. 111(C), a copy of this decision is available here https://casetext.com/case/silk-v-blodgett.

similar statute as "vague" when the statute applied to activities that "relate to" electioneering communications); *Lair v. Murry*, 871 F. Supp. 2d 1058, 1063 (D. Mon. 2012) (describing a similar statute containing the phrase "closely related in time" as vague).

1. R2-20-801(B) Does Not Clarify § 16-971(2)(a)(vii).

Facing this unintelligible statute, VRTK tries to rely on R2-20-801(B) for clarification. VRTK Brief, pp. 39–40. But this regulation is circular and gives no intelligible guidance.

R2-20-801(B) says that certain activities—"research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with" other activities listed in § 16-971(2)(a)—do not qualify as "campaign media spending" except when "***specifically*** conducted in preparation for or in conjunction with" other campaign media spending.

But adding only the word "specifically," R2-20-801(B) gives no useful guidance. Rather, it simply means that at some unknown time within a chain of events, some "specific[]" event set forth in § 16-971(2)(a) must occur. But it leaves Plaintiffs and similar organizations (and all Arizonans) in the dark as to *what*

activities can be fairly assumed to be "combined with" or "together with" other campaign media spending.

This type of ambiguity chills speech and renders § 16-971(2)(a)(vii) unconstitutional.

B. The "Top Three" donor requirement in § 16-974(C) is vague because donors cannot know if they will be disclosed.

To avoid public disclosure, a donor must both "opt out" under § 16-972(B) *and* contribute some amount less than the top three donors who contributed, directly or indirectly, in an election cycle. Because it is unknowable, at the time a donation is made, whether it will qualify as "top three" donation, § 16-974(C) forces every organization and donor to guess as to whether their donation will fall under the statute—even if they opt out under § 16-972(B). And applying this provision to *every* donation made to any PAC or organization, this problem manifestly satisfies the "substantial number" standard. *AZ Petition Partners LLC v*, 255 Ariz. at 258 ¶ ¶ 17, 18.

Resting exclusively on § 16-972(B), Appellees contend that a donor who "opts out" is sufficiently apprised as to whether his or her donation will be publicly disclosed under § 16-974(C). VRTK Brief, p. 41; AG Brief, p. 50. That is wrong. As set forth above, *supra* p. 10, §§ 16-972(B) and -974(C) govern wholly separate disclosures. Indeed, grafting § 16-972(B) into § 16-974(C) does violence to the text

of § 16-974(C). And, as noted above, Appellees cannot rely on R2-20-805(B), because it alters the plain text of § 16-974(C). *Supra* p. 10*; Stambaugh*, 242 Ariz. at 510 ¶ ¶ 10.

IV. AS APPLIED HERE, THE ACT'S DISCLOSURE REQUIREMENTS VIOLATE THE ARIZONA CONSTITUTION.

A. Plaintiffs met the standard for an as-applied challenge.

For an as-applied challenge, Plaintiffs "need only show 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; *Comm. for Just. & Fair.*, 235 Ariz. at 359 ¶ 45.

Plaintiffs' evidence far exceeded that standard. In *Citizens United*, the Supreme Court explained that disclosure requirements would be "unconstitutional" (as applied) if there was a "reasonable probability" that a particular group's members would face broad categories of retaliation— "threats, harassment, or reprisals." 558 U.S. at 370 (quoting *Buckley*, 424 U.S. at 74). Here, Plaintiffs alleged and proved specific instances of threats of physical harm, vandalism, property damage, harassment, obscenities, retaliation, false light, "doxing," and other forms of social and economic harm. Op. Brief pp. 44–45; Herrod Decl. 1 ¶20, IR.3, ep.24–25. There is nothing "hypothetical" here — the trial court had evidence of actual death threats,

violence, and property damage towards Plaintiffs. Based on this evidence, Plaintiffs more than satisfied the reasonable probability standard under *Buckley*.

The Attorney General, however, tries to minimize this evidence by re-writing the standard for as-applied challenges. Specifically, the Attorney General claims that Plaintiffs must show that the government was directly involved in the harassment or that the harassment constant and pervasive. AG Brief p. 52–54.

This is flatly wrong. The test has never been *limited* to government harassment or pervasive harassment. *See supra*, pp. 29–30. Rather, the Supreme Court's test is phrased broadly, requiring proof that there is a "reasonable probability that the compelled disclosure of … contributors' names will subject them" to harm. *Bonta*, 594 U.S. at 627. And to determine whether the Plaintiffs have met that burden, "the [courts] carefully scrutinize[] record evidence to determine whether a disclosure requirement actually risks exposing supporters to *backlash*." *Id.* at 628 (emphasis added).

This "record evidence" here clearly supports Plaintiffs' as-applied challenge under Arizona's Free Speech Clause.

B. Each of the Preliminary Injunction Factors Were Met.

The Attorney General concedes, and Plaintiffs agree, that the trial court ruled on Plaintiffs' Motion for Preliminary Injunction. AG Brief, pp. 13, 27, 75–81. Thus, the trial court's denial of this motion is properly before this Court.

Denial of a preliminary injunction should be reversed if there is an abuse of discretion. *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 ¶ 9 (1999). An abuse of discretion occurs when a trial court: (1) applies the incorrect substantive law; (2) applies the incorrect preliminary injunction standard; (3) bases "its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction"; or (4) applies the correct standard "in a manner that results in an abuse of discretion." *McCarthy W. Constructors v. Phx. Resort Corp.*, 169 Ariz. 520, 523 (App. 1991).

This Court may take its pick; the trial court abused its discretion on all of these factors. Indeed, Appellees provide little briefing on this point. While VRTK devotes one sentence in a footnote, *see* VRTK's Brief pp. 50–59, 59 n.26, the Attorney General simply argues that the trial court's dismissal under Rule 12(b)(6) shows Plaintiffs "could not succeed on the merits" under the first preliminary injunction factor. AG Brief, p. 77.

But the trial court failed to consider Plaintiffs' factual allegations as true under Rule 12(b)(6). Therefore, this significant legal error cannot serve as the basis for denial of Plaintiffs' preliminary injunction. And to the extent that the trial court's dismissal under 12(b)(6) can be grafted into a nonexistent preliminary injunction analysis, the trial court applied incorrect law under that Rule.

The Attorney General also attempts to discredit, and minimize, some portions of Plaintiffs' testimony. AG Brief, pp. 77–78. But this testimony, when placed in context, does not support denial of the preliminary injunction. And more importantly, there was *at least* substantial evidence in the record showing a "reasonable probability" of the "threats, harassment, or reprisals" suffered by Plaintiffs under *Citizens United*. Herrod Decl. 1 ¶18, IR.3 at ep.23–24; Herrod Depo. Tr. 2, at 90:14-91:3, IR.182, Ex. 22 (under seal); Mussi Decl. 1 ¶21, IR.3 at ep.4–5; Doe 1 Decl. 1 ¶13, IR.182, Ex. 26 (under seal), 9; Doe 2 Decl. 1 ¶12, IR.182, Ex. 27 (under seal).

Therefore, the Court should hold that the trial court ignored the proper standard under *Citizens United*, abused its discretion, and remand with instructions to the trial court to enter a preliminary injunction while this case proceeds to trial or summary judgement.

V. THE APPROPRIATE LEVEL OF JUDICIAL REVIEW IS STRICT SCRUTINY.

A. The Arizona Free Speech Clause Requires Strict Scrutiny.

Neither Appellee refutes the fact that the Arizona Free Speech Clause offers greater protection than the First Amendment. Upon this foundation, Arizona courts obviously should not apply the First Amendment's *lower* "exacting scrutiny" standard to the Act.

1. The Act is a Content-Based Regulation on Speech.

First, it is critical to note that other jurisdictions have applied strict scrutiny to campaign disclosure laws as content-based restrictions on speech. *Holland v. Williams*, 2018 WL 2938320 at *6 (D. Colo. 2018) (invalidating similar disclosure statute under strict scrutiny because it: (1) regulated core political speech and; (2) was a content-based restriction under *Reed v. Town of Gilbert* as "a particular type of speech—political speech");[5] *see also Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987) (applying strict scrutiny to Tennessee's Campaign Financial Disclosure Act, which required disclosure of individual donors who donated more than $100.00 to candidates or political campaign committees).

[5] Pursuant to Ariz. Sup. Ct. R. 111(C), a copy of this decision is available here https://casetext.com/case/holland-v-williams-2.

It is axiomatic that content-based laws are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); *Brush & Nib*, 247 Ariz. 269, 292 ¶ 96 (2019) ("Content-based laws must satisfy strict scrutiny.")). Both Appellees confuse content-based discrimination with viewpoint discrimination. Plaintiffs have never argued that Prop 211 is a viewpoint-based restriction that discriminates against, or in favor of, a particular point of view or message. *See*, *e.g.*, *Rosenberg v. Rector*, 515 U.S. 819 (1995) (holding that university policy that solely excluded a school newspaper espousing religious beliefs from its policy of reimbursing student newspapers for their printing costs was viewpoint-based discrimination).

Here, Prop 211 is a content-based restriction because it regulates and burdens speech based on *election-related content*. *Holland*, 2018 WL 2938320 at *6 ("[T]he [disclosure statutes] apply to a particular type of speech—political speech—because of the topics discussed in said speech."); A.R.S. § 16-971(2) (applying to speech that, among other things, "advocates for or against the nomination, or election of a candidate;" "promotes, supports, attacks[,] or opposes' a candidate" [or] . . . any state or local initiative for referendum.").

The content-based nature of Prop 211 is made manifest by the fact that it requires the regulated parties to decide whether the speech in question is "media" speech for purposes of triggering disclosure requirements. This is a quintessential

content-based speech analysis. *Reed*, 576 U.S. at 171; *Brush & Nib*, 247 Ariz. at 292 ¶ 96 ("Content-based laws must satisfy strict scrutiny.").

2. Appellees' Remaining Arguments Rest on Mischaracterized Constitutional Provisions and Caselaw.

The constitutional provisions cited by the Attorney General—article VII, § 12 and article VII § 16—only reference contributions to *committees* and *candidates*. *See* AG's Brief, p. 32 (citing Ariz. Const. art. VII, § 16 (requiring that "all campaign contributions to, and expenditures of campaign committees and candidates for public office" be publicized)). No constitutional provision cited by the Attorney General addresses donor contributions to *independent nonprofit organizations* or to *PACs*, which impose no corruption threats and require a categorically different analysis. *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

Moreover, the Attorney General asserts that "the founders were concerned with 'fight[ing] corruption and undue influence' in elections, and it is against this backdrop that the framers adopted these provisions." AG's Brief, p. 32. True enought. But Plaintiff CAP—as a 501(c)(3) nonprofit organization—is prohibited under federal law from engaging in any campaign activity. Op. Brief, pp. 20–21. As such, "there is no possibility of corruption or the appearance of corruption because

there are no contributions to candidates." *Id.* p. 22; *see also Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007) ("Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). The same is true for PACs. In fact, PACs are permitted to spend more resources than candidates and campaigns precisely because corruption concerns are lessened, and free speech concerns are heightened. *Buckley*, 424 at 47.

The Attorney General also misinterprets Plaintiffs' argument by stating that the "greater protection" refers to the scope of *topics* covered by the Arizona Free Speech Clause. AG's Brief, p. 32. But that is not the point advanced by the Plaintiffs. The Plaintiffs have argued—and continue to maintain—that the Arizona Free Speech Clause provides greater protections for all types of free speech rights with respect to the *depth of their protection*, e.g., the right to speak freely should be protected with the highest level of scrutiny. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354–55 (1989).

At bottom, Appellees fail to rebut the fact that Prop 211—applying to PACS and *independent organizations*—deserves strict scrutiny.

B. The Act fails to satisfy strict scrutiny.

While a state generally has interests in having an informed electorate and avoiding corruption, the Act's disclosure requirements are not properly tailored or targeted to either of these interests. Op. Brief, 22–23.

The Act's disclosure requirements are not properly tailored because they mandate disclosure of an entity's top three donors, even if those donors did not contribute to "campaign media spending." A.R.S. § 16-974(C). Additionally, an entity must also disclose donors who "opted out" from campaign media spending under Section 16-972(B). This requirement is arbitrary and incompatible with the state's purported interests because it requires disclosure of all donors, even those who did not contribute to "campaign media spending." As such, it is not properly tailored to the statutes' purported goal.

The Act's disclosure requirements are also not properly tailored because they mandate disclosure of all donors who contribute more than $5,000 to an entity if that entity later spends its resources on campaign media. In effect, the Act requires disclosure of donors who did not earmark their donations for—and likely never intended their donations to be spent on—campaign media spending, which stands in stark contrast with permissible disclosure requirements. *See e.g.*, *Williams*, 812 F.3d at 797–98 (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").

The Attorney General attempts to rebut this point by asserting that "Prop. 211 explicitly requires that a donor be (1) notified in writing that his money ***may*** be used for campaign media spending, (2) given a 21-day opportunity to opt out, and (3) told that, if he does not opt out, his identity may be disclosed." AG's Brief, p. 43–44 (citing A.R.S. § 16-972(B)) (emphasis added). But the Attorney General concedes, the contributions "*may*" be used for campaign media spending, and thus, not all contributions will be used for campaign media spending. That necessarily means the Act's compelled disclosure of *all* donors who contribute more than $5,000 to an entity if that entity later spends its resources on campaign media is overbroad. Given this overbroad disclosure requirement, the Act does not advance the State's interest in "helping 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).

The Act is also improperly tailored because it sets an arbitrary donation threshold of $5,000 as the trigger for disclosure. The Act provides no justification for why donations over $5,000 trigger the disclosure requirement and the state's interests, whereas donations of $4,999 do not. The Attorney General attempts to support the Act's "large donor" focus by referencing the Act's opt-out, § 16-

972(B),(C), and risk-of-physical harm exception, § 16-973(F), and then stating that the Act "operates to inform voters of the original source of monies used for campaign media spending, while minimizing the impact on associational interests." AG's Brief, p. 42. But as discussed above, the opt out provision and risk-of-physical harm exception are illusory and provide no protection for donors.

Stated simply, the Act's arbitrarily high $5,000.00 threshold does not provide a better informed electorate, nor is it aimed at anticorruption or anti-fraud efforts. It is improperly tailored. And the Act places a severe burden and impact on the associational and free speech rights of donors, and targets "large donors" determined by an arbitrary $5,000 threshold. Thus, the Act 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).

VI. THE ACT FAILS TO SATISFY EXACTING SCRUTINY.

A. Even if exacting scrutiny were applied, the Act's disclosure requirements still fail to satisfy the exacting scrutiny standard.

The exacting scrutiny standard "has real teeth" and "require[s] narrow tailoring for every single disclosure regime." *Bonta*, 594 U.S. at 622 (Alito, J., concurring); *id*. at 636 (Sotomayor, J., dissenting). "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. Narrow

tailoring 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)).

The Act's disclosure requirements fail to satisfy exacting scrutiny standard because they heavily burden free speech and are not narrowly tailored. *Buckley*, 424 U.S. at 64. The burden is clear—the disclosures effectively dox donors and expose them to retaliation. The Supreme Court has recognized that donors are deterred from speech and experience "widespread burden[s]" on their "associational rights" when they face potential violence, threats, and protests, in response to the donors' act of donating. *Bonta*, 594 U.S. at 598. Declarations submitted by Plaintiffs—detailing the threats and violence they have faced and will face—provide factual support of this reality in the instant case. *See* Herrod Decl. 1 ¶18, IR.3 at ep.23–24; Herrod Depo. Tr. 2, at 90:14-91:3, IR.182, Ex. 22 (under seal); Mussi Decl. 1 ¶21, IR.3 at ep.4–5; Doe 1 Decl. 1 ¶13, IR.182, Ex. 26 (under seal), 9; Doe 2 Decl. 1 ¶12, IR.182, Ex. 27 (under seal).

While the Act provides a purported "exception" for donors, this "exception" is illusory and fails to save the Act. The "exception" eliminates disclosure requirements for donors who can show "a reasonable probability" that a donor or the donor's family is subject to "a serious risk of *physical* harm." § 16-973(F) (emphasis

added). In effect, this provision vitiates the well-established protections for free speech and heightens the standard for what constitutes a violation. Indeed, there are many types of threats and harassment that could violate free speech rights but that may not otherwise meet the Act's heightened standard of serious risk of "physical harm." § 16-973(F). Thus, the Act is arbitrary and fails exacting scrutiny review.

VII. THE ACT ALSO VIOLATES THE PRIVATE AFFAIRS CLAUSE OF THE ARIZONA CONSTITUTION.

VRTK contends the Private Affairs Clause is inapplicable because the Act covers a "public issue," passed by the Legislature addressing public advertising. VRTK Brief, p. 46. But that cannot be the standard. If it were, the government could intrude on essentially all private affairs by simply making it a "public" issue by legislating it.

Rather than limiting it to the Fourth Amendment, Arizona courts have also interpreted the Private Affairs Clause to cover *other* specific instances of government intrusion into the private affairs of Arizona citizens. *See Dep't of Child Safety v. Lang*, 254 Ariz. 539 (App. 2023) (mental health of minors); *Morgan v. Dickerson ex rel. Cnty. of Cochise*, 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).

The Attorney General also asserts that article VII, § 16 "strongly suggests" that campaign contributions were not considered "private information by the [Arizona] framers." AG Brief, p. 65–66. The opposite is true, actually. Article VII § 16 covers disclosure of campaign contributions by *campaign committees and candidates*—nothing more. Thus, this exception to the Private Affairs Clause is clear; campaign contributions must be disclosed by corporations. Yet the Act goes much further than that, requiring disclosure by and to people and organizations that are not candidates or campaign committees—such as organizations that engage in pure issue advocacy.

The Attorney General misses the point; Prop 211 requires organizations like CAP and FEC to disclose donors and contributions that by law *cannot* go towards campaigns or candidates. CAP and FEC are involved in issue advocacy and candidate support, not campaigns and candidate coordination. It would be illegal for CAP and FEC to do so. Thus, Prop 211 violates the Private Affairs Clause.

VIII. THE TRIAL COURT ALSO ERRED IN DENYING STANDING AS TO PLAINTIFF'S SEPARATION OF POWERS CLAIM.

Section 16-974 allows the Commission to exercise legislative, executive, and judicial power without oversight. Appellees have failed to refute the fact that Arizona

courts have invalidated such broad grants of authority to agencies. *State v. Block*, 189 Ariz. 269, 278 (1997) (invalidating similar agency).

The trial court erred in denying standing. Plaintiffs' distinct, palpable, and individualized injury is that they are confronted with unchecked enforcement from the Commission. This injury falls squarely only on donors and Plaintiffs.

The Attorney General wrongly attempts to limit the reach of *Gregory v. Shurtleff* to cases in which "public interest" dictates standing where no one else can bring a claim. AG Brief, p. 71. The Court said nothing to that effect. 299 P.3d 1098, 1110 (Utah 2013) (explaining plaintiff need only be an appropriate party). As jurisdictions with "mandatory" clauses, *see* Ariz. Const. art. II § 32, plaintiffs can have standing to enforce such protections here. Finally, neither Appellee has refuted it is within the Court's discretion to adjudicate this matter of public importance. *Rios v. Symington*, 172 Ariz. 3, 5 n.2 (1992).

IX. CONCLUSION.

The Act's disclosure requirements are overbroad, vague, and violate Arizona's Free Speech Clause. This Court should: (1) hold the Act's disclosure requirements as facially unconstitutional; (2) vacate the dismissal of Plaintiffs' claims; (3) vacate the denial of Plaintiffs' preliminary injunction motions; and (4) remand with an order

to enter a preliminary injunction while this case proceeds to trial or summary judgement.

RESPECTFULLY SUBMITTED this 16th day of August 2024.

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