

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

<p>CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE I; DOE II;</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p style="text-align: center;">v.</p> <p>ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,</p> <p style="text-align: center;">Defendants/Appellees,</p> <p style="text-align: center;">and,</p> <p>ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC, Intervenor-Defendants/Appellees.</p>	<p>Arizona Supreme Court No. CV-24-0295-PR</p> <p>Court of Appeals Division One No. 1 CA-CV 24-0272</p> <p>Maricopa County Superior Court No. CV2022-016564</p> <p>BRIEF OF AMICUS CURIAE ARIZONA CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF APPELLANTS</p>
--	--

BRIEF OF AMICUS CURIAE ARIZONA CHAMBER

FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

MICHAEL G. BAILEY, SBN 013747
ARIZONA CHAMBER OF
COMMERCE & INDUSTRY
100 N. 7th Avenue, Suite 120
Phoenix, Arizona 85007
Telephone: (602) 248-4430
mbailey@azchamber.com
Attorney for Arizona Chamber of Commerce & Industry

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF CITATIONS.....	iii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
ARGUMENT.....	3
I. The Court should grant the Petition to provide guidance on the difference between the First Amendment and the Arizona Constitution’s free speech clause. ..	3
CONCLUSION.....	8

TABLE OF CITATIONS

CASES

BRUSH & NIB STUDIOS, LC v. CITY OF PHX., 247 ARIZ. 269 (2019).....	3, 4
CTR. FOR ARIZ. POL’Y INC. v. ARIZ. SEC’Y OF STATE, No. 1. CA-CV 24-0272, 2024 ARIZ. APP. LEXIS 144 (Nov. 8, 2024).....	2, 3, 6, 7
DAILEY v. SUPERIOR COURT OF SAN FRANCISCO, 112 CAL. 94 (CAL. 1896).....	5
GITLOW v. NEW YORK, 268 U.S. 652 (1925).....	5
LEGACY FOUND. ACTION FUND. v. CITIZENS CLEAN ELECTIONS COMM’N, 254 ARIZ. 485 (2023).....	2
MCDONALD v. CITY OF CHICAGO, 561 U.S. 742 (2010).....	5
MOUNTAIN STATES TEL. & TEL. CO. v. ARIZ. CORP. COMM., 160 ARIZ. 350 (1989).....	4
PHOENIX NEWSPAPERS v. SUPERIOR COURT, 101 ARIZ. 257 (1966).....	7
STATE v. MIXTON, 250 ARIZ. 282 (2021).....	5, 8
STATE v. STUMMER, 219 ARIZ. 137 (2008).....	6
TURLEY v. STATE, 48 ARIZ. 61 (1936)	4

YETMAN V. ENGLISH, 168 ARIZ. 71 (1991).....	6
--	---

IN RE MARRIAGE OF EVILSIZOR SWEENEY, 237 CAL. APP. 4TH 1416 (CAL. APP. 2015).....	6
--	---

STATUTES

PROP 211, AZ. PROPOSITION NO. 211 (2024).....	PASSIM
---	--------

OTHER AUTHORITIES

JEFFREY S. SUTTON, WHY TEACH—AND WHY STUDY—STATE CONSTITUTIONAL LAW, 34 OKLA. CITY. U. L. REV. 165 (2009).....	3
--	---

REBECCA WHITE BERCH, MEGAN K. SCANLON, AND JARED L. SUTTON, CELEBRATING THE CENTENNIAL: A CENTURY OF ARIZONA SUPREME COURT CONSTITUTIONAL INTERPRETATION, 44 ARIZ. ST. L. J. 461 (2012).....	5
---	---

CONSTITUTIONAL PROVISIONS

ARIZ. CONST. ART. II, § 6.....	PASSIM
--------------------------------	--------

U.S. CONST. AMEND. 1.....	PASSIM
---------------------------	--------

IDENTITY AND INTEREST OF AMICUS CURIAE

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

INTRODUCTION

Despite our constitution’s guarantee that we may “freely speak,” the Voters’ Right to Know Act (“Prop 211” or the “Act”) chills speech by exposing those who take a stand on issues of public interest to harassment and abuse. If not self-evident, Petitioners’ account of the dangers to those who voice unpopular positions amply demonstrates the Act’s harm. *See* Petition at 17-19.

Prop 211 creates the most burdensome campaign finance disclosure regime in the country.¹ And at least as to its ballot proposition spending regulations, which the Court of Appeals never addressed, and for which there is no compelling governmental interest, no important governmental interest, no narrow tailoring, and indeed no rational basis at all, it does so unconstitutionally. The Court should grant review because the issues presented are recurring legal issues of statewide

¹ As described by one of the intervenor-defendants, Prop 211 “establish[ed] the nation’s most comprehensive elections spending transparency law.” Campaign Legal Center, *Arizona’s Proposition 211 and the Fight for the Voters’ Right to Know* (Aug. 22, 2023), available at: <https://campaignlegal.org/story/arizonas-proposition-211-and-fight-voters-right-know>.

importance, and particularly because they are of constitutional dimension. *See Legacy Found. Action Fund. v. Citizens Clean Elections Comm’n*, 254 Ariz. 485 (2023).

In addition, the Court should grant review to consider the distinctions between the speech guarantees of the U.S. Constitution and the Arizona Constitution. Petitioners raised issues only under the Arizona Constitution, explaining that the applicable provisions give broader protection than the federal counterparts. Yet the Court of Appeals said little to address the textual differences between the Arizona speech guarantee and the First Amendment. While quasi-summarily rejecting arguments relating to Arizona speech protections, the court focused instead on the Arizona constitution’s *candidate* contribution disclosure requirements, and erroneously conflated contributions to candidates, contributions to independent expenditure efforts, and contributions in relation to ballot propositions. *Ctr. For Ariz. Pol’y Inc. v. Ariz. Sec’y of State*, No. 1. CA-CV 24-0272, 2024 Ariz. App. LEXIS 144, ¶ 19 (Nov. 8, 2024). But the government’s regulatory interest is different for each type of contribution, and the categories of contribution should be analyzed individually.

The Court of Appeals’ willingness to confront these issues was perhaps hamstrung by the dearth of developed case law regarding Arizona’s free speech clause. This Court has often observed that Arizona’s free speech protection is textually distinguishable and broader than the First Amendment, and yet has rarely explained those differences.

ARGUMENT

I. The Court should grant the Petition to provide guidance on the difference between the First Amendment and the Arizona constitution's free speech clause.

As Petitioners explain, the applicable standard of review for campaign disclosure regimes under the First Amendment has proved elusive. Petition at 20-22. The Court should grant review and consider the issue under our constitution. Deciding the correct standard would serve the two-fold purpose of expanding on our constitution's meaning and clarifying an important area of law.

State courts often give their own state constitutions short shrift in developing a provision's particularized meaning. *See Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 282 ¶ 46 (2019) ("However, although article 2, section 6 does, by its terms provide greater speech protection than the First Amendment, we have rarely explored the contours of that right. Rather, we have often relied on federal case law in addressing free speech claims under the Arizona Constitution."); Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 Okla. City. U. L. Rev. 165, 166 (2009) (noting that relatively few law schools offer a state constitution class). This overreliance on federal case law was evident in the Court of Appeals' analysis, which wholesale adopted First Amendment jurisprudence. *Ctr. For Ariz. Pol'y*, at ¶¶ 17-21. This Court should elucidate the meaning of Arizona's unique speech-related provisions.

Arizona's free speech provision and the First Amendment are starkly different:

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

Arizona case law is replete with statements that Article II, Section 6 of the Arizona Constitution provides “broader protections” than the First Amendment. *Brush & Nib*, 247 Ariz. at 282 ¶ 47 (listing cases). The terms of the Arizona provision differ from the First Amendment and establish a positive right for Arizonans to speak “freely,” surpassing the First Amendment’s mere constraint on government power. Ariz. Const. art. II, § 6; *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm.*, 160 Ariz. 350, 355 (1989). Arizona’s free speech clause also grants the right to not speak. *Brush & Nib*, 247 Ariz. at 282 ¶ 48. Enforcing our constitution’s broad guarantees is especially necessary “where the language is different” between Arizona’s provisions and their federal counterpart. *State v. Mixton*, 250 Ariz. 282, 302 ¶ 94 (2021) (Bolick, J., dissenting) (listing cases where state constitutional provisions were more protective than their federal counterparts). Indeed, independently construing the contours of state constitutional provisions is a proud tradition in Arizona. *See Turley v. State*, 48 Ariz. 61, 70-71 (1936) (“We have the right, however, to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the federal Constitution and the federal decisions based on that Constitution.”)

The sweeping language of Article II, Section 6 “indicates the Arizona framers’ intent to rigorously protect freedom of speech.” *State v. Stummer*, 219 Ariz. 137, 142

¶ 14 (2008). The framers of the Arizona Constitution “had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona’s needs.” Rebecca White Berch, Megan K. Scanlon, and Jared L. Sutton, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L. J. 461, 468 (2012). The framers also adopted the free speech provision before the First Amendment’s incorporation. *See McDonald v. City of Chicago*, 561 U.S. 742, 810 (2010) (noting that the right to free speech was incorporated against the states in *Gitlow v. New York*, 268 U.S. 652 (1925)). Accordingly, the Arizona free speech clause stands on its own to jealously protect the right to speak and to bar overzealous regulation.

The text reveals another important aspect of Article II, Section 6 - the guaranteed speech rights cannot be curtailed until after the right is abused. The clause demands that people be permitted to freely speak, allowing restraint or penalty only if the right is abused. That is to say, the “right to speak, write, and publish cannot be abused until it is exercised.” *Phoenix Newspapers v. Superior Court*, 101 Ariz. 257, 259 (1966) (quoting *Dailey v. Superior Court of San Francisco*, 112 Cal. 94, 97 (Cal. 1896)).² At odds with that framework, Prop 211’s recordkeeping and disclosure burdens chill non-abusive speech.

² In *Phoenix Newspapers*, the Court noted that California and Texas, who share similar language to Arizona’s free speech clause, also recognized this temporal element to the clause’s guarantee. 101 Ariz. at 259. *See also Ex parte Tucci*, 859 S.W. 2d 1, 5-6 (Tex. 1993) (holding Texas’s similarly worded state constitution provision would not tolerate judicial restrictions on speech unless they

This is not to say speech is entirely unlimited. Arizona’s free speech clause does not protect against libel or defamation, for example. *See Yetman v. English*, 168 Ariz. 71 (1991). The Arizona Constitution also provides for disclosure of contribution and expenditures for *candidates* and *campaign committees*. Ariz. Const. art. VII, § 16. And some unlawful speech may be enjoined with due process. *See In re Marriage of Evilsizor Sweeney*, 237 Cal. App. 4th 1416, 1431 (Cal. App. 2015) (upholding injunction preventing a husband from publishing text messages after a judicial determination that his conduct constituted abuse under the California Constitution). Nothing in the Arizona Constitution, however, endorses disclosure and recordkeeping requirements for organizations that are neither campaigns nor campaign committees and whose speech has not already been adjudicated unlawful.

Despite the textual differences between the First Amendment and Article II, Section 6, the Court of Appeals applied “the less rigorous standard—exacting scrutiny,” rather than strict scrutiny. *Ctr. For Ariz. Pol’y*, at ¶ 21. In doing so, it did not consider the actual “texts” of the relevant provisions, thus ignoring the proper “analytical starting point” for comparing the Arizona Constitution to the relevant federal counterparts. *Mixton*, 250 Ariz. at 290 ¶ 30. Instead, the court cited Article VII, Section 16 — which regulates contributions to campaign committees and candidates for public office — to conclude that the Arizona Constitution “suggests” that it does not offer broader speech protection than the First Amendment.

“represent[ed] the least restrictive means” of preventing imminent and irreparable harm to the judicial process).

The Court of Appeals also pervasively conflated different categories of political spending. The governmental interest in regulating direct candidate contributions is addressed directly in the Arizona constitution. But regulation of independent expenditures for candidates requires a different assessment of governmental interest; and ballot proposition spending, different still. Treating all “election” spending as the same, the Court of Appeals failed to distinguish between these categories and failed to consider the government’s relative interest in regulating each category in light of Prop 211.³

Is the government’s interest in policing corruption by regulating candidate contributions different from its interest in regulating independent expenditure efforts? And, is there *any* rational basis to require the disclosure of spending on ballot propositions, which are (or should be) transparent on their face? Is there a rational claim that “if my neighbor is for it, I must be against it?”

At a minimum, the Court should grant review to explore the meaning of the Arizona Constitution and to give guidance on the proper standard of review and the nature of the government’s interest in these regulations. Such a review should include an analysis of the texts and their differences. This is especially important because Prop 211’s prophylaxes capture far more than “campaign committees and candidates for public office”—the subject of the clause the Court of Appeals relied

³ “By expressly mandating the disclosure of *campaign contributions*, the framers of the Arizona Constitution in fact highlighted an intent to compel the disclosure of the identities of persons and groups contributing money to influence *elections*.” *Ctr. For Ariz. Pol’y*, at ¶ 19 (emphasis added).

on. Only after considering the text should the Court determine the level of scrutiny and the pertinent governmental interest.

CONCLUSION

For the reasons above, the Court should grant review in this case.

RESPECTFULLY SUBMITTED this 28th day of February, 2025.

By: /s/ Michael G. Bailey

Michael G. Bailey

Arizona Chamber of Commerce & Industry

100 N. 7th Ave., Suite 120

Telephone: (602) 248-4430

mbailey@azchamber.com

Attorney for Arizona Chamber of Commerce & Industry