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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE I; DOE II; Plaintiffs, vs. ARIZONA SECRETARY OF STATE; KATIE HOBBS, in her official capacity; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION; DAMIEN R. MEYER, in his official capacity as Chairman; AMY B. CHAN, in her official capacity as Commissioner; GALEN D. PATON, in his official capacity as Commissioner; MARK KIMBLE, in his official capacity as Commissioner; STEVE M. TITLA, in his official capacity as Commissioner; THOMAS M. COLLINS, its executive director, Defendants.	Case No. **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **(Oral Argument Requested)**

Pursuant to Rule 65 of the Arizona Rules of Civil Procedure, Plaintiffs move for an order preliminarily enjoining Defendants from enforcing or implementing Proposition 211, the so-called "Voters' Right to Know Act" (the "Act" or "Prop 211").

INTRODUCTION

This action seeks to protect Plaintiffs' free speech, privacy, and other rights under the Arizona Constitution. The Act violates these rights by chilling Plaintiffs' speech, invading their private affairs, and burdening them with labyrinthine and vague disclosure

rules that are committed exclusively to an unelected commission to create, interpret, and enforce.

The right to express one's views without fear of reprisal is deeply ingrained in the American tradition. The works of Thomas Paine and *The Federalist,* for example—as well as the responses to them—were published anonymously, and since those days, anonymous speech has been prized in the United States, and limited only in the most serious circumstances.[1] This core right, however, faces a serious infringement from Prop 211 with no serious circumstance to justify the limitation

Purportedly, the Act encourages transparency and more "civil discourse." But transparency is for the government, not citizens. Citizens are entitled to *privacy*. And promoting "civil discourse" is an admission that the Act seeks to regulate how people speak and who may do so.

Prop 211 also burdens individuals and charitable organizations with the task of navigating a vague reporting regime, vesting the Citizens Clean Elections Commission ("Commission") with unfettered discretion to "clarify" and enforce the Act. Hurt most by this scheme are small charities and low-dollar donors who cannot afford to risk being caught up in the Act's various enforcement traps even if the "original sources" of donations are willing to disclose their identities. The Act is most likely to silence groups and individuals like these.

But more than just silencing the little guys, Prop 211 is more likely to stifle those who engage in unpopular or controversial speech. Not long ago, members and advocates in the LGBTQ community feared retaliation, discrimination, and ostracism, not only from their own families but from the public. Although courageous people spoke against this type of discrimination and for recognition and rights for this community, many chose to remain anonymous fearing harassment, but still wishing to support their cause by "speaking" through donations.

[1] For example, forty-four states have some form of guaranty in their constitution related to ballot secrecy. *See* https://www.secretballotatrisk.org/Secret-Ballot-At-Risk.pdf at Appendix 2.

Today, the situation is different, with those advocating for no special recognition or rights related to LGBTQ issues perhaps being ostracized or, in today's parlance, "canceled," even if they express sincerely held religious or political beliefs. Many are not willing to put their name to speech and advocacy against controversial issues.

Fortunately, Arizona's Constitution protects those who wish to speak on controversial matters affecting public policy, allowing them to do so without fear of reprisal. "Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). That is why "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). Prop 211 destroys this shield.

Unless this Court enjoins its enforcement, Prop 211 will leave citizens without the protections that generations of people who wished to speak on controversial and potentially unpopular topics have enjoyed. But more than that, it will undoubtedly harm the quality of discourse as it will shift the focus from what is being said to who is speaking.

Prop 211 is styled the "Voters' Right to Know Act," but that is a misnomer. Voters only get to know who felt comfortable subjecting themselves to the Act's identity and financial reporting requirements and who can risk the exposure to retaliation when communicating their political views; voters do not get to know who the Act silenced. This action seeks a declaration that the Act is unconstitutional and an order permanently enjoining its enforcement. The Motion asks the Court to preliminarily enjoin its enforcement and effect immediately until such time the Court decides whether further proceedings are necessary.

STATEMENT OF FACTS

What Prop 211 requires

Prop 211 went into effect on December 5, 2022. It adds Sections 16-971 through 16-979 to Title 16 of the Arizona Revised Statutes, imposing new original-source

disclosure requirements related to monetary and in-kind contributions used for "Campaign Media Spending." In summary, the Act provides as follows:

Section 16-971 adds nineteen defined terms, many with multiple subparts, including terms not otherwise defined in the Arizona Revised Statutes such as "Business Income," "Campaign Media Spending," "Covered Person," "Identity," "In-Kind Contribution," "Original monies," "Personal Monies, "Public Communication," Traceable Monies," and "Transfer Records."[2]

Campaign Media Spending is defined broadly to include 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 until the time of the general election and that is disseminated in the jurisdiction where the Candidate's election is taking place"; and "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum."[3] A.R.S. § 16-971(2).

Campaign Media Spending also 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 in [the subdivision]." *Id.* § 16-971(2)(vii) (emphasis added).

Section 16-972 requires a Covered Person[4] to provide donors with notice and up to 21 days to "opt-out" of having their donations used for Campaign Media Spending.[5] This

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[2] The Act's defined terms are capitalized in this Motion.

[3] It also includes any "*activity* or Public Communication that supports the election or defeat of Candidates of an identified political party or the electoral prospects of an identified political party." A.R.S. § 16-971(2)(vi) (emphasis added).

[4] Covered Person is defined as "any person whose total Campaign Media Spending or acceptance of In-kind Contributions to enable campaign media spending, or a combination of both, in an election cycle is more than $50,000 in statewide campaigns or more than $25,000 in any other type of campaigns." A.R.S. § 16-971(7)(a).

[5] Confusingly, because Campaign Media Spending includes "research, design, production, polling, data analytics, mailing or social media list acquisition," etc., that might be used to prepare for future Public Communications, charities can meet the Campaign Media Spending threshold—thus becoming a Covered Person under the Act with disclosure

Section also requires that any person donating more than $5,000 in Traceable Monies to a Covered Person in an election cycle inform the Covered Person of identities of any other person that "directly or indirectly" contributed more than $2,500 Original Monies to the donor and any intermediaries involved in transferring those Original Monies to the donor.[6]

Section 16-973(A) requires, among other things, that a Covered Person file a disclosure report with the Secretary of State "[w]ithin five days after first spending monies or accepting In-kind Contributions totaling $50,000 or more during an Election Cycle on Campaign Media Spending." The report must contain the name, mailing address, and occupation and employer of each "donor[7] of Original Monies[8] who contributed, directly or indirectly, more than $5,000 of Traceable Monies[9] or In-kind Contributions for Campaign Media Spending during the Election Cycle to the Covered Person." *Id*. § 16-973(A)(6). In other words, an organization that spends more than $50,000 for Campaign Media Spending during an Election Cycle must disclose to the Secretary of State the name, mailing address, occupation, and employer information of all donors who gave more than $5,000 over those two years; the Secretary will then make that information available to the public.[10]

Section 16-974(C) also requires a Covered Person to disclose "the names of the top three donors who directly or indirectly made the three largest contributions of original

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obligations—*simply by conducting research* and other things charities do. Unless charities pre-emptively give all donors notice that donations might be used to fund activities that could be regarded as Campaign Media Spending at least 21 days in the future, they cannot use those donations in their charitable discretion without risking the public disclosure of their donors' private information.

[6] This Section also requires a Covered Person to identify all persons the Covered Person disbursed $10,000 or more to in Traceable Monies during the election cycle. A.R.S. § 16-973(A)(8).

[7] If the donor is an Organization, the report must provide the Organization's tax identification number and state of organization.

[8] Original Monies is defined to included "Business Income or an individual's Personal Monies." A.R.S. § 16-971(12).

[9] Traceable Monies is defined to include "[m]onies that have been given, loaned[,] or promised to be given to a covered person and for which no donor has opted out of their use or transfer for Campaign Media Spending." A.R.S. § 16-971(18).

[10] Under the Act, unions engaging in Campaign Media Spending are allowed to receive twice as much in "dues" without having to disclose the donors so long as they use *only* dues money on campaign media spending. *Id.* A.R.S. § 16-971(1) & (7)(b)(ii).

monies during the election cycle to the covered person." This disclosure is required even if the donors of those Original Monies elected to not have their donations used for Campaign Media Spending, i.e., they "opted out" under Section 16-972(B).

Section 16-974(A) gives the Commission extensive powers, including the power 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 this chapter." Remarkably, this grant of powers is so broad that any rules or enforcement actions "are not subject to the approval of or any prohibition or limit imposed by *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).

Section 16-973(F) contains an exception that prevents disclosure only if the Original Source of a 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."

Section 16-976 provides for the imposition of significant civil penalties for violating the Act, and Section 5 of Prop 211 itself states that "[t]he rights established by this Act shall be construed broadly."

Effects on Plaintiffs

Plaintiffs are Center for Arizona Policy, Inc., ("CAP"), a qualified 501(c)(3) organization, and the Arizona Free Enterprise Club ("FEC"), a qualified 501(c)(4) organization, and Does I and II. CAP and FEC engage in issue advocacy related to campaigns in Arizona that would qualify them as "Covered Persons" under the Act. *See* Declaration of Cathi Herrod, attached as Exhibit 1, ("CAP Dec") ¶¶ 1–14; Declaration of Scot Mussi, attached as Exhibit 2, ("FEC Dec") ¶¶ 1–12. Doe plaintiffs are individuals who donate confidentially to organizations like CAP and FEC in amounts covered by the Act precisely because of the campaign-related issue advocacy engaged in by those charitable organizations. Declaration of Doe I, attached as Exhibit 3 (redacted), ("Doe I

Dec") ¶¶ 1–9; Declaration of Doe II, attached as Exhibit 4 (redacted), ("Doe II Dec") ¶¶ 1–9.[11]

In their Verified Complaint, Plaintiffs assert that the Act is unconstitutional because it violates their rights to speak freely, to be undisturbed in their private affairs, and to a government where legislative, executive, and judicial powers are wielded by distinct and separate divisions of government. Implementing the Act violates these rights.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiffs satisfy the requirements for a preliminary injunction.

A party seeking a preliminary injunction must show 1) a likelihood of success on the merits; 2) the possibility of irreparable harm if relief is not granted; 3) balance of hardships favoring the moving party; and 4) public policy weighs in favor of injunctive relief. *Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021). Courts apply a sliding scale in determining whether to issue a preliminary injunction rather than a strict balancing of the four factors. *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. 407, 410–11 ¶ 10 (2006). Thus, to warrant a preliminary injunction the plaintiff must "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 tips sharply in favor of the moving party." *Id*. (citation and internal marks omitted). In other words, "[t]he greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be." *Id*. All these factors decidedly favor Plaintiffs on each of their claims.

II. Plaintiffs will prevail on the merits of each of their claims.

Plaintiffs allege that the Act violates their rights under the Arizona Constitution because it violates their rights to "speak freely," to be "undisturbed" in their "private affairs," and to have a state government constrained by the "separation of powers."

[11] Declarations from the two organizational Plaintiffs are attached to this Motion. Plaintiffs are filing redacted versions of the Declarations submitted by Plaintiffs Doe I and II, and seeking leave to file the unredacted versions under seal. This is necessary to preserve the confidentiality of Doe I and II.

Verified Complaint ¶¶ 70–92. The Act fails strict scrutiny and is otherwise vague, overly broad, and unenforceable.

A. Plaintiffs' First Claim: The Act Violates the Free Speech Guarantees in Article II, Section 6, of the Arizona Constitution.

The Arizona Constitution protects the right of all people to speak freely. Ariz. Const. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").

Unlike the First Amendment, which frames free speech in terms of restricting government actions, Arizona's Constitution frames the right to speak freely as a positive right, without reference to government action. *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 104 ¶ 10 (App. 2017) ("The right to free speech is granted directly to every Arizonan and is not merely a protection against government action …").

In part because of these textual differences, the Supreme Court has consistently held that Arizona's Constitution provides greater protection than the First Amendment. *See, e.g., Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 ¶ 45 (2019) ("[T]he Arizona Constitution provides broader protections for free speech than the First Amendment."); *see also Sign Here Petitions*, 243 Ariz. at 104 ¶ 10 ("Where the guarantees of the Arizona Constitution are in question, 'we first consult our constitution.'" (citation omitted). Arizona courts may therefore use First Amendment precedent to address state constitutional claims, because "a violation of First Amendment principles 'necessarily implies' a violation of the broader protections" of the Arizona Constitution. *Brush & Nib*, 247 Ariz. at 282 ¶ 47. But a law that does *not* violate the First Amendment may still violate the Arizona Constitution.

Finally, like the First Amendment, Arizona's Constitution "includes both the right to speak freely and the right to refrain from speaking at all." *Id*. at 282 ¶ 48 (citation omitted); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988) (First Amendment guaranties include freedom of deciding "both what to say and what *not* to say.")

Here, the Act violates the right to speak and not speak: it chills speech through its disclosure and regulatory scheme, and it compels speech through its donor disclosure obligations. Plaintiffs consist of two charitable organizations and two individual donor plaintiffs. The organizations have a history of engaging in Campaign Media Spending with donors that Contribute more than $5,000 to support those efforts during an Election Cycle. CAP Dec ¶¶ 1–14; FEC Dec ¶¶ 1–12, 23. These organizations have experienced harassment, threats (including violent threats), intimidation, and property damage because of their public positions. CAP Dec ¶¶ 19–22; FEC Dec ¶¶ 16–17. These organizations also keep their donors' identities and donation amounts confidential, in part to shield them from suffering harassment and other forms of retaliation. CAP Dec ¶¶ 15–18, 22–24; FEC Dec ¶¶ 13–15, 17–24.

Plaintiffs Doe I and II each have a history of donating to charitable organizations because those charities engage in issue advocacy that they support (Campaign Media Spending under the Act) and do so in amounts governed by the Act's disclosure requirements. Doe I Dec ¶¶ 1–9; Doe II Dec ¶¶ 1–8, 15. Plaintiffs Doe I and II donate to these organizations and require that their donations be kept confidential, in part because of concern about harassment. *See* Doe I Dec ¶¶ 10–16; Doe II Dec ¶¶ 9–15.

Because of the Act, CAP and FEC will alter or eliminate activities that could subject them and their donors to the Act, and that "self-censorship" will have a material impact on their ability to speak to the public on policy issues and on donor support. CAP Dec ¶¶ 25–30; FEC Dec ¶¶ 24–29. Likewise, Plaintiffs Doe I and II will limit or alter their charitable donations to such organizations because of the Act. Doe I Dec ¶ 14; Doe II Dec ¶¶ 13–15.

Thus, Plaintiffs' Verified Complaint and declarations demonstrate beyond any doubt that the Act chills speech. *See Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) (stating that "political speech must prevail against laws that would suppress it by design or inadvertence" and that "the First Amendment protects speech and speaker, and the ideas that flow from each").

1. The Act is content-based and fails strict scrutiny.

Laws or regulations that "distinguish favored speech from disfavored speech" or "regulate speech because of the message it conveys" are content-based laws subject to strict scrutiny. *Brush & Nib*, 247 Ariz. at 292 ¶ 96 (citations omitted). Laws that seem "content neutral" are nevertheless content-based regulations of speech if they "cannot be 'justified without reference to the content of the regulated speech' or [if they] were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (citation omitted). "[S]uch laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Brush & Nib*, 247 Ariz. at 292 ¶ 96 (citation & internal marks omitted).

The Act imposes content-based restrictions on speech and thus is presumptively unconstitutional for the following reasons:

First, the Act is directed at a specific kind of political speech that comes in the form of Campaign Media Spending. A.R.S. § 16-971(2). This includes 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." *Id.* Thus, the Act requires the examination of the content of the communication to determine whether it applies. It applies to a particular kind of political discourse, that which is tied in a poorly defined way to a campaign. It is thus "content based." *See Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.")

Second, the Act discriminates against forms of speech most likely to garner interest, e.g., intensely controversial issues or candidates in highly competitive elections. These are the kind of "campaigns" most likely to generate the Act's "Campaign Media Spending," and most likely to involve donors who want to contribute to charitable

organizations that take positions on those issues and in those contests. *See McIntyre*, 514 U.S. at 347 ("Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.")

Third, the Act compels the disclosure of additional information with the communication: the identity of donors, including the "top three" donors to the "Covered Person," irrespective of whether those donors "opted out" of having their donations used for Campaign Media Spending. Thus, as the *Brush & Nib* court explained, if the government mandates speech an organization would not otherwise engage in, and if that speech alters the content of the speech, then the law operates as a content-based regulation of speech. 247 Ariz. at 292 ¶ 100.

Fourth, the Act obviously discriminates against—in fact outright bans—a form of anonymous speech. Here, Plaintiffs maintain the privacy of donors and their donations that are used in what the Act now calls "Campaign Media Spending." But anonymous speech is a protected type of speech. *See McIntyre*, 514 U.S. at 342 (ban on anonymous pamphleteering regarding a ballot measure violated First Amendment).

The Act's ban on forms of anonymous speech is particularly pernicious because it affects "disfavored" speech. In *NAACP v. Alabama*, the U.S. Supreme Court "recognized the vital relationship between freedom to associate and privacy in one's associations," and compared the compelled disclosure of membership groups to "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." 357 U.S. 449, 462 (1958) (citation & internal marks omitted). The Court found that such a requirement would clearly be unconstitutional, and it struck down Alabama's attempt to compel public disclosure of private membership and donor information. The purpose of Prop 211 is no different: it chills, changes, and silences speech by exposing the supporters of CAP and FEC to having their identities and other private information placed on a

publicly accessible government list, thus risking and even encouraging harassment and intimidation.[12]

2. The Act does not further a compelling government interest nor is it narrowly tailored.

To survive strict scrutiny, the government must prove that the Act "(1) furthers a compelling government interest and (2) is narrowly tailored to achieve that interest." *Brush & Nib*, 247 Ariz. at 293 ¶ 105.

The purported "compelling interest" here is in an informed electorate that knows the identities of private groups or individuals funding communications. But the U.S. Supreme Court has held that such an informational interest is "plainly insufficient." *McIntyre*, 514 U.S. at 349. *McIntyre* explained that

> People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

Id. at 348 n.11 (internal marks & citations omitted). The same applies here.

In addition, the Act's disclosure requirements are not narrowly tailored, in part because it requires Covered Persons to disclose the identities of certain donors who have either "opted out" or who were not given the opportunity to "opt out."

For example, it requires the disclosure of a Covered Person's "top three donors who directly or indirectly made the three largest contributions," even if those donors "opted out" of having their contributions used for Campaign Media Spending. *See* A.R.S. § 16-974(C). The Act also requires Covered Persons to disclose donors as well as the

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[12] Indeed, one of Prop 211's main proponents and drafters, Terry Goddard, explained that the Act's disclosure requirements would change campaign ads by forcing speakers to alter their "tone," on pain of not being allowed to speak. *See* Debate with Terry Goddard at 50:7 and 51:14, found at https://www.youtube.com/watch?v=CTUZcJk8YhU. These are admissions that the Act is content based, favoring one form of communication over another.

"original sources" of the money the donor contributed and any "intermediaries" of those funds. But the Act only requires the "opt out" notice to be sent to those that donated directly to the Covered Person, not to the "original sources." That means the Act strips people of privacy who have funded the charity for *other* reasons, and who might have no idea that their funds ultimately would be given to a Covered Person. *See* A.R.S. § 16-973(A)(6).

In addition, the Act's exception to the disclosure requirement set forth in Section 16-973(F) is dangerously narrow, subjecting all but a handful of donors to the risk of harassment, intimidation, and abuse. The exception applies *only* to donors who can prove that disclosure is likely to cause a risk of a "serious" threat of "physical" harm. But the harms speakers are likely to experience—and the constitutional rights speakers enjoy—are not so limited. True, *NAACP v. Alabama* protected the privacy rights of people who might have faced physical violence in retaliation for supporting the NAACP—but the Court also struck down that disclosure requirement due to the risk that donors might face "economic reprisal, loss of employment … and other manifestations of public hostility," 357 U.S. at 462, and in *Shelton v. Tucker*, 364 U.S. 479, 486 (1960), the Court struck down a mandatory disclosure requirement because it would put "pressure upon a teacher to avoid any ties which might displease those who control his professional destiny." By focusing solely on "physical" threats, the Act effectively endorses "doxing," boycott, harassment, ostracism, failure-to-hire, and other forms of retaliation.

In any event, the Act places an impossible burden on donors because no one can predict how speaking about issues *today* might be viewed in the future. CAP Dec ¶ 24; FEC Dec ¶ 22. Donor-endorsed speech might be completely anodyne today and highly controversial in the future. *See Delaware Strong Fams. v. Denn*, 136 S. Ct. 2376, 2377 (2016) (Thomas, J., dissenting from denial of certiorari) (questioning "whether a State's interest in an informed electorate can ever justify the disclosure of otherwise anonymous donor rolls" when it is admitted that the requirements will lead to individuals not speaking for fear of harassment).

3. The Act is unconstitutional because it is vague and overly broad.

"A statute is unconstitutionally over broad when it prohibits or deters conduct protected by the First Amendment." *State v. Carrasco*, 201 Ariz. 220, 224 ¶ 14 (App. 2001). An individual can prevail on an overbreadth claim by proving there is "a realistic danger that the statute will *significantly* jeopardize recognized first amendment protections of individuals not before the court." *State v. McLamb*, 188 Ariz. 1, 9–10 (App. 1996) (emphasis in original, citation omitted).

Here, the Act's definitions alone render it unconstitutional because of their vagueness and overbreadth. For example, Campaign Media Spending includes a wide range of activities including any public communication that simply "refers to a clearly identified candidate within ninety days before a primary election," A.R.S. § 16-971(2)(a)(iii), meaning that a simple blog post that mentions a candidate ninety days before a primary—even if the reference has nothing to do with the candidacy or election—could trigger the disclosure requirements under Section 16-973(A)(6). This is particularly problematic for 501(c)(3) organizations, like CAP, which are expressly prohibited from engaging in political activities like supporting or opposing candidates.

The meaning of Campaign Media Spending is also unclear because its spending threshold includes activities "conducted in preparation for or in conjunction with" the campaign related activities described in the statute. *See id.* § 16-971(2)(a)(vii). Section 16-971(2)(vii) contains no requirement that an organization ***actually engage*** in Public Communications to count as Campaign Media Spending. Thus, charities like CAP and FEC are left to guess at which activities might subject them to the Act's reporting and disclosure requirements, what contributions can be used to fund the charities' activities, and who should be provided with an "opt out" notice and when. *See* CAP Dec ¶¶ 27–28; FEC Dec ¶ 26–27.

These examples exemplify the vagueness and overbreadth of an Act that causes the disclosure and potential doxing of individuals with a highly attenuated connection to the Public Communication ultimately conveyed, exposes people unprotected from anonymity

to real threats of reprisal, and leaves charities unable to safely navigate an unclear regulatory environment.

B. Plaintiffs will prevail on their Second Claim because 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."

In interpreting the Private Affairs Clause, Arizona courts look to its "natural, obvious, and ordinary meaning." *State v. Mixton*, 250 Ariz. 282, 290 ¶ 33 (2021) (internal marks & citation omitted). This Clause prohibits, among other things, government efforts to investigate a private organization's financial dealings, or to compel the disclosure of an organization's financial records, books, and files, or to compel the public disclosure of tax information or other sensitive information. *Id.* at 291 ¶¶ 34–35. When the Clause was written, information relating to (inter alia) the financial support of ballot initiative campaigns, or of organizations other than campaign committees, or of charitable organizations that engage in speech on matters of public concern, was generally considered a private affair.[13]

Plaintiffs' contributions to charities that engage in issue advocacy or candidate support are private affairs. These donations involve private financial decisions related to speech in support of or opposition to matters that people ultimately vote on—in secret—when voting. *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.") Plaintiffs have a legitimate expectation that their donations and identities will be kept confidential. CAP Dec ¶¶ 15–18; FEC Dec ¶¶ 13–18; Doe I Dec ¶¶ 10–12; Doe II Dec ¶¶ 9–12.

[13] The *sole* exceptions were specified in Ariz. Const. art. VII, § 16: "campaign contributions to, and expenditures of campaign committees and candidates for public office." Pursuant to "[t]he maxim '*expressio unis est exclusio alterius*,'" *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 299–300 (1914), the private financial information of organizations that are neither campaign committees nor candidates, and who do not make campaign contributions, are "private affairs" protected by the Private Affairs clause.

The Act conditions Plaintiffs' ability to speak on campaign-related matters on disclosing their donors' identities and contributions, thereby disclosing their donor's support of those organizations, and subjecting them to the risk of retaliation. The Act, therefore, violates Plaintiffs' constitutional rights under the Private Affairs Clause.

C. The Act Violates the Separation of Powers Guarantees of Article III of the Arizona Constitution.

The Act gives the Commission—itself a statutory body protected by Arizona's Voter Protection Act—extensive new legislative, executive, and quasi-judicial powers. This broad grant of interdepartmental powers, and the raising of the Commission to what amounts to an independent "Fourth Branch of Government," violates Article III of the Arizona Constitution, which states:

> 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.

This Act empowers the Commission to wield powers of all three branches and removes any normal oversight.

The Supreme Court has twice considered, and twice invalidated, similar broad delegations of legislative authority. First, in *Tillotson v. Frohmiller*, the Board of Directors of State Institutions was given power through an initiative to levy taxes, incur debts, and establish a bank. 34 Ariz. 394, 397–98 (1928). The Court held that this violated Article III, which assigns the power of making laws to the legislature, the interpretation of laws to the courts, and the enforcement of laws to the executive. *Id*. at 401. The people through the initiative tried to give the Board absolute discretionary power not subject to the legislature or executive. *Id*. at 403. That was unconstitutional.

Second, in *State v. Marana Plantations, Inc.*, the Court held unconstitutional the "Sanitary Code" made for agricultural labor camps by the State Board of Health, because the Code was made under an improper delegation of legislative power. 75 Ariz. 111, 114–15 (1953). The Court explained that the power "vested in the legislature … cannot

be relinquished nor delegated," and although it acknowledged that "[t]he line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim," it said that an effort to "give[] unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power." *Id*. at 113–14.

The Act constitutes just that kind of unrestrained delegation. It empowers the Commission to act on its independent and uncontrolled judgment in a variety of areas, and makes clear that the Commission will have unrestricted powers: "[t]he Commission's rules and any commission enforcement actions pursuant to this chapter *are not subject* to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official." A.R.S. § 16-974(D) (emphasis added).

The Act also gives the Commission unlimited discretionary authority to raise or lower the donation and expenditure thresholds. *See id*. § 16-974(F). It empowers the Commission to "adjust" the thresholds to reflect inflation, so the Commission could arguably lower both thresholds if the current high inflation goes down. The Commission, once its uses penalties collected under the Act to pay for implementation and enforcement of this chapter, can use left-over money for any "other Commission-approved purpose." *Id*. § 16-976(B). The Commission does not have to use the left-over money to further any purpose *of the Commission*, but for whatever purpose *the Commission approves.* Thus, the Commission can use the left-over money for whatever it wants, and since it is exempt from standard rulemaking requirements, the legislature can exercise no control over such expenditures.

Finally, the Act allows the Commission to "[p]erform any other act that *may* assist in implementing this chapter." *Id*. § 16-974(A)(8) (emphasis added). Again, it is impossible to understand this vast delegation without also considering that the Act *exempts the Commission from all traditional rulemaking oversight.* The use of "may," however, shows that the Commission can undertake any action that could conceivably

help in implementing the Act—an extremely broad grant of power, immune from traditional checks or balances.

The Act, in the words of *Tillotson,* empowers the Commission to act as it chooses "upon their independent uncontrolled judgment. 34 Ariz. at 403. Thus, the Act violates separation of powers principles and constitutes an unlawful delegation of power.

III. Irreparable harm will result absent an injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Am. Trucking Ass'n v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (citation omitted)).

Plaintiffs' harm, the loss of unknown donations and the public disclosure of individual Plaintiffs, is impossible to remedy with damages. *Shoen v. Shoen,* 167 Ariz. 58, 63 (App. 1990). After all, once an organization has been forced to place its donors' private information on a publicly accessible government list, that disclosure cannot be undone. *See Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 112 ¶ 26 (App. 2007) (once an anonymous party is "unmasked" there is no remedy for the unmasked person); *Constand v. Cosby,* 833 F.3d 405, 410 (3rd Cir. 2016) ("Public disclosure cannot be undone").

Unquestionably, the harm suffered by Plaintiffs is irreparable.

IV. The balance of hardships and public interest favors Plaintiffs.

When a government entity is a party to a lawsuit, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).[14] Although it is not necessary for this Court to address these factors because Plaintiffs have a strong likelihood of success on the merits, any violation of the Constitution is also a hardship that tips the balance in favor of Plaintiffs, and enforcing the

[14] *Flynn v. Campbell*, 243 Ariz. 76, 80 ¶ 9 (2017) ("Although a federal court's interpretation of a federal procedural rule is 'not binding in the construction of our rule,' we recognize its instructive and persuasive vale and that 'uniformity in interpretation of our rules and the federal rules is highly desirable.'" (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 304 (1990))

constitution is always in the public interest. *See, e.g,. Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Conversely, any hardship to the government would be minimal. Plaintiffs here are not asking this Court to halt enforcement of a longstanding disclosure regime on which voters in Arizona have relied. Instead, the Act has not yet come into full force and the Commission has not yet adopted rules to make the Act operative. An injunction would simply preserve the status quo and bring no harm to the Commission or the Act itself.

If the Act were to be implemented immediately, however, Covered Persons including Plaintiffs would have to file disclosure reports with the Secretary of State and make their donors' private information public. Further, donor Plaintiffs would risk having their private information disclosed. It is impossible to unwind such disclosures. Pausing implementation of Prop 211 would have no longstanding harm in the unlikely event that it passes constitutional muster, because the Commission would be in the same position it is now. As the same cannot be said for the Plaintiffs, it is clear that the balance of hardships and the public interest tip in favor of Plaintiffs.

V. Plaintiffs meet all requirements for preliminary relief and no bond should be required.

A plaintiff seeking preliminary relief must usually post a bond "in such amount as the court considers proper to pay," Ariz. R. Civ. Proc. 65(c), but the Court has discretion to waive this requirement where doing so serves the interests of justice. *In re Wilcox Revocable Trust*, 192 Ariz. 337, 341 ¶¶ 17–20 (App. 1988); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004) ("requiring nominal bonds is perfectly proper in public interest litigation.")

Any bond in this matter should be nominal because plaintiffs are seeking in the public interest to enjoin a violation of the Constitution(s). As one federal court observed when interpreting Rule 56(c)'s federal counterpart, "requiring a bond to issue before enjoying potentially unconstitutional conduct by a governmental entity simply seems inappropriate," because that would make "protection of [constitutional] rights …

contingent upon an ability to pay." *Doctor John's Inc. v. City of Sioux City*, 305 F. Supp.2d 1022, 1043–44 (N.D. Iowa 2004).

Plaintiffs bring this case as concerned citizens seeking to vindicate rights enjoyed by all Arizonans. *Cf. Ctr. For Food Safety v. Vilsack*, 753 F. Supp.2d 1051, 1062 (N.D. Cal. 2010) (court dispensed with bond requirement where plaintiff was a "small non-profit" and "requiring the organization to pay a bond would fatality [sic] harm its ability to bring lawsuits on behalf of the public interest."). Anything more than a nominal bond will have a chilling effect on efforts to ensure legal compliance. *Cf. Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984) (Attorney fees should not be awarded "[w]here aggrieved citizens, in good faith, seek a determination of the legitimacy of governmental actions … Courts exist to hear such cases; we should encourage resolution of constitutional arguments in court rather than on the streets."). The Court should therefore waive the bond requirement or set it at a nominal amount.

CONCLUSION

This Court should grant Plaintiffs' Motion and enter a preliminary injunction enjoining the enforcement of the Act in all respects until the Court has the opportunity to consider and enter a permanent injunction.

RESPECTFULLY SUBMITTED this 15th day of December, 2022.

/s/ *Scott Day Freeman*
Jonathan Riches (025712)
Timothy Sandefur (033670)
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Attorneys for Plaintiffs

DECLARATION OF CATHI HERROD

I, Cathi Herrod, declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.

2. I am the President of the Center for Arizona Policy ("CAP"), which is a statewide research and education organization. I have served in this capacity since 2006 and have worked at CAP since 1997. I am authorized to make this declaration on behalf of CAP.

3. CAP's mission is to promote and defend foundational principles of life, marriage and family, and religious freedom. To advance that mission, CAP engages in public education, lobbying, and grassroots activity, including hosting public policy events, issuing policy papers, and communicating with individual citizens, the media, and policymakers on public policy issues.

4. CAP is a tax-exempt, charitable organization under section 501(c)(3) of the Internal Revenue Code. CAP is a not-for-profit organization operating exclusively for charitable purposes.

5. As a 501(c)(3) organization, CAP is completely prohibited from supporting or opposing candidates for office within the meaning of the federal Internal Revenue Code. Under federal law, CAP is also limited in the amount of its budget that it can dedicate to communicating with policymakers or lobbying for or against state and local laws.

Exhibit 1

6. CAP is in good standing as a 501(c)(3) organization with the Internal Revenue Service ("IRS"), and it has been so since its founding in 1995.

7. CAP funds its activities by raising charitable contributions from donors throughout Arizona.

8. A number of donors have given CAP over $5,000 each within the most recent election cycle as defined under A.R.S. § 16-971.

9. One of the primary reasons donors give to CAP is so that CAP can engage in research, education, advocacy, and public communications about issues to advance CAP's charitable purpose. It is my belief and understanding that many of these activities fall within the definition of "campaign media spending" under A.R.S. § 16-971.

10. For example, CAP conducts research and analysis to prepare policy papers and other public communications that refer to government officials, including officials who may be running as incumbents in an election. Some of those communications may occur prior to general and primary elections.

11. CAP also regularly communicates with its supporters and the general public, through its website and the media. Some of those communications may refer to a candidate within the meaning of A.R.S. § 16-971, including government officials who are incumbents, prior to an election.

12. CAP also provides limited support and opposition to ballot measures as permitted by federal law to advance its charitable purposes.

13. During the most recent election cycle, CAP expended upwards of $50,000 collectively on the public communications described in the preceding paragraphs. CAP

generally spends upwards of $50,000 on these sorts of communications in a given election cycle.

14. CAP's communications to the public and its supporters will be impacted, impaired, and altered because of the disclosure and other regulatory requirements in the "Voters' Right to Know Act" (the "Act").

15. CAP keeps the names and addresses of its donors strictly confidential. It does not disclose the names and addresses of its donors to government officials in Arizona or any other state. CAP does not publicly disclose the identities of its donors or the amounts received from them.

16. CAP solicits charitable contributions in a variety of ways, including meeting with donors, and CAP works to build and maintain personal relationships with many of its donors. In conversations with CAP staff, several donors have expressed concerns about confidentiality and potential reprisals for exercising their speech rights, and in particular, concerns about the effects of the Act.

17. In soliciting charitable contributions, CAP informs donors that it will safeguard their identities. Moreover, CAP has a written donor privacy policy that appears on its website, expressing its commitment to safeguarding donor confidentiality.

18. CAP donors have informed me that they are concerned about having their contributions to CAP reported to government officials or about having that information disclosed to the public. Donors are concerned that if their donations to CAP are publicly disclosed, this will lead to harassment, retaliation, economic harm, harms to their reputation, and even physical harm. Donors, including donors who give more than

$5,000 in an election cycle as defined under the Act, have specifically expressed to CAP the importance of remaining anonymous.

19. CAP as an organization, and its staff personally, have frequently been subject to harassment because of CAP's public communications. We have received many threats of physical harm (including some that resulted in local police and FBI involvement), protests outside CAP's office, and harassing emails.

20. The following are a few excerpts of the kind of harassing and threatening language directed at CAP and its staff in emails and other communications:

- "Sooner or later, you will die, and some of us pray it is sooner…."
- "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 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."
- "You both [referring to myself and 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."

21. CAP and its staff have also been characterized in extremely negative and repugnant ways in emails and other communications. For example:

- "race baiters"
- "making money from hate and bigotry"
- "ignorant fascist[s]"
- "turning us into a religious autocracy"
- "medieval throwback horrible anti-woman garbage"
- allegations of bribing public officials

22. It is my understanding and belief that many of CAP's donors will limit or eliminate their contributions to CAP rather than risk having their names, addresses, and employers publicly disclosed.

23. It is my understanding and belief that the "disclosure exemption" set out in A.R.S. § 16-973(F) is insufficient to assuage CAP donor concerns because, among other things, that provision puts the burden on donors to prove the exemption and whether the exemption is granted is within the sole discretion of the Citizens Clean Elections Commission ("Commission"). The exemption is also limited to "a serious risk of physical harm" to the donor or the donor's family. As set out above, CAP donors are not

only concerned about physical harm if their contributions are made public; they are also concerned about economic and reputation harm and other forms of harassment and retaliation.

24. What's more, the disclosure exemption provisions of A.R.S. § 16-973(F) are inadequate because it is impossible to predict the risk of *future* harm from public communications made *today*. As political, policy, and cultural winds shift, a donation or communication that is not controversial now may become highly controversial, with the potential of leading to harassment and retaliation, in the future.

25. Thus, it is my understanding and belief that donors who do not wish to have their identities reported to the government and publicly disclosed will limit, alter, or eliminate their contributions to CAP as a result of the Act's disclosure requirements. For this same reason, the "opt-out" provisions of A.R.S. § 16-972 are inadequate.

26. In addition to the negative impact that the Act would have on charitable contributions, CAP would incur significant costs to comply with the Act's requirements, including having to hire counsel to advise CAP how to comply.

27. Several portions of the Act are so vague and ambiguous that CAP cannot reasonably determine which of its current charitable activities would be permitted, prohibited, or otherwise covered by the Act.

28. Rather than compromise its donors' confidentiality, expose them to the risk of retaliation and harassment, risk the liability of attempting to comply with the many vague and ambiguous provisions in the Act, and submit to the unchecked authority of the Commission to enforce the Act's requirements, CAP is considering simply avoiding any

activities that could possibly be considered "campaign media spending" under A.R.S. § 16-971.

29. Ceasing such activity, however, would require CAP to stop making the kinds of public communications it currently makes, including virtually all references to candidates, starting ninety days before a primary election and continuing until the date of a general election. This will drastically curtail CAP's ability to carry out the research, education, advocacy, and public communications central to CAP's charitable purpose.

30. Donors trust CAP to be their voice. If CAP is forced to self-censor in this way, it is my understanding and belief that CAP will lose much of its donor support, as it will have to cease many of the very activities that lead donors to support CAP in the first place.

I declare that to the best of my knowledge the foregoing is true and correct.

Cathi Herrod

Cathi Herrod

DATED: 12-13-2022

DECLARATION OF SCOT MUSSI

I, Scot Mussi, declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.

2. I am the President and Executive Director of the Arizona Free Enterprise Club ("FEC"), which is a statewide research and public policy organization that is registered and in good standing with the Arizona Corporation Commission. I have served in this capacity since 2014, and I am authorized to make this declaration on behalf of FEC.

3. Since 2005, FEC has been a leading organization in Arizona advocating for principles of free enterprise and pro-growth, limited government policies. To advance that mission, FEC engages in extensive public education, lobbying, and grassroots activity, including hosting public policy events, issuing policy papers, and communicating with individual citizens, the media, and policymakers on public policy issues. Our communication efforts focus on helping the public understand why policies that promote free enterprise help ensure prosperity for all Americans and Arizonans.

4. FEC is a tax-exempt social welfare organization under section 501(c)(4) of the Internal Revenue Code. FEC is a not-for-profit organization operating exclusively to promote the social welfare of the community.

5. As a 501(c)(4) organization, FEC engages in lobbying activities to educate policymakers on questions of public policy within our charitable purposes. FEC also

Exhibit 2

engages in some political activities in support of our charitable purposes, including supporting and opposing candidates for election, but as a 501(c)(4) organization, those activities are not its primary activities.

6. FEC is in and has remained in good standing as a 501(c)(4) organization with the Internal Revenue Service ("IRS"), with no violations of any IRS-administered statute or regulation, since it was granted that status in 2006.

7. One of the primary reasons donors give to FEC is so that FEC can engage in education, advocacy, and public communications about issues to advance FEC's charitable purpose. It is my belief and understanding that many of these activities fall within the definition of "campaign media spending" under A.R.S. § 16-971.

8. For example, as part of its research and educational advocacy efforts, FEC produces policy reports and research and analysis on public policy issues, including a legislative scorecard. In these materials, FEC routinely refers to public officials, including public officials who are political candidates.

9. FEC also hosts educational and civic events, and it sometimes refers to public officials at those events, and invites public officials, including public officials who are candidates, to speak at those events.

10. In the most recent election cycle, FEC expended more than $50,000 toward communication activities that referred to public officials, including public officials who are candidates.

11. FEC funds its activities by raising charitable contributions from donors throughout Arizona.

12. A number of donors have given FEC more than $5,000 within the most recent election cycle as defined under A.R.S. § 16-971, and most of these donors reside in Arizona.

13. FEC keeps the names and addresses of its donors strictly confidential. It does not disclose the names and addresses of its donors to government officials in Arizona or any other state. FEC does not publicly disclose the identities of its donors or the amounts of donations received, and it has expressed to its donors its commitment to safeguard this information.

14. FEC solicits charitable contributions in a variety of ways, including meeting with donors, and FEC works to build and maintain personal relationships with many of its donors. In conversations with FEC staff, donors have expressed concerns about confidentiality and potential reprisals for public communications, and in particular, concerns about the effects of the "Voters' Right to Know Act" (the "Act").

15. Many FEC donors are concerned about having their contributions to FEC reported to government officials or about having that information publicly disclosed and rely upon FEC to safeguard this information.

16. FEC and its staff have been subject to harassment because of its public communications. For example, both I and members of my staff have received numerous phone calls and voicemails from individuals threatening violence or harassing or trying to intimidate our organization because of FEC's speech and activities. On one occasion a staff member had her car vandalized in retaliation for engaging in public communications on FEC's behalf.

17. It is my understanding and belief that current and future donors to FEC are justifiably afraid that public disclosure of their names, addresses, occupations, and employers will result in harassment and reprisal against them because of their charitable contributions to FEC.

18. Donors have informed me that although they would like to continue contributing to FEC, they fear the risk of the harassment or reprisal they will face if their contributions become publicly known.

19. Donors have informed me that they would limit, alter, or eliminate their contributions to FEC if their names, addresses, and employers are publicly disclosed.

20. FEC is concerned about the possibility of harassment or retaliation at the hands of government officials because of the disclosure requirements under the Act. FEC is particularly concerned that the law vests the Citizens Clean Elections Commission ("Commission") with extremely broad discretion in how to exercise its considerable rulemaking and enforcement authority over FEC, an organization with which the Commission has had a long and often-adversarial relationship. The Commission and FEC have been at odds in ballot initiative campaigns, extensive litigation, and a U.S. Supreme Court case that significantly curbed the Commission's power,[1] in which FEC and the Commission were opposing parties.

21. It is my understanding and belief that the "disclosure exemption" set out in A.R.S. § 16-973(F) is insufficient to assuage FEC donor concerns because, among other

[1] *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

things, that provision places the burden on the donor to affirmatively demonstrate to the satisfaction of the Commission that public disclosure of the donor's identity poses a reasonable probability that the donor or the donor's family will be subject to "a serious risk of physical harm." As set out above, FEC donors are not only concerned about the risk of physical harm if their contributions are made public; they are also concerned about economic and reputational harm and other forms of harassment and retaliation.

22. What's more, the disclosure exemption provisions of A.R.S. § 16-973(F) are inadequate because it is impossible to predict the risk of *future* harm from public communications made *today*. As political, policy, and cultural winds shift, a donation or communication that is not controversial now may become highly controversial, with the potential of leading to harassment and retaliation, in the future.

23. Many donors support FEC specifically because FEC engages in education, advocacy, and public communications that may fall within the definition of "campaign media spending" under A.R.S. § 16-971.

24. Thus, it is my understanding and belief that donors who do not wish to have their identities reported to the government and publicly disclosed will limit, alter, or eliminate their contributions to FEC as a result of the Act's disclosure requirements. For this same reason, the "opt-out" provisions of A.R.S. § 16-972 is inadequate.

25. In addition to the negative impact that the Act would have on charitable contributions, FEC would incur significant costs to comply with the Act's requirements, including hiring counsel to advise FEC how to comply.

26. Several portions of the Act are so vague and ambiguous that FEC cannot reasonably determine which of its current charitable activities would be permitted, prohibited, or otherwise covered by the Act.

27. Rather than compromise its donors' confidentiality, expose them to the risk of retaliation and harassment, risk the liability of attempting to comply with the many vague and ambiguous provisions in the Act, and submit to the unchecked authority of the Commission to enforce the Act's requirements, FEC will likely avoid triggering the Act's reporting requirements by altogether avoiding any activities that could possibly be considered "campaign media spending" under A.R.S. § 16-971.

28. Ceasing such activity, however, will require FEC to avoid virtually all references to candidates, including public officials who happen to be running as incumbent candidates, at least six months before a primary election and continuing through to the date of the general election. This is because the Act's definition of "campaign media spending" includes any public communication that "promotes, supports, attacks, or opposes" a candidate within six months of an election or even "refers" to a candidate ninety days before a primary election—a hopelessly vague standard that is left to the unfettered discretion of the Commission to interpret and enforce. This will drastically curtail FEC's public communications during legislative sessions and through the campaign season.

29. It is my understanding and belief that by self-censoring in this way, FEC will lose much of its donor support, as it would have to cease many of the very activities that lead donors to support FEC in the first place.

I declare that to the best of my knowledge the foregoing is true and correct.

Scot Mussi

Scot Mussi

DATED: 12/13/22

DECLARATION OF Redacted

I, **Redacted** declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.

2. I am a U.S. Citizen and a resident of the State of Arizona.

3. I am currently the Executive Director of the **Redacted** **Redacted** and its sister organization, **Redacted** **Redacted** is a **Redacted** **Redacted**

4. I previously served in the **Redacted** for a period of approximately 15 years, including as the **Redacted**

5. I participate in many civic and community activities and engage in charitable giving.

6. Over the years, I have given to 501(c)(3) nonprofit organizations, including nonprofit organizations that operate in Arizona and engage in charitable activities within Arizona.

7. I have previously given and wish to continue giving charitable contributions that exceed $5,000 during an "election cycle" as that term is defined in A.R.S. § 16-971(8).

Exhibit 3

8. On information and belief, charitable organizations that I donate to engage in charitable activities within Arizona that fall within the definition of "campaign media spending" as that phrase is defined in A.R.S. § 16-971(2).

9. I donate to charitable issue advocacy organizations in Arizona specifically because they engage in issue advocacy work that falls within the definition of "campaign media spending" under A.R.S. § 16-971.

10. I expect the nonprofit organizations to which I donate to keep my name, address, and other identifying information confidential, and, on information and belief, the Arizona nonprofit organizations to which I donate that also engage in issue advocacy or "campaign media spending" keep my name, address, and other identifying information confidential.

11. I am concerned that under the "Voters' Right to Know Act" ("Act"), my donations to charities that engage in issue advocacy or "campaign media spending," as well as my name, address, and other identifying information, will be reported to government officials and publicly disclosed because of my charitable giving.

12. I do not want my name, address, and other identifying information reported to government officials or publicly disclosed because of my charitable contributions to nonprofit organizations that engage in issue advocacy or "campaign media spending" in Arizona.

13. I am concerned that if my contributions to nonprofit organizations that engage in "campaign media spending" are publicly disclosed it will lead to harassment,

retaliation, and other harms to me and possibly my employer because of those contributions.

14. As a result of the disclosure requirements under the Act, I plan to limit or alter my charitable contributions to nonprofit organizations that engage in issue advocacy or "campaign media spending" in Arizona.

15. The "disclosure exemption" set out in A.R.S. § 16-973(F) is insufficient to assuage my concerns because that prevision places the burden on me to affirmatively demonstrate to the satisfaction the Clean Elections Commission that public disclosure of my private information poses a reasonable probability that me or my family will be subject to "a serious risk of physical harm." As set out above, I am not only concerned about physical harm if my contributions are made public, but I am also concerned about other forms of harassment and retaliation.

16. The "opt-out" provisions of A.R.S. § 16-972 would limit and alter my charitable giving because I support nonprofit organizations specifically because those organizations engage in issue advocacy, including education, advocacy, and public communications activities that may fall within the definition of "campaign media spending" under A.R.S. § 16-971.

I declare that to the best of my knowledge the foregoing is true and correct.

Redacted

DATED: 12/7/22

DECLARATION OF Redacted

I, **Redacted** , declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.

2. I am a U.S. Citizen and a resident of the State of Arizona.

3. I am an attorney licensed to practice law in the State of Arizona. I am currently employed as a Partner at **Redacted** .

4. I participate in a variety of civic and community activities and engage in charitable giving.

5. Over the years, I have given to 501(c)(3) nonprofit organizations, including nonprofit organizations that operate in Arizona and engage in charitable activities within Arizona.

6. I have previously given and intend to continue giving charitable contributions that exceed $5,000 during an "election cycle" as that term is defined in A.R.S. § 16-971(8).

7. On information and belief, a charitable organization that I donate to engages in charitable activities within Arizona that falls within the definition of "campaign media spending" as that phrase is defined in A.R.S. § 16-971(2).

8. I donate to this charitable issue advocacy organization in Arizona specifically because it engages in issue advocacy work that falls within the definition of "campaign media spending" under A.R.S. § 16-971.

Exhibit 4

9. I expect the nonprofit organizations to which I donate to keep my name, address, and other identifying information confidential, and, on information and belief, the nonprofit organization to which I donate that also engages in issue advocacy or "campaign media spending" does that.

10. I am concerned that under the "Voters' Right to Know Act" (the "Act"), my donations to a charity that engages in issue advocacy or "campaign media spending," as well as my name, address, and other identifying information, will be reported to government officials and publicly disclosed.

11. I do not want my name, address, and other identifying information reported to government officials or publicly disclosed because of my charitable contributions to nonprofit organizations that engage in issue advocacy or "campaign media spending" in Arizona.

12. I am concerned that if my contributions to a nonprofit organization that engages in "campaign media spending" are publicly disclosed it will lead to harassment, retaliation, and other harms to me and possibly my employer because of those contributions.

13. As a result of the disclosure requirements under the Act, I plan to limit or alter my charitable contributions to nonprofit organizations that engage in issue advocacy or "campaign media spending" in Arizona.

14. The "disclosure exemption" set out in A.R.S. § 16-973(F) is insufficient to assuage my concerns because that prevision places the burden on me to affirmatively demonstrate to the satisfaction the Clean Elections Commission that public disclosure of

my private information poses a reasonable probability that me or my family will be subject to "a serious risk of physical harm." As set out above, I am not only concerned about physical harm if my contributions are made public, but I am also concerned about other forms of harassment and retaliation.

15. The "opt-out" provisions of A.R.S. § 16-972 would limit and alter my charitable giving because I support an issue advocacy nonprofit organization specifically because that organization engages in issue advocacy, including education, advocacy, and public communications activities that may fall within the definition of "campaign media spending" under A.R.S. § 16-971.

I declare that to the best of my knowledge the foregoing is true and correct.

Redacted

DATED: 12-9-2022