IN THE SUPREME COURT
STATE OF ARIZONA

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

PLAINTIFFS/APPELLANTS' COMBINED RESPONSE TO AMICUS BRIEFS OF JOHN D. LESHY AND OTHER LEGAL SCHOLARS

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INTRODUCTION

The Scholarly Amici—Professors Richard Briffault, et al., and Professor John Leshy[1]—contend that Prop 211 does not offend the Constitution's Freely Speak and Private Affairs Clauses (Ariz. Const. art. II §§ 6, 8). They base their arguments on a combination of cherry-picked legal history, irrelevancy, outright factual errors, and straw-man characterizations of Plaintiffs' arguments. This brief will combine responses to both.

To begin with the irrelevancy: both briefs explain at length that the Constitution's authors were concerned with expanding democratic control through such processes as the initiative and referendum. That's not in dispute. They also argue that the framers endorsed government regulation of corporations, transparency in government, and democratic accountability. LB at 6; SB at 1-2. That, too, is uncontested. Rather, the question here is: can the Freely Speak and Private Affairs Clauses be reconciled with a law that says that when people donate to nonprofits that speak about candidates—but that *aren't* controlled by or coordinating with candidates—or to nonprofits that support or oppose ballot initiatives, those donors' names, addresses, and phone numbers must be placed on a publicly accessible government list, thereby making them targets for ostracism, intimidation, and potentially violent retaliation? The Scholarly Amici make no serious attempt to answer that question in the affirmative.

ARGUMENT

I. The Freely Speak Clause protects the privacy rights of people and groups that express their views about candidates and initiatives.

The Scholarly Amici agree with Plaintiffs that the Freely Speak Clause protects speech more broadly than the federal First Amendment. SB at 7. But they

[1] Here, Professor Leshy's brief is called "LB," that of Legal Scholars Richard Briffault, et al., is called "SB," and collectively they are referred to as, "Scholarly Amici."

go on to argue that when the Clause was written, "the idea that requiring the disclosure of campaign contributions and expenditures somehow implicated freedom of speech was many decades away," LB at 14, or that this idea would have struck the 1910-12 framers as "incongruous." SB at 6. That's simply not true, as a review of the text and history of this Clause and other constitutional provisions reveals.

Laws restricting election funding were in their infancy when our Constitution was written, and those that existed then and shortly afterwards were *far* narrower than Prop 211. Those statutes—and the "General Publicity" Clause (Ariz. Const. art. VII § 16)—therefore provide no precedent for the notion that the framers would have viewed Prop 211 as compatible with speech and privacy rights.

Scholarly Amici's attempts to prove such commit two fundamental errors. First, they cast aside the actual history of the General Publicity Clause. Second, they ignore the critical difference between contributions to *candidates* running *"for public office"* on one hand, and speech about *ballot initiatives*, or un-coordinated, independent speech *about* candidates (so-called "independent expenditures"), on the other. That distinction is essential to understanding this case. Blurring it, as Scholarly Amici do, is not helpful.

A. Anonymity in contributions and speech were ordinary exercises of speech rights in 1910-12.

The first federal campaign finance laws—the Tillman Act of 1907 (34 Stat. 864)[2] the Publicity Act of 1910 (36 Stat. 822), and 1911 amendments to the Publicity Act (37 Stat. 25)—were adopted shortly before statehood. They're instructive because they all focused on *candidate* elections. The first banned corporate

[2] The Tillman Act, championed by Senator Ben "Pitchfork" Tillman, was adopted in hopes of preventing northern businesses from funding campaigns against racial segregation (of which Tillman was a vocal supporter). *See* Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 Nexus J. Op. 3, 4–5 (2007).

donations to *candidates*. The other two limited expenditures in *candidate* elections and required publication of the identities of major donors to *candidates and their committees*.[3] None of them concerned *initiative* elections or *independent expenditures*, which are at issue in this case.

"The idea," explained Elihu Root, "is to prevent the great railroad companies … [and other] great aggregations of wealth, from using their corporate funds … to *send members [to] the legislature*." (quoted in Urofsky, *Campaign Finance Reform Before 1971*, 1 Alb. Gov't L. Rev. 1, 13 (2008) (emphasis added; citation omitted)). But this case doesn't involve the use of funds to send candidates to the legislature. It involves burdens on independent expenditures by nonprofits who aren't controlled by, or coordinated with, candidates, as well as speech involving ballot initiatives. And when Arizona's Constitution was written, the rules for *those* were different. There is ***no*** statehood-era precedent for efforts to compel disclosure of donors' personal information with respect to the latter.

On the contrary, anonymous donation to ballot initiative campaigns was commonplace at the time of statehood. For example, much of the funding for the 1912 ballot initiative campaign for women's right to vote—one of the first initiatives Arizonans ever voted on—was anonymously donated. *See Forty-Fourth Annual Report of the National American Woman Suffrage Association* 42 (1912).[4] There was no effort to force the National American Woman Suffrage Association to divulge its donors' confidential information.

Similarly, the Anti-Saloon League, which championed 1914's prohibition ballot initiative, gathered its funding at church events and other mass meetings, *see*

[3] The expenditure limits were declared unconstitutional in *Newberry v. United States*, 256 U.S. 232 (1921).

[4] The same was true of efforts in many other states. *See* Johnson, *Funding Feminism* 55–56 (2017); Fields, *Katharine Dexter McCormick: Pioneer for Women's Rights* 107–08 (2003).

Kerr, *"Organized for Prohibition" A New History of the Anti-Saloon League* 149-50 (1985), and took the official position that "[t]he amount of our subscriptions is a secret from the public and should be kept within our own circle." *Anderson Silent on Order Keeping Dry Funds Secret*, N.Y. Evening World, Mar 22, 1920, at 2. That infuriated anti-prohibitionists, who complained about the League not being required to disclose its donor information. *See, e.g., Are Politico-Religious Parties Exempt from the Laws?,* The Mixer and Server 55 (Jan. 15, 1920). But Arizona never sought to force the League to disclose its donors' identities.

In fact, the Arizona State Archives maintains records of financial disclosures during this era. Undersigned counsel has made a diligent search of these records, and they contain *no* reports of receipts or expenditures from the backers of initiatives in the 1911, 1912, 1914, or 1916 elections—only from candidates, candidate committees, and political parties. Most revealing is the fact that the records of the 1914 election—when the prohibition ballot initiative was placed before voters—*do* contain itemized receipt and expense reports from the Prohibition Party's *candidates*, but none relating to the Prohibition *initiative*.[5] That's because these two things were treated differently. While the disclosure mandate applied to candidates and committees controlled by them, it did not apply to independent expenditures or supporters of ballot initiatives.

The same distinction is ubiquitous in the literature of the time. Books like Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* (1912), or Guthrie, *The Initiative, Referendum, and Recall* (American Academy of Political & Social Science, 1912), or *The Initiative, Referendum, and Recall* (Munro, ed. 1913), contain *no mention* of requiring disclosure of the personal information of donors to

[5] These records can be found in the Arizona State Library Archives and Public Records, Identification No. RG2 SG7 Series 2 (Nomination Papers and Campaign Finances), boxes 003-00-016. Petitioners ask that this Court take judicial notice of these facts pursuant to Ariz. R. Ev. 201(b)(2).

initiative campaigns or independent expenditure groups, even while these authors inveighed against the influence of money in *candidate* elections. For example, Eaton, *supra* at 153, advocated "lessen[ing] considerably the power of money … and mercenary political manipulators" through a series of changes to the initiative process—but never suggested compelling the kinds of disclosure that Prop 211 compels.

Most strikingly, Perry Belmont's *The Abolition of the Secrecy of Party Funds* (1912), on which Legal Scholars rely, SB at 19, quite clearly distinguished between the two. Belmont ended his book with a proposal to mandate disclosure of donors' identities—but "*exempt[ed]* from its provisions committees and *organizations for the discussion and advancement of political questions or principles*, having no *direct* connection with any election," *id*. at 68 (emphasis added)—which is a perfect description of the Plaintiffs here.[6]

Progressive-era reformers certainly did believe in requiring donors to *candidates and their committees* to disclose their identities. But neither the Scholarly Amici nor anyone else has offered evidence that they believed in doing the same to groups or individuals who endorse or oppose ballot proposals or simply talk *about* candidates.

Actually, anonymous expression was commonplace at the time—often out of fear of retribution and a legitimate desire to have one's arguments weighed on the merits rather than *ad hominem*. Anonymous and pseudonymous publications were the norm in early Arizona—from Mark Twain, Nellie Bly, and O. Henry to "Gila,"[7]

[6] Scholars also quote, SB at 19, Belmont's article *Progress of Campaign-Fund Publicity*, 189 N. Amer. Rev. 35 (1909), but again omit the fact that Belmont distinguish[ed] … charitable and other *organizations having limited relations to the public welfare* from those made to *political organizations* entrusted with important *public functions*." *Id.* at 40 (emphasis added).

[7] Pseudonym of Edward E. Cross, editor of Arizona's first newspaper, the *Weekly Arizonan*. *See* *Stand Firm and Fire Low: The Civil War Writings of Edward E. Cross* 3-4 (Holden, et al., eds, 2003).

"Ancient Mariner,"[8] "Neo Mex,"[9] "A Man on the Fence,"[10] and "George Frost." This last was a woman author who explained to the *Arizona Republican* in 1909 that she wrote under a male pseudonym "because I believe a woman's work is handicapped by the mere fact of her sex. The voteless woman witnesses to the injustice of men…. The use of a male pen name gives a writer a better chance of publication." *Noms De Plume of Women Writers: Novelists Tell Why They Use Masculine Names*, Ariz. Republican, Feb. 4, 1909 at 2.

Leshy suggests that anonymous donation to a group one agrees with, or anonymous speech itself, are "abuse[s]" of free speech. LB at 15. The above shows why that's false. But more: Arizona courts have already said that anonymous speech is constitutionally protected, *State v. Mixton*, 250 Ariz. 282, 298 ¶ 69 (2021); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 108-10 ¶¶ 10-21 (App. 2007), and for good reason. Arizona's Freely Speak Clause is derived from Pennsylvania's 1790 Constitution,[11] and in 1790, both anonymous speech and anonymous donation to printers and others who spoke about issues and candidates was the norm. Benjamin Franklin, who presided over the convention that wrote Pennsylvania's 1790 constitution, often wrote anonymously. *The Federalist* was published anonymously. Thomas Jefferson and Alexander Hamilton confidentially gave money to publishers to print their partisan views. *See* Ferling, *Jefferson and Hamilton: The Rivalry that Forged a Nation* 221–22 (2013). None of this was considered an "abuse." Supreme

[8] Pseudonym of Arizona newspaper publisher Harry Brook. *See* Miller, *Arizona: The Last Frontier* 87 (1956).
[9] The pseudonymous author of "Contra los difamadores de Nuevo México," a 1909 poem denouncing Senator Albert Beveridge for preventing Arizona and New Mexico from becoming states. *See* Melendez, *Nuevo Mexico by Any Other Name: Creating a State from an Ancestral Homeland, in* *The Contested Homeland: A Chicano History of New Mexico* 147–48 (Gonzales-Berry & Maciel, eds., 2000).
[10] Pseudonymous author of *Prohibition for Phoenix*, Ariz. Republican, Apr. 15, 1911 at 8, an article attacking a prohibition ballot initiative in the city.
[11] Pa. Const. of 1790 art. IX § 7. Pennsylvania courts have held that anonymous speech is not an "abuse." *Commonwealth v. Rentschler*, 11 Pa. D. 203, 207–08 (Pa. Quar. Sess. 1901).

Court Justice James Wilson (himself an author of anonymous publications) explained that the word "abuse" referred to "attack[ing] the security or welfare of the government, or the safety, character, and property of the individual"—not anonymity. 1 *Collected Works of James Wilson* 207 (Hall & Hall eds., 2007).

B. The sole exception is the "general publicity" of donations to candidates for public office and their committees—but that's not at issue here.

True, the General Publicity Clause (Ariz. Const. art. VII § 16) empowers the Legislature to "provid[e] for a general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates for public office." But that Clause doesn't apply here because Plaintiffs aren't campaign committees for public office, and the organizational plaintiffs don't contribute to candidates or committees controlled by them. CAP is legally forbidden from endorsing candidates, and FEC can endorse them, but cannot legally coordinate with them.

Still, the General Publicity Clause is relevant because it shines light on the scope of the Freely Speak and Private Affairs Clauses.

Plaintiffs contend that the right to speak freely includes the right to donate to (or receive donations from) people who agree with one's political views—and to spend money to express one's support for or opposition to, ballot initiatives, or to speak about candidates—without being forced to surrender one's private information, as Prop 211 requires. Scholarly Amici contend to the contrary: that the right to "freely speak" does not include this right, and that this does not qualify as a "private affair." To support their contentions, they claim that the General Publicity Clause proves that Arizona's framers had a narrower view of speech and privacy than Plaintiffs do. But a conscientious review of the history proves the opposite.

1. Leshy starts with a long argument that the 1910-12 framers were concerned with the power of "special interests" in elections. True—although he

ignores the fact that they were also preoccupied with protecting privacy rights (as discussed in detail in Section II, below). But, again, the Progressive focus on special interests concerned *direct contributions to candidates and their committees*, not *initiative* elections or *independent expenditures*. As noted above, there's ***no*** historical evidence that Arizona's framers anticipated forcing donors to initiative campaigns to surrender their private information, or thought that such a power was implicit in the General Publicity Clause. Nor is there any indication that Arizona's framers thought that people or organizations that merely speak *about* candidates—what Prop 211 calls "campaign media spending" that "refers to a clearly identified candidate," A.R.S. § 16-971(2)—should be forced to give up their confidentiality as the price of speaking.

2. Scholarly Amici ignore—indeed, obscure—the difference between *candidate* and *initiative* elections. For example, Leshy quotes Theodore Roosevelt to imply that Arizona's framers believed in requiring that "all moneys" in political campaigns be made public, LB at 7—but in the paragraph in question, Roosevelt actually wrote that "[w]e need to make *our political representatives* more quickly and sensitively responsive to the people," and "prevent the advantage of *the man* willing recklessly and unscrupulously to spend money over *his more honest competitor*." *The New Nationalism* 29-30 (1910) (emphasis added). In other words, he was writing about *candidates* receiving and spending money—not about initiative campaigns or independent expenditures by groups that simply speak *about* candidates.

This distinction makes sense, because initiatives can't be bribed or persuaded, and because independent expenditures represent a group standing up and saying what they think about candidates—which is a feature, not a bug, of democracy.

3. The framers of Arizona's Constitution did not ignore the difference between candidates and their committees on one hand, and independent expenditures

and initiative campaigns on the other.[12] On the contrary, at the Constitutional Convention, delegate Winsor introduced what eventually became the General Publicity Clause. It was then called "Proposition 70," and it would have empowered the Legislature to pass laws "providing for general publicity … of *all* contributions of money or its equivalent, made or promised … *for the purpose of influencing any primary, general or municipal election*." Goff, *The Records of the Arizona Constitutional Convention of 1910* at 1179 (1991) (emphasis added). Proposition 70 would also have provided for a publicly accessible government list identifying "every person, firm, corporation, association, or committee" who made such a contribution. *Id*. at 1180. In other words, it would have done just what Prop 211 does.

But the Convention *rejected* Proposition 70. Instead, it adopted a narrower substitute that required a "general publicity" only of "campaign contributions to, and expenditures of *campaign committees and candidates for public office.*" Ariz. Const. art. VII § 16 (emphasis added). This language confines the "general publicity" power to *public office* campaigns (thus implicitly excluding *ballot initiative* campaigns) and to *candidates and their committees*, not independent expenditures by organizations that merely speak *about* candidates. This case concerns the latter, however. So the General Publicity Clause does not prove that the Plaintiffs' speech and privacy claims are baseless. Quite the opposite: the limits of that Clause reveal how sensitive the Convention was to the burdens on speech and privacy imposed by excessive "publicity."

[12] Neither has the U.S. Supreme Court, which stressed this distinction in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). "In *candidate* elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures," it said, but in "referenda or other issue-based ballot measures," the question is different, because "[the] interest in avoiding the appearance of corruption … has no application." *Id.* at 354, 356 (emphasis added).

The fact that the Convention considered and rejected a proposition is usually taken as evidence that they intended that proposition *not* to apply. For example, in *Hancock v. McCarroll*, 188 Ariz. 492, 496 (App. 1996), the fact that the Convention considered extending certain initiative and referendum powers to special districts, and then rejected that idea, was taken as showing that the framers thought those powers did not extend to such districts. And in *State v. Moerman*, 182 Ariz. 255, 258-59 (App. 1994), the court found that the Convention's rejection of a proposal that would have allowed the Legislature to regulate "the wearing of weapons" indicated that the framers did not believe the Constitution included such a power.

Amicus Leshy's sole response to this point[13] is to say that Goff's *Records of the Convention* is incomplete, so that "it is not possible to determine with any accuracy why the framers made the decisions they did." LB at 10. But while Goff's *Records* may not be perfect,[14] it's absolutely clear that the Convention considered adopting something substantively identical to Prop 211 and chose not to.

The supreme indicator of the framers' intent is the text itself. *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996). Here, the text confines the "general publicity" power to candidates and candidate committees "for public office." The General Publicity Clause therefore fails to support the Scholarly Amici's theory that the

[13] Legal Scholars' attempt to answer this point consists of straw-manning Plaintiffs' position. SB at 12. Plaintiffs are not arguing that the General Publicity Clause *prohibits* Prop 211. Rather, we contend that the rejection of Proposition 70 proves that while the framers "supported enshrining campaign finance disclosure in the state constitution," *id.*, there were limits to what they "enshrined"—limits that demonstrate the breadth of the Freely Speak and Private Affairs Clauses. The question here is whether the General Publicity Clause proves that the framers thought the kinds of mandates imposed by Prop 211 were compatible with the rights of speech and privacy. The fact that the framers were given the chance to "enshrine" something very like Prop 211 in the Constitution, and chose not to—adopting instead the much narrower General Publicity Clause—is strong evidence that that Clause is a limited exception to the general rules of privacy and free speech. In other words, there were limits to the kind of disclosures the framers were comfortable with, because this kind of information is a private affair, and compelled disclosure creates a chilling effect that violates the right to speak freely.

[14] This Court has cited Goff in nearly 30 cases.

Freely Speak or Private Affairs Clauses are inapplicable. Mere speculative doubt about the Convention's motives in rejecting Proposition 70[15] cannot trump the fact that the Constitution as adopted includes *no* "general publicity" requirement for initiative campaigns or for nonprofits that are not controlled by or coordinated with candidates, but just speak *about* candidates—and the fact that this omission was intentional on the framers' part.

Not only is Leshy's speculation unreliable, but given that "the right to engage in political activities, or to make contributions to a campaign, is a privilege of citizenship which can only be denied by *express language* of a statute [or the Constitution]," *State v. Miller*, 100 Ariz. 288, 296 (1966) (emphasis added), it's not enough to contend that Prop 211 is in some broad sense consistent with the desires of the Progressive movement. Rather, there must be actual constitutional language showing that the Freely Speak and Private Affairs Clauses don't apply. None exists.

4. Lacking such language, Scholarly Amici cite some other things that they claim prove that the framers understood the "general publicity" principle as applying outside the context of candidates for public office. None of these examples proves what Scholarly Amici claim.

First, Leshy cites Governor Hunt's proclamation to the first Legislature and the Act of June 21, 1912 (Laws 1st Sp. Sess. 1912, c. 69). But both of these concerned *contributions to candidates for public office,* not independent expenditures or initiative campaigns. They therefore don't support Leshy's argument. Hunt's message urged lawmakers to pass laws "to guard against the employment of large sums of money *in the nomination or election of candidates*

[15] Leshy suggests that a discussion regarding Proposition 70 that appears on page 146 of Goff's *Records* helps illuminate the Convention's thinking. It doesn't. That exchange concerned the phrase "before and after election" in the General Publicity Clause, and lends no support to the contention that the framers gave the Legislature power to compel disclosure of matters outside the scope of "public office" elections. On the contrary, the Constitution's actual language excludes that possibility.

desirable to great financial interests." *Message of Geo. W.P. Hunt, Governor of Arizona to the First Legislature* 11 (1912) (emphasis added). Echoing Roosevelt, Hunt complained of the use of money in "influencing the nomination of undesirable or weak *candidates*." *Id.* (emphasis added).[16] He made no mention of "general publicity" in the context of either ballot initiatives or groups that aren't controlled by or coordinated with candidates, but only (in Prop 211's language) make "public communication[s]" that "promote[], support[], attack[] or oppose[] a candidate." A.R.S. § 16-971(2). His proclamation therefore sheds no light on the meaning of the Freely Speak or Private Affairs Clauses in the context relevant here.

Next, Scholarly Amici cite the June 21, 1912 statute,[17] but it also doesn't support their argument. For one thing, "a statute cannot circumvent or modify constitutional requirements." *Fann v. State*, 251 Ariz. 425, 434 ¶ 24 (2021). But setting that aside, the 1912 statute also only applied to elections of *candidates* for public office and *their committees*. It imposed no reporting requirement on private individuals or organizations like CAP and FEC that aren't committees, or on persons or groups who speak in support of, or opposition to, *initiatives*.[18] Section 9 of that act only required *candidates,* and committees controlled by or coordinating with

[16] A few days later, Hunt wrote to the Legislature, in language Leshy quotes, encouraging it to adopt laws "providing for general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates *for public office*." Governor's Proclamation dated May 21, 1912, *reprinted in Journals of the Special Session of the First Legislative Assembly of the State of Arizona* 28 (1912) (emphasis added).

[17] Legal Scholars cite this act, too. SB at 13.

[18] In fact, the standard form that the Secretary of State's office prepared in 1912 for campaign committees to fill out pursuant to this statute said "We, the undersigned campaign committee, who managed the Primary campaign held … for *(state whether for particular candidate or candidates or for political party)* … first being duly sworn …." *Registration and Election Laws of Arizona* 38 (1912) (emphasis added). In other words, the Secretary contemplated only candidates and their committees filling out the form. That helps explain why ballot initiative campaigns, such as the 1912 campaign in support of woman suffrage and the 1914 campaign for prohibition, did not submit such reports. *See supra* note 5.

them, to file reports of receipts and expenditures.[19] That fact led the Attorney General in 1946 and 1965 to conclude that the act *did not apply* to "a committee for an initiative or referendum … inasmuch as [it] is silent as to where [the required reports] shall be filed."[20] Op. Atty. Gen. 65-42-L at 4. *Accord*, Op. Atty. Gen. 46-132. This Court agreed in *Mecham Recall Comm., Inc. v. Corbin*, 155 Ariz. 203, 204–06 (1987).

Legal Scholars offer another purported example: the territorial-era Act 20, adopted March 11, 1895.[21] *See* SB at 11. But as proven by the passages Legal Scholars themselves quote, that act, too, was concerned with contributions to *candidates* and their committees, *not* independent expenditures or donations to organizations that support or oppose ballot initiatives (which didn't exist in 1895). This case, however, isn't about people who give money to *candidates or committees*—it's about people who give money to organizations that support or oppose ballot initiatives, or that speak *about* candidates without being controlled by or coordinated with them. So the 1895 act, too, tells us nothing.

Finally, Legal Scholars' cite the Act of March 8, 1917 (ch. 47, 1917 Ariz. Sess. Laws 62), which prohibited anonymous publications supporting or opposing ballot initiatives. LB at 13-14. This example is much stronger—and much more revealing, because that act was clearly unconstitutional. In *Talley v. California*, 362 U.S. 60, 64 (1960), the U.S. Supreme Court invalidated an identical California law because "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression ….

[19] It read: "The statements herein required to be filed shall be filed in the office of the Secretary of State *in the case of candidates for State offices*, and members of the Legislature, and with the Clerk of the Board of Supervisors *in the case of candidates for county officers*, and with the city or town clerk *in the case of candidates for city or town officers*." *Id.* (emphasis added).
[20] And, again, no such reports appear to have been filed. *See* above, Section I.A.
[21] Rev. Stat. Ariz. Territory, Penal Code, pt. 1, tit. IV, § 66 (1901).

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." In declaring bans on anonymous speech unconstitutional, *Talley* observed that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65 (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958)). In other words, anti-privacy mandates chill free speech.[22] *Accord, McIntyre*, 514 U.S. at 357 ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.").

It's astonishing that a group of amici who are purportedly well-versed in constitutional law would argue that "categorical bans on … anonymous leafletting" are constitutional, SB at 17 n.12, or would deny that a statute imposing a two-year jail sentence on anyone publishing or distributing an anonymous pamphlet or advertisement "interfer[ed] with anyone's right to speak freely." *Id*. 14. Anonymous speech is quite clearly protected by the Arizona Constitution. *Mixton*, 250 Ariz. at 298 ¶ 69.

The bottom line is that none of the purported examples Scholarly Amici cite—with the possible exception of the obviously unconstitutional 1917 act—support their contention that the framers of our Constitution believed it stripped people of their confidentiality as the price of speaking about candidates or supporting or opposing ballot initiatives. Instead, they provided for a "general publicity" of donations to *candidates and their committees*—but expressly chose *not* to empower the state to deprive people of privacy if they contribute money to an organization

[22] There's also no evidence that the 1917 law was enforced; anonymous campaign literature remained common even after its adoption. *See, e.g., Hayden Squelches Political Slanderers*, Copper Era & Morenci Leader, Oct. 4, 1918 at 4; *Give Hayden a Square Deal*, Border Vidette, Oct. 12, 1918 at 1; *Tobacco Tax Possible*, Ariz. Daily Star, Feb. 15, 1929, at 2.

that "promotes, supports, attacks or opposes a candidate" through independent expenditures, or that "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative." A.R.S. § 16-971(2).

The Constitution's plain language, the historical record, and the laws enacted at the Legislature's first session all demonstrate that the framers of the Arizona Constitution supported compulsory disclosure of contributions and expenditures by *candidates and their committees*—but *not* compulsory disclosure of contributions and expenditures of individuals or private nonprofits that speak about candidates or support or oppose ballot initiatives. This all proves the General Publicity Clause in no way diminishes the free speech and privacy rights at issue in this case.

II. The framers of Arizona's Constitution were deeply concerned about privacy rights.

A. The information concerned here is a "private affair."

Arizona's founders may have been Progressives, but Progressives were not a unified bloc. Hofstadter, *The Age of Reform,* 273 (1955). Arizona's founders were *Western* Progressives, differing from their Eastern allies in being "characterized by a fierce independence [and] a suspicion of corporate *and governmental* bigness." Maline & Etulain, *The American West: A Twentieth-Century History* 64 (1989) (emphasis added). They were concerned about privacy as much as democracy. That's why they expressly protected the individual's "private affairs" in the Constitution, Ariz. Const. art. II § 8. And that's why they prioritized *individual* freedom, specifying that "governments … are established to protect and maintain individual rights." *Id.* art. II § 2.

Privacy became a preoccupation in the early Twentieth Century partly due to extensive efforts by legislatures and attorneys general to force business owners and other private parties to hand over their financial information as part of political-influence and trust-busting investigations. *See* Sandefur, *The Arizona "Private*

Affairs" Clause, 51 Ariz. St. L.J. 723, 729-36 (2019). Among the most controversial of these was the Pujo Committee, investigating banks, which sought to force these banks to turn over their account books. To this, the *Arizona Republican* responded by deprecating "[w]holesale attacks upon corporate credit and private affairs … . It becomes an interesting question as to where privacy ends and publicity begins. We are living in a period of inquisition. Institutions as well as individuals have some rights to privacy and ill-considered exposure may easily invite disaster and spread unwarranted distrust among the ignorant." Clews, *Weekly Financial Review*, Ariz. Republican, Mar. 17, 1912, at 2.

By 1910, the U.S. Supreme Court had declared that a person or business's records of receipts and expenditures were "private affairs" protected by the Fourth Amendment.[23] The phrase "private affairs" was thereafter most frequently used to refer to these types of records. *See Mixton*, 250 Ariz. at 291, ¶ 35 (noting that "private affairs" included "business records").[24] One of the principal goals of the Private Affairs Clause was to prevent government from forcing people or businesses to turn over financial records to public inspection without some form of individualized suspicion. Sandefur, *supra* at 730-32. Yet Prop 211 mandates the disclosure of organizational and personal financial records without particularized suspicion in precisely the same manner that the framers objected to.

The personal and financial information of which Prop 211 requires disclosure is plainly a private affair. This Court has said that "private affairs" refers to things about which a person has a "reasonable expectation" of privacy. *Mixton*, 250 Ariz. at 292 ¶ 41. Records of whom one donates to, or whom an organization receives

[23] In *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880), and *Boyd v. United States*, 116 U.S. 616, 620 (1886).

[24] That's one reason the Convention delegates rejected a proposal to allow the Corporation Commission to inspect the records of all businesses in the state. *See* Sandefur, *supra* at 735-36.

donations from, obviously fall within such reasonable expectations. *See generally* NAACP, 357 U.S. at 461–62; Shelton v. Tucker, 364 U.S. 479, 486–87 (1960); *see also* City of Carmel-By-The-Sea v. Young, 466 P.2d 225, 231 (Cal. 1970) ("the right of privacy concerns one's feelings and one's own peace of mind, and certainly one's personal financial affairs are an essential element of such peace of mind." (citation omitted)).[25] So do addresses, telephone numbers, and employment information. State v. Butterworth, 737 P.2d 1297, 1300 (Wash. App. 1987).

Leshy's contention that that Private Affairs Clause cannot apply here, because "all of the provisions of Article VII (suffrage and elections) demonstrate the framers' intent that elections and the source of campaign funds can and should be subject to close regulation," is illogical. LB at 16. First, it ignores the general/specific canon, which teaches that Article VII's restrictions and provisions are exceptions to the general rule of privacy. Unless "expressly authorized" by language in Article VII, the state may not intrude into Plaintiffs' financial and personal information. *Miller*, 100 Ariz. at 296. Second, as explained above, nothing in Article VII compels the "general publicity" of the information at issue here. That article requires voter registration laws, sets voter qualifications, and guarantees the secret ballot, but does not indicate any intent to retreat from the strong rule of privacy established by the Private Affairs Clause.

Legal Scholars say that "campaigns and elections … are quintessential public matters." SB at 10. Obviously—but that's not the question. The question is whether *the information Prop 211 forces Plaintiffs to disclose*—their financial information and their names, addresses, phone numbers, and employer's identities—is a public

[25] Legal Scholars quote from Brandeis and Warren's famous *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890), that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest." SB at 10. But later in that paragraph, Warren and Brandeis said this proposition applied only to people who "renounce[] the right" to be "screened from public observation," *id.* at 215, which isn't true of people who donate to CAP or FEC.

matter.[26] The answer is no. It's reasonable for people who donate to CAP or FEC to expect this information to be kept confidential—especially in this age of hostility and violence directed against people who support or oppose political views that others find distasteful. The evidence in the record here shows that donors and organizations face retaliation, vandalism, and violence if their personal information is publicized. Amicus Buckeye Institute offers additional examples (at pages 3-7 of their brief). Or consider the violent retaliation directed against donors to California's Prop 8. *See* Messner, *The Price of Prop 8*, Heritage Foundation (Oct. 22, 2009). Or the attempt on Justice Kavanaugh's life in 2022; the perpetrator found his address on a publicly accessible online database. Fonrouge, *Nicholas Roske Found Brett Kavanaugh's Address Online, Feds Say*, N.Y. Post (June 8, 2022). Just weeks ago, two Minnesota legislators were shot to death by an assassin who found their addresses in a publicly accessible online database. Barnett, *How Did Shooter Find Minnesota Lawmakers' Homes? It's Easier Than Most People Think*, Minn. Star-Tribune (June 19, 2025). Plaintiffs' expectations of privacy here are subjectively and objectively reasonable.

B. Prop 211 is not "authority of law."

Leshy contends that the Private Affairs Clause presents no obstacle to Prop 211 because "legislation that is entirely consistent with a specific constitutional

[26] By Legal Scholars' logic, even the most personal information would cease to be public if it's related to a public affair. Newsletters, for example, could be forced to turn over the names and addresses of subscribers, because newsletters discuss public controversies. In fact, an effort to do just that was one of the principal reasons for the Private Affairs Clause. *See* Sandefur, *supra* at 731 n.47. Moreover, we know that Arizona's founders did not embrace such logic, because (*inter alia*) they rejected a proposal to let the Corporation Commission examine the books of all corporations in Arizona. *See id.* at 735-36. Although Legal Scholars try to bolster their anti-privacy argument by saying that "[c]orporations … are subject to a litany of disclosure obligations" in the Constitution, SB at 6, the truth is the opposite: Arizona's founders chose to *limit* the disclosure obligations imposed on corporations—which again proves their sensitivity to the privacy of financial information.

provision … ought to qualify as 'authority of law.'" LB at 16. But that begs the question in two ways.

First, as explained above, Prop 211 is not "consistent with a specific constitutional provision," because it goes beyond what the General Publicity Clause authorizes.

Second, a statute adopted by the Legislature or the voters doesn't *ipso facto* qualify as the "authority of law" to which the Clause refers. If it did, the Legislature could simply pass a law saying "there shall be no privacy," and that would satisfy the Clause. That's obviously not what was intended. The Constitution's framers were familiar with the principle that "[i]t is not every act, legislative in form, that is law." *Hurtado v. California*, 110 U.S. 516, 535 (1884). Instead, the "authority of law" contemplated by the Clause means a warrant or other "'well-established principle[] of the common law'" sufficient to justify a search or demand for information (e.g., border searches). *State v. Ladson*, 979 P.2d 833, 838 (Wash. 1999) (citation omitted).

But it's not necessary to precisely define "authority of law" here because Prop 211 imposes a *per se* rule of compulsory disclosure of private information, without suspicion of wrongdoing. Such a blanket command, unbacked by any individualized suspicion or traditional justification, isn't "authority of law" by *any* measure.[27]

III. Prop 211 harms democracy.

Finally, the Scholarly Amici underscore the framers' "emphasis on democracy." LB at 4; SB at 3 (citation omitted). This argument, however, ignores the fact that the Constitution prioritizes *personal freedom*—expressly declaring that

[27] In *Fritz v. Gorton*, 517 P.2d 911, 925 (Wash. 1974), the Washington Supreme Court held that a suspicionless disclosure requirement constituted "lawful authority"—but only because the statute at issue there applied to officials and candidates for public office and "[did] not intrude upon intimate personal matters which are unrelated to fitness for public office." The reverse is true here.

government is "established to protect and maintain *individual* rights." Ariz. Const. art. II § 2 (emphasis added).

This constitutional language cannot be disregarded as mere rhetoric. *Morrissey v. Garner*, 248 Ariz. 408, 410 ¶ 8 (2020) ("As a general rule of constitutional interpretation … [w]e strive 'to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.'" (citation omitted)). It makes clear that elections exist to protect individual rights, not the other way around. *Ceteris paribus*, courts should prioritize the protection of individual liberty over more abstract values. *Bristor v. Cheatham*, 75 Ariz. 227, 234 (1953) ("It is the court's duty to protect constitutional rights.")

But even aside from that, Prop 211 actually *undermines* democracy. It does so by scaring people away from expressing their views or supporting organizations that articulate and defend their beliefs in the public square. *Cf. Mobilisa*, 217 Ariz. at 110 ¶ 18 n.7 (remarking on "the potential for chilling speech by unmasking the identity of an anonymous or pseudonymous … speaker."). Chilling speech about ballot initiatives or candidates by stripping people of their privacy rights if they contribute to organizations that express their opinions doesn't serve democracy; it harms it. If it were otherwise—if "transparency" were invariably good—why have a secret ballot?

The U.S. Supreme Court has repeatedly recognized that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective … restraint on freedom of association," and chill free speech. *NAACP*, 357 U.S. at 462; *see also Talley*, 362 U.S. at 65. Indeed, the mere "risk of a chilling effect on association is enough" to violate the Constitution because freedom of speech "'need[s] breathing space to survive.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618–19 (2021) (citation omitted). But here, it's not just a risk—the record shows that people and organizations are *already* refraining from "freely

speaking" out of fear that their private information will be made public, exposing them to the risks of retaliation, harassment, and even violence. The best way to vindicate the Constitution's "emphasis on democracy" is to enforce the Constitution's Freely Speak and Private Affairs Clauses and declare Prop 211 unconstitutional.

CONCLUSION

The judgment of the Court of Appeals should be *reversed*.

Respectfully submitted this 1st day of August 2025 by:

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