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' RESPONSE TO AMICI BRIEF OF FIFE SYMINGTON, VERNON PARKER, AND BOB BURNS

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INTRODUCTION

Former office-holders Symington, Parker, and Burns ("FOH") submitted an amicus brief that does not assist the Court in resolving the free speech and privacy violations Prop 211 creates under the Arizona Constitution. Instead, they offer the perspective of aggrieved politicians who essentially complain about the speech of others, disregarding how their favored policy choice, i.e., donor disclosure mandates, would suppress speech and intrude on privacy.

First, FOH argue that Prop 211's disclosure requirements are universally regarded as serving the democratic interest of transparency, offering the Court cherry-picked quotes from current and former office-holders about the "public's right to know." But political rhetoric is no substitute for legal analysis, and the selective quotes and examples they cite do not address the constitutional implications of Prop 211, nor do they offer a balanced view of its restrictions on free speech and privacy.

Second, they argue that Prop 211 serves an "informational interest," an argument, like the first, bereft of persuasive legal authority. Frustrated politicians might want to know personal information about who is "target[ing]" them with "attack ads," FOH Br. at 5, but this only serves *their* interests, not the public's, and gives political officials information they can use to distract the public with *ad hominem* arguments and chill opposition speech.

Third, they argue that Prop 211 is presumptively constitutional because whatever voters say at the polls ought to be the law. That's wrong because Prop 211 upends core fundamental rights, chilling free speech and traducing privacy rights, which dispenses with any presumption of constitutionality. *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258 ¶ 14 (2023) ("'[I]f a law burdens fundamental rights, such as free speech or freedom of religion, any presumption [of constitutionality] in its favor falls away.'" (citation omitted)). The performance of

an initiative at the polls is simply irrelevant for constitutional concerns and is not a legal argument. This Court should scrutinize Prop 211's impact on fundamental rights and recognize that any purported claim to popularity cannot override constitutional protections.

ARGUMENT

I. The Arizona Constitution protects the rights of individual citizens, not politicians.

FOH begin by offering the Court cherry-picked quotes from current and former federal office-holders that ostensibly support their position. But whether measures like Prop 211 are endorsed by politicians is irrelevant to its constitutionality. *State v. Wein*, 244 Ariz. 22, 31 ¶ 37 (2018); *In re Marquardt*, 161 Ariz. 206, 212 (1989). Arizona's courts don't determine a law's validity by measuring the political winds; they are charged with upholding the Constitution and should not be distracted or swayed by appeals to political pressure. *Stockton v. McFarland*, 56 Ariz. 138, 141 (1940) ("So far as the courts are concerned, the questions submitted, although they do have a political effect, must be decided solely on the law as it exists, and not on the political and moral *animus differendi* of the respective parties.").

The Constitution protects individual rights against governmental intrusion. Article II sets out its "Declaration of Rights." Section 1 states: "A frequent recurrence to fundamental principles is essential to the security of *individual rights* and the perpetuity of free government," and Section 2 declares that governments are "established to protect and maintain *individual rights*." (Emphasis added.) The sections that follow list those rights—non-exclusively—including the right of individuals to freely speak (Section 6) and to privacy (Section 8)—and the protection of rights is *mandatory* (Section 32). As this Court has noted, our Constitution "'is even more explicit than its federal counterpart in safeguarding the fundamental

liberty of Arizona citizens.'" *State v. Mixton*, 250 Ariz. 282, 290 ¶ 30 (2021) (quoting *State v. Ault*, 150 Ariz. 459, 463 (1986)).[1]

But FOH seemingly ignores the fact that oftentimes the government acts to violate individual rights *through the democratic process itself*, i.e., the legislature or the people vote—by majority or supermajority—to enact an unconstitutional law. As James Madison warned, "[i]n our governments, the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the constituents." Letter to Thomas Jefferson, Oct, 17, 1788, *in Madison: Writings* 421 (Jack Rakove, ed., 1999) (modernized). That is why we have a constitution to protect minorities against majorities. Thus, irrespective of political popularity, legislation is only valid if it complies with the Constitution, *which is the ultimate statement of the people's will*. *Kilpatrick v. Superior Ct.*, 105 Ariz. 413, 419 (1970) ("The Constitution is, of course, the supreme law of the State circumscribing the otherwise plenary power of the Legislature."). As Plaintiffs/Appellants explain in their Response to Amicus Brief of City of Phoenix at 11, efforts to persuade this Court to follow "voters' preferences" instead of the Constitution are shockingly inappropriate.

In any event, the political rhetoric FOH offer is meaningless. For one thing, although FOH tout statements from Senator McConnell that seem to support donor disclosure, that Senator has taken contrary positions. He voted against the "Disclose Act" in Congress and "has long been one of Congress's foremost advocates for a far-

[1] *See also Mixton*, 250 Ariz. at 300 ¶ 80 (Bolick, J., Brutinel, C.J., and Timmer, V.C.J., dissenting) ("[O]ur constitution's Declaration of Rights is the 'main formulation of rights and privileges conferred on Arizonans.'" (quoting *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 (1989)).

reaching interpretation of First Amendment rights."[2] Senator McConnell also commonly asks, "Where did this notion get going that we were spending too much in campaigns—compared to what?"[3]

That point is well taken because, despite politicians' rhetoric, money does not actually buy election results. For example, in 2024, voters rejected ranked-choice-voting and open primary initiatives in numerous states, including Arizona, despite a $ 100 million push— "vastly outpacing opponents"— seeking to get them passed.[4] In 2020, an Arizona initiative imposing a renewable-energy mandate (Prop 127) failed despite its backers (including a California billionaire and his NextGen Claim Action Committee) spending record amounts on the campaign.[5][6] In 2016, candidate Donald Trump spent approximately half what candidate Hillary Clinton spent, but won anyway.[7] California Senate Candidate Michael Huffington spent $30 million in his campaign—then the largest amount ever spent on a candidate campaign in that state—and still lost.[8]

True, many politicians support restrictions on political fundraising and spending. But that's because—as explained in more detail in Section II.B below—such restrictions create an enormous advantage for incumbents seeking to remain in

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[2] Sam Stein, *Mitch McConnell Argues against More Donor Disclosure, Accuses Obama of Political Retribution*, HuffPost (Jun. 15, 2012); Hans A. von Spakovsky, *Senator McConnell on the Perils of Campaign Finance "Reform,"* Heritage Foundation (Jun. 22, 2012) (Sen. McConnell warning that "government-compelled disclosure of contributions to all grassroots groups … is far more dangerous than its proponents are willing to admit").

[3] Kelly McEvers & Tom Dreisbach, *Essential Mitch: The Money, Part 2*, NPR (Dec. 1, 2020).

[4] David A. Lieb, *Voters Rejected Historic Election Reforms Across the U.S., Despite More Than $100M Push*, AP (Nov. 22, 2024).

[5] Howard Fischer, *Proposition 127 Becomes the Most Expensive Ballot Fight in Arizona History*, Arizona Daily Star and Tucson.com (Jun. 10, 2020).

[6] Quotes from Senators Snowe and Hawley, contextualized, suggest they were raising concerns about foreign actors, not individual citizens expressing their views.

[7] Jacob Pramuk, *Trump Spent About Half of What Clinton Did on His Way to the Presidency*, CNBC (Nov. 9, 2016).

[8] Glenn F. Bunting, *News Analysis: Huffington and Others Say $30 Million Was Well Spent*, L.A. Times (Nov. 13, 1994).

office, at the expense of challengers and voters. As former Federal Election Commission Chairman Bradley Smith writes, laws like Prop 211 "insulate the political system from challenge by outsiders, and hinder the ability of challengers to compete on equal terms with those already in power." Bradley Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1072 (1996). Incumbents have less need to raise or spend money to get their faces on television—they can just do an interview on *Meet the Press* or *Arizona Horizon*—whereas political newcomers have no such advantage. They need to obtain and spend money to get their message out, lacking the advantages that come with incumbency. Thus, by "making it harder for challengers to raise cash," politicians can restrict competition against themselves—at the expense of the democratic process. *Id.* at 1073. No wonder they support burdens on free speech.

Regardless, if political rhetoric *were* to matter in this case, there are plenty of examples of politicians expressing concern for the protection of donor privacy, too. For example, Senators Young and Lankford have said that "[a]nonymous giving has long been a way for Americans to support philanthropic organizations that rely on generous charitable contributions. In recent years, donor privacy has been threatened on too many occasions."[9] And the Trump administration has issued orders prohibiting federal agencies from censoring citizen's speech, in reaction to perceived efforts by the prior administration to chill speech under the guise of combatting "misinformation."[10]

Anyway, constitutional rights don't turn on the vicissitudes of political rhetoric. This Court should decide the case on the law, instead.

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[9] Todd Young, U.S. Senator for Indiana, *Young, Lankford Introduce Bill to Protect the Privacy of Charitable Donors*, (May 14, 2024).

[10] The White House, Presidential Actions, *Restoring Freedom of Speech and Ending Federal Censorship*, (Jan. 20, 2025); The White House, Presidential Actions, *Ending the Weaponization of the Federal Government* (Jan. 20, 2025).

II. Information about donors does not lead to "knowledge."

A. Prop 211's broad sweep.

FOH next argue that compelled disclosure arms candidates and voters with valuable information. But the government should not be "arming" candidates with anything; it's their own job to make their case to voters, and they already have all the incentive necessary to obtain such information and communicate it.[11] And FOH's argument that providing voters with a list of donors' names, addresses, and other identifying information is valuable is offered purely *ipse dixit*. They offer no evidence that voters actually find such information useful.

FOH claim that knowing the identities and employers of donors will allow candidates to "counter falsehoods," "contextualize arguments," and "hold the speaker accountable." FOH Br. at 6. But candidates can already do all those things, even against anonymous criticism. What they *cannot* do, and what Prop 211 *empowers* them to do—is target private, independent donors for retaliation when they contribute their resources to support organizations that may later use that money to engage in political speech (which Prop 211 calls "Campaign Media Spending"). In that regard, observe the discrepancy in Prop 211: it contains carve-outs that shield the privacy of people who invest in private media companies or who enroll in unions, even though these entities speak about candidates and ballot initiatives—but contains no such protections for groups or individuals like Plaintiffs. *See* A.R.S. §§ 16-971(1) (definition of "Business Income"); 16-971(2)(b) (exempting media and

[11] Federal courts have held that the fact that private parties have "strong incentives" to acquire and communicate information to the public is a factor in determining whether a speech restriction is constitutional under the First Amendment. *Edwards v. District of Columbia*, 755 F.3d 996, 1006 (D.C. Cir. 2014). *See also United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 821–22 (2000) (where "market-based solutions" offer a means of accomplishing the legitimate state interest, government-imposed speech restrictions may fail First Amendment scrutiny).

publishers from definition of "Campaign Media Spending"); 16-971(7)(b) (exempting certain organizations from definition of "Covered Persons").

And forcing donors to disclose their private information as the price of engaging in speech—particularly speech that criticizes candidates—is likely to lead to retaliation and punitive measures, both by political opponents in the population at large, and by successful candidates themselves. Indeed, such retaliation is a disturbingly growing trend today. Consider the efforts by the mayors of Boston, Chicago, San Francisco, and Washington, D.C., in 2012, to bar Chick-fil-A restaurants from opening new restaurants in retaliation for the fact that the company's owners financially supported organizations that share their opposition to same-sex marriage.[12]

Even if depriving private, independent donors of their privacy had some actual value, FOH cannot reasonably argue—and does not try to argue—that such disclosure is valuable for each instance of "Campaign Media Spending" or for each disclosed donor. This highlights Prop 211's lack of tailoring. It simply forces disclosure regardless of any actual benefit relating to the particular information being disclosed.

Information is not the same as "knowledge." If simply providing more "information" were a sufficient government interest regardless of the cost, then *any* privacy right could be overridden by the government's claimed need for disclosure. *See* *John Doe No. 1 v. Reed*, 561 U.S. 186, 207 (2010) (Alito, J., concurring) ("Were we to accept respondents' asserted informational interest, the State would be free to require petition signers to disclose all kinds of demographic information, including

[12] *See* Greg Turner, *Mayor Menino on Chick-fil-A: Stuff It*, Boston Herald (Nov. 17, 2018); Hal Dardick, *Alderman to Chick-fil-A: No Deal*, Chicago Tribune (Mar. 29, 2019); Ricardo Lopez & Tiffany Hsu, *San Francisco is the Third City to Tell Chick-fil-A: Keep Out*, L.A. Times (July 26, 2012); Tim Craig, *Gray Opposes Chick-fil-A Expansion: Calls it 'Hate Chicken,'* Washington Post (July 28, 2012).

the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships.").

Here, Prop 211 chills the speech of those who value their privacy. It also arms politicians and their allies with information that can be used to attack and intimidate donors, sending a strong message that speech should be engaged in only where the speaker is sure her views are in line with the views of the prevailing public, media, and political zeitgeist.

B. Prop 211 unfairly favors candidates and entrenched interests.

Candidates are applicants for public office. They are subject to laws pertaining to candidates. Although this comes with certain burdens, which FOH describes as an "uneven playing field," FOH Br. at 6, candidates agree to take them on for the prospect of being "hired" by the voters. But candidacy also comes with advantages that more than compensate for these self-imposed "burdens."

For example, candidates have name recognition, party support, websites, and access to public platforms. They are more likely to gain media attention, to draw crowds, and to have statements or opinion pieces published in newspapers.

Independent donors, by contrast, have none of those advantages. Instead, they often rely on anonymity to amplify their marginalized voices or challenge entrenched interests and incumbents. Absent anonymity, they face doxing, employer retaliation, ridicule, ostracism, and—as is well-documented—threats, intimidation, property damage, and even violence. *See* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 617 (2021). Thus forcing independent donors' private information to be disclosed tilts the playing field decisively against them, favoring candidates with established networks, media and union backing, and entrenched special interests.

The examples FOH offers of the KKK or out-of-state interests (e.g., gaming, controlled substances, or labor groups) are inflammatory and misleading, because

laws *already* prohibit contributions from foreign nationals or illegal organizations and require organizations that primarily engage in electioneering to register as political action committees. *See, e.g.*, A.R.S. § 16-905.

FOH's purported example of Senator Leach is also unpersuasive. Although in 2024 he faced substantial opposition spending, he also faced opposition from his own party. He had represented his district, or its prior incarnation, since 2014, only losing in the primary in 2022.[13] No evidence proves that any of the attacks against him or any donor disclosures had any effect on the outcome of his 2024 election—just as no evidence would prove that a *lack* of donor disclosure mandates caused him to *win* his *prior* elections.

Irrespective of donor disclosure, Senator Leach, like any candidate, could (and did) challenge any misleading claims by speaking to community groups, promoting his views on his website, citing evidence, rallying supporters, raising money, or running counter-ads. The claim that disclosure of Future Freedoms' out-of-state funding enabled a more effective response is baseless. Senator Leach won his races by convincing a majority of voters that he would represent their interests. The notion that the privacy or non-privacy of independent donors tilted the playing field in any manner is simply pure speculation.

III. Disclosure is not required for speech, nor is Prop 211 presumptively constitutional.

A. Disclosing one's identity is not a prerequisite for participating in public discourse.

FOH argue that being disclosed—and thereby doxed—is the price independent donors must pay for using their resources to support organizations that speak regarding ballot measures or candidates. They claim—with no legal support—that individuals and groups seeking to influence elections are "like

[13] Reagan Priest, *Democratic Challenger Leads Former Republican Lawmaker in Legislative District 17 Senate Race*, Ariz. Capitol Times (Nov. 5, 2024).

candidates, political actors themselves." FOH Br. at 8. No, they are not. Private citizens have a right to participate in the political process without losing their privacy rights and becoming public figures. Otherwise, why have a secret ballot? Comparing private citizens to public officials is a dangerous and distorted view, particularly in a world where some consider *everything* a political act to the judged.[14] For freedom of speech and thought to thrive, the protections our Constitution promises must be enforced.

For support, FOH cite Justice Scalia's concurrence in *Reed*, *supra*, where he said that "harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance" and that requiring public disclosure "fosters civic courage, without which democracy is doomed." 561 U.S. at 228. This view, however, overstates the actual holding of that case and, as importantly, the government's authority to compel disclosure. It also underestimates the chilling effect on the fundamental rights of speech, association, and privacy imposed by Prop 211's broad disclosure mandates. In any event, Justice Scalia also took the view that anonymous political speech is not constitutionally protected.[15] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting); *but see id.* at 359-62 (Thomas, J. concurring) (stating "the historical evidence indicates that Founding-era Americans opposed attempts to require that

[14] This attitude—so well expressed in the words of Lt. Razin in the film adaptation of *Dr. Zhivago*: "all men will be judged *politically*"—is anathema to our constitution. Alexis de Tocqueville wrote that the wonder of American democracy was that during an election, "[t]he whole nation gets into a feverish state," but once the election is over, "the ardor is dissipated, everything calms down," and people go about their lives in peace and privacy. *Democracy in America* 135 (J.P. Mayer, ed., George Lawrence trans., 1969). But a world in which a person cannot speak out on political issues without forever sacrificing her privacy and becoming a permanent target for retaliation, is one in which such ardor will never dissipate.

[15] He did, however, acknowledge the danger that disclosure mandates might "chill[] protected speech" due to the risk of "threats, harassment, or reprisals," and concluded that people should not have to "clear[] a high evidentiary hurdle" to obtain judicial protection against such mandates. *Reed*, 561 U.S. at 203-04 (Scalia, J., concurring).

anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press,'" and citing examples). But this Court has squarely rejected that view. *Mixton*, 250 Ariz. at 298 ¶ 69 ("we embrace the principle of anonymous speech and recognize its inestimable contribution to our liberty."). Prop 211's anti-privacy mandates are unconstitutional because they unduly burden anonymous speech and expose donors to risks far beyond mere "criticism."

Plaintiffs, like Cathi Herrod of the Center for Arizona Policy Action and Scot Mussi of the Arizona Free Enterprise Club, have raised precisely such concerns, asserting that Prop 211's mandates expose donors to harassment and bullying, chilling their speech. These fears are not speculative, but grounded in evidence of real-world risks in today's polarized environment.

In *Bonta, supra,* the U.S. Supreme Court clarified that disclosure laws must be narrowly tailored to a compelling state interest and cannot impose broad burdens that deter protected speech. 594 U.S. at 610–14. Prop 211's expansive requirements fail even this test, as less intrusive measures—such as voluntary disclosures, higher reporting thresholds for top donors, or disclosures only for donations earmarked for specific messages—could achieve transparency while inflicting a lesser burden on speech.

But Arizona's Constitution provides greater protections than those vindicated in *Bonta*. Anonymous speech, from *The Federalist* to modern tweeting, is a cornerstone of free expression, enabling individuals to speak without fear of retribution. *McIntyre*, 514 U.S. at 342–43 (striking down a ban on anonymous campaign literature and emphasizing anonymity's role in protecting unpopular views). Far from dooming democracy, anonymity safeguards it by ensuring that dissenting voices—especially those of minorities or marginalized groups—can participate without facing majoritarian backlash.

FOH's claim that laws against threats and intimidation adequately protect donors is also unpersuasive. Legal remedies for harassment are often reactive, rather than proactive, and ineffective against the swift, pervasive, even fickle harm caused by public exposure, such as online mobbing or professional or social ostracism. The *Bonta* Court recognized that disclosure's chilling effect extends beyond unlawful acts, as the mere risk of social or economic reprisals can silence speech. *Bonta*, 141 S. Ct. at 616.[16] And that is why Justice Alito acknowledged that protections against mandatory disclosure must be made available "quickly and *well in advance of speaking*," to "avoid the possibility that a disclosure requirement might chill [speech]." *Reed*, 561 U.S. at 203 (Alito, J., concurring). Plaintiffs have shown that Prop 211 deters political participation, outweighing any informational benefit. By dismissing the concern with retaliation, harassment and violence, FOH underestimate the modern reality of political retribution.

Indeed, FOH touts a philosophy in which majority rule overrides individual rights. *See, e.g.,* FOH Br. at 9. But Arizona's Constitution is designed to protect speech, association, privacy, and other individual rights against both governmental and popular overreach, not to force individuals to endure harassment as the price of civic participation. Prop 211's intrusions and failure to narrowly tailor its disclosure requirements renders it unconstitutional, regardless of its purported goal of transparency or its popularity at the ballot box.

This Court should strike down Prop 211 to protect the fundamental rights of anonymous speech and association and individual privacy, ensuring that democracy remains a home for the free—not *just* the brave.

[16] Indeed, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court held that a mandatory disclosure requirement was unconstitutional "*[e]ven if there were no disclosure to the general public*," because it was likely to impose "constant and heavy" "pressure" on speakers, thus chilling speech. *Id.* at 486 (emphasis added).

B. When fundamental rights are imperiled, there is no presumption of constitutionality.

Contrary to FOH's assertion, laws that implicate fundamental rights, such as speech and privacy, receive no presumption of constitutionality and must withstand the severest scrutiny. *See* Gallardo v. State, 236 Ariz. 84, 87 ¶ 9 (2014) ("if a law burdens fundamental rights, such as free speech or freedom of religion, any presumption in its favor falls away."); *cf.* Reed v. Town of Gilbert, 576 U.S. 155, 163-64 (2015) (applying strict scrutiny to speech restrictions); *see also* Brush & Nib Studio, LC v. City of Phoenix, 247 Ariz. 269, 292 ¶ 96 (2019) ("[c]ontent-based laws must satisfy strict scrutiny.").

Prop 211's donor disclosure requirement directly burdens fundamental rights by compelling speech and deterring political participation through fear of retaliation. The U.S. Supreme Court has long recognized that compelled disclosures can chill anonymous speech and association, particularly in contentious political climates. *See* Buckley v. Valeo, 424 U.S. 1, 64–68 (1976) (noting that disclosures can infringe on expressive and associational rights); Bonta, 594 U.S. at 612–14 (invalidating disclosure requirements that broadly chill speech).

Instead of addressing this concern, FOH again tout the polling numbers, arguing that they support a presumption of constitutionality, and citing Gallardo, *supra*, and State v. Bonnewell, 196 Ariz. 592, 594 ¶ 5 (App. 1999). But this is wrong. When a statute implicates fundamental rights, such as speech and privacy, no presumption of constitutionality applies, regardless of how popular that statute might be with the voters. Instead, courts apply the highest of scrutiny and put the burden on the government to prove compliance with constitutional guarantees—precisely to avoid the tyranny of the majority. *See* McIntyre, 514 U.S. at 357. Prop 211's donor disclosure requirements directly burden these rights by chilling speech, triggering the strictest of scrutiny, not deferential review.

FOH's reliance on Justice Holmes' infamous dissent in *Lochner v. New York*, 198 U.S. 45 (1905), is also unpersuasive. Justice Holmes took the astonishing view that "the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion." *Id.* at 76. This remark was unsurprising from a Justice who boasted that "[a]ll my life I have sneered at the natural rights of man," Letter to Harold Laski (Sept. 15, 1916), in *The Essential Holmes* xxv (Richard Posner, ed., 1992), and who believed that "[p]ersecution for the expression of opinions seems to me perfectly logical." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But no federal or state court has ever agreed with him. All have held that the word "liberty" in that Amendment *can only mean* that individuals are protected against "dominant opinion." *See, e.g., Sw. Eng'g Co. v. Ernst*, 79 Ariz. 403, 414 (1955) ("in order that government may not be oppressive and tyrannical, certainty must be found within the law whereby men of common intelligence may know where the power and the authority of the government ends and individual rights begin.").

That's especially true of our Constitution's speech and privacy protections. As this Court said in *Brush & Nib*, "the guarantee[] of free speech … [is] for everyone. … Indeed, '[w]e can have intellectual individualism' and 'rich cultural diversities ... only at the price' of allowing others to express [their] beliefs." 247 Ariz. at 275 ¶ 4 (citation omitted). FOH's view that courts should defer to majority will, regardless of a law's content, reflects an inversion of constitutional rights and judicial review, prioritizing state power over individual liberties, and treating rights as subordinate to majoritarian impulses. Justice Holmes' sneering at individual rights,[17] and his belief that laws should reflect majority opinion, regardless of their constitutional merit, ignores the purpose of constitutional protections: to shield

[17] To reiterate, our Constitution takes the un-Holmesian position that the purpose of government is to protect individual rights. *See* Ariz. Const. art. II § 2.

unpopular speech from suppression. As Justice Jackson wrote in *West Virginia Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. … One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*

319 U.S. 624, 638 (1943) (emphasis added).

FOH's citation to Professor Bickel's *The Morality of Consent* (1974) and cases like *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 20 (1948), to condemn the principle of judicial review are unhelpful. These sources address legislative policymaking in contexts unrelated to fundamental rights, not laws that burden speech and privacy under the Arizona Constitution. Indeed, *American Sash & Door* concerned the constitutionality (under the U.S. Constitution) of a right-to-work law Arizona voters chose to *add* to their state Constitution. *Id.* at 24. Plaintiffs aren't asking this Court to "impose an answer on … society merely because it seems prudent and wise to [the justices] personally," Bickel, *supra* at 26. They're asking the Court to enforce the individual rights specified *and made mandatory*[18] in the Arizona Constitution.

This Court has repeatedly reaffirmed the importance of judicial review. *See, e.g., Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 220 Ariz. 587, 595 ¶¶ 20–21 (2009) (Separation of powers does not

[18] The Mandatory Clause, Ariz. Const. art II § 32, was written specifically to forbid courts from taking a "restrained" view toward individual rights. *See* Timothy Sandefur, *The "Mandatory" Clauses of State Constitutions*, 60 Gonz. L. Rev. 159, 208 (2025) ("If the Mandatory Clause means anything, it is that all branches of government must, to the fullest feasible extent, implement and enforce the specified right or constitutional command. For courts to do otherwise, whether due to what they see as impracticality, difficulty, or a need for 'judicial restraint,' clearly represents judicial legislating in the form of abdication—precisely the alteration of law in the guise of judicial 'modesty' that the authors of these Clauses sought to repudiate.").

preclude the Court from striking initiatives that violate federal or state constitutional protections); *Fann v. State*, 251 Ariz. 425, 434 ¶ 24 (2021) ("it is the judiciary's exclusive power to state what the law is.").

Here, Prop 211's effect on speech and privacy demands the highest scrutiny. The "overwhelming voter support" argument presented in FOH's Appendix A is irrelevant, as majorities cannot override the rights guaranteed by our Constitution. *See Barnette*, 319 U.S. at 638. Prop 211's burdens on free speech and privacy eliminate any presumption of constitutionality. This Court should fulfill its role as a guardian of constitutional protections, not defer to political arguments.

CONCLUSION

FOH argue that by the force of a numerical majority, the government can condition people's right to free speech on the surrender of their privacy rights whenever they pool their resources and later use them to express their political views—what Prop 211 calls "Campaign Media Spending." They say this burden on constitutional rights is justified for the sake of "information" and "evening the playing field" for politicians. They ignore the anti-privacy aspects of their political preferences and shrug off the profound chilling effect involved.

Fortunately, our Constitution protects individual rights like speech and privacy, more so even than its federal counterpart. All laws must survive constitutional scrutiny, and here Prop 211 must survive the highest form, because it involves these fundamental rights. It fails that scrutiny. This Court should reverse and direct the Superior Court to enter judgment in favor of Plaintiffs.

Respectfully submitted this 1st day of August 2025 by:

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