IN THE SUPREME COURT
OF THE STATE OF ARIZONA

CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE I; DOE II; Plaintiffs-Appellants, v. ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants/Appellees, and, ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC, Intervenor-Defendants/Appellees.	Arizona Supreme Court No. CV-24-0295-PR Court of Appeals Division One No. 1 CA-CV 24-0272 Maricopa County Superior Court No. CV2022-016564 **BRIEF OF AMICUS CURIAE ARIZONA CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF APPELLANTS** (Filed with the consent of the parties)

BRIEF OF AMICUS CURIAE ARIZONA CHAMBER

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This Court "embrace[s] the principle of anonymous speech and recognize[s] its inestimable contribution to our liberty." *State v. Mixton*, 250 Ariz. 282, 298 (2021). Indeed. The framers of the Arizona Constitution likewise went to great lengths to protect that principle by establishing expansive privacy rights and robust speech protections surpassing those of the U.S. Constitution's First Amendment. Moreover, because they recognized the dangers of intimidation and coercion in public policy, the framers guaranteed the privacy and secrecy of political speech, including political speech in its purest form - the vote.

But in one area, and one area only, the framers' policy judgment was that speech and privacy interest protections were outweighed by another concern, i.e., the need to protect citizens from the corruption of public officials through bribery or other undue financial influence. To effectuate that policy decision, the constitution requires that financial contributions to candidates for public office and their committees be disclosed.

The Voters' Right to Know Act ("Prop 211" or the "Act") is thus consistent with the Arizona Constitution with respect to candidate contribution disclosures. But in all other respects the Act is unconstitutional because it violates the constitution's speech and privacy provisions and is inconsistent with the constitution's baseline protection of anonymity in political expression.

The Arizona Chamber of Commerce and Industry ("the Chamber") is a non-profit organization that advocates for free-market public policies and works to ensure economic growth and prosperity for all Arizonans. Its membership includes

businesses operating in Arizona that wish to speak with a common voice on a range of issues relating to the ACCI's broad purpose. The Chamber wishes to preserve the speech and privacy rights of its members and all Arizonans. Though the Chamber agrees in all respects with Appellants' arguments, this brief will address three issues pertinent to the Court's review, all in the context of Prop 211's ballot proposition disclosure requirement: the pertinence of the secret ballot provisions to the Court's inquiry, the level of scrutiny the Court should apply to Prop 211's burden on speech, and the deficiencies of Appellees' "informational" interest in requiring disclosure of ballot proposition contributions.

ARGUMENT

I. Prop 211 Burdens Speech

This Court's paean to anonymity in *Mixton* roughly coincided with the ascendancy of a political and social movement that focused on exposing the identities of people engaged in wrongthink. "Cancel culture," or most recently "accountability culture",[1] represents a "long overdue accountability for the elite and powerful who have grown accustomed to the tacit immunity that often accompanies wealth, power and celebrity."[2] The movement's goal is to ostracize and/or reeducate

[1] "Naturally, then, the first step toward salvaging what had begun as a powerful tool to influence change through social media, is to reinstate accountability into the process again — resulting in the entrance of "accountability culture" into our collective lexicon." Rakshit, D., *Cancel Culture Is Canceled. Meet Accountability Culture*. 2023/4/11, theswaddle.com, https://www.theswaddle.com/cancel-culture-is-canceled-meet-accountability-culture

[2] Brownlee, D, 2021/7/1, *Is 'Cancel Culture' Really Just Long Overdue Accountability For The Privileged?* Forbes,

those with whom it disagrees. "Unlike many critics of cancel culture, we see value in some aspects of it. Successful social movements need members who bring 'heat' and those who bring 'light.' The first group stirs controversy with sit-ins, callouts and walkouts, and the second patiently educates."[3] Apropos of the issues herein, in 2014 early adopters of cancel culture activism gained removal of a tech CEO with "furious attacks" after learning that, six years earlier, the CEO made a financial contribution in support of California Proposition 8.[4] There are myriad similar examples of "cancelation" in the years since.

While Appellants' account[5] of the dangers to those who dare speak out of turn amply demonstrate the Act's harm, it is clear today that anyone who contributes financially to a ballot proposition in compliance with Prop 211's disclosure requirements exposes themselves to risk of intimidation, ostracization and reeducation.

Prop 211 burdens the right to speak freely, and chills speech. One study found that many who strongly support a comprehensive disclosure regime change their

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https://www.forbes.com/sites/danabrownlee/2021/07/01/is-cancel-culture-really-just-long-overdue-accountability-for-the-privileged/?sh=1bd1900f3a22

[3] Yoshino, K and Glasgow, D, 2023/3/17, *"Cancel culture" has its merits, but the left is ready for a better approach*, Los Angeles Times. https://www.latimes.com/opinion/story/2023-03-17/cancel-culture-racism-sexism-bias (cleaned up)

[4] AP, 2014/4/4, *Mozilla CEO resignation raises free-speech issues*, USA Today, https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/

[5] *See* Petition for Review at 17-19.

tune when confronted with disclosing their own identity in connection with a political contribution. Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, Vol 13, Number 4, Spring 2009 567, at 575. And nearly 60 percent of those surveyed would "think twice about contributing if their personal information is to be disclosed." *Id*.

II. The Arizona Constitutional Provisions

The parties have extensively addressed the speech and privacy provisions of the Arizona Constitution, along with the candidate contribution provision. Article II §§ 6 and 8, Article VII § 16.

The secrecy provisions of Article VII § 1 and Article II § 37 provide additional context and a framework for evaluating the competing interests of the core provisions relating to speech, privacy, and disclosure. Article VII § 1 preserves "secrecy in voting," and Article II § 37 establishes that the "right to vote by secret ballot for employee representation is fundamental and shall be guaranteed."

The Arizona Constitution was promulgated on the heels of a country-wide movement to adopt the Australian ballot system (the secret ballot). The secret ballot, "allowing the voter to cast an anonymous vote—was aimed at addressing the problem of voter intimidation and electoral fraud." E. Scott Adler and Thad E. Hall, *Ballots, Transparency, and Democracy*, Election Law Journal, Vol 12, Number 2, 2013. https://www.liebertpub.com/doi/epub/10.1089/elj.2012.0179. In 1888 Kentucky was the first state to adopt the secret ballot, and by 1892 thirty more states had followed. *Id.* By the turn of the century, just before Arizona adopted the

provision, other state courts noted the dual purpose of the secret ballot, i.e., to prevent voter intimidation and to prevent corruption. *Nall v. Tinsley*, 54 S.W. 187, 188 (Ky. 1899)(voters should be "free from improper influences in the expression of his preference" and "placed beyond reach of intimidation."); *Lynch v. Malley*, 74 N.E. 723, 725 (Ill. 1905)("protect the voter against intimidation and secure him freedom in the exercise of the elective franchise and reduce to a minimum the incentive to bribe the voter").

In *Burson*, the Supreme Court summarized the country's move to the secret ballot.

> In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: *voter intimidation and election fraud*. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot ... We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Burson v. Freeman, 504 U.S. 191, 206, 112 S. Ct. 1846, 1855 (1992)(emphasis added).

Our constitutional provisions protecting voter secrecy, privacy, and free speech create a strong presumption that the framers intended to secure privacy protections for political views, in large part to preclude the type of intimidation described in Section I, above. Contrary to Appellees' arguments, the constitution's candidate disclosure provision did not defenestrate the constitution's pervasive protections for speech, privacy, and anonymity in political viewpoint. Rather,

Article VII § 16 merely represents the framers' judgment that protecting against corruption by monitoring *candidate contributions* was so important that it outweighed the other interests, but only with respect to that specific issue.

In addition to *exlusio alterius*, the rule of statutory construction argued by Appellants, two other canons work to resolve any seeming conflict between the specific candidate contribution provision and the general application of the constitution's speech, privacy, and secret ballot provisions. First, the Omitted-Case Canon provides that "a matter not covered is to be treated as not covered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). An "absent provision cannot be supplied by the courts." *Id*., at 94 Thus, if the candidate contribution provision is the exception to the constitution's general protections for speech, privacy, and secrecy, then the exception should be limited to its text, leaving the general protections to cover non-candidate contributions.

The General/Specific Canon is also instructive. "Under this canon, the specific provision is treated as an exception to the general rule." *Id*. at 183. The general provisions continue in force and only their "application to cases covered by the specific provision is suspended." Id., at 184. Thus, the constitution's general preservation of speech, privacy, and secrecy continues to apply, precluding mandatory disclosure in all cases except candidate contributions.

III. The Court Should Apply a Bright Line Test

This Court has already determined that at least one federal tier of scrutiny does not sufficiently preserve the "broad protection of speech afforded by the Arizona Constitution." *State v. Stummer*, 219 Ariz. 137, 144, (2008). Thus the Court should

reject the court of appeals' reflexive application of exacting scrutiny. Instead, the Court should apply strict scrutiny or some other bright line test.

At the same time, the Court should refrain from extending the complex and subjective balancing test set forth in *Stummer*. In a concurring opinion, Justice Scalia incisively conveyed the dangers of balancing tests.

> This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important."

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897, 108 S. Ct. 2218, 2223-24 (1988). Though finding Arizona's speech protections to be expansive, the *Stummer* court also created a byzantine balancing test, leaving the courts (and litigants) to subjectively traverse terms like "substantial interest," "substantially reduces," "significant ameliorative impact," and whether a regulation "unduly" burdens speech.

IV. The Informational Interest is Insufficient

Even if the Court applies exacting scrutiny or some other balancing test, it should reject the "informational" interest as insufficient to outweigh the burden placed on speech by Prop 211 in the context of ballot proposition spending. For ballot propositions, the subject of the election is right in front of a voter's eyes, in black and white. The voter can read the proposition, a summary of the proposition,

and a voter guide with arguments for and against the proposition written by citizens, interest groups, and community leaders. The voter can read news articles and other media coverage describing the proposition. Knowledge of who else might support or oppose a proposition offers little meaningful information. To the extent there is value in having voters let interest groups make up their mind for them, voters already learn of interest group positions through mechanisms other than disclosure of contributions.

A study reporting on the marginal benefits of disclosure in ballot proposition spending, by comparing focus groups with varying degrees of information about the proposition, found the marginal "information" provided by disclosure to be "imperceptible" and "trivial and statistically insignificant." David M. Primo, *Information on the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, Election Law Journal, Volume 12, Number 2, 127 (2013). The study concluded

> As a result, disclosure information can't be serving a cue-giving function, and the link between disclosure and voter competence is severed.
> This result is surprising given the theoretical edifice upon which disclosure laws are built. In many respects, however, it should not be surprising. Voters have access to a plethora of information about ballot issues, even obscure ones…

Id. at 128.

CONCLUSION

For the reasons above and the reasons set forth in Appellants' briefing, this Court should find the portions of Prop 211 relating to disclosure for ballot propositions and independent expenditures in violation of the Arizona Constitution.

RESPECTFULLY SUBMITTED this 24th day of June, 2025.

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