IN THE SUPREME COURT
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.	No. CV-24-0295-PR Court of Appeals Division One No. 1CA-CV-24-0272 A Maricopa County Superior Court No. CV2022-016564

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF APPELLEES

(with written consent of the parties)

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Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, *amici curiae* submit this brief in support of Appellees with all parties' written consent.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici, listed in the Appendix, are eight legal scholars with expertise in state constitutional law and campaign finance law. They have researched and published extensively in these areas and have a professional interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case.

INTRODUCTION & SUMMARY OF ARGUMENT

The Court of Appeals properly rejected Plaintiffs' constitutional challenges to Proposition 211. As *amici* explain here, that decision comports with the Arizona Constitution's foundational textual and structural commitments to democratic self-government. It also finds strong historical support in Arizona's founding-era campaign laws and in the broad-based national movement for electoral transparency and accountability that drove law and policy at the time of statehood.

I. Going well beyond the U.S. Constitution, the Arizona Constitution includes a panoply of provisions designed to keep the people in the driver's seat of their government and to guard against abuses of both public and private power. Among other things, the constitution's drafters relied on transparency requirements—including a campaign finance disclosure mandate—to give the people information to check the machinations of powerful interests. Consistent with these animating

principles of transparency and democratic accountability, disclosure laws like Proposition 211 are constitutionally favored, not suspect. Subjecting such laws to highly skeptical judicial review would exaggerate the limited constitutional interests that big spenders have in secretly influencing public elections while disserving the countervailing bedrock rights and freedoms that such laws promote.

II. Arizona's history confirms that the state's founding generation did not view campaign disclosure regulations as constitutionally disfavored. Both before and immediately after statehood, Arizona law required meaningful campaign disclosure and limited anonymous electioneering in ways that went well beyond Proposition 211. Significantly, it does not appear that anyone at the time expressed concern that these measures infringed on anyone's constitutional right to speak freely.

III. The national context at the time of statehood provides even more emphatic evidence that speech rights were not originally understood as roadblocks to campaign disclosure requirements. The early twentieth century—the Progressive Era—saw profound public and legal commitment to transparency. In these years, dozens of states and the federal government rolled out campaign finance disclosure laws, along with even more expansive forms of campaign regulation. The idea that such laws infringed on free speech guarantees was almost entirely absent from the relevant discourse. The prevailing view was that campaign disclosure was a salutary and constitutionally valid mechanism to elicit information and deter corruption,

thereby promoting responsible democratic governance. Plaintiffs' challenges to Proposition 211 simply cannot be squared with these original understandings.

ARGUMENT

I. Robust campaign finance disclosure rules fully align with the Arizona Constitution's bedrock democratic commitments.

The notion that Arizona's Constitution disfavors meaningful campaign disclosure regulations flies in the face of the foundational democratic principles embodied in the document's text and structure. As this Court has repeatedly observed, provisions like the Constitution's free speech guarantee cannot be read in isolation. Instead, the document must be "construed as a whole," with its "various parts … read together" and harmonized. *Kilpatrick v. Superior Ct.*, 105 Ariz. 413, 419 (1970); *Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159, 170 (1939). A properly holistic interpretive approach makes clear that laws like Proposition 211 advance, not subvert, fundamental constitutional rights and interests.

At its core, the Arizona Constitution promises Arizonans the freedom to govern themselves as political equals. *See, e.g.*, Ariz. Const. art. 2, § 2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 59 (1988) ("Perhaps the most constant thread running through the Arizona Constitution is its emphasis on democracy—popular control through the electoral

process."). Provision after provision aims to keep the government firmly in the people's hands and to guard against abuses of power: The document divides governmental authority across multiple branches[1]; it makes officials in every branch electorally accountable, including through recalls[2]; it reserves the people's ability to bypass unresponsive officials through initiative and referendum[3]; and it protects the rights of the state's electors and the "purity" of the electoral process.[4] *Cf*. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 864 (2021) (detailing how state constitutions' "text, history, and structure" evince "interrelated … commitments to popular sovereignty, majority rule, and political equality" that together comprise a "democracy principle"); David L. Abney, *Never Just a Footnote: Relying on the Arizona Constitution to Protect the Rights and Liberties of Arizona's People*, 44 Ariz. St. L.J. 427, 433 (2012) (discussing the Arizona Constitution's array of "innovative rights and protections for popular democracy" with no direct federal constitutional analog).

And these provisions are just the start of the Arizona Constitution's efforts to

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[1] *Id*. art. 3.
[2] *Id*. art. 4, pt. 2, § 1 (legislature); art. 6, § 38 (judicial retention); art. 5, § 1 (executive officers); art. 15, § 1 (Corporation Commission); art 19 (mine inspector); art. 8, § 1 (recall); art. 7, § 10 (direct primaries); *see also* Leshy, *The Making of the Arizona Constitution*, *supra,* at 60 ("[W]henever the delegates debated whether a particular official was to be appointed or elected, the convention opted for election.").
[3] Ariz. Const. art. 4, pt. 1, § 1.
[4] *Id*. art. 7; art. 7, § 12 ("There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.").

protect and promote popular self-rule. The constitution's drafters were highly attuned to the dangers posed by excessive concentrations of power—both public and private. *See* Leshy, *The Making of the Arizona Constitution*, *supra*, at 58. They had seen deep-pocketed actors—including railroads and mining companies—use their resources to try to capture political institutions and manipulate government for self-serving or oppressive ends. *See, e.g.*, John D. Leshy, The Arizona State Constitution 341 (2d ed. 2013). Empowering the people to resist the capture and corruption of state institutions was a top priority. This is why the Arizona Constitution devotes two entire articles (14 and 15) to curbing corporate power and influence over state policy and policymakers, including by imposing a broad ban on corporate electioneering.[5]

The Arizona Constitution's drafters placed particular emphasis on public transparency as a vital tool for keeping government responsive and accountable. The Constitution repeatedly insists that every branch of government act openly.[6] It also

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[5] *See* Ariz. Const. art. 14, § 18 ("It shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action."). The Arizona Constitution also establishes an independent commission to regulate corporate activity, Ariz. Const. art. 15; bans monopolies and trusts, art. 14, § 15; bars the legislature from passing laws that grant special privileges to corporations, art. 4, § 19; limits joint ventures between government and private entities, art. 9, § 9; and even prohibits public officials from accepting special transportation passes from railroads and other corporations, art. 4, § 23.

[6] *See, e.g.*, Ariz. Const. art. 2, § 11 ("Justice in all cases shall be administered openly …."); art. 4, pt. 2, § 22 (open proceedings for juveniles accused of unlawful conduct); art. 6, § 8 ("speedy publication" of supreme court opinions); art. 4, pt. 2, § 14 (publication of amended laws); art. 4, pt. 1, § 1(11) (publication of all proposed

mandates transparency for private acts that affect public interests, including by influencing elections. Corporations, for example, are subject to a litany of disclosure obligations.[7] And most significant here, the Constitution has, from the beginning, required the legislature to "enact a law providing for a general publicity, before and after election, of all campaign contributions to and expenditures of campaign committees and candidates for public office." Ariz. Const. art. 7, § 16. Indeed, Arizona was the first state to constitutionalize a campaign disclosure mandate.[8]

Together, these provisions and their connective throughlines reveal how utterly incongruous it would be to interpret the Arizona Constitution's free speech guarantee to confer a broad right to cloak large campaign expenditures, and the sources of the funds used to pay for them, in a shroud of secrecy. The constitution's right to speak freely is—and has always been—compatible with transparency mandates (and, indeed, was even viewed as compatible with outright prohibitions on

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ballot measure text); art. 4, pt. 2, § 1(16) (publication of proposed redistricting plans); art. 9, § 9 (tax laws to "distinctly state the tax and objects for which it shall be applied"); art. 9, § 4 (disclosure of the state's receipts and expenditures of public money).

[7] *See, e.g.*, Ariz. Const. art. 14, § 8 (requiring the filing of articles of incorporation); art. 14, § 16 (subjecting many corporate "records, books, and files … to the full visitorial and inquisitorial powers of the state"); art. 15, §§ 4, 13 (subjecting the "books, papers, business, methods, and affairs" of corporations that publicly sell stock to reporting and inspection); art. 15, § 14 (requiring public service corporations to disclose information on the value of their property).

[8] Even today, only six other states expressly include disclosure requirements in their constitutions. *See* Colo. Const. art. 28, § 7; Fla. Const. art. 2, § 8; Minn. Const. art. 7, § 9; Mo. Const. art. 7, § 23; Ore. Const. art. 2, § 8; R.I. Const. art. 6, § 9.

campaign spending by entities regarded as threats to self-government). To help the people govern themselves, the Arizona Constitution empowers Arizonans to insist on being told who is spending large sums to influence the state's elections.

Plaintiffs' contrary position rests largely on a spurious syllogism: On their telling, because this Court has at times described the Arizona Constitution's free speech clause as more protective than the First Amendment, and because campaign disclosure requirements receive exacting First Amendment scrutiny, then Arizona's Constitution must require even more judicial skepticism of such requirements.

Beyond the fact that the Arizona Constitution embraces transparency much more directly than the U.S. Constitution, Plaintiffs' reasoning fails to appreciate how the First Amendment and Arizona's free speech guarantee differ from one another. As this Court has observed, the First Amendment "is phrased as a constraint on government," while Arizona's provision establishes an affirmative right to "freely speak, write, and publish" (with every person remaining responsible for the abuse of that right). *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281-82 (2019). In other words, Arizona's provision is not more protective in the sense that it is invariably more deregulatory than the First Amendment. To the contrary, the Arizona Constitution invites regulations that help to facilitate expression and association.

Disclosure rules like Proposition 211 are exactly the sort of speech-facilitating provisions that the Arizona Constitution welcomes. Plaintiffs focus exclusively on

the possibility that Proposition 211—which does not limit anyone's contributions or expenditures—may prompt some unspecified fraction of those with the means to spend lavishly on Arizona elections to refrain from doing so. But there is another side to the ledger. For one thing, unchecked anonymous campaign spending can itself have a chilling effect. Those who wish to exercise their right to engage in electoral advocacy may be deterred from participating if their speech may be met with a barrage of invective financed by unnamed donors who use anonymity to avoid accountability. For another, laws like Proposition 211 are information-eliciting. They make Arizonans freer to speak, write, and publish by supplying them with facts that can inform their election-related advocacy and deliberations.

At the very least, the competing constitutional interests here make a standard like strict scrutiny wholly inapt. It simply cannot be that campaign transparency rules—which aim to facilitate popular self-rule—face the same strong presumption of invalidity that applies to laws that flatly bar campaign spending or that overtly deprive citizens of their fundamental right to vote.[9] If anything, this Court's review should be more deferential than federal exacting scrutiny, which has itself rarely resulted in the invalidation of campaign disclosure regulations. After all, the Arizona Constitution surpasses the federal constitution both in recognizing the democratic

[9] *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (noting that even if disclosure rules "may burden the ability to speak," they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking").

perils of unchecked electoral spending and in embracing the virtues of transparency to a well-functioning system of popular self-government. Applying a standard of review that deems disclosure regulations inherently suspect would improperly devalue the vital constitutional rights and interests that disclosure advances.

Plaintiffs additionally suggest that two provisions of the Arizona Constitution bolster their case against Proposition 211, but both provisions do just the opposite. First, plaintiffs counterintuitively contend that Proposition 211 is suspect because it supposedly goes beyond Article 7, § 16's demand for a "general publicity" law covering "all campaign contributions to, and expenditures of campaign committees and candidates for public office." On their telling, if Proposition 211's disclosure rules are not constitutionally required, they must be constitutionally prohibited. But that simply does not follow. The constitution's drafters were so concerned about anonymous campaign spending, and so valued an informed electorate, that they created a disclosure mandate; they were not, by negative implication, foreclosing any form of disclosure beyond that mandate's four corners. Simply put, Article 7, § 16 sets a constitutional floor, not a ceiling. It certainly does not bar legislators (and the people themselves) from requiring disclosure from groups, such as super PACs or 501(c)(4)s, that did not exist at the founding but that today exert the same sort of electoral influence as candidate and party committees. In any event, as explained

further in Part II, Plaintiffs' cramped conception of the kind of "general publicity" law the constitution contemplates is at odds with Arizona's historical practice.

Second, plaintiffs point to Article 2, § 8, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law"—a provision this Court has generally applied only to matters covered by the Fourth Amendment. *State v. Mixton*, 250 Ariz. 282, 290 (2021). But campaigns and elections—particularly the campaign advertising that Proposition 211 covers—are quintessential public matters, not private ones, something myriad contemporaneous judicial precedents confirm.[10] According to the canonical article that first delineated the concept, "[t]he right to privacy does not prohibit the publication of any matter which is of public or general interest." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). As detailed below, the prevailing understanding at Arizona's founding was that the disclosure of large campaign contributions and expenditures infringed neither privacy nor speech.

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[10] *See, e.g.*, *Beason v. Shaw*, 42 So. 611, 612 (Ala. 1906) ("The election was not a matter of private, but of public, concern."); *State ex rel. Kiel v. Riechmann*, 142 S.W. 304, 308 (Mo. 1911) (noting the "public interest in honest primaries and elections"); *State ex rel. Webber v. Felton*, 84 N.E. 85, 87 (Ohio 1908) (explaining that "the nomination of candidates [is] as much a matter of public concern as the election of officers" and thus "subject to regulation under the police power"); *Cunningham v. Cokely*, 90 S.E. 546, 547 (W. Va. 1916) (describing "nominations and elections of public officials" as "matters of public concern, and subjects of proper and reasonable legislative regulation, restriction, and control").

II. Arizona's pre- and post-ratification history shows that disclosure has a long pedigree and was not originally understood to pose free speech concerns.

Beyond text and structure, history also counsels strongly in favor of upholding Proposition 211. Since before statehood, Arizona has sought to improve electoral transparency and accountability through campaign disclosure requirements. The Arizona Territory enacted the first such law in 1895. *See* Rev. Stat. Ariz. Territory, Penal Code, pt. 1, tit. IV, § 66 (1901) (originally enacted as Act 20, § 6, Mar. 11, 1895). Even at this early stage, lawmakers sought to ensure that disclosure would be meaningful by anticipating and addressing potential evasions. Thus, the law required candidates to file "itemized statement[s] showing in detail all of the moneys contributed or expended by him, *directly or indirectly*, by himself *or through any other person*, in aid of his election." *Id*. (emphasis added). And it extended this obligation to "the chairman and secretary of the territorial, county and city central committees of each and every political party presenting candidates." *Id*. The territorial legislature also went beyond disclosure and imposed direct restraints on independent electioneering. It barred both corporate and noncorporate employers from engaging in various forms of advocacy within ninety days of an election in an effort "to influence the political opinions or actions of its, their or his employees." *Id*. § 42. And it prohibited any person, "with the intent to promote the election of himself of any other person," to "[f]urnish[] entertainment at his expense to any

meeting of electors previous to or during an election." *Id*. § 40.

At this time, the Arizona Territory had a statutory Bill of Rights with the same free speech language later incorporated into the state constitution. *See* Rev. Stat. Ariz. Territory, tit. I, ch. 1 § 16 (1901) ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."). Yet, as far as we are aware, no one ever raised free speech concerns about these disclosure requirements and other campaign regulations. The consensus at the time seems to have been that such laws did not infringe the right to speak freely.

That understanding continued to prevail during the Arizona Constitution's drafting and ratification. When campaign finance disclosure was discussed at the 1910 constitutional convention, no delegate expressed the view that publicity laws might threaten the right to speak freely or suggested that anyone had a right to engage in anonymous electioneering. Noting that the convention rejected a proposal that expressly required disclosure for initiative campaigns, Plaintiffs posit (Suppl. Br. at 7) that the drafters must have opposed such disclosure. But that misunderstands the record. The delegates nearly unanimously supported enshrining campaign finance disclosure in the state constitution, and the only real disagreement among them was about whether to spell out a disclosure regime in detail or instead to reserve the specifics to the legislature. *See* The Records of the Arizona Constitutional

Convention of 1910 144-51 (John S. Goff, ed., 1991). They chose the latter option, but that by no means reflected a desire to cabin the scope of disclosure regulations. *Cf.* Alexander J. Lindvall, *Ending Dark Money in Arizona*, 44 Seton Hall Legis. J. 61, 79 (2020) (explaining that the framers aimed to "make Arizona elections as transparent as possible"); Joseph Kanefield, *The Arizona Legislature Should Restore Clarity to Our Campaign Finance Laws*, Ariz. Att'y, March 2015, at 32 ("Disclosure and transparency in our elections have been paramount since statehood.").

The legislature's actions immediately after ratification offer further evidence that the Arizona Constitution's free speech guarantee was not originally understood as a barrier to campaign disclosure requirements. Within a year of statehood, lawmakers adopted Arizona's first campaign publicity statute. *See* Rev. Stat. Ariz., Civil Code § 3048 *et seq*. (1913). Building on prior territorial law, it required candidates and "campaign committees" (essentially all party-affiliated groups) to make detailed contribution and expenditure disclosures. Candidates additionally had to report any "promise or pledge … relative to appointment or recommendation for appointment of any person to any position of trust, honor, or profit." *Id*. § 3054. Lawmakers also carried forward the pre-statehood bans on corporate contributions and electioneering activities, as well as the bar on election-related entertainment expenditures. *See id*. § 3057; Rev. Stat. Ariz. Penal Code, §§ 41, 44 (1913).

Soon after, lawmakers went further, adopting a broad prohibition on

anonymous electioneering with respect to ballot measures. *See* Act of Mar. 8, 1917, ch. 47, 1917 Ariz. Sess. Laws 62 ("An Act to Prohibit Anonymous Advertisements, Arguments, Statements or Advise with Respect to Initiated or Referred Measures or Amendments to the Constitution."). That law required anyone who communicated about ballot measures, whether by "book, notice, handbill, poster, circular or letter, or in any other way," to "clearly stat[e] and set[] forth … the true name or names" and addresses of the sponsor. *Id*. For organizations, there was a tracing requirement: They had to identify "the officers, directors, and not less than five members." *Id*.[11]

Once again, it is striking that none of these early post-ratification laws appear to have elicited pushback for interfering with anyone's right to speak freely.

[11] The provision's full text is as follows: "Any person or persons, club, association, corporation or other organization who makes, publishes, circulates or places before the public in this state, or who directly or indirectly causes to be made, published, circulated or placed before the public in this State, in a newspaper, or in the form of a book, notice, handbill, poster, circular or letter, or in any other way, any advertisement, argument or statement in favor of or against any initiated or referred measure or amendment to the State Constitution, or which advises or purports to advise the electors of this state with respect to any such referred measure or amendment to the State Constitution, without clearly stating and setting forth in such advertisement, argument or statement the true name or names of the person or persons, club, association, corporation or other organization making, publishing, circulating or placing the same before the public, together with the true name or names, and the addresses, of the person or persons, or of the officers, directors, and not less than five members of the corporation, association, club or other organization directly or indirectly causing the said advertisement, argument, statement or advice to be made, published, circulated or placed before the public, or defraying the expense thereof, in whole or in part, shall upon conviction therefor, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment …."

Arizona's founding generation simply did not view the state constitution's free speech guarantee as standing in the way of efforts to insist on meaningful transparency for both candidate and non-candidate elections.

III. The national context at the time of statehood confirms that campaign transparency requirements were broadly accepted as constitutionally proper measures to improve democratic governance.

Arizona's Constitution is the product of a political and legal context vastly different from the one that shaped the U.S. Constitution. Its provisions, including its free speech guarantee, thus have a distinctive original public meaning. The document was drafted and ratified during a historical period—the Progressive Era—when the cause of transparency (or, as it was often called then, "publicity") was a national preoccupation and enjoyed broad-based popular and intellectual support. The prevailing view, which became increasingly embedded in both law and policy, was that government, and anyone who sought to influence political and economic affairs, should act openly. This was the moment when soon-to-be Justice Louis Brandeis famously remarked: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants." Louis D. Brandeis, *What Publicity Can Do*, Harper's Wkly., Dec. 20, 1913, at 10.

At the time of statehood, the federal government and most states were busily enacting campaign disclosure rules—as well as direct restraints on election-related contributions and expenditures, especially by corporations. The clamor for such laws

intensified after the 1904 presidential election, when the discovery that both major parties secretly solicited and accepted huge donations from corporations and other wealthy actors became a national scandal. *See* Louise Overacker, *Money in Elections* 235-38 (1932). The leading early historian of U.S. campaign finance law described the era's zeitgeist as follows: "So far as the public at large is concerned the remedy is publicity, and more publicity…. Publicity of contributions as of expenditures—pitiless, continuous, and intelligent publicity, extending to non-party as well as party organizations—is the least that a democracy should demand." *Id*. at 202.

At the federal level, Congress adopted the first federal disclosure mandates in 1910 and 1911—within months of the Arizona Constitution's drafting and ratification. *See* The Publicity Act of 1910, 36 Stat. 822 (1910); The Publicity Act of 1911, 37 Stat. 25 (1911). These laws, which had broad bipartisan support, applied not just to "national and congressional campaign committees," but also "to all other committees, associations, or organizations which, in two or more states attempted to influence the results of an election at which Representatives were chosen." Overacker, *supra*, at 239; *see also* Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 385–86 (2013) ("Eradicating the corrupting influence of undisclosed political contributions and expenditures was a central focus of early twentieth-century progressivism, and this early transparency

effort enjoyed broad support from across the political spectrum.").

At the state level, at least 30 states had campaign publicity laws on the books when Arizona's constitution was ratified, and by the end of the 1910s, such laws had spread to nearly every state. *See* Overacker, *supra*, at 294, 294 nn.1-4. Many of these laws were written in sweeping terms, requiring reporting from anyone who made election-related expenditures. *See id*. at 296. While these provisions were generally underenforced, by their terms they sought to "make a matter of public record every cent spent in a campaign." *Id*. at 297.[12]

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[12] Like Arizona, many states at this time went beyond campaign finance regulation to impose categorical bans on anonymous electioneering, including activities like anonymous leafletting. By the late 1910s, at least half the states had such laws on the books. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 376 n.1 (1995) (Scalia, J., dissenting). Of course, many decades later, the Supreme Court held in *McIntyre* that the First Amendment bars such sweeping measures, distinguishing them from campaign finance disclosure laws. The *McIntyre* majority, however, did not dispute Justice Scalia's observation in dissent that such anti-anonymity laws were the norm in the early 20th century and amounted to "a universal and long-established American legislative practice." *Id*. at 376-77. For Justice Scalia (joined by Chief Justice Rehnquist), that "widespread and long-standing tradition[]" gave those laws "a strong presumption of constitutionality." *Id*. at 375. Justice Thomas responded in a concurring opinion that, "like Justice Scalia, [he was] loath to overturn a century of practice shared by almost all of the States," but he believed "the historical evidence from the [U.S. Constitution's late 18th century framing] outweigh[ed] [more] recent tradition." *Id*. at 370 (Thomas, J., concurring in the judgment). In Arizona, however, Justice Thomas's originalist objection to Justice Scalia's analysis does not apply since the state's founding moment coincided with the nation's emphatic rejection of anonymous electioneering, thus imbuing the state constitution's free speech guarantee with an original public meaning very different from the First Amendment's. Like Justice Scalia, founding-era Arizonans believed that anonymous electioneering "facilitates wrong by eliminating accountability," and thus rejected the view that it should be treated "sacrosanct." *Id*. at 385; *cf. Doe*

Like Arizona, many of these states have constitutional provisions that call for "secur[ing] the purity of elections," Ariz. Const. art. 7, § 12, and disclosure rules were seen as advancing constitutional "purity" obligations. California, for example, captioned its first campaign disclosure law, "An act to promote purity in elections." Overacker, *supra*, at 293. And close in time to the Arizona Constitution's ratification, at least two different state supreme courts held that laws regulating disclosure and other campaign practices "should be liberally construed" to advance "the purity of elections." *People v. Gansley*, 158 N.W. 195, 200 (Mich. 1916); *Diehl v. Totten*, 155 N.W. 74, 77 (N.D. 1915). Later cases continued to convey a similar understanding.[13]

Throughout this period, virtually no assertion was made anywhere—whether in public, legislative, or judicial discourse—that any of these disclosure mandates

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v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). Of course, even if this Court were to extend the *McIntyre* majority's First Amendment analysis to Arizona's free speech clause, campaign finance disclosure laws like Proposition 211 are readily distinguishable from the broader laws *McIntyre* rejected.

[13] *See, e.g.*, *LaBelle v. Hennepin Cnty. Bar Ass'n*, 288 N.W. 788, 791 (Minn. 1939) ("The purpose of the corrupt practices law is to prevent fraud and to insure the purity of elections by … requiring publicity of all campaign contributions and regulating practices incident to political campaigns."); *Nickerson v. Mecklem*, 126 P.2d 1095, 1098 (Or. 1942) (same); *Smith v. Higinbothom*, 48 A.2d 754, 760 (Md. 1946) (explaining that the legislature has "very broad" power "to enact corrupt practices legislation" because acting "to guard against corruption and to preserve the purity of elections" is "commendable if not absolutely essential"); *cf. Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (explaining that, in enacting FECA, Congress "wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process").

clashed with constitutionally enshrined speech rights. In the words of an architect of the first federal disclosure laws, "It is now the accepted opinion that a contributor to a political committee has no right to secrecy." Perry Belmont, *Progress of Campaign-Fund Publicity*, 189 N. Amer. Rev. 35, 39 (1909). Disclosure, he later wrote, strengthened the constitutional order by preventing "the secret use of money" from "interfer[ing] with free expression of the will of the people at the polls." Perry Belmont, *The Abolition of the Secrecy of Party Funds* 4 (1912).

Plaintiffs contend (Suppl. Br. at 3) that a Wisconsin case, *State v. Pierce*, 158 N.W. 696 (Wis. 1916), shows founding-era understanding that such laws were constitutionally suspect. But the takeaway from *Pierce* is exactly the opposite. For starters, *Pierce* underscores the rarity of speech-related objections at this time. States had rolled out dozens of laws regulating disclosure and other campaign practices, but *Pierce* is, on Plaintiffs' own telling, "the only case dating to Arizona's statehood period that applied a Speak Freely Clause in the context of campaign finance restrictions." Suppl. Br. at 3. And, significantly, *Pierce* did not involve a free speech challenge to a disclosure regulation, but instead to a portion of Wisconsin's corrupt practices law that banned independent election-related expenditures. *See* 158 N.W. at 698-99. At the time, there was an active national debate about whether expenditure bans infringed on free speech—a contrast to the lack of such objections to disclosure provisions. Even as the Wisconsin Supreme Court in *Pierce* invalidated the state's

expenditure ban, it made clear that it was not disturbing the law's separate disclosure and disclaimer requirements. *See id*. at 699 ("The remaining sections of the law … are unaffected by this decision."). More broadly, the consensus view in this era was that, if an expenditure ban "should be held unconstitutional," then "any person or organization [would be allowed] to spend money for political purposes," but states would remain free to "require full reports of such expenditures." Overacker, *supra*, at 335; *see also* Charles B. Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 204 (1948) ("The constitutionality of requirements of this character seems obvious in spite of the fact that they admittedly force the disclosure of matters which the candidates and their supporters may wish to conceal.").

In short, campaign finance disclosure laws were nearly ubiquitous in Arizona's founding era, and there was broad consensus about their constitutionality. The idea that a measure like Proposition 211 violates anyone's right to speak freely simply has no grounding in the realities and understandings of that time.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the decision below.

RESPECTFULLY SUBMITTED this 24th day of June, 2025.

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