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 AMICUS BRIEF OF CITY OF PHOENIX

Jonathan Riches (025712)
Timothy Sandefur (033670)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Andrew Gould (013234)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2555 East Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com

Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTRODUCTION

Amicus Phoenix makes three unpersuasive points. *First*, it urges the Court to adopt the "informational interest" theory (as part of the "compelling state interest" analysis)—but neither this Court nor federal courts have ever endorsed the "informational interest" theory in the context relevant here. That theory only applies to speech by *candidates* or speech endorsing *candidates*, not speech about ballot *initiatives*, or by *independent entities* like Center for Arizona Policy, Inc. ("CAP") and Arizona Free Enterprise Club ("FEC"). Nor should the Court adopt that theory.

Second, the City argues that Prop 211's burdens are justified by a need to prevent circumvention of other campaign finance restrictions. But that's untenable, because circumvention is already illegal under other laws, and there's no reason to believe those laws don't suffice. Nor has the City attempted to balance its purported need for additional legal restrictions against the chilling effects Prop 211 causes. Indeed, the City entirely ignores the question of chill. *Third*, the City's argument that this Court should base its decision on public opinion polls is unacceptable.

ARGUMENT

I. The informational interest theory is inapplicable.

1. The City urges the Court to uphold Prop 211 based on the so-called "informational interest" theory—i.e., the theory that the state has compelling interest in "informing" voters about who supports a candidate or a ballot initiative, by forcing such supporters to divulge information about themselves. Plaintiffs have explained in their Supplemental Brief (at 10-13) why the "informational interest" is inapplicable to this case. Neither Arizona courts nor federal courts have ever applied that theory to ballot initiative campaigns or to entities like CAP (which doesn't endorse candidates) or FEC (which speaks about candidates but isn't controlled by or coordinated with them). Nor should they.

2. Phoenix claims that "the United States Supreme Court has repeatedly upheld" compelled disclosure of donors' private information under the "informational interest" theory because disclosure is "'a less restrictive alternative to more comprehensive regulations of speech.'" Phoenix Br. at 9 (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010)). It also claims that "an 'informational interest alone is sufficient to justify' a requirement to disclose election-related spending." *Id.* (citation omitted). But that's not accurate. The U.S. Supreme Court has applied the "informational interest" theory with respect to campaigns of *candidates for public office*, but not to those supporting ballot initiatives. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354, 356 (1995). That's for good reasons, as explained in Plaintiffs' Supplemental Brief at 11-13. The phrases from *Citizens United* that Phoenix quotes are therefore inapposite.

The City says the only reason federal courts haven't applied the "informational interest" theory to initiative campaigns is that there aren't a lot of precedents, and those that exist "interpret federal disclosure laws, and the federal interests differ significantly from the states' interests." Phoenix Br. at 10. Maybe—but the reverse is also true: the state's interests in *protecting free speech and privacy* also differ significantly from federal interests. In particular, Arizona's Constitution protects speech more broadly than the federal Constitution, *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354–55 (1989), and includes an explicit protection of privacy rights, which the federal Constitution does not. Ariz. Const. art. II § 8. It also expressly declares that the state exists for the purpose of "protect[ing] and maintain[ing] individual rights." Ariz. Const. art. II §§ 1, 2. Thus, the state's interest in protecting speech and privacy is far stronger than even the federal government's interest in enforcing the First Amendment. And if the federal interests are too weak to warrant applying the "informational interest" theory to

ballot initiatives—*see* *Reed*, 561 U.S. at 197; *McIntyre*, 514 U.S. at 354, 356—then the state's interests in doing so is even weaker. Far stronger is the state's interest in preserving the individual rights of speech and privacy.

3. As for mere speech *about* candidates, *Citizens United* took a more limited position than the City claims. Even setting aside the fact that *Citizens United* involved the First Amendment, whereas this case is brought under the Freely Speak and Private Affairs Clauses of the Arizona Constitution, the *Citizens United* Court was simply not presented with the question of groups or individuals who face harassment, intimidation, or violence as a result of disclosure. The Court expressly said so, stating that "disclosure requirements can chill donations to an organization by exposing donors to retaliation," and that means there's "cause for concern" that a "group's members would face threats, harassment, or reprisals if their names were disclosed"—but it further noted that the plaintiffs in *Citizens United* had "offered no evidence that its members may face similar threats or reprisals." 558 U.S. at 370. It therefore declined to address that question.

The Court did, however, address that question in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), which stressed "[t]he gravity of the privacy concerns in this context," acknowledged that "disclosure requirements can chill association" by "indiscriminately sweeping up the information of every major donor with reason to remain anonymous," and for that reason struck down the state's effort to force donors to nonprofits to turn over their confidential information to the public. *Id.* at 616-17.

This case, too, bears out the concerns regarding chilling speech. Not only does the record show that there is plentiful danger of harassment, intimidation, and violence if the names, addresses, and employment information of donors to groups like CAP and FEC are published—a point bolstered by additional examples in Amicus Buckeye Institute's brief (at pages 3-7)—but recent events have

demonstrated that risk more broadly. Last year, the offices of three conservative groups—the Center for the American Experiment, the Upper Midwest Law Center, and TakeCharge—experienced an arson attack. Steve Karnowski, *Federal Authorities Investigate Suspected Arson at Offices of 3 Conservative Groups in Minnesota*, AP News (Feb. 2, 2024). The Secretaries of State of Missouri and Maine, and the chief operating officer of the Georgia Secretary of State, were "swatted" by harassers who found their addresses online. Curt Devine, et al., *Election Officials' Homes "Swatted" as Presidential Race Heats Up*, CNN (Mar. 13, 2024).[1] A man arrested with weapons near former President Obama's home had tracked down the address from online sources. Ryan J. Reilly & Fiona Glisson, *Jan. 6 Defendant Arrested Near Obama's Home Had Guns And 400 Rounds of Ammunition in His Van*, NBC News (June 30, 2023).

People considering donating to groups like CAP or FEC (or Buckeye) face a significant likelihood that if their names are placed in a publicly accessible database, they will experience reprisals and even violence. That creates a chilling effect. In fact, both CAP and FEC have already chosen to self-censor as a result of the burdens Prop 211 imposes. *See* Ariz. Clean Elections Comm'n's ("CEC") COA App. to Answering Br. at APP035-38.

Even if no such evidence existed, the *Bonta* Court held that the mere "*risk* of a chilling effect on association is enough" to violate the First Amendment because free speech "'need[s] breathing space to survive.'" 594 U.S. at 618–19 (citation omitted; emphasis added). And because the Freely Speak Clause is broader than the First Amendment, that point strikes with even stronger force here.

[1] "Swatting" occurs when a person calls 911 to make a false report of violence at the target's address, with the consequence that heavily armed police SWAT forces rush to that address, with potentially deadly consequences. Elizabeth M. Jaffe, *Swatting: The New Cyberbullying Frontier After Elonis v. United States*, 64 Drake L. Rev. 455 (2016).

Indeed, it is worth reiterating that the reason mere *risk* is enough is because it's impossible to foretell the future. "[W]hile our own ideas may be popular today, they may not be tomorrow." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 275 ¶ 4 (2019). Someone wishing to express or support a political position today can never know whether that position might come to be considered anathema—possibly in the distant future—whereupon retaliation or harassment might follow. *See* Plaintiffs' Supplemental Brief at 18-19. Thus a disclosure mandate can impose a chill even absent specific examples of violence. To require plaintiffs to prove with *certainty* that retaliation will follow from disclosure, or to cite examples of *actual* violence *already* experienced, would mean that every harasser would get "one free bite." Courts have accordingly never required that degree of specificity.

In fact, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court held that a mandatory disclosure law can cause an unconstitutional chill "[e]ven if there were *no [actual] disclosure* to the general public." *Id.* at 486 (emphasis added). That case involved a law requiring teachers to disclose to school boards the identities of organizations they donated to; the state supreme court held this constitutional because the information was "not being publicized," and was "being kept under lock and key." *Carr v. Young*, 331 S.W.2d 701, 704 (Ark. 1960). Yet the Court reversed, because the law unconstitutionally chilled free speech. "[T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy," it said. "Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to *widen and aggravate* the impairment of constitutional liberty." *Shelton,* 364 U.S. at 486–87 (emphasis added).

Phoenix says *absolutely nothing* about these risks in its brief. It claims Prop 211 imposes "minimal burdens," Phoenix Br. at 3, but never tries to assess the true weight of those burdens, let alone to balance them against concerns about privacy or retaliation. The City speaks of "transparency" as if it were an unmitigated good, but the truth is more complicated. As courts have repeatedly recognized, and as the record and amicus briefs here demonstrate, so-called "transparency" also invites retaliation, vandalism, and violence against groups and individuals holding dissenting or unpopular views. Even where such incidents don't actually occur, the risk of violence alone can be "as effective a restraint on freedom of association as [outright censorship]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

4. As for the alleged public benefits of mandatory disclosure, the City claims that it "provides voters with vital information necessary to 'aid the voters in evaluating' decisions at the ballot box," Phoenix Br. at 10 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)), but as Plaintiffs showed in their Supplemental Brief (at 11-13), and as Amicus Arizona Chamber explains in their brief (at 7-8), that's simply not true. For one thing, *Buckley* was referring to *candidate* elections. (It said, in words Phoenix omits from its quotation, "… aid the voters in evaluating *those who seek federal office*." 424 U.S. at 66–67 (emphasis added).) Knowing who donates to a candidate might indeed accomplish that objective—although as Amici Make Liberty Win and Young Americans for Liberty point out in their brief (at 15-16),[2] Prop 211 actually distorts the information provided in such a way that it fails to meaningfully inform voters way. *Ballot initiatives,* however, cannot be bribed, influenced, or fall "'victim [to] character assassination.'" *McIntyre*, 514 U.S. at 352

[2] As these amici observe, so-called "tracing contributions to their source" ignores the decisions made by individuals who aren't coordinating with or influencing a candidate and who can't receive favors from them. *Id.* at 16.

n.16 (citation omitted). They should be weighed on the merits, not on *ad hominem*. *See* Sampson v. Buescher, 625 F.3d 1247, 1249, 1256-59 (10th Cir. 2010). The "informational interest" argument is thus far weaker here.

In any event, any "informational" benefits that Prop 211's anti-privacy mandates provide must be weighed against the chilling effects and burdens on these Plaintiffs and other would-be speakers. And the latter outweigh the former.

II. Existing campaign finance regulations are sufficient to address fraud without violating the Freely Speak or Private Affairs Clauses.

1. The City contends that Prop 211's burdens are justified as a means of preventing bad actors from circumventing other, already-existing campaign funding restrictions. Without the anti-privacy provisions of Prop 211, says the City, "it [would be] trivial to circumvent the purposes of independent expenditure disclosure laws" or to "sidestep[] direct contribution disclosure … through the use of an intermediary." Phoenix Br. at 11.

But as this very language suggests, such actions are *already* against the law. If a person is donating to a nonprofit with a wink and nudge, expecting express advocacy of a candidate—or if a candidate is secretly coordinating with a nonprofit by using it as an "intermediary"—that would *already* be illegal, under laws that prohibit coordination. The answer is to prosecute conspirators and violators, not to violate the constitutional rights of the innocent.

A similar argument was presented in Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013), which involved a state law limiting the amounts of contributions to political committees, but which defined "political committee" so broadly as to encompass entities that only engaged in advocacy. The court held that this broad definition violated the free speech rights of independent entities, and when the state argued that it needed to use such a broad definition to prevent people from circumventing the state's other campaign finance laws, the court answered that

> [the alleged risk of] *quid pro quo* corruption no longer justifies restrictions on uncoordinated spending for independent expenditure-only entities … . If the political committees are indirectly controlled by political parties, that would raise a separate issue—coordination. … If New Mexico believes that there is improper coordination between a PAC and a state or local political party, then it could bring an enforcement action.

Id. at 1097, 1103.[3] Likewise, Phoenix or the state can already bring enforcement actions against anyone conspiring to evade the election statutes through some kind of ruse. But citing the mere possibility that the guilty might evade other laws is not enough to overcome the government's burden of justifying Prop 211's burdens on speech and privacy.

What's more, as former Federal Election Commission chairman Bradley Smith observes, "the circumvention argument knows no bounds. … [E]very time we close off one avenue of political participation, politically active Americans will turn to the next most effective legal means of carrying on their activity. That next most effective means will then become the loophole that must be closed." Bradley A. Smith, *The Myth of Campaign Finance Reform,* National Affairs, 90 (Winter 2010). But as courts have recognized, states may adopt prophylactic laws to prevent the evasion of other laws, but there are limits to that power, lest the state must squelch all speech in an effort to prevent circumvention. *Cf. Coal. For Secular Gov't v. Williams*, 815 F.3d 1267, 1276 (10th Cir. 2016) (balancing "[t]he informational interest in the Coalition's disclosures" against "the substantial and serious burdens of the required disclosures.").

2. The question, therefore, is whether the benefits outweigh the burdens. Yet the City makes no effort to compare the benefits to the burdens here. It just *ignores* the chill on speech imposed by Prop 211's anti-privacy rules. Nor does it offer any evidence that the Plaintiffs or anyone else is actually engaged in circumvention.

[3] This case involves disclosure rather than the contribution limits at issue in *King*, but that only makes the Tenth Circuit's observation all the *more* applicable.

Instead, it merely cites a law review article by a lawyer at a Progressive activist group who waves away the chill caused by anti-privacy mandates by saying that "chill is not sufficient," because "[c]orporations can't suffer violence." Stuart McPhail, *Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 Penn St. L. Rev. 1049, 1064-65 (2017) (cited in Phoenix Br. at 11). That would come as news to PNC and Wells Fargo Banks, both of whose Tucson offices suffered $100,000 in vandalism last year by members of a leftist group[4]; or Tesla, whose Mesa dealership was attacked months ago by an arsonist who burned one car and caused multiple explosions at the facility, evidently moved by political hostility toward Elon Musk[5]; or the Arizona Democratic Party, whose Phoenix office was firebombed in 2020,[6] and whose Tempe office was shot up months ago by a man whom police believe was "planning a mass casualty event."[7]

3. Putting that aside, Phoenix's *entire* argument about the danger of *quid pro quo* and circumvention applies to *candidate* elections and to organizations that coordinate with and/or expressly endorse *candidates*. But CAP and FEC are involved in issue advocacy and candidate support, not campaigns and candidate coordination. Indeed, CAP, as a 501(c)(3) organization, is not legally permitted to endorse candidates at all, and FEC, as a 501(c)(4), is not allowed to coordinate with them.

Astoundingly, Phoenix's *only* answer to this last point is to say that federal law might change someday: "While it is true that 26 U.S.C. § 501(c)(3) prohibits participation in 'any political campaign on behalf of (or in opposition to) any

[4] Charles Borla, *Downtown Tucson Vandalism Spree Politically Motivated, Police Say*, Tucson.com (Feb. 28, 2024).
[5] Sean Rice, *Mesa Man Accused of Lighting Tesla Cybertruck Ablaze to be Held in Custody Until Trial, Federal Judge Rules*, 12News (May 2, 2025).
[6] Ray Stern, *The Arizona Democratic Party HQ Was Torched by an Ex-Dem State Committeeman*, Phoenix New Times (July 29, 2020).
[7] Anita Snow & Walter Berry, *DNC Office Shooting Suspect Had More Than 120 Guns in his Arizona Home, Officials Find*, PBS (Oct. 24, 2004).

candidate for public office,'" it asserts, "nothing guarantees that Congress will not later amend the code to alter or remove this restriction." Phoenix Br. at 12. Suffice it to say that this Court decides cases based on what the law actually *is*, not on "who's to say"-type hypotheticals about what the law might become in the future. *Cf.* *Arizona Together v. Brewer*, 214 Ariz. 118, 124 ¶ 21 (2007) (refusing to "speculate about the behavior of the electorate at some future time.").

4. The City claims that Plaintiffs "imply that nonprofit organizations have some kind of special status with respect to election spending disclosure," Phoenix Br. at 12, but that is not true. Plaintiffs simply contend that the body of precedent upholding disclosure mandates has involved *candidate* elections, and that those cases are therefore inapplicable to groups like Plaintiffs that don't, and legally cannot, endorse or coordinate with candidates—but that do have the constitutional right to speak *about* candidates. And Plaintiffs contend that the Private Affairs and Freely Speak Clauses do not entitle the state to expose them and their supporters to the risk of harassment, vandalism, or violence as the price of expressing their political opinions.

5. Still more extraordinary is Phoenix's reliance on "federalism," which it says "permits a state to independently address its interests in requiring disclosure." *Id.* But this case is brought under the Arizona Constitution alone, so "federalism" concerns are irrelevant. Arizona surely may "independently address its interests" in all manner of subjects, *id.*—but it must do so within the confines of the Arizona Constitution, which protects the right to speak freely, and the right to the security of one's private affairs, and which declares that the purpose of government is "to protect and maintain individual rights." Ariz. Const. art. II §§ 2, 6, 8.

III. Phoenix's suggestion that this Court should base its decision on popularity polls is untenable.

Finally, Phoenix urges this Court to base its ruling, not on the law, but on "voters' preferences," even going so far as to cite polling data in its brief. Phoenix Br. at 17-18. This argument is shockingly inappropriate. "[W]hether [voter initiatives] are narrowly passed or approved 'overwhelmingly' by Arizona's voters [is] an irrelevancy for constitutionality purposes." *State v. Wein*, 244 Ariz. 22, 31 ¶ 37 (2018) (citation modified).

This Court needs no reminder that it applies the Constitution as written, rather than being swayed by political winds. *In re Marquardt*, 161 Ariz. 206, 212 (1989) ("We sit as a court of law, and providing justice … is our mandate even if it causes controversy.").[8] In fact, doing that *is* doing the will of the people. The entire theory of judicial review is that the will of the people is the Constitution—*not* any particular statute or ballot initiative, which is only the will of a particular majority at a particular time. *See The Federalist* No. 78 at 526–27 (J. Cooke ed. 1961). When courts enforce the Constitution by declaring unconstitutional laws to be void and unenforceable, they are implementing the people's will, as expressed in the Constitution. *Id.; see also State ex rel. Haggart v. Nichols*, 265 N.W. 859, 860 (N.D. 1935) ("When a legislative enactment is held void it is … because the will of the people as expressed in the Constitution is paramount to that of their representatives

[8] The Wisconsin Supreme Court said it well a century ago:

> While the legislative and executive branches of government should give heed to popular opinion, it should not be forgotten that governments and constitutions are created to protect the rights of the minority, and … [to] stand as the buffer between the majority and the minority, protecting sacred and fundamental rights from confiscation and destruction at the hands of either. Under such circumstances the courts cannot expect, and should not court, public acclaim or approval. Their only guide and mentor should be the fundamental law.

State ex rel. Rodd v. Verage, 187 N.W. 830, 836–37 (Wis. 1922).

as expressed in the statute; and it is the duty of the judges under their oaths of office to give effect to the will of the people as expressed in the fundamental law.").

As the President of the Arizona Bar said in 1997, "[t]hose who would expect any judge to decide a case based merely upon public opinion or political pressure do not understand the basic tenets upon which our democracy rests. To protect and preserve our representative democracy, judges are required to exercise independent judgment based upon the rule of law—not politics or personal preferences. This constitutional principle is so fundamental that without it, basic freedoms we take for granted would not exist." Michael L. Piccarreta, *Independence of Judiciary Safeguards Democracy*, Ariz. Att'y (Jan. 1997) at 11.

CONCLUSION

Our Constitution protects the right of all Arizonans to "freely speak, write, and publish on all subjects," and to not be "disturbed in [their] private affairs … without authority of law." Ariz. Const. art. II §§ 6, 8. Indeed, it makes clear that the reason government exists is "to protect and maintain individual rights," like these, *id.* art. II § 2—not to blindly follow popularity polls. To strip people and organizations of their privacy, thereby exposing them to the "tyranny of the majority," *McIntyre*, 514 U.S. at 357, is to undermine both individual rights and, ultimately, democracy itself.

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

Respectfully submitted this 1st day of August 2025 by:

/s/ *Timothy Sandefur*
Jonathan Riches (025712)
Timothy Sandefur (033670)
Scott Day Freeman (019784)
Parker Jackson (037844)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

and

/s/ *Andrew Gould*
Andrew Gould (013234)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

Attorneys for Plaintiffs/Appellants