SUPREME COURT OF ARIZONA

CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE 1; DOE II, Plaintiffs-Appellants, vs. ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants-Appellees, ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC, Intervenor-Defendants-Appellees.	Arizona Supreme Court No. CV 24-0295-PR Arizona Court of Appeals No. CA-CV 24-072 Maricopa Counter Superior Court No. CV2022-016564 FILED WITH WRITTEN CONSENT OF PARTIES

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Aaron T. Martin (028358)
Martin Law & Mediation PLLC
2415 East Camelback
Suite 700
Phoenix, AZ 85016
602-812-2680
aaron@martinlawandmediation.com

Brett R. Nolan*
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org
**pro hac vice*

Counsel for amicus curiae

Table of Contents

Table of Authorities

Cases

Other Authorities

Disclosure of Sponsor and Statement of Interest

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and organizations in litigation securing their First Amendment liberties. IFS also files *amicus* briefs in cases raising important free speech questions, including issues related to donor privacy. IFS has an interest here because the Court's decision will have an impact on donor privacy throughout Arizona, affecting nonprofits like IFS who depend on donors who wish to maintain their privacy to fund their work.

No other person or entity provided financial resources for the preparation of this brief.

Introduction and Summary of Argument

Proposition 211 imposes sweeping disclosure rules unlike anything seen before. By every metric, the law expands on its predecessors. It covers *more* people, *more* speech, for a *longer* time. Where other laws narrow, Proposition 211 widens. It is a drastic evolution in compelled disclosure—and one that should not survive constitutional scrutiny.

But what kind of scrutiny even applies? The First Amendment requires what's called "exacting scrutiny." *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) ("*AFPF*"). It's a high bar in theory—part of the increasingly convoluted "tiers of scrutiny" the federal courts have adopted. Under this standard, a law's constitutionality often boils down to "if, in the judge's view, the law is sufficiently reasonable or important." *United States v. Rahimi*, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring). Yet that "kind of balancing approach to constitutional interpretation" is inconsistent with "what judges as umpires should strive to do." *Id.* (Kavanaugh, J., concurring).

Fortunately, "the Arizona Constitution provides broader protections for free speech than the First Amendment." *Brush & Nib Studios, LC v. Phoenix*, 247 Ariz. 269, 281 (Ariz. 2019). Those protections do not

depend on courts weighing the value of amorphous governmental interests. Rather, Arizona's Constitution guarantees that "[e]very person may freely speak, write, and publish on all subjects." Ariz. Const. art. II, § 6. And this Court has taken a "more literal application" of that language, mandating that courts "avoid, where possible, attempts to erode [these rights] by balancing them against . . . governmental interests," *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 357 (Ariz. 1989).

That means laws like Proposition 211 do not live or die based on the freewheeling balancing that tests like "exacting scrutiny" rely on. If the law burdens the right to speak freely, it violates the Arizona Constitution *unless* the state can show it prevents abuse. *See* Plaintiffs' Supp. Br. at 5–6. And since no one disputes that Proposition 211's expansive disclosure rules deter protected speech, and no one argues that it targets abusive speech, it cannot survive scrutiny.

The Court should hold that Proposition 211 is facially unconstitutional and reject the Government's attempt to save it by importing the malleable approach to constitutional interpretation that federal courts have applied to the First Amendment.

Argument

The Arizona Constitution guarantees that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6. "That language is majestic in its sweep[.]" *Brush & Nib Studios*, 247 Ariz. at 346 (Bolick, J., concurring). It "does not speak of major or minor impediments." *Mountain States*, 160 Ariz. at 357. And it does not typically allow courts "to erode [free speech rights] by balancing them against regulations serving governmental interests." *Id.* Even a "less serious impairment" violates the Speak Freely Clause—regardless of the government's purpose. *Id.*

Proposition 211 cannot survive scrutiny under this "more literal application" of the Constitution. *Id.* It "adversely affects the right to speak and publish." *Id.* And in doing so, it "impairs the right to 'freely speak.'" *Id.* The Court should hold that it's facially unconstitutional. *See* IFS Amicus in Support of Pet. at 12–19.

I. Proposition 211 prevents people from speaking freely.

A. The Arizona Constitution does not distinguish between laws that ban speech and those that affect it.

No one disputes that Arizona "provides broader protections for free speech than the First Amendment." Govt's Supp. Br. at 2 (quoting *Brush & Nib Studio, LC*, 247 Ariz. at 281). Yet the Government argues that the difference does not matter here because disclosure rules like Proposition 211 "merely *affect* speech," rather than "prohibit [it]." *Id.* at 8. And so, the argument goes, this "more modest burden" does not prevent anyone from speaking freely. *Id.*

That argument not only ignores the text of the Speak Freely Clause—it ignores how this Court has applied it.

Start with the text. Section 6 does not only prohibit the government from banning speech. It guarantees that people can "*freely* speak." Ariz. Const. art. II, § 6 (emphasis added). "Freely" means "without constraint or reluctance," "unreservedly," and "without stipulation," *Freely*, Oxford English Dictionary (2d ed. 1989)—a meaning that has remained consistent over time. *See Freely, Meaning & Use*, Oxford English Dictionary, https://doi.org/10.1093/OED/9924159558. It captures not only the notion that one is *allowed* to speak, but that one can do so

without the government requiring stipulations from the speaker or imposing consequences for speaking that might reasonably cause people to feel reluctant about doing so.

That definition matches this Court's longstanding interpretation. More than three decades ago, the Court held that the Speak Freely Clause prohibits laws that "adversely affect[] the right to speak and publish." *Mountain States*, 160 Ariz. at 357. It does not matter whether the burden is small. *Id.* And it does not matter whether the government's interest is strong. *Id.* The right to "freely speak" means what is says: the right to *freely* speak—without impairment. *Id.*

Mountain States resolves this question. There, the Court considered a law that required telephone operators to have customers "presubscribe" to certain information services before gaining access. These services allowed customers to dial a number and receive information about weather, sports, and other things. *Id.* at 352. Customers would typically pay a fee for dialing the numbers. *Id.* But problems inevitably arose, ranging from unauthorized charges to children accessing information containing "sexually explicit messages." *Id.* In response, the government enacted a regulation that required

telephone operators to "devise a presubscription plan"—a plan that required customers to sign up for information services before using them. *Id.* at 356. The details of that plan could vary (from requiring universal presubscription or presubscription for only certain numbers)—but in general, customers would be required to presubscribe to some or all information services to access them. *Id.* at 352, 356–57.

The state argued this regulation imposed only a modest burden that, when weighed against the government's interest in regulating public utilities, did not violate Section 6. *Id.* at 357. This Court disagreed—not about whether the burden was modest, but whether it mattered.

"The Arizona Constitution does not speak of major or minor impediments," the Court explained. *Id.* Presubscription requirements—no matter how easy to sign up for—affect speech because some people "tend not to presubscribe," preferring to "call such services spontaneously when and if they have a need for particular information." *Id.* at 354. This customer preference meant that presubscription requirements imposed a deterrent, and even a small deterrent "affects or impairs the right to 'freely speak.'" *Id.* at 357.

The Court then rejected the government's argument that its important interest could overcome the small burden on the plaintiff's speech rights. Again—not because the Court disagreed about how important the government's interest was. It simply did not matter. Explaining the "more literal application of [Section 6]," this Court held that the judiciary must "avoid, where possible, attempts to erode constitutional rights by balancing them against regulations serving governmental interests." *Id.* at 357.

That logic applies even more forcefully for disclosure rules. "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute *as effective* a restraint on freedom of association as [other] forms of governmental action." *AFPF*, 594 U.S. at 606 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)) (emphasis added). That's because disclosure rules create an "inevitable" deterrent effect on exercising speech rights. *Id.* (quotation omitted). And here, the Government concedes that "disclosure requirements may 'deter some individuals who otherwise might contribute.'" Gov't Supp. Br. at 8 (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

So the Government's argument that disclosure laws should face lower scrutiny because they don't prevent all speech (just some of it) implicitly asks the Court to decide how much deterred speech is too much. What amount of speech can the government chill before violating the Constitution? That's the question this Court would answer every time it applies exacting scrutiny to uphold or invalidate a law. But "[t]he framers of [Arizona's] constitution did not give [its] judges authority to . . . decide how much speech the constitution allows." *Mountain States*,160 Ariz. at 357.

And that is always the problem with balancing tests like exacting scrutiny. They let judges decide how much of a burden on speech is too much, or what government interests are important enough to override the constitutional text. *See infra* Part II. Fortunately, Arizona's Constitution does not allow such judicial policymaking.

B. Proposition 211 flunks the Speak Freely Clause's stringent requirements.

The Government is right about one thing: the Speak Freely Clause does not "prohibit[] all laws affecting speech." Gov't Supp. Br. at 2. But to say that Section 6 has limits does not mean that courts can decide for

themselves what those limits may be. The framers answered that question already. Section 6 guarantees the right to speak freely, subject only to "being responsible for the abuse of that right." Ariz. Const. art. II, § 6.

"The provision undeniably imposes responsibility on those exercising their rights to free speech for any abuse thereof." *Yetman v. English*, 168 Ariz. 71, 82 (Ariz. 1991). The meaning of "abuse" generally tracks the concept of "unprotected speech"—like defamation—under the First Amendment. *State v. Stummer*, 219 Ariz. 137, 142–43 (Ariz. 2008). But otherwise, Section 6 is not subject to flexible balancing tests.

That interpretation "conforms with the Washington Supreme Court's reading of Washington Constitution art. 1, § 5, the model for Arizona's art. 2, § 6." *Mountain States*, 160 Ariz. at 355. The Speak Freely Clause "came essentially verbatim from the state of Washington's constitutional convention of 1889." *Id.* at 356 n.12. And the Washington Supreme Court has explained that "the right to free speech and press" is "guaranteed to all, and so long as it is not abused is absolute." *State v. Rinaldo*, 673 P.2d 614, 618 (Wash. 1983). This ensures the right will "not be tampered with by future legislatures *or courts*." *Id.*

(emphasis added). And as for any balancing test, "all necessary 'weighing' and 'balancing' was done in 1889 when the State's constitutional convention adopted [the Washington] constitution and the people thereafter ratified." *Id.* at 619. So too here.[1]

Neither the Government nor the intervenors attempt to explain how Proposition 211 addresses the "abuse" of the right to speak freely. For good reason. Proposition 211 does not target defamation or fraud. It does not target obscenity or true threats. It targets none of the "historic and traditional categories [of speech]" that may be considered abuse. *See United States v. Alvarez*, 567 U.S. 709, 717–18 (2012). Rather, Proposition 211 attaches onerous conditions on core political speech—the kind of speech that is vital to a functioning democracy. It in no way regulates abusive or even potentially abusive speech.

[1] The plaintiffs correctly point out that other constitutional provisions also limit Section 6, such as the mandate that the legislature enact disclosure rules for donations to candidates and campaigns. *See* Plaintiffs' Supp. Br. at 7–8. But that only hurts the case for Proposition 211, as it compels disclosure for contributions and expenditures well beyond those of "campaign committees and candidates for public office." *Id.* at 8 (emphasis removed).

II. Arizona's Constitution aside, the Court should run away from the convoluted and theoretically unsound "tiers of scrutiny."

The Government urges this Court to adopt the tiers of scrutiny used by federal courts in interpreting the First Amendment because that interpretative method "reflect[s] decades of analysis and experience regarding the strength of governmental interests and comparative burdens on substantive rights." Gov't Supp. Br. at 5. But that experience serves more as a warning.

The plaintiffs rightly point out that exacting scrutiny—the Government's preferred "tier" for this case—is a "confusing, inconsistent, and poorly formulated" standard. Plaintiffs' Supp. Br. at 4. Yet that's only exacting scrutiny. The "decades of analysis and experience" the Government touts, Gov't Supp. Br. at 5, has seen "the tiers of scrutiny proliferate[] into ever more gradations" of an already confusing approach to constitutional interpretation. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 639 (2016) (Thomas, J., dissenting). There's not only rational basis, but also "rational basis with bite." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring); *see Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 692 (6th Cir. 2011).

There's not just intermediate scrutiny, but exacting scrutiny, *AFPF*, 594 U.S. at 607–08, and closely drawn scrutiny as well, *Buckley*, 424 U.S. at 25. Not to mention the federal courts' four-part test for commercial speech that's not quite intermediate scrutiny but not strict or exacting scrutiny, either. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). When a case comes to federal court under the Free Speech Clause, too many doctrines give courts too much room to decide "if, in the judge's view, the law is sufficiently reasonable or important." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring).

This convoluted mess is not surprising, given that "courts invented this doctrine by accident." *Nat'l Republican Senatorial Comm.*, *Nat'l Republican Senatorial Comm. v. FEC*, 117 F.4th 389, 400 (6th Cir. 2024) (en banc) (Thapar, J., concurring). As Chief Justice Roberts observed, tiered scrutiny "just kind of developed over the years as sort of baggage." Tr. of Oral Arg. 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008). And federal courts seem stuck in endless debates about the proper gradations of a made-up theory of constitutional review. *See, e.g.*, *AFPF*, 594 U.S. at 622–23 (Alito, J., concurring).

Perhaps none of that would matter if the tiers of scrutiny provided sound and administrable rules for the judiciary. Far from it. "For good reason, there's a growing chorus of voices casting doubt on a tiers-of-scrutiny approach to constitutional law." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 400. It "departs from . . . what judges as umpires should strive to do." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring). Rather, it's "policy by another name," *id.*, "require[ing] highly subjective judicial evaluations," *id.* at 732.

This fact is none more obvious than in the world of campaign finance, where courts of past have balanced the First Amendment against vague policy goals like preventing "undue influence," *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003), or "an unfair advantage in the political marketplace," *Austin v. Mich. St. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quotation omitted), *overruled by Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Too often, the malleability of heightened scrutiny has allowed federal courts to "balance away bedrock free speech protections for the perceived policy needs of the moment." *Rahimi*, 602 U.S. at 733 (Kavanaugh, J., concurring) (citing H. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 878–79 (1960)).

On top of that, the "tiers-of-scrutiny approach strains courts' institutional competence." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 400 (Thapar, J., concurring). "[J]udges are not equipped," for example, "to evaluate whether campaign-finance regulations adequately reduce corruption." *Id.* (Thapar, J., concurring). And it would be "startling and dangerous" for courts to decide the scope of our free speech rights by "balancing [the] relative social costs and benefits." *Alvarez*, 567 U.S. at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)). Yet that's the kind of analysis the tiers of scrutiny invite.

This case only highlights these problems—and the future that might come from abandoning the text of Section 6 in favor of the federal courts' free-wheeling judicial policymaking. The Government and the intervenors urge the Court to uphold Proposition 211 because it furthers vague concepts like "electoral transparency," Gov't Supp. Br. at 12, and "enhancing voters' ability to participate meaningfully in self-government," VRTK Supp. Br. at 1. But how should a court weigh the importance of "electoral transparency" against the very real deterrent effect that this disclosure law will have? Or what evidence should a court consider to determine whether Proposition 211 does in fact

"enhance" the ability of citizens to "meaningfully" participate in their government? Or are these just rosy-sounding but unfalsifiable claims the Government can make—not just here, but in other contexts as well—to override the speech rights of everyone in Arizona? Either way, these are not questions the judiciary can resolve.

Nor should it try. "The framers of [Arizona's] constitution" answered those questions when they adopted Section 6, the text of which makes no mention of weighing or balancing the various policy interests at stake. *Mountain States*, 160 Ariz. at 357. Rather, it states clearly that all people are guaranteed the right to speak freely, subject only to responsibility for abuse. And the judiciary's only job is to "uphold and enforce those rights." *Id.*

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Conclusion

The Court should hold that Proposition 211 violates the Arizona Constitution and is facially invalid.

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Respectfully submitted,

/s/Aaron T. Martin
Aaron T. Martin (028358)
Martin Law & Mediation PLLC
2415 East Camelback
Suite 700
Phoenix, AZ 85016
602-812-2680
aaron@martinlawandmediation.com

Brett R. Nolan*
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org

**admitted pro hac vice*

Counsel for amicus curiae