August 21, 2023

Submitted electronically to ccec@azcleanelections.gov.

Mark Kimble, Chairman
Arizona Citizens Clean Elections Commission
1802 W. Jackson St. #129
Phoenix, Arizona 85007

Re: Comments in Support of Proposed Rules R2-20-801 through R2-20-808, relating to the Voters' Right to Know Act (Proposition 211)

Dear Chairman Kimble and Members of the Commission,

Campaign Legal Center ("CLC") respectfully submits these written comments to the Arizona Citizens Clean Elections Commission ("Commission") in support of Proposed Rules R2-20-801 through R2-20-808 (collectively "Proposed Rules") implementing Arizona's recently enacted Voters' Right to Know Act.[1]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American's right to an accountable and transparent democratic system.

CLC commends the Commission's efforts to timely implement the Voters' Right to Know Act ("VRTKA" or "the Act") and commitment to developing thorough, clear, and functional regulations. Our comments and recommendations are intended to strengthen and clarify the draft rules and assist the Commission's work on this important issue.

DISCUSSION

I. Background

Before the passage of the Act, Arizona's prior campaign finance disclosure system was described as "one of the most pro-dark-money statutes imaginable."[2] Wealthy special interests used 501(c)(4) groups and other nonprofits as a conduit for millions of dollars, donating to organizations that

[1] *See* Ariz. Admin. Register, Vol. 29, Issue 28 at 1571-76, Notice of Proposed Exempt Rulemaking, Title 2. Administration, Chapter 20. Citizens Clean Elections Commission, Article 8, R2-20-801 through 808 (July 15, 2023), https://apps.azsos.gov/public_services/register/2023/28/contents.pdf.
[2] *See* Alexander J. Lindvall, Ending Dark Money in Arizona, 44 Seton Hall Legis. J. 61, 73 (2019).

either pay for independent spending directly or transfer the money to super PACs and other nonprofits for election spending in Arizona.[3]

The Voters' Right to Know Act was enacted by over 70% of Arizona voters in November 2022 to shine a light on the original sources of this flood of secret "dark money" campaign spending.[4] Like other disclosure laws, the Act does not limit expenditures for campaign speech or contributions to pay for such speech. Instead, the Act protects the First Amendment rights of voters, enhancing robust public debate and providing voters with information critical to choosing, and holding accountable, their elected leaders. As the Commission is aware, this was recently affirmed in a ruling by the Superior Court of Arizona, Maricopa County,[5] which granted the Commission and other defendants' motions to dismiss a facial challenge to the Act in June.[6]

II. The Proposed Rules and CLC's Recommendations

The Act is a critical policy achievement protecting voters' right to know who is spending big money to influence their vote. Laws requiring donor disclosure have always intended to educate the public about the true source of money trying to affect elections, and the Act ensures that disclosure in Arizona will be meaningful and not simply report the names of intermediaries or front groups who are masking the true identity of large donors. These proposed rules are an important next step in implementing the Act, fulfilling statutory obligations (as directed for top three donor disclaimers in A.R.S. § 16-974(C)), and providing necessary guidance and clarification to other sections.

In the following subsections, CLC suggests clarifications for four sections of the Commission's draft regulations, including provisions relating to opt-out notices, donor requests for exemptions from disclosure, top three donor disclaimers, and ex parte communications regarding pending complaints. We additionally suggest the Commission adopt regulations providing further guidance regarding how direct donors provide original source and intermediary information to covered persons under the Act. Finally, we have also included a brief subsection identifying some technical corrections.

A. § 803 - Opt-Out Notices

A key feature of the Act is each donor's right to opt-out their donations from use in campaign media spending; when a donor elects to opt-out within the 21-day statutory period, a covered person may not use those funds for campaign media spending, and the donor's identity is not subject to disclosure under the Act.[7] This process empowers donors to decide whether their money can be used by covered persons to influence elections. To avoid

---

[3] *See* David R. Berman, Dark Money in Arizona: The Right to Know, Free Speech and Playing Whack-a-Mole, Morrison Inst. for Pub. Pol'y 3-4 (2014). *See* also Lindvall at 67-68; Dark Money Basics, OpenSecrets, https://www.opensecrets.org/dark-money/basics (last visited January 28, 2023).

[4] *See* ARIZ. SEC. OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2022 GENERAL ELECTION 12 (Dec. 5, 2022, 10:00:00 AM), https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf. *See also* Jane Mayer, *A rare win in the fight against dark money,* THE NEW YORKER (Nov. 16, 2022), https://www.newyorker.com/news/news-desk/a-rare-win-in-the-fight-against-dark-money.

[5] Minute Entry: Under Advisement Ruling, *Center for Arizona Policy, Inc. v. Arizona Secretary of State*, Sup. Ct. of the State of Arizona, Maricopa Cty., Case No. CV2022-016564 (Jun. 22, 2023) (*copy of ruling available at* https://campaignlegal.org/document/center-arizona-policy-inc-et-al-v-arizona-secretary-state-et-al-under-advisement-ruling).

[6] CLC's affiliated 501(c)(4) organization, CLC Action, represents Voters Right to Know, the political committee established to draft and support Proposition 211, in this litigation.

[7] *See* A.R.S. §§ 16-972(B) and (C), 16-973(A) and (E).

confusion for both donors and covered persons in the opt-out process, we recommend revisions to the below portions of § R2-20-803.

First, § R2-20-803(D) (providing covered persons with the ability to send donors additional opt-out notices) creates potential ambiguity surrounding the opt-out timeline when a covered person sends an additional opt-out notice or reminder within the statutory 21-day period.

The draft rule's language permits covered persons to send subsequent opt-out notices with new opt-out deadlines of no less than one day after receipt of the new notice. However, because the rule does not address how these new opt-out notices interact with the statutory opt-out period, it could create confusion among covered persons regarding whether a subsequent opt-out notice alters the required minimum 21-day opt-out period under A.R.S. § 16-972.

While nothing prevents a covered person from providing a donor with additional time to opt their contribution out of campaign media spending, we recommend revisions to clarify that any subsequent notices provided by a covered person cannot shorten the statutory 21-day opt-out period.

Furthermore, the final rule should specify that if a covered person does send a donor a subsequent opt-out notice, the covered person may not spend, transfer, or otherwise obligate those funds for campaign media spending purposes until any additional opt-out time provided in that notice has elapsed (or, of course, the donor affirmatively opts in).

Suggested language for subsection (D) is available below:

> "If a donor does not opt out after the initial 21-day notice period under A.R.S. § 16-972, a covered person may make subsequent written notices to a donor of their right to opt out and may set a time for response of no less than 1 day from the date the donor receives the notice. To be valid, the opt-out information must provide contact information to allow the recipient to contact the person who provided the opt-out information within the time identified in the subsequent request."

Second, § R2-20-803(E) creates ambiguity regarding how covered persons must address donor opt-out requests made after the 21-day period—and any subsequent opt-out period provided by the covered person—has passed. While a covered person may choose to honor a late opt-out request from a donor, the draft language presents logistical issues and appears to be in tension with the 21-day statutory deadline that a donor must abide by in order to opt out.

A.R.S. § 16-972(B) permits funds that have not been opted out within the 21-day period to be used or transferred for campaign media spending. Section R2-20-803(E) of the Proposed Rules currently requires a covered person to honor a donor's late opt-out request and treat it as a retroactive opt-out for that donor. However, this may be impossible if a covered person has already spent or obligated those funds for campaign media spending, as permitted by the statute. Moreover, this requirement potentially would result in covered persons being in a perpetual state of limbo: If any donor may opt out at any point after the initial notice, covered persons may be unable to spend donor funds on elections without being at risk of violating a late opt-out request.

We recommend the Commission eliminate the requirement that covered persons honor late opt-out requests and, accordingly, remove subsection (E) entirely. Covered persons could choose to honor a late opt-out request from a

donor if the funds have not already been spent or obligated, but they should not be required to do so. This deletion also dovetails with subsection (D), which (as clarified above) would allow covered persons to send additional opt-out notices with response periods after the initial 21-day statutory opt-out period has elapsed.

Third, we recommend revising the parallel language in § R2-20-803(B) and (D) regarding receipts provided to donors upon request.[8] This language permits donors to request a receipt, which may be issued prior to the end of the 21-day opt-out period (or any subsequent opt-out period provided under subsection (D)). Currently, the language requires a receipt to "confirm[] the donor's choice" as to whether funds have been opted out. Rather than requiring the receipt to confirm the status of the donated funds while the opt-out period is potentially still in effect, we suggest the following language:

> ". . . Upon request of the donor, the person responsible for providing the opt-out information must provide a receipt to the donor stating whether the funds had been opted-out at the time the receipt was issued. If the covered person regularly provides receipts for donations the receipt shall note whether the funds have been opted out . . ."

B. § 804 - Requests for exemptions

The Act provides original source donors with the ability to request an exemption from disclosure of their identity under the Act when their identity is otherwise protected from disclosure by a law or by a court order, or where a donor "demonstrates to the satisfaction of the commission that there is a reasonable probability that public knowledge of the original source's identity would subject the source or the source's family to a serious risk of physical harm." A.R.S. § 16-973(F).

The administration of this provision is particularly important to ensure both that donors who are truly at risk are protected and that the exemption process is not abused by those who merely would prefer anonymity. We suggest seven areas for revision or clarification below:

First, and most generally, this section appears to contemplate only situations where original sources request exemptions *after* a contribution is made to a covered person. We strongly recommend the Commission allow original sources to request an exemption from the Act prior to receiving a solicitation or making a contribution; a donor may intend to make contributions subject to disclosure under the Act and should be able, at that time, to submit a request prior to making such contribution.

Second, proposed § R2-20-804(A) provides that an original source who has not opted their funds out from campaign media spending must file a request for an exemption within fourteen days after the notice to opt out is given. However, the original source of funds may not receive an opt-out notice; if the original source contributes funds to an intermediary, which then passes the funds on to a covered person, it is possible that only the intermediary receives the opt-out notice. While an intermediary could choose to pass the opt-out notice back to the original source, there is no requirement that an intermediary do so. In this case, the Proposed Rule's timeline for an original source to apply for an exemption remains unclear.

We suggest that the regulations provide the same exemption request period for original sources who were not an immediate contributor to a covered person but may nonetheless be reported as the original source of funds in a

[8] This language is also paralleled in subsection (E); we recommend removing that paragraph entirely, but if it is retained or otherwise revised, the parallel language should also be updated.

report required under the Act. For example, where an original source contributed funds to multiple entities, who each passed along funds (thus functioning as intermediaries) to the covered person that totaled more than the $5,000 reporting threshold, the original source would not have received an opt-out notice – but would be identified in a report as a major contributor of funds in aggregate. That person may still qualify for, and should therefore be able to request, an exemption under A.R.S. § 16-973(F), and this situation should be contemplated in the final rule.

Third, proposed § R2-20-804(A) provides only a fourteen-day exemption request period after a donor receives the notice to opt out. This means that the exemption request period would elapse before the 21-day statutory opt-out period (or an extended opt-out period under § R2-20-803(D)) ends. We recommend modifying this subsection to reflect a twenty-one day exemption request period, in line with the statutory opt-out deadline.

Suggested language reflecting the above revisions to subsection (A) is as follows:

> "A. An original source who has not opted out of having their monies used for campaign media spending may file a request for an exemption with the Executive Director no later than 21 days after the notice to opt out is given. An original source may file a request for an exemption with the Executive Director prior to making a donation. In the event an original source did not receive a notice to opt out, the original source may file a request for exemption with the Executive Director no later than 21 days after discovering their monies may be or have been used for campaign media spending."

Fourth, proposed § R2-20-804(B), (C), and (D) currently describe the determination process for whether a requestor will be exempted from disclosure under the Act because of a court order (subsection (B)), statutory claim to confidentiality (subsection (C)), or reasonable probability of physical harm to the requestor or their family (subsection (D)). However, none currently provide for clear guidelines when the Commission determines the requestor is *not* entitled to the requested exemption. In such circumstances, the final rule should specify that the requestor's identity is subject to disclosure under the Act *but* should also provide a requestor who has already contributed money to a covered person with an additional amount of time (for example, five days) from the date of the decision denying the exemption to determine whether they wish to opt-out their contribution from campaign media spending.

We suggest the below language be added as a new subsection following subsection (D):

> "In the event the Commission decides that the request should not be granted, the Executive Director shall issue a letter to the requestor within five days stating the Commission's decision. The letter shall notify the requestor that they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing within five days of receipt of the letter, and that if the requestor does not opt out, their name shall be subject to disclosure."

Fifth, subsection (F) provides that "[n]o records related to a request shall be subject to a public records request or any other type of request. The records shall not be produced absent a court order compelling disclosure." This prohibition on sharing any records "related to" an exemption request is potentially overly broad and could capture even routine Commission agendas that mention a request but do not contain any identifying information regarding the requestor. We recommend narrowing this public records exemption to apply only to records that contain information that could lead to

the identification of a requestor, or by specifically listing the types of records subject to the exemption in subsection (F). Suggested language is as follows:

> "Records related to a request that contain information that may lead to the identification of a requestor shall not be subject to a public records request or any other type of request. Such records shall not be produced absent a court order compelling disclosure."

Furthermore, in the final rule, the Commission should consider making redacted versions of each final determination letter available to the public; the reasoning contained in such letters could be helpful to the public and to potential future applicants for exemptions to understand the process and reasoning behind the Commission's decision.

Sixth, we recommend modifying the language in (G) to clarify that records must be retained upon appeal of the Executive Director or Commission's determination:

> "All except the Executive Director's letter shall be destroyed within 30 days of the final disposition or determination and only after the conclusion of any subsequent court review, in the case of an appeal."

Lastly, § R2-20-804 does not provide for how the Commission will handle situations where a request for exemption is denied by the agency and later upheld by a court upon review. We suggest that a final version of the rules also provide guidelines for this situation. For example, when a request is denied by the Commission and then upheld by the court, the Commission should retain records until thirty days after the conclusion of the case, or until the period for an appeal has passed, whichever is longer.

C. § 805 – Disclaimers

Section R2-20-805 provides necessary guidance for A.R.S. § 16-974(C), which directs the Commission to establish a top three donor disclaimer requirement for public communications by covered persons. We commend the Commission in particular for including in proposed § R2-20-805(B) a clarification that top-three donor disclaimers only include donors of original monies who have not opted out pursuant to A.R.S. § 16-972. This interpretation of the Act is clearly consistent with its intent and other provisions.

As the Commission explores how to implement the top three donor disclaimers, we recommend additional language regarding how to calculate the top three donors and updated language applying the disclaimer requirement to different ad formats. These additional guidelines are particularly important for practical implementation; for example, if an ad runs over a longer period of time, the identity of the top three original source donors who did not opt out their funds might change. Without clear guidelines for these common situations, there may be questions or confusion for the regulated community.

Our recommended language is as follows:

> "B. Public communications by covered persons shall state in a clear and conspicuous manner the names of the top three donors who directly or indirectly made the three largest contributions of original monies who have not opted out pursuant to A.R.S. § 16-972 or a rule of the Commission during the election cycle to the covered person as calculated by the covered person at the time the advertisement was distributed for publication, display, delivery, or broadcast.
>
> > 1. For purposes of this subsection, contributions of traceable monies made in prior election cycles shall be considered to have been contributed in the current election cycle if the contributor's

aggregate contributions of original funds to the covered person constituted more than half of the covered person's traceable funds at the start of the election cycle;

2. If multiple contributors have contributed identical amounts such that there is no difference in contributed amounts between the third-highest contributor and the fourth-highest (or lower), the contributor who most recently contributed to the covered person shall be deemed a top three donor.

3. No contributor of traceable monies shall be deemed a top three donor if its aggregate contributions of original funds during the election cycle to the covered person are less than $5,000."

The recommended language below is designed to dovetail with the "clear and conspicuous" language in (B) and efficiently address how covered persons should include disclaimers in the broad range of ads and ad formats that fall under this requirement and would replace (C) and (D) from this section. The proposed standards leave potential ambiguity as to what would qualify as, for example, "clearly readable" or "clearly spoken." By creating a safe harbor where ads meet certain requirements, these regulations also provide the Commission with flexibility to better address potential violations of the Proposed Rule's disclaimer requirement.

C. For purposes of this § R2-20-805(B), a communication does not make a statement in a clear and conspicuous manner if it is difficult to read or hear or if the placement is easily overlooked.

D. Flexibility for certain internet or digital communications.—

1. Accommodation for technological impossibility. In the case of a public communication disseminated on the internet or by social media message, text message, or short message service where it is not technologically possible to provide all the information required by this section, the communication shall, in a clear and conspicuous manner—

a. state the full legal name of the covered person who paid for the communication; and

b. provide a means for the recipient of the communication to immediately and easily obtain the remainder of the information required under (B) with minimal effort and without receiving or viewing any additional material other than such required information.

E. Safe harbor for determining clear and conspicuous manner. A statement shall be considered to be made in a clear and conspicuous manner if the communication meets the following requirements:

1. Text or graphic communication.— In the case of a text or graphic communication, the statement shall be clearly readable and —

a. appear in letters at least as large as the majority of the text in the communication;

b. is contained in a printed box set apart from the other contents of the communication; and

c. is printed with a reasonable degree of color contrast between the background and the printed statement.

d. In the case of a sign or billboard, in addition to the requirements in clauses (a), (b), and (c), the disclosure shall be displayed at a height that is at least four percent of the vertical height of the sign or billboard.

2. Audio communications.— In the case of an audio communication, the statement is spoken in a clearly audible and intelligible manner at the beginning or end of the communications and lasts at least 4 seconds.

3. Video communications.— In the case of a video communication which also includes audio, the statement—

a. is included at either the beginning or the end of the communication; and

b. is made both in a written format that meets the requirements of clause (1) and appears for at least 4 seconds, and in an audible format that meets the requirements of clause (2).

4. Other communications.— In the case of any other type of communication, the statement is at least as clear and conspicuous as the statement specified in clauses (1), (2), or (3).

5. Brief video communications.— In the case of a video communication that is a qualified internet or digital communication shorter than 10 seconds, the audible portion of the statement may be omitted.

6. The disclosure requirements in (1), (2), and (3) apply to any broadcast, video, film, or audio format, whether distributed via airwaves, cable, the internet, or other delivery methods."

D. § 806 - Communication (ex parte)

We recommend the Commission consider re-titling proposed § R2-20-806 to "Ex Parte Communication" provide greater clarity regarding its purpose. In addition, we recommend a small revision to (B) to reflect that the ban on communications between the Executive Director (or any other commission staff or attorneys representing the Executive Director) and the Commissioners applies *only* to communications relating to a pending Complaint. In the absence of this revision, the proposed rule seems to suggest that the Commissioners cannot communicate with the Executive Director or other Commission staff at all if there is any complaint pending before the Commission.

"B. In the event of a Complaint, no Commissioner shall communicate with the Executive Director or any other commission staff or attorney who represents the Executive Director <u>regarding the Complaint</u> except in commission proceedings where the Respondent or Respondent's Counsel is present."

We additionally suggest that the Commission insert a new subsection (C) as follows, and re-number the current subsections (C) through (F) as (D) through (G).

"C. In the event that a Commissioner receives an ex parte communication as defined in subsections F and G of this rule, the Commissioner shall disclose receipt of such a communication on the public record in commission proceedings."

E. Proposed Additional Regulations

Any final regulations promulgated by the Commission on the Act should include guidance regarding the process for the direct donor to a covered person to provide original source information for the funds contributed if that donor is not the original source themselves.

A.R.S. § 16-972(D) requires any person who donates more than $5,000 in traceable monies in an election cycle to inform a covered person in writing of the identity of each other person who directly or indirectly contributed more than $2,500 of the donation in original monies and the amount of money contributed by those persons. A donor must convey this information within ten days after receiving a written request from the covered person, and must maintain these records for at least five years, available upon request to the Commission. Similar provisions govern in-kind contributions valued at more than $5,000. *See* A.R.S. § 16-972(E).

Language outlining this responsibility and the process for donors to report this information to a covered person – from a request by a covered person to the tracing, reporting, and record-keeping process for donors – should be addressed in the final regulations to reduce confusion for both donors and covered persons.

F. Minor Changes and Corrections

In addition to the more detailed and policy-oriented suggestions above, we identified a few minor changes and corrections the Commission may wish to consider. We suggest updating:

- § R2-20-801(C): ". . . a person must inform that covered person in writing <u>of</u> the identity of each other person that directly or indirectly contributed . . ."
- § R2-20-803(B)(3): "<u>Provide opt-out information in writing.</u> . . ." (The structure set forth in (B) and followed in (B)(1) and (2) is not followed in (B)(3) but can be resolved with this language).
- § R2-20-804(B): ". . . the Executive Director shall confirm the validity of the court order <u>with</u>in five days . . " provides greater flexibility to the Executive Director and parallels the construction in (C).

Conclusion

CLC thanks the Commission for its consideration of the foregoing comments and recommendations regarding this important rulemaking. As the Commission prepares to implement the Voters' Right to Know Act, CLC would be glad to provide further assistance or resources.

Respectfully submitted,

<u>s/ Elizabeth D. Shimek</u>
Elizabeth D. Shimek
Senior Legal Counsel