March 8, 2024

Submitted electronically to ccec@azcleanelections.gov.

Arizona Citizens Clean Elections Commission
c/o Thomas Collins, Executive Director
1110 West Washington Street
Phoenix, Arizona 85007

Re: Comments regarding AOR 24-01(Submitted Feb. 23, 2024)

Dear Commissioners,

Campaign Legal Center ("CLC") respectfully submits these written comments in response to AOR 24-01, the request for an Advisory Opinion submitted by Opportunity Arizona regarding the Voters' Right to Know Act ("the 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.[2]

CLC commends the Commission for its ongoing commitment to developing thorough, clear, and functional guidance to implement the Voters' Right to Know Act. Our comments focus on the second issue presented in AOR 24-01, which concerns the Act's coverage of ads that reference a clearly identified candidate close to an election.[3] Specifically, adopting the interpretation advanced by Opportunity Arizona would eviscerate an entire category of political ads from the law's coverage, undermining the Act's goal of protecting Arizonans' rights under the First Amendment and the Arizona Constitution to make informed election decisions "by securing their right to know the source of monies used to influence Arizona

[1] AOR 24-01, Request for Advisory Opinion from Opportunity Arizona (Feb. 23, 2024), https://storageccec.blob.core.usgovcloudapi.net/public/docs/976-2024-02-23-Ltr-re-AO-Request--Opportunity-Arizona.pdf.

[2] CLC's affiliated 501(c)(4) organization, CLC Action, represents Voters' Right to Know, the political committee established to support Proposition 211, in ongoing litigation relating to the Act.

[3] *See* A.R.S. § 16-971(2)(a)(iii).

elections," including "the original source of all major contributions used to pay, in whole or in part, for campaign media spending."[4]

As explained in more detail below, an essential element of disclosure requirements for these types of ads—sometimes called "electioneering communications—is *not* requiring that such ads reference a candidate "as a candidate" for a particular office or expressly reference an election. Requiring transparency for these ads is plainly constitutional and critical to prevent evasion of disclosure requirements for political ads simply by omitting certain words.

I. Campaign finance transparency advances First Amendment rights.

The Voters' Right to Know Act recognizes that voters have the right to certain information about the political messages they receive, including information about who pays for those messages[5] — a right that has been long recognized by the Supreme Court.[6] Public disclosure reports and on-ad disclaimers allow voters to know who is funding a campaign or trying to influence government decision-making.[7] This helps voters determine who supports which positions and why, allowing them to make fully informed decisions at the ballot box.

As the Supreme Court has repeatedly recognized in decades of decisions upholding campaign finance disclosure provisions:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters

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[4] *See* Voters' Right to Know Act (2022 Proposition 211), Sections 2A. and 2B., *available at* https://static1.squarespace.com/static/60621fe406d8457258f2d3fa/t/6090bcc2f3cadb117854a4e4/1620098242920/Voters%27+Right+to+Know+Initiative.pdf.

[5] *Id*.

[6] The Supreme Court has long recognized the importance of transparency in a variety of contexts, including candidate elections, ballot initiatives, and lobbying. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (candidate elections); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (ballot initiative); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . [and] will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" (second alteration in original)); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.,* 454 U.S. 290, 299 (1981) ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified . . ."); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding federal lobbying disclosure statute).

[7] *See No on E v. Chiu*, 85 F.4th 493, 505 (9th Cir. 2023) ("Understanding what entity is funding a communication allows citizens to make informed choices in the political marketplace."); *Gaspee Project v. Mederos*, 13 F.4th 79,91 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 2647 ("The donor disclosure alerts viewers that the speaker has donors and, thus, may elicit debate as to both the extent of donor influence on the message and the extent to which the top five donors are representative of the speaker's donor base . . . [in *Citizens United*] the Court recognized that the disclaimers at issue were intended to insure that the voters are fully informed . . ." (internal quotation marks and citation omitted)).

> to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.[8]

Requiring disclosure of the sources of funding for election-related speech has been a feature of American campaign finance law for more than a century,[9] and the Supreme Court has consistently rejected challenges to electoral transparency laws, repeatedly emphasizing their constitutional validity.[10]

The Supreme Court's decision in *Citizens United* opened the door to unlimited corporate independent expenditures and ultimately led to the creation of super PACs, making corporations an increasingly attractive vehicle to funnel unlimited funds to political committees and other independent spenders while concealing the true source of those funds.[11] The Court in *Citizens United* assumed that these new forms of unlimited spending would be transparent, observing that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[12]

Effective disclosure helps prevent wealthy special interests from secretly "hiding behind dubious and misleading names" to disguise who they are and mask the source of their funding.[13] Indeed, the Supreme Court also held in *Citizens United* that "[t]he right of

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[8] *Buckley*, 424 U.S. at 66-67 (internal quotation marks and footnote omitted). In *Buckley*, the Supreme Court articulated the constitutional standard for disclosure laws and upheld federal disclosure requirements, explaining that disclosure served three important purposes: "providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (listing the "important state interests" identified in *Buckley*), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The first of these, the public's informational interest, is "alone sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369; *see also No on E*, 85 F.4th at 504-06; *Gaspee Project*, 13 F.4th at 86.

[9] *See* Publicity of Political Contributions Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 822-24 (1910).

[10] *See Buckley*, 424 U.S. at 64-68 (upholding Federal Election Campaign Act disclosure requirements); *McConnell*, 540 U.S. at 194-99 (upholding McCain-Feingold Act's federal disclosure requirements); *Citizens United*, 558 U.S. at 366-71 (same); *see also Citizens Against Rent Control*,454 U.S. at 299-300 (expressing approval of disclosure in the ballot initiative context); *Bellotti*, 435 U.S. at 792 & n.32 (striking down corporate expenditure ban in part because disclosure sufficed to enable "the people . . . to evaluate the arguments to which they are being subjected").

[11] *See Citizens United*, 558 U.S. at 365-69; *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc) (The D.C. Circuit's decision in *SpeechNow*, issued shortly after *Citizens United*, directly gave rise to super PACs by striking down the contribution limits applicable to political committees that make only independent expenditures).

[12] *Citizens United,* 558 U.S. at 370; *see also Buckley*, 424 U.S. at 67 ("A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.").

[13] *McConnell*, 540 U.S. at 197. For example, some independent spending groups have acknowledged that it can be "much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'" *Id*. at 128 n.23 (citation omitted).

citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[14]

Veiling the true sources of electoral spending impairs democratic debate and decision-making. The Act ends the shell game of wealthy special interests hiding behind other entities in multiple ways, revealing the sources of funding behind independent expenditures and electioneering communications and supporting voters' right to know who is spending to influence their ballots.[15] And Arizona courts have agreed, firmly rejecting challenges to the constitutionality of the Act—both facially and as applied to particular plaintiffs.[16]

The AOR must be viewed in this context. While the AOR focuses on the impact of disclosure and disclaimer requirements on Opportunity Arizona and other political spenders, curtailing the Act's transparency requirements would leave Arizona voters without critical information they need to fully participate in democratic self-government.

II. Disclosure under A.R.S. § 16-971(2)(a)(iii) is not limited to communications that expressly reference an election or identify a candidate "as a candidate."

In AOR 24-01, Question 2 specifically seeks guidance regarding the application of A.R.S. § 16-971(2)(a)(iii) to paid public communications disseminated within 90 days before a primary election, where such communications explicitly reference by name elected officials who are candidates but do not explicitly "refer[] to any election."[17] Opportunity Arizona seeks to have such advertisements excluded from the disclosures required under the Act.[18]

The AOR attempts to create ambiguity in the Act where none exists, and adopting the proposed interpretation of A.R.S. § 16-971(2)(a)(iii) would weaken the Act's clear disclosure requirements for campaign media spending. CLC strongly disagrees with this interpretation and requests that the Commission apply the plain language of A.R.S. § 16-

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[14] *Citizens United*, 558 U.S. at 339. The Supreme Court has recognized that disclosure does not meaningfully inhibit First Amendment interests and actually advances those interests. *See id.*

[15] *Supra* note 4; s*ee also*, *Arizona's Voters' Right to Know Act to End Secret Spending in Arizona Elections* 1-2, 8-11, CAMPAIGN LEGAL CENTER (Nov. 29, 2022), https://campaignlegal.org/sites/default/files/2022-11/AZ%20Proposition%20211%20White%20Paper%20-%2011.29.22.pdf.

[16] Minute Entry: Under Advisement Ruling, *Ctr. for Ariz. Pol'y, Inc. v. Ariz. Sec'y of State*, No. CV2022-016564 (Maricopa Cnty. Super. Ct., issued Jun. 22, 2023), *copy available at* https://campaignlegal.org/document/center-arizona-policy-inc-et-al-v-arizona-secretary-state-et-al-under-advisement-ruling (dismissing Plaintiffs' facial challenge to the Act's disclosure requirements); Minute Entry: Under Advisement Ruling, *Ctr. for Ariz. Pol'y, Inc. v. Ariz. Sec'y of State*, No. CV2022-016564 (Maricopa Cnty. Super. Ct., Feb. 29, 2024), *copy available at* https://campaignlegal.org/document/under-advisement-ruling-applied-challenge (dismissing Plaintiffs' as-applied challenge to the Act's disclosure requirements).

[17] *Supra* note 1 at 7; Opportunity Arizona also appears to argue that such communications should not be covered because they do not reference these "as a candidate." *Id.* at 8, 9.

[18] *Id*. at 7-8.

971(2)(a)(iii) as written and consistent with similar disclosure provisions at the federal level.

A. The plain language of A.R.S. § 16-971(2)(a)(iii) is clear.

The statute is unambiguous: Campaign media spending includes "[a] public communication that refers to a clearly identified candidate within ninety days before a primary election until the time of the general election and that is disseminated in the jurisdiction where the candidate's election is taking place."[19] Nothing in that provision requires that a communication expressly reference an election or specifically identify a candidate "as a candidate" to qualify as campaign media spending. So long as the candidate is "clearly identified"—meaning "the name or a description, image, photograph or drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference"[20]—no other description of the candidate or their particular status as a candidate is required for this provision to apply.

Importantly, in *Committee for Justice & Fairness v. Arizona Secretary of State's Office* (*CJF*), the Arizona Supreme Court already rejected the kind of argument proposed in the AOR.[21] When interpreting the term "expressly advocates," the court rejected the argument that the requirement that an ad "refer[s] to one or more clearly identified candidates" means that the ad must refer to that person *as a candidate* for the office sought:

> [A]lthough CJF argues Hornes was not a 'clearly identified candidate' because the advertisement did not specifically identify him as a candidate for Attorney General, no question exists that Horne was in fact a 'clearly identified candidate' as defined under Arizona's statutory scheme. . . . In the advertisement promulgated by CJF, Horne was identified through his name, photographs, and his prior and then-current public offices. Moreover, by the time the advertisement was run, Horne had been clearly identified to the general populace as the Republican candidate for Attorney General. It was unnecessary for the advertisement to further identify the position he sought.[22]

Other provisions of the Act make clear that, were such requirements intended, they easily could have been included. For example, A.R.S. § 16-971(2)(a)(i) covers communications that expressly advocate "for or against *the nomination*, or *election* of a candidate." Similarly, A.R.S. § 16-971(2)(a)(vi) covers any activity or communication" that "supports *the election* or *defeat* of candidates of an identified political party or the *electoral prospects* of an identified political party … ." Particularly given that A.R.S. § 16-971(2)(a)(iii) applies to a truncated time frame compared to other covered communications in the Act, there is no support in the Act's text for limiting this provision to communications that expressly reference an election or a candidate "as a candidate."

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[19] A.R.S. § 16-971(2)(iii).

[20] A.R.S. § 16-901(9); *cf.* 52 U.S.C. § 30101(18) (defining "clearly identified" similarly).

[21] 332 P.3d 94 (Ariz. 2014).

[22] *Id.* at 101, ¶ 28.

Additionally, comparison of A.R.S. § 16-971(2)(a)(iii) with federal disclosure requirements for electioneering communications—which this provision largely mirrors—further belies the AOR's proposed interpretation.

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), disclosures and disclaimers are required for "electioneering communications," defined in relevant part as a broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" made within 60 days prior to a general election or 30 days prior to a primary election.[23] FEC regulations interpreting the law provide that a communication refers to a clearly identified candidate where (1) it contains the candidate's name, nickname, photograph, or drawing; (2) the candidate's identity is "otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the Incumbent'"; or (3) the candidate's identity is "otherwise apparent … through an unambiguous reference to *his or her status as a candidate* such as 'the Democratic presidential nominee' or 'the Republic candidate for Senate in the State of Georgia.'"[24] As those commonsense rules explain, while referencing a person's status as a candidate for the office sought is *one* way to clearly identify that person, it is not required or the only way.

Finally, the AOR's comparison of A.R.S. § 16-971(2)(a)(iii)'s reference to "candidate" with § 16-971(2)(a)(v)'s reference to "public officer" is inapposite. As the AOR notes, § 16-971(2)(a)(v) concerns spending regarding a recall election. While it is unlikely that every candidate in a typical election will be a public officer, every person facing a recall is necessarily a public officer. Further, the statutory term "candidate" does not appear to include public officers facing a recall: Arizona law defines "candidate" as an individual seeking "nomination, election or retention for any public office," and further defines "retention" as "the election process by which a superior court judge, appellate court judge or supreme court justice is retained in office as prescribed by" the Arizona Constitution.[25]

B. Requiring disclosure for ads covered by A.R.S. § 16-971(2)(a)(iii) is constitutional.

Requiring disclosure for ads that reference a candidate close to an election ensures that influential election ads do not evade transparency simply by avoiding certain words. For this reason, the U.S. Supreme Court, along with numerous other courts, has consistently upheld disclosure requirements for these types of ads.

The history of federal election spending leading to electioneering communication disclosure is particularly illustrative. When Congress passed BCRA, federal lawmakers were seeking to close a major gap in federal law that had enabled organizations to sponsor sham "issue" advertisements that discussed federal candidates in the run up to an election but, because the ads carefully avoided the "magic words" of express advocacy, were not subject to

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[23] 52 U.S.C. § 30104(f)(3)(A)(i). The definition also requires that, for communications referring to congressional candidates, the communication be "targeted to the relevant electorate," *id.* § 30104(f)(3)(A)(i)(III), which is analogous to A.R.S. § 16-971(2)(a)(iii)'s requirement that the communication be "disseminated in the jurisdiction where the candidate's election is taking place."

[24] 11 CFR § 100.29 (b)(2) (emphasis added).

[25] A.R.S. § 16-901(7), (44).

independent expenditure reporting or on-ad disclaimer requirements.[26] For example, in the 2000 presidential election—the last one prior to BCRA's enactment—"130 groups spent over an estimated $500 million on more than 1,100 [such] ads."[27] In other words, once wealthy special interests identified a gap in disclosure coverage, that gap was exploited to inundate voters with ads that failed to provide even basic information about who was running them.

To close this gap, Congress enacted new disclosure requirements for electioneering communications that were specifically formulated to increase transparency for pre-election ads that do *not* expressly advocate for or against a candidate in their capacity as a candidate. Importantly, the U.S. Supreme Court has twice affirmed that electioneering communication disclosure is constitutional and has explicitly rejected any constitutional significance between express advocacy and issue advocacy for disclosure purposes.

First, in *McConnell v. FEC*, the Court denied a facial challenge to federal disclosure requirements for electioneering communications.[28] In particular, the Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure context, concluding that lawmakers may apply "disclosure requirements to the entire range of 'electioneering communications'"—that is, without distinguishing between ads that expressly advocate for an electoral outcome and those that do not—and that these requirements advance the public's interest in knowing the sources responsible for political speech in the leadup to an election.[29]

Second, in *Citizens United v. FEC*, eight of the Court's nine Justices joined the part of the decision which affirmed the constitutionality of BCRA's electioneering communication disclosure requirements as applied to *Hillary: The Movie*, a video on- demand documentary, and to brief commercial ads for the film.[30] In upholding the statute's application to commercials for the film, *Citizens United* resoundingly affirmed the constitutionality of disclosure and disclaimer requirements for pre-election advertising that references a candidate and does not advocate an electoral outcome: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."[31]

Following *Citizen United's* broad endorsement of the constitutionality of electioneering communication disclosure, federal courts have routinely upheld disclosure requirements for

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[26] 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, 431-35 (2013).

[27] *Id.* at 430 (quoting *McConnell*, 540 U.S. at 129 n.20).

[28] 540 U.S. at 189-202.

[29] 540 U.S. at 194, 196.

[30] 558 U.S. at 369.

[31] *Id.*

pre-election advertising that does not advocate for an electoral outcome.[32] The AOR entirely ignores *Citizens United* and these subsequent decisions from federal courts in arguing that "[l]obbying and legislative accountability efforts are regulated separately from electoral advocacy efforts because a legal difference exists between the two." Indeed, the AOR relies primarily on the Supreme Court's decision in *Wisconsin Right to Life v. FEC* (*WRTL*)[33] in making this argument, which the Court explicitly rejected in *Citizens United*.

WRTL concerned a different aspect of BCRA: its expansion of federal law's longstanding *ban* on corporate independent expenditures to also ban corporate electioneering communications. Applying strict scrutiny—because the law entirely banned certain types of corporate political spending—the Court concluded the ban could not be constitutionally applied to ads that were neither express advocacy nor its functional equivalent.[34] While *Citizens United* subsequently expanded *WRTL* by striking down federal law's ban on both corporate independent expenditures and electioneering communications, the Court explicitly rejected extending *WRTL*'s rationale to *disclosure* requirements:

> As a final point, Citizens United claims that, in any event, the disclosure requirements [for electioneering communications] must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar decision into BCRA's disclosure requirements. We reject this contention.[35]

As the Court explained, the constitutionally significant difference is whether a law *bans* certain communications or whether it merely requires *disclosure* about certain

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[32] *See, e.g., Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *Nat'l Org. for Marriage v. McKee*, 649 F. 3d 34, 54-55 (1st Cir. 2011) ("We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Independence Inst. v. Gessler*, 812 F. 3d 787, 795 (10th Cir. 2016) ("It follows from *Citizens United* that disclosure requirements can, if cabined within the bounds of exacting scrutiny, reach beyond express advocacy to at least some forms of issue speech."); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *see also Independence Inst. v. FEC*, 216 F. Supp. 3d 176, 187 (D.D.C.) (three-judge court) ("[T]he Supreme Court and every court of appeals to consider the question have already largely, if not completely, closed the door to the Institute's argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate."), *aff'd mem.*, 580 U.S. 1157 (2017).

[33] 551 U.S. 449 (2007).

[34] *Id.* at 476-81.

[35] *Citizens United*, 558 U.S. at 368-69 (internal citation omitted).

communications. The Court explained that disclaimer and disclosure requirements "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking."[36] Importantly, *CJF*—a case the AOR claims supports a distinction in Arizona law between issue advocacy and candidate advocacy—also emphasized *Citizens United*'s distinction of disclosure laws, explaining that "the permissible scope of disclosure requirements … could extend beyond speech that is the functional equivalent of express advocacy to address even ads that only pertain to a commercial transaction."[37] Accordingly, there is no basis for curtailing A.R.S. § 16-971(2)(a)(iii)'s coverage of political ads based on any supposed distinction between express advocacy and issue advocacy.

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In light of the plain language of the Act, the important role of disclosure and disclaimer requirements for political ads in the run-up to an election, and the significant body of case law affirming the constitutionality of disclosure and disclaimer requirements for these ads, we urge the Commission to reject the AOR's request to limit A.R.S. § 16-971(2)(a)(iii) to ads that explicitly reference an election or refer to a candidate "as a candidate."

CONCLUSION

We thank the Citizens Clean Elections Commission for considering our comments regarding AOR 24-01, and we applaud the Commission's efforts to provide clear guidance for spenders and the public in Arizona. We would be happy to answer questions or provide additional information to assist the Commission's development of its Advisory Opinion.

Respectfully submitted,

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[36] *Id.* at 366 (quoting *Buckley*, 424 U.S. at 64, and *McConnell*, 540 U.S. at 201). Opportunity Arizona tacitly acknowledges as much in a footnote, noting that its speech would not be "'suppressed' to the point of total censorship, as was the case in *Wisconsin Right to Life*." AOR at 9 n.6.

[37] 332 P.3d at 105 (quoting *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013)) (internal quotation marks omitted); *see also id.* (noting *Citizens United* supports "mandatory disclosure requirements" for "ads that merely *mention* a candidate" (quoting *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 552 (4th Cir. 2012) (internal brackets omitted)).