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' PETITION FOR REVIEW

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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 affect donor privacy throughout Arizona, which will impact nonprofits like IFS and other groups who depend on anonymous donors 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. On every metric, the law expands on its predecessors. It covers *more* people, *more* speech, for *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.

The First Amendment mandates exacting scrutiny for disclosure laws like Proposition 211, requiring courts to weigh the burden on speech against the government's interest, asking whether the law is "narrowly tailored" to achieve a permissible goal. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) ("*AFPF*"). But "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). Its positive endorsement of free speech guarantees that "[e]very person may freely speak, write, and publish on all subjects." Ariz. Const. art. II, § 6. "That language is majestic in its sweep," *Brush & Nib Studios, LC*, 247 Ariz. at 346 (Bolick, J., concurring), requiring courts to "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).

This Court has not yet considered how "the more stringent protections of the Arizona Constitution," *id.* at 358, apply to compelled disclosure laws like the one at issue here.[1] And so this brief offers a fresh way to think about the problem—one that makes clear that Proposition 211 unconstitutionally infringes on the right to "freely speak, write, and publish." Ariz. Const. art. II, § 6.

Every disclosure rule makes a similar set of choices: *Who* must be identified? *What* speech does it cover? *Where* does that speech occur? And *when* does that speech happen? Each choice alters the terrain, "sweeping up" speech in different ways—often to dramatic effect. *AFPF*, 594 U.S. at 616–17. Expanding *who* must disclose their speech while limiting *when* that disclosure happens produces a burden much

[1] The Court of Appeals discounted Arizona's robust protection for free speech because "[n]othing in the text of the Arizona Constitution or its history suggests that it provides greater protection for association rights than the First Amendment." Opinion at 10 (¶25). In doing so, the court conflated the freedom of *association* with the freedom of *assembly*. *See id.* (citing Ariz. Const. art. II, § 5). But the "right to associate" derives from all the "activities protected by the First Amendment," not just assembly. *See AFPF*, 594 U.S. at 606.

different than expanding both. And the government's interest likewise rises and falls based on those choices. Any analysis of whether Proposition 211 is sufficiently tailored must account for the cumulative impact that these various decisions have on free speech.

Proposition 211 exemplifies the problem. It expands on other disclosure rules in virtually every way. It does not limit disclosure to speech about elections, to speech close in time to elections, or to speech by those engaged mainly in election advocacy. It does not limit disclosure to donors who intend to support election advocacy, or even donors who know their dollars might be used for election advocacy. By expanding every part of an ordinary disclosure rule, Proposition 211 "accomplishes a shift in kind, not merely degree." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) ("*NFIB*") (Roberts, C.J., op.). And that shift in kind turns a series of individually problematic provisions into a cataclysmic free speech violation.

Argument

I. The Who, What, Where, and When of disclosure rules.

One way to think about the legality of any disclosure rule is by asking *who* must be identified, *what* speech is subject to the rule, *when*

that speech triggers disclosure, and *where* that speech occurs. Each issue shapes both the burden on speech and the strength of the state's interest.

A. Who must be identified?

"The first federal disclosure law was enacted in 1910" and drew lines based on the speaker's identity. *See Buckley v. Valeo*, 424 U.S. 1, 61 (1976). The law required "political committees" (organizations that exist to influence elections) to disclose their major donors and any expenditures over a certain threshold. Other speakers could spend money on elections without disclosing their donors, and they only had to report expenditures over a threshold five times higher than that for political committees. *Id.*

By the time the Supreme Court weighed in, Congress had passed the Federal Election Campaign Act of 1971 (FECA) and modified the disclosure rules. But FECA still focused on *who* was speaking. The law required different disclosures for candidates and political committees than for groups making independent expenditures. *Id.* at 74–75. Only candidates and committees had to identify their donors. *Id.*

Buckley explained how to think about the government's interest in compelled disclosure. Applied to candidates, donor disclosure "provides the electorate with information as to where political campaign money comes from," *id.* at 66, and it allows the public to "detect any post-election special favors that may be given in return," *id.* at 67. So, the Supreme Court reasoned, the state has a significant anticorruption interest in identifying who is donating to candidates.

That interest changes for independent advocacy groups. Disclosing independent expenditures still allows voters to learn about who might be influencing a candidate through indirect support. *Id.* at 67, 76. But donating to an independent advocacy group does not raise a risk of *quid pro quo* corruption. Thus, while disclosing a candidate's donors deters corruption by "arm[ing]" the public "with information about a candidate's most generous supporters," *id.* at 67, the same is not true for revealing the donors to independent advocacy groups.

Even further removed from the narrow informational interest that *Buckley* identified are laws requiring disclosure of "indirect donors"—that is, of donors who gave financial support to a third party, that in turn made its own decision to support a candidate or advocacy group.

Requiring disclosure there, when the original donor has no idea that one organization might donate to another, does not further any of the informational interests that *Buckley* identified. Such an indirect donor is not a "generous supporter" of a candidate or even of the organization that eventually received support. Nor could anyone reasonably think that the indirect donor would expect *quid pro quo* from an organization that the donor might not even know exists. In regulating *who* must be identified on a disclosure report as a donor, the state's interest is weaker as one moves further away from the actual donation.

B. What speech is covered?

Disclosure rules also apply based on what the speaker talks about. Even people who are not candidates or groups that do not primarily exist for political advocacy must sometimes disclose election-related expenditures. These rules are often triggered by, among other things, what the speaker says. Federal law, for example, defines an "electioneering communication" in part as a communication that "refers to a clearly identified candidate for Federal office." 52 U.S.C. § 30104(f)(3)(A)(i)(I). Many states adopt similar rules for activating

disclosure obligations. *See, e.g.*, Cal. Gov't Code § 85310; N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10; Wyo. Stat. § 22-25-101(d)(i)(A).

Like regulating *who* must be disclosed, the government's interest shifts (and often dissipates) based on *what* kind of speech triggers the compelled disclosure. Speaking about a ballot issue, for example, "present[s] neither a substantial risk of libel nor any potential appearance of corrupt advantage," and so the government's interest in disclosing the source of such speech is not as strong as speech about the "elections of public officers." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351–52 & n.15 (1995).

The state's interest diminishes even further when it regulates speech unrelated to elections. In *Buckley*, the Supreme Court zeroed in on the voters' interest in knowing where "campaign money" comes from to "evaluat[e] those who seek federal office." 424 U.S. at 66–67. In *Citizens United*, the Court likewise emphasized that speech about someone's "candidacy" helps make sure that "voters" are "fully informed" before voting. *Citizens United v. FEC*, 558 U.S. 310, 368 (2010). And the Ninth Circuit has tethered the government's interest in disclosure to

persuading people about how to vote. *See, e.g.*, *Human Life Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010).

Buckley applied this principle to narrowly interpret FECA to stop it from requiring groups to report expenditures when "engaged purely in issue discussion." 424 U.S. at 79. The law there required disclosure for "both issue discussion and advocacy of a political result." *Id.* "[T]o insure that the reach of [the law] is not impermissibly broad, [the Supreme Court] construe[d] 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Requiring more created a mismatch between the state's interest and the speech the law covered.

C. Where does the speech occur?

Disclosure rules also vary depending on where the speech occurs. Federal law, for example, requires any person making an "electioneering communication" to disclose her expenditures when delivered via "broadcast, cable, or satellite" and "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3)(A)(i). That excludes many common communications, including online digital speech that may reach countless jurisdictions without targeting a particular group of

voters. Other laws are more expansive. *See*, *e.g.*, Ala. Code § 17-5-2(6) ("Any communication disseminated through any federally regulated broadcast media, any mailing, or other distribution, electronic communication, phone bank, or publication . . . ."); Cal. Gov't Code § 85310(a) (similar).

The wider the net one casts, the more speech one catches. That is particularly troublesome for online speech, which is disseminated across the world, plunging speakers into a potential web of campaign-finance laws that they are unaware of. Imagine, for example, an advertising campaign in New York that promotes a series of blog posts about national issues that mention some public officials in Arizona unrelated to a particular election. A disclosure rule that captures all speech delivered digitally could activate in such circumstances. But Arizona's interest in discovering the source of funding for such a national issue-based advertising campaign would be incredibly weak. *See Buckley*, 424 U.S. at 67, 79.

D. When does the speech occur?

Time is critical to defining the scope of a disclosure rule. Indeed, time limits are often a key piece to cabining the scope of a potentially

unconstitutional law. That's because an advertisement about a public official takes on a different character when it runs "shortly before" an election compared to the same communication made six months earlier. *See Citizens United*, 558 U.S. at 369. The "temporal breadth" of a rule matters quite a bit. *McIntyre*, 514 U.S. at 352 n.16.

That makes sense. As discussed above, the government's interest in disclosure is closely tied to ensuring the public can adequately inform itself about who is trying to persuade voters during an election. *See supra* at 9–11. But the "concern that the public could be misinformed and an election swayed on the strength of an eleventh-hour anonymous smear campaign to which the candidate could not meaningfully respond," *McIntyre*, 514 U.S. at 352 n.16 (quotation omitted), does not exist for speech six months before the vote. On the other hand, speech about a candidate "shortly before" an election will likely affect voters even if it does not "express[ly]" advocate for or against that candidate. *Citizens United,* 558 U.S. at 369. Timing matters in both how much speech a law captures, and how powerful the government's interest in compelling disclosure really is.

II. Proposition 211's multi-faceted expansion of other disclosure rules is facially overbroad.

Proposition 211 suffers from many problems. It requires publicly disclosing the identity of indirect donors to advocacy organizations that likely have no idea they are listed as supporting a candidate or issue they may have never even heard of. Pet.16–17. It requires disclosing the *employers* of donors, who may be retaliated against for donations they had nothing to do with. *Id.* at 10. It defines "campaign media spending" so broadly that it captures virtually any activity tangentially related to speech about a public official. *Id.* 15–16. And the minimum monetary threshold for activating the law includes not just expenditures for speech, but also expenditures for a vague list of preparatory activity that makes it impossible to know what might trigger the law. *Id.* at 20. Each of these provisions creates serious free speech problems.

But analyzing this case in such a fragmented manner misses Proposition 211's most troubling aspect. Even if it's constitutional to require that advocacy groups disclose a limitless chain of indirect donors for engaging in "campaign media spending," or to label all speech that refers to a candidate for office six months before an election as campaign-related, combining those two rules together creates an

indefensible burden on "the individual right to 'freely speak, write, and publish.'" *Brush & Nib Studios, LC*, 247 Ariz. at 281 (quoting Ariz. Const. art. II, § 6). And by enlarging every aspect of an ordinary disclosure rule at the same time, Proposition 211 "accomplishes a shift in kind, not merely degree"—a shift that renders the law unconstitutional. *See NFIB*, 567 U.S. at 583 (Roberts, C.J., op.).

Consider one problematic feature of Proposition 211: disclosing indirect donors. *See* Pet.16. The law requires disclosing individuals who donate to one organization that in turn donates to *another* organization that engages in "campaign media spending"—without any requirement that the original donors knew or intended this to happen. Ariz. Stat. Rev. § 16-973(A)(6), (7); *see also* Pet.16. By failing to require earmarking or knowledge on the part of the original donor, Proposition 211 greatly expands on *who* must be disclosed relative to other similar laws. *See, e.g.*, 52 U.S.C. § 30104(f)(2)(E).

Yet scrutinizing the indirect-donor problem in isolation masks the bigger problem. To see how, contrast the other features of Proposition 211 to its federal counterpart. Both laws require disclosing donors for electioneering communications that "refer" to a "clearly identified

candidate" for office. *Compare* Ariz. Rev. Stat. § 16-971(2)(a)(iii), *with* 52 U.S.C. § 30104(f)(3). But unlike Proposition 211, federal law requires that speakers disclose an electioneering expenditure only when that communication is made via "broadcast, cable, or satellite." 52 U.S.C. § 30104(f)(3)(A)(i). The similar provision in Proposition 211 reaches all "public communication[s]," no matter the means of distribution. Ariz. Rev. Stat. §§ 16-971(2)(a)(iii), § 16-971(17)(a). Likewise, an electioneering communication under federal law is limited to broadcasts made only "60 days before a general" election and "30 days before a primary" election—a maximum total of three months. 52 U.S.C. § 30104(f)(3)(A)(i)(II). But under Proposition 211, the clock starts 90 days before the primary election and continues all the way through the general election. Ariz. Rev. Stat. § 16-971(2)(a)(iii). This means the rule captures six to seven months out of the year, including communications made when the Arizona legislature is in its last days of session. And under federal law, persons making electioneering communications need only disclose contributors who earmark their donations for political advocacy, *see* 52 U.S.C. § 30104(f)(2)(E), while Proposition 211 requires disclosing indirect contributors who did not donate for advocacy

purposes and may have no idea that their funds were used for "campaign media spending" in Arizona, *see* Ariz. Stat. Rev. § 16-973(A)(6), (7).

The result is dramatic. Proposition 211 expands on the *who*, the *what*, the *where*, and the *when*. In doing so, it captures far more speech, requires disclosing the identity of far more people, and it does so even though the state's interest decreases at every step. That Proposition 211 requires disclosing indirect donors is thus only one piece of the problem. Those indirect donors must be identified for contributing to organizations in more circumstances, many of which are tenuously tied to the state's purported interests—if at all.

The Court of Appeals missed this point when it relied on cases like *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023), to hold that the indirect-donor provision furthers the government's interest "in the disclosure of the sources of campaign funding." Opinion at 9 (¶23). Unlike Proposition 211, the law in *No on E* targeted specific kinds of organizations—committees formed primarily to speak *about elections*. That's why the Ninth Circuit characterized the state's interest as informing voters about who is funding advertisements that ask voters

"to cast one's vote a particular way." *No on E*, 85 F.4th at 506. But Proposition 211 is not limited to groups engaged in election-related speech. It compels *all* organizations to disclose their indirect donors simply for referring to a public official by name six to seven months before his or her next election. Even if the state has an interest in disclosing the identity of an indirect donor to an organization speaking about an election, that interest dramatically diminishes when talking about organizations "engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. But Proposition 211 captures both.

This problem crystallizes when considering nonpolitical organizations like *amicus*. The Institute for Free Speech is a nonpartisan, nonprofit organization tax exempt under 26 U.S.C. § 501(c)(3). IFS's mission includes educating people about campaign finance and advocating against policies like Proposition 211. Under federal law, IFS cannot engage in political activity—it cannot endorse candidates or advocate for or against their election. *See* 26 U.S.C. § 501(c)(3). Yet Proposition 211 treats ordinary civic education and advocacy as electioneering, requiring IFS to comply with the indirect-donor disclosure rule if it says just one word wrong.

That's no exaggeration. Arizona's legislature regularly meets through the end of May, and its most recent legislative session did not adjourn until June 15, 2024. The primary election for legislative candidates took place on July 30, 2024. That means the 90-day clock for assessing "campaign media spending" reached all the way to the beginning of May—forty-five days before the end of the legislative session. Thus, any speech during that time that "refers" to a state legislator who is running for office several months later qualifies as *electioneering* subject to the indirect-donor disclosure rule.

IFS does not participate in elections, and none of IFS's donors from around the country would expect IFS to engage in electioneering. But IFS *does* engage in "issue discussion." *Buckley*, 424 U.S. at 79. As part of that, IFS conducts research about free-speech issues, and it distributes that research to the public. *See, e.g.*, Anti-SLAPP Statutes: 2023 Report Card, available at https://www.ifs.org/anti-slapp-report/. But that issue research and advocacy transforms into "campaign media spending" if it's disseminated in Arizona when the state has an upcoming ballot initiative on the same issue months down the road. *See* Ariz. Stat. § 16-971(2)(a)(iv). Likewise if IFS issues a report that

mentions a bill sponsor while talking about legislative developments during the end of the session. *See* Ariz. Rev. Stat. § 16-971(2)(a)(iii). These circumstances could trigger Proposition 211, imposing complex administrative burdens alongside an unprecedented "intrusion" on IFS's donors' privacy. *See McIntyre*, 514 U.S. at 355.

Given this, the Court of Appeals' holding that Arizona has an interest in identifying the original "sources of campaign funding" is almost a non-sequitur. Opinion at 9 (¶23). Does that interest hold for donors who gave to a third party, who might have never heard of IFS, and have no knowledge about Arizona's elections or campaigns? Surely not. The fact that the state may have an interest in identifying *some* indirect donors in *some* circumstances means little when the state has layered on one sweeping provision after another—as Arizona has done here.

Protecting the right to "freely speak, write, and publish," Ariz. Const. art. II, § 6, requires a robust "right to associate with others," *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). And compelled disclosure laws "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)). To prevent such an infringement, Arizona's free speech clause must account for the way that Proposition 211's many expansive provisions work together to "sweep[] up the information" of donors far removed from election advocacy, creating "an unnecessary risk of chilling" speech. *Id.* at 616–17. The law is facially overbroad, and the Court should grant the petition for review to say so.

Conclusion

The Court should grant the petition for review.

Dated: February 27, 2025

Respectfully submitted,

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Certificate of Service

I certify that the Institute for Free Speech's *amicus* brief in support of the petition for review was served upon the following through AZ Turbo Court on February 27, 2025:

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