ARIZONA COURT OF APPEALS
DIVISION ONE

CENTER FOR ARIZONA POLICY, INC., an Arizona nonprofit corporation; ARIZONA FREE ENTERPRISE CLUB; DOE I; DOE II,

Plaintiffs-Appellants,

v.

ARIZONA SECRETARY OF STATE; ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants-Appellees,

and

ARIZONA ATTORNEY GENERAL; VOTERS' RIGHT TO KNOW PAC,

Intervenor-Defendant-Appellees.

Arizona Court of Appeals
Case No. CA-CV 24-0272

Maricopa County Superior Court
Case No. CV2022-016564

BRIEF OF AMICI CURIAE AMERICANS FOR PROSPERITY AND AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF APPELLANTS

(Filed with the consent of the parties)

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STATEMENT OF INTEREST OF AMICI

Americans for Prosperity ("AFP") is a nonprofit corporation headquartered in Virginia that operates nationwide and has a chapter in Phoenix, Arizona. AFP engages in grassroots outreach to advocate for solutions to the country's biggest problems, such as unsustainable government spending and debt, a broken immigration system, a rigged economy, and a host of other issues. In 2022, AFP engaged in elections in Arizona and in 17 other states. In 2024, AFP expects to engage in elections in 24 states. AFP funds its activities by raising charitable donations from donors throughout the country, including in Arizona.

Americans for Prosperity Foundation ("AFPF") is a nonprofit corporation headquartered in Virginia. For over 20 years, AFPF has been educating and training citizens to advocate for freedom, sharing knowledge and tools that encourage participants to apply the principles of a free and open society in their daily lives. AFPF funds its activities by raising charitable donations from donors nationwide, and has taken public positions on hot-button issues that affect individuals across the political spectrum, such as education reform, immigration reform, and criminal justice reform.

In 2023, AFP and AFPF filed suit in federal court challenging Proposition 211 under the First Amendment to the U.S. Constitution. *See Ams. for Prosperity v. Meyer*, No. 2:23-cv-00470 (D. Ariz.). On April 10, 2024, the district court dismissed

the suit and entered judgment, from which AFP and AFPF timely appealed on May 6, 2024. The case is currently pending before the U.S. Court of Appeals for the Ninth Circuit. *See Ams. for Prosperity v. Meyer*, No. 24-2933 (9th Cir.).

INTRODUCTION

Plaintiffs-Appellants raise important issues concerning freedom of speech, privacy, and the separation of powers under the Arizona Constitution, which are "part of an overall constitutional scheme to protect individual rights." *State v. Prentiss*, 163 Ariz. 81, 84 (1990) (en banc). Those rights include "[t]he ability to speak anonymously" without "fear of reprisal," a tradition "rooted in our constitutional system of government" that stretches back to the "pseudonymous authors of the *Federalist Papers*." Opening Br. 1. Proposition 211 "[f]lout[s] this tradition," compelling the disclosure of private information for donors, and donors' donors, and so on. *Id.* As the Opening Brief explains, Proposition 211 "violates constitutional protections for speech and privacy" under Arizona's Constitution, *id.*, which provides "'greater speech protection' than that provided by the federal First Amendment," *id*. at 14 (quoting *Brush & Nib Studio, LC v. City of Phx*., 247 Ariz. 269, 282 ¶46 (2019)).

But make no mistake: Proposition 211 violates the First Amendment of the U.S. Constitution as well. The law poses unprecedented threats to free speech and association, sweeping more broadly and invasively than any such disclosure law ever has. While purporting to regulate "[c]ampaign media spending," A.R.S. § 16-971(2), the law extends far beyond elections and ensnares issue advocacy. In exchange, the law does not provide useful information to the electorate. Instead, it

offers spurious disclosures that stand only to mislead voters on both the amounts spent on electoral advocacy and who is supposedly "behind" such spending. It will also publicly tie donors and businesses to speech over which they have no control or even knowledge. Given its anomalous, indiscriminate intrusions into vast swathes of core political expression, Proposition 211 violates the First Amendment of the federal Constitution.

Because Proposition 211 offends the First Amendment, it follows *a fortiori* that it violates the more expansive protections of the Arizona Constitution. Indeed, the Arizona Supreme Court has made clear that when both the "federal [and] state constitution" are at issue, Arizona courts should "first consult our constitution" and "apply . . . the broader freedom of speech clause of the Arizona Constitution." *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 (1989). Particularly with the 2024 election underway, this Court should vacate the Superior Court's contrary rulings below and remand with instructions to enter a preliminary injunction that prohibits the Defendants-Appellees from enforcing Proposition 211.

ARGUMENT

The First Amendment safeguards the right to donate to charitable and advocacy organizations without undue risk of disclosure or other chilling by the government. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610–12 (2021)

(plurality opinion). "The 'government may regulate in the [First Amendment] area only with narrow specificity,' and compelled disclosure regimes are no exception." *Id.* at 610 (quoting *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963)). "When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.'" *Id.* (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)).

Therefore, "[r]egardless of the type of association, compelled disclosure requirements [must be] reviewed under exacting scrutiny." *Id.* at 608. "Under that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,'" and the disclosure requirement must "be narrowly tailored to the government's asserted interest." *Id.* at 607–08 (citation omitted).[1]

"A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters." *Id.* at 609. Narrow tailoring is also "crucial where First Amendment

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[1] The concurring opinions in *Bonta* commend strict scrutiny, an even *more* demanding level of scrutiny. 594 U.S. at 619 (2021) (Thomas, J., concurring in part); *id.* at 622 (Alito, J., concurring in part).

activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Id.* (quoting *Button*, 371 U.S. at 433).

Proposition 211's defenders bear the burden of satisfying exacting scrutiny. *See Bonta*, 595 U.S. at 608; *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *Elrod v. Burns*, 427 U.S. 347, 362 (1976). They cannot justify such a dragnet based on "[m]ere administrative convenience." *Bonta*, 594 U.S. at 615 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)).

A. Proposition 211 Does Not Advance The State's Purported Interests.

Exacting scrutiny requires that Proposition 211 bear a "substantial relation" to the "*sufficiently important*" interests asserted by the state. *Id.* at 607 (emphasis added) (quotation omitted). Not every interest so qualifies. Indeed, the Supreme Court has acknowledged few interests of sufficient "magnitude" to justify disclosure. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). First, disclosure can be justified if it "provides the electorate with information" relevant to an election, *i.e.*, the contributions received directly by a future lawmaker that may help predict how he may choose to act. *Id.* Second, disclosure requirements can be justified when they "deter actual corruption and avoid the appearance of corruption." *Id.* at 67. Proposition 211 does not meaningfully advance either interest. The law's look-through disclosures require groups engaged in "campaign media spending" (as further discussed below) to publicly disclose their donors, as well as their donors'

donors, and so on back to the "original source[]" of funding. A.R.S. § 16-973(A)(7). In particular, covered entities must disclose primary and secondary donors who donate more than $5,000, A.R.S. §§ 16-973(A)(6), (7), while also issuing disclaimers identifying their top three "donors" (whether primary or secondary), A.R.S. § 16-974(C). This is so even if the "original sources" who indirectly provided funds never foresaw or intended that their donations would be used for "campaign media spending." A.R.S. § 16-973(A)(7). The requisite disclosures and disclaimers are not pegged to any purpose, intent, or even knowledge by a donor that a donation would be used for electioneering—let alone in Arizona.

Proposition 211 Does Not Further Any Informational Interest. Disclosure can be justified only to the extent that it "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." *Buckley*, 424 U.S. at 66–67 (quotations and footnote omitted). The essential premise for upholding a disclosure requirement, where properly tailored, is that "[t]he sources of a candidate's financial support" can "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 67. But "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer

make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

To be sure, the Supreme Court in *Citizens United* stated that "the informational interest alone" can be "sufficient to justify" disclosure requirements. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010). But *Citizens United* in no way overruled *Buckley* and *McIntyre*, or permitted disclosure of *any* "information" no matter how attenuated to electoral advocacy. *McIntyre*, 514 U.S. at 348. Notably, the disclosures in *Citizens United* did not include donors' donors, and donors' donors' donors, and so on. *See* 558 U.S. at 366. Moreover, the disclosures concerned a film that the Supreme Court ruled was an "electioneering communication" under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). *Id.* at 368. BCRA's definition of "electioneering communication" in turn was drawn so that it encompassed only a "'broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Id.* at 321 (quoting 2 U.S.C. § 434(f)(3)(A) (2006 ed.)). The *Citizens United* Court concluded that disclosures tied to *those* communications would serve the public's "interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369.

In sum, *Citizens United* upheld disclosures evidencing a close nexus to electoral advocacy oriented around steering individual candidates to victory or

defeat. It also permitted disclosure only of organizational speakers, not of underlying donors as well. That holding tracks *Buckley*'s narrow articulation of the informational interest—to help voters determine "the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67. Post-*Citizens United*, the Court did not recognize a generalized interest in any potentially "relevant information" no matter how removed from elections. *McIntyre*, 514 U.S. at 348. The "informational interest" endorsed in *Buckley* remains, by its nature, a narrow one.

Throughout its decisions, the Supreme Court has permitted disclosures only in narrow circumstances where contributors gave directly to candidates or earmarked their contributions for such electioneering. *See Buckley*, 424 U.S. at 66; *Citizens United*, 558 U.S. at 371; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 202 (2003). And post-*Citizens United*, many courts have emphasized the importance of limiting disclosure to contributions specifically earmarked to support campaign-related advocacy. *See, e.g., Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016); *Indep. Inst. v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016); *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021); *Indep. Inst. v. Fed. Elec. Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016); *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023).

No legitimate informational interest is furthered by Proposition 211's look-through provisions. A.R.S. § 16-973(A)(7). Such disclosures are premised on the assumption that, if A gives to B, and B gives to C, and C engages in electioneering, then A is somehow the "true source" that should be disclosed. But the Supreme Court has already rejected that assumption as "divorced from reality," particularly insomuch as it targets circumvention that is already prohibited. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 215–16 (2014) (plurality opinion).

The Court rejected similar reasoning in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). There, the California Medical Association ("CMA") argued that because its political action committee, CALPAC, was limited to contributing $5,000 to a candidate, there should be no limit on its contributions to the PAC. The Court disagreed, observing that this line of argument improperly conflated the speech of the PAC with that of the CMA:

> [A]ppellants' claim that CALPAC is merely the mouthpiece of CMA is untenable. CALPAC instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy. Of course, CMA would probably not contribute to CALPAC unless it agreed with the views espoused by CALPAC, but this sympathy of interests alone does not convert CALPAC's speech into that of CMA.

Id. at 196. In *Buckley*, the Court similarly upheld limits on contributions (as opposed to independent expenditures) in part because "the transformation of contributions

into political debate *involves speech by someone other than the contributor*." 424 U.S. at 21 (emphasis added).

The disconnect between an upstream donor and unforeseen electioneering much further downstream is similarly stark and dispositive here. Suppose a business donates to a 501(c)(4) advocacy group in December 2024 because of the group's research on a particular policy issue. In July 2025, the group gives to a separately incorporated, independent organization to support its efforts on a completely different issue. If the independent organization spends $50,000 to promote a candidate in October 2026, there would be no basis to presume the business also supported that candidate—after all, it relinquished all control of its donation, which it gave for different purposes, nearly two years earlier.

In this light, the lack of an intent or earmarking requirement further undermines any informational interest purportedly served by Proposition 211. *See Van Hollen*, 811 F.3d at 501. When an individual donates money without strings, that person is not the "true donor" for the organization's electioneering. Instead, an organization's use of unearmarked funds is the organization's speech, *not* that of individual donors. This is particularly true for donors to heterodox organizations who may not share all of the organizations' views. Yet Proposition 211 compels the disclosure of donors who had no intent to engage in electioneering based on unforeseeable actions that organizations later undertake. The problem is even worse

for secondary donors, whose information will be disclosed based on downstream organizations to which they lack any meaningful connection. Disclosing such "donors" in no way alerts voters "to the interests to which a candidate is most likely to be responsive." *Buckley*, 424 U.S. at 67.

While Proposition 211's proponents insist that the law prevents wealthy interests from routing electoral funding through intermediaries to hide their identities, intentional circumvention is already illegal under both Arizona and federal statute. *See* A.R.S. § 16-1022(B); 52 U.S.C. § 30122. If preventing circumvention were truly Proposition 211's purpose, the law would include some knowledge or intent requirement. But it does not, thereby obviating any "substantial relation" to this asserted interest. *Bonta*, 594 U.S. at 611.

Because Proposition 211 dumps undifferentiated piles of donor data upon the public, the law will result in spurious disclosures, undermining Arizona's interest in "provid[ing] the electorate with information." *Buckley*, 424 U.S. at 66. Indeed, the law will affirmatively mislead voters by directly tying named donors to candidates and issues those donors may not support at all. Suppose a conservative "Never Trump" donor gives to a center-left 501(c)(4) to fund a report on threats to democracy posed by the Trump campaign. If the 501(c)(4) group then spends money supporting a Democratic candidate, the Never Trump donor may be disclosed as a funder of its ads—even though he actually supported the Republican rival. Far from

helping the electorate understand the interests to which the Democratic candidate is "most likely to be responsive," *id.* at 67, the disclosure at best confuses and at worst affirmatively misleads the electorate.

Additionally, the sheer volume of information to be disclosed under Proposition 211 further undermines the state's informational interest. Far from adding meaningful information and aiding understanding, a barrage of spurious information far removed from any funds flowing to a candidate can only sow confusion and misperception among the electorate. This does more harm than good for voters' actual understanding.

Simply put, the "information" provided by Proposition 211 serves no beneficial government purpose and is certainly not a "sufficiently important" state interest. *Bonta*, 594 U.S. at 611. As the Supreme Court explained, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348.

Proposition 211 Does Not Further Any Anti-Corruption Interest. Nor does Proposition 211 meaningfully advance any anti-corruption interest. Disclosure requirements can be justified in instances where they "deter actual corruption and avoid the appearance of corruption" by exposing "a candidate's most generous supporters," which enables the public to "detect any post-election special favors that

may be given in return." *Buckley*, 424 U.S. at 67. As the Supreme Court observed, however, "[t]he risk of corruption perceived in cases involving candidate elections[] simply is not present in a popular vote on a public issue." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (citation omitted).

Proposition 211 is not limited to money that flows to Arizona candidates—indeed, the law has no application whatsoever to money given directly to candidates. In some cases, Proposition 211 will require disclosure of donors to national organizations even when they have no connection to or interest in Arizona. As such, it cannot be "narrowly tailored" to preventing corruption of Arizona's candidates or the appearance thereof. *See Buckley*, 424 U.S. at 66. Moreover, because Proposition 211's look-through mechanism will disclose unknowing secondary donors, it cannot plausibly serve any interest in preventing corruption at the hands of "donors" who do not even know their money has gone to any political candidate or issue, let alone which. Requiring disclosures and disclaimers of unwitting, attenuated donors does not meaningfully curb any of the supposed evils attributed to "dark money."

Nor can there be *any* anti-corruption interest served for disclosures tied to ballot measures. *See, e.g.*, *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections[] simply is not present in a popular vote on a public issue.") (citation omitted). Particularly for ballot initiatives, there

is no conceivable anti-corruption interest *at all* given that no candidate is in play. *See id.*

B. Proposition 211 Is Not Narrowly Tailored.

Compounding problems is Proposition 211's overbroad definition of "campaign media spending," which sweeps in protected activity far removed from the electoral context. Given its expansive sweep, Proposition 211 is not narrowly tailored to the interests the law purportedly promotes. The law's burdens apply to any "covered person," defined as anyone whose "campaign media spending" exceeds $50,000 in statewide campaigns or $25,000 in other campaigns in a two-year cycle. A.R.S. § 16-971(7). Proposition 211 in turn defines "campaign media spending" to encompass a broad range of election and issue advocacy.

In particular, it includes any communication that merely "refers to a clearly identified candidate" within 90 days before a primary until the general election and is disseminated in the candidate's jurisdiction. A.R.S. § 16-971(2)(a)(iii). Had Proposition 211 been in effect, immigration advocacy groups would have triggered coverage just by mentioning Sherriff Arpaio's contempt proceedings before his 2016 election. As of Proposition 211, advocacy groups across the spectrum must think twice before addressing how state prosecutors handle issues ranging from abortion to election integrity.

This trigger's expansive time window also ventures far beyond anything the Supreme Court has ever sanctioned: in *McConnell*, the Court upheld regulations that were triggered by references to a federal candidate within 60 days of a general election. 540 U.S. at 201–02. By contrast, Proposition 211 regulates references made within *90* days before a *primary* election through the general election itself. A.R.S. § 16-971(2)(a)(iii). Because the legislature is in session for much of this time, Proposition 211 threatens to stifle critical discussion concerning legislative activity when it is most salient. And in *Citizens United*, BCRA's disclosure triggers were limited to certain broadcast, cable, and satellite communications that could reach 50,000 people "in a State where a primary election [for President] . . . is being held within 30 days." 558 U.S. at 321 (quoting 11 CFR § 100.29(b)(3)(ii)(A) (2009)). Proposition 211's broad definition of "campaign media spending" covers a much broader swath of communication mediums and contains no such threshold requirement for the number of people a communication must reach. *See* A.R.S. § 16-971(17)(a) (covering "broadcast, cable, satellite, internet or another digital method, newspaper, magazine, outdoor advertising facility, mass mailing or another mass distribution, telephone bank or any other form of general public political advertising or marketing, regardless of medium").

"[C]ampaign media spending" also includes advocating for or against the "qualification or approval of any state or local initiative or referendum." A.R.S. § 16-971(2)(a)(iv). The vast array of state and local measures highlights this trigger's sweep, ranging from the "Save the Puppies and Kittens"[2] initiative enabling local governments to ban puppy mills; to Scottsdale's Proposition 420[3] protecting the McDowell Sonoran Preserve; to the proposed "Protect Arizona Agriculture Act,"[4] which would have regulated use of agriculture chemicals. Such measures predictably spark public debate.

Proposition 211's coverage can also be triggered by a communication that "promotes, supports, attacks or opposes the recall of a public officer" at *any* time. A.R.S. § 16-971(2)(a)(v). But speech criticizing an elected officeholder could potentially be characterized as advocating for a "recall," thereby chilling speech and insulating elected officials from criticism.

Perhaps most sweeping is Proposition 211's catch-all for "other partisan campaign activity." A.R.S. § 16-971(2)(a)(vi). This term is undefined, and

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[2] *Available at* https://apps.azsos.gov/election/2016/general/initiatives.htm.

[3] *See* https://www.azcentral.com/story/news/local/scottsdale/2018/11/06/scottsdale-proposition-420-desert-edge-development-mcdowell-sonoran-preserve-question-1-sales-tax/1809403002/.

[4] *Available at* https://apps.azsos.gov/election/2020/general/ballotmeasuretext/I-10-2020.pdf.

potentially ensnares *any* issue advocacy that arguably correlates with the stance taken by a political party. Given our political polarization, regulators can target political rivals by deeming advocacy to be "partisan," particularly on pressing issues like immigration. This is exactly the type of vague, sweeping term the *Buckley* Court sought to narrow. 424 U.S. at 41 ("The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech.").

Although the Citizens Clean Elections Commission has issued advisory opinions purporting to limit Proposition 211's reach and offer safe harbors to "covered persons," those opinions ostensibly defy the law's text. As Chief Justice Roberts remarked during oral argument in *Citizens United*, "We don't put our First Amendment rights in the hands of FEC bureaucrats." Transcript of Oral Argument at 65–66, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (No. 08-205), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf.

Worse, private parties are empowered to enforce Proposition 211 pursuant to *their own* interpretations, however expansive, aggressive, and self-serving those may be. A.R.S. § 16-977. Arizona voters can file "a verified complaint" with the Citizens Clean Elections Commission, A.R.S. § 16-977(A), which the Commission must "investigate" and pursue wherever plausible, A.R.S. § 16-977(B). If the

Commission declines, a private party can file suit to "compel" enforcement. A.R.S. § 16-977(C).

This deputization sows unpredictability and chill, particularly given the law's broad triggers. The safe harbors promised by the Commission's advisory opinions may prove illusory once private enforcers urge different interpretations and have those imposed *post hoc*. Even if the private complainant loses, the charge itself can be damaging, especially when filed near the election. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 151, 164 (2014) (finding challengers to law penalizing "false statements" had standing to sue, noting that "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents. And petitioners, who intend to criticize candidates for political office, are easy targets.") (citations omitted), *on remand* 814 F.3d 466, 475 (6th Cir. 2016) (striking down false-statements law and noting that "some complainants use the law's process 'to gain a campaign advantage without ever having to prove the falsity of a statement . . . tim[ing] their submissions to achieve maximum disruption . . . forc[ing political opponents] to divert significant time and resources . . . in the crucial days leading up to an election.'") (citation omitted).

Covered entities therefore face exposure and chill from the specter of countless private lawsuits. For these reasons and more, Proposition 211 is not "narrowly tailored" to withstand exacting scrutiny. *Bonta*, 594 U.S. at 611.

C. Proposition 211 Imposes Onerous Administrative Burdens.

Proposition 211's administrative requirements, particularly for opt-out correspondence and transfer records, are also unduly burdensome. Under Proposition 211, a "covered person" must provide donors "an opportunity to opt out of having the donation used or transferred for campaign media spending" and thereby avoid disclosure. A.R.S. § 16-972(B). "The notice required . . . may be provided to the donor before or after the covered person receives a donor's monies, but the donor's monies may not be used or transferred for campaign media spending until at least twenty-one days after the notice is provided or until the donor provides written consent pursuant to this section, whichever is earlier." A.R.S. § 16-972(C).

The upshot requires would-be speakers to sit silent for up to 21 days before using or transferring donor monies for campaign media spending. That is an outright muzzling of core speech—particularly in the context of political and policy issues, where "timing is of the essence" and "it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). Because "delay may permanently vitiate the expressive content" of such a message, the opt-out procedure perpetrates

its own unconstitutional restraint on speech. *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984). The opt-out also destroys the very reason for associations: to protect privacy, to outsource decision-making, and to protect members. Businesses in particular join trade associations precisely so they do not have to take the lead in fighting a government regulation in court, angering a powerful official by challenging a bill in the legislature, or speaking out for the industry. Proposition 211's opt-out provisions deny that protection by requiring members to differentiate themselves to protect their interests, thereby vitiating the very benefits that make it so valuable for members to associate.

Proposition 211's required transfer records also impose undue burdens, placing privacy at risk in the absence of any provisions that would secure these records. Covered persons must maintain "transfer records" for "at least" five years, far beyond the election cycle in which the donation is made. A.R.S. § 16-972(A). Secondary donors who give over $2,500 will have no control or knowledge over the ultimate use of their funds, nor any control over disclosure of their personal information. A.R.S. § 16-972(E).

Finally, Proposition 211's definition of "covered person" sweeps far beyond "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," drastically burdening organizations even when their "major purpose[s]" do not encompass election-related

activity. *Buckley*, 424 U.S. at 79; *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014) (citing *id.*).[5] Under Proposition 211, non-profit organizations of any stripe that engage in anything loosely categorized as "campaign media spending" are lumped together with PACs without regard for their primary purpose.

D. Proposition 211 Imposes Burdens Nationwide.

Proposition 211's burdens are felt not only statewide but nationwide as well. For example, an out-of-state organization could spend over $50,000 preparing an online publication on a salient political issue that "refers" to a candidate. A.R.S. § 16-971(2)(a)(iii). If the publication has been "disseminated" nationwide via the internet during the relevant window, Proposition 211 would apply. *Id.*

Donors likewise face burdens nationwide. A Virginia donor who gives to one group could later discover that her name and address were publicly disclosed due to the speech of another group she never heard of—just because some portion of the

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[5] Amici recognize that Ninth Circuit precedent currently holds that disclosure requirements need not be limited to organizations with electoral activity as their one, single major purpose. *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1009–10 (9th Cir. 2010). However, *Brumsickle* still requires that campaign spending be at least one significant purpose for a covered organization—indeed, *Brumsickle* was not decided in the context of a law, like Proposition 211, that extends to both primary and secondary donors and to groups that only "incidentally engage in [political] advocacy." *Id.* at 1011. And here, Proposition 211's $50,000 threshold represents a small fraction of the budgets for many national organizations, thereby sweeping in groups who only "incidentally engage in [political] advocacy." *Id.*

money she gave to the first entity, for different reasons, made its way to a group addressing issues in Arizona.

Particularly with the 2024 election underway, advocacy groups nationwide seek a robust exchange on issues that matter to their fellow citizens. Of course, "timing is of the essence in politics . . . [and] it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth*, 394 U.S. at 163. Proposition 211 chills debate precisely when it matters most. To ensure First Amendment rights are not dampened at a critical juncture, this Court should vacate the orders below and direct entry of a preliminary injunction on remand.

CONCLUSION

The Court should vacate the dismissal of Plaintiffs-Appellants' claims and the denial of their preliminary injunction motions, and remand with direction to enter a preliminary injunction while this case proceeds.

DATED this 22nd day of August, 2024.

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CERTIFICATE OF COMPLIANCE

I, Dominic E. Draye, do hereby certify that the foregoing Brief of Amici Curiae Americans for Prosperity Foundation and Americans for Prosperity in Support of Appellants is in compliance with Rule 14(a), Arizona Rules of Civil Appellate Procedure, in that it is double spaced except in footnotes and quotations, is prepared in 14-point proportionally spaced type Times New Roman and contains 4,652 words.

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CERTIFICATE OF SERVICE

I, Carolyn Smith, hereby certify that on the 22nd day of August, 2024, I caused the original of this Brief of Amici Curiae Americans for Prosperity Foundation and Americans for Prosperity in Support of Appellants to be electronically filed with the Court via AZTurboCourt.com:

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