***CENTER FOR ARIZONA POLICY V. HOBBS* — BACKGROUNDER**

Executive Summary

Everyone has the right to support causes they believe in without fear of harassment, retaliation, or being canceled. Unfortunately, a new measure in Arizona—Proposition 211—tramples on this foundational right. It requires individuals who donate to nonprofits to risk having their private information reported to the government and disclosed to the public. It was sold to Arizonans under the guise of transparency and "disclosure." But voters weren't told the full story. What disclosure really means is your identity ends up on a government list for everyone to see. What Prop 211 does is flip our constitutional arrangement on its head. Privacy is for individuals; transparency is for the government. Under Prop 211, there is compelled disclosure for individuals, while the government silences speech, and decides what rules and regulations to impose free from democratic accountability.

Prop 211—the Voters' Right to Know Act—enacts burdensome disclosure requirements for organizations that speak on issues of public concern in Arizona. The main requirement of Prop 211 is that organizations that spend more than $50,000 total "in campaign media spending" over a two-year period must disclose any donor who gave more than $5,000 during that same two years. The identity of the donors will then be reported to the government and made public.

This will open up donors, especially those who support unpopular causes, to violence, harassment, and the risk of "cancellation." This harmful measure applies to nonprofit organizations discussing issues of public importance across the ideological spectrum, and reaches the activities of traditional charities that engage in policy discussions.

This is why the Goldwater Institute, through its Scharf-Norton Center for Constitutional Government, is stepping in and leading the charge against the new law. Goldwater Institute attorneys are representing Arizona nonprofits and charitable donors who are choosing to exercise their fundamental constitutional right to speech and association.

Background

Anonymous political speech has been essential to democratic discourse since the founding of our republic. Ratification of the U.S. Constitution was primarily debated through a series of anonymous papers. Yet in recent years, anonymous political speech has been under attack by so-called "dark money" critics, who demand that government expose the identities of individuals, businesses, and nonprofits that spend money to participate in political dialogue. Couched as "transparency" measures, "dark money" disclosure mandates are often used as excuses to silence disfavored speech. These mandates have diluted political dialogue, invited harassment and retaliation against speakers, and chilled speech. Troublingly, disclosure mandates are sweeping the country in the form of vague and overbroad regulations reaching the activities of 501(c)(3) nonprofit organizations – groups that operate in nearly every sector and industry in the United States and represent views across the political and philosophical spectrum.

According to the National Center for Charitable Statistics, there are over 1.5 million nonprofit organizations in the United States.[1] These include schools, churches, art centers, public radio stations, research foundations, and other groups. Many of these charities sometimes work to influence public issues that are important to their members—from something as local as a new animal shelter to something as broad as national healthcare policy. This means adding their voice to the public debate on a given topic.

Unfortunately, cities and states across the country are implementing laws designed to make it harder for nonprofits to participate in policy debates, robbing the public of these important voices. These new laws, passed under the guise of "campaign finance" reform and "transparency," have little to do with public officials or individual candidates. Instead, they target groups that are merely speaking about whether a particular policy is a good or bad idea.

Here's how it works: A nonprofit chooses to discuss a policy issue, pending legislation, or a lawmaker who may be running for office. The group will communicate with the public through Facebook posts, a webpage, a newspaper advertisement, a mailer, a YouTube video, or one of countless other ways. Under new donor-disclosure laws, if the nonprofit spends a certain amount of money to spread its message, it must then file reports detailing its spending, and report the names, addresses, employers, and contributions amount of its donors to the government and then disclose that information to the public.

Charitable donors suddenly find that the donations they thought were private have become part of an official government record—one that is available to anyone with a computer and web browser. If those charities happen to be unpopular or to support controversial causes, then the families that chose to send in a contribution might find themselves targeted for harassment and intimidation by opponents of those causes.

This is not just speculation. The past decade has seen an increasing trend of harassment toward individuals and nonprofit groups that take controversial political opinions. Groups as diverse as Tea Party organizations and Planned Parenthood have been the focus of concerted retaliation efforts by people who disagree with their policy positions. For example, a 2014 report by the U.S. House of Representatives found that the IRS had systematically targeted conservative groups for scrutiny.[2] After passage of a controversial ballot initiative in California, opponents of the proposition created public websites that combined donor information with an interactive map, so that people could look up donors and their home addresses online.[3] One U.S. Senator even

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[1] Quick facts about nonprofits, National Center for Charitable Statistics, http://nccs.urban.org/data-statistics/quickfacts-about-nonprofits

[2] U.S. House of Representatives, The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress (Dec. 23, 2014), pp. i-ii, http://oversight.house.gov/wpcontent/uploads/2014/12/.

[3] Thomas M. Messner, The Price of Prop. 8, Heritage Foundation Backgrounder No. 2328 (Oct. 22, 2009), http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf.

lauded the idea of forcing nonprofit organizations to disclose the identities of their donors because it would have "a deterrent effect."[4]

Compelled disclosure has the effect of discouraging people from donating to nonprofits that take unpopular positions on public issues, thereby diminishing or silencing the voices of those nonprofits in the public debate.[5] Knowing this, a nonprofit might reasonably decide to remain silent on a particular topic, rather than be forced to turn its donor lists over to the government. But the reason our Constitution protects freedom of speech is precisely to protect people against retaliation when they speak on public issues—especially controversial ones.

Proposition 211 is a broad and freewheeling attack on anonymous speech

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Prop 211 defines "campaign media spending" in an extremely broad way. Unsurprisingly, it includes any public communication that supports or opposes a nomination or election of an individual. But it also includes public communications that simply refer to a candidate within 90 days of a primary election. There is no requirement that the communication advocate for or oppose the candidate or even that the communication is in any way related to the election. It is enough that the communication simply refers to a candidate for office, including a public official who may be running for reelection.

The disclosure requirements are also triggered by any public communication that "supports, attacks, or opposes the qualification or approval of any state or local initiative or referendum." That is, issue advocacy counts as campaign media spending and triggers disclosure requirements if the issue is on the ballot. Making matters worse is that any "research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for" a public communication about a candidate, initiative, or referendum counts towards the $50,000 threshold, making it easy for an organization to meet the threshold.

Prop 211 also requires that organizations disclose the "true source" of the money they receive. That is, once an organization receives a donation of over $5,000 and the donor does not "opt out" of having their donation used for campaign media spending, the organization must request the donor disclose all persons who gave more than $2,500 (indirectly or directly) that

[4] Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee
Hearing, July 17, 2012), https://www.youtube.com/watch?v=NHX_EGH0qbM.
[5] Dick M. Carpenter, Disclosure Costs: Unintended Consequences of Campaign Finance Reform, Institute for
Justice (March 2007), http://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf

enabled the donor's transfer to the organization. These persons will be disclosed, and the donor must keep a list of these persons for the Clean Elections Commission to inspect for five years.

Prop 211 also requires the disclosure of donors who have "opted out" of having their money used for campaign media spending in certain circumstances. If an organization engages in a public communication that qualifies as "campaign media spending," the organization will have to list the names of its top three donors on that communication irrespective of whether those donors have opted out of having their funds used for campaign media spending.

In addition to all these issues, Prop 211 also gives enormous powers to the Arizona Clean Elections Commission. The Commission is empowered to adopt and enforce rules, issue and enforce subpoenas, institute enforcement actions, conduct hearings, and impose fines all while being exempted from the normal rulemaking requirements – and even legislative oversight – in Arizona.

Legal Analysis

Prop 211 isn't just bad for public discourse, it also violates the Arizona Constitution. The right to freely speak—and speak anonymously—are fundamental rights and essential to the functioning of a healthy democratic republic. That's why the right is enshrined in the Arizona Constitution.[6] Nevertheless, governments continue to attack the free speech rights of anyone who participates in public discourse. Robust debate makes politicians' jobs harder and gives them less opportunity to shape their desired political outcomes. Many politicians and political operatives—including those behind this proposition—want fewer voices, not more. And disclosure laws like Prop 211 are an effective way to ensure that fewer organizations will speak about issues important to voters.

Fortunately, just three years ago the Arizona Supreme Court laid out a framework for evaluating laws that curtail Arizonans right to speak freely in *Brush & Nib Studio, LLC v. City of Phoenix*.[7] That framework mandates that Arizona courts apply "strict scrutiny" in evaluating government actions that curtain speech, like Prop 211. Prop 211 can only survive strict scrutiny if the *government* proves it is narrowly tailored to achieve a compelling government interest.[8]

The government will not be able to meet this high burden. Just like the numerous other disclosure laws that have been passed in recent years, there is no evidence that knowing a nonprofit's donors will lead to a more informed voting electorate. And the real demonstrable harm to individuals and nonprofits outweighs any speculative hopes that the requirements of Prop 211 will lead to beneficial outcomes for Arizonans.

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[6] Ariz. Const. Art. II, Sec. VI.
[7] 247 Ariz. 269 (2019).
[8] *Id.* at 292 ¶ 96.

What's more, Arizona's Constitution specifically protects the right to privacy in one's "private affairs."[9] The Private Affairs Clause prohibits, among other things, government efforts to investigate a private organization's financial dealings, or to compel the disclosure of an organization's financial records, books, and files, or to compel the public disclosure of tax information or other sensitive information. State v. *Mixton,* 250 Ariz. 282, 291 ¶¶ 34-35. This is exactly the sort of private information that Prop 211 seeks to disgorge from Arizona citizens.

Further, even without the significant violation to the Arizona Constitution's free speech protections, this regime would still fail. Prop 211 gives extensive legislative, executive, and quasi-judicial powers to the Arizona Clean Elections Commission—a commission created by *another* statutory initiative. This broad grant of interdepartmental powers and the raising of the Commission to what amounts to an independent "Fourth Branch of Government" violates Article III of the Arizona Constitution.

Under Article III, the powers of the government are to be divided into three separate branches and none of the three branches is supposed to exercise power given to one of the other two.[10] Here, a statutory body is entrusted with powers belonging to each of the three branches of government. What's more, Prop 211 explicitly exempts the Commission from any normal oversight from the legislature or the executive. The Commission is given free rein to enforce Prop 211 and is even allowed to spend the money it collects in fines on anything the Commission approves.[11] This violates the clear and direct requirements of Article III of the Arizona Constitution.

Prop 211 places onerous requirements on organizations that engage in public dialogue or issue advocacy. It puts donors at risk of doxing and harassment. And it is intended to chill constitutionally protected speech without any guarantee that donor disclosure will lead to better public policy outcomes.

Case Logistics

The Goldwater Institute represents the Center for Arizona Policy, the Arizona Free Enterprise Club, and two private donors in their suit against the Arizona Secretary of State and the Arizona Clean Elections Commission, and public officials charged with implementing and enforcing the measure in their official capacities.

The Case was filed in the Superior Court of Arizona in Maricopa County on December 13, 2022.

The Legal Team

[9] Ariz. Const. Art. II, Section 9.
[10] Ariz. Const. Art. III.
[11] A.R.S. § 16-976(B).

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