IN THE SUPREME COURT

OF THE STATE OF ARIZONA

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-Defendants Appellees.	Arizona Supreme Court No. CV-24-0295-PR Arizona Court of Appeals No. CA-CV 24-0272 Maricopa County Superior Court No. CV2022-016564

BRIEF OF *AMICI CURIAE* SPEAKER STEVE MONTENEGRO AND PRESIDENT WARREN PETERSEN FILED UNDER ARCAP 16(b)(1)(B)

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IDENTITY AND INTEREST OF AMICI CURIAE

Under Arizona Rule of Civil Appellate Procedure ("ARCAP") 16, Speaker of the House Steve Montenegro and President of the Senate Warren Peterson, on behalf of the 57th Arizona Legislature (the "Legislative Leaders"), submit this brief as *amici curiae* in support of the Center for Arizona Policy, the Arizona Free Enterprise Club, and Doe I and Doe II's (collectively, the "CAP Appellants") Petition for Review from the Court of Appeals opinion ("Opinion") upholding the constitutionality of Proposition 211, A.R.S. § 16-971, *et seq.* ("Prop 211").

Although this Court granted review of the Legislative Leaders' petition for review in *Montenegro v. Fontes*, No. CV-24-0166-PR, the CAP Appellants raise distinct constitutional questions about how Prop 211 violates the right of free speech guaranteed by the Arizona Constitution. While those infirmities would be enough to invalidate Prop 211 on their own, they are compounded by the facially unconstitutional delegation of legislative authority to the unelected, unchecked Arizona Citizens Clean Election Commission ("Commission").

Beyond impacting their interests in *Montenegro*, this case affects the Legislative Leaders' interests in, and they can provide perspective regarding, the issues at stake here and in future voter initiatives. *See* ARCAP 16(b)(1)(C)(ii)–(iii). As officers of the State of Arizona, the Legislative Leaders file this brief as matter of right under ARCAP 16(b)(1)(B).

INTRODUCTION

At first blush, Prop 211 appears to be a garden-variety campaign-finance law requiring entities who are engaged in "campaign media spending" to disclose its donors. A.R.S. § 16-973(A). But upon closer inspection, Prop 211 is nothing more than a complex house of cards that is unconstitutional on its face and definitely as applied to those forced to comply while engaging in constitutionally protected political debate.

To start, Prop 211's disclosure provisions are built on a shaky foundation. Prop 211's text is littered with unworkable, confusing, and incomplete provisions. Indeed, the Commission recognizes Prop 211's faults by attempting to limit the unconstitutional overreach of the measure through equally unconstitutional "advisory opinions." But two wrongs do not make a right. Unfortunately, the law delegates to the unelected Commission a blank check to take "any" action (including, apparently, unilateral authority to issue "advisory opinions" and create "safe harbors" absent from the statute) that "may assist in implementing" the law. A.R.S. § 16-974(A)(1), (8). Not only is the delegation devoid of any criteria to actually guide the Commission in implementation of this expansive power, but the Commission is also a politically unaccountable, unelected agency.

Given this unprecedented delegation of legislative power in violation of Article III, it is unsurprising that the Commission has granted itself the power to

issue "advisory opinions," create "safe harbors," and make substantive policy decisions through rules and opinions. Indeed, the Commission's advisory opinions on Prop 211's disclosure and opt-out requirements expose the law's constitutional fragility.

As the Petition explains, Prop 211's campaign disclosure laws (as rewritten by the Commission) burden political speech by requiring the identification of direct and indirect donors on additional disclosure reports and through a top-three donor disclaimer. The Opinion erred in concluding that these burdens are somehow narrowly tailored to the State's (unsupported) informational and anti-corruption interests because of Prop 211's opt-out provision or supposed limitation to "large" donors.

Prop 211's opt-out provision (also amended by the Commission) does not require covered persons to extend an opt-out notification to indirect donors. Thus, some of these donors will appear on Prop 211 disclosures without ever being given the opportunity to remain anonymous. And it is wrong to say that Prop 211 only applies to those making "large" contributions. Prop 211 goes well beyond existing disclosure statutes and their related thresholds without any supporting rationale. It is not narrowly tailored and cannot withstand even exacting scrutiny.

This Court should grant the Petition, reverse the Opinion, and hold that Prop 211 violates the right to free speech.

ARGUMENT

I. AS A CASE OF FIRST IMPRESSION INTERPRETING AND APPLYING ARIZONA'S FREE SPEECH RIGHTS, THIS COURT SHOULD GRANT REVIEW.

Regardless of this Court's adjudication of the Legislative Leaders' separation-of-powers challenges to Prop 211 pending in *Montenegro*, this Court should also grant this Petition and scrutinize the distinct constitutional questions raised by Prop 211's disclosure provisions.

This Court should grant a petition where "no Arizona decision controls the point of law in question" or "important issues of law have been incorrectly decided." ARCAP 23(d)(3). The Petition raises critically important issues regarding Prop 211's infringement on Arizonans' free speech rights. This Court has never addressed the appropriate test to resolve these issues, and the Opinion relied almost exclusively on federal caselaw. *See* Op. at 7 ¶ 17 ("[T]he Arizona Supreme Court has never addressed what level of scrutiny to apply to a compelled disclosure law…."), 9–17 ¶¶ 22–48 (exacting scrutiny analysis). The Petition thus presents an opportunity for this Court to set the level of scrutiny applicable to campaign disclosure laws and the degree of tailoring required for such laws.

Additionally, this Court should grant the Petition to correct the Opinion's application of exacting scrutiny to Prop 211, particularly its narrow tailoring analysis. The Commission's re-writing of Prop 211, and its use of advisory opinions

and rules to change Prop 211's requirements, is both a transparent power grab from an unelected Commission and confirmation that the law is not narrowly tailored at all. If the Opinion stands, it would allow other agencies to act similarly, opening a Pandora's Box that threatens the careful balances required by the separation of powers.

II. PROP 211'S LIMITLESS DELEGATION OF AUTHORITY TO THE COMMISSION EXACERBATES THE BURDEN ON FREE SPEECH RIGHTS.

As explained in the Petition and expanded on here, Prop 211 burdens free speech and is not narrowly tailored to the interests it ostensibly promotes. Prop 211 also creates an impermissible statutory work-around that violates Article III of the Arizona Constitution.

Specifically, Prop 211 empowers the Commission to "[a]dopt and enforce rules" and to "[p]erform any other act that may assist in implementing" the law. A.R.S. § 16-974(A)(1)–(8). That permissive language does not in any way restrain the Commission's powers and permits the Commission to take actions so long as they might possibly relate to Prop 211's implementation. *May*, Merriam-Webster[1] ("may" indicates possibility or probability); *May*, Black's Law Dictionary (11th ed. 2019). Because this delegation lacks an intelligible principle, Prop 211 hands the

[1] https://www.merriam-webster.com/dictionary/may/.

Commission policymaking power free from the ordinary restraints on lawmaking. *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022) ("If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible . . . ."); *Consumers' Research. v. FCC*, 109 F.4th 743, 762 (5th Cir. 2024) (discussing 47 U.S.C. § 254(b)(1) and noting that the qualifiers "should" and "affordable" "leaves FCC—and as importantly reviewing courts—utterly at sea").

Because Article III's boundaries are "part of an overall constitutional scheme to protect individual rights," *see State v. Prentiss*, 163 Ariz. 81, 84 (1989), Prop 211's standardless delegation sets a perilous foundation for the Commission's disregard of individual rights. Namely, the Commission has given itself more power, made major policy decisions, and rewritten the law. The Commission has given itself the power to issue "advisory opinions" and determined that persons entitled to rely on those opinions are immune from "any sanction provided in" Prop 211. A.A.C. R2-20-808(C)(4).[2]

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[2] Nothing in Prop 211 specifically authorizes advisory opinions. When the Legislature, as a matter of public policy, desires agencies to issue advisory opinions, it delegates that power specifically. *See*, *e.g.*, A.R.S. §§ 32-1405(C)(24) (Medical Board), 32-1606(A)(2) (Board of Nursing), 32-1803(C)(4) (Board of Osteopathic Examiners in Medicine and Surgery), 32-2003(A)(15) (Board of Physical Therapy), 32-3241 (Interstate Medical Licensure Compact Commission), 32-4103 (Board of Athletic Training), 38-519(C) (Legislative Ethics Committee), 41-103(A)(7) (Attorney General). Given the frequency with which legislation has specifically authorized the advisory opinion power, "we would expect to see the authority

Because Prop 211 left open myriad questions, regulated parties have reached vastly different interpretations of the law. *See* LegApp0029–0142. They have asked for the "advisory opinions" to answer those weighty questions, including at least two policy questions critical to this Court's analysis. *See infra* § III.A.

Moreover, the Commission has used its unrestricted rulemaking power to make additional policy choices that stray from statutory text. For example, the Commission redefined Prop 211's central term, "campaign media spending" under § 16-971(2)(a), to exclude certain activities that are not "specifically conducted in preparation for or in conjunction with" the statute's enumerated examples of "campaign media spending." A.A.C. R2-20-801(B). And it has gone beyond the plain terms of A.R.S. § 16-972(B)–(C) to require covered persons to treat donors "as having opted out" even if the donor opts out *after* the 21-day statutory holding period. *Id.* R2-20-803(E).

The upshot of all of this is that Prop 211 empowers an unelected Commission to directly regulate political speech. Worse, with unfettered authority to take *any* action that might assist in Prop 211's implementation, the Commission could change key policy decisions at any time. This regulatory uncertainty heightens Prop 211's already severe chilling effect and discourages individuals from participating in

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conveyed in [a statutory] provision, which is silent on the point." *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op, Inc.*, 207 Ariz. 95, 113 ¶ 60 (App. 2004).

political speech. Handing off the job of lawmaking to unelected agencies, free from the burdens of the ordinary legislative process, "'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

III. PROP 211'S DISCLOSURE PROVISIONS ARE NOT NARROWLY TAILORED.

Disclosure regimes will generally only pass muster if "the strength of the governmental interest ... reflect[s] the seriousness of the actual burden on First Amendment rights," *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1243 (10th Cir. 2023), and are "narrowly tailored to the government's asserted interest," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021) (explaining that "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'"). *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) (recognizing that "[r]egulations on speech . . . must meet a higher standard of clarity and precision"). To be sure, courts have approved certain limited "governmental interests [that are] sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). But a disclosure regime cannot stand when

it becomes untethered from these interests or imposes disproportionate burdens on regulated entities.

In applying this framework, the Opinion concluded that Prop 211 is sufficiently tailored, ostensibly because donors have an opportunity to remain anonymous by "opting out" of having their funds used for campaign media spending and because only "big spenders" who contribute "larger donation amounts" are subject to disclosure. In addition to the reasons articulated by the Petition, both lines of reasoning are wrong.

A. Contrary to the Opinion's Reasoning, Some Indirect Donors May Never Be Given the Chance to "Opt-Out."

Under Prop 211, covered persons must report to the Secretary of State the "identity of each donor of original monies who contributed, directly ***or indirectly***, more than $5,000 of traceable monies or in-kind contributions for campaign media spending during the election cycle . . ." A.R.S. § 16-973(A)(6) (emphasis added). In addition to disclosure reports, all "[p]ublic communications by covered persons shall state, at a minimum, the names of the top three donors who directly ***or indirectly*** made the three largest contributions of original monies during the election cycle to the covered person." *Id.* § 16-974(C) (emphasis added).

After regulated parties raised competing interpretations of the top-three donor rule, the Commission issued an advisory opinion "interpreting" the rule. In reality, the Commission made a unilateral policy decision that the top-three donor rule

requires a covered persons to list the top three sources of "original monies," regardless of whether that contribution was made directly or indirectly to the covered person, and expressly excludes "intermediaries" like PACs that directly contribute to the covered person. LegApp0008–09; *see also* A.R.S. § 16-971(12); LegApp0138–42 (noting conflicting interpretations of A.R.S. § 16-974(C)).

A lynchpin of the Opinion's exacting scrutiny analysis was its belief that these disclosure provisions were sufficiently tailored, in part because Prop 211's so-called "opt-out" provision allows some donors to remain anonymous. Op. at 10, 13, 15 ¶¶ 26, 37, 42. That misunderstands how the opt-out provision works.

Before a covered person "may use or transfer a donor's monies for campaign media spending, the donor must be notified in writing that the monies may be so used [for campaign media spending] and must be given an opportunity to opt out of having the donation used or transferred for campaign media spending." A.R.S. § 16-972(B). But this requirement does not facially apply to indirect donors. *Id.* In another advisory opinion, the Commission (again unilaterally) declared that "[t]he plain text of the Act does not impose on a donor who is not a covered person an obligation to provide the notice to those who may donate to that donor." *See* LegApp0022. In other words, Prop 211, as amended by the Commission, only requires that covered persons give notice to its direct donors, and an "intermediary"

directly donating to a covered person has no obligation to give its donors an opportunity to opt-out.

Thus, indirect donors are subject to Prop 211's disclosure requirements without having an opportunity or opt-out (or frankly without any knowledge of the covered person's existence or use of their funds). Accordingly, it is wrong to say, as the Opinion did, that all "[d]onors who prefer to remain anonymous may opt out of having their contributions used for campaign media spending, ensuring their identities are never made public." Op. at 4 ¶ 7; *see also id.* at 10, 13, 15 ¶¶ 26, 37, 42. If an indirect donor is never even informed that their monies will be used for campaign media spending, the opt out provision is illusory and cannot support a finding that either of Prop 211's disclosure laws are narrowly tailored.

Even if the Court found the disclosure reports requirement was narrowly tailored, Prop 211 still falls short in tailoring because of the disproportionate burdens imposed by the top-three donor rule. The top-three donor rule subjects donors to placement on all public communications (including TV ads and billboards), which is far more burdensome than listing a name on a disclosure report. If an indirect source of original monies qualifies as a top three donor to the covered person, that person will be exposed to this highly burdensome disclosure, without any requirement that those donors be given notice of the association or speech.

In response, Appellees argue that "[n]othing in the Act prevents a chain of donors from talking with each other or restricting how funds may be transferred to others." VRTK A.B. at 11; *see also* LegApp0149 at 46:5–12 (reasoning that there is "no reason why a PAC can't tell its donors that -- its subdonors that their names may be disclosed"). That an intermediary donor to a covered person *may* of its own accord discuss how it intends to spend its donors' money has no bearing on whether Prop 211's disclosure obligations are narrowly tailored.

At bottom, the opt-out provision is not the constitutional safeguard the Opinion imagined it would be. The Opinion should be reversed on this point alone.

B. Prop 211 Imposes Significant Burdens on Small-Dollar Donors.

Additionally, both the Opinion and Appellees suggest that Prop 211's limitation to "large dollar amounts" somehow evinces that it is narrowly tailored "by removing the disclosure burden on ordinary citizens who make modest campaign contributions and decreasing the reporting obligations on the covered persons." Op. at 16 ¶ 44. This is wrong for two reasons.

First, Prop 211 requires intermediaries disclose indirect donors contributing over $2,500 and covered persons disclose direct and indirect donors over $5,000 (both in reports and in the top-three disclaimer).

While these limits might be considered "large contributions" relative to the maximum contributions allowable to a candidate committee (*i.e.*, $5,400 for

statewide and legislative candidates from individuals or non-multicandidate PACs), Prop 211 does not apply to contributions to candidate committees. *See* A.R.S. § 16-971(2)(a) (defining campaign media spending as certain public *communications*, get out the vote activities, and activities "in preparation for or in conjunction with" the same); *cf.* LegApp0023–28. This is not the correct context to determine whether a contribution is a large one.

Rather, Prop 211 applies to a group of activities that virtually subsumes the definition of issue advocacy and independent expenditures. *Compare* A.R.S. § 16-971(2)(a) (defining campaign media spending to include public communications that "expressly advocates for or against the nomination, or election of a candidate" and "promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum"), *with id.* §§ 16-901(31) (defining independent expenditure an one that "expressly advocates the election or defeat of a clearly identified candidate" that is not coordinated with the candidate) *and* 16-901(4) (defining ballot measure expenditure as one that "expressly advocates the support or opposition of a clearly identified ballot measure").

In this context, individuals and entities are permitted to make *unlimited* contributions to political action committees and to engage in issue advocacy and independent expenditures. Arizona Secretary of State, *Campaign Contribution*

Limits 2023–2024 Election Cycle (Jan. 1, 2023);[3] *see also SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010). As a result, VRTK's efforts (at 1) to characterize Prop 211 as applying only to "big campaign spenders" is a misnomer.

Second, Prop 211's top-three donor rule far surpasses comparable laws enacted by the Legislature. Before Prop 211's passage (and for all non-covered persons after its passage), Arizona law provided a similar top three disclaimer on any "advertisement or fundraising solicitation." A.R.S. § 16-925(B). However, unlike Prop 211's top-three donor rule, § 16-925 only requires ***PACs*** to disclose their top three donors, and only when those donors are also PACs contributing over $20,000 in an election cycle. *Id.*

In contrast, Prop 211 specifically requires that *all* covered persons disclose *any* donor—not just PACs—that "directly or indirectly made the three largest contributions" to the covered person. *See id.* § 16-974(C). Thus, an indirect donor who contributes $5,001 to a PAC, which then contributes that money to a covered person, has less privacy than a PAC contributing $20,000 to a non-covered person.

[3] https://azsos.gov/sites/default/files/2023-11/2023_2024_contribution_limit_chart_final.pdf.

So while the Commission has adopted rules stating that only donors who opt in are covered by this "top three donor" rule, A.A.C. R2-20-805(B),[4] only direct donors have a meaningful opportunity to avail themselves of this privilege. For example, if a PAC declines to opt out of its funds being utilized as campaign media spending, but fails to notify its donors of its decision, it is possible that an upstream donor who did not intend for its contributions to go toward campaign media spending could qualify as a top-three donor without even knowing that its contribution would eventually end up in the hands of a covered person.

Tellingly, nothing in Prop 211 provides any other recourse or privacy protection to these unwitting donors, whose speech is all but certain to be chilled by the initiative's broad reach. And the Commission's efforts to re-write the disclaimer provision to encompass unknowing indirect contributors, *see* LegApp0022, only highlights how the separation-of-powers concerns compound the free speech tailoring issues raised by the CAP Appellants. *See Bonta*, 594 U.S. at 608.

These points also demonstrate why Prop 211's disclosure laws do not serve the purported governmental interests of anti-corruption and information. *See* VRTK

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[4] Under this rule, "[p]ublic communications by covered persons shall state the names of the top three donors who directly or indirectly made the three largest contributions of original monies in excess of $5,000 for the election cycle and who have not opted out pursuant to A.R.S. § 16-972. . ." A.A.C. R2-20-805(B).

Resp. at 5–6, Commission Resp. at 10–14. Because Prop 211 does not apply to direct contributions to candidate campaigns, there is no anti-corruption interest served. *See* Pet. at 11–13. And, if Prop 211 mandates disclosure of indirect donors who do not even know the covered person exists or what the covered person is advocating for or against, there is no meaningful information gained from the public disclosure.

CONCLUSION

In sum, Prop 211's unprecedented upending of the constitutional order significantly compounds the overbreadth and tailoring issues raised by the Petition. This Court should grant review of the Petition to resolve the important issues raised therein and hold that Prop 211 violates the right to free speech.

RESPECTFULLY SUBMITTED this 27th day of February, 2025.

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