

**ARIZONA SUPREME COURT**

BEN TOMA, in his official capacity as  
Speaker of the Arizona House of  
Representatives; WARREN  
PETERSEN, in his official capacity as  
President of the Arizona Senate,

Plaintiff-Appellants,

v.

ADRIAN FONTES, in his official  
capacity as Arizona Secretary of State;  
ARIZONA CITIZENS CLEAN  
ELECTIONS COMMISSION, an  
agency of the state of Arizona,

Defendant-Appellees,

and

KRIS MAYES, in her official capacity  
as Arizona Attorney General;  
VOTERS' RIGHT TO KNOW, an  
Arizona political action committee,

Intervenor- Defendant-  
Appellees.

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Supreme Court No. T-24-0001-CV

Court of Appeals

No. 1 CA-CV 24-0002

Maricopa County Superior Court

No. CV2023-011834

**BRIEF OF AMICI CURIAE  
AMERICANS FOR PROSPERITY  
FOUNDATION AND AMERICANS  
FOR PROSPERITY IN SUPPORT  
OF PETITION TO TRANSFER**

**(Filed pursuant to ARCAP  
16(b)(1)(A) with the written 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 impact 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 Americans for Prosperity*

*v. Meyer*, No. 2:23-cv-00470 (D. Ariz.). On March 20, 2024, the court dismissed the suit with leave to amend by April 10, 2024.

## INTRODUCTION

The Petition for Transfer raises important issues concerning the separation of powers, which are “part of an overall constitutional scheme to protect individual rights.” *State v. Prentiss*, 163 Ariz. 81, 84 (1990). As the Petition notes, the separation of powers “is central to liberty, and when we destroy it, we place liberty at peril.” Pet. at 1 (quoting *Roberts v. State*, 253 Ariz. 259, 268 ¶ 28 (2022)). This dynamic is vividly illustrated by Proposition 211, which not only transgresses Arizona’s separation of powers but poses unprecedented threats to free speech by sweeping more broadly and invasively than any such disclosure law ever has. Although purporting to regulate “campaign media spending,” A.R.S. § 16-971(2), the law extends far beyond elections and ensnares issue advocacy. Given its anomalous, indiscriminate intrusions into vast swathes of core political expression, Proposition 211 violates the First Amendment. Before those issues are decided, however, this Court should resolve the threshold questions presented here. Those questions might be less galvanizing than First-Amendment ones, but resolving them could obviate the chill that is otherwise being cast. Particularly with the 2024 election underway, this Court should grant the Petition.

## LEGAL STANDARD

This Court may transfer an appeal when “extraordinary circumstances justify transfer,” Ariz. R. Civ. App. P. 19(a)(3), including to decide issues of “statewide

importance.” *Hall v. Elected Officials’ Ret. Plan*, 241 Ariz. 33, 38 ¶ 13 (2016). Statutes burdening First Amendment rights raise “important issues of statewide concern.” *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 257 ¶ 8 (2023). Proposition 211 poses statewide and *nationwide* concerns, particularly given its unprecedented look-through provision, which far transcends Arizona’s borders. Moreover, transfer may be especially appropriate to resolve election-related disputes “before an upcoming election.” *See Perini Land & Dev. Co. v. Pima Cnty.*, 170 Ariz. 380, 382 (1992).

## ARGUMENT

### **A. Proposition 211 Burdens First Amendment Rights.**

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 Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021). But Proposition 211 trammels that right, subjecting donors to governmental “doxxing.” Such laws are subject to “exacting scrutiny,” which requires the law to be “narrowly tailored to the interest[s]” it purports to promote. *Id.*

Proposition 211 is not “narrowly tailored.” Its 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. *Id.* § 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. Advocacy groups across the spectrum must now think twice before addressing how state prosecutors handle issues ranging from abortion to election integrity.

“[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”<sup>1</sup> initiative enabling local governments to ban puppy mills; to Scottsdale’s Proposition 420<sup>2</sup> protecting the McDowell Sonoran Preserve; to the proposed “Protect Arizona Agriculture

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<sup>1</sup> Available at <https://apps.azsos.gov/election/2016/general/initiatives.htm>.

<sup>2</sup> 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/>.

Act,”<sup>3</sup> which would have regulated use of agriculture chemicals. Such measures predictably occasion 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 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.

And under Proposition 211, regulated groups must publicly disclose not only their donors, but their donors’ donors (and so on) back to the “original source[]” of funding. A.R.S. § 16-973(A)(7). This applies even if the “original sources” who indirectly provided funds never foresaw or intended that their donations would be

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<sup>3</sup> Available at <https://apps.azsos.gov/election/2020/general/ballotmeasuretext/I-10-2020.pdf>.

used for “campaign media spending.” Such “donors” thus face disclosure even though they never knew downstream organizations would receive their funds.

Proposition 211 imposes other burdens too. It requires covered groups to provide direct donors an “opt out” notice; the group must then sit silent for up to 21 days unless donors consent to their funds being used for campaign spending. A.R.S. § 16-972(B). The law also requires record-keeping of direct and indirect donors who contribute over \$2,500. A.R.S. § 16-972(D). Proposition 211 levies these burdens even if the group’s “major purpose” is not electioneering, *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976), while carving out special treatment for unions and media companies. A.R.S. §§ 16-971(1)(b) & (2)(b)(i).

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 seemingly defy the law’s text. Worse, private parties are empowered to enforce Proposition 211 pursuant to *their own* interpretations, however expansive and aggressive those may be. A.R.S. § 16-977. Arizona voters can file “a verified complaint” with the Citizens Clean Elections Commission, *id.* § 16-977(A), which the Commission must “investigate” and pursue wherever plausible. *Id.* § 16-977(B). If the Commission declines, a private party can file suit to “compel” enforcement. *Id.* § 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*. 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*, 141 S. Ct. at 2385.

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

**C. Transfer Can Obviate Chilling of Protected Expression.**

Although the Petition does not raise challenges “based on speech,” that is no reason to deny it, as Respondents suggest. Response at 3. Resolving threshold issues concerning “the separation of powers, non-delegation doctrine, and Voter Protection Act” could invalidate Proposition 211, thereby mooting the “lawsuits [that] have challenged Prop. 211 on speech-related grounds.” *Id.* Most importantly, it would prevent profound chill that is otherwise being felt in Arizona and beyond. This Court should therefore address the Petition’s threshold issues and potentially vindicate First Amendment interests that will otherwise require separate treatment.

**D. Transfer Is Appropriate in Light Of The Election.**

The time to decide these questions is now. Particularly with the 2024 election underway, advocacy groups nationwide seek a robust exchange on issues that matter to their fellow citizens. Indeed, “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 v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). Yet Proposition 211 chills debate precisely when it matters most. To ensure First Amendment rights are not dampened at a critical juncture, this Court should grant the Petition and decide Proposition 211’s validity.

**CONCLUSION**

The Petition should be granted.

DATED this 21st day of March, 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 Petition to Transfer is in compliance with Rule 14(a), Arizona Rules of Civil 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 1,394 words.

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## CERTIFICATE OF SERVICE

I, Carolyn Smith, hereby certify that on the 21st day of March, 2024, I caused the original of this Brief of Amici Curiae Americans for Prosperity Foundation and Americans for Prosperity in Support of Petition to Transfer to be electronically filed with the Court via AZTurboCourt.com:

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