

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.

Supreme Court No. CV-24-0166-PR

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 FOR REVIEW**

(Filed pursuant to ARCAP
16(b)(1)(A) with the written consent
of the parties)

GREENBERG TRAUIG, LLP

Dominic E. Draye

drayed@gtlaw.com

2375 E. Camelback Rd., Suite 800

Phoenix, AZ 85016

(602) 445-8425

Attorney for Amici

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI.....	i
INTRODUCTION	1
ARGUMENT	2
A. Proposition 211 Burdens First Amendment Rights.	2
B. Proposition 211 Imposes Burdens Nationwide.....	6
C. Review Can Obviate Chilling Of Protected Expression.	7
D. Review Is Appropriate In Light Of The Election.	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>Americans for Prosperity Found. v. Bonta</i> , 141 S. Ct. 2373 (2021)	2, 6
<i>Americans for Prosperity v. Meyer</i> , No. 2:23-cv-00470 (D. Ariz.).....	i
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	5
<i>Roberts v. State</i> , 253 Ariz. 259 (2022)	1
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	7
<i>State v. Prentiss</i> , 163 Ariz. 81 (1990)	1
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	1

Statutes

A.R.S. § 16-971	passim
A.R.S. § 16-972	5
A.R.S. § 16-973	5
A.R.S. § 16-977	6

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 is dedicated to the belief that every person has a unique set of gifts and the ability to contribute to society in their own way, an idea that has inspired progress since our nation’s founding. True to this belief, AFP engages in broad-based grassroots outreach to advocate for long-term solutions to the country’s biggest problems—including government spending and debt, immigration reform, economic protectionism, and a host of other issues. AFP funds its activities by accepting donations from donors through 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 issues in Arizona, such as by running advertisements opposing passage of Proposition 211.

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.). AFP and AFPF filed their Opening Brief in that case on September 16, 2024.

INTRODUCTION

The Petition for Review 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, “Our constitution’s framers devoted an entire article to separation of powers, comprised of a single command: ‘The powers of the government of the state of Arizona shall be divided into three separate departments ... and ... no one of such departments shall exercise the powers properly belonging to either of the others.’” *Roberts v. State*, 253 Ariz. 259, 268 ¶ 32 (2022) (quoting Ariz. Const. art. III). Pet. at 1. Proposition 211 violates this structure, not only transgressing Arizona’s separation of powers, but also posing unprecedented threats to the individual rights the separation of powers is designed to protect.

Indeed, Proposition 211, as the Petition notes, provides a “cocktail of powers” “transforming the [Citizens’ Clean Election] Commission into an unelected super-branch” with legislative, administrative, investigative, and quasi-judicial power. Pet. at 9. Proposition 211’s consolidation of these powers in a single body is especially dangerous for free speech rights, which this Court and others have noted are particularly vulnerable to “chilling” by potential sanctions. *See Wieman v Updegraff*, 344 U.S. 183 (1952). Thus, although the separation of powers protects all individual rights, it is especially vital for the fragile right to speak freely.

Although purporting to regulate “campaign 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. Before those issues, which are also of statewide importance, are decided, however, this Court should resolve the threshold questions presented here. Those questions might be less galvanizing than First Amendment ones, but they are no less important and resolving them could obviate the chill that is otherwise being felt. Particularly with the 2024 election underway, this Court should grant the Petition.

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 Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (“AFPF”). 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.* This is so because the “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.” *Id.* at 2382 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Narrow tailoring in regard to compelled disclosure of donor information requires a “means-end fit,” which prohibits universal disclosure regimes that “cast[] a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases.” *Id.* at 2386–87.

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. 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”¹ initiative enabling local governments to ban puppy mills; to Scottsdale’s Proposition 420² protecting the McDowell Sonoran Preserve. Such measures predictably occasion public debate and most importantly so in the 90 days before voting occurs.

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

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

² 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/>.

taken by a political party, allowing regulators to 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 used for “campaign media spending.” Such “donors” thus face disclosure even though they never knew downstream organizations would receive their funds. Such surprise disclosures seem destined—if not designed—to chill donations.

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 may defy the law’s text. Worse, private parties

are empowered to enforce Proposition 211 pursuant to *their own* interpretations, however expansive those may be. A.R.S. § 16-977. Arizona voters can file “a verified complaint” with the Commission, *id.* § 16-977(A), which the Commission must “investigate” and pursue where plausible. *Id.* § 16-977(B). If the Commission declines, a private party can sue 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. *AFPF*, 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 contributes 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. Review Can Obviate Chilling Of Protected Expression.

Although the Appeal does not raise challenges based on the First Amendment, resolving threshold issues concerning “the separation of powers, non-delegation doctrine, and Voter Protection Act” could invalidate Proposition 211, thereby mooted the lawsuits that have challenged Proposition 211 on First Amendment grounds. Most importantly, it would prevent profound chill that is otherwise being felt in Arizona and beyond. This Court should therefore address the Appeal’s threshold issues and potentially vindicate First Amendment interests that will otherwise require separate treatment.

D. Review 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 17th day of October 2024.

GREENBERG TRAURIG, LLP

/s/ Dominic E. Draye

Dominic E. Draye

drayed@gtlaw.com

2375 E. Camelback Rd., Suite 800

Phoenix, AZ 85016

(602) 445-8425

Attorney for Amici Americans for
Prosperity & Americans for Prosperity
Foundation

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 for Review is in compliance with Rules 16(d)(1) and 23(g), 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 1,845 words.

GREENBERG TRAUIG, LLP

/s/ Dominic E. Draye

Dominic E. Draye

drayed@gtlaw.com

2375 E. Camelback Rd., Suite 800

Phoenix, AZ 85016

(602) 445-8425

Attorney for Amici Americans for
Prosperity & Americans for Prosperity
Foundation

CERTIFICATE OF SERVICE

I, Tammy Mowen, hereby certify that on the 17th of October, 2024, I caused the original of this Brief of Amici Curiae Americans for Prosperity Foundation and Americans for Prosperity In Support of Petition for Review to be electronically filed with the Court via AZTurboCourt.com:

Clerk of the Court
Arizona Supreme Court
1501 West Washington Street, Suite 402
Phoenix, Arizona 85007

And served via AZTurboCourt.com e-service and e-mail to:

Brett W. Johnson
Ryan P. Hogan
Charlene Anne Warner
Tracy A. Olson
SNELL & WILMER
One E. Washington Street, Suite 2700
Phoenix, AZ 85004
bwjohnson@swlaw.com
rhogan@swlaw.com
tolson@swlaw.com
cwarner@swlaw.com
Attorneys for Plaintiffs / Appellants

Craig A. Morgan
Shayna Gabrielle Stuart
SHERMAN AND HOWARD LLC
2555 E. Camelback Road, Ste. 1050
Phoenix, AZ 85016
cmorgan@shermanhoward.com
sstuart@shermanhoward.com
Attorneys for Defendant / Appellee Adrian Fontes

Mary R. O'Grady
Eric M. Fraser
Emma J. Cone-Roddy
Sarah P. Lawson
OSBORN MALEDON
2929 N. Central Ave., Suite 2000
Phoenix, AZ 85012
mograd@omlaw.com
efraser@omlaw.com
econe-rod@omlaw.com
slawson@omlaw.com

Attorneys for Defendant / Appellee Arizona Citizens Clean Elections Commission

Alexander W. Samuels
Nathan Arrowsmith
Luci Danielle Davis
ARIZONA ATTORNEY GENERAL'S OFFICE
2005 N. Central Avenue
Phoenix, AZ 85004
Alexander.Samuels@azag.gov
Nathan.Arrowsmith@azag.gov
Luci.Davis@azag.gov

Attorneys for Intervenor / Appellee Attorney General Kris Mayes

David Kolker
Tara Malloy
Elizabeth D. Shimek
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 2005
dkolker@campaignlegalcenter.org
tmalloy@campaignlegalcenter.org
eshimek@campaignlegalcenter.org

Daniel J. Adelman
Chanele N. Reyes
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
352 E. Camelback Road, Suite 200
Phoenix, AZ 85004
danny@aclpi.org

chanele@aclpi.org

Attorneys for Intervenor / Appellee Voters' Right to Know

Michael G. Bailey

Arizona Chamber of Commerce

100 N. 7th Avenue, Suite 120

Phoenix, AZ 85007

[mbailey@azchamber.com](mailto:m Bailey@azchamber.com)

Attorney for Amicus Curiae Arizona Chamber of Commerce

/s/ Tammy Mowen