No. 24-2933

In the United States Court of Appeals for the Ninth Circuit

AMERICANS FOR PROSPERITY and AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiffs-Appellants

v.

DAMIEN R. MEYER, in his official capacity as Chairman of the Citizens Clean Elections Commission, *et al.*,

Defendants-Appellees

and

VOTERS' RIGHT TO KNOW and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Intervenors-Defendants-Appellees

On appeal from the United States District Court
for the District of Arizona (No. 2:23-cv-470)
Hon. Roslyn O. Silver, District Judge

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* Institute for Free Speech, Brett R. Nolan, certifies that IFS is not a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation has a substantial interest in the outcome of this litigation.

/s/ Brett R. Nolan

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and civil society organizations in litigation securing their First Amendment liberties. IFS also files *amicus* briefs in cases raising important First Amendment questions, and it has an interest here because the panel's decision will have widespread effects, influencing how governments regulate donor disclosure throughout the circuit.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or its counsel, financially contribute to preparing or submitting this brief. All parties have consented to IFS filing this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 211 imposes sweeping disclosure rules unlike anything seen before. On every metric, the law expands on its predecessors. It covers *more* people, *more* speech, for *longer* time. Where other laws narrow, Proposition 211 widens. It is a drastic evolution in compelled disclosure—and one that does not survive First Amendment scrutiny.

Disclosure laws are nothing new in American elections. Fifty years ago, the Supreme Court upheld narrow reporting requirements for election-related speech in *Buckley v. Valeo*, 424 U.S. 1 (1976). And since then, Congress and the states have experimented with various kinds of similar rules.

But not all those experiments have survived the First Amendment. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Although disclosure rules face less scrutiny than laws directly limiting political speech, that scrutiny is still *exacting*. "The government may regulate in the First Amendment area only with narrow specificity, and compelled disclosure regimes are no exception." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021) (cleaned up). That's because "compelled disclosure of affiliation with groups engaged in advocacy

may constitute as effective a restraint on freedom of association as" prohibiting association itself. *See id.* at 606. So to satisfy the First Amendment, states must carefully limit the reach of any disclosure requirement they impose. *Id.* at 606–07.

Exacting scrutiny calls on courts to engage in the familiar exercise of weighing the burden on speech against the government's interest, asking whether the law is "narrowly tailored" to achieve a permissible goal. *Id.* at 607. This brief offers a fresh way to think about the problem. Every disclosure rule makes a similar set of choices: *Who* must be identified? *What* speech does it cover? *Where* does that speech occur? And *when* does that speech happen? Each choice alters the terrain, "sweeping up" speech in different ways—often to dramatic effect. *Id.* at 616–17. Expanding *who* must disclose their speech while limiting *when* that disclosure happens produces a burden much different than expanding both. And the government's interest likewise rises and falls based on those choices.

This case exemplifies the problem. Proposition 211 expands on other disclosure rules in virtually every way. It does not limit disclosure to speech about elections, to speech close in time to elections, or to speech

by those engaged mainly in election advocacy. It does not limit disclosure to donors who intend to support election advocacy, or even donors who know their dollars might be used for election advocacy. By expanding every part of an ordinary disclosure rule, Proposition 211 "accomplishes a shift in kind, not merely degree." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) ("*NFIB*") (Roberts, C.J., op.). And that shift in kind turns a series of individually problematic provisions into a cataclysmic First Amendment violation.

ARGUMENT

I. THE WHO, WHAT, WHERE, AND WHEN OF DISCLOSURE RULES.

Disclosure rules must be narrowly tailored to reflect the seriousness of the burden given the state's purported interest. One way to think about this problem is by asking *who* must be identified, *what* speech is subject to the rule, *when* that speech triggers disclosure, and *where* that speech occurs. Each issue shapes both the burden on speech and the strength of the state's interest.

A. Who must be identified?

"The first federal disclosure law was enacted in 1910" and drew lines based on the speaker's identity. *See Buckley*, 424 U.S. at 61. The law

required "political committees" (organizations that exist to influence elections) to disclose their major donors and any expenditures over a certain threshold. Other speakers—those not classified as political committees—could spend money on elections without disclosing their donors, and they only had to report expenditures over a threshold five times higher than that for political committees. *Id.*

By the time the Supreme Court weighed in on these laws, Congress had passed the Federal Election Campaign Act of 1971 (FECA) and modified the disclosure rules. But FECA's original version still focused in large part on *who* was speaking. The law required different disclosures for candidates and political committees than other groups making independent expenditures. *Id.* at 74–75. And as part of that, only candidates and committees had to identify their donors. *Id.*

Buckley set the foundation for assessing the government's interest in these kinds of rules. Applied to candidates, donor disclosure "provides the electorate with information as to where political campaign money comes from," *id.* at 66, and allows the public to "detect any post-election special favors that may be given in return," *id.* at 67. So, the Court reasoned, the state has a significant anticorruption interest in

disclosure rules that require identifying who is donating to particular candidates.

That interest changes for disclosure rules affecting independent advocacy groups. Disclosing the existence of expenditures still allows voters to learn about who might be influencing a candidate through support. *Id.* at 67, 76. But donating to an independent advocacy group does not raise the risk of *quid pro quo* corruption because such groups have no public power to wield for their donors. Thus, while disclosing a candidate's donors deters corruption by "arm[ing]" the public "with information about a candidate's most generous supporters," *id.* at 67, the same is not true for revealing the identity of donors to independent advocacy groups.

Even further removed from the narrow informational interest that *Buckley* identified are laws requiring disclosure of "indirect donors"—that is, of donors who gave financial support to a third party, that in turn made its own independent decision to support a candidate or advocacy group. Requiring disclosure there, when the original donor has no idea that one organization might donate to another (sometimes years later), does not further any of the informational interests that *Buckley*

first described. That indirect donor is not a "generous supporter" of a candidate or even the advocacy organization that eventually received support. Nor could anyone reasonably think that such an indirect donor would expect *quid pro quo* from an advocacy organization that the donor might not even know exists. The further out one moves in regulating *who* must be identified on a disclosure report as a donor, the weaker the state's interest is.

B. What speech is covered?

Disclosure rules also apply based on what the speaker talks about. Even people who are not candidates or groups that do not primarily exist for political advocacy must sometimes disclose election-related expenditures. Spend enough money talking about an election and most jurisdictions will require you to file reports listing your expenditures. *See, e.g.*, 52 U.S.C. § 30104(f). These rules are often triggered by, among other things, what the speaker says. Federal law, for example, defines an "electioneering communication" in part as a communication that "refers to a clearly identified candidate for Federal office." 52 U.S.C. § 30104(f)(3)(A)(i)(I). Many states adopt similar rules for activating

disclosure obligations. *See, e.g.*, Cal. Gov't Code § 85310; N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10; Wyo. Stat. § 22-25-101(d)(i)(A).

Like regulating *who* must be disclosed, the government's interest shifts (and often dissipates) based on *what* kind of speech triggers the compelled disclosure. Speaking about a ballot issue "present[s] neither a substantial risk of libel nor any potential appearance of corrupt advantage," *McIntyre*, 514 U.S. at 351–52, and so the government's interest in disclosing the source of such speech is not as strong as speech about the "elections of public officers," *id.* at 351–52 & n.15 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). While the Supreme Court has held that the government maintains some interest in disclosure not tied to corruption, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791–92 (1978), that interest is significantly weaker.

The state's interest diminishes even further once you start regulating speech unrelated to elections. The Supreme Court has consistently tied the government's interest in disclosure to informing voters about persuasive, election-centered speech. In *Buckley*, the Court

zeroed in on the voters' interest in knowing where "campaign money" comes from when "evaluating those who seek federal office." 424 U.S. at 66–67. In *Citizens United*, the Court likewise emphasized that speech about someone's "candidacy" helps make sure that "voters" are "fully informed." *Citizens United v. FEC*, 558 U.S. 310, 368 (2010). And this Court has tethered the government's interest in disclosure and speech to elections and persuading people about how to vote. *See, e.g.*, *Human Life Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010) ("An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.").

So important is this distinction that *Buckley* narrowly interpreted FECA to stop it from requiring groups to report expenditures when they are "engaged purely in issue discussion." 424 U.S. at 79. The law there required disclosure for "both issue discussion and advocacy of a political result." *Id.* "[T]o insure that the reach of [the law] is not impermissibly broad, [the Supreme Court] construe[d] 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Requiring more

created a mismatch between the state's interest and the speech the law covered.

Thus, the Supreme Court has always focused on *what* kind of speech triggers disclosure because the state's interest is often "different and less powerful" depending on the subject. *McIntyre*, 514 U.S. at 356. And since compelled disclosure "undeniably impedes protected First Amendment activity," rules that rely on a "less powerful" interest stand on shaky ground. *See id.* at 355–56.

C. Where does the speech occur?

Disclosure rules also vary depending on where the speech occurs. Federal law, for example, requires any person making an "electioneering communication" to disclose her expenditures when delivered via "broadcast, cable, or satellite" and "targeted to the relevant electorate," 52 U.S.C. § 30104(f)(3)(A)(i). That excludes all kinds of common communications, including online digital speech that may reach many jurisdictions without targeting a particular group of voters. Other laws are more expansive. *See*, *e.g.*, Ala. Code § 17-5-2(6) ("Any communication disseminated through any federally regulated broadcast media, any mailing, or other distribution, electronic

communication, phone bank, or publication . . . ."); Cal. Gov't Code § 85310(a).

It's easy to see how expanding or contracting this issue increases and decreases the burden on speech. The wider the net one casts, the more speech one catches. That is particularly troublesome for online speech, which is disseminated across the world, plunging speakers into a potential web of campaign-finance laws that they are unaware of. Imagine, for example, an advertising campaign in New York that promotes a series of blog posts about national issues that mention some public officials unrelated to a particular election. A disclosure rule that captures all speech delivered digitally could activate in such circumstances. But any individual state's interest in discovering the source of funding for such a national issue-based advertising campaign would be incredibly weak. *See Buckley*, 424 U.S. at 67, 79.

D. When does the speech occur?

Time is critical to defining the scope of a disclosure rule. Indeed, time limits are often a key piece to cabining the scope of a potentially unconstitutional law. That's because an advertisement about a public official takes on a different character when it runs "shortly before" an

election compared to the same communication made six months earlier. *See Citizens United*, 558 U.S. at 369. Recognizing this, the Supreme Court has distinguished disclosure rules based on their "temporal breadth." *McIntyre*, 514 U.S. at 352 n.16.

That makes sense. As discussed above, the government's interest in disclosure is closely tied to ensuring the public can adequately inform itself about who is trying to persuade voters during an election. *See supra* at 8–9. Thus, the government's interest diminishes the further away from an election the regulated speech occurs. The "concern that the public could be misinformed and an election swayed on the strength of an eleventh-hour anonymous smear campaign to which the candidate could not meaningfully respond," *McIntyre*, 514 U.S. at 352 n.16 (quotation omitted), does not exist for speech six months before the vote. On the other hand, speech about a candidate "shortly before" an election will likely affect voters even if it does not "express[ly]" advocate for or against that candidate. *See Citizens United,* 558 U.S. at 369. Timing matters in both how much speech a law captures, and how powerful the government's interest in compelling disclosure really is.

II. PROPOSITION 211'S MULTI-FACETED EXPANSION OF PREVIOUS DISCLOSURE RULES ACCOMPLISHES A TROUBLING SHIFT IN KIND, NOT MERELY DEGREE.

Proposition 211 suffers from many problems. *See generally* Appellants' Br. at 56–69. It requires disclosing the identity of indirect donors to advocacy organizations that likely have no idea that they are listed as supporting a candidate or issue they may have never even heard of. *Id.* at 57–58. It requires disclosing the *employers* of donors, who may be retaliated against for donations they had nothing to do with. *Id.* at 58. It defines "campaign media spending" so broadly that it captures speech unrelated to any election or campaign whatsoever. *Id.* at 60–63. And the minimum monetary threshold for activating the law includes not just expenditures for speech, but also expenditures for a vast list of preparatory activity that makes triggering the law for a simple online communication much more likely. *Id.* at 64–65. Each of these provisions poses serious First Amendment problems.

But analyzing this case in such a fragmented manner misses Proposition 211's most troubling aspect. Even if it's constitutional to require that advocacy groups disclose a limitless chain of indirect donors for engaging in "campaign media spending," or to label all

speech that refers to a candidate for office six months before an election as campaign-related, combining those two rules together creates an indefensible burden on the First Amendment. And by enlarging every aspect of an ordinary disclosure rule at the same time, Proposition 211 "accomplishes a shift in kind, not merely degree." *See NFIB*, 567 U.S. at 583 (Roberts, C.J., op.). This Court should reject the "divide-and-conquer" approach to analyzing the plaintiffs' challenge that masks the law's most pernicious effects. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002).

A. A divide-and-conquer analysis of Proposition 211 distorts its true effect.

The district court rejected the challenge to each feature of Proposition 211 by analyzing it in isolation. This approach distorts the "undeniabl[e]" burden on "protected First Amendment activity." *McIntyre*, 514 U.S. 355.

Consider how the district court handled the provision classifying any communication that "refers to a clearly identified candidate" as "campaign media spending." Ariz. Rev. Stat. § 16-971(2)(a)(iii). The plaintiffs contend that this provision is overbroad because it "sweep[s]

in issue advocacy well outside the electoral context." ER 52. But the district court dismissed that concern because the statutory language is so much like that found in federal law, which the Supreme Court upheld in *Citizens United*. *Id.* at 25 (citing *Citizens United*, 558 U.S. at 368–39). Both require disclosing communications that "refer" to a "clearly identified candidate."

That myopic focus on one part the law—*what* speech is covered—misses the way in which Proposition 211 combines this rule with other provisions to sweep in a much broader category of speech that federal law does not. Federal law includes other requirements that narrow the scope of the rule by restricting *where* the speech must occur, *when* it must happen, and *who* must be identified.

Unlike Proposition 211, federal law requires that speakers disclose an electioneering expenditure only when that communication is made via "broadcast, cable, or satellite." 52 U.S.C. § 30104(f)(3)(A)(i). The similar provision in Proposition 211, on the other hand, reaches all "public communication[s]," no matter the means of distribution. Ariz. Rev. Stat. §§ 16-971(2)(a)(iii), § 16-971(17)(a). Likewise, an electioneering communication under federal law is limited to broadcasts

made only "60 days before a general" election and "30 days before a primary" election—a maximum total of three months. 52 U.S.C. § 30104(f)(3)(A)(i)(II). But under Proposition 211, the clock starts 90 days before the primary election and continues all the way through the general election. Ariz. Rev. Stat. § 16-971(2)(a)(iii). This means the rule captures 6 to 7 months out of the year, including communications made when the Arizona legislature is in its last days of session. *See* Appellants' Br. at 60. And under federal law, persons making electioneering communications need only disclose direct contributors who earmark their donations for political advocacy, *see* 52 U.S.C. § 30104(f)(2)(E), while Proposition 211 requires disclosing an unlimited chain of indirect contributors who did not donate for advocacy purposes and may have no idea that the organization they supported donated to *someone else* who engaged in "campaign media spending" in Arizona, *see* Ariz. Stat. Rev. § 16-973(A)(6), (7).

The result is dramatic. Proposition 211 captures a far greater amount of speech, requires disclosing the identity of a far greater number of people, and it does so even though the state's interest decreases at every step. By isolating only one aspect of Proposition 211

and comparing it to federal law, the district court could dismiss the plaintiffs' challenge. But that provision is only one part of a law that expands everywhere else.

This same problem repeats with each provision. Take the provision that requires disclosing indirect donors—an immensely overbroad rule that requires organizations to identify people as "donors" even though they have no connection to the group at all. The district court dismissed concern over this rule in one paragraph, relying on this Court's recent decision upholding a similar (but not identical) San Francisco law. ER at 20 (citing *No on E v. Chiu*, 85 F.4th 493, 505 (9th Cir. 2023)).[2] Because this Court held in *No on E* that the state has a strong governmental interest in "identifying the original source of funds" to "inform[] the electorate who is paying for campaign media spending," the district court held that Proposition 211's indirect-donor rule is constitutional. *Id.*

[2] *No on E* was wrongly decided. The state has no interest in laws that make it appear as though individuals support a candidate or ballot initiative that the individual may have no knowledge of. *See id.* at 527–28 (VanDyke, J., dissenting from denial of rehearing en banc). And that is precisely what these indirect-disclosure rules do.

That one-paragraph conclusion fails to grapple with the bigger picture. True, Proposition 211—like *No on E*—requires some speakers to disclose indirect donors. But the law in *No on E* targeted specific kinds of advocacy groups—committees formed primarily to speak about elections. That's why the Court characterized the state's interest as informing voters about who is funding advertisements asking the voters "to cast one's vote in a particular way." 85 F.4th at 506. But Proposition 211 is not limited to groups engaged in election-related speech. It compels *all* organizations to disclose their indirect donors simply for referring to a public official who is running for office by name. Even if the state has an interest in disclosing the identity of an indirect donor to an organization speaking about an election, that interest dramatically diminishes when talking about organizations "engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. Yet Proposition 211 reaches both.

Looking at Proposition 211 one piece at a time misses the story. One might debate whether—on its own—extending the period of time for electioneering communications from two or three months to six months is overbroad. And one might debate whether widening the covered

means of communication from broadcast and satellite to include virtually all online speech is overbroad. And one might conclude—as this Court has done—that compelling disclosure of some indirect donors for election-related speech is permissible. But the way in which Proposition 211 expands every facet of an ordinary disclosure rule fundamentally alters the analysis. Any decision on Proposition 211's constitutionality must account for the sweeping and unprecedented First Amendment burdens created by the law's cumulative effect.

B. Proposition 211's cumulative effect is the exact kind of sweeping, overbroad intrusion on privacy that the Supreme Court has warned against.

Consider how Proposition 211 affects nonpolitical organizations like *amicus*. The Institute for Free Speech is a nonpartisan, nonprofit organization tax exempt under 26 U.S.C. § 501(c)(3). IFS's mission includes educating people about campaign finance and advocating against policies like Proposition 211. Under federal law, IFS cannot engage in political activity—it cannot endorse candidates or advocate for or against their election. *See* 26 U.S.C. § 501(c)(3). Yet Proposition 211 nevertheless treats ordinary civic education and advocacy as

electioneering, requiring IFS to comply with the indirect-donor disclosure rule if it says just one word wrong.

That's no exaggeration. Arizona's legislature regularly meets through the end of May, and its most recent legislative session did not adjourn until June 15, 2024. The primary election for legislative candidates took place on July 30, 2024. That means the 90-day clock for assessing "campaign media spending" reached all the way to the beginning of May—forty-five days before the end of the legislative session. Thus, any speech during that time that "refers" to a state legislator who is running for office several months later qualifies as *electioneering* subject to the indirect-donor disclosure rule.

IFS does not participate in elections. In fact, federal law prohibits IFS from doing so. *See* 26 U.S.C. § 501(c)(3). So none of IFS's donors—much less indirect donors—would expect IFS to engage in electioneering. But IFS *does* engage in "issue discussion." *Buckley*, 424 U.S. at 79. As part of that, IFS conducts research about nationwide free-speech issues, and it distributes that research to the public. *See, e.g.*, Anti-SLAPP Statutes: 2023 Report Card, available at https://www.ifs.org/anti-slapp-report/. But what if IFS's issue research

and advocacy is disseminated in a state like Arizona while that state has an upcoming ballot initiative on the same issue? *See* Ariz. Stat. § 16-971(2)(a)(iv). Or what if IFS issues a report that mentions the bill sponsor while talking about legislative developments during the end of the session? *See* Ariz. Rev. Stat. § 16-971(2)(a)(iii). These circumstances could trigger Proposition 211, imposing complex administrative burdens alongside an unprecedented "intrusion" on IFS's donors' privacy. *See McIntyre*, 514 U.S. at 355.

And at least IFS has a narrow mission. Other larger and more heterodox organizations, like the plaintiffs, face even more burdens. Multi-issue organizations often bring together donors with different opinions, but who donate because of one particular issue that the organization advocates for. Consider a civil rights organization that advocates for both criminal justice reform and occupational licensing reform—two topics that might draw in two different kinds of donors. That organization might spend money on an ad that mentions an Arizona legislator who pushes a criminal justice reform bill during the session. Under Proposition 211, donors who contributed money to that organization owing to its occupational licensing reform work would be

disclosed as funding a communication about criminal justice reform all because the ad mentioned the name of a legislator. This makes no sense. *See Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) (explaining the "intuitive logic" that an expansive disclosure rule like this would convey "misinformation" by making it appear particular donors supported particular ads they might not have even known about). Even worse, if that donor is an organization, *its* donors—who are not even aware of what's happening in Arizona—will also be listed as funding an advertisement about criminal justice reform.

While "*Buckley* may permit a more narrowly drawn statute" than Proposition 211, "it surely is not authority for upholding" such a sweeping invasion of donor privacy. *See McIntyre*, 514 U.S. at 356.

CONCLUSION

The Court should reverse the district court's decision.

Dated: September 23, 2024

Respectfully submitted,

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I certify that on September 23, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan