ARIZONA SUPREME COURT

CENTER FOR ARIZONA POLICY, INC., et al., Plaintiffs/Plaintiffs, v. ARIZONA SECRETARY OF STATE, et al., Defendants/Appellees, and ARIZONA ATTORNEY GENERAL, et al., Intervenor-Defendants/Appellees.	Arizona Supreme Court No. CV-24-0295-PR Court of Appeals Division One No. 1 CA-CV 24-0272 Maricopa County Superior Court No. CV2022-016564

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The Court should deny review because the Court of Appeals correctly applied longstanding, settled precedent involving campaign-finance disclosures. At a high level, the Petition misinterprets the Opinion and the law and ignores Prop. 211's careful design.

Prop. 211 satisfies exacting scrutiny because it directly serves important informational and anti-corruption interests. Prop. 211 is narrowly tailored to serve those interests because it applies only to large spenders and their large donors and provides opportunities to opt out of disclosure. Plaintiffs cite no authority applying strict scrutiny to disclosure regulations.

Plaintiffs' as-applied challenge falls short of the specific allegations necessary to show a "reasonable probability" of threats, harassment, and reprisals, making it a poor vehicle for review.

Finally, courts around the country have rejected vagueness challenges to the phrases "in preparation for" and "in conjunction with." This issue is not novel and does not warrant review.

The Court should deny review.

BACKGROUND

In 2022, 72% of Arizona voters passed Prop. 211 expressly "to prevent corruption and to assist Arizona voters in making informed election decisions by securing their right to know the source of monies used to influence Arizona elections." 2022 Ariz. Legis. Serv. Prop. 211 § 2(B). Prop. 211 requires covered persons who spend more than $50,000 on campaign media in statewide campaigns and $25,000 in other campaigns during an election cycle to report donations over $5,000. A.R.S. § 16-971(7)(a); A.R.S. § 16-973(A). Covered persons must disclose the original source of campaign media spending and any intermediaries in between the original donor and the covered person. A.R.S. § 16-973(A)(6)-(7).

Under Prop. 211, the term "campaign media spending" delineates the specific communications and acts to advance or defeat candidates and ballot measures that may give rise to a reporting obligation. A.R.S. § 16-971(2)(a); Op. ¶ 4.

To protect donor privacy and associational rights, Prop. 211 allows donors to opt out of the use of their contributions for campaign media. A.R.S. § 16-972(B).

Plaintiffs, two nonprofit organizations and two anonymous donors, lodged facial and as-applied challenges to Prop. 211 under the Arizona Constitution. The superior court granted Defendants' motions to dismiss and denied Plaintiffs' preliminary injunction requests. The Court of Appeals affirmed.

ISSUES

1. Does Prop. 211's original-source requirement satisfy exacting scrutiny?

2. Did Plaintiffs allege specific facts showing that their donors would suffer threats, harassment, or reprisals if disclosed to state an as-applied claim?

3. Is the phrase "in preparation for or in conjunction with" vague?

4. Does exacting scrutiny apply to disclosure requirements under the Arizona's free speech clause?

REASONS TO DENY THE PETITION

I. The application of exacting scrutiny does not warrant review because the Opinion correctly applied settled law.

The Court should deny review on the application of exacting scrutiny because the Opinion correctly applied settled law. Plaintiffs contend that the Opinion misapplied exacting scrutiny because the State has no legitimate interests and the law is not narrowly tailored. But the informational interest alone justifies Prop. 211. And Prop. 211 is similar to disclosure laws upheld by courts across the country.

Exacting scrutiny requires (1) "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (citation omitted), and (2) "that the disclosure regime be narrowly tailored to the interest it promotes," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). Because this is a facial challenge, Plaintiffs must show that a "substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 594 U.S. at 615.

A. The Opinion correctly held that Prop. 211's original-source requirement directly serves the State's interests.

1. The State's informational interest alone justifies Prop. 211.

Disclosure laws "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking." *Citizens United*, 558 U.S. at 369 (citation and quotation marks omitted). This "informational interest alone is sufficient to justify" disclosure requirements. *Id.* Moreover, "[d]isclosure requirements, as a general matter, directly serve substantial governmental interests." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976).

Here, the Opinion properly recognized that the State's informational interest justifies Prop. 211. Op. ¶ 28. Prop. 211's original-source requirement directly serves the State's interest in an informed electorate by revealing who is actually funding political advertisements.

Indeed, other courts that considered original-source requirements have likewise held that the requirements are substantially related to the government's interest in an informed electorate. *See No on E v. Chiu*, 85 F.4th 493, 506 (9th Cir. 2023) ("Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate."); *Smith v. Helzer*, 614 F.Supp.3d 668, 674-75 (D. Alaska 2022), *aff'd*, 95 F.4th 1207 (9th Cir. 2024) (true-source requirement is "substantially related … to fulfill the State's informational interest in informing voters about the actual identity of those trying to influence the outcome of elections.").

Plaintiffs do not dispute that the informational interest alone justifies disclosure laws or that the State has an interest in disclosing who is actually funding campaign media. Instead, they argue (at 12-13) that the State's informational interest is insufficient here because it is overbroad and not narrowly tailored. But that's not the test; the argument conflates the government interest (which may be broad) with the disclosure requirement (which must be narrowly tailored). Exacting scrutiny requires that the "*disclosure requirement* be narrowly tailored to the interest it promotes." *Bonta*, 594 U.S. at 611 (emphasis added). But the state's *interest* can be broad. Indeed, the informational interest by its very nature *is* broad.

Plaintiffs seek (at 16) to undermine the State's informational interest by suggesting that the public learns nothing about candidates from contributions by "low-level donors." But Prop. 211's $5,000+ donor-disclosure threshold is not low. In fact, it's up to twenty times higher than disclosure thresholds upheld by other courts.[1] *See, e.g.*, *Citizens United*, 558 U.S. at 366-67 ($1,000 threshold); *Nat'l Ass'n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019) ($250 threshold).

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[1] Prop. 211's thresholds are also significantly higher than other Arizona disclosure requirements. *See* A.R.S. § 16-926(B)(2)(a)(i) ($100 threshold for contributions to political committees).

Even if a $5,000+ contributor was considered "low level," in the aggregate, smaller donors with aligned interests can be extremely large and quite relevant to voters' education. Consider a proposition to ban short-term rentals but grandfather in existing properties. The voters want to know whether the group "Neighbors Against Airbnbs" is supported by ordinary citizens or by hundreds of existing Airbnb hosts looking to reduce competition.

Over 72% of Arizona voters decided that this information is important. On a facial challenge, Plaintiffs cannot undermine the voters' legitimate interests by substituting Plaintiffs' own opinions about what is relevant to the informational interest and proclaiming that the public learns nothing.

2. Plaintiffs' anti-corruption argument doesn't warrant review because it relies on a misreading of the Opinion.

The Court should deny review on the anti-corruption issue because Plaintiffs misconstrue Prop. 211 and the Opinion.

Plaintiffs' sole argument on this issue is that corruption doesn't apply to things like ballot measures where there is no candidate. But Prop. 211 also applies to spending related to candidates—where the State unquestionably has an anti-corruption interest. *See* A.R.S. § 16-971(2)(a). Contrary to

Plaintiffs' assumption, the same State interest does not have to justify every application of the law. For ballot measures, the informational interest alone justifies Prop. 211. For spending on candidates, an additional interest (anti-corruption) also justifies the law. Op. ¶¶ 32-33.

Stretching for review, Plaintiffs claim (at 13) that the "anti-corruption interest was critical to the Court's decision[.]" Not so. The Opinion recognized that "the informational interest alone is sufficient to justify" Prop. 211. Op. ¶ 30 (citation omitted). The court addressed the anti-corruption interest "in [its] discretion," as an *additional* legitimate interest. Op. ¶ 31. The Opinion never applied the anti-corruption interest outside of the candidate context.

In sum, the Opinion correctly held that "[t]he government has strong informational and anti-corruption interests, which are sufficiently important to justify the modest burden the Act places on donors' association rights." Op. ¶ 28. These issues don't warrant review.

B. The narrow-tailoring issue does not warrant review because the Opinion faithfully applied settled law.

1. Prop. 211 has high disclosure thresholds and provides opportunities to opt out.

Prop. 211's disclosure requirements apply only to covered persons who spend $50,000 or more on campaign media for statewide campaigns or $25,000 or more for other campaigns. A.R.S. § 16-973(A). Prop. 211 is further tailored by limiting disclosure to donors who contribute more than $5,000. A.R.S. § 16-973(A)(6). As the Opinion properly recognized, Prop. 211's "larger dollar amounts more narrowly tailor the Act by removing the disclosure burden on ordinary citizens who make modest campaign contributions and decreasing the reporting obligations on the covered persons." Op. ¶ 44.

Prop. 211 provides additional tailoring by allowing donors to covered persons to opt out of the use of their contributions for campaign media. A.R.S. § 16-972(B). The Opinion recognized that the opt-out provision "protects donors' identities by mandating they be notified that they may opt out or their identity may be disclosed." Op. ¶ 42. For that reason, "[t]he opt-out provision narrows the breadth of the Act, tailoring it to its informational and anti-corruption interests." *Id.*

Prop. 211 is like other disclosure laws routinely upheld by courts. *See, e.g.*, *No on E*, 85 F.4th at 506-11 (secondary-contributor requirement narrowly tailored to informational interest); *Gaspee Project v. Mederos*, 13 F.4th 79, 89-90 (1st Cir. 2021) (disclosure of "relatively large donors who choose to engage in election-related speech," is "narrowly tailored enough to avoid any First Amendment infirmity").

2. Plaintiffs' arguments to the contrary misrepresent the law.

Analogizing Prop. 211 to the statute at issue in *Wyo. Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023), Plaintiffs argue (at 14-15) that Prop. 211's definition of "campaign media spending" is not narrowly tailored because it applies to all activities "in conjunction with" campaign media spending. In *Gray*, the Tenth Circuit held that a statute requiring disclosure of contributions that "relate to" an independent expenditure or electioneering communication was insufficiently tailored as applied to an organization because it required the organization with an unsophisticated bookkeeping system to disclose all donations. *Id.* at 1247.

Under Prop. 211, "[r]esearch, design, production, polling, data analytics, mailing or social media list acquisition" or other activities are considered campaign media spending only if conducted "in preparation for or in conjunction with" other activities or public communications enumerated in A.R.S. § 16-971(2)(a)(i)-(vi). The remaining text of the statute appropriately narrows the phrase "in conjunction with."

To succeed on their overbreadth challenge, Plaintiffs must show a "substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 594 U.S. 615. They don't even attempt to meet this burden. Plaintiffs argue (at 15) that "in conjunction with" encompasses every activity tangentially related to influencing elections. But they don't identify a single unconstitutional application of this provision, let alone demonstrate that a "substantial number" of its applications are unconstitutional. Plaintiffs cannot invalidate an entire law on a facial challenge by imagining that a few (unidentified) applications may be problematic.

Relying on *Gray* again, Plaintiffs suggest (at 15) that without an earmarking requirement, Prop. 211 fails narrow tailoring. But *Gray* undermines this argument, too. There, the Tenth Circuit suggested that to be narrowly tailored the disclosure law "*could* have outlined an earmarking system." 83 F.4th at 1248 (emphasis added). Indeed, it expressly declined to find that "legislatures *must* include an earmarking provision to survive narrow tailoring." *Id.* at 1249 n.8 (emphasis added). Even there, the court distinguished *Gaspee*, which upheld a disclosure law as narrowly tailored because it included an opt-out provision. *Id.* at 1249 (citing *Gaspee*, 13 F.4th at 89). The opt-out provision similarly narrows the breadth of Prop. 211.

Plaintiffs next contend (at 17) that the opt-out provision does not save narrow tailoring because the top three donors are still disclosed. Not so. The Opinion correctly held as a matter of statutory interpretation that donors who opt out do not get disclosed under § 16-974(C). Op. ¶¶ 35-39. The Commission reached the same conclusion. *See* A.A.C. R2-20-805(B). The Petition does not explain why the Opinion's holding is incorrect, nor does it ask this Court to review the Commission's rule.

Plaintiffs also argue (at 16-17) that Prop. 211 isn't narrowly tailored because it requires disclosure of "low-level" individuals who donate only $2,500 to the general public. That's not true. Prop. 211 requires intermediaries to *maintain records* of individuals who donate or transfer more than $2,500 and less than $5,000 for five years and to make the records available upon the Commission's request. A.R.S. § 16-972(D). It doesn't allow the Commission to publish this information or require covered persons to report it.

The Opinion correctly held that Prop. 211's high donor thresholds and opt-out provision narrowly tailor the law to the State's interests. This issue doesn't warrant review.

II. The as-applied issue doesn't warrant review because the Opinion applied the correct standard.

Plaintiffs ask the Court (at 17) to review their as-applied challenge because the Opinion supposedly applied "the wrong legal standard." But the Opinion applied the correct standard.

Plaintiffs claim the correct standard asks whether they have shown "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." Pet. at 17 (quoting *Citizens United*, 558 U.S. at 367). That's the exact standard the Court of Appeals applied, word-for-word. *See* Op. ¶ 52.

To meet this burden, Plaintiffs had to allege specific facts showing "past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Buckley*, 424 U.S. at 74.

The Opinion properly recognized that even though both CAP and FEC have disclosed their PAC donors for years, they did not allege that any of those donors were harassed because of their donations. Op. ¶¶ 54-55. And the "handful of harassing communications" they allege against the organizations themselves (not against their donors) over lengthy histories are not the "'pervasive' and 'persistent' harassment necessary to demonstrate a reasonable probability that the disclosure requirement will result in significant reprisals against *donors*." *Id.* ¶ 59. Indeed, most of the comments Plaintiffs use to support their as-applied challenge are protected speech. *See Watts v. U.S.*, 394 U.S. 705, 707–08 (1969) ("very crude offensive method of stating a political opposition" was protected speech).

Plaintiffs argue (at 19) that the Opinion required them to show that the comments were "fighting words" or "true threats" to state an as-applied claim. But the Opinion mentioned these terms only to show that nothing removed the alleged comments from the realm of protected speech. Op. ¶ 51. It did not create a new standard.

Plaintiffs also argue (at 19) that the Opinion minimized the instances where it was forced to hire private security in response to protests. As the Opinion recognized, Plaintiffs did not allege threats or harassment because of the protests. Op. ¶ 56. Peaceful protests are protected speech. *Cox v. Louisiana*, 379 U.S. 536, 558 (1965); Op. ¶ 56. The Opinion also properly rejected Plaintiffs' allegations concerning a violent attack on an out-of-state organization with similar views but with no connection to Plaintiffs. CAP and FEC are not new entities, and the attack was on an out-of-state organization, not its donors. Op. ¶ 58.

In sum, the Opinion faithfully applied the settled standard, and the fact-bound application of the standard does not warrant review.

III. The vagueness issue does not warrant review because the phrases "in preparation for" and "in conjunction with" are not vague.

The vagueness challenge does not warrant review because courts in Arizona and elsewhere have repeatedly found that the phrases "in preparation for" and "in conjunction with" are not vague.

The Opinion held "[t]he phrase 'in preparation for or in conjunction with' is sufficiently definite to give a person of ordinary intelligence, applying common understanding and practices, fair notice of what is prohibited." Op. ¶ 47.

This holding comports with other Arizona decisions. For example, the Court of Appeals previously held that a statute prohibiting driving in a lane except "if preparing for" or making a left turn or a u-turn was not unconstitutionally vague. *State v. Peters*, 2018 WL 4691075, at *3 ¶ 13 (Ariz. Ct. App. Sept. 27, 2018).

Other states have likewise rejected vagueness challenges to "preparatory" language. *See State v. Reed*, 618 N.W.2d 327, 333 (Iowa 2000) ("any act, including any preparatory or completed offense" not vague); *People v. Chow*, 2002 WL 857763, at *2 (Mich. Ct. App. May 3, 2002) ("preparing for" not unconstitutionally vague).

Same with "in conjunction with." *See Dartmouth Corp. of Alpha Delta v. Town of Hanover*, 159 A.3d 359, 368 (N.H. 2017) ("in conjunction with" not vague); *Bristow v. Del. Bd. of Exam'rs in Optometry*, 2005 WL 396336, at *5 (Del. Ch. Feb. 8, 2005), *aff'd*, 884 A.2d 511 (Del. 2005) ("in conjunction with" not vague).

Relying on *Gray*, Plaintiffs argue (at 20) that the Tenth Circuit found "nearly identical language" unconstitutionally vague. But *Gray* held that the statute requiring disclosure of funds that "relate to" electioneering communications was vague as applied to an organization with undifferentiated pools of money because it provided no standards for determining what funds it related to. *Gray*, 83 F.4th at 1238.

Prop. 211 is different. Read in context, "in preparation for or in conjunction with" applies only to the enumerated activities in the definition of campaign media spending.

Because courts have repeatedly rejected vagueness challenges to the phrases actually used in Prop. 211, this Court should deny review.

IV. The Court should deny review of the level of scrutiny because courts in Arizona and elsewhere uniformly apply exacting scrutiny.

Plaintiffs ask this Court (at 20-21) to apply strict scrutiny to disclosure requirements under the Arizona Constitution, arguing that there is "reasonable debate" as to what standard applies. There's no debate. Plaintiffs don't identify any case applying strict scrutiny to disclosure requirements. Courts across the country, including the U.S. Supreme Court, uniformly apply exacting scrutiny to disclosure requirements. *See, e.g.*, *Citizens United*, 558 U.S. at 366-67 (applying exacting scrutiny); *No on E*, 85 F.4th at 502 (same).

The Arizona Court of Appeals likewise applies exacting scrutiny to disclosure requirements. *See Comm. for Just. & Fairness v. Ariz. Sec'y of State's Off.*, 235 Ariz. 347, 356 ¶ 33 (App. 2014).

Following both federal caselaw and prior precedent in Arizona, the Opinion applied exacting scrutiny. Op. ¶ 21. This makes sense because even though disclosure requirements affect speech, they "do not prevent anyone from speaking"—they merely require disclosure. *Citizens United*, 558 U.S. at 366. Indeed, "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.

Moreover, although Arizona's free speech clause is broader than the First Amendment in some respects, the Opinion recognized that "nothing suggests that the Arizona Constitution provides enhanced campaign finance disclosure protections." Op. ¶ 19. In fact, its plain language and historical context suggest the opposite. *Id.* ¶¶ 19-20.

Plaintiffs argue (at 21) that strict scrutiny should apply because Arizona's free speech clause provides greater protection. But as the Opinion correctly held, Arizona courts base the level of scrutiny on the severity of the *burden* on the associated right. Op. ¶ 21. For example, content-neutral regulations and certain time-place-and-manner restrictions get intermediate scrutiny. *State v. Stummer*, 219 Ariz. 137, 141 ¶¶ 8-9 (2008). In other words, even if Arizona's free-speech clause is broader than the federal counterpart, the level of scrutiny still depends on the burden.

Plaintiffs also contend (at 21) that strict scrutiny is appropriate because by regulating public communications on election-related issues, Prop. 211 is a content-based restriction. Even if true, the Supreme Court has consistently applied exacting scrutiny to disclosure requirements, *Buckley*, 424 U.S. at 64; *Citizens United*, 558 U.S. at 366-67, including when disclosure doesn't involve candidate elections, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995).

Moreover, the historical context of Arizona's Constitution confirms that disclosure of campaign media spending should not receive more-intense scrutiny. When the founders adopted Article 2, § 6, they simultaneously enacted multiple provisions demonstrating their commitment to electoral transparency. For example, Article 7, § 16 requires the public disclosure of "all campaign contributions to, and expenditures of campaign committees and candidates for public office." Op. ¶¶ 19-20. These provisions reveal that the founders and voters—who mandated campaign finance disclosure—did not intend to give enhanced constitutional protection to keep election-related spending secret. Instead, they viewed transparency as essential to protecting the integrity of Arizona's democratic process.

The Court does not need to review this issue.

CONCLUSION

The Court should deny review.

RESPECTFULLY SUBMITTED this 7th day of February, 2025.

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