No. 24-2933

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,
Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. CV-23-00470-PHX-ROS
Before the Honorable Roslyn O. Silver

ANSWERING BRIEF OF APPELLEE INTERVENOR-DEFENDANT VOTERS' RIGHT TO KNOW

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CORPORATE DISCLOSURE STATEMENT

Voters' Right to Know has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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INTRODUCTION

Proposition 211 (the "Act") serves compelling First Amendment interests long recognized by the Supreme Court. By shining light on the original sources of "dark money" campaign contributions, the Act enhances robust debate and provides voters with information critical to choosing, and holding accountable, their elected leaders. The Act may be unique in requiring that the true, original sources of money spent to influence elections are disclosed to voters, but it presents no unique or novel constitutional questions. Instead, it merely ensures that disclosure laws do what they were always meant to do: educating citizens about the real parties of interest trying to influence their votes and preventing front groups and intermediaries from shielding the true sources of big election spending. And by using high monetary thresholds for reporting and an effective donor notice and opt-out mechanism, the Act is significantly *more* narrowly tailored than ordinary disclosure laws.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Americans for Prosperity and Americans for Prosperity Foundation (collectively, "AFP") timely appealed from a final judgment dismissing their facial and as-applied claims, entered April 10, 2024. ER-4, ER-165. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court correctly held that that Proposition 211 is constitutional on its face and as applied to Appellants.

STATUTORY AUTHORITIES

All relevant statutory and regulatory authorities are set out in the addendum to the brief filed by the state government Defendants-Appellees.

STATEMENT OF THE CASE

I. The Parties

A. Voters' Right to Know

Voters' Right to Know ("VRTK") is a political action committee registered with the State of Arizona.[1] VRTK drafted the language of Proposition 211 and submitted almost 400,000 signatures to place the initiative on the ballot—which passed with 72% of voters' approval.[2]

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[1] VRTK's committee reports can be found on the Arizona Secretary of State's website at https://seethemoney.az.gov/Reporting/Explore#JurisdictionId=0%7CPage|Page=11|startYear=2023|endYear=2025|IsLessActive=false|ShowOfficeHolder=false|View=Detail|Name=2~100542|TablePage=1|TableLength=10.

[2] *See Arizona Proposition 211, Campaign Finance Sources Disclosure Initiative (2022)*, https://ballotpedia.org/Arizona_Proposition_211,_Campaign_Finance_Sources_Disclosure_Initiative_(2022).

VRTK has published on its website answers to "frequently asked questions" that explain the details of how the Act works. *Voters' Right to Know Act—Frequently Asked Questions*, VRTK's "Stop Dark Money" website, https://www.stopdarkmoney.com/faq.

B. Appellants

Americans for Prosperity is a Washington, DC, nonprofit corporation headquartered in Virginia. ER-94. Americans for Prosperity Foundation is a Delaware nonprofit corporation headquartered in Virginia. ER-94-95.

C. State government defendants

Defendants Damien R. Meyer, Amy B. Chan, Galen D. Paton, Mark Kimble, and Steve M. Titla were Commissioners of the Citizens Clean Elections Commission ("Commission") at the time this suit was filed. Mr. Meyer has since left the Commission, and Mr. Kimble is the current Chairman. Thomas M. Collins is the Executive Director of the Commission. Defendant Adrian Fontes is the Secretary of State of Arizona. Intervenor Kristen K. Mayes is the Attorney General of Arizona.

II. The Rise of Dark Money Nationally

After the Supreme Court in *Citizens United v. FEC*, 558 U.S. 310 (2010), invalidated the limits on corporate independent expenditures supporting or opposing candidates for office, the D.C. Circuit held that political committees that

make only independent expenditures (and no contributions) can receive unlimited contributions from their donors. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). Such "independent expenditure only political committees" came to be known as "super PACs."

In the wake of these legal developments, elections have increasingly become awash in super PAC and other "independent" spending—dubbed "dark money" when it is not accompanied by public disclosure of the interests funding the spending. By routing their money through 501(c)(4) corporations, super PACs, or limited liability corporations, wealthy interests fund huge electoral expenditures while obscuring their identity and hiding behind opaque front groups. *See, e.g.*, Anna Massoglia, *'Dark money' groups find new ways to hide donors in 2020 election*, OpenSecrets (Oct. 30, 2020), https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/.

Since 2010, dark-money groups have spent more than $2.6 billion to influence federal elections. Anna Massoglia, *'Dark money' groups have poured billions into federal elections since the Supreme Court's 2010 Citizens United decision*, OpenSecrets (Jan. 24, 2023), https://www.opensecrets.org/news/2023/01/dark-money-groups-have-poured-billions-into-federal-elections-since-the-supreme-courts-2010-citizens-united-

decision/. The 2020 election alone saw more than $1 billion in "dark money" spending at the federal level, including $660 million in donations from opaque political nonprofits and shell companies to outside groups. Anna Massoglia & Karl Evers-Hillstrom, *'Dark Money' topped $1 billion in 2020, largely boosting Democrats*, OpenSecrets (Mar. 17, 2021), https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/. And outside spending in the 2024 cycle hit a record $4.5 billion, with more than half coming from groups that do not fully disclose their contributors. Anna Massoglia, *Outside spending on 2024 elections shatters records, fueled by billion-dollar 'dark money' infusion*, OpenSecrets (Nov. 5, 2024), https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion/.

III. Dark Money in Arizona

Similarly, between 2006 and 2014, dark money spending exploded in state races. *See* Chisun Lee, et al., *Secret Spending in the States*, Brennan Ctr. for Justice, 7 (June 26, 2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Secret_Spending_in_the_States.pdf. But Arizona showed "by far the biggest surge in dark money, with the amount in 2014 rising to 295 times—nearly three hundred times—the level in 2006." *Id*.

Before the passage of the Act, Arizona's existing campaign finance disclosure system was described as "one of the most pro-dark-money statutes imaginable." *See* Alexander J. Lindvall, *Ending Dark Money in Arizona*, 44 Seton Hall Legis. J. 61, 73 (2019); *see also* David R. Berman, *Dark Money in Arizona: The Right to Know, Free Speech and Playing Whack-a-Mole*, Morrison Inst. for Pub. Pol'y 3-4 (2014).

In a particularly egregious 2014 case, Arizona Public Service secretly spent more than $10 million through its holding company, Pinnacle West Capital Corporation, to influence the race for seats on its regulating agency, the Arizona Corporation Commission. *See* David Brancaccio and Alex Schroeder, *In Arizona, a story of secret campaign spending and rising electric bills*, Marketplace (Oct. 10, 2022), https://www.marketplace.org/2022/10/10/secret-campaign-spending-rising-electric-bills-arizona/. It took nearly five years for the true source of this spending to come to light in 2019, when it was finally revealed that Pinnacle West Capital gave $12.9 million to sixteen different political groups in 2014, with $10.7 million going to groups that spent to influence the Corporation Commission elections that year. Ryan Randazzo, *APS acknowledges spending millions to elect Corporation Commission members, after years of questions*, Ariz. Republic (Mar. 29, 2019).

IV. Voters' Right to Know Act

The Act requires big campaign spenders to disclose the original sources of funds that come from large donors and are used to pay for election-related spending in Arizona. Such spenders, i.e., "covered person[s]," are defined as any person (either a natural person or entity) "whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than $50,000 in statewide campaigns or more than $25,000 in any other type of campaigns." A.R.S. § 16-971(7). This definition excludes individuals who spend only their own money on campaign media spending, any organization that spends only its own business income on campaign media spending, any "candidate committee," and any political action committee that receives not more than $20,000 "from any one person in an election cycle." A.R.S. § 16-971(7)(b).

The Act's definition of "campaign media spending" includes "spending monies or accepting in-kind contributions to pay for" communications that promote or oppose candidates or initiatives, or that refer to them shortly before an election. A.R.S. § 16-971(2)(a). The Act excludes from this definition certain spending to disseminate news and commentary, as well as certain nonpartisan activities, such as sponsoring a nonpartisan debate. A.R.S. § 16-971(2)(b).

The Act requires covered persons to maintain "transfer records" that keep track of the identity of persons who contribute more than $2,500 in original monies used for campaign media spending. A.R.S. § 16-971(19). The responsibility for obtaining the information maintained in transfer records comes in part from donors who contribute directly to covered persons. A person who donates more than $5,000 to a covered person during an election cycle must provide to the covered person the identity of every "person that directly or indirectly contributed more than $2,500" of the funds being donated. A.R.S. § 16-972(D). The information provided must also identify any previous transfers of $2,500 or more. The donors and intermediaries must be identified until the source of "original monies" is identified: i.e., the person or entity that derived the funds from either regular business income or personal income. A.R.S. § 16-971(12) (defining "original monies").

The Act also requires covered persons to file reports with the Arizona Secretary of State, who will in turn make this information available to the public. A.R.S. § 16-973(A)-(C), (G). These reports must identify each donor who contributed more than $5,000 of original monies used for campaign media spending. A.R.S. §16-973(A)(6). Thus, when a donation consisted of a series of earlier donations, each prior donation of more than $5,000 must be included in the report. A.R.S. § 16-973(A)(7).

Although covered persons must disclose certain large donors whose funds are used for campaign media spending, the Act also requires covered persons to give their donors an opportunity to avoid having their money spent on electioneering, as well as avoid having their donations disclosed. When a covered person wishes to use a donation for campaign media spending, the covered person must "[i]nform donors that they can opt out of having their monies used or transferred for campaign media spending." A.R.S. § 16-972(B)(2). The covered person may provide its donors with this opt-out option either before or after receiving the donations. A.R.S. § 16-972(C). Regardless of when the covered person provides the opt-out notice, that person cannot use a donation for "campaign media spending until at least twenty-one days after the notice is provided or until the donor provides written consent" for such use, whichever comes first. A.R.S. § 16-972(C).[3]

Beyond reporting donations larger than $5,000 to the Secretary of State, covered persons must include a disclaimer in certain of their "public

[3] When AFP describes (Br. at 17-18) Ariz. Admin. Code § R2-20-803(E)—a rule concerning an opt-out request made after the twenty-one-day period—AFP does not mention that Commission staff have clarified that, although the rule permits a donor to request to opt out after twenty-one days, a covered person is not obligated to honor that request. *See* Ariz. Admin. Register, Vol. 29, Issue 45 at 3526 (Nov. 10, 2023), https://storageccec.blob.core.usgovcloudapi.net/public/docs/957-Arizona-Administrative-Register-for-R2-20-801-to-R2-20-808.pdf.

communications" (defined in A.R.S. § 16-971(17)). When a covered person makes a paid campaign communication to the public, such as a television advertisement, this disclaimer must "state, at a minimum, the names of the top three donors who directly or indirectly made the three largest contributions" to the covered person of funds which those donors derived from regular business activities or personal income. A.R.S. § 16-974(C); *see also* Ariz. Admin. Code § R2-20-805(B) (regulation implementing disclaimer requirement).

The Act grants the Commission power "to implement and enforce" the Act by, among other things, adopting and enforcing rules. A.R.S. § 16-974(A). The Act also grants the Commission enforcement authority to impose "civil penalties for noncompliance" and to "[s]eek legal and equitable relief in court as necessary." A.R.S. § 16-974(A)(5)-(6). Although the Act grants exclusive enforcement power to the Commission, any qualified voter may file a "verified complaint" with the Commission alleging a person has failed to comply with the Act. A.R.S. § 16-977.

V. The District Court Decision

On March 20, 2024, the district court dismissed Appellants' facial and as-applied claims but granted them leave to amend their as-applied challenge to allege additional facts that might establish a reasonable probability that their members would face threats, harassment, or reprisals if their names were disclosed. Appellants chose not to amend their Complaint.

In its opinion, the district court summarized Proposition 211's major provisions, noted that the Complaint was unclear about the exact provisions being challenged, and then applied the Supreme Court's "exacting scrutiny" standard to the Act's disclosure and recordkeeping requirements. The court first held that the "Act's requirement of identifying the original source of funds bears a substantial relation to the governmental interest of informing the electorate who is paying for campaign media spending." ER-20. The court next held that the Act's administrative burdens "are not unduly onerous for any individual person or entity." ER-20-21. The court also held that Appellants' arguments about the opt-out provision "make little sense," given how flexible and "straightforward" the provision is. ER-23. And the court rejected Appellants' broader argument that there is any "cognizable burden to prohibiting anonymous donations to covered persons." ER-24.

Regarding Appellants' challenge to the Act's definition of "campaign media spending," A.R.S. § 16-971(2), the court noted that their arguments "often rel[ied] on misreading the Act's text" and held that the Act is in fact narrowly tailored. ER-24.

The court also rejected Appellants' freedom of association arguments by citing this Court's precedent for the principle that a disclosure law is not unconstitutional simply because "a donor is identified as funding a communication

the donor might disagree with." ER-29. And the court noted that the "Act grants a significant amount of control to donors such that donors may, if they wish, avoid disclosure." ER-30.

Finally, regarding Appellants' as-applied challenge, the court held that while "Plaintiffs need not make voluminous allegations of possible harm, they must make some allegations that can be plausibly tied to the Act." ER-32-33. Here, the "lack of specific factual allegations doom[ed] Plaintiffs' as-applied free speech challenge," ER-33, but Appellants chose not to amend their Complaint to try to remedy this shortcoming.

VI. Related Litigation

Earlier this month, the Court of Appeals of Arizona upheld the Act against facial and as-applied challenges. *Center for Arizona Policy Inc. v. Arizona Sec'y of State*, No. 1 CA-CV 24-0272 A, 2024 WL 4719050 (Ariz. Ct. App. Nov. 8, 2024) ("*CAP*"). The plaintiffs there relied on the Arizona Constitution, which "provides broader protections for free speech than the First Amendment," *id.* at *4 (citation and quotation marks omitted), but the Court nevertheless rejected many of the same arguments AFP makes here.

SUMMARY OF ARGUMENT

By informing citizens of the true sources of money spent to influence their votes, Proposition 211 is narrowly tailored to promote compelling governmental

interests long recognized by the Supreme Court. While the Act may be unique in how it constrains efforts to obscure this critical information from voters, the Act breaks no new constitutional ground and simply restores disclosure laws to their original purpose.

The Act is constitutional on its face, and AFP fails to even allege that there are a substantial number of unconstitutional applications of the Act. The Act satisfies exacting scrutiny because it advances the critical governmental interests that campaign disclosure laws serve: providing voters information, deterring corruption, and aiding law enforcement. Indeed, Proposition 211 *promotes* First Amendment interests by providing voters with valuable information about candidates and ballot measures and thereby encouraging more robust debate and greater citizen engagement in activities of self-government.

The Act is narrowly tailored: it uses high reporting thresholds to target big donors who may attempt to evade disclosure; provides donors extra protection and control by giving them notice and an opportunity to opt out of disclosure; gives big campaign spenders great flexibility and imposes minimal burdens; and leaves donors free to place restrictions on how their money may be spent. The communications defined as "campaign media spending" are directly related to Arizona elections.

Appellants' sweeping arguments, if accepted, would threaten most electoral disclosure laws. They make little distinction between laws that require disclosure of only the direct donors to campaign spenders, and a law like the Act, which requires disclosure of the original sources of such spending. An overwhelming majority of Arizona voters have decided that they need all this information, and AFP's opinion that it may not be useful is irrelevant.

AFP's Complaint also fails to adequately state a claim for as-applied relief. Appellants rely on generalities, not the kind of specific allegations necessary to state a viable claim, and they present no allegations that their members or donors have ever suffered harm from being identified under other disclosure laws.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," and "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotation marks omitted).

This Court "review[s] an order granting a motion to dismiss de novo." *D'Augusta v. Am. Petroleum Inst.*, 117 F.4th 1094, 1100 (9th Cir. 2024) ("When

conducting this review, we accept all nonconclusory factual allegations in the complaint as true.").

ARGUMENT

AFP failed to demonstrate that they would be entitled to either facial or as-applied relief under any interpretation of facts susceptible of proof, and the district court correctly dismissed their Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

I. The Act Is Facially Constitutional.

For their facial challenge, AFP must demonstrate that a "substantial number of [the Act's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (citation and quotation marks omitted). Although AFP acknowledges this test (Br. at 30), it makes no attempt to meet this standard. The Complaint does not even *allege* that there are a "substantial number" of unconstitutional applications of the Act. AFP instead relies upon general concerns about how the statute *may* affect them and their donors—who are not parties here—along with speculative applications of the Act. However, "[i]n determining whether a law is facially invalid, [a court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449-50 (2008); *see also Yamada v. Snipes*, 786 F.3d 1182, 1201 (9th Cir. 2015).

Moreover, a group's particularized allegations of a potential chilling effect on its own donors have never sufficed to *facially* invalidate a political disclosure law. The Supreme Court explained long ago that "[i]t is undoubtedly true that public disclosure of contributions" may "deter some individuals who otherwise might contribute." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). Nonetheless, the Court upheld federal disclosure laws under "exacting scrutiny," concluding that disclosure "certainly in most applications appear[s] to be the least restrictive means of curbing the evils of campaign ignorance." *Id.*

A. The Act promotes First Amendment interests.

The Act, like other disclosure laws, does not limit campaign expenditures or contributions. "Disclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities . . . and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (citations and quotation marks omitted). AFP focuses only on their putative right to receive anonymous donations, but "ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (citation omitted), *overruled in part on other grounds*, *Citizens United*. Because the Act adds to robust debate by providing the public with critical

information—i.e., *more* speech—about the persons behind campaign spending and contributions, it promotes the values and principles that underlie the First Amendment.

The right to free speech was designed to enable self-government, ensure responsive officeholders, and prevent the corruption of democratic processes. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010) ("disclosure requirements have become an important part of our First Amendment tradition."). Properly understood, disclosure laws like the Act enhance, rather than constrain, the free speech necessary to sustain our democracy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices [in elections] is essential." *Buckley*, 424 U.S. at 14-15. Disclosure laws thus directly serve the democratic values animating the First Amendment—"secur[ing] the widest possible dissemination of information from diverse and antagonistic sources" and facilitating "uninhibited, robust, and wide-open" public debate. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 270 (1964).

As the Supreme Court explained in *Citizens United*:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold

> corporations and elected officials accountable for their positions and supporters. . . . [C]itizens can see whether elected officials are in the pocket of so-called moneyed interests. The First Amendment protects political speech; *and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way*.

558 U.S. at 370-71 (citations and quotation marks omitted; emphasis added). Rather than abridging anyone's ability to speak freely, the Act empowers citizens to engage meaningfully in self-government.

Moreover, the Supreme Court has repeatedly voiced approval of laws requiring disclosure of spending in both candidate elections and ballot referenda because in both contexts, "[i]dentification of the source of advertising" enables voters "to evaluate the arguments to which they are being subjected." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . [and] will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" (second alteration in original)); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981).

Indeed, several courts of appeals—including this one—have found that "[e]ducating voters [through disclosure] is at least as important, *if not more so*, in the context of initiatives and referenda as in candidate elections." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) (emphasis

added); *see also Family PAC v. McKenna*, 685 F.3d 800, 806-07 (9th Cir. 2012) ("We have repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions.") (collecting cases); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003) (noting that in the "cacophony of political communications through which California voters must pick out meaningful and accurate messages . . . being able to evaluate who is doing the talking is of great importance").[4]

This concern with transparency makes sense: through ballot measures, citizens engage even more directly in the process of self-government than when they choose their legislative representatives. "[T]he initiative system is, at its core, a mechanism to ensure that the people, rather than corporations or special interests, maintain control of their government." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 533 (9th Cir. 2015) (en banc).

Empirical research confirms that knowing the sources of election messaging is a "particularly credible" informational cue for voters seeking to make decisions consistent with their policy preferences. Elizabeth Garrett & Daniel A. Smith,

[4] *See also Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012).

Veiled Political Actors and Campaign Finance Disclosure Laws in Direct Democracy, 4 Election L.J. 295, 296 (2015); *see also* Abby K. Wood, *Learning from Campaign Finance Information*, 70 Emory L. J. 1091 (2021); Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 Geo. L.J. 1443, 1471-72 (2014).

In sum, the Act empowers citizens to engage meaningfully in self-government and is entirely consistent with both the language and purpose of the First Amendment.

B. The Act satisfies the applicable standard of review: exacting scrutiny.

The standard of review for disclosure requirements is exacting scrutiny, which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366 (citations omitted). "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Bonta*, 594 U.S. at 608. The Act clearly satisfies this test by restoring campaign finance disclosure to its original intent and objective: that the true source of contributions would be reported to the public.

In *Buckley*, 424 U.S. at 66-68, the Court summarized three critical interests served by campaign disclosure laws: (1) providing the electorate with information

about where political campaign money comes from to aid voters in evaluating candidates; (2) deterring actual corruption and the appearance of corruption by shining light on large contributions and expenditures; and (3) gathering the data necessary to detect violations of the law. The first of these interests, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369.

None of these substantial interests can be properly served if donor disclosure is limited to intermediaries or front groups who mask the true source of the funds. First, voters cannot accurately evaluate campaign advertisements for potential biases or hidden political agendas without knowing the true source of funds publicizing the message. The "interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible"—often "ad hoc organizations with creative but misleading names"—to the "actual contributors to such groups." *No on E v. Chiu*, 85 F.4th 493, 505 (9th Cir. 2023), *cert. denied sub nom. No on E, San Franciscans v. Chiu*, No. 23-926, 2024 WL 4426534 (U.S. Oct. 7, 2024) (citations and quotation marks omitted). It is impossible for "'uninhibited, robust, and wide-open' speech [to] occur when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (citations omitted). Second, disclosure will not prevent or discourage corruption if the true sources of funds remain unidentified. And third,

the government cannot detect violations if the true sources of contributions remain unknown. Requiring spenders to disclose the original source of funds behind election spending thus promotes *every* informational interest implicated by a campaign finance regime. *See Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (en banc) (emphasis added) ("*Buckley* carefully considered the danger posed by compelled disclosure. . . . Proscription of conduit contributions *(with the concomitant requirement that the true source of contributions be disclosed)* would seem to be at the very core of the Court's analysis.").

C. The Act is narrowly tailored.

Campaign finance disclosure laws typically require persons engaged in election-related spending to report both those expenditures and the donors who gave money to finance them. What makes the Act unique is that it requires big campaign spenders to disclose the *original* sources of large contributions they use for electoral purposes. The Act is thus narrowly tailored to address the recent explosion in "dark money" spending. Other courts in recent years have upheld similar statutes. *Smith v. Helzer*, 614 F. Supp. 3d 668, 679-80 (D. Alaska 2022) (finding disclosures seeking the "true source" of donors' funds not overly burdensome), *aff'd*, 95 F.4th 1207 (9th Cir. 2024), *cert. denied Smith v. Stillie*, No. 23-1316, 2024 WL 4805897 (U.S. Nov. 18, 2024); *No on E*, 85 F.4th at 509-11 (finding original source disclosure requirements narrowly tailored); *Gaspee Project*

v. Mederos, 13 F.4th 79, 88-89 (1st Cir. 2021) (upholding top donor disclaimer, with $1,000 threshold).

1. The Act's high thresholds target big donors and spenders.

By targeting only big spenders in Arizona elections and large contributors to those spenders, the Act's burdens are minimal. Campaign spenders do not become covered persons until they spend $50,000 in an election cycle on statewide elections, or $25,000 on other elections. A.R.S. § 16-971(7). Persons or organizations who spend less than those amounts do not have to give their donors notice of how their dollars may be spent, nor determine whether their donors were the original source of the monies received.

Donors who contribute $5,000 or less to covered persons do not have to provide any information about the source of their donations, A.R.S. § 16-972(D), and covered persons do not report the identity of any original sources unless they have contributed more than $5,000 each, A.R.S. § 16-973(A)(6). This figure is *five times* higher than the $1,000 threshold for the donor disclosure upheld in *Citizens United*. 558 U.S. at 366-67; *see* 52 U.S.C. § 30104(f)(2).[5] "[D]isclosure laws

[5] Under federal law, persons who make "electioneering communications" must file disclosure reports once they spend more than $10,000 on such communications and must disclose contributors who gave $1,000 or more. 52 U.S.C. § 30104(f)(1) & (2)(E). Persons who make "independent expenditures" must file disclosure reports once they spend more than $250 on such communications and must disclose contributors who gave more than $200. 52 U.S.C. § 30104(c)(1) & (2)(C).

specifying a monetary threshold at which contributions or expenditures trigger reporting requirements ensure that the government does not burden minimal political advocacy. The acceptable threshold for triggering reporting requirements need not be high." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019) (upholding a $1,000 threshold). The Act's high thresholds thus far exceed other constitutional reporting thresholds.

2. The Act's notice provisions enhance its narrow tailoring, protect donors' free speech, and provide flexibility to both covered persons and donors.

Contrary to AFP's arguments, the Act *protects* the First Amendment interests of donors far more than most other disclosure laws and does so without unduly burdening the rights of spenders. AFP's tailoring arguments misunderstand the Act, and have already been rejected not only by the court below but also by the Arizona Court of Appeals in *CAP.* Rather than "compound[ing] constitutional concerns" or "actively pressur[ing] donors to opt out" (AFP Br. at 46), the Act's notice and opt-out features give donors a *choice*.

a. Direct donors can choose whether their funds will be used for electioneering or other purposes.

Direct donors to covered persons receive notice that their contributions may be used for campaign media spending, and if they wish to remain anonymous or prevent their money from being used for such spending, they can "opt out" yet still

provide the covered person financial support for non-campaign purposes.[6] A.R.S. §§ 16-971(18); 16-972(B), (C). Contrary to AFP's allegations (Br. at 4), the Act does *not* "require[] would-be speakers to sit silent for up to 21 days before using or transferring donor monies for campaign media spending." If a donor is eager to make its donation available to the covered person for campaign spending, that donor can immediately consent in writing to provide that permission, thus making its contribution instantly available for a covered person's campaign spending. A.R.S. § 16-972(C). As the court below noted, "[b]ecause covered persons and their donors can easily avoid the 21-day period, the opt-out provision is not unduly burdensome." ER-23.

b. Covered persons have great flexibility regarding when, and to whom, the notice is given to donors.

AFP ignores the fact that A.R.S. § 16-972(C) allows covered persons to provide the opt-out notice *before or after* they receive a donation. This provides covered persons with the flexibility to decide when and to whom they direct this notice. For instance, covered persons who may not anticipate engaging in significant campaign media spending at the beginning of an election cycle can

[6] Because donors can avoid disclosure and simultaneously give money to a group they support, they do not, as AFP suggests (Br. at 45), forfeit their associational rights by choosing to opt out of financing the group's electioneering. *See also CAP*, 2024 WL 4719050, at *5.

raise funds without providing the notice to donors at that time, but later provide the required notice to appropriate donors to make sufficient funds available for campaign spending. Although AFP suggests (Br. at 49) that a covered person might want to "suddenly . . . speak out on an issue," each covered person can prepare for that possibility by, for example, simply providing the required notice in all of its solicitations to minimize the need to return to donors subsequently to seek their consent.

c. Nothing in the Act prevents major donors or covered persons from conferring with original sources about how their donations might be used.

Although the Act does not *require* a covered person to provide any notice to the original sources of the funds being passed on by the direct contributor to the covered person, nothing in the Act prevents a covered person from doing so. Under A.R.S. § 16-972(D), a direct contributor will provide the identity of the original sources only of the "monies being transferred" to the covered person.[7] Nothing in

[7] The Commission has issued an advisory opinion confirming this interpretation. Arizona Clean Elections Commission, Adv. Op. 2024-02, at 6-8 (Jan. 25, 2024), https://storageccec.blob.core.usgovcloudapi.net/public/docs/969-Advisory-Opinion-24-02--approved--by-Commission-1_24_25.pdf. Contrary to AFP's characterization (Br. at 47-48), this flexibility is a feature, not a bug, of the Act, which is designed to give direct contributors—the persons who are transferring the relevant funds—a choice about whose "monies" are "being transferred" to a particular covered person after receiving notice that the funds may be used for campaign media spending.

the Act or any other law prevents a direct contributor from discussing with its own upstream donors whether and how it intends to transfer their original monies. The direct contributor can then choose not to contribute certain upstream donors' funds to certain recipients, or to opt out of campaign spending entirely when contributing certain original monies. Likewise, nothing in the Act prevents a covered person—upon learning the identity of upstream donors whose original money it receives—from contacting the original source donors to discuss how their funds might be spent.

d. Covered persons need not create separate entities or bank accounts to segregate traceable monies.

AFP suggests (Br. at 47) that "if one donor chose to opt out after 21 days, and that donor's funds were deposited in the group's general fund, Proposition 211 could prohibit using *any* funds in the group's general fund." This suggestion is wrong. Covered persons need not segregate funds that can be used for campaign media spending—i.e., "traceable monies," A.R.S. § 16-971(18)—from funds that come from donors who have opted out. Instead, covered persons need only track and report the amount of traceable monies they have received and spent, as well as maintain "transfer records" about large contributors. *See* A.R.S. §§ 16-971(19), 16-972(A), 16-973(A).

Thus, unlike federal law, covered persons under the Act need not establish a political committee or "separate segregated fund," *see* 52 U.S.C. § 30101(4)(B),

nor even a separate bank account, to receive and spend funds for campaign activity. *Cf.* 52 U.S.C. § 50104(f)(3)(E) & (F) (requiring a separate bank account for funds contributed for electioneering communications to limit disclosure to those contributions). Nothing in the Act prevents covered persons from comingling traceable and non-traceable funds, as long as the transfer records keep track of the distinction.

e. All donors remain free to control how their contributions may or may not be used.

Nothing in the Act prevents a source of original monies from instructing a recipient of such funds not to pass on the funds, directly or indirectly, to a covered person without opting out. The common practice of restricting the use of donations takes place in numerous contexts: e.g., when section 501(c)(3) foundations provide funds that cannot be used to influence elections; when large donations are given to institutions for particular purposes, such as financing buildings or scholarships; or when bequests are tagged for particular purposes or recipients.[8]

[8] *See generally Restricted Funds: What Are They? And Why Do They Matter?*, Jitasa: Numbers for Good (Dec. 14, 2023), https://www.jitasagroup.com/jitasa_nonprofit_blog/restricted-funds/; James Chen, *Restricted Fund: Definition Types, Legal Requirements*, Investopedia (May 10, 2022), https://www.investopedia.com/terms/r/restricted-fund.asp (discussing "restricted funds").

Our legal system assumes that citizens will educate themselves about new laws and adjust to them. "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny" and can "become familiar with their obligations under it." *Atkins v. Parker*, 472 U.S. 115, 130-31 (1985). Indeed, legislatures sometimes delay the effective date of new laws to give regulated persons time to adapt. *See, e.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990) ("Congress delayed the effective date on the amended version by six months to permit courts and attorneys to prepare for the change in the law.") (citation omitted). AFP's suggestion (Br. 43-44) that donors will be confused, misrepresented, or otherwise wrongly associated with certain campaign spending ignores both the flexibility built into the Act and the ability of the regulated community to take advantage of it.

While the Act's donor notice, opt-out, and traceback features are new, there is no basis for speculating that original source donors, intermediaries (if any), and spenders will not adapt and make use of the Act's many flexibilities. For example, consistent with Proposition 211's provisions, any person could restrict funds that it donates by conditioning the donation on a written promise such as:

> The recipient shall not use any of the funds received, directly or indirectly, to enable "campaign media spending" in Arizona, A.R.S. § 16-971(2), nor donate or transfer any of the funds received to any other person who, directly or indirectly, would use or subsequently

> transfer the funds to other persons to use to enable campaign media spending in Arizona.

Thus, AFP is wrong to suggest (Br. at 54) that "secondary donors . . . will have no control or knowledge over the ultimate use of their funds." And AFP is similarly wrong to suggest (Br. at 75-76) that the Act "compels association" because of how AFP's own donations might be passed on to others. Nothing in the Act prevents AFP from restricting how their donations may or may not be spent or transferred to third parties. AFP's attempt (Br. at 49-40) to distinguish the law at issue in *No on E* from the Act therefore fails: given the ability of donors to control the use of their funds, it is irrelevant for constitutional purposes how many transfers of a donor's money take place before that money is spent to influence Arizona elections.

Especially with respect to money in politics, the Supreme Court has held that legislatures can "ma[k]e a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that . . . donors would react to [a new law] by scrambling to find another way to purchase influence." *McConnell*, 540 U.S. at 165-66 (discussing the limits on party committees' receipt of "soft money" contributions). More generally, the Court has expected organizations to adapt to choices in the tax code to further their missions. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Court upheld Internal Revenue Code restrictions on lobbying activities by § 501(c)(3) groups as a condition for their eligibility for tax-deductible

contributions. Noting that tax deductions are a form of government subsidy, the Court held that these lobbying restrictions did not violate the First Amendment, with the concurring Justices explaining that a § 501(c)(3) group could simply restructure its operation to "create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying" without the tax deduction. *Id*. at 552-53 (Blackmun, J., concurring).

The people of Arizona made an analogous prediction when they approved Proposition 211: that covered persons would take advantage of the new law's flexibility, and that consequently, their donors would have more knowledge of, and control over, whether or how their contributions are used to influence elections. These features ensure that the Act will narrowly focus on disclosing the kind of information most useful to voters.

3. AFP's hypothetical speculation about purported donor and electorate confusion does not demonstrate insufficient tailoring.

In this facial challenge, AFP relies on hypothetical examples of how they believe Proposition 211 will operate, but "[i]n determining whether a law is facially invalid, [a court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50.

AFP seems to assume (Br. at 39) that donors who give away more than $5,000 will both donate money with no strings attached and remain unaware of Proposition 211's disclosure requirements. For example, AFP imagines (Br. at 41) an incomplete and implausible scenario wherein a "business" donates to an "advocacy group" and that group then passes on the donation to an "independent organization" that becomes a covered person. But if the "independent organization" has not provided the "advocacy group" notice that it wishes to use the latter's donation to support a candidate, then that donation is not available for campaign media spending in Arizona and will not be disclosed. If the advocacy group in fact receives the notice and does not opt out, *and also* then informs the independent organization that its donation includes funds whose original source is a "business," then the advocacy group will be on notice that the business (if the group passes on more than $5,000 of the business's money) will be disclosed by the independent organization. But AFP assumes that the advocacy group would pass on the business's money in this manner *without telling it or seeking its approval*, even though it is a major donor to the advocacy group. Nothing in the Act would require that kind of silence by the advocacy group, and it is implausible to imagine that such a group would risk alienating its major donors in this fashion.

AFP also offers an even more fanciful example (Br. at 43), in which a "pro-life" Catholic gives to a "center-left 501(c)(4) to support a bump-stock ban"

which, in turn, supports a candidate "who advocates for strong abortion rights." But AFP ignores two critical facts. First, under the Act, the "pro-life" contributor would receive prior notice from the 501(c)(4) that their donation might be used for campaign media spending and would have an opportunity to opt out. And second, the Act is hardly unusual in requiring groups engaged in express candidate advocacy to disclose the donors funding their advocacy. If the 501(c)(4) organization were to make this kind of independent expenditure to support a federal candidate, under existing federal law, it would have to report the donor's contribution. *See supra* at 23 n.5. Under this scenario, the Act gives the imagined donor a choice and thus is *more* narrowly tailored than federal law.

In its amicus brief, the Institute for Free Speech ("IFS") relies on even more attenuated, generalized hypotheticals. It argues (Amicus Br. at 18-19), for example, that combining a longer time window for electioneering communications with inclusion of internet ads makes the Act overbroad. But it offers no concrete examples or principled basis for concluding that an internet ad is any less likely to be election-related than a radio ad if disseminated 65 days before an election. IFS essentially argues that the Act's whole is greater than the sum of its parts, but it completely ignores those parts of the Act—especially its high thresholds and donor opt-out provisions—that *reduce* the Act's regulatory scope and make it especially narrowly tailored. Thus, even if any of IFS's speculative scenarios were sharpened

with specificity and identified conduct clearly outside the scope of constitutional regulation, at most they would give rise to a potentially valid as-applied claim. But none of IFS's speculative generalizations support AFP's *facial* challenge here.

Finally, AFP assumes not only that donors will fail to take advantage of the Act's features and flexibility, but also that the information the Act provides will "sow confusion and misperception among the electorate." Br. at 44. But interest groups like AFP do not determine whether this information is useful to the Arizona electorate. The voters do, and they have already made that decision. AFP suggests that the Court must override the judgment of 72% of Arizona's voters who wish to be better informed because AFP speculates that these voters will be confused by the very disclosures they enacted. But neither AFP nor any court in this country is empowered to second-guess whether voters should be denied lawful, truthful information in the voting process because there is some chance that they could draw a conclusion from it that a third party disagrees with or views as mistaken. The Supreme Court has repeatedly rejected the bald assumption that voters will be confused or misled by objective election information: "our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Wash. State Grange*, 552 U.S. at 454-55 (citations and quotation marks omitted); *see also No on E*, 85 F.4th at 506.

4. The Act targets spending directly related to campaign expenditures.

The definition of "campaign media spending" is narrowly targeted at election-related spending and is clearly constitutional. A.R.S. § 16-971(2). *Citizens United* upheld federal disclosure requirements for "electioneering communications," 52 U.S.C. § 30104(f)(3), and rejected the argument that disclosure requirements must be limited to communications that contain express advocacy or its functional equivalent. Indeed, the Court held, 8-1, that the public had an "informational interest" in knowing the source of funding even for advertisements encouraging viewers to watch a movie about Hillary Clinton: "*Even if the ads only pertain to a commercial transaction*, the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369 (emphasis added). *See also Human Life*, 624 F.3d at 1016 ("[T]he position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *Gaspee Project*, 13 F.4th at 86; *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015). This federal "electioneering communications" disclosure law is the model for part of the Act's definition of campaign media spending, A.R.S. § 16-971(2)(a)(iii), and this provision of the Act is constitutional for the same reasons the federal law is.[9]

[9] AFP takes issue (Br. at 60-61) with the Act's 90-day, pre-primary time window in A.R.S. § 16-971(2)(a)(iii), comparing it to the analogous federal definition in

Indeed, one such "commercial" ad the Court considered in *Citizens United* was a ten-second pitch for a movie about Hillary Clinton, which stated only: "If you thought you knew everything about Hillary Clinton. . . wait 'til you see the movie" (followed by the text "Hillary: The Movie" and "www.hillarythemovie.com").[10] *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 n.2 (D.D.C. 2008) (three-judge court). Compared with that rather vacuous ad, a communication concerning Sheriff Arpaio's contempt proceeding shortly before his election in 2016 (AFP Br. at 60) would likely be significantly more informative to the public.

The Act's definition of campaign-related spending also includes a public communication that "promotes, supports, attacks or opposes" a candidate, ballot initiative, or recall of a public officer. A.R.S. § 16-971(2)(a)(ii), (iv), (v). In *McConnell*, the Supreme Court upheld this kind of definition and explained that

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52 U.S.C. § 30104(f)(3)(A) that uses a 30-day window. But even if AFP were correct that the Act's longer window might include a public communication that meets this definition yet unequivocally has no relevance to an upcoming election, that rare circumstance would at most support an as-applied challenge. Such outliers, if they exist, would not lessen the plainly legitimate sweep of this one subpart of the Act's definition, let alone the Act's overall, well-tailored sweep.

[10] AFP argues (Br. at 35) that "*Citizens United* upheld disclosures evidencing a close nexus to electoral advocacy intending to steer individual candidates to victory or defeat." While the Supreme Court did not formulate a test with that description, it found the ads for the "Hillary" movie constitutionally subject to disclosure.

words like "'promote,' 'oppose,' 'attack,' and 'support' . . . 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" 540 U.S. at 170 n.64 (citation omitted). More recently, this Court rejected a vagueness challenge to Hawaii's "support" or "oppose" standard in a disclosure requirement. *Yamada*, 786 F.3d at 1192-93 (citing *McConnell*, 540 U.S. at 170 n.64).

AFP also objects (Br. at 63-64) to the inclusion of "other partisan campaign activity" in A.R.S. § 16-971(2)(a)(vi), but ignores the statutory context in which this phrase resides. This subpart of the definition of "campaign media spending" covers, in relevant part, a "public communication that *supports the election or defeat* of candidates of an identified political party or the electoral prospects of an identified political party, *including* partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity." *Id*. (emphases added). Thus, to trigger disclosure under this definition, the public communication must both "support[] the election or defeat" of an identified political party's candidates or the political party itself *and* constitute "partisan campaign activity" such as efforts to drive voters of only one political party to the polls. The "other partisan campaign activity" language thus does not stand alone, but rather modifies and illustrates the "support[] . . . or defeat" test that precedes it. As the district court found, the

"possibility that officials will misread the Act and apply it to any speech they deem 'hot-button,'" as AFP contends, is thus simply "not plausible." ER-27.

AFP further argues (Br. at 61-62) that A.R.S. § 16-971(2)(a)(iv), which concerns public communications that promote or attack ballot measures, is overbroad, but its argument ignores the provision's plain language. It covers communications that promote or attack the "qualification or approval *of any state or local initiative or referendum*" (emphasis added), *not* communications that are pure issue advocacy and do not even refer to any ballot measure.[11]

Finally, AFP argues (Br. at 64) that subpart A.R.S. § 16-971(2)(a)(vii) is "problematic." But this provision simply ensures that underlying expenses for activities such as production costs "conducted in preparation for or in conjunction with" election ads are covered by the Act. But such costs are included as reportable expenses only if the relevant communication is actually disseminated to the public. *See also* Ariz. Admin. Code R2-20-801(B) (narrowly construing this provision to include such spending only when "these activities are *specifically conducted* in

[11] Similarly, AFP suggests (Br. at 62-63) that any speech criticizing an elected officeholder could potentially be characterized as advocating for a "recall" under § 16-971(2)(a)(v). But as the district court explained: "The most obvious reading of the Act's language is that it is referring to a recall that already exists. That is, it refers to 'the recall' of an elected official, not merely a 'possible recall' or 'future recall.' Once there is a pending recall, the Act will be triggered by communications promoting or opposing that recall. Until then, the Act will not be triggered by Plaintiffs or others merely referencing public officials." ER-26-27.

preparation for or in conjunction with those other activities") (emphasis added); *CAP*, 2024 WL 4719050, at *10 (rejecting vagueness attack to this provision).

Similarly, AFP objects that the Act "reaches preparatory activity occurring wholly outside Arizona's borders" (Br. at 64), but it does not explain the constitutional problem with covering Arizona-focused activity that might occur out of state. AFP does not contest that the production costs of election ads are often included in calculations of the total cost of advertising for the purpose of campaign finance disclosure laws. *See*, *e.g.*, 11 C.F.R. § 104.20(a)(1)(ii) (including production costs "such as studio rental time, staff salaries, costs of video or audio recording media, and talent"). Because such expenses will only be reportable if they result in public communications relating to Arizona elections, it is irrelevant where such production costs are incurred.

AFP thus repeatedly offers straw men, based on strained and overbroad readings of the Act. But even if any of these interpretations were more plausible, the Court should adopt VRTK's interpretation and follow the longstanding "canon of statutory construction" that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (citations and quotation marks omitted); *see also United States v.*

Hansen, 599 U.S. 762, 781 (2023) (noting canon of constitutional avoidance means a court's "task is to seek harmony, not to manufacture conflict").[12]

5. The absence of an earmarking requirement does not make the Act overbroad.

AFP asserts that "[w]ithout earmarking or similar limitations, Proposition 211 is menacingly overinclusive," Br. at 58, but fails to acknowledge that the Supreme Court has repeatedly held that disclosure can extend beyond those contributions that a donor explicitly "earmarks" for campaign purposes.

The Court has three times upheld the federal electioneering communications disclosure statute, 52 U.S.C. § 30104(f)(2)(E)-(F), on its face and as-applied, and this provision requires broad donor disclosure without reference to earmarking. *McConnell*, 540 U.S. at 196-97; *Citizens United*, 558 U.S. at 369; *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court), *summarily aff'd*, 137 S. Ct. 1204 (2017). This federal statute requires groups to disclose *all* of their donors over $1,000 if they do not fund electioneering communications through a segregated account established exclusively for that purpose. 52 U.S.C. § 30104(f)(2)(E).

[12] Finally, even if any of the subparts of the definition of "campaign media spending" could not be construed constitutionally, each one is clearly severable from the rest of the Act's disclosure requirements. The Act contains an explicit severability provision, *see* 2022 Ariz. Legis. Serv. Prop. 211, § 4 (WEST).

Despite this precedent, AFP claims that the Court has only approved laws that require the disclosure of "those persons who earmarked their contributions for electioneering." Br. at 36 (citing *Buckley*, 424 U.S. at 62-84; *McConnell*, 540 U.S. at 194–202; *Citizens United*, 558 U.S. at 368-71). But AFP quotes no supporting text from any of these decisions—because there is none. To be sure, the FEC, on its own initiative, promulgated a regulation in 2007 that provided that certain entities engaged in electioneering, i.e., corporations and unions, need disclose only those contributions earmarked for electioneering communications. *See* 11 C.F.R. § 104.20(c)(9); Electioneering Communications, 72 Fed. Reg. 72899 (Dec. 26, 2007) (final rule). But this regulation was adopted four years after *McConnell* upheld the statute against facial challenge. 540 U.S. at 194-202. And although the FEC regulation had been adopted by the time of *Citizens United*, the rule had already been challenged in court, and neither the parties nor the Supreme Court relied on it. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished).[13]

[13] The D.C. Circuit upheld the FEC's earmarking rule in *Van Hollen, Jr. v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), against a challenge under the Administrative Procedure Act; but this was a statutory interpretation case, not a First Amendment one. Under deferential review, the *Van Hollen* court found that the FEC rule was a permissible construction of the statutory disclosure provision, *id*. at 493. But it did not suggest

AFP also includes a string cite to lower court cases that it claims have recognized "the importance of limiting disclosure to contributions specifically earmarked to support campaign-related advocacy." Br. at 36. But, to the contrary, many appellate courts have understood *McConnell* and *Citizens United* as confirming the constitutionality of statutes requiring organizations to disclose their contributions regardless of whether earmarked for campaign purposes.

Indeed, AFP stops short of asserting that any of the cited cases have held that an earmarking requirement is a constitutional *requirement*—because that would be false. Instead, these decisions simply stand for the unremarkable proposition that an earmarking restriction—or any mechanism, like an opt-out, that limits donor disclosure—is *relevant* to a statute's tailoring. The Tenth Circuit, for example, noted that Colorado's disclosure law had been modified by regulation to require only the disclosure of "those donors who have specifically earmarked their contributions for electioneering purposes" when upholding this law. *Independence Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016). It is simply wrong, however, to imply that *Williams* suggests in any way that the First Amendment *requires* earmarking.

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that the First Amendment requires this type of earmarking limitation, and in fact expressly "forestall[ed]" any constitutional questions "to some other time." *Id.* at 501.

AFP also highlights *Wyoming Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023), but although the Tenth Circuit expressed concern about the breadth and vagueness of a Wyoming disclosure law, it expressly noted that it was *not* holding that "legislatures must include an earmarking provision to survive narrow tailoring." *Id*. at 1249 n.8. The Tenth Circuit explained that the challenged Wyoming law lacked other tailoring features—like an "opt-out requirement"—that would have circumscribed its potential applications. *Id*. at 1249. The Court then contrasted Wyoming's law to a Rhode Island disclosure law that, like Arizona, includes an opt-out option, noting that this feature obviated the need for an earmarking provision because it "provides ample opportunity for donors to opt out from having their donations used for . . . electioneering communications, even if the entity to which they contribute has not created a segregated fund." *Id*. (citing *Gaspee Project*, 13 F.4th at 89). Thus, if anything, *Wyoming Gun Owners* implicitly *endorses* the structure and tailoring of the Act, which includes a far more robust opt-out provision than did the Rhode Island law upheld in *Gaspee Project*.[14]

[14] AFP also challenges the lower court's citation of *Gaspee Project* for the proposition that an opt-out provision tailors disclosure. AFP claims (Br. at 59) the First Circuit failed to understand that donors may be "pressur[ed]" to opt out of election expenditures by the possibility of disclosure. But an opt-out provision creates a choice, not a demand, and helps narrowly tailor disclosure by ensuring that donors who do not wish to fund electoral advocacy are not reported.

Indeed, contrary to AFP's claims, far from restricting donor disclosure only to earmarked funds, federal circuit courts have consistently upheld laws requiring near plenary donor disclosure, without the Act's robust opt-out feature. The Third Circuit, for example, upheld a Delaware law requiring comprehensive donor disclosure with no earmarking limitation. *Del. Strong Families*, 793 F.3d at 310-311 (upholding law requiring groups spending $500 or more on electioneering ads to disclose all contributors above $100 for the preceding four years). Similarly, the Fourth Circuit reversed a lower court decision for *imposing* an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding disclosure requirement without earmarking limitation because "*McConnell* compels us to find that [it] is constitutional"). As this Circuit recently found, no court has held that a law "fails narrow tailoring unless it is limited to the disclosure of earmarked contributions." *No on E*, 85 F.4th at 510. *See also Hosemann*, 771 F.3d at 289 (committees must itemize and report all contributions of $200 or more); *Vt. Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 124 (2d Cir. 2014) (committees must file reports "identifying each person who contributed more than $100"); *Worley*, 717 F.3d at 1251 (groups must disclose all donors starting from "first-dollar disclosure threshold").

None of the laws at issue in the cases cited above, save Rhode Island's, included any kind of opt-out provision akin to § 16-972 of the Act. Although this opt-out provision is not identical to an earmarking requirement, it nonetheless provides more control for donors than the laws upheld in these other cases. If those laws survive exacting scrutiny, then the Act must too.[15]

II. AFP's Sweeping Allegations Would Undermine Almost All Electoral Disclosure Laws.

A. The Supreme Court long ago recognized that disclosure might dissuade some contributors.

AFP alleges (ER-93) that "[p]ublic disclosure and broadcasting will make individuals less likely to donate to advocacy and other non-profit organizations such as Plaintiffs," but the Supreme Court long ago recognized that disclosure laws might have that effect on some donors when it upheld such laws:

> It is undoubtedly true that public disclosure of contributions . . . will deter some individuals who otherwise might contribute. . . . These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation. In this process, we note . . . that disclosure requirements certainly in most applications appear to be *the least*

[15] In addition, existing laws regulating the use of "straw donors" do not address the problems created by current dark money abuses. Provisions such as A.R.S. § 16-1022(B) and 52 U.S.C. § 30122 prohibit contributions when one person knowingly gives money in the name of another person, not to more generalized transfers of money or a series of transfers. But as the Supreme Court has recognized, that kind of prohibition "would reach only the most clumsy attempts to pass contributions through to candidates." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 462-63 (2001).

> *restrictive means of curbing the evils of campaign ignorance and corruption* that Congress found to exist.

Buckley, 424 U.S. at 68 (footnotes omitted; emphasis added). In other words, compared with limits on campaign expenditures or contributions, disclosure laws present the "least" First Amendment burden and are constitutional, even if they dissuade some persons from contributing. AFP's suggestion that a potential drop in donations could suffice to declare a disclosure statute facially unconstitutional would threaten virtually all campaign finance disclosure laws and is precluded by decades of binding precedent.

B. Much of AFP's argument applies to direct contributors, not just indirect original sources.

Most of AFP's allegations focus on their relationship with their direct donors, not the original sources who might be identified under the Act. AFP, for example, alleges (ER-110) that they "do not share information about a donor absent the donor's explicit permission to do so." Similarly, AFP alleges (ER-116) that even "Proposition 211's compelled disclosures . . . of *direct* donors" "rest on the false assumption that donors to large, heterodox organizations support *all* of the many issues and candidates that these organizations spend money supporting." But many campaign finance disclosure laws require that election-related spenders report their direct donors—usually with a reporting threshold far below the Act's—without any criteria related to how many issues the donors and receiving

organizations agree upon. *See supra* at 23 n.5. No precedent guarantees donors a constitutional right of confidentiality in the campaign finance context or holds that donor disclosure can be required only if donors' contributions are expressly tied to particular communications. *See No on E*, 85 F.4th at 506 (noting that the disclosure "laws at issue further the governmental interest in revealing the source of campaign funding, not ensuring that every donor agrees with every aspect of the message").

For example, some donors may give to the NRA because they want to support its gun safety programs, while other donors may give to the Sierra Club because they wish to address climate change—and these same donors may have no interest in supporting either organizations' election advocacy. These donors are nonetheless subject to many disclosure laws at the federal and state level. AFP's argument thus proves too much because it would threaten most campaign finance disclosure laws. In any event, as discussed *supra* at 23-26, the Act is uniquely narrowly tailored because its opt-out provisions give donors *more* control over how their money is spent as compared with other campaign finance disclosure laws.

AFP's reliance (Br. at 37-38) on in *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981), represents another indirect attack on typical donor disclosure requirements. When the Supreme Court upheld a federal contribution limit in that case, it recognized that a monetary donation likely indicates "sympathy of

interests" with the recipient speaker—but not necessarily that the speaker's specific message reflects the precise thoughts of its direct donors. 453 U.S. at 196. Like every other campaign finance disclosure law that requires speakers to report their donors, the Act does not purport to suggest that any specific message financed by the speaker conveys the exact view of any particular donor, whether direct or indirect. Covered persons must simply report the identity of donors who contributed original monies of more than $5,000, without having to report how that specific donation was spent. A.R.S. § 16-973(A)(6).[16] AFP's suggestion that a speaker need only report donors who have explicitly earmarked funds for each specific message of the speaker would imperil virtually all campaign finance donor disclosure requirements.[17]

[16] Covered persons must also report employer and occupation information about these large donors. *See* A.R.S. §§ 16-971(10), 16-973(A)(6). AFP dislikes (*see* Br. at 58) this requirement, but federal law contains the same requirement for contributors of $200 or more. *See* 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A), 30104(c)(1).

[17]AFP also relies (Br. at 37, 41) on *McCutcheon v. FEC*, 572 U.S. 185 (2014), but that case is irrelevant here. *McCutcheon* addressed an aggregate limit on *contributions*, not a *disclosure* requirement. The primary compelling interest supporting the Act is its ability to create an informed electorate, not to prevent circumvention of contribution limits.

C. Arizona voters have rejected AFP's opinion that individual donor information is not useful.

While conceding that the disclosure of only the "creative" names of conduit organizations may not "provide much information standing alone," AFP attempts to denigrate the value of virtually all disclosure by claiming, without support, that "neither do the names of individual donors." Br. at 40. AFP further suggests that "it may be much more difficult to pin down the leanings of individuals." *Id.* But 72% of Arizona voters have decided otherwise about the value of this information. And AFP undercuts its own argument against disclosure of original sources by speculating that it is "typically straightforward to identify who is 'behind' organizations." *Id.*[18] Arizona citizens made the simple choice to require information about both direct and indirect donors—when it relates to big-dollar election spending—to be reported to the public, rather than force individuals to each become campaign finance detectives. AFP's suggestion that even direct donor information is of little value would again threaten virtually all campaign finance disclosure laws and is contrary to existing precedent.

[18] Despite AFP's speculation here about how easy it is to figure out the money behind organizations, AFP concedes elsewhere (Br. at 46) that businesses "join trade associations precisely so they do not have to take the lead" in public persuasion.

D. AFP misunderstands the anti-corruption interest that disclosure promotes.

AFP wrongly conflates two different anti-corruption purposes of campaign finance laws. When the Supreme Court first upheld contribution limits in *Buckley*, it recognized that when donors give money directly to candidates, such contributions present a direct risk of quid pro quo corruption and its appearance. 424 U.S. at 27. But disclosure laws provide a different kind of protection against corruption: *deterring* corruption by shining light on large contributions and expenditures and empowering the public to hold their elected officials accountable. As the Court explained, disclosure may help prevent corruption by "discourag[ing] those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67.

Rather than address this precedent, AFP attempts to rely on the fact that "Proposition 211 has no application whatsoever to money given directly to candidates." Br. at 53. But this is a red herring. The Act will help prevent corruption by informing the voting public and putting elected officials on notice that the public will know who their generous supporters are.

Obviously, "generous" support can take the form of either a direct contribution to a candidate or independent campaign media spending in support of

a candidate. And it would be naïve to assume that persons who hide behind front groups to engage in campaign spending would fail to inform a beneficiary candidate that they were the original source of such support—especially if the public is deprived of that same information.[19] *See also CAP*, 2024 WL 4719050, at **6-7.

III. AFP Relies Heavily on Easily Distinguishable Authorities.

A. The statute at issue in *Bonta* differs from the Act.

AFP relies heavily on *Bonta* (*see* Br. at 5, 28-32), but the California statute considered there bears no resemblance to the Act; it neither regulated election spending nor required the disclosure of information to voters. That law required a charity that wanted to solicit donations from California residents to register and submit organizational and tax documents, on a confidential basis, to the state attorney general. These documents included the charity's federal IRS Form 990 Schedule B, on which section 501(c)(3) nonprofits report to the IRS the names and donations of all major donors. Although in reviewing this law the Supreme Court clarified that all disclosure laws must be "narrowly tailored," the Court

[19] In any event, the public's informational interest is "alone . . . sufficient to justify" disclosure laws, *Citizens United*, 558 U.S. at 369, so the anti-corruption interest, while important, is not essential to uphold the Act.

distinguished the California law from electoral disclosure requirements, and approvingly cited precedents *upholding* the latter.[20]

The Court also concluded that there was a "dramatic mismatch" between the government's asserted interest in policing charities' potential fraud and California's Schedule B requirement. First, the Court noted that this reporting law did not require any public disclosure of Schedule B information, and thus the law served no public informational purpose. The Court further explained that the law swept broadly, requiring more than 60,000 charities to submit Schedule Bs to the attorney general with donor names, addresses, and contribution amounts, but the attorney general's investigations rarely used Schedule Bs. 594 U.S. at 612-13. Moreover, the attorney general could obtain the information it needed for law enforcement purposes through less broadly sweeping means such as subpoenas. The Court thus held that the "lack of tailoring to the State's investigative goals [was] categorical—present in every case—as [was] the weakness of the State's interest in administrative convenience." *Id*. at 615.

In contrast, here the Act requires disclosure only from big campaign donors and spenders and is directly related to Arizona's compelling interest in promptly

[20] *Bonta*, 594 U.S. at 607-11 (citing *Buckley*, 424 U.S. at 64-68; *Citizens United*, 558 U.S. at 366-367; *Davis v. FEC,* 554 U.S. 724, 744 (2008); *Doe v. Reed*, 561 U.S. 186, 198-99, 201 (2010)).

providing voters with information about the source of funding of political advertisements.

B. The compelled disclosure scenarios and cases AFP cites do not involve the financing of election advocacy.

Although AFP acknowledges (Br. at 32) that *Buckley* upheld the required disclosure of information "relevant to an election," AFP then proceeds to offer a series of irrelevant straw men to speculate about the limits of *Buckley's* holding. Even if AFP is correct that a law cannot require disclosure of a "candidate's medical records" or "Social Security or credit card numbers" (Br. at 32-34), such imaginary requirements are irrelevant here and neither *Buckley* nor *Bonta* addressed such issues. The Act requires no such disclosures, and AFP does not suggest otherwise.

Next, AFP relies on (Br. at 33) *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), to support a broad right to anonymous speech, but there the Supreme Court questioned only a particular application of a state law that required a lone pamphleteer to include a sponsor disclaimer on the campaign literature she was personally distributing. *Id.* at 337, 354-55. The Court's concern was that a disclaimer in this context was "particularly intrusive" and might "precipitate retaliation" against the speaker, but specifically distinguished laws, like the Act here, that instead require the disclosure of the donors financing election-related expenditures. *Id*. at 355.

Finally, AFP relies on (Br. at 31-32) cases cited in *Bonta* regarding the right to associate, such as *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). But again, those cases did not involve campaign finance disclosures or information important to educating voters. And *Bonta* itself implicitly distinguished these cases from the Court's major campaign finance rulings. In any event, the Act does not require the disclosure of an organization's membership lists, but is instead narrowly tailored to inform the public of large spenders and donors who attempt to influence voters' electoral choices.

IV. AFP's Remaining Arguments Against Proposition 211 Rely on Misunderstandings of How the Act Works.

A. The Act is not underinclusive.

Contrary to AFP's argument (Br. at 68), the Act does not favor unions over other "advocacy associations"; it treats them the same. Under A.R.S. § 16-971(1)(b), both "membership" and "union" dues that "do not exceed $5,000 from any one person in a calendar year" are considered "business income" and therefore a type of "original monies" that do not need to be traced back to other sources for reporting purposes. *See* A.R.S. §§ 16-971(12), 16-973(A)(6). Thus, for example, if either a local Chamber of Commerce or a Teamsters union collects annual dues of $5,000 from their members, and if those funds are contributed to a covered person, then it will report the funds' original sources as the Chamber or the

union, not the individuals who paid those dues. The Act treats all organizations with dues paying members the same.

B. *Buckley's* "major purpose" test is irrelevant here.

The Supreme Court held in *Buckley* that an organization cannot be subject to the kind of regular, comprehensive registration, reporting, and recordkeeping requirements applicable to political committees under federal law, 52 U.S.C. §§ 30102-04, unless its "major purpose" is the nomination or election of candidates. 424 U.S. at 79. The reporting requirements include at least quarterly reports in election years of all of the organization's receipts and disbursements over $200. *See* 52 U.S.C. §§ 30104(a)(4), 30104(b)(3), 30104(c)(5). Indeed, the Supreme Court and many other appellate courts have reiterated that event-driven disclosure laws like Arizona's are inherently more closely tailored than "political committee" disclosure regimes. *See, e.g.*, *Independence Inst.*, 812 F.3d at 795 n.9 ("The obligations that come with political committee status, including reporting and auditing requirements . . . tend to be considerably more burdensome than disclosure requirements.") (citation omitted); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).[21]

[21] Notably, while recognizing the greater burdens entailed in political committee reporting, this Circuit has upheld such comprehensive regimes. *See Yamada*, 786 F.3d at 1194-1201.

Proposition 211 requires no such regular and comprehensive reporting, so AFP's assertion (Br. at 67) that the Act "lump[s] together" covered persons with much more highly regulated political committees is false. Reporting under the Act is based on a person's campaign media spending, not any general status as a political committee. If and when a person spends more than $50,000 on statewide campaign media spending in Arizona (or $25,000 on other state campaigns), then it must file reports limited to disclosing the funds it has collected that are available for such spending—not other funds in its possession. Neither *Buckley* nor any other precedent has applied the "major purpose" to this kind of event-driven reporting.

C. The Act's thresholds are high, not low.

Contrary to AFP's suggestion (Br. at 69-70), the Act's thresholds are high. As noted *supra* at 23 n.5, under federal law, persons who make independent expenditures of only $250, or who make electioneering communications of $10,000, must file disclosure reports. Under the Act, however, the thresholds for "covered person" status are $25,000 and $50,000. A.R.S. § 16-971(7)(a). And covered persons need only disclose contributors of original monies who donated more than $5,000. A.R.S. § 16-973(A)(6). Under federal law, contributors who donate as little as $200 must be itemized. 52 U.S.C. § 30104(b)(3)(A).

D. The disclaimer requirement will protect donors who opt out.

Under A.R.S. § 16-974(C), the Commission is required to establish disclaimer requirements ensuring that covered persons name their top three donors of original monies on their election ads. The Commission's regulation implementing this requirement, Ariz. Admin. Code R2-20-805(B), makes it clear that a donor who has opted out need not be included in a public communication's disclaimer. AFP argues (Br. at 44-45) that this regulation is contrary the Act's text, but that is mistaken. The entire structure of the donor notice and opt out provision would be frustrated if a donor who opts out under § 16-972(B)—and whose money therefore cannot be used to pay for a communication that contains a disclaimer—were to be identified in a disclaimer.[22] Moreover, under § 16-973(D), a covered person generally may rely on the information it receives from its direct donors about the original sources of the funds being contributed. Yet donors to a covered person need not identify the sources of any funds that are opted out; under the law, they cannot be used for campaign media spending. A covered person will not,

[22] *See CAP*, 2024 WL 4719050, at *8 ("If we were to adopt Plaintiffs' interpretation, it would negate the purpose of the Act by informing the electorate of the identities of donors whose contributions were not used for campaign media spending.").

therefore, receive any information about the original sources of such opted-out funds and would be unable to identify any such donors in its disclaimers.

E. The Act contains no private enforcement right of action.

Although AFP acknowledges (Br. at 55-56) that any citizen suit under the Act must be filed against the Commission and not directly against a person who has allegedly violated the Act, AFP labels this key feature a "technical quibble [that] makes no substantive difference." *See* A.R.S. § 16-977. But this provision eliminates the ability of "private parties to weaponize the law" (AFP Br. at 3) because only the courts, not private parties, can decide whether the Commission errs when it fails to take enforcement action. AFP's suggestion (Br. at 56) that the Act "empowers private parties to interpret the law aggressively and expansively" ignores the judiciary; a private party's interpretation will have no impact whatsoever unless a court agrees with it. Under § 16-977(C) courts will review *de novo* the Commission's alleged failure to act, and nothing in the Act suggests that a court can or should rubber stamp any private party's interpretation of the law. And even if a private party prevails against the Commission, it will not win the right to pursue a private right of action.[23] Only the Commission can bring an enforcement case.

[23] In contrast, under federal law, if a private party demonstrates that the Federal Election Commission has acted contrary to law and the Commission fails to

V. AFP Cannot Demonstrate That the Act Is Unconstitutional As Applied to Them.

Even if AFP could prove all the allegations in their Complaint, they would still fail to qualify for an as-applied exemption under *Buckley* or *NAACP*. The Supreme Court has recognized an exemption from disclosure for the members of politically and socially marginalized groups, like the tiny Socialist Workers' Party of Ohio (SWP), who can show a "reasonable probability" of harassment and reprisals if their donors are disclosed. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982). Politically powerful actors like AFP, however, are "a far cry from the sixty-member SWP," which was "repeatedly unsuccessful at the polls, and incapable of raising sufficient funds." *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 928 (E.D. Cal. 2011), *aff'd in part, dismissed in part as moot*, 752 F.3d 827 (9th Cir. 2014). And groups who have won this exemption in the past have often had members who suffered *governmental* harassment and surveillance. *See Brown*, 459 U.S. at 99.

AFP does not allege that their organizations have suffered the kind of violence, threats or harassment that warranted exemptions for the SWP and NAACP. Moreover, unlike those vulnerable organizations, AFP does not even

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conform to the court's declaration to that effect, a private party can bring a separate action directly against the alleged violator. *See* 52 U.S.C. § 30109(a)(8).

allege that they are membership organizations, but instead focuses (ER-92, 94-95, 109-10) on vague allegations about possible harassment of their *donors*. But their donors are not parties here, and AFP has made no allegation either that they are representing their donors in any sort of organizational capacity or that their members, if they have any, face harm. Moreover, AFP has not alleged any reason why disclosing the *original sources* of the funds they use for campaign spending—as opposed to reporting only their direct donors—presents any different or heightened risk that would implicate *NAACP*-style harassment concerns.

As discussed above, the Supreme Court has long recognized that disclosure might discourage some donors from making contributions, so AFP's vague theory (ER-93; emphases added) that public disclosure "will make individuals *less likely* to donate to advocacy and other nonprofit organizations *such as Plaintiffs*" cannot support an as-applied challenge—especially since this allegation does not even assert that *AFP themselves* will receive fewer donations. Indeed, AFP (ER-94-95) does not include any allegations of harm to themselves. Instead, AFP focuses (ER-144-45) on their donors' purported preference for anonymity. But a disclosure law is not unconstitutional simply because an organization has operated with greater secrecy in the past and wishes to continue doing so. And AFP does not allege that any specific donor has notified them of an intent to stop donating because of the Act's disclosure requirements. *No on E*, 85 F.4th at 509 (finding that "donors'

alleged desire not to have their names listed" is insufficient to establish that disclosure creates real "deterrent effect" on fundraising).

Moreover, Appellants are national, extremely well-funded organizations.[24] AFP admits (ER-110) that prior to the Act, they already had a long history of "fierce critics." Nothing in AFP's Complaint alleges that they intend to spend such a significant amount of money to influence Arizona elections that the disclosures required by the Act would create a noticeable increase in the amount of attention, much less potential harassment, that they or their donors might receive. Instead, AFP relies on dicta regarding donor harassment in unrelated past cases, such as *Bonta*. *See* ER-142-44. Insofar as AFP purports to rely on that case, however, the Supreme Court made no findings there as to whether AFPF merited an as-applied exemption from the law at issue there.

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[24] In 2021, AFP's total revenue was $113,776,550, and AFPF's was $11,877,459. AFP 2021 8879-TE IRS Tax Form, https://s3.documentcloud.org/documents/23404092/2021-americans-for-prosperity-990.pdf; AFPF 2021 8879-TE IRS Tax Form, https://s3.documentcloud.org/documents/23404093/2021-americans-for-prosperity-foundation-990.pdf. Their affiliated super PAC, Americans for Prosperity Action, had total federal receipts in 2021-22 of $78,515,133. *AFP Action Financial Summary*, FEC, https://www.fec.gov/data/committee/C00687103/. In the same period, the super PAC spent $69,495,635 on independent expenditures and reported the names of hundreds of donors. *AFP Action Receipts*, FEC, https://www.fec.gov/data/receipts/?committee_id=C00687103&two_year_transaction_period=2022&data_type=processed. AFP makes no allegations that such donors have faced any harassment from these prior disclosures.

Finally, even though AFP has generally alleged (ER-143) that they have "fierce critics," it would be antithetical to the First Amendment to insulate them from lawful criticism spurred by their own speech. "[A] principal 'function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989) (citation omitted).

CONCLUSION

For these reasons, this Court should affirm the district court decision.

Respectfully submitted,

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Dated: November 27, 2024

STATEMENT OF RELATED CASES

Intervenor Defendant-Appellee Voters' Right To Know is not aware of any related cases pending in this Court.

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) No. 24-02933

I am the attorney or self-represented party.

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Signature */s/ Tara Malloy* **Date** November 27, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on November 27, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/Tara Malloy
Tara Malloy

Attorney for Voters' Right to Know