NO. 03-12-00255-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS

KING STREET PATRIOTS, CATHERINE ENGELBRECHT, BRYAN ENGELBRECHT AND DIANE JOSEPHS

***Appellants*,**

v.

TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE, IN HIS CAPACITY AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY AND JOHN WARREN, IN HIS CAPACITY AS DEMOCRATIC NOMINEE FOR DALLAS COUNTY CLERK 55TH JUDICIAL DISTRICT

***Appellees*.**

On Appeal from the Judicial District Court of Travis County, Texas
Cause No. D-1-GN-11-002363

APPELLANTS' BRIEF

Oral Argument Requested

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[1] For the readers' convenience, the actual page numbers match the .pdf page numbers. *Cf.* 2D CIR. R. 32.1(a)(3) (2010), *available at* http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_32_1.htm (all Internet sites visited June 15, 2012).

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I. STATEMENT OF THE CASE

This action arises out of a petition by the Texas Democratic Party in Travis County against Counter-Plaintiffs and Appellants King Street Patriots, Inc. ("KSP"), Catherine Engelbrecht, Bryan Engelbrecht, and Diane Josephs. The petition alleged that Counter-Plaintiffs had violated at least eight provisions of the Texas Election Code based on KSP's political speech. The petition sought damages and injunctive relief. On November 15, 2010, Counter-Plaintiffs filed an answer and counterclaim, along with a motion to transfer venue. The counterclaim challenged the *facial* constitutionality of Texas Election Code provisions. On July 25, 2011, the parties entered into a Rule 11 agreement, under which Counter-Plaintiffs' constitutional challenges were severed into a new action, so that the district court could address them before subjecting Counter-Plaintiffs to discovery necessary to resolve venue. *See* CLERK'S RECORD 461 ("CR.460-73").

The District Court of Travis County, Texas, 261st Judicial District (John Deitz, P.J.), granted summary judgment to Counter-Defendants and Appellees Texas Democratic Party; Boyd Richie, in his capacity as Texas Democratic Party chairman; Ann Bennett, in her capacity as Democratic nominee for Harris County Clerk; and John Warren, in his capacity as Democratic nominee for Dallas County clerk. CR.460-73.

Counter Plaintiffs filed their notice of appeal on April 24, 2012, CR.474-77, and filed their request to prepare the clerk's record on May 1, 2012. CR.478-82.

II. ORAL ARGUMENT REQUEST

Counter-Plaintiffs-Appellants request oral argument. An opportunity to hear all sides and allow them to respond to questions the Court may have would further the cause of justice in this action.

III. ISSUES PRESENTED

1. Are provisions creating a private right of action for enforcement of the Texas Election Code, TEX. ELEC. CODE 253.131, 253.132, 273.081, constitutional?

2. Are the Texas bans on contributions and expenditures, TEX. ELEC. CODE 253.091, 253.094, constitutional?

3. Are the Texas contribution, campaign-contribution, officeholder-contribution, political-contribution, expenditure, campaign-expenditure, direct-campaign-expenditure, officeholder-expenditure, and political-expenditure definitions, TEX. ELEC. CODE 251.001, constitutional?

4. Are the Texas political-committee, specific-purpose committee, and general-purpose-committee definitions, TEX. ELEC. CODE 251.001, and the now-repealed direct-expenditure provisions, TEX. ELEC. CODE 253.062, 253.097, constitutional?

5. Are the Texas 30 and 60 days blackout periods, TEX. ELEC. CODE 253.031, 253.037, constitutional?

6. Are the criminal penalties in the Texas Election Code, TEX. ELEC. CODE 253.094, 253.095, 253.003, 253.101, 253.102, 253.103, 253.104; TEX. PENAL CODE 12.34, constitutional?

IV. STATEMENT OF FACTS

The relevant facts include those in the first paragraph of the statement of the case.[2] Moreover, as the district court noted, KSP

> was formed as a non-profit Texas corporation on December 30, 2009, with the stated purpose "To provide education and awareness with [sic] the general public on important civic and patriotic duties." KSP reviewed public information regarding voter registration in Harris County, reported findings to the Harris County Voter Registrar, and trained several hundred poll watchers who served during the 2010 general election. This poll training was done in conjunction with the organization True the Vote[3]. KSP conducts weekly meetings at which speakers address topics of interest to citizens in the Houston area such as immigration, education, fiscal policy, national defense, as well as "protecting the integrity of elections." KSP collects donations at its meetings by "passing the hat." Further, according to their [*sic*] counterclaim, politician speakers are "strictly informed" that the group is nonpartisan and politicians may not campaign. Finally, KSP states it has made no contributions to any candidate or politician.

C.R. 460-61 (first brackets in original).

V. SUMMARY OF ARGUMENT

Political speech is at the core of what the First Amendment protects. Texas regulates political speech beyond its power to do so. Several sets of Texas laws are facially unconstitutional under the First Amendment:

- The provisions creating a private right of action for enforcement of the Texas Election Code. TEX. ELEC. CODE 253.131, 253.132, 273.081.

- The Texas bans on contributions and expenditures. TEX. ELEC. CODE 253.091, 253.094.

[2] *Supra* Part I.
[3] http://www.truethevote.org/

- The Texas contribution, campaign-contribution, officeholder-contribution, political-contribution, expenditure, campaign-expenditure, direct-campaign-expenditure, officeholder-expenditure, and political-expenditure definitions. TEX. ELEC. CODE 251.001, are unconstitutional.

- The Texas political-committee, specific-purpose committee, and general-purpose-committee definitions, TEX. ELEC. CODE 251.001, and the now-repealed direct-expenditure provisions. TEX. ELEC. CODE 253.062, 253.097.

- The 30 and 60 days blackout periods. TEX. ELEC. CODE 253.031, 253.037, and

- The criminal penalties in the Texas Election Code. TEX. ELEC. CODE 253.094, 253.095, 253.003, 253.101, 253.102, 253.103, 253.104; TEX. PENAL CODE 12.34.

VI. ARGUMENT

A trial court's summary-judgment ruling receives *de novo* review. *E.g., Kourosh Hemyari v. Stephens,* 355 S.W.3d 623, 627 (Tex. 2011) (citing *Tittizer v. Union Gas Corp.,* 171 S.W.3d 857, 860 (Tex. 2005)).

A. First Principles: Freedom of speech is the norm, not the exception.

Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976), *quoted in Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 564 U.S. ____, ____, 131 S.Ct. 2806, 2828-29 (2011) ("*AFEC*").

Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Buckley,* 424 U.S. at 41-43, 76-77.

Even non-vague law regulating political speech must comply with the First Amendment, U.S. CONST. amend. I (1791), which guards against overbreadth. *Buckley,* 424 U.S. at 80 ("impermissibly broad").[4]

Regardless of the level of scrutiny, the only interest that suffices to *limit*[5] "campaign finances" is the prevention of corruption of candidates or officeholders, or its appearance,[6] and where "the First Amendment is implicated, the tie [(if there is one)] goes to the speaker, not the censor." *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 474 (2007) ("*WRTL-II*"). Corruption means only *quid pro quo* corruption. *Citizens United,* 130 S.Ct. at 908-10.

B. The provisions creating a private right of action for enforcement of the Texas Election Code, TEX. ELEC. CODE 253.131, 253.132, 273.081, are unconstitutional.

The private-right-of-action provisions, TEX. ELEC. CODE 253.131, 253.132, 273.081, have an enormous potential for abuse. Political opponents can sue individuals and organizations, such as KSP, and use discovery as a weapon. Even when there is no violation of law, discovery wrings speakers through a process that becomes the punishment. *See WRTL-II,* 551 U.S. at 468 n.5; *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (stating that the "chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or

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[4] "Overbreadth" applies not only to facial claims but also to as-applied ones. *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006).

[5] As opposed to *regulate*. *See, e.g., Buckley,* 424 U.S. at 66-68.

[6] *FEC v. National Conservative PAC,* 470 U.S. 480, 496-97 (1985) ("*NCPAC*") (citing *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981); *Buckley v. Valeo,* 424 U.S. 1 (1976)); *see Citizens Against Rent Control,* 454 U.S. at 297 (referring to candidates and officeholders).

failure"). By holding that the government's interest in "transparency" outweighs this, CR.464, the district court erred.

1. The private-right-of-action provisions violate the Due Process Clause.

Texas law allows launching an investigation with only an allegation of wrongdoing. "[W]hen the constitutional right to speak is sought to be deterred by a State[] … due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). When a legislature delegates enforcement authority, due process also curtails private parties' discretion. *Biener v. Calio*, 209 F.Supp.2d 405, 412 (D. Del. 2002) (citing *General Elec. Co. v. New York State Dep't of Labor,* 936 F.2d 1448, 1454-55 (2d Cir. 1991) (collecting authorities)).

Law must have "sufficient clarity to … 'provide *explicit standards* for those who apply them.'" *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) (emphasis added) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). These are procedural safeguards, *id.,* and these principles apply in the First Amendment context. *See Board of Regents v. Roth*, 408 U.S. 564, 575 (1972) (collecting authorities). Absent clear safeguards, private enforcers have "unbridled discretion" *via* discovery to seize constitutionally protected documents and communications, even if the private enforcers eventually lose on their claims. Such "unbridled discretion" is unconstitutional. *See Gaudiya Vaishnava Soc. v. San Francisco,* 952 F.2d 1059, 1065

(9th Cir. 1991) (citing *Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 756–58 (1988)).

Courts strike laws giving private citizens enforcement power lacking procedural safeguards. *E.g., Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912). Courts recognize this problem and reiterate the demands of due process. *See, e.g., Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121-22 (1928); *General Elec.*, 936 F.2d at 1454-55 (collecting authorities and noting that *Eubank* and *Roberge* remain good law).

Texas's private-right-of-action provisions lack guidelines regarding what showing is necessary to initiate an investigation. A general allegation of "harm" or a "threatened harm" is insufficient. The Court should strike these provisions as violating the Due Process Clause.

Since this is a matter of constitutional law, it is no answer to say, as the district court did, that "procedural safeguards" elsewhere protect against abuse. CR.465. The statute is what Counter-Plaintiffs reasonably fear.

2. The private-right-of-action provisions violate the First Amendment.

a. The private-right-of-action provisions lack sufficient standards to protect discovery abuse.

The private-right-of-action provisions violate the First Amendment.

First, compelled disclosure of political associations can chill fundamental rights. *Buckley*, 424 U.S. at 64; *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (2010); *AFL-CIO v. FEC,* 333 F.3d 168, 175 (D.C. Cir. 2003). The freedom of association implicit in

the First Amendment protects privacy in association. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Perry*, 591 F.3d at 1162. Thus, there must be a sufficient state interest supporting compelled disclosure of information normally protected by the right of association, *id.* at 1160, particularly where one must divulge such information to political opponents. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 382-84, 387-88 (D.C. Cir.), *cert. denied,* 454 U.S. 897 (1981). Materials likely to be sought are extremely "delicate"; they reach "the very heart of the organism which the First Amendment was intended to nurture and protect: political expression and association." *Id.* at 388. Such materials will likely "relate[] to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Id.* at 387. Discovery may reach internal communications about candidates that organizations support, plus political strategies or political affiliations. *See id.* at 388.

The "outcome of a lawsuit – and hence the vindication of legal rights – depends more often on how the fact finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser,* 357 U.S. at 520-21. The "more important the rights at stake[,] the more important must be the procedural safeguards surrounding those rights." *Id.*; *see also Riley v. Nat'l Fed. of the Blind,* 487 U.S. 781, 794 (1988); *City of Houston v. Hill,* 482 U.S. 451, 465-67 (1987); *Dombrowski,* 380 U.S. at 487.

Texas's private-right-of-action provisions lack standards regarding what showing is necessary to initiate discovery and what is discoverable. But the First Amendment requires both. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-63 (1989); *Perry,* 591 F.3d at 1164.

If one can allege wrongdoing and then commence discovery to see whether one can prove the claim, then the protections of associational rights hardly have any meaning. *See NAACP v. Alabama,* 357 U.S. at 462 (recognizing "the vital relationship between freedom to associate and privacy in one's associations"). Any private-right-of-action provision that offers incentives to harass or intimidate political opponents must require a heightened showing of wrongdoing. Inadequate safeguards in enforcement proceedings threaten free speech. *See Dombrowski,* 380 U.S. at 487; *In re Grand Jury Proceeding,* 842 F.2d 1229, 1236 (11th Cir. 1988) ("the government investigation itself may indicate the possibility of harassment"). Because Texas's private-right-of-action provisions do not delineate the showing necessary to seek discovery in an action, they violate the First Amendment.

Second, any discoverable evidence must satisfy a heightened showing of relevance. *Perry,* 591 F.3d at 1164. At a minimum, the First Amendment protects against fishing expeditions into the private affairs of political opponents; a party must show a "substantial relation" to an "overriding or compelling state interest" before proceeding with discovery. *See In re Grand Jury Proceeding,* 842 F.2d at 1236. Even if a party satisfies this standard, a court must limit discovery to what is substantially related

to the issue at hand. *Id.* Because Texas law lacks such safeguards, the Court should strike it.

b. The injunction provision is a prior restraint.

Texas law allows those filing a private right of action – including political opponents – to get an injunction for a "threatened violation" of law. TEX. ELEC. CODE 273.081. An injunction against speech is a prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions – *i.e.,* court orders that actually forbid speech activities – are classic examples of prior restraints"); *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (refusing to enjoin publications of the "Pentagon Papers" because it would be a prior restraint on speech); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 317 (1980) (holding that Texas's public-nuisance law, which authorized state judges, on the basis of past conduct of a theater, to enjoin the theater's future exhibition of films, was unconstitutional as authorizing an invalid prior restraint). Prior restraints on speech "are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976), and the Supreme Court has held that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

The First Amendment opposes prior restraints, *see Vance*, 445 U.S. at 311 n.3, 316 n.13, on political speech. *Nebraska Press*, 427 U.S. at 559. An injunction against future speech under Section 273.081 is a prior restraint, so Section 273.081 must be narrowly

tailored to a compelling government interest. *See Cooper v. Dilon*, 403 F.3d 1208, 1214-15 (11th Cir. 2005) ("prior restraints on speech and are subject to strict scrutiny").

Section 273.081 fails strict scrutiny. No compelling interest justifies enjoining political speech, *see Vance*, 445 U.S. at 316 n.13, of political opponents. *See Sampson v. Buescher*, 625 F.3d 1247, 1253 (10th Cir. 2010).

In the alternative, Section 273.081 is not narrowly tailored to burden the least amount of speech necessary to accomplish the interest. Instead, it allows "a person who is being harmed" or one who "is in danger of being harmed" by a "violation or threatened violation" to obtain an injunction to "prevent the violation from continuing or occurring."

The problems with Section 273.081 do not stop with political opponents. Any individual could claim to be "in danger of being harmed" by arguing that a political speaker may not disclose something in the future, TEX. ELEC. CODE 254.001 *et seq.,* or may not appoint a treasurer. *Id.* 253.031. The speaker must then prove future compliance with the law. This is unjustified. *See Vance,* 445 U.S. at 317. In holding otherwise, the district court erred. CR. 466-67. The district court does not acknowledge the problem that Texas law presents. *See id.*

3. *Osterberg v. Peca* does not preclude KSP's challenge.

Although *Osterberg v. Peca,* 12 S.W.3d 31, 48-50 (Tex. 2000), holds private rights of action are not *per se* unconstitutional, *Osterberg* does not address the foregoing points. Instead, it considers only "*who* can seek and receive damages." *Id.* at 49. The

Osterbergs asserted all private causes of action in this context violate the First Amendment. *Id.* at 48.

In addition, *Osterberg* rests on the mistaken presumption that a political speaker will be subject to only one enforcement proceeding. *See id.* at 49 ("that the person enforcing the law and receiving damages can be a private party *rather than* the state") (emphasis added). Rather, Texas law allows for an unlimited number of private parties to sue. *See* TEX. ELEC. CODE 253.131 ("each opposing candidate"), 253.132 ("each political committee). In addition, Texas can step in and seek a treble penalty. *See id.* 253.133. In not recognizing this, the district court erred. CR.466.

This is especially true since *Osterberg* addresses only a challenge to the candidate private right of action. This law allows a candidate to sue a speaker who violates the law. TEX. ELEC. CODE. 253.131(b). If the speech at issue were regarding one candidate, as in *Osterberg*, there may be only one private cause of action. However, when speech is about issues, many candidates may sue. Thus, *Osterberg* does not control here. In holding otherwise, the district court erred. CR.464.

4. The private-right-of-action provisions violate the Fourth Amendment.

An open and unrestrained fishing expedition, under color of state law, through the property and files of political opponents can be an unreasonable search under the Fourth Amendment, U.S. CONST. amend. IV (1791). *see Maryland v. Macon*, 472 U.S. 463, 469 (1985), especially when it invades privacy protected under the First Amendment.

"[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965), *quoted in NASA v. Nelson,* 131 S.Ct. 746, 755 n.6 (2011). The right of association includes a right of privacy, *NAACP v. Alabama,* 357 U.S. at 462, that courts apply. *Perry,* 591 F.3d at 1162; *Machinists,* 655 F.2d at 389.

As discovery in this action would be aimed at uncovering information at the heart of this protection, and as discovery is initiated by persons acting under color of state law, discovery here is a Fourth Amendment search.

Due to the First Amendment interests at stake, courts must evaluate probable cause to allow an investigation to commence. *Stanford v. Texas,* 379 U.S. 476 (1965). While the private-right-of-action provisions, being private, are civil rather than criminal, these actions are often accompanied by prosecution. Therefore, if probable cause is not required in the private-enforcement proceedings, the government could circumvent the Fourth Amendments probable-cause requirements by awaiting the findings from discovery in the civil proceeding.

The Fourth Amendment is often used to provide extra protection to First Amendment interests, especially where state-authorized investigations chill the advancement of legitimate speech. *See, e.g., Fort Wayne Books,* 489 U.S. at 66; *Macon,* 472 U.S. at 470; *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 326 n.5 (1979); *Zurcher v. Stanford Daily,* 436 U.S. 547, 564 (1978); *Roaden v. Kentucky,* 413 U.S. 496,

504 (1973); *see also New York v. P.J. Video, Inc.,* 475 U.S. 868 (1986); *Heller v. New York,* 413 U.S. 483 (1973).

This is because the "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant,* 367 U.S. 717, 729 (1961). The "unrestricted power" of discovery is "an instrument for stifling liberty of expression." *Id*. As the sections at issue here do not require a showing of probable cause *prior* to seeking discovery, they should be struck.

C. The Texas bans on contributions and expenditures, TEX. ELEC. CODE 253.091, 253.094, are constitutional.

Texas law bans corporate contributions and expenditures. TEX. ELEC. CODE 253.091, 253.094.

The expenditure ban fails strict scrutiny under *Citizens United,* 130 S.Ct. at 896-914. The district court does not address this. *See, e.g.,* CR.8-10.

The contribution ban does as well. *United States v. Danielczyk,* 791 F.Supp.2d 513, 514-19 (E.D. Va. 2011).

As *Danielczyk* explains, *id.* at 514, banning independent spending for political speech is unconstitutional under *Citizens United,* 130 S.Ct. at 896-914, because independent spending does not cause corruption or its appearance. *Id.* at 908-10. Addressing facial challenges, *Buckley* held that contributions *within federal limits* do not cause *quid pro quo* corruption or its appearance. 791 F.Supp.2d at 515 (citing 424 U.S.

at 25). *Buckley* also held that independent spending for political speech does not cause *quid pro quo* corruption or its appearance. *Id.* (quoting 424 U.S. at 47-48).

Two years later, the Supreme Court held that "the identity of a corporation as 'speaker,' especially in the context of political speech, is of no consequence to the First Amendment protection its speech is afforded." *Id.* (quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 784-85 (1978)).

Based on *Buckley* and *Bellotti, Citizens United* held that government may not ban corporations' independent spending for political speech. *Id.* (citing 130 S.Ct. at 899-903).

"That logic remains inescapable. If human beings can directly contribute *within FECA's limits* without risking *quid pro quo* corruption or its appearance, and if 'the First Amendment does not allow political speech restrictions based on a speaker's corporate identity,' *Citizens United,* 130 S.Ct. at 903, then corporations … must be able to do the same." *Danielcyzk,* 791 F.Supp.2d at 515 (emphasis in original).

The logic of *Citizens United* supersedes other case law for the reasons *Danielczyk* explains. This includes not only other Supreme Court case law, *id.* at 515-19, but also *Ex parte Ellis*, 279 S.W.3d 1 (Tex.App. Austin 2008). First, *Ellis* outlines the notion that contribution limits receive a lesser scrutiny than expenditure limits. *Id.* at 14-17. Next the court had to explain why corporate contributions could be banned while contributions from other speakers were allowed. *Id.* at 17-19. *Citizens United* undermines this. *Ellis, id.* at 17 (noting "corporations' potentially 'deleterious influences on federal elections,'"

"war chests," and "the ban was and is intended to prevent corruption"), relies on *FEC v. Beaumont,* 539 U.S. 146, 161-62 (2003), but *Citizens United* undermines this for the reasons *Danielczyk* explains. 791 F.Supp.2d at 515-19.

Ellis further speaks of the government's interest in the "circumvention of valid contribution limits" as an interest justifying a ban. 279 S.W.3d at 17-18. But "valid" is the key word: Texas's corporate-contribution ban is *in*valid under *Citizens United. See Danielcyzk,* 791 F.Supp.2d at 515-19.

The key to the district court's error is that it does not recognize how the logic of *Citizens United* supersedes *Beaumont* and *Ellis. See* CR.468.

In addition, the corporate-contribution ban violates the Equal Protection Clause. *Dallman v. Ritter,* 225 P.3d 610, 614 (Colo. 2010). The district court does not address this. *See, e.g.,* CR.8-10.

Content-based restrictions raise equal protection concerns "because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson v. Freeman,* 504 U.S. 191, 197 n.3 (1991); *see also Carey v. Brown,* 447 U.S. 455, 459, 461-62 (1980); *City of Chicago v. Mosley,* 408 U.S. 92, 94, 102 (1972). As such restrictions implicate equal protection, "under either a free speech or equal protection theory, a content-based regulation of political speech … is valid only if it can survive strict scrutiny." *Burson,* 504 U.S. at 197 n.3; *see also Carey,* 447 U.S. at 461-62; *Mosley,* 408 U.S. at 101.

Similarly, speech restrictions that differentiate among *speakers* are subject to strict scrutiny under the Equal Protection Clause. "When such vital rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979); *Williams v. Rhodes,* 393 U.S. 23, 31 (1968).

D. The Texas contribution, campaign-contribution, officeholder-contribution, political-contribution, expenditure, campaign-expenditure, direct-campaign-expenditure, officeholder-expenditure, and political-expenditure definitions, TEX. ELEC. CODE 251.001, are unconstitutional.

As a foundation to its regulation of political speech, Texas, with exceptions not material here, defines a contribution as: "a *direct* or *indirect* transfer of money, goods, services, or *any other thing of value*…" TEX. ELEC. CODE 251.001(2). An expenditure is "a payment of money or *any other thing of value*…" *Id.* 251.001(6). In applying *Ellis,* the district court erred. *See* CR.469-70.

1. The contribution definitions are vague.

a. Legal Principles Regarding Vagueness

Law regulating political speech must not be vague. *See Buckley,* 424 U.S. at 41-43, 76-77. Vagueness arises when the rules are not in simple and concise terms, *see Citizens United,* 130 S. Ct. at 889, or when they do not "provide the kind of notice that will enable ordinary people to understand what conduct" is regulated or when they "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999). The language in the statutes must provide

the "(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms." *Buckley*, 424 U.S. at 41.

Vagueness concerns specially arise in the context of standards that allow for consideration of subjective, or intent-based, factors. *See WRTL-II*, 551 U.S. at 468. "[A] statute or ordinance offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons.'" *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 358-59 (6th Cir. 1998) (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996)). In essence, employing standards that allow for intent-based considerations "blankets with uncertainty whatever may be said and offers no security for free discussion" and thus "chill[s] core political speech." *WRTL-II*, 551 U.S. at 468 (internal quotations omitted). As regulation of political speech must "provide a safe harbor for those who wish to exercise First Amendment rights," *id.* at 467, regulation that turns "on the intent of the speaker does not remotely fit the bill." *Id.* at 468. In other words, all regulation must have the clarity and precision necessary to avoid subjective and intent-based factors so that the regulations uphold "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* at 467 (internal quotations omitted).

Finally, it must be remembered that in a facial challenge under the First Amendment, law need not be vague in all its applications. Rather, the test is whether the

law is substantially overbroad. *See City of Houston v. Hill,* 482 U.S. at 458-59. Additionally, where law imposes criminal penalties, as it does here, the standard of certainty required in the law is higher. *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (citing *Winters v. New York*, 333 U. S. 507, 515 (1948)).

b. The contribution definition is vague.

The contribution definition uses the phrase "indirect transfer of any other thing of value." TEX. ELEC. CODE 251.001(2). Because one cannot know the meaning of this phrase, it is unconstitutionally vague.

c. The campaign-contribution definition is vague.

"Campaign contribution" is defined as: "a *contribution* to a candidate or *political committee* that is offered or given with *the intent* that it be used *in connection with* a campaign for elective office or on a measure." TEX. ELEC. CODE 251.001(3). There are a number of vagueness issues with this.

First, it depends on the contribution definition, which is vague.

Second, it is circular, because the campaign-contribution definition depends on the political-committee definition, *id.,* which depends on the political-contribution definition, *id.* 251.001(12), which depends on the campaign-contribution definition. *Id.* 251.001(5).

Third, the definition is intent based, contrary to *WRTL-II,* 551 U.S. at 466-69. An intent-based test affords "no security for free discussion" and "blankets with uncertainty whatever may be said." *Id.* at 467-68. "It compels the speaker to hedge and trim," and places the speaker "wholly at the mercy of the varied understanding of his hearers and

consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43.

Fourth, the definition incorporates the vague phrase "in connection with." This phrase is vague. *Osterberg*, 12 S.W.3d at 51. While the Texas Supreme Court also narrowed the phrase, *id.,* the *Osterberg* narrowing gloss would undermine the express text of the statute here. Here, the definition states that "it be used *in connection with* a campaign for elective office or *on a measure."* While the phrase "*in connection with a campaign for elective office"* can be narrowed to reach only communications that "'expressly advocate[s]' the election of candidates," *id.,* the phrase *"in connection with a campaign on a measure"* cannot be similarly narrowed. *See id.* at 51 n.25 (noting that the definition of *"on a measure"* still presents constitutional problems). This is so because constitutional regulations cannot take in "general issue advocacy," which any communications *"on a measure"* would assuredly include. *See id.* at 51 (noting that "general issue advocacy" cannot be regulated). Since *"in connection with a campaign on a measure"* cannot be construed to exclude "general issue advocacy," the statute is vague and must be struck as unconstitutional.

At this point it is necessary to consider the impact of *Ellis*. *Ellis* dismissed a vagueness challenge to the corporate-contribution ban. 279 S.W.3d at 22. In so doing, the court had to address the phrase "in connection with a campaign for elective office." *Id.* at 21. The court began by stating "[w]e recognize that the phrase 'in connection with a campaign' is broad …. We also recognize that the elaborate structure for regulating

political contributions in the election code is complicated and a challenge for 'a person of ordinary intelligence' to understand and navigate." *Id.* The court ultimately held, however, that the challenged provisions "are not so indefinite that they fail to give reasonable notice of what is prohibited with respect to *corporate* contributions." *Id.* (emphasis added).

d. The officeholder-contribution definition is vague.

An "officeholder contribution" is "a *contribution* to an officeholder or *political committee* that is offered or given with the *intent* that it be used to *defray* expenses that: (A) are incurred by the officeholder in performing a duty or engaging in an activity *in connection with* the office; and (B) are not reimbursable with public money." This definition is vague for many of the same reasons that "campaign contribution" is vague, including the use of the vague term "contribution," the circular definitional problems associated with "political committee," and the intent based test. In addition, this definition is vague for two additional reasons. "Defray" is a vague here, as is the phrase "in connection with."

e. The political-contribution definition is vague.

Section 251.001(5) defines a "political contribution" as "a *campaign contribution* or an *officeholder contribution."* As discussed above, since these other two definitions are vague, the definition of "political contribution" is also vague.

2. The expenditure definitions are vague.

a. The expenditure definition is vague.

The expenditure definition, TEX. ELEC. CODE 251.001(6), uses "or any other thing of value." This is vague for the reasons stated above.

b. The campaign-expenditure and direct-campaign-expenditure definitions are vague.

Osterberg addressed the campaign-expenditure and direct-campaign-expenditure definitions, 12 S.W.3d at 51, and applied a narrowing gloss. The court, however, did not address the vagueness of the expenditure definition or the phrase "an expenditure made in connection with a campaign on a measure." *Id.* at 51 n.25. Therefore, *Osterberg* does not save these definitions. *See id.* Rather, *Osterberg* supports KSP's position that these definitions are still too vague.

Both definitions are unconstitutional if the "expenditure" definition – with its use of "any other thing of value," as discussed above – is unconstitutional. The definitions are also unconstitutional for the use of "in connection with." Even with the *Osterberg* narrowing gloss on the part of the campaign-expenditure definition dealing with "in connection with a campaign for an elective office," *id.* at 51, this definition is still vague when considering its impact on political speech about a measure, especially since the statute's express terms reach political speech *after* an election. TEX. ELEC. CODE 251.001(7). In other words, the statute expressly regulates general issue advocacy that is not a part of advocating for or against a measure. As indicated in *Osterberg*, 12 S.W.3d at

51, regulation of general issue advocacy is unconstitutional, and laws that could be construed to reach general issue advocacy are unconstitutional. Therefore, these definitions should be struck on vagueness grounds.

c. The officeholder-expenditure definition is unconstitutionally vague.

The officeholder-expenditure definition is vague for the same reasons the officeholder-contribution is vague: The use of "defray" and "in connection with." This definition is more troubling, however, because many payments may be an "expenditure."

d. The political-expenditure definition is unconstitutionally vague.

The political-expenditure definition is vague, because it uses the terms "campaign expenditure" and "officeholder expenditure," TEX. ELEC. CODE. 251.001(10), which are vague.

E. The Texas political-committee, specific-purpose committee, and general-purpose-committee definitions, TEX. ELEC. CODE 251.001, and the now-repealed direct-expenditure provisions, TEX. ELEC. CODE 253.062, 253.097, are unconstitutional.

Turning to political-committee or political-committee-like burdens, most case law addresses such burdens by addressing political-committee definitions. However, Texas imposes such burdens *via* its political-committee, specific-purpose-committee, and general-purpose-committee definitions. TEX. ELEC. CODE 251.001. The district court erred in summarily rejecting these claims. *See* CR.471. The district court provided no analysis. *See id.*

In a constitutional analysis, it is important to remember that it is not the label but the substance that matters. As explained below, the burdens that apply when Texas defines an organization not only as a political committee, but also as a specific-purpose-committee or general-purpose committee, namely

(1) Registration (including treasurer-designation and bank-account) and termination requirements. *E.g.,* TEXAS ELEC. CODE 252.001, 253.031.b-c, 253.037, 254.159, 254.204;

(2) Recordkeeping requirements, *e.g., id.* 253.001, 254.001; and

(3) Extensive, periodic reporting requirements, *e.g., id.* 254.031, 254.153, 254.154; *see also id.* 254.161

are the very burdens that are "onerous" under *Citizens United*, 130 S.Ct. at 898, and *WRTL-II,* 551 U.S. at 477 n.9 (citing *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 253-55 (1986) ("*MCFL*")). But government may not abrogate First Amendment rights through clever drafting or revision. It "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. 415, 429 (1963), *followed in FEC v. Colorado Republican Fed. Campaign Comm.,* 518 U.S. 604, 622 (1996) ("*Colorado Republican-I*"). Never mind that political-committee, specific-purpose committee, and general-purpose committees, must also comply with restrictions on contributions they receive. *E.g.,* TEX. ELEC. CODE 253.032, 253.039, 253.094.a.

Law need not ban or otherwise limit political speech to be unconstitutional. *See, e.g., Snyder v. Phelps,* 562 U.S. ____, ____, 131 S.Ct. 1207, 1218-19 (2011); *Buckley,* 424 U.S. at 74-82.

Strict scrutiny applies to government's defining organizations as political committees – or whatever label a jurisdiction uses – and thereby imposing political-committee burdens. This is so both when government (a) bans an organization itself from speaking and requires the organization to *form* a separate organization – a political committee, or whatever label a jurisdiction uses – to speak, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990), *overruled on other grounds, Citizens United*, 130 S.Ct. at 896-914; *see Citizens United,* 130 S.Ct. at 897-98;)*MCFL,* 479 U.S. at 252, and (b) does not ban an organization itself from speaking, *Citizens United,* 130 S.Ct. at 897 (noting that allowing the organization to speak would "not alleviate the First Amendment problems"); *MCFL,* 479 U.S. at 263 (holding there was no "compelling justification" for the "burdens" of corporate independent expenditures, which then included either forming or being a political committee), yet requires it to *be* a political committee – or whatever label a jurisdiction uses – to speak. *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*"); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 290 (4th Cir. 2008) ("*NCRL-III*"). In the alternative, exacting scrutiny applies under (b). *New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*"); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1010 (9th Cir. 2010) ("*HLW*"), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011).

As a matter of *law,* not fact, political-committee – or whatever label a jurisdiction uses – status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also

"onerous[,]" *id.* at 898; *WRTL-II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), because political committees "are expensive and subject to extensive regulations." *Citizens United,* 130 S.Ct. at 897. Government may impose far greater burdens on organizations it may define as political committees under *Buckley,* 424 U.S. at 74-79, than it may impose on other persons. *See MCFL,* 479 U.S. at 251-56.[7] While it is one thing to assert that *non*-political-committee disclosure requirements "do not prevent anyone from speaking," *Citizens United,* 130 S.Ct. at 914 (quoting *McConnell v. FEC,* 540 U.S. 93, 201 (1993), full-fledged political-committee burdens are another matter. Allowing speech only if an organization becomes a political committee is like banning the organization's speech, *see id.* at 897, when the organization reasonably concludes that the speech is "simply not worth it." *MCFL,* 479 U.S. at 255.

Political-committee – or whatever label a jurisdiction uses – requirements are burdensome and onerous even if they include "only" – so to speak – (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive, periodic reporting requirements yet not (4) limits or (5) source bans on contributions received. *See Citizens United,* 130 S.Ct. at 897-98 (mentioning (1), (2), and (3), but not (4) or (5)). Similar state requirements, such as Texas's, are also a "significant regulatory burden[,]" *NCRL-III,*

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[7] Federal courts of appeal have struck down state laws that do not ban speech but instead require that organizations themselves be political committees. *See NMYO,* 611 F.3d at 673; *NCRL-III,* 525 F.3d at 279; *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1140-41 (10th Cir. 2007) ("*CRLC*").

National Organization for Marriage, Inc. v. McKee misses this point. *See* 649 F.3d 34, 56 (1st Cir. 2011), *cert. denied,* 565 U.S. ____, 132 S.Ct. 1635 (2012), *followed in id.,* 669 F.3d 34, 44-45 (1st Cir. 2012).

525 F.3d at 286 (citation omitted),[8] even if they do not include (4)[9] or (5).[10] Texas *via* its political-committee, specific-purpose-committee, and general-purpose-committee definitions, TEX. ELEC. CODE 251.001, imposes (1), (2), and (3) on organizations such as KSP. Although it is immaterial, it also imposes contribution restrictions.

With such burdens in mind, *Buckley* establishes that government may define an organization as a political committee or otherwise impose political-committee or political-committee-like burdens only if (a) it is "under the control of a candidate" or candidates, or (b) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates, in the jurisdiction. 424 U.S. at 79, *followed in McConnell,* 540 U.S. at 170 n.64, *and MCFL,* 479 U.S. at 252 n.6, 262; *CRLC,* 498 F.3d at 1153-54; *NCRL-III,* 525 F.3d at 287-90.[11]

These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010) (quoting *Machinists,* 655 F.2d at 392, 395-96); *NCRL-III,* 525 F.3d at 288-89;

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[8] *McKee* misses this point as well. *See* 649 F.3d at 56; 669 F.3d at 39-40.

[9] *See CRLC,* 498 F.3d at 1141; *Richey v. Tyson,* 120 F. Supp.2d 1298, 1316 & nn.19-21 (S.D. Ala. 2000); *Volle v. Webster,* 69 F. Supp.2d 171, 172 (D. Me. 1999); *New York Civil Liberties Union v. Acito,* 459 F. Supp. 75, 78-79 (S.D.N.Y. 1978).

Some contribution-source bans apply whenever federal or state government defines an organization as a "political committee." *See* 2 U.S.C. 441b.a, 441b.b.2, 441e.

[10] *See National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F. Supp.2d 1132, 1136, 1138, 1139 (D. Utah 2008).

[11] While the Supreme Court has not applied the major-purpose test to state law, *McKee,* 649 F.3d at 59, that is because it has not accepted such a case. *See, e.g., McKee,* 132 S.Ct. at 1635. The apparent *McKee* holding that the test does not even apply to state law, 649 F.3d at 59, cannot be right. If it were, then state governments would have more power than the federal government to impose political-committee requirements. Given that these requirements – meaning (1), (2), and (3), regardless of whether (4) and (5) are present – are burdensome and onerous as matter of law under *Citizens United* and *WRTL-II,* the apparent *McKee* holding makes no sense. Political speech needs protection from both federal and state governments. *See Bellotti,* 435 U.S. at 778-79.

CRLC, 498 F.3d at 1139, 1154-55; *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 505 n.5 (7th Cir. 1998); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982); *see also NMYO,* 611 F.3d at 676; *cf. HLW,* 624 F.3d at 997-98, 1008-09, 1011-12 (considering a political-committee *definition,* stating incorrectly that the plaintiff also challenged the political-committee disclosure requirements,[12] and applying a priority-incidentally test for political-committee disclosure requirements).[13]

Determining whether an organization is "under the control of a candidate" or candidates for state or local office in Wisconsin is straightforward. *Cf. NMYO,* 611 F.3d at 677 (citing *Buckley,* 424 U.S. at 79); *Unity08,* 596 F.3d at 867; *Machinists,* 655 F.2d at 394-96; *Florida for Kennedy,* 681 F.2d at 1287.

Determining whether an organization passes the major-purpose test is also straightforward. *See CRLC,* 498 F.3d at 1152. The test asks what *the* major purpose of an organization is, not whether something is *a* major purpose. *MCFL,* 479 U.S. at 252 n.6, 262; *Buckley,* 424 U.S. at 79; *NCRL-III,* 525 F.3d at 287-89, 302-04. And "major" is the root of "majority," which means more than half. Thus, an organization can have only

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[12] *See HLW,* No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008).

[13] The major-purpose test is not a narrowing gloss. *CRLC,* 498 F.3d at 1153. The *McKee* decisions miss this point. *See, e.g.,* 649 F.3d at 59. If the major-purpose test were a narrowing gloss, then federal courts could not apply it to state law. Under *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry,* 485 U.S. 312, 330 (1988)), it would not be a "reasonable and readily apparent" narrowing gloss. *CRLC,* 498 F.3d at 1154-55. But federal appellate courts *do* apply it to state law, as *NMYO, NCRL-III,* and *CRLC* demonstrate. *Supra* Part II.E.

one major purpose. *See MCFL,* 479 U.S. at 252 n.6 (referring to "the major purpose" of an organization and "its organizational purpose," not purposes).

The law provides two methods to determine whether an organization passes the major-purpose test. Either suffices. The first method to determine an organization's major purpose considers how the organization has *articulated* its mission in its organizational documents, *see id.* at 241-42, 252 n.6, or in public statements, *FEC v. GOPAC, Inc.,* 917 F. Supp. 851, 859 (D.D.C. 1996), and the second method considers whether, in *carrying out* its mission, the organization devotes the majority of its spending to either contributions to, or independent expenditures[14] for, candidates, *CRLC,* 498 F.3d at 1152, *followed in NMYO,* 611 F.3d at 678; *NCRL-III,* 525 F.3d at 289, in the jurisdiction in question.[15,16]

Because Texas's political committee and political-committee-like definitions have no "under the control of a candidate" or major-purpose test, they are fail either strict scrutiny under *CRLC* and *NCRL-III* or exacting scrutiny under *NMYO.* Either way, the law is facially unconstitutional.

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[14] Meaning express advocacy as defined in *Buckley* and not coordinated with a candidate, the candidate's agents, the candidate's committee, or a party, which is the standard under the Constitution. *See* 424 U.S. at 46-47, 78; *McConnell,* 540 U.S. at 219-23. The phrase "independent spending" in *CRLC,* 498 F.3d at 1152 (citing/quoting *MCFL,* 479 U.S. at 252 n.6, 262), refers to express advocacy as defined in *Buckley. MCFL,* 479 U.S. at 249.

[15] Texas defines an organization as a political committee or political-committee-like organization in part based on contributions it receives. However, the test for whether a political-committee or political-committee-like definition is *constitutional* does not consider contributions an organization *receives.* Makes, yes. Receives, no.

[16] Once it *is* constitutional to impose full-fledged political-committee burdens on an organization, government may regulate more than the organization's express advocacy. *See Citizens United,* 130 S.Ct. at 897; *MCFL,* 479 U.S. at 254. However, in determining *whether* government may impose such burdens, one asks, *inter alia,* whether the organization devotes the majority of its spending to either contributions to, or independent expenditures – meaning express advocacy not coordinated with a candidate or political party – for, candidates in the jurisdiction.

If Texas wanted to regulate, for example, spending for political speech by persons it may *not* define as political committees under *Buckley,* 424 U.S. at 74-79, then it could, subject to further inquiry, *see, e.g., Citizens United,* 130 S.Ct. at 915-16, use other means, *id.* at 915 (citing *MCFL,* 479 U.S. at 262), and require non-"onerous" disclosure, *id.* at 898; *WRTL-II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), of (1) express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, *i.e.,* independent expenditures as defined in *Buckley, id.* at 39-51, 74-81, *vis-à-vis* state or local office in Texas or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Texas. *See Citizens United,* 130 S.Ct. at 914-16 (FECA electioneering communications); *MCFL,* 479 U.S. at 262 (express advocacy); *Buckley,* 424 U.S. at 80-81 (express advocacy).

Texas does not *have to* do this though. No jurisdiction *has to* regulate absolutely, positively everything that it may regulate. But whatever course Texas chooses, it may impose political-committee burdens *only* on organizations it may define as full-fledged political committees.

In addition:

The committee definitions are unconstitutional, because they have a zero-dollar threshold. That is, they impose full-fledged political-committee burdens even when organizations spend only a few dollars on political speech. This is also unconstitutional. *See Sampson*, 625 F.3d at 1261.

The direct-expenditure requirements, TEX. ELEC. CODE 253.062, 253.097, are unconstitutional. Although they do not require individuals acting alone to have a treasurer, these force political-committee burdens on individuals. However, *Buckley* contemplates that only "organizations" may be political committees. 424 U.S. at 79. Individuals may not be. *See Volle v. Webster*, 69 F.Supp.2d 171, 174-77 (D. Me. 1999); *Osterberg*, 12 S.W.3d at 63 (Gonzales, J. concurring) (noting that the regulations are far too complex for an individual to comply with).

1. The committee definitions are unconstitutionally vague.

Section 251.001(12) is unconstitutional for other reasons as well. Hinging the imposition of political-committee burdens on an organization that has "a principal purpose" or "has among its principal purposes" is vague. A speaker cannot know when it has this "principal purpose[.]"

Such language threatens to "trap the innocent by not providing fair warning," gives reign to "arbitrary and discriminatory application," and forces speakers to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley,* 424 U.S. at 41 n.48 (quoting *Grayned,* 408 U.S. at 108-09). It "puts the speaker[s] in these circumstances wholly at the mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [the speakers'] intent and meaning. [This] blankets with uncertainty whatever may be said. It compels the speaker[s] to hedge and trim." *Id.* at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)). A vague law thereby "chill[s] speech: People 'of common

intelligence must necessarily guess at the law's meaning and differ as to its application.'" *Citizens United,* 130 S.Ct. at 889 (brackets omitted) (quoting *Connally v. General Constr. Co.,* 269 U. S. 385, 391 (1926)). Such language also focuses on the subjective intent of the speaker and violates *WRTL-II*, 551 U.S. at 468 ("an intent-based test would chill core political speech" because "an intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion'"). *See also id.* at 474 n.7 (stating that there must "be no free-ranging intent-and-effect test").

Furthermore, the general-purpose-committee definition, TEX. ELEC. CODE 251.001(14), is vague.

First, it incorporates the vague political-committee definition. *See id.*

Second, it uses "supporting or opposing[.]" *Id.* Words "necessarily ha[ve] different meanings that depend on whether the spender is a candidate, a political committee, or an individual." *Osterberg*, 12 S.W.3d at 51. While *McConnell* did say promote-support-attack-oppose ("PASO") is not unconstitutionally vague *vis-à-vis* party committees and federal candidates, *compare* 540 U.S. at 170 n.64 *with* 2 U.S.C. 434.e (2002) *and id.* 441i (2002) (each citing *id.* 431.20.A), that is different from what is at issue here. Other courts have held parts of PASO are vague *vis-à-vis* other speech or other speakers. *See WRTL-II,* 551 U.S. at 492 (Scalia, J., concurring in part and concurring in the judgment) (calling, *inter alia,* PASO "impermissibly vague"); *id.* at 493 (calling PASO "inherently vague"). One court considered a state law defining "political committee" as any group "the primary or incidental purpose of which is to support or

oppose any candidate or to influence or attempt to influence the result of an election." The court held the law "is unconstitutionally vague[.]" *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 712-13 (4th Cir. 1999) (*"NCRL-I"*) (ellipsis omitted) (citing *Buckley,* 424 U.S. at 79-80), *cert. denied,* 528 U.S. 1153 (2000). The Fifth Circuit considered a law requiring disclosure of payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006), *cert. denied,* 549 U.S. 1112 (2007). The court's holding was based on the premise that the law is vague. *See id.* at 665. And *Buckley* holds the phrase "advocating the election or defeat of a candidate" is vague. 424 U.S. at 42-44. Since "advocating the election or defeat of a candidate" is more precise than PASO and the form thereof at issue here, they must also be vague. *Cf. WRTL-II,* 551 U.S. at 493 (Scalia, J., concurring in part and concurring in the judgment) (calling the appeal-to-vote test vague and stating that it "seem[s] tighter" than, *inter alia,* PASO); *NCRL-III,* 525 F.3d at 289, 301 (approving "support or oppose" when – after *NCRL-III,* 525 F.3d at 281-86 – its definition included only express advocacy as defined in *Buckley*).[17,18]

[17] Moreover, considering whether speech "PASOs" comes close to assessing the intent or purpose behind, or the effect of, political speech to determine its meaning and whether government may regulate it. *WRTL-II* all but forecloses this. 551 U.S. at 467-68. *WRTL-II* was not the first time the Court rejected considering intent, purpose, or effect, *see Buckley,* 424 U.S. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)), nor was *McConnell* the first time the Court considered the vagueness of parts of PASO. *See Cole v. Richardson,* 405 U.S. 676, 678-85 (1972) (treating oaths to support one's country and "oppose" its enemies as harmless "amenities" merely requiring compliance with other laws, but explaining that "oppose" would be vague elsewhere); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 279 (1971) (holding "support" unconstitutionally vague); *cf. Baggett v. Bullitt,* 377 U.S. 360, 373 (1964) (stating that since some push vague laws to limits, "[w]ell intentioned prosecutors and judicial safeguards do not neutralize the voice of a vague law"). Of course, Texas law is no "amenity" requiring compliance with other laws. Instead, it is law with serious penalties.

Besides, political parties and many federal candidates' campaigns are filled with political professionals accustomed to, though not necessarily content with, baroque election law. *Cf. McConnell,* 540 U.S. at 170 n.64 (holding that PASO is clear for political parties). Texas law leaves in a quandary those speakers, other than political parties and federal candidates, who want to engage in political speech. They cannot know how far they may go before they are "supporting or opposing[.]" As a result, they will "hedge and trim" their speech out of fear of violating a law that is hard for those outside a party or candidate-campaign apparatus to understand. *Buckley,* 424 U.S. at 42 n.50 (quoting *Thomas,* 323 U.S. at 535).[19]

Third, Section 251.001(14)(B) refers to those "assisting two or more officeholders." This is as vague as "supporting or opposing[.]"

Fourth, this definition includes "candidates who are *unidentified*," "offices that are *unknown*," "measures that are *unidentified*," and "officeholders who are *unidentified."* TEX. ELEC. CODE 251.001(14)(B) (emphasis added). This is also as vague as "supporting or opposing[.]"

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[18] A vacated Fourth Circuit panel opinion missed a crucial point about *NCRL-III. See Real Truth About Obama, Inc. v. FEC,* 575 F.3d 342, 349-50 (4th Cir. 2009) ("*RTAO*"), *cert. granted and judgment vacated,* 559 U.S. ____, 130 S.Ct. 2371 (2010). In approving undefined "support or oppose" language, *RTAO* relied on *NCRL-III.* However, *NCRL-III* addressed *North Carolina's* "support or oppose" definition, 525 F.3d at 289, 301, which after *NCRL-III, id.* at 281-86, includes *only* express advocacy as defined in *Buckley*. Those reading only *RTAO* may get the misimpression that *NCRL-III* holds "support or oppose" is inherently *not* vague. *NCRL-III* has no such holding.

[19] *National Organization for Marriage, Inc. v. Daluz* summarily rejects a similar point. *See* 654 F.3d 115, 120 (1st Cir. 2011). *McKee,* decided by the same panel, disagrees with the distinction between *McConnell* and other law. 649 F.3d at 63-64.

F. The 30 and 60 days blackout periods, TEX. ELEC. CODE 253.031, 253.037, are unconstitutional.

A political committee may engage in political speech "in a primary or general election" only if it appoints a treasurer 30 days "before the appropriate election day." TEX. ELEC. CODE 253.031(c). Meanwhile, a general-purpose committee may engage in political speech only if it appoints a treasurer 60 days before the speech and accepts contributions from at least 10 persons. *Id.* 253.037(a). In holding that these claims are not at issue here, the district court erred. *See* CR.472. To engage in political speech, KSP must abide by these deadlines.

Government lacks any interest such bans. *See, e.g., Citizens United*, 130 S. Ct. at 887, 911 ("An outright ban on corporate political speech during the critical period is not a permissible remedy"); *Danielczyk,* 791 F.Supp.2d at 514-19. This includes bans in 30 and 60 days windows. *See id.* at 896-914. The 60 day ban is even worse, because Texas law does not tie it to an election. *Compare id. with* TEX. ELEC. CODE 253.037(a).

Nor does the 30 day blackout's proximity to an election make it constitutional. Texas cannot be worried about a new political committee operating undercover (or not disclosing its speech before the election) because political committees have to file reports eight days before the election disclosing their activity. *Id.* 254.154. If Texas is worried about the formation of a new political committee in this eight-day window, it will have to address that issue in another case, because that is not the law at issue here.

Further, the requirement to accept contributions from 10 persons, TEX. ELEC. CODE 253.037(a)(2), is a prior restraint. Strict scrutiny applies. *See Alexander*, 509 U.S. at 550; *Cooper*, 403 F.3d at 1214-15.

The government lacks any interest in ensuring that political speech has a base of support. *See Buckley*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Even if only two persons believe or support the speech at hand, the freedom of speech guarantees that person the right to voice their opinions. *See United States v. Dennis*, 183 F.2d 201, 206 (2d Cir. 1950) (the First Amendment "protects all utterances, individual or concerted, seeking constitutional changes"). The First Amendment also includes the right of association, a necessary component to protecting the freedom of speech. *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) ("it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected"). The 10 person minimum requirement violates the right of association of any group of persons smaller than 10. *See, e.g., Worley v. Roberts*, 749 F.Supp.2d 1321 (N.D. Fla. 2010) (granting injunction where plaintiffs were a group of four neighbors). No interest justifies 10 person minimum.

G. The criminal penalties in the Texas Election Code, TEX. ELEC. CODE 253.094, 253.095, 253.003, 253.101, 253.102, 253.103, 253.104; TEX. PENAL CODE 12.34, are unconstitutional.

Despite the Eighth Amendment, U.S. CONST. amend. VIII (1791), corporate officers who violate the election code face a punishment at least ten times greater than others who violate the same code.

Under Texas Election Code Section 253.094, a corporation "may not make a political contribution or political expenditure that is not authorized by this subchapter," and under Section 253.095, an "officer, director, or other agent of a corporation … who commits an offense under this subchapter is punishable for the grade of offense applicable to the corporation or labor organization." Violations of section 253.094 are a third-degree felony. TEX. ELEC. CODE 253.094(c). Other sections that impose a third-degree felony for violations include: 253.003(e) (unlawful contributions for corporations), 253.101 (corporation unlawfully assisting a political committee), 253.102 (corporation using coercion to raise money), 253.103 (making a corporate loan), and 253.104 (corporate contribution to a political party).

A corporate officer guilty of a third-degree felony "shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years." TEX. PENAL CODE 12.34. In addition to imprisonment, a corporate officer guilty of a third-degree felony "may be punished by a fine not to exceed $10,000." *Id.*

The Eighth Amendment bans sentences that are grossly disproportionate to the crime. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). Three factors are relevant to determining whether a sentence is so disproportionate that it violates the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 2122.

Here, Texas law imposes a sentence of up to 10 years' imprisonment (and a minimum of two years' imprisonment), for doing nothing more than engaging in political speech, and without regard to the falsity of the speech, whether it was made for fraudulent or other improper purposes, or whether it had any tendency to incite unlawful action.

The penalties for engaging in truthful political speech are greater than for participating in a riot, engaging in forgery, burglarizing a commercial or retail establishment, burglarizing a vehicle, driving while intoxicated, running a brothel or an illegal gambling operation, stealing property of up to $20,000, spraying graffiti causing damage up to $20,000, selling obscenity to a minor, or for committing acts that amount to public lewdness, indecent exposure, or criminally negligent homicide—none which rises to the level of a third-degree felony.[20]

[20] TEX. PENAL CODE 19.05 (criminally negligent homicide; state jail felony); 21.07 (public lewdness; class A misdemeanor); 21.08 (indecent exposure; class B misdemeanor); 28.08 (graffiti; state jail felony for up to $20,000 damage); 30.02 (burglary of building other than habitation; state jail felony); 30.04 (burglary of vehicle; class A misdemeanor); 31.03 (stealing property up to $20,000; state jail felony); 32.21 (forgery; class A misdemeanor or state jail felony for most offenses); 42.02 (participating in riot; class B misdemeanor); 43.03 (running a brothel;

Driving while intoxicated, which puts others at risk of death or serious bodily harm, carries a maximum jail sentence of 180 days. TEX. PENAL CODE 12.22, 49.04. Yet engaging in truthful political speech, which puts no one at risk of death or serious bodily harm, can mean up to 10 years in prison. Even more amazing is that the Texas legislature has assigned the same penalty for engaging in truthful political speech as for making a terror threat that puts the public in fear of death or serious bodily harm. TEX. PENAL CODE 22.07. It is evident that the Texas legislature feels that the political speech of concerned citizens is equivalent to the speech of terrorists. This alone should be a clear indicator that the punishment imposed for truthful political speech (the type of speech at the core of the First Amendment) far exceeds anything appropriate under the Eighth Amendment. Treating political speech as the equivalent of a terrorist threat is the role of a totalitarian regime – not the role of a government committed to defending freedom.

Yet, terrorists in Texas seem to have it easier because there is an intent element in the terror-threat statute, but there is no such thing in Texas Election Code Section 253.094. In fact, Section 253.094 appears to be drafted as a strict-liability offense, because there is no *mens rea* element, nor even a requirement that the prescribed or prohibited activity be done or omitted with *scienter.* The law simply states: "A corporation … may not make a political contribution … that is not authorized by this

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class A misdemeanor); 43.24 (selling obscenity to minor; class A misdemeanor); 47.04 (keeping a gambling place; class A misdemeanor); 49.04 (driving while intoxicated; class B misdemeanor).

subchapter." Ten years for violating a complex regulatory provision, one that regulates speech no less, is disproportionate to the "crime" committed.

Turning to comparable sentences in Texas, violations of the same code for a non-corporate individual receive a maximum of one year in jail. Many carry a maximum of six months. This is still ridiculous given what the First Amendment stands for, but it is nowhere near as ludicrous as ten years in jail for the same type of violation. The maximum penalty under federal law is five years in jail, 2 U.S.C. 437g(d)(1)(A) (2006), and most other states remain around one year or less in jail. *See*, *e.g.*, FLA. STAT. 106.09(2)(a), 06.071(4), 775.082(4)(a). Even when a state exceeds the one year penalty, most follow federal law and place the maximum penalty at five years in jail. *See* FLA. STAT. 106.09(2)(b), 775.082(3)(d).

The most telling consideration of disproportionality with the 10 year penalty is that it applies only to those acting for a corporation or those receiving funds from a corporation. *See*, *e.g.*, TEX. ELEC. CODE 253.094, 253.101(b). In other words, the same individuals could face one year in jail for the same crime that they would face ten years in jail for if they were employed for a corporation. KSP here is in this precise situation. As individuals, for violations of the election code, they face up to one year in jail. *Id.* 253.003(e). Yet, as corporate officers, for violations of the election code regulating the same issues, they face up to ten years in jail, with a mandatory minimum of two years. *Id.*

The presumption underlying the disparate treatment between individuals and corporate officers is that corporations, and those acting for them, are somehow more

"evil" or "deserving" of punishment than "mere" individuals. *Citizens United* held the opposite though. *See* 130 S. Ct. at 911, 913. Therefore, a prison sentence ten times longer than the sentence other persons receive for the same type of violations is clearly disproportionate to the crime committed. The First Amendment does not allow unequal treatment of persons, the Fourteenth Amendment does not allow unequal treatment either, and the Eighth Amendment cements this notion in place by banning the disproportionate jail time imposed on corporate actors. For these reasons, whether the ten year maximum and two year minimum is found to violate the First Amendment, the Fourteenth Amendment, or the Eighth Amendment, it is clear that this punishment violates the constitution.

In holding that these claims are not at issue here because the state is not a party, the district court again erred. *See* CR.472.

VII. PRAYER

The district court incorrectly granted Counter-Defendants summary-judgment motion. The Texas law at issue here extends beyond Texas's power to regulate political speech. This Court should reverse the holding of the court below.

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