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CASE NO. 03-12-00255-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

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

Appellants,

vs.

TEXAS DEMOCRATIC PARTY, GILBERTOA HINOJOSA, in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk, 55th Judicial District,

Appellees.

On Appeal from the 261st Judicial District Court of
Travis County, Texas
Trial Court Cause No. D-1-GN-11-002363

APPELLEES' BRIEF

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Preamble

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA[1], in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk, 55th Judicial District, Defendants and Counter-Plaintiffs below and Appellees herein, respectfully submits this, their Appellees' Brief. In this Brief the Appellees will be referred to collectively as "TDP," KING STREET PATRIOTS, CATHERINE ENGELBRECHT, BRYAN ENGELBRECHT and DIANE JOSEPHS, Plaintiffs and Counter-Defendants below and Appellants herein, will be referred to collectively as "KSP." The Clerk's Record will be cited by page as "CR ____."

[1] Gilberto Hinojosa replaces Boyd Richie as the proper party in this action following Mr. Hinojosa's election as Chairman at the recent Texas Democratic Party State Convention.

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Statement Regarding Oral Argument

The Appellees believe oral argument will materially assist the Court in disposing of this case. Although this appeal is from a summary judgment, the issues presented in this case are of the utmost import for our democracy and the integrity of elections in Texas. The issues presented are complex and TDP believes the give-and-take of oral argument would provide the Court with an important opportunity to delve more fully into issues it identifies as dispositive.

Statement of Facts

The stipulations and evidence below established that KSP, during the 2010 election (and continuing today), engaged in political activities that had the purpose and/or effect of altering or influencing election outcomes. CR 130-175. Money and in-kind contributions were received by KSP to undertake these activities. *See* id. KSP made political expenditures. *See* id. Despite all of this, neither KSP or an affiliated political committee filed campaign reports as required by law. CR 131. TDP filed suit to collect statutory damages and attorneys' fees under Texas Election Code §§ 253.131-32. CR 49 and CR 52-66. KSP does not contest undertaking activity regulated under the Code but has instead claimed the applicable statutes are unconstitutional.

Though in their opening brief, KSP quotes at length from the District Court, KSP leaves out critical facts also found by the lower court:

> By Rule 11 agreement KSP has stipulated that, at its own expense, KSP conducted a training and recruitment program for poll watchers. Many of those recruited and trained poll watchers were appointed to serve by the Harris County Republican Party Chairman and/or Republican Nominees with regard to the 2010 General Elections for State and County Officers. KSP did not offer any summary judgment evidence in support of its motion for summary judgment or in response to TDP's motion for summary judgment.

CR 461. The only evidence offered in this case was presented by TDP. *See* id. It established that the activities of KSP amounted to activities by a political committee. KSP was a political committee under state law or it was a corporation engaged in politics under state law and either way KSP was obligated to file campaign finance reports. This

much was not disputed in the evidence below. What is disputed below is whether state laws requiring disclosure are unconstitutional. The District Court was correct to refuse the invitation to be a lonely court striking down legislatively enacted campaign disclosure laws and this Court should AFFIRM.

Summary of the Argument

For decades, State and federal law has required that those who wish to engage in activity that may affect the outcome of a public election, may do so as long as they report such activity in a manner prescribed by law. Such reporting serves to inform the voting public who or what interests might have influence over a given candidate. Such reporting has been found by every court to address the issue as critical to discovering and sorting out corruption. Just as individuals must been seen when they speak or disclosed on campaign literature or television commercials, corporations and entities are required to report their expenditures through political committees. The difference with corporations is that they are often named (i.e., King Street Patriots, Inc.) where an observer has no idea who is behind the corporate curtain. Such condition gives the corporation the right to anonymous speech while the lowly citizen, the only of the two who can vote, must speak publicly. The Legislature has prevented such unfair treatment of individuals by enacted regulations that permit unlimited speech, on any content, by so long as the activity is reported through campaign finance reports.

Each of the state laws challenged by KSP are narrowly tailored to require public disclosure. Contrary to KSP's bare assertions, these disclosure regulations have no effect of the ability of corporations, individuals or candidates to speak as they desire or engage in any public dialogue. KSP's lofty language of Free Speech notwithstanding, this case is about transparency in the cut and thrust of politics. If Texas is to go down the path of

anonymous donations, its Legislature should choose to do so. It is ironic messengers on behalf of conservative citizens ask this, a judicial Court to strike down duly enacted state laws. The case is made even more insupportable given that most of the statutes at issue have been found constitutional by this Court, the Texas Supreme Court, the Texas Court of Criminal Appeals and/or the United States Supreme Court. KSP's arguments in this case are nothing less than chimerical and this Court should reject them as did the District Court.

Standard of Review

A. Of a Summary Judgment

The decision to grant a traditional summary judgment is reviewed on appeal *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 156 (Tex. 2004). The standard for reviewing a summary judgment is well established: (1) the movant must demonstrate there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether a disputed issue of material fact that would preclude summary judgment exists, all evidence favorable to the nonmovant is taken as true; and (3) the court should indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *Valence Operating*, 164 S.W.3d at 661; *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Here, the parties agree that issues are legal and that factual disputes between them remain pending in the related district court case.

B. Of the Constitutionality of a Statute

In this case, the summary judgment was that certain statutes were constitutional. "A statute is presumptively constitutional," *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex. 2004); *accord*, Tex. Gov't Code § 311.021(1); *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011), and must be interpreted in a way that makes it constitutional, if possible, *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009). The

fact reasonable minds can differ on the issue is insufficient to find a law unconstitutional. *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 285 (Tex. 2010). This is especially true where, as here, the argument is a statute is facially unconstitutional, i.e., unconstitutional at all times, against all persons and in all applications. *City of Corpus Christi v. Public Util. Comm'n of Tex*., 51 S.W.3d 231, 240-41 (Tex. 2001). Facial unconstitutionality is rare, *Wilson v. Andrews*, 10 S.W.3d 663, 670 (Tex. 1999), and the burden of proving it "heavy." *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 and n. 16 (Tex. 1995).

C. Of Statutes Regulating Elections

The fact the statutes at issue regulate elections, and therefore implicate First Amendment rights, does not change this analysis. The propriety of laws restricting the contribution of funds in elections are treated differently than those restricting campaign expenditures, because laws governing expenditures impose "significantly more severe restrictions on protected freedoms" than those governing contributions. *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612 (1976). Because statutes governing contributions have less effect on speech, they are afforded "relatively complaisant review under the First Amendment," *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 161, 123 S.Ct. 2200 (2003), meaning the Court need not ask if they are *narrowly* tailored to serve a *compelling* governmental interest (the standard used when the scrutiny is strict), but rather only whether they are *closely drawn* to match a *sufficiently* important interest.

Beaumont, 539 U.S. at 162; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88, 120 S.Ct. 897 (2000). This standard applies where the statute in question implicates the obligation to publically disclose the source of funds, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S.Ct. 2806, 2817 (2011), and in contribution cases, regardless of whether the law restricts political contributions or bans them outright. *Doe v. Reed*, ___ U.S. ___, 130 S.Ct. 2811, 2818 (2010); *Beaumont*, 539 U.S. at 162; *see also Citizens United*, ___ U.S. ___, 130 S.Ct. 876, 909 (2010) (litigant assailing limitations on election expenditures "has not suggested that the Court should also reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny"). KSP's claims to the contrary notwithstanding, this is not a case where the constitutionality of the laws is subject to strict scrutiny. *Preston v. Leake*, 660 F.3d 726, 732-35 (4th Cir. 2011) (explicitly rejecting the argument that *Citizens United* overruled or affected the standard of review announced in *Buckley*, *Nixon* and *Beaumont*).

Argument and Authorities

KSP's brief broadly assaults the Texas Election Code, its requirements, enforcement provisions and even definitions in argument after argument, many consisting of a single line of text without analysis, others attacking the law of other states such as Wisconsin. The brief appears to be a cut-and-paste job of every argument ever made against an election law since *Citizens United*, whether the argument has any application

to Texas law or not. The goal is obvious: to slip one past TDP or the Court and then leap from behind the log shouting "waiver" or with a twenty-page Reply Brief bolstering a one-line argument. TDP will do its best to address all issues.

First Response Issue
(Restated)

> Statutes permitting those harmed by violations of election laws to bring a claim against the person who broke the election laws are constitutional.

In their first argument, KSP asserts that Sections 253.131, 253.132 and 273.081 of the Election Code, which gives those affected by Election Code violations the right to sue the violators (Sections 253.131 and 253.132) and to seek an injunction against the violations (Section 273.081), are unconstitutional. The trial court correctly held they are not.

A. Enforcement Provisions of the Election Code Were Found Constitutional

The primary problem with the argument is the Texas Supreme Court has already considered the issue and found these statutes constitutional. *Osterberg v. Peca*, 12 S.W.3d 31, 41-55 (Tex. 2000). TDP can do no better than to quote from *Osterberg*:

> When an individual breaks Texas's campaign finance laws, [Section 253.131] allows a candidate to enforce those laws by seeking civil damages as a penalty. We agree with the Fifth Court of Appeals, which recognized that section 253.131 is designed to "deter violators and encourage enforcement by candidates and others directly participating in the process, rather than placing the entire enforcement burden on the government." Because state resources for policing election laws are necessarily limited, in many cases section 253.131 is likely to provide the only viable means of

> enforcing reporting requirements. Preventing evasion of these important campaign finance provisions is a legitimate and substantial state interest.
>
> Furthermore, that the person enforcing the law and receiving damages can be a private party rather than the State does not mean that section 253.131 adds additional restrictions on First Amendment rights. In *Missouri Pacific Railway v. Humes*, [ ] the United States Supreme Court stated that
>
> > it is not a valid objection that the sufferer instead of the State receives [damages].... The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and *the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public,* and what disposition shall be made of the amounts collected, *are merely matters of legislative discretion.*
> >
> > (emphasis added).
>
> More recently, Justice O'Connor explained, "*Humes* teaches us that the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty." ...

Osterberg, 12 S.W.3d at 49-50 (internal citations omitted; emphasis in original).

Although *Osterberg* addressed only Section 253.131 (the enforcement provision allowing a suit against a wrongdoer by a candidate) the same logic applies to Section 253.132, which is all but identical to Section 253.131 except that it provides for a cause of action by a "political committee," including political parties like TDP.

B. State May Allow Those Hurt by a Lawbreaker to Sue the Lawbreaker

In arguing the contrary position, KSP's basic claim is that allowing private parties to sue violators of the Election Code has "an enormous potential for abuse," because

lawsuits allow things like discovery, something KSP believes cannot be allowed in election cases. The premise of KSP's argument is wrong.

As *Osterberg* recognizes, the government has a strong interest in allowing those affected by another's failure to obey the law to sue the lawbreaker for his acts. Many statutes — ranging from civil rights statutes to securities laws to consumer protection laws to those allowing class actions to RICO — allow ordinary citizens to act as "private attorney generals," empowered to sue wrongdoers for violating a law in order to vindicate the policy underlying the law. *See, e.g., Fox v. Vice*, ___ U.S. ___, 131 S.Ct. 2205, 2213 (2011); *Newman v. Piggie Park Enter., Inc*., 390 U.S. 400, 402, 88 S.Ct. 964 (1968) (per curiam); *Farmers Gp., Inc. v. Lubin*, 222 S.W.3d 417, 427 (Tex. 2007). Such suits are particularly appropriate where, as here, the person bringing suit has been hurt by the wrongdoing — people who have been harmed "can generally be counted on to vindicate the law," *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 269-70, 112 S.Ct. 1311 (1992); *accord, Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654-55, 128 S.Ct. 2131 (2008), and the person who has been hurt has the strongest incentive to see the law is enforced. *Smith v. Coldwell Bankr Real Estate Svcs*., 122 F.Supp.2d 267, 274 (D. Conn. 2000); *Electronic Relays (India) Pvt. Ltd. v. Pascente*, 610 F.Supp. 648, 652 (N.D. Ill. 1985).

KSP claims the ability to sue for Election Code violations will have a chilling effect, deterring its actions. TDP responds that the purpose of the law is to deter illegal

acts, and in any case the right to enforce a constitutional law is not lost just because the law being enforced deals with behavior that (in other circumstances) may be constitutionally protected. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 61, 109 S.Ct. 916 (1989) (fact RICO can be used to enforce obscenity laws did not make enforcement an unconstitutional violation of the defendant's First Amendment rights; rejecting claim that fact of enforcement would lead people to "self-censor" and refuse to deal in expressive materials that were constitutional meant laws could not be enforced); *accord, G.B. v. Rogers*, 703 F.Supp.2d 724, 730 (S.D. Ohio 2010) (fact new sex offender registration scheme requires person guilty of "pandering" to register was not unconstitutional because it might lead those who not charged with pandering to avoid legal activities out of fear this charge would be brought).

KSP says the law allows suits based on an "allegation" of wrongdoing. Of course it does — that is how lawsuits work. Conclusive proof is not required before a suit may be filed. To sustain the claim a lawsuit based on an alleged wrong is unconstitutional would be to sustain an objection to our entire civil justice system, the very system KSP invokes. If the Court needs proof our justice system can prevent the abuses KSP claims will flow from enforcing the Election Code, it need look no further than the case before it.[2]

[2] KSP has been subjected to little discovery to date while the constitutional issues are adjudicated. If anything, the procedural history of this case demonstrates that the ruled of procedure applying to discovery matters work well to protect litigants.

At its heart, KSP's objection is that some might use the Election Code as a vehicle to bring frivolous claims against a political opponent. Even if the Court assumes this could happen this does not mean all suits alleging Election Code wrongdoing must be prohibited. In fact, the danger a plaintiff might bring a frivolous lawsuit always exists, no matter what the subject of the litigation. Statutes and rules provide ample safeguards against such abuse, allowing courts to limit and tailor discovery, Tex. R. Civ. Pro. 192.6, to sanction those who seek discovery or bring claims in bad faith, to harass or for other improper purposes, Tex. Civ. Prac. & Rem. Code §§ 9.001, *et seq*., 10.001, *et seq*., Tex. R. Civ. Pro. 13, 215, and courts may ensure the judicial process is not abused even if there is no rule or statute allowing a court to impose a specific sanction on a misbehaving litigant. *Kutch v. Del Mar College*, 831 S.W.2d 506, 512 (Tex. App. — Corpus Christi 1992, no writ). Why these safeguards are insufficient to protect against the danger KSP posits goes unexplained. TDP could easily claim that KSP's assertion that numerous state laws are unconstitutional despite clear controlling inapposite opinions from the Texas and the United States Supreme Courts abuses an overtaxed judiciary.

C. Due Process Does Not Preclude a Lawsuit

KSP also claims allowing private citizens to engage in discovery violates their due process rights, theorizing such discovery occurs without "explicit standards" governing what can be discovered. KSP's understanding of what due process protects is wrong.

Constitutional due process guarantees protect only against state action, not private actors. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449 (1974). Even though it is brought in a state-established court, a private lawsuit does not give rise to a due process claim because "[p]rivate use of state sanctioned remedies or procedures does not rise to the level of state action." *Tulsa Prof. Collection Svcs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340 (1988).

Although there are cases saying some laws must give those enforcing them "explicit standards," they arise in a different context, involving a "delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a Narrow (sic) segment of the community ..." *City of Eastlake v. Forest City Enter., Inc*., 426 U.S. 668, 677, 96 S.Ct. 2358 (1976) (emphasis added). For example, an ordinance allowing boundaries to be fixed by a vote of two-thirds of property owners was unconstitutional because it allowed a majority of private citizens to determine the rights of the minority, without fixing a standard under which the decision was made. *Eubank v. City of Richmond*, 226 U.S. 137, 141-44, 33 S.Ct. 76 (1912); *see also General Elec. Co. v. New York Dep't of Labor*, 936 F.2d 1448 (2nd Cir. 1991) (collecting similar cases). A law is objectionable for lack of explicit standards not when the state gives an injured party the right to sue, but only if it delegates "to private parties the power to *determine* the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties'

discretion." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665-66 (4th Cir. 1989) (emphasis added). The rules governing civil litigation hardly lack clarity or fail to provide "explicit standards," and moot KSP's due process concerns. *In re Letters Rogatory from the First Ct. of First Instance in Civ. Matters, Caracas, Venezuela*, 42 F.3d 308, 311 (5th Cir. 1995). KSP's due process concerns are chimerical.

D. Associational Rights are Unaffected

Nor does the fact KSP can be sued for violating Election Code disclosure requirements affect associational rights in a way giving rise to a constitutional problem. If an election law imposes a reporting requirement that requires revealing certain information, the constitution provides some protection: an otherwise required disclosure is not required if there is a "reasonable probability" that the disclosure of a person's name "will subject them to threats, harassment, or reprisals from either Government officials or private parties," *Citizens United*, 130 S.Ct. at 914; *Buckley*, 424 U.S. at 74 (1976); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380-82 (Tex. 1998) (orig. proceeding), such as was a concern in parts of the Civil Rights-era South. *National Ass'n for the Advancement of Colored People v. State of Alabama ex rel. Peterson*, 357 U.S. 449, 462-63, 78 S.Ct. 1163 (1958) (refusing to force the NAACP to produce its membership lists to Alabama officials). An abstract or generalized dread of unspecified bad consequences not shown likely to occur does not meet this standard. *United States v. Judicial Watch, Inc*., 371 F.3d 824, 832 (D.C. Cir. 2004); *United States v. Norcutt*, 680

F.2d 54, 56 (8th Cir. 1982). KSP offered no evidence showing a "reasonable probability" of any such danger in this case.

Nor is there a generalized First Amendment right to "associational privacy," i.e., to keep the identity of members of some association or the other secret. While associational rights are important, so is the need for open and complete discovery. *Tilton v. Moye*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding). This means discovery is available when necessary to prove a claim, even if it means revealing the identity of a person who would rather remain anonymous, *see, e.g., In re Maurer*, 15 S.W.3d 256, 260 (Tex. App. — Houston [14th Dist.] 2000, orig. proceeding) (mand. denied) (plaintiff could discover identity of those responsible for defamatory statements so he could pursue his claim); *accord, In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988); *United States v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003), a general rule specifically applied in election cases. *Doe*, 130 S.Ct. at 2815 (disclosing names and addresses of those signing petition to repeal a law allowing same-sex unions permissible; state had a interest in protecting the integrity of the electoral process and preventing fraud sufficient to overcome a signatory's right to keep his identity secret). Finally, as is the case with all discovery, a court's ability to limit the scope of disclosure or enter protective orders moots theoretical First Amendment objections. *Citizens Assoc. for Sound Energy (CASE) v. Boltz*, 886 S.W.2d 283, 288 (Tex. App. — Amarillo 1994, write denied), *cert. denied*,

516 U.S. 1029, 116 S.Ct. 675 (1995); *National Organization for Marriage v. McKee*, 723 F.Supp.2d 236, 240-41 (D. Maine 2010).

E. Injunction Against Violations of the Law is not a Prior Restraint

The fact Section 273.081 of the Election Code allows a party harmed by or threatened with harm by a violation of the Election Code may seek an injunction is not objectionable as a prior restraint of speech. A "prior restraint" is an "administrative or judicial order[ ] forbidding certain communications when issued in advance of the time that such communications occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766 (1993); *accord, Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393 (Tex. App. — Austin 2000, no pet.). To be a prior restraint: (1) the speaker must apply to the decision maker before engaging in the conduct; (2) the decision maker is empowered to determine whether the speaker will be allowed to speak based on the content of his communication; (3) approval requires the decision maker to do something affirmative; and (4) approval is not routine, but requires the application of the decision maker's judgment. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554, 95 S.Ct. 1239 (1975).

In order to hold that a statute providing for a court-ordered injunction to enforce Texas election laws is unconstitutional because it constitutes a prior restraint requires accepting that the laws sought to be enforced through the injunction are themselves unconstitutional, and so any speech prevented by such an injunction is

therefore constitutionally protected. By definition if an injunction for violating the Election Code prevents any speech it is preventing unlawful speech, and injunctions preventing unlawful speech is entirely proper. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390, 93 S.Ct. 2553 (1973) (injunction to prohibit adverting for jobs based on the sex of the applicant); *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000), *cert. denied*, 533 U.S. 902, 121 S.Ct. 2242 (2001) (injunction to prevent man from persuading people to violate the tax laws); *Hodinka v. Delaware County*, 759 F.Supp.2d 603, 613 (E.D. Pa. 2011) (injunction against distributing materials that violate election laws).

Even if this were not true, an injunction against violating the law does not qualify as a prior restraint. Nothing in Section 273.081 requires a putative speaker to "apply" to anyone before engaging in the prohibited conduct, entitlement to an injunction is not based on the content of what is said but rather on whether the law has been complied with and nothing about the law allows the decision-maker to allow or disallow speech based on the application of their judgment. Tex. Elec. Code § 273.081.

Any Election Code injunction is necessarily also content-neutral, as the law does not allow consideration of what is being said in deciding whether an injunction should issue. Even if the Court accepts that an injunction against violating the Election Code might restrain speech, the fact it is issued without regard for or even any consideration of the content of the speech means the fear of censorship associated with prior restraints

does not exist, *Thomas v. Chicago Park Police*, 534 U.S. 316, 320-23, 122 S.Ct. 775 (2002), and the protections afforded by "ordinary court procedural rules and practices" are constitutionally sufficient. *City of Little, Colo. v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 781-84, 124 S.Ct. 2219 (2004).

F. This Case Presents no Fourth Amendment Issues

Finally, KSP continues to pursue the argument that the enforcement provisions of the Election Code are unconstitutional because they allow an unreasonable search and seizure. Again, KSP improperly asks the Court to rely on a prohibition that only applies to governmental action and not to acts of private parties, *Burdeau v. McDowell*, 256 U.S. 465, 474-75, 41 S.Ct. 574 (1921) (Fourth Amendment protections against search and seizure do not apply if the "seizure" complained of is done by a private party); *accord, Sinkker v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614, 109 S.Ct. 1402 (1989); *Miles v. State*, 241 S.W.3d 28, 34 (Tex. Crim. App. 2007), a general rule that has been specifically applied to civil discovery requests. *See, e.g., Estate of Schwartz*, 514 N.Y.S.2d 875, 876-77 (Sur. Ct. 1987); *Union Oil Co. of Cal. v. Hertel*, 411 N.E.2d 1006, 1008 (Ill. Ct. App. 1980). Private civil discovery is not precluded by the Fourth Amendment.

G. TDP Has Rights, Too

KSP speaks loud and long about its rights while ignoring the rights of others, rights of a constitutional dimension. *Osterberg*, 12 S.W.3d at 45 (decrying "myopic"

view of the First Amendment that honors the petitioners' rights while ignoring the others' rights). KSP's rights do not allow it the privilege of deciding whether or not to obey the law. The Election Code provisions KSP attacks safeguard the right to have an election free of the poison of corruption. KSP's claim that laws enforcing these requirements are invalid consigns these rights to the rubbish bin. KSP desires this result; TDP does not; the Court ought not. KSP tries to divert the Court on the notion that its speech will be limited. In reality, the statutes together prevent anonymous speech. KSP need only file its campaign reports like all other candidates and political committees in this state and then it is free to speak as often and loudly as it and its members desire.

Second Response Issue
(Restated)

> Statutes allowing corporations to give unlimited amounts to political committees is constitutional.

KSP next assails the constitutionality of Sections 253.091 and 253.094 of the Election Code, claiming they "ban[ ] corporate contributions and expenditures." They do not, and are not constitutionally objectionable.

A. What the Law Actually Says

Section 253.094 of the Election Code says a corporation may only make political contributions in a way allowed by law. Tex. Elec. Code § 253.094(a). The law allows them to make "campaign contributions" in any amount, with no limit, if it is made to a "political committee." Tex. Elec. Code § 253.096. "Campaign contributions" are money

given to a candidate or political committee for use in connection with a campaign for office or to pass a law. Tex. Elec. Code § 251.001(3). A political committee is a group whose purpose is to accept and spend such contributions, Tex. Elec. Code § 251.001(12), including political parties. Tex. EAO 320 (Apr. 19, 1996). Finally, corporations can spend any amount on issues unrelated to electing a particular candidate, because Section 253.094 addresses only "political contributions." Tex. Elec. Code § 253.094(a). All this means corporations can give any amount of money to a group who uses it to support or oppose an issue or party's candidate, and spend what they please to influence discussion of issues generally. As the court is aware corporations all over this state have setup political committees to pursue their interests. KSP asks the court to make corporation super speakers who can hide behind nondisclosure while the rest of political players including individuals and candidates must do their speaking out in the open.

The truth is KSP's objection is not that corporations can give unlimited amounts to spend on elections, it is the requirement the money be given to a political committee who is required to report the identity of donors and amounts given. KSP wants to hide this information, but has no right to do so.

B. Constitutionally Permissible Restrictions on Campaign Spending

After Watergate, Congress passed a series of laws restricting the ability of people and entities to spend money on candidates and politics. The constitutionality of these statutes was challenged, reaching the Supreme Court as *Buckley v. Valeo*. *Buckley*, 424

U.S. at 6-7. Although *Buckley* addressed many issues, it has three broad holdings relevant in this case:

— limitations on contributions to a political campaign were constitutional, being only a "marginal restriction" on the contributor's expressive rights and serving the important purpose of preventing corruption, *Id.* at 20-29;

— limitations on "independent expenditures" made on behalf of some a cause or candidate were not constitutional, representing a heavy burden of the right of free expression, *Id.* at 39-56; and

— disclosure and reporting requirements of contributions were constitutional, serving the important purpose of giving the electorate information about spending, allowing an informed vote for a candidate or on an issue and constituting "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of [the] election system to public view." *Id.* at 66-82.

More recently, *Citizens United* again found unconstitutional limitations on independent political expenditures, this time by corporations. *Citizens United*, 130 S.Ct. at 913. However, the same decision also found a reporting requirement imposed by federal election statutes constitutional. *Id.* at 914. It is against the background of *Buckley* and *Citizens United* that the constitutionality of Section 253.094(a) must be judged.

C. Limitations Imposed by Section 253.094(a) are Constitutional

Section 253.094(a) imposes only one limit on political spending by corporations: if a corporation wants to support a candidate or party directly by making a campaign contribution it may spend an unlimited amount of its money to do so, as long as the money is given to the candidate or party's political committee. Tex. Elec. Code §

253.096. Based on *Buckley* and *Citizens United*, this restriction is entirely permissible. *Buckley* distinguished among three kinds of statutes governing election spending: (1) those governing money spent directly on candidates; (2) those governing "independent expenditures," i.e., money spent on issues generally but not given to or subject to the control of a candidate; and (3) reporting and disclosure statutes. The restrictions embodied in two out of these statutes — those imposed on money spent directly on candidates and those requiring disclosure — are constitutional.

Buckley upheld limitations on amounts people could contribute directly to a candidate, recognizing that while such limits may hamper free speech they serve another important goal, preventing corruption. *Buckley*, 424 U.S. at 25-26. Because unlimited campaign contributions are or are seen as a bribe given to secure "a political *quid pro quo*," they may be limited because it is wrong to bribe people. *Id.* at 26. It is this danger of *quid pro quo* corruption that differentiates limitations on amounts given to candidates from the limitations on independent political contributions that were struck down. *Id.* at 47-48; *accord, Citizens United*, 130 S.Ct. at 901-02. Laws requiring disclosure of who is behind the money spent in an election also prevent "the wolf from masquerading in sheep's clothing." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 n. 24 (9th Cir. 2003). This means it is constitutionally permissible to regulate spending that is not independent of a candidate. *Buckley*, 424 U.S. at 46-47; *Ognibene v. Parkes*, 671 F.3d 174, 195 n. 21 (2nd Cir. 2011), *cert. denied*, ___ S.Ct. ___, 2012 WL 950086 (June

25, 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011); *see also Speechnow.org v. Federal Elec. Comm'n*, 599 F.3d 686, 695 (D.C. Cir.), *cert. denied*, 131 S.Ct. 553 (2010) (*Citizens United* did not change the long-standing rule that direct contributions could be regulated).

What federal law refers to as an "independent expenditure" subject to little or no regulation, Texas calls a "direct campaign expenditure." *Osterberg*, 12 S.W.3d at 36 n. 2. *Buckley* and *Citizens United* tell us laws restricting direct campaign expenditures may be constitutionally infirm, and KSP uses these cases (and others following them) to argue the "ban" supposedly imposed by Section 253.094 is unconstitutional. In making these arguments, KSP ignores that the statutes about which it complains do not govern independent/direct campaign expenditures, but only "campaign contributions," i.e., money given for use in a campaign that is not spent independently of the candidate. Tex. Elec. Code §§ 251.001(3), (7), (8). KSP further ignores that *Citizens United* does not allow entities like KSP to make such campaign contributions without any regulation, *see, e.g., In re Cao*, 619 F.3d 410, 421-23 (5th Cir. 2010), *cert. denied sub nom Cao v. Federal Election Comm'n*, ___ U.S. ___, 131 S.Ct. 1718 (2011) (rejecting claim that *Citizens United*'s decision allowing corporations to make independent campaign expenditures means other kinds of limitations on campaign spending are therefore also invalid), and the decision to which KSP gives pride of place in making this argument (the District Court's decision in *Danielczyk*) has been reversed. *United States v. Danielczyk*,

___ F.3d. ___, 2012 WL 2445040 (4th Cir. June 28, 2012). The kinds of contributions at issue in this case may be regulated.

It is also important to remember Texas is more generous than the federal laws discussed in *Buckley* and *Citizens United* — it allows *unlimited* campaign contributions, subject only to the requirement that they be given to a political committee — so that the contributions will be reported through campaign reports to the public. Tex. Elec. Code § 253.096. This is not much of a restriction, but it does ensure the amount of the contribution and the identity of the contributor are publically reported. Tex. Elec. Code §§ 254.001(b), 254.031(a)(1). Texas has apparently decided it is better to allow unrestricted contributions subject to full disclosure rather than restricting the amount of contributions, allowing voters to determine if an elected official is offering *quid pro quo* to donors. This limit, light by any measure, is permissible under *Buckley* and *Citizens United*, and is constitutional.

The import of this second benefit cannot be understated, as the Supreme Court recently reiterated in *Citizens United*. Although it found the law could not limit the amount a corporation could spend to attack a candidate if the attack is not coordinated with the candidate's opponent, it did find a statute requiring the corporation making the payment to identify who spent the money, the amount, the election it was intended to influence and "the names of certain contributors" was constitutionally permissible.

Citizens United, 130 S.Ct. at 914. The rationale for this holding is worth quoting at length:

> Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.
>
> In *Buckley,* the Court explained that disclosure could be justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to [a federal campaign finance law]. There was evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names. The Court therefore upheld [the law] on the ground that they would help citizens make informed choices in the political marketplace. ...
>
> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [a federal campaign finance law] to be unconstitutional nonetheless voted to uphold [its] disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.
>
> *Id.* at 914-15 (all but non-parenthetical citations and quotations omitted).

The requirements imposed by Section 253.094 ensure this disclosure — which is not only constitutionally *permissible* but constitutionally *valuable* — will be made, giving the public valuable information about their elected officials.

D. Equal Protect Rights Not Implicated

In addition to misunderstanding how Section 253.094 works, KSP also misunderstands equal protection. In a single line argument, it asserts the challenged section of the Election Code "violates the Equal Protection Clause." How is not explained.

Equal protection requires similarly-situated persons be treated alike, *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999), in order to secure everyone against the evils of arbitrary discrimination. *Sonnier v. Quarterman*, 476 F.3d 349, 368 (5th Cir.), *cert. denied*, 552 U.S. 948, 128 S.Ct. 374 (2007). In order to offend Equal Protection guarantees, a distinction made in law cannot be capricious or arbitrary, *Motorola, Inc. v. Tarrant County Appraisal Dist*., 980 S.W.2d 899, 903 (Tex. App. — Fort Worth 1998, no pet.), but without proof of constitutionally impermissible levels of differential treatment, an Equal Protection claim fails. *Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007).

Although Section 253.094(a) of the Election Code does impose certain obligations only on corporations, these obligations are not materially different from those imposed on other organizations that are, like corporations, an association or group of individuals. Under the Election Code, any group of two or more people who band together to accept political contributions or make political expenditures are defined as a "political committee." Tex. Elec. Code § 251.001(12). Like corporations, political committees are subject to rules on how they can spend money and what reports they have to file. *See,*

e.g., Tex. Elec. Code §§ 254.001(b), 254.031, 254.038, 254.121, 254.151, 254.152. Equal Protection is violated if and only if similar-situated persons are treated differently, whereas the Election Code regulates all groups of individuals, and therefore it does not treat any one group materially differently than any other group. *American Party of Tex. v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296 (1974) (proof of Equal Protection violation requires proof of *substantial* discrimination against the complaining group; existence of multiple classifications within a statute does not offend Equal Protection); *accord, Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028 (1963).

E. Election Code Pays no Attention to Content of Speech

Finally, KSP argues the Election Code creates content-based restriction to speech. In making this argument KSP confuses the identity of the speaker (a corporation) with the content of its speech (what it says). Content-based regulations are those creating distinctions between favored and disfavored speech on the basis of the *ideas* expressed, *Turner Broadcasting Sys., Inc. v. Federal Comm. Comm'n*, 512 U.S. 622, 643, 114 S.Ct. 2445 (1994), so a statute is "content based" only if its underlying purpose is to suppress a particular idea, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989), or if singles out particular content for differential treatment. *Turner Broadcasting*, 512 U.S. at 642-43. A regulation serving a purpose unrelated to the content of the expression is content-neutral, even if it has an effect on some messages but not on others. *Christian Legal Soc. Chap. of the Univ. of Cal, Hastings College of Law v. Martinez*, ___ U.S. ___,

130 S.Ct. 2971, 2994 (2010); *Alpha Delta Chi — Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1743 (2012). For example, an injunction against anti-abortion protestors may affect only one message about abortion, but this "does not itself render the injunction content or viewpoint based." *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 763, 114 S.Ct. 2516 (1994). The Election Code affects all equally, without regard for the message and regulates conduct (donations, spending and reporting), not the message. All are affected equally, whether the message they espouse is Democratic, Republican, Libertarian or Communist. A law affecting all equally is content-neutral, not content-based.

F. Conclusion

Arguments all but identical to those raised by KSP in this case were recently addressed by the El Paso Court of Appeals in a case involving election activity in support of a recall election. A church used its website to solicit signatures on the recall petition, an act that violated the law. In finding that *Citizens United* did not require it to find this activity was permissible, the Court explained just how little the Election Code requires of corporations who wish to be involved in the political process:

> Let us be clear. The Election Code has not and does not prohibit any and all corporate contributions in connection with recall elections. It merely prescribes the parameters under which contributions may be made. Appellees were not barred from pursuing the November 2010 ballot initiative through the special purpose committee known as EPTFV, nor were they banned from speaking. They spoke and spoke loudly. They are not banned from speaking now. They must simply follow the protocol

> established in the Election Code with which they are already familiar. All they needed to do was "re-purpose" EPTFV [an existing special purpose committee the corporation had previously established] or create a new special purpose committee. "Why?", one might ask. Why are these procedures necessary? *Citizens United* tells us precisely why:
>
> > The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.
> >
> > *Citizens United,* 130 S.Ct. at 916.
>
> While finding that *Citizens United* was constitutionally empowered to speak, the Court also required it to disclose the identities of the parties who spoke. In accordance with Citizens United, the Texas Election Code also requires disclosure. *See* Tex. Elec. Code Ann. § 253.094(b) West Supp.2011. Violations of Section 253.094(b) were established in the trial court below. Tex. Elec. Code Ann. § 253.094(b) (West Supp.2011).

Cook v. Tom Brown Ministries, ___ S.W.3d ___, 08-11-00367-CV, 2012 WL 525451 at * 8-9 (Tex. App. — El Paso Feb. 17, 2012, pet. filed) (not yet released for publication)

As *Cook* recognizes, the issue is one of transparency. TDP wants transparency, KSP does not. The laws challenged by KSP allow those affected by violations of the laws ensuring this transparency to enforce them. They do not limit either independent expenditures nor the amount that may spend in support of a candidate or issue. All it does is require unlimited donations made to a candidate be made in a way that ensures they are

reported. These reporting laws are constitutional, and KSP fails to show why the Court should conclude otherwise.

Third Response Issue
(Restated)

> Definitions of regulated activities and people found in the Election Code are neither overbroad or unduly vague, and are constitutional.

KSP's next line of constitutional attack is to assail the definitions used in the Election Code to define who may do what to and with who, and when they may do it. The primary words they focus on are "contribution," "expenditure" and "political committee," but they also question other definitions that incorporate or are based on these terms, including "campaign contribution," "officeholder contribution," "political contribution," "campaign expenditure," "direct campaign expenditure," "officeholder expenditure," "political committee," "general purpose committee" and "specific purpose committee." As KSP sees it, the terms are too vague to be constitutional.

A. Vagueness Claims Generally

A law is unconstitutionally vague if it fails to give those affected a reasonable opportunity to know what is required, or when it is so indefinite that any enforcement is necessarily arbitrary or discriminatory, *Women's Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001), such as a law telling policemen to arrest folks who "ain't doin' right." Such vague laws may be prohibited because they "delegate[ ] basic policy

matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis ...," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972). Conversely, a law allowing a person of reasonable intelligence to understand what is required or prohibited is not too vague, *Grayned*, 408 U.S. at 108, because the reasonable person can read the law and know his conduct is at risk. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. (1998); *United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009), *cert. denied*, 130 S.Ct. 1306 (2010).[3]

B. What the Definitions Say

The first set of definitions KSP attacks are those defining "contributions" made in an election context. "Contribution" is broadly defined as any transfer of "money, goods, services, or any other thing of value," directly or indirectly. Tex. Elec. Code § 251.001(2). This broad definition is made applicable to elections through the definition of "political contribution," defined as either a "campaign contribution or an officeholder contribution." Tex. Elec. Code § 251.001(5). A "campaign contribution" is, in turn, defined as a contribution made to either a candidate or political committee that is "offered or given" for use in connection with a campaign or ballot measure. Tex. Elec. Code §

[3] A law may also be unconstitutionally vague when it is overbroad. i.e., when the law prohibits a substantial amount of constitutionally-protected conduct. *United States v. Williams*, 553 U.S. 285, 292-93, 128 S.Ct. 1830 (2008); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186 (1982). Although overbreadth was argued in the Court below, KSP's brief mentions the idea only twice: in a general sense in footnote 4, and once on page 19 in observing a law can be constitutionally inform if it is "substantially overbroad." None of KSP's arguments about the definitions it challenges assert they are overbroad, only that they are vague or otherwise contrary to the constitution. Accordingly, TDP will not address the vague due to overbreadth arguments KSP raised below.

251.001(3). An "officeholder contribution" is one made to a person who holds office or to a political committee that is to defray costs the officeholder incurs in serving. Tex. Elec. Code § 251.001(4). The hierarchy of these definitions is some contributions are "political," and political contributions are either campaign contributions (if the recipient has not won the election yet) or officeholder contributions (if they have).

The second set of definitions KSP assails are "expenditures." The broad definition of expenditure is "a payment of money or any other thing of value." Tex. Elec. Code § 251.001(6). An expenditure is "political expenditure" when it qualifies as either a "campaign expenditure" or as an "officeholder expenditure." Tex. Elec. Code § 251.001(10). There are two kinds of campaign expenditures: those made by "any person in connection with a campaign," Tex. Elec. Code § 251.001(7), and "direct campaign expenditures," which are those made in a way that they do not qualify as a "campaign contribution." Tex. Elec. Code § 251.001(8). Finally, "officeholder expenditures," which are (reasonably enough) defined as being the kind of expenditures that could be reimbursed by an officeholder contribution. Tex. Elec. Code § 251.001(9). The hierarchy of these definitions is similar to the hierarchy of contributions an expenditure can be "political," and if they are they are either made in connection with a campaign or officeholders.

Finally, KSP objects to the definitions of "political committee," a group whose "principal purpose is to accept political contributions and make political expenditures,"

Tex. Elec. Code § 251.001(12), "general-purpose committee," a political committee formed to support or oppose multiple candidates or "unidentified" ballot measures, Tex. Elec. Code § 251.001(14), and "specific-purpose committee," a committee supporting or opposing specific candidates or issues. Tex. Elec. Code § 251.001(13).

C. None of these Definitions are Vague

The purpose of defining contributions and expenditures the way they were defined was to allow Texas election law to distinguish between those kinds of contributions and expenditures that may be permissibly regulated (such as those given to a particular candidate for an election) and those for which regulations are limited (such as direct campaign expenditures). In order to do what *Buckley* says is permissible, the statutes must somehow explain what funds are subject to restrictions, and what funds are not.

Nor are these definitions too vague to be understood. A person of average intelligence should be able to sit down, read them, and understand what is and is not allowed. For example, the definition of "campaign contribution" makes clear it is a contribution (money or goods) to a candidate (the person running for office) or political committee (a group organized to take or spend this money) in connection with a campaign (the candidate's quest for office). KSP make a series of specific attacks on words found in the challenged provisions they claim are too vague to be understood, attacks which TDP will address in turn.

1. Challenges to Definitions Associated with Contributions

KSP starts by claiming not to know what a "contribution" is, asserting (as the entire argument) "one cannot know the meaning of this phrase." Actually, the only people guessing are TDP and the Court, because KSP does nothing to explain itself, and other courts have found the meaning plain enough. *See, e.g., Cook* at * 8-9 (use of website to promote signing recall petition was an illegal contribution to the campaign on this issue).

Nor does the fact the contribution may be "direct or indirect" muddy the waters in the way suggested by KSP. The phrase "direct or indirect" appears throughout the law, *see, e.g.,*); *Matter of Thomas*, 651 A.2d 1063, 1065 (N.J. Super. Ct. 1995*Crucible, Inc. v. Stora Kopparbergs Berslags AB*, 403 F.Supp. 9, 12 (W.D. Pa. 1975); *Little v. United States*, 331 F.2d 287, 293 (8th Cir. 1964); *Securities & Exch. Comm'n v. Dumaine*, 218 F.2d 308, 314-15 (1st Cir. 1954), *cert. denied*, 349 U.S. 929, 75 S.Ct. 771 (1955), as does "directly or indirectly." *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 175-76, 114 S.Ct. 1439 (1994); *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163 (1993); *del Canto v. ITT Sheraton Corp*., 965 F.Supp. 927, 932 (D.D.C. 1994), *aff'd*, 70 F.3d 637 (D.C. Cir. 1995); *United States v. Norton*, 250 F.2d 902, 908-09 (5th Cir. 1958). The phrase is so common because reasonable people understand what it means, *Tily B., Inc. v. City of Newport Beach*, 81 Cal.Rptr.2d 6, 23-24 (Ct. App. 1998) (prohibition against "direct" payment of nude dancer was not

unconstitutionally vague), even in the context of elections law. *See, e.g., Alaska Right to Life C'tte v. Miles*, 441 F.3d 773, 782-84 (9th Cir.), cert. denied 549 U.S. 886, 127 S.Ct. 261 (2006); *Lesiak v. Ohio Elections Comm'n*, 716 N.E.2d 773, 777 (Ohio Ct. App.), app. not allowed, 701 N.E.2d 380 (Ohio 1998) (both finding statutes governing things done directly or indirectly not unconstitutionally vague).

Moving to the definitions that depend on the definition of contribution, KSP assails the definition "political contribution," a definition which in turn refers to "campaign contributions" and "officeholder contributions." Again, these definitions are straightforward to all but the most obtuse. Campaign contributions are money or other things of value given to use in connection with a campaign, officeholder contributions are given to those already elected. Tex. Elec. Code §§ 251.001(3), (4).

KSP claims the fact that the definitions includes the word "intent" makes it unconstitutional, because intent-based definitions make people fear to speak freely. As support for this proposition, KSP cites *Federal Election Commission v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 465-66, 127 S.Ct. 2652 (2007). The intent issue in this case dealt with the determination of whether a person was speaking about an issue (permitted) or a candidate (regulated under federal law). *Wisconsin Right to Life*, 551 U.S. at 467-68. The court found intent was irrelevant to the law at issue because an intent standard would require the impossible, an inquiry into the "subjective sincerity" of every message broadcast. *Id.* at 468. In the footnote the Supreme Court noted the case before it had

already resulted in a great deal of litigation about the intent issue it had found to be irrelevant. *Id.* at 468 n. 5.

This is all well and good, but has nothing to do with the use of "intent" in one portion of one definition of one term used to define one regulated thing under Texas law. In the trial court TDP challenged KSP to find any authority holding that any consideration of intent *per se* invalidates an election law, a challenge KSP has now declined twice. It has done so because no such authority exists, and so the "intent" behind a contribution is judged by an objective reasonable person standard.

This standard shows contribution must be made with the "intent" that it to be used on a campaign to limits the scope of "contributions." But for the intent requirement, any payment made to a candidate or political committee for anything (such as the salary a candidate earns) would have to comply with the Election Code, because that money could (in theory) be used to support the candidate's campaign. This limit prevents the definition from being overbroad, keeping the definition of contributions made for political purposes within reasonable bounds. The idea something has been done with a particular "intent" is hardly incomprehensible, *see, e.g., Ex parte Ellis*, 309 S.W.3d 71, 86-87 (Tex. Crim. App. 2010); *American Ass'n of People with Disabilities v. Herrera*, 580 F.Supp.2d 1195, 1241 (D.N.M. 2008), and facially less certain formulations have been found to be constitutionally sound. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1020-21 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1477 (2011) (contributions made

with the "expectation" they would be used in a given way was constitutional and not vague, imposing "concrete, discernable criteria necessary to prevent arbitrary and discriminatory enforcement ..."). If intent was such a hard concept to grasp, no criminal could every be constitutionally convicted.

Continuing on, KSP assert the phrase "in connection with" (as in a political contribution is one used "in connection with a campaign for elective office," Tex. Elec. Code § 251.001(3)) is also too hard to understand. This phrase is another one common in the law, used in many different contexts. *See, e.g., Securities & Exch. Comm'n v. Zanford*, 535 U.S. 813, 122 S.Ct. 1899 (2002); *United States v. Baggott*, 463 U.S. 476, 103 S.Ct. 3164 (1983); *United States v. American Union Transport*, 327 U.S. 437, 66 S.Ct. 644 (1946). More specifically, this Court has considered this argument before, and found the definition sufficiently comprehensible to support a criminal prosecution. *Ex Parte Ellis*, 279 S.W.3d 1, 21-22 (Tex. App. — Austin 2008), *aff'd*, 301 S.W.3d 79 (Tex. Crim. App. 2010). Although KSP notes the Supreme Court found the phrase troublesome, it ignores that the Supreme Court went on to interpret it narrowly to make the definition constitutional, and decline to speculate whether it was objectionable in other contexts, *Osterberg*, 12 S.W.3d at 51; *accord, Federal Elec. Comm'n v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238, 248, 107 S.Ct. 616 (1986), and that other courts find the concept of a connection between money given and an election not to be a difficult one. *See, e.g., Ellis*, 309 S.W.3d at 87-88; *Center for Individual Freedom v. Madigan*, 735 F.Supp.2d

994, 1000 (N.D. Ill. 2010); *McKee*, 666 F.Supp.2d at 210-11 (all election law cases rejecting the argument that defining a thing done in "connection" with something else was too vague). The meaning of the phrase "in connection with" is confusing only if the reader refuses to use common sense, and the meaning of "in connection with" a campaign is straightforward: if the candidate is running for office and the contribution is to help the race, it is "in connection with" the campaign.

2. Challenges to Definitions Associated with Expenditures

What comes in must go out. Contributions come in the door, expenditures go out, and KSP claims just as it does not know what a contribution is, it also cannot figure out what qualifies as an expenditure. The focus is on value (an expenditure is the "payment of money or any other thing of value." Tex. Elec. Code § 251.001(6)), and on expenditures made "in connection with" a political matter. Tex. Elec. Code § 251.001(7). Once again, KSP claims to have no idea what constitutes value, or what value means, but the challenges to the terms "expenditure," "campaign expenditure," "direct campaign expenditure," "officeholder expenditure" and "political expenditure" are answered with the same arguments used to respond to the challenges to the contribution-related terms made above, as these expenditures are just the flip-side of the contributions that have been received.

The only new argument is inventive — the decision in *Osterberg*, which considered the meaning of "in connection with" but did not find it unconstitutional —

actually "supports KSP's position that these definitions are still too vague." This bears repeating: a decision finding a law constitutional actually shows this law is unconstitutional. KSP claims this is so because the term is "still vague when considering its impact on political speech," an argument that confounds a vagueness claim (the definition cannot be understood) and the other claims KSP makes (vague or not, the definition infringes on their constitutional rights). Refocusing the matter on the law relevant to the issue KSP claims to present, the question is whether the phrase "in connection with" is too vague for a reasonable person to know what would and would not qualify. The cases cited above show it is not and, KSP's reading notwithstanding, *Osterberg* found a narrow reading of the term was constitutional, the result the Court should reach here. This means a regulated expenditure in connection with a campaign or issue should be reasonably understood to mean money spent for the benefit of a candidate or on an issue.

3. Challenges to Definitions Associated with Committees

Finally, KSP complains it cannot figure out who the committees receiving these contributions and making these expenditures are, being unable to understand what a political, general-purpose or specific-purpose committee is. KSP argues these terms are mere "labels" (which, given their definitions, may be correct) and that such labels cannot interfere with constitutional rights. As KSP sees it, imposition of these labels impose "burdens" that are "onerous," ones KSP believes it need not obey.

The fundamental problem with this rather confused argument is the burdens about which KSP complains are all related to the kind of disclosures found to be proper in both *Buckley* and *Citizens United*. As KSP notes, political committees must register, keep records and make periodic reports, but this kind of paperwork is the kind of thing without which the reporting and disclosure found permissible in *Buckley* and *Citizens United* cannot occur. Although there are burdens, the burdens are appropriate given the public's right to know who is funding a campaign.

Moreover, in making this argument, KSP glosses over the fact the Election Code does not force KSP to bear these burdens; rather, the political committees to which KSP is allowed to make unlimited donations must bear these burdens. If KSP makes a donation to a political committee, the obligation to report this payment is on the committee, not KSP. If anyone has the right to complain an election law is burdensome it is the committee, not KSP. KSP's belief to the contrary notwithstanding, nothing in the Election Code requires a person wishing to speak about political issues to form a committee, *Cook* at * 8-9, and people are allowed to speak and spend to their heart's content so long as they don't accept money from others.[4]

The force of KSP's rhetoric is further blunted when the Court realizes the definitions about which it complains closely mirror the language used in *Buckley*.

[4] This is a point of distinction between Texas and federal law, as federal law sometimes requires forming a political action committee to make political contributions. *Citizens United*, 130 S.Ct. at 897-98. In contrast, while the Election Code impose requirements on political committees, it does not ban anyone's speech in the absence of a political committee.

Buckley held states could require disclosure and reporting from committees under certain circumstances:

> To fulfill the purposes of the [federal election law] [political committees] need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.
>
> *Buckley*, 424 U.S. at 79.

Compare this language with the definition of a "specific-purpose committee" in Texas, a group with "a principal purpose [of] accepting political contributions or politician expenditures" to support or oppose identified candidates or measures, Tex. Elec. Code §§ 251.001(12), (13), and with other state's definition of "committees" found to be unconstitutional. *See, e.g., South Carolinians for Responsible Gov't v. Krawcheck*, ___ F. Supp.2d ___, 2012 WL 590807 at * 5-6 (D.S.C. Feb. 23, 2012) (slip op.) (definition of "committee" contained no purpose requirement at all). Other than the substitution of "principal" for "major" the wording of the Election Code could have been taken from *Buckley*, a fact distinguishing it from *South Carolinians for Responsible Government* and invalidating KSP's claims. KSP asks the Court to find the definitions of the various kinds of committees by Texas law impose such high burdens that they must be unconstitutional. The problem is *Buckley* found committees properly subject to

disclosure and reporting requirements, making it is hard to see how the decision saying this is constitutional shows it is not constitutional.

D. Conclusion

Can a reasonable person read the Election Code definitions KSP challenges, understand what they mean and understand what is and is not permitted? Apparently; these definitions have been in use for thousands of elections, with little difficulty. Although couched in the language of constitutional vagueness, any reasonable reading of the many definitions KSP challenges shows them to be objectively comprehensible, and therefore constitutional. To find them unconstitutional deprives everyone but KSP of their constitutional right to know where the money comes from, and would effectively gut the Election Code as a whole because many of its provisions would lack valid definitions. The meaning of these words being clear to a reasonable person, KSP was correctly denied and TDP correctly granted summary judgment on these vagueness claims.

Fourth Response Issue
(Restated)

> Requiring political committees to appoint a treasurer responsible for making required reports a fixed period of time before an election is not unconstitutional.

Given that KSP does not feel it should be bound by reporting requirements, it should be no surprise it feels the statutes enacted to effectuate these requirements are

unconstitutional. These provisions, found in Sections 253.031(c) and 257.037(a) of the Election Code, impose a "blackout" period before an election, during which a political committee who has not timely appointed a "campaign treasurer" may not make expenditures. Like the others these statutes are constitutional, but it is not an issue the Court should reach.

A. Court May not Issue an Advisory Opinion

Surprisingly, the reason the Court should not reach the issue is itself constitutional. Nowhere in their petition did TDP claim KSP did anything that violates the blackout provisions and therefore, the District Court properly refused to rule on the issue. CR 472-73.

KSP's request for a determination of the constitutionality of provisions it has not been accused of violating means KSP asks the Court to issue an advisory opinion. The distinctive characteristic of an advisory opinion is that it decides "an abstract question of law without binding the parties." *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam); *accord Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001); *Estate of Washington*, 262 S.W.3d 903, 905 (Tex. App. — Texarkana 2008, no pet.). The separation of powers provisions of the Texas Constitution mean courts lack the jurisdiction to issue advisory opinions, *Valley Baptist Med. Ctr.*, 33 S.W.3d at 822, so such an opinion would itself be unconstitutional. *Texas Health Care Information Council v. Seton Health Plan, Inc*., 94 S.W.3d 841, 847 (Tex. App. — Austin 2002, pet. denied);

see also Atmos Energy Corp. v. Abbott, 127 S.W.3d 852, 857 (Tex. App. — Austin 2004, no pet.) (prohibition on advisory opinions is intended to conserve scarce judicial resources for actual disputes and to avoid making bad law by deciding abstract issues).

Although KSP asserts "the district court erred" in refusing to address this issue, its brief fails to explain why the Court's opinion would not be an advisory one, and so the Court should refuse to address the issue.

B. Regulations Only Limit Speech by Those Who Ignore Constitutionally Permissible Laws

However, even if this were not the case, the Court should still deny the relief requested by KSP, which has a curious idea about what constitutes a "blackout." The provisions about which KSP complaining pose no blackout at all if the law is followed. Although the provisions can limit spending by affected committees, they do so if and only the committee fails to appoint a campaign treasurer, and even this limitation is tempered by the requirement that a general-purpose committee need only make such an appointment if it has accepted contributions from at least 10 people. Tex. Elec. Code §§ 253.031(c), 253.037(a).

By law, all political committees must appoint a treasurer. Tex. Elec. Code 252.001. This requirement is imposed because it is the treasurer who is responsible for filing the reports on contributions and expenditures required by the Election Code. Tex. Elec. Code § 253.031; Tex. EAO-315 (Mar. 22, 1996). To tread the well-worn path, laws

requiring disclosure of political spending are constitutionally unobjectionable, but KSP asks the Court to find that while the law may require disclosure it cannot require those who have to disclose to appoint a person to do so. The First Amendment rights KSP imagines it has do not extend so far as to allow the gutting the disclosure requirements that have been found proper under the First Amendment on First Amendment grounds. To hold otherwise would be to make these disclosures a unicorn crossbow — theoretically useful, but of no practical value. The Court should reject KSP's invitation to do so.

Fifth Response Issue
(Restated)

> It is constitutionally permissible to assess criminal penalties for violating the Election Code.

KSP's final claim is the penalties imposed for violating the Election Code are so harsh they violate the Eight Amendment's prohibition on cruel and unusual punishments. As KSP sees it, because criminal penalties can be imposed for the violations of the Election Code of which they are guilty this must mean these penalties are too harsh, an argument that may be likened to the robber who argues he should only be imprisoned for a short time because he only robbed a small bank. On the merits TDP has three responses.

A. No Criminal Sanctions Against KSP are Sought

KSP claims various parts of the Election Code are unconstitutional because they make violations of the law a third degree felony, a penalty allegedly amounting to cruel

and unusual punishment. Although the Eighth Amendment is generally the means used to attack the constitutionality of criminal punishments, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262, 109 S.Ct. 2909, 2913 (1989), TDP is not a prosecutor and so cannot ask a court, the jury or anyone else to find KSP guilty of a criminal offense. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another").

This provides the most straightforward answer to KSP's arguments — they are being made in the wrong case. KSP is again asking the Court to issue an advisory opinion, or else is asking the Court to violate the rule that civil courts may not pass on the constitutionality of a criminal statute in the absence of an irreparable injury to vested property rights, absent here. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 441 (Tex. 1994); *Ryan v. Rosenthal*, 314 S.W.3d 136, 145-46 (Tex. App. — Houston [14th Dist.] 2010, pet. denied). In either case the Court should decline to decide the issue as did the District Court.

B. Eighth Amendment Extends Only to Criminal Prosecutions

Given TDP's inability to imprison KSP, the Court would expect the Eight Amendment arguments raised would be inapplicable in a civil case, and it would not be disappointed. The Eight Amendment protects only those who have been convicted of a crime. *Ingraham v. Wright*, 430 U.S. 651, 664 and 671-72, 97 S.Ct. 1401 (1977). This

means Eighth Amendment scrutiny is only appropriate after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions, *United States v. Lovett*, 328 U.S. 303, 317-18, 66 S.Ct. 1073 (1946), and the State cannot punish until after it has secured a formal adjudication of criminal guilt. *Ingraham*, 430 U.S. at 671 n. 40. Where, as here, the case is not a criminal case and the complainant cannot be convicted of a crime, there is no viable Eighth Amendment claim. *Palermo v. Rorex*, 806 F.2d 1266, 1272 (5th Cir. 1987). Because KSP cannot be prosecuted in this case the Court should decline to decide whether the prosecution-that-cannot-be would amount to cruel and unusual punishment.

C. The Criminal Provisions of the Election Code Do Not Amount to Cruel and Unusual Punishment or Provide for Excessive Fines

Finally, if the Court examined the Election Code criminal provisions to see if they did violate the Eight Amendment it will find that they do not. Punishment is not necessarily cruel and unusual even though it is severe, and there is no constitutional requirement of strict proportionality between the crime and the sentence; instead the Constitution only forbids an extreme sentence grossly disproportionate to the crime committed. *Ewing v. California*, 538 U.S. 11, 23, 123 S.Ct. 1179 (2003). In determining whether this is the case, the Court should consider the following objective factors: (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 the

commission of the same crime in other jurisdictions. *Graham v. Florida*, __ U.S.___, 130 S.Ct. 2011, 2021 (2010).

The challenged sections of the Election Code say a violation of the law is a third degree felony, which is punishable with a jail sentence of between two and ten years and a fine of up to $10,000. Tex. Penal Code § 12.34. This range provides a court with wide discretion as to what sentence to impose and to consider whether community supervision is important, and it is not required to impose a fine at all. Although corporate officers convicted of a violation in accordance with the above provisions could be sent to jail for up to ten years, they could also be sent for only two years, or perhaps not at all.

Perhaps recognizing the weakness of their Eighth Amendment argument, KSP once again seeks to inject content into the mix, claiming the Election Code allows them to be jailed for "truthful political speech." The problem with this claim is it is false: the Election Code punishes only the making of illegal (namely anonymous) political contributions or expenditures, not constitutionally-permissible speech.

Additionally, the crimes KSP cites as being more severe than Election Code violations and punished with less severe sentences seek to compare apples to oranges. For example, it is difficult to compare indecent exposure, running a brothel, selling obscenity to minors, keeping a gambling place or participating in a riot to an Election Code violation. Crimes more closely analogous to Election Code violations are money laundering, insurance fraud or Medicaid fraud, all of which involve improper financial

transactions or reporting of a transaction involving money. Tex. Penal Code §§ 34.02, 35.02, 35A.02. A conviction for money laundering is considered a felony conviction with the length of the sentence depending on the amount of money involved. Tex. Penal Code § 34.02 A conviction for insurance or Medicaid fraud is also considered a felony if the amount is more than $1,500 dollars, and can rise to a third degree felony if more money is involved. Tex. Penal Code §§ 35.02, 35A.02. These sentences are (if anything) worse than the one about which KSP complains, showing their Eight Amendment concerns are invalid.

In order to prove their martyrdom, KSP goes onto compare sentences imposed on individuals compared to sentences imposed on corporations, claiming several Election Code provisions carry a maximum of one year of jail time, that federal law provides for five years of jail time and other states up to one year of jail time for individuals, all less than the theoretical ten-year maximum of which they complain. The problem here is again KSP assumes courts will necessarily sentence them to ten years in jail. Further, the sentence for corporations compared to individuals in Texas is not grossly disproportionate for the same reason. A court may impose a two year sentence for a corporation and a one year sentence for an individual. There is nothing grossly disproportionate that makes the two year sentence cruel and unusual.

Lastly, although courts are asked to consider the punishment proscribed to the same crime in different jurisdictions, federal legislators and other state legislators may

have a different view of the seriousness of an offense. *Smith v. State*, 10 S.W.3d 48, 50 (Tex. App. — Texarkana 1999, no pet.). Even if a Texas statute provides for a more severe punishment than other jurisdictions, it does not necessarily render the punishment cruel. *Smith*, 10 S.W.3d at 50. Texas courts have traditionally held that as long as the punishment is within the range established by the Legislature the punishment assessed does not violate either federal or state prohibitions against cruel and unusual punishment. *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); *Jackson v. State*, 989 S.W.2d 842, 847 (Tex. App. — Texarkana 1999, no pet.). Thus, as demonstrated above, KSP's claim the criminal provisions of the Election Code allowing punishment of a corporation are unconstitutional fails because the wide range of a two to ten sentence is not so grossly disproportionate as to qualify as cruel and unusual nor is the possibility of a fine up to $10,000 excessive.

Prayer

For the foregoing reasons, TDP prays that the summary judgment of the trial court be in all respects AFFIRMED.

Strictly in the alternative, if the Court finds that any portion of the summary judgment should be reversed, TDP prays that the summary judgment of the trial court be AFFIRMED with respect to those matters for which summary judgment was proper.

TDP prays for such other and further relief, general or special, in law or in equity, to which they may prove themselves to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the Texas Online eFiling for courts system and confirmed that the following counsel of record are registered for electronic service on this the 26th day of July, 2012:

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