Case No. 15-0320

In The Supreme Court of Texas

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

Petitioners**,**

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,

Respondents**.**

On Petition for Review from the 3rd Court of Appeals at Austin
Case No. 03-12-00255-CV

BRIEF *AMICUS CURIAE* FOR CAMPAIGN LEGAL CENTER IN SUPPORT OF RESPONDENTS

J. Gerald Hebert
(VA Bar No. 38432)
Tara Malloy
(NY Bar No. 4251005)
Megan McAllen
(D.C. Bar No. 1020509)
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, DC 20005
Tel.: (202) 736-2200
Fax: (202) 236-2222

Kelly G. Prather,
kgreenwood@midtownlegal.com
(TX Bar No. 00796670)
THE GREENWOOD PRATHER LAW FIRM
2009 North Durham Drive
Houston, TX 77008
Tel.: (713) 333-3200
Fax: (713) 621-1449

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Statutes and Legislative Materials:

Administrative Material:

Other Authorities:

STATEMENT OF INTEREST

Petitioners King Street Patriots *et al*. ("KSP") challenge the constitutionality of Texas's restriction on corporate contributions to state candidates, officeholders and political committees, Tex. Elec. Code §§ 253.091-253.104, and its disclosure and organizational requirements connected to "political committees," Tex. Elec. Code § 251.001(12)-(14). All of the challenged laws are vital to preventing corruption and ensuring transparency in elections, and have become yet more crucial in light of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which invalidated longstanding restrictions on corporate and union expenditures to influence elections.

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing the campaign finance and election laws throughout the nation. CLC has participated in numerous past cases addressing corporate restrictions, contribution limits and political disclosure, including *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), *Citizens United* and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"). CLC thus has a longstanding, demonstrated interest in the constitutionality and efficacy of such laws. CLC also participated as an *amicus curiae* in this case in the district court

and the Court of Appeals and is thus experienced in the legal and constitutional claims at issue here.

No person or entity other than CLC and its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

KSP attempts to leverage the Supreme Court's recent decisions in *Citizens United* and *McCutcheon* to challenge unrelated provisions of Texas campaign finance law pertaining to corporate contributions and political committee disclosure requirements. *See* Petitioners' Brief on the Merits (Oct. 9, 2015) ("KSP Br."). The district court and the Court of Appeals both rejected KSP's attempt to apply these inapposite precedents to this case and dismissed its counterclaim in its entirety. *TDP v. King Street Patriots*, 459 S.W.3d 631, 635 (Tex.App.-Austin 2014, pet. filed). This Court should do the same.

KSP attacks the corporate contribution law, Tex. Elec. Code § 253.094(a), by arguing that *Citizens United* and *McCutcheon* called into question the Supreme Court's earlier decisions upholding corporate contribution restrictions, in particular, *FEC v. Beaumont*, 539 U.S. 146 (2003). But *Citizens United* reviewed only the federal restriction on corporate expenditures, not the restriction on corporate contributions. 558 U.S. at 358-59. *McCutcheon* reviewed a particular type of limit, an "aggregate" contribution limit, but reaffirmed that contribution

restrictions are subject to only an intermediate level of scrutiny and did not question their general validity. 134 S. Ct. at 1445; *see also id.* at 1451 & n.6. Neither case has any direct application here.

KSP maintains, however, that the reasoning of *Citizens United* nevertheless "undercuts" *Beaumont*. KSP Br. 15. But the expenditure restriction reviewed by *Citizens United* and the contribution law challenged here are subject to different standards of scrutiny and are supported by different governmental interests. *Citizens United* therefore does not even indirectly impact Texas's corporate contribution law. This was recognized by *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App.-Austin 2008), *aff'd but criticized on other grounds*, 309 S.W.3d 71 (Tex. Crim. App. 2010), wherein the Texas Court of Criminal Appeals upheld Texas's corporate contribution law in the wake of *Citizens United*. All courts that have considered KSP's argument have dismissed it as wholly lacking merit.

Likewise untenable is KSP's argument that the definition of "political contribution," a term used by Texas's corporate contribution law, is unconstitutionally vague. *Ex parte Ellis* rejected a virtually-identical challenge to the state corporate contribution restriction, holding that the definition of "contribution" was not facially unconstitutional due to vagueness. 309 S.W.3d at 88-89.

The remainder of KSP's claims concern Texas's disclosure requirements, specifically its political committee definitions, Tex. Elec. Code § 251.001(12)-(14), and the registration, recordkeeping and reporting requirements they effectuate. KSP first argues that Texas impermissibly imposes political committee status on groups who do not have as their "major purpose" the nomination or election of a candidate. But the limiting "major purpose" construction in *Buckley v. Valeo*, 424 U.S. 1 (1976), was drawn to correct the deficiencies of the specific federal statute under review, in light of both its vague definition of "political committee" and the array of obligations it imposed on such committees, including contribution limits and source restrictions. Unlike federal law, "PAC status" under Texas law entails only registration and reporting requirements. The U.S. Supreme Court has never applied a "major purpose" test to such a state law. *See Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487-88 (7th Cir. 2012). And numerous courts nationwide have recognized that states have broad latitude to regulate in the area of disclosure, and may require registration and reporting from groups that do not have campaign activity as their sole or even "major" purpose. *See, e.g.*, *Utter v. Bldg. Indus. Ass'n of Wash.*, 341 P.3d 953, 965-67 (Wash. 2015) (collecting cases), *cert. denied*, No. 14-1397, 2015 WL 2462603 (U.S. Oct. 5, 2015).

KSP also argues that Texas's general- and specific-purpose political committee definitions are unconstitutionally vague because they incorporate "support or oppose" language, *see* KSP Br. 85 (citing Tex. Elec. Code § 251.001(13), (14)), but this argument is plainly foreclosed by *McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court there upheld virtually identical language in Title I of the federal Bipartisan Campaign Reform Act (BCRA). Further, the great majority of lower courts to have recently considered this issue have accepted a range of state law definitions of the term "political committee" that do not hew to a standard of express advocacy. *See, e.g.*, *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 997, 1008 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011); *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 62-63 n.39 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

Finally, KSP argues that the political committee reporting requirements are unconstitutionally burdensome even as to groups with the requisite "major purpose," and thus cannot withstand constitutional scrutiny. But KSP does not explain precisely how the disclosure and reporting obligations that attend political committee status under Texas law—which the Fifth Circuit has characterized as "exceedingly minimal," *see Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 440-41 (5th Cir. 2014)—constitute burdens, nor does KSP attempt to

distinguish the many cases post-*Citizens United* upholding substantially similar laws.

For all these reasons, this Court should deny KSP's petition for review, or in the alternative, affirm the judgment of the Court of Appeals.

ARGUMENT

I. Texas's Corporate Contribution Law Is Constitutional.

A. Corporate Contribution Restrictions Are a Standard Component of Federal and State Campaign Finance Laws.

For over a century, restrictions on corporate campaign contributions have been a key component of campaign finance laws at both the federal and state level, and often have been accompanied by criminal penalties. Further, both the federal law and its state counterparts have been upheld on multiple occasions as entirely consonant with the First Amendment.

Federal law has restricted corporate campaign contributions since 1907. Tillman Act, Ch. 420, 34 Stat. 864 (1907). The current Federal Election Campaign Act (FECA) makes it unlawful "for any corporation whatever, or any labor organization, to make a contribution . . . in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus . . . ." 52

U.S.C. § 30118(a).[1] FECA, however, allows a corporation to establish a political action committee to make campaign contributions, and to pay its administrative expenses—a choice often referred to as the "PAC option." *Id.* § 30118(b)(2)(C). The PAC is barred from using corporate treasury funds to finance its political contributions. *Id.* § 30118(a). Instead, the PAC can solicit voluntary contributions from the connected corporation's "restricted class" (i.e., shareholders and executive and administrative personnel and their families) in compliance with the federal contribution limits. *Id.* §§ 30116(a)(1), 30118(b)(4); 11 C.F.R. § 114.5.

The Supreme Court has repeatedly affirmed the constitutionality of the federal restriction over the law's hundred-year history. In 1982, the Court upheld the federal law, or more specifically, its attendant PAC restrictions, as applied to a nonprofit corporation that sought to make contributions to federal candidates through its corporate PAC. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982) ("*NRWC*"). In 2003, the Supreme Court again affirmed the constitutionality of the federal restriction on corporate contributions in a more direct challenge to the law in *Beaumont*. *See* Section I.B. *infra* for further detail.

The Texas prohibition on corporate campaign contributions predated even the federal restriction. Four years before the federal restriction was enacted, Texas

[1] Formerly 2 U.S.C. § 441b. As of September 2014, the provisions of FECA that were codified in Title 2 of the United States Code, 2 U.S.C. § 431 et seq., were recodified in a new title, 52 U.S.C. § 30101 et seq.

Governor S. W. T. Latham signed into law House Bill No. 45, which made it unlawful for "[a]ny corporation, or officer thereof" to "directly or indirectly, furnish[], loan[], or give[] any money or thing of value . . . to any campaign manager or to any particular candidate or person to promote the success of such candidate for public office." H.B. 49 § 137, *in* THE LAWS OF TEXAS, 1903-1905 (Volume 12), at 157, *available at* http://texashistory.unt.edu/ark:/67531/metapth6695/m1/187/. The scope of the restriction has been expanded to prohibit contributions from labor organizations, but the basic legislative proscription remains materially the same 110 years later. Tex. Elec. Code § 253.094(a). Although the law regulates corporate and union political contributions, it does not operate as a ban on their election activity. Like federal law, Texas law allows corporations to form a PAC, i.e., to "pay the administrative expenses of a general purpose political committee." *Id.* § 253.100. But the corporation may not use its resources to fundraise "other than from its stockholders or members, as applicable, or the families of its stockholders or members." *Id.* § 253.100(b), (d)(5).

Although its legislature led the way in limiting the influence of corporate money in elections in 1903, Texas is now one of more than twenty states to regulate direct corporate contributions to candidates.[2] These state restrictions on

[2] The other states include Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, West Virginia, Wisconsin and Wyoming. *See State*

corporate contributions have been tested in courts around the country and have passed constitutional muster. The laws of Alaska,[3] Iowa,[4] and Minnesota[5] have recently been upheld, as well as those of New York City[6] and San Diego, California.[7] Similarly, the constitutionality of the federal restriction was recently reaffirmed in *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013). Supreme Court review was sought in the cases upholding the Iowa, New York City and federal corporate contribution restrictions, but the Supreme Court declined to grant *certiorari* in all instances.

B. Supreme Court Decisions Following *Beaumont* Do Not Directly or Indirectly Impact the Constitutionality of the Corporate Contribution Law.

KSP's principal argument against Texas's corporate contribution law, Tex. Elec. Code § 253.094(a), is that "post-*Beaumont* U.S. Supreme Court opinions

---

Limits on Contributions to Candidates, Nat'l Conference of State Legislatures, May 18, 2015, http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

[3] *Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir. 2003) (upholding Alaska ban on corporate contributions to political parties).

[4] *Iowa Right to Life Comm., Inc. v. Tooker*, 795 F. Supp. 2d 852, 869 (S.D. Iowa 2011) ("*IRTL II*"), *aff'd*, 717 F.3d 576 (8th Cir. 2013) ("*IRTL III*"), *cert. denied*, 134 S. Ct. 1787 (2014).

[5] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 878-80 (8th Cir. 2012) (en banc) ("*MCCL*").

[6] *Ognibene v. Parkes*, 671 F.3d 174, 178 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 28 (June 25, 2012) (upholding extension of existing municipal ban on corporate contributions to prohibit political contributions from LLCs, LLPs and general partnerships).

[7] *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124 (9th Cir. 2011).

undercut *Beaumont*" and consequently cast doubt on the constitutionality of Texas's law. KSP Br. 90. KSP cites not a single judicial authority for this proposition; indeed, it does not even identify the specific Supreme Court opinions that purportedly "undercut" *Beaumont*, although it mentions *Citizens United* and *McCutcheon* in its discussion. The Court of Appeals thus correctly "declined to" take up KSP's request that it "expand the holding in *Citizens United*" to find restrictions on corporate contributions unconstitutional. 459 S.W.3d at 645.

The problem with KSP's argument is two-fold.

First, KSP does not assert that *Citizens United* or *McCutcheon* have any direct application to this case. *Citizens United* reviewed an expenditure restriction, and the Supreme Court noted expressly that "Citizens United has not made direct contributions to candidates." 558 U.S. at 359. Similarly, in *McCutcheon*, although the Supreme Court reviewed a contribution limit, it was a distinct type of limit, a federal law that imposed a $123,200 limit on an individual's aggregate contributions to all federal candidates, party committees and PACs. 52 U.S.C. § 30116(a)(3). The *McCutcheon* Court did not opine on contribution limits generally—but rather engaged in a particularized analysis of whether the federal aggregate limits under challenge served to reduce circumvention of the individual federal "base" contribution limits. *See, e.g.*, 134 S. Ct. at 1445, 1451. This case, by contrast, concerns a corporate contribution law. The most recent Supreme

Court case to consider the constitutionality of such a statute was *Beaumont*. No subsequent case has addressed this specific type of law.

Second, given that *Citizens United* and *McCutcheon* reviewed laws unrelated to a corporate contribution restriction, neither Supreme Court ruling even indirectly bears upon the reasoning in *Beaumont*. KSP nevertheless contends that the reasoning of post-*Beaumont* cases "undercuts" the constitutionality of corporate contribution restrictions in "seven ways." KSP Br. 15. Most of these "ways" pertain to the degree of scrutiny appropriate for a corporate contribution law and the governmental interests such a law implicates. None have any merit.

First, KSP claims that *Citizens United* implicitly changed the appropriate standard of review, arguing that *Citizens United* calls into question the deference paid by the *Beaumont* Court to the legislature in upholding the federal corporate contribution restriction. KSP Br. 98-99. But in reviewing an expenditure restriction, *Citizens United* in no way purported to change the level of scrutiny or deference applicable to a contribution restriction: it is black-letter law that these two laws are held to different levels of review.

Beginning with *Buckley*, the Court has held "that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial . . . restraints on the quantity and diversity of political speech." 424 U.S. at 19. Consequently, a statutory

restriction on expenditures must satisfy strict scrutiny review. *Citizens United*, 558 U.S. at 340; *WRTL*, 551 U.S. at 464; *Buckley*, 424 U.S. at 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," *Buckley*, 424 U.S. at 20-21, and as a result, "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (quotation marks omitted). Further, in applying "closely drawn" scrutiny, the Supreme Court has consistently given deference to Congress' expertise in regulating political contributions. *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."); *Buckley*, 424 U.S. at 30 (noting that "a court has no scalpel to probe" details of contribution limits formulated by Congress).

In both *Citizens United* and *McCutcheon*, the Supreme Court expressly declined to change this longstanding framework for the review of campaign finance restrictions. In *Citizens United*, it stated that it was "not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 558 U.S. at 359. Similarly, in *McCutcheon*, although the Supreme Court had been urged by the plaintiffs to reconsider the

scrutiny given contribution limits, the Court instead explicitly stated that it saw no reason to "revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review." 134 S. Ct. at 1445; *see also id*. at 1451 & n.6. As noted by the Second Circuit, "although the [Supreme] Court's campaign-finance jurisprudence may be in a state of flux" after *Citizens United*, "*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law." *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3090 (2011). Contrary to KSP's claims, the Supreme Court has not altered the standard of scrutiny or deference due to contribution restrictions.

Next, KSP offers several reasons why the governmental interests cited by the *Beaumont* Court to sustain the federal corporate contribution restriction are now insufficient.

It first notes that *Citizens United* rejected the anti-distortion and shareholder protection rationales invoked by *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), to support a corporate expenditure restriction. KSP Br. 94-95. But it is an undisputed precept of constitutional law that corporate expenditure restrictions and corporate contribution restrictions implicate different governmental interests. *Beaumont* did not rely on the *Austin* interests in upholding the federal

corporate contribution restriction, and the interests upon which the *Beaumont* Court did rely were not questioned by *Citizens United*.

In *Austin* and earlier precedents, restrictions on corporate expenditures were found to further two governmental interests: one, the interest in ensuring that the expenditure of corporate funds amassed in the "economic marketplace" did not distort the "political marketplace," *see Austin*, 494 U.S. at 659 (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986) ("*MCFL*")); and two, the interest in protecting shareholders from the unapproved corporate use of their investment dollars to fund campaign-related advocacy, *see id.* at 670-71 (Brennan, J., concurring). By contrast, corporate contribution restrictions have been sustained based on wholly different governmental interests. In *Beaumont*, the Court noted that the federal restriction on corporate contributions prevented "corporate earnings from conversion into political 'war chests,'" and thereby was "intended to 'preven[t] corruption or the appearance of corruption.'" 539 U.S. at 154 (quoting *Nat'l Conservative PAC v. FEC*, 470 U.S. 480, 496-97 (1985)). Relatedly, the Court found that "another reason for regulating corporate electoral involvement" was to "hedge[] against their use as conduits for 'circumvention of [valid] contribution limits.'" *Id.* at 155 (second alteration in original) (quoting *FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 456 & n.18 (2001)).

Citizens United did not question the validity of the governmental interests found by *Beaumont* to justify the corporate contribution restriction. It is true that *Citizens United* held that *Austin*'s "distortion" and "shareholder protection" interests were not legitimate and therefore could not form the constitutional justification for the corporate expenditure restriction. 558 U.S. at 349-56, 361-62. But *Beaumont* made clear that the contribution restrictions were justified principally by the state interests in preventing *quid pro quo* corruption and the circumvention of the individual contribution limits. 539 U.S. at 154-56. *See also Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1045 n.20 (S.D. Iowa 2010) ("*IRTL I*") (noting that *Beaumont* discussed the *Austin* interests, but "never suggested that the government's interest in preventing corruption was not itself sufficient to support a ban on corporate contributions").

Further, although the *Citizens United* majority found that the state interest in preventing corruption and the appearance of corruption did not justify an expenditure restriction, it affirmed that this interest remained compelling in connection to contribution restrictions. It noted that "contribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." 558 U.S. at 359. The Court further noted that *Buckley* "sustained limits on direct contributions in order to ensure against the reality or

appearance of corruption," but "did not extend this rationale to independent expenditures." *Id.*

KSP next claims, however, that corporate contribution restrictions are on unsteady ground because *Beaumont* broadly conceived of this anti-corruption interest as the avoidance of "undue influence," whereas *Citizens United* made clear that the anti-corruption interest extends only to the prevention of quid pro quo corruption. KSP Br. 94-95. But this theory is untenable because *Citizens United*, in its discussion of the Supreme Court's earlier holding in *NRWC*, expressly noted that contribution limits—including restrictions on corporate contributions—were indeed designed to deter *quid pro quo* exchanges. The *Citizens United* Court remarked that *NRWC* had upheld the PAC requirements associated with the federal corporate contribution restriction based upon the state's anti-corruption interest. 558 U.S. at 358-59 (citing *NRWC*, 459 U.S. at 207-08). The Court then distinguished *NRWC* from *Citizens United* on the ground that "*NRWC* involved contribution limits . . . which, unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." *Id*. at 359 (emphasis added) (citations omitted). Thus, far from questioning whether the federal corporate contribution restriction is supported by the state's interest in preventing *quid pro quo* corruption, the *Citizens United* majority highlighted that the federal restriction had already been defended in *NRWC* based upon this very interest.

Finally, KSP asserts that the key interest articulated in *Beaumont* for the corporate contribution restriction—namely, the state interest in preventing circumvention of the contribution limits—is insufficient. 539 U.S. at 155. Citing *McCutcheon*, it claims that "preventing 'circumvention' cannot justify otherwise unconstitutional law." KSP Br. 97. KSP is simply mistaken. The government's anti-circumvention interest is a well-accepted justification for campaign finance restrictions.[8] Contrary to KSP's proclamation, "preventing circumvention" in many cases will indeed assure the constitutionality of a campaign finance law. *See* n.8 *infra*.

Indeed, if anything, post-*Beaumont* decisions have reaffirmed the centrality of the anti-circumvention interest. The *McCutcheon* majority devoted most of its opinion to an analysis of whether the federal aggregate limits were closely tailored to "prevent circumvention of the base [contribution] limits." 134 S. Ct. at 1452. If the anti-circumvention interest was somehow illegitimate, then almost the entirety

[8] The Supreme Court has repeatedly held that reducing circumvention of the contribution limits is part of the government's compelling interest in combating corruption, and has upheld a broad range of campaign finance laws on this basis. *McConnell*, 540 U.S. at 144 (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Colorado Republican*, 533 U.S. at 455 (upholding coordinated party spending limits to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*").

of the opinion would have been superfluous. But instead, *McCutcheon* outlined in detail a typical scheme of circumvention:

> The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels "massive amounts of money" to Smith through a series of contributions to PACs that have stated their intention to support Smith.

Id. at 1453. The circumvention scheme involving PACs identified by the *McCutcheon* Court is similarly a threat in the corporate context. The artificial nature of corporate entities can easily be manipulated for the purpose of facilitating multiple contributions from a donor to her favored candidates.[9] *Beaumont*, 539 U.S. at 154-56.

Thus, contrary to KSP's claims, no post-*Beaumont* decision has directly or indirectly "undercut" the holding in *Beaumont* in any way. Even if this court had

---

[9] KSP also argues that *Citizens United* and *WRTL* undercut *Beaumont* by rejecting the theory that the burdens imposed by a campaign finance restriction can be alleviated by the availability of "alternate" channels of communication such as a PAC. KSP Br. 95-97 (claiming that "alternatives do not fix First Amendment problems"). First, *Beaumont* did not condition its decision to uphold the federal corporate contribution restriction on the availability of a PAC option or other alternatives. To the contrary, the Court stressed that it was the unique danger of corruption posed by corporate contributions that justified the restriction. 539 U.S. at 152; *see also IRTL I*, 750 F. Supp. 2d at 1045 n.20 (noting that the *Beaumont* holding was not based on availability of "PAC option" under federal law, but rather on "the differences between independent expenditures and contributions").

Second, as multiple authorities cited in Section I.B. attest, the Supreme Court has always distinguished between contribution restrictions and expenditures restrictions for the purpose of First Amendment review. Thus, the fact that a "PAC option" did not save a corporate expenditure restriction—the most "restrictive" type of campaign finance regulation that does not serve any anti-corruption purpose—does not bear upon its impact on the constitutionality of a corporate contribution restriction.

the authority to disregard this controlling Supreme Court precedent—which it does not—KSP has no basis for its claim that *Beaumont* has been implicitly overruled.

C. Following *Citizens United*, the Lower Courts Have Been Unanimous in Recognizing the Validity of *Beaumont*.

Because *Citizens United* and *McCutcheon* reviewed an expenditure restriction and an aggregate contribution limit respectively, their legal reasoning does not even indirectly impact the constitutionality of corporate contribution restrictions or the continuing vitality of the *Beaumont* decision. This has been the unanimous conclusion[10] of those courts that have addressed the validity of *Beaumont* in the wake of *Citizens United*. Indeed, the only support KSP cites to the contrary is (1) a blog post by an election lawyer, (2) a law review article penned by its own counsel, and (3) dicta in *MCCL*, an Eighth Circuit decision that upheld Minnesota's corporate contribution ban. *See* KSP Br. 92-93 (citing Robert Bauer, *Breaking Bad in Albuquerque? Or: the Question of Corporate Contributions After Citizens United*, More Soft Money Hard Law (Sept. 12, 2013)); 97-98 (citing James Bopp, Jr., Randy Elf & Anita Y. Milanovich, *Contribution Limits After McCutcheon v. FEC*, 49 Val. U. L. Rev. 361, 367-68 (2015)); 90-91 (citing *MCCL*, 692 F.3d at 879).

[10] KSP cites *Giant Cab Co. v. Bailey*, No.13-cv-426-MCA/ACT (D.N.M. Sept. 4, 2013), *appeal dismissed*, 781 F.3d 1240 (10th Cir. 2015), as an example of a case that invalidated a corporate contribution restriction. However, the district court did not question that *Beaumont* was controlling precedent, *see* slip op. at 6-7, but instead appeared to find that the record was inadequate (a holding that was never tested upon appeal).

Running counter to this "authority" is every other court to have considered this issue, including the Texas Court of Criminal Appeals in *Ex parte Ellis*. The defendants there attacked the same provisions of the law that KSP attacks here, contending that *Citizens United* marked a "philosophical shift in the Court's treatment of restrictions on corporate free speech" that rendered the Texas corporate contribution ban unconstitutional. 309 S.W.3d at 85. But while acknowledging that *Citizens United* "remov[ed] restrictions on independent corporate expenditures," the Court of Criminal Appeals unambiguously "disagree[d] with [defendants'] contention that the decision [in *Citizens United*] has had <u>any effect</u> on the Court's jurisprudence relating to corporate <u>contributions</u>." *Id.* (emphasis added). The Court of Criminal Appeals instead recognized that *Citizens United* had reaffirmed the distinction drawn by *Buckley* between direct political contributions and expenditures, both in terms of the standard of scrutiny applied and the governmental interests implicated by the two types of law. *Id.* at 84-86. Based on this reasoning, *Ex parte Ellis* held that *Citizens United* had not in any way undercut the constitutionality of the Texas corporate contribution law. *Id.* at 86.

Similarly, the Ninth Circuit Court of Appeals found that *Beaumont* was unaffected by the *Citizens United* decision when it upheld a San Diego law prohibiting political contributions by "non-individual entities" (e.g., corporations,

labor unions and other groups) to candidates, political parties and certain other political committees. *Thalheimer*, 645 F.3d at 1124-26. The Thalheimer plaintiffs argued that *Citizens United* implicitly overruled *Beaumont*, asserting that *Citizens United* had found that the government's interest in preventing circumvention of the contribution limits was no longer valid. The Ninth Circuit, however, rejected this theory, concluding that "there is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions." *Id.* at 1125.

In addition to the cases discussed above, the Courts of Appeals for both the Second and Eighth Circuits have also confirmed that *Beaumont* remains the controlling precedent on the subject of corporate contribution restrictions in the wake of *Citizens United*. *See Ognibene*, 671 F.3d at 195 ("*Citizens United* preserves the anti-corruption justification for regulating corporate contributions, based on its clear distinction between expenditures and contributions, and the lack of an express rejection of the corporate ban, which has existed since the first federal campaign finance law in 1907."); *MCCL*, 692 F.3d at 879 ("*Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests Minnesota advances by prohibiting corporate contributions to political candidates and committees."); *IRTL III*, 717 F.3d at 601 (rejecting plaintiffs' assertion that *Beaumont* is on "'shaky ground' after *Citizens United*" and holding that

"*Beaumont* and *MCCL* dictate the outcome here"); *see also Green Party*, 616 F.3d at 199 ("*Beaumont* . . . remain[s] good law.").

Most recently, the Fourth Circuit Court of Appeals reaffirmed the constitutionality of the federal corporate contribution restriction in *Danielczyk*, 683 F.3d at 614. *Danielczyk* was a criminal case alleging a number of campaign finance violations, including that the defendants directed corporate contributions from for-profit corporations to Hillary Clinton's 2008 Presidential campaign in violation of federal law. *Id.* The district court initially dismissed the charges relating to illegal contributions on the ground that *Citizens United* had implicitly invalidated the corporate contribution restriction, *see id.*, but the Fourth Circuit reversed, holding that that "*Beaumont* clearly supports the constitutionality of [§ 30118(a)] and *Citizens United* . . . does not undermine *Beaumont*'s reasoning on this point." *Id.* at 615. The court also highlighted that *Citizens United*'s "'corporations-are-equal-to-people' logic" did not "necessarily appl[y] in the context of direct contributions," noting that to hold otherwise would upend "the well-established principle that independent expenditures and direct contributions are subject to different standards of scrutiny and supported by different government interests." *Id*.

D. Neither the Statutory Definition of "Political Contribution," Nor the Corporate Contribution Restriction, Is Vague or Overbroad.

KSP charges that the statutory prohibition on corporate "political contributions" is unconstitutionally vague and overbroad insofar as it relies upon the definition of "political contribution" at Tex. Elec. Code § 251.001(5). KSP Br. 86. However, as noted by the Court of Appeals, *see* 459 S.W.3d at 647, Texas courts recently rejected a virtually-identical challenge to the state contribution definition in *Ex parte Ellis*. *Id*. ("[T]he Texas Court of Criminal Appeals considered vagueness and overbreadth challenges to the contribution definitions and found the definitions to be facially constitutional."). Furthermore, the U.S. Supreme Court has rejected the proposition that an analogous federal definition of "contribution" is vague or overbroad.

Texas law provides that a "political contribution" is "a campaign contribution or an officeholder contribution." Tex. Elec. Code § 251.001(5). A "campaign contribution," in turn, is "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," *id*. § 251.001(3), and 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 . . . are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office," *id*. § 251.001(4).

KSP argues that the Texas definition of "political contribution" is impermissible because it relies on an alleged "intent" standard. KSP Br. 87. But *Ex parte Ellis* rejected this exact argument, emphasizing that the use of an intent standard does not automatically render a statute unconstitutionally vague in the First Amendment context. 309 S.W.3d at 89-90 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)). Further, according to *Ex parte Ellis*, the possibility that intent may be difficult to establish is the problem of the State, not the defendant; it remains the burden of the State to demonstrate the "applicable culpable mental states." *Id*. at 90.

KSP cites no authority that would call *Ex parte Ellis* into question. It cites dicta from *WRTL* that discusses the potential chill that may result when an "intent" standard is used to define the types of independent expenditures are subject to regulation. *See* KSP Br. 87 (citing *WRTL*, 551 U.S. at 466-69). Specifically, the *WRTL* Court was considering whether it should use an "intent-and-effect test" to determine whether certain "electioneering communications" were the "functional equivalent of express advocacy." 551 U.S. at 465. The Court made clear, however, that its concerns regarding an "intent test" were connected to "the difficulty of distinguishing between discussions of issues on the one hand and advocacy of election or defeat of candidates on the other," or in other words, the difficulty of distinguishing between different types of independent spending. *Id.* at

467. The Court in no way suggested that such concerns would arise in the context of defining a "contribution."

Indeed, the Court in *Buckley* had stressed that concerns of vagueness are less acute in defining a "contribution" than in defining an "expenditure" due to a greater "general understanding of what constitutes a political contribution." 424 U.S. at 24. Both the definition of "contribution" and the definition of "expenditure" in federal law rely on the same operative phrase: "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure"). *Buckley* held that this phrase raised vagueness concerns in connection to the definition of "expenditure" and consequently construed "expenditure" narrowly in certain contexts to encompass only spending for "express advocacy." 424 U.S. at 79-80. But, by contrast, the Court found that the same phrase "presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). The "limiting connection" was that something of value had to actually be "provided" to a candidate or political party, or to another "person or organization" "for political purposes." *Id.*

Here, a corporation will only potentially be in violation of Texas law when it actually "provides" something of value to a candidate, officeholder or political

committee. The intent standard does not stand alone, but rather is an additional element that the state has to demonstrate. Hence, the requirement that the state demonstrate a "culpable mental state" narrows the reach of the law and offers added protection to corporate actors.

II. Texas's Political Committee Disclosure Laws Are Constitutional.

KSP also challenges Texas's political committee definitions, Tex. Elec. Code § 251.001(12)-(14), and the registration, recordkeeping and reporting requirements they effectuate on multiple grounds, including that the definitions are unconstitutionally vague and that Texas impermissibly imposes political committee status on groups who do not have as their "major purpose" the nomination or election of a candidate. KSP also argues that the political committee reporting requirements are unconstitutionally burdensome even as to groups with the requisite "major purpose," and thus cannot withstand constitutional scrutiny. But KSP does not explain precisely how the disclosure and reporting obligations that attend political committee status under Texas law—which the Fifth Circuit has characterized as "exceedingly minimal," *see Reisman*, 764 F.3d at 440-41—constitute burdens, nor does KSP attempt to distinguish the many cases post-*Citizens United* upholding substantially similar laws.

A. The "Major Purpose" Test Does Not Apply.

Under Texas law, a "political committee" is defined as "a group of persons that has as a principal purpose accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12). KSP contends that this political committee definition is unconstitutional because it may impose "PAC status" or "PAC-like status" on groups whose "major purpose" does not relate to the nomination or election of a candidate. *See* KSP Br. 67-82. Although the statute expressly incorporates a "principal purpose" requirement, KSP maintains that "a principal purpose," and even the narrow "the principal purpose" reading adopted by the Court of Appeals, 459 S.W.3d at 649, are unconstitutional because these formulations are "different from 'the major purpose' under *Buckley*." KSP Br. 83-84.[11] But *Buckley*'s "major purpose" test was crafted as a narrowing construction to the federal statutory definition of "political committee," and there is no justification for importing a freestanding "major purpose" rule into a state law. *See, e.g.*, *McKee*, 649 F.3d at 59 (noting that "[t]he Court has never applied a

[11] Last year, the Texas Ethics Commission adopted rules further clarifying when groups have the requisite "principal purpose" to be deemed "political committees." *See* 1 Tex. Admin. Code § 20.1(20) (defining "principal purpose"). The rule provides that making political expenditures or accepting political contributions must be a group's "important" or "main" function, but expressly allows that groups "may have more than one principal purpose," *id.* 20.1(20)(A), leading KSP to characterize the rule "as yet another example of Texas law reaching beyond the Constitution." KSP Br. 51 n.25. On the contrary, this rule is perfectly consistent with the Constitution: it provides clear guidelines and extends no more broadly than necessary to implement Texas's disclosure laws.

'major purpose' test to a state's regulation of PACs"). With or without the lower court's limiting interpretation, therefore, the law passes muster.

The Supreme Court first formulated the "major purpose" test in *Buckley* to address the constitutional concern that FECA's definition of "political committee" was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group that "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A)(i). The Court feared that the definition of "political committee"—because it relied upon this expansive definition of "expenditure"—could "be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. Furthermore, groups deemed "political committees" were subject not only to registration and reporting, but also to contribution limits and source restrictions under federal law. *See Madigan*, 697 F.3d at 488 (noting that "[w]hen *Buckley* was decided, political committees faced much greater burdens under FECA's 1974 amendments" than they did under a state disclosure law).

To resolve its concerns about the definition of "political committee," *Buckley* narrowed the definition to encompass only "organizations that are under

the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* The "major purpose" test was thus intended to narrow the federal definition of "political committee" to ensure that federal political committee requirements would not "reach groups engaged purely in issue discussion." *Id*.

But the Supreme Court did not state that the "major purpose" test was the *only* way to ensure that groups engaged purely in issue advocacy would not be subject to undue regulation. This was recognized by the Ninth Circuit in *Brumsickle*:

> *Buckley*'s statement—that defining groups with "the major purpose" of political advocacy as political committees is sufficient "[t]o fulfill the purposes of the Act"—does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee. Rather, in stating that disclosure requirements "(1) cannot cover 'groups engaged purely in issue discussion' and (2) can cover 'groups the major purpose of which is the nomination or election of a candidate,'" the *Buckley* Court "defined the outer limits of permissible political committee regulation."

624 F.3d at 1009-10 (citations omitted). Otherwise expressed, the "major purpose" test operates as a form of regulatory safe harbor. Groups meeting the "major purpose" test can be permissibly regulated as political committees, but it does not necessarily follow that "non-major purpose" groups engaged in multiple types of advocacy must be exempt from all regulation, even disclosure requirements, such as those at issue here.

Indeed, since *Citizens United*, courts have overwhelmingly rejected the argument that political committee status cannot be imposed on "non-major purpose" groups for the purpose of disclosure. As these courts have recognized, laws that effectuate only registration and reporting may constitutionally be applied to groups that do not have campaign activity as their sole or even "major" purpose. *See, e.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1196-98 (9th Cir. 2015), *petition for cert. filed*, No. 15-215 (U.S. Aug. 14, 2015) ("*Buckley* and [*MCFL*] did not hold that an entity must have the sole, major purpose of political advocacy 'to be deemed constitutionally a political committee.'"); *Utter*, 341 P.3d at 966-67 ("Adopting the even more stringent 'the' primary purpose test, however, would likely contravene the intent of the voters to extend the reach of this state's filing and disclosure requirements as much as possible and is not necessary to satisfy the First Amendment.").[12] In light of this overwhelming consensus, there is "no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute." *McKee*, 649 F.3d at 59.

[12] *See also, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 135-38 (2d Cir. 2014) (recognizing that *Buckley*'s major-purpose construction "was drawing a statutory line," "not holding that the Constitution forbade any regulations from going further."), *cert. denied*, 135 S. Ct. 949 (2015).

KSP makes no serious attempt to address this authority—insisting only that these cases "conflict with *Citizens United*"[13]—and instead relies on decisions that are inapposite, outdated, or both. For instance, KSP's reliance on the Tenth Circuit's decisions in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 671 (10th Cir. 2010), and *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), are misplaced. Both of those decisions, the latter of which was decided before *Citizens United*, held only that comprehensive political committee registration, reporting and disclosure requirements could not be imposed exclusively on the basis of election spending that exceeded a certain threshold with no consideration of the organizations' major purposes. The Tenth Circuit did not speak to the validity of laws like Texas's, where groups must register and report as political committees only if they accept contributions or make expenditures exceeding $500 and have a principal purpose of supporting candidates or measures.[14] Similarly, in *IRTL III* the Eighth Circuit held only that "major purpose" is "an important consideration" in considering whether particular

[13] *See* KSP Br. 63-64 (collecting cases). As reflected by the Supreme Court's denials of certiorari in many, if not most, of these post-*Citizens United* disclosure cases—which largely raised the same major purpose argument as KSP does here—there is no such conflict.

[14] Furthermore, *Herrera*, as well as *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), struck down disclosure requirements only as applied to groups engaged in small-scale ballot-issue advocacy—not candidate advocacy. *See id.* at 1249 (concluding that "[t]he legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue elections"); *Herrera*, 611 F.3d at 671. Both decisions have been criticized or distinguished by other circuits. *See, e.g.*, *Worley v. Florida Sec'y of State*, 717 F.3d 1238, 1248-49 (11th Cir. 2013); *Madigan*, 697 F.3d at 484. In any event, neither supports KSP's challenge to the political committee disclosure requirements applicable to groups that support or oppose candidates.

requirements may be imposed on an organization, finding that certain requirements could not be applied to organizations without *any* consideration of major purpose, whereas others could be. 717 F.3d at 592-601.

The Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), is likewise distinguishable. As the Second Circuit has noted, *Barland* recognizes and does not supersede the Seventh Circuit's holding in *Madigan* that the major purpose requirement is not constitutionally mandated. *See Sorrell*, 758 F.3d at 135 n.15; *Barland*, 751 F.3d at 839. Moreover, the Wisconsin law at issue in *Barland* did not include any primary purpose limitation, but rather imposed extensive requirements on groups solely because they spent $300 or more on non-express advocacy communications that mentioned candidates.[15]

[15] *MCCL* does not require otherwise. There, the Eighth Circuit considered a Minnesota law that required associations making more than $100 in independent expenditures to register a "political fund," file regular reports and comply with a range of organizational requirements. The court upheld much of the "political fund" disclosure regime, but struck down the "ongoing" reporting requirement as applied to non-major-purpose groups, stating that an "event-driven" reporting requirement would adequately address the government's interests in disclosure. 692 F.3d at 873. *Amicus* believes the Eighth Circuit was unduly stringent: although the Court claimed to apply "exacting scrutiny," it incorrectly held each aspect of Minnesota's disclosure regime to the "least restrictive means" standard reserved for strict scrutiny review. *Id.* at 876. However, the Court let stand the majority of Minnesota's disclosure requirements.

B. Texas's Political Committee Definitions Are Not Unconstitutionally Vague for Incorporating "Support or Oppose" Language.

There are two types of political committees in Texas. A "general purpose committee" is a "political committee that has among its principal purposes: (A) supporting or opposing: (i) two or more candidates who are unidentified or are seeking offices that are unknown; or (ii) one or more measures that are unidentified; or (B) assisting two or more officeholders who are unidentified." Tex. Elec. Code § 251.001(14). A "specific purpose committee," by contrast, is a "political committee that . . . [has] among its principal purposes: (A) supporting or opposing one or more: (i) candidates, all of whom are identified and are seeking offices that are known; or (ii) measures, all of which are identified; (B) assisting one or more officeholders, all of whom are identified; or (C) supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown." *Id.* § 251.001(13). KSP maintains that both the specific- and general-purpose committee definitions are unconstitutionally vague because they refer to "supporting or opposing" candidates or measures. *See* KSP Br. 85.

That claim is flatly contradicted by *McConnell*, which upheld virtually identical language in BCRA. Reviewing one prong of the federal definition of "federal election activity," 52 U.S.C. § 30101(20)(A)(iii), the Court concluded that words like "'promote,' 'oppose,' 'attack,' and 'support' ["PASO"] . . . 'provide

explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *McConnell*, 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). The language at issue here mirrors the language that *McConnell* upheld.

Lower courts have followed *McConnell* to uphold a range of state disclosure laws incorporating "PASO" language. The Seventh Circuit, for example, rejected a vagueness claim involving an Illinois statute containing analogous "support" and "oppose" language, and reiterated that "[t]his part of *McConnell* remains valid after *Citizens United*." *Madigan*, 697 F.3d at 486. Courts have accepted a range of state law definitions of the term "political committee" that do not hew to a standard of express advocacy. For instance, the Ninth Circuit upheld a Washington state law that defined "political committee" in a manner similarly to Texas, i.e., as "any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition," which has as its "primary or one of the primary purposes" "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Brumsickle*, 624 F.3d at 997. *See also McKee*, 649 F.3d at 62-64 (rejecting vagueness challenge to Maine law containing the words "promoting," "support," and "opposition," and noting that "*McConnell* remains the leading authority relevant to interpretation of the terms before us").

KSP provides no valid authority to justify the assertion that the presence of the phrase "supporting or opposing" in Texas's general- and specific-purpose political committee definitions places speakers in an unconstitutional "quandary" as to the law's requirements. They cite Justice Scalia's concurring opinion in *WRTL*, KSP Br. 85-86, but a concurrence does not overrule *McConnell*'s endorsement of a PASO standard. They also cite *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007), which employed a limiting construction to uphold a Louisiana definition of "expenditure" that included PASO language. But in so holding, *Carmouche* identified the phrase "or otherwise influenc[e]" as the source of potential vagueness, not the PASO language at issue here. Neither decision supports KSP's vagueness claims.

The Supreme Court has confirmed that "support or oppose" language is sufficiently clear, and the phrase KSP identifies is analogous to the "PASO" language interpreted in *McConnell*. Taken as a whole, therefore, Texas law "clearly set[s] forth the confines within which . . . speakers must act." *McConnell*, 540 U.S. at 170 n.64.

C. Texas's Disclosure Laws Are Properly Tailored to the State's Informational Interest.

KSP also charges that the registration and reporting requirements "unconstitutionally burden" protected First Amendment rights, both on their face and as applied to KSP.

The "burdensome" and "onerous" requirements about which KSP complains are, in reality, neither. Under Texas law, before a political committee accepts political contributions or makes political expenditures totaling more than $500, it must file a notice of appointment of a campaign treasurer, which can then be submitted electronically or by mail using a form provided by the Texas Ethics Commission. Tex. Elec. Code § 253.031(b). As the Fifth Circuit has recognized, "any burden created by the treasurer-appointment requirement—essentially filling out and putting a three-page form that asks for basic information in the mail—appears to be exceedingly minimal." *Reisman*, 764 F.3d at 440-41. As soon as the treasurer appointment is filed, a committee may immediately accept contributions and make expenditures without limitation. Thereafter, a general- or specific-purpose committee must generally report, *inter alia*: who contributes to it, the amounts of those contributions, the amounts spent on political expenditures and to whom those expenditure are made, the name of any candidate supported or opposed by the committee, and the name of any officeholder assisted by the committee. Tex. Elec. Code §§ 254.031; 254.151; 254.153. The "extensive,

ongoing reporting" requirements that KSP catalogues generally require political committees to submit reports only semiannually, in January and July, *id.* §§ 254.123, 254.153, and before certain elections if they are involved.[16]

As a whole, this system of reporting and recordkeeping "requires little more if anything than a prudent person or group would do in these circumstances anyway." *Worley*, 717 F.3d at 1250 (finding that ongoing political committee reporting by four individuals who wanted to spend $600 was not overly burdensome). Whatever minimal burdens are imposed by Texas's political committee reporting requirements, they are more than outweighed by the key transparency interests they serve.

The gravamen of KSP's argument, however, is that mere designation as a political committee inflicts constitutional injury "as a matter of law" whether or not there is any actual burden—or in other words, that "political committee status" is unconstitutional irrespective of what, if anything, that status entails. KSP Br. 32 n.62. But this generalized account of the "burdens" of disclosure ignores the powerful First Amendment interests weighing in disclosure's favor. As the Supreme Court has consistently recognized, "effective" and "prompt" campaign

[16] Committees are also required to file pre-election reports 30 days and 8 days before any election in which they are involved. Tex. Elec. Code. §§ 254.124, 254.154. Certain committees that accept or spend large sums to support or oppose candidates or measures in the nine-day period before an election must also file "special pre-election reports" within 24 hours. *Id.* §§ 254.038, 254.039. None of these pre-election reports are required unless the committee supports or opposes candidates or measures in that election. *See id.* § 254.124; 1 Tex. Admin. Code § 20.425.

disclosure laws "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages" but "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366, 369.

Citizens United thus made clear that disclosure requirements, although they may impose some burden on First Amendment rights, must be balanced against the vital and countervailing state interests in providing citizens "with the information needed to hold corporations and elected officials accountable" and "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 368-69. Disclosure laws are therefore justified so long as they are substantially related to these "important" interests.

KSP asserts that the inherent "burdens" of disclosure create an unconstitutional "parade of horribles" under prevailing Supreme Court precedent, but none of the cases they cite support this claim. KSP Br. 32-33 (citing *Citizens United* and *MCFL*). *MCFL* was not a disclosure case: instead, it involved a challenge to a federal law prohibition on corporate political spending. The challenged law required MCFL to speak through a "separate segregated fund" rather than its general treasury, imposing a "substantial" restriction on MCFL's speech. 479 U.S. at 252 (plurality opinion of Brennan, J.). MCFL notably did <u>not</u> challenge the federal law definition of "political committee," 52 U.S.C.

§ 30101(4), nor any of the federal law disclosure requirements applicable to political committees. *See id.* §§ 30102-4. Indeed, Justice O'Connor made clear in concurrence that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." 479 U.S. at 266 (O'Connor, J., concurring in part and concurring in the judgment). Texas's disclosure laws involve only a fraction of the disclosure requirements that were applicable to MCFL, and most importantly, do not impose either the substantive fundraising restrictions or organizational requirements of federal law.

KSP also cites *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), a decision predating *Citizens United* that involved the circumstances under which an organization could be defined as a political committee *to which contributions were limited*. Texas law imposes no such contribution limits; "political committee status" implicates only disclosure and reporting obligations. The obligations triggered by "political committee status" in Texas are readily distinguishable from the source restrictions and limitations at issue in *Leake*. Moreover, *Leake* itself recognized that, although the requirements imposed by North Carolina law were too burdensome as to non-major purpose organizations to withstand scrutiny, lesser burdens, like disclosure and reporting requirements, would pass muster. *See id*. at 290, 304.

Petitioners here have in no way demonstrated that the modest burdens of disclosure are even close to sufficient to justify their attempt to evade valid disclosure laws. The many courts to have considered disclosure laws have not ignored claims that such laws create a "burden" or "chill," but found nevertheless that these concerns are outweighed by the governmental interest in transparency. *Buckley* itself acknowledged that disclosure might "deter some individuals who otherwise might contribute[,]" but nevertheless upheld FECA's disclosure requirements because they appeared to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68.[17] And as the Seventh Circuit observed in *Madigan*, it may have been "regrettable" that Illinois reporting requirements would deter plaintiff "from engaging in its preferred form of public advocacy[,]" but that burden was not sufficient to conclude that "voters must remain in the dark" about the sources of campaign speech. 697 F.3d at 482.[18] This Court should also reject KSP's invitation to reduce transparency in the state of Texas.

[17] *See also Yamada*, 786 F.3d at 1196 (acknowledging Hawaii's noncandidate committee reporting and recordkeeping requirements "might be inconvenient," but rejecting argument that those burdens "are onerous as matters of fact or law"); *Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014) (rejecting claim that Mississippi's "entire statutory scheme [was] too burdensome" "as applied to small groups"); *Sorrell*, 758 F.3d at 135-38 (rejecting argument that "registration, recordkeeping necessary for reporting, and reporting requirements" are onerous as a matter of law).

CONCLUSION

For the foregoing reasons, Texas's restriction on corporate political contributions, as well as its political committee definitions and disclosure requirements, are consistent with the First Amendment. Accordingly, this Court should deny KSP's petition for review, or, in the alternative, affirm the Court of Appeals' judgment below.

Respectfully submitted,

/s/ Kelly G. Prather
Kelly G. Prather,
kgreenwood@midtownlegal.com
(TX Bar No. 00796670)
THE GREENWOOD PRATHER
LAW FIRM
2009 North Durham Drive
Houston, TX 77008
Tel.: (713) 333-3200
Fax: (713) 621-1449

J. Gerald Hebert,
ghebert@campaignlegalcenter.org
(VA Bar No. 38432)
Tara Malloy,
tmalloy@campaignlegalcenter.org
(NY Bar No. 4251005)
Megan McAllen
mmcallen@campaignlegalcenter.org
(D.C. Bar No. 1020509)
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, DC 20005
Tel.: (202) 736-2200
Fax: (202) 736-2222

Counsel for *Amicus Curiae*
Campaign Legal Center

Dated: November 10, 2015

CERTIFICATE OF COMPLIANCE

I certify that this filing has 9,483 words not counting the parts exempt from the word count. TEX. R. APP. P. 9.4(i)(l), 9.4(i)(2)(B), 9.4(i)(3).

/s/ Kelly G. Prather
Kelly G. Prather

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2015, I electronically filed the foregoing BRIEF *AMICUS CURIAE* FOR CAMPAIGN LEGAL CENTER with the Clerk of Court using the Court's Electronic Case Filing System which effected service on all counsel of record.

/s/ Kelly G. Prather
Kelly G. Prather