

COPY

CAUSE NO. D-1-GN-11-002363

KING STREET PATRIOTS, INC., et al.,  
Plaintiffs

v.

TEXAS DEMOCRATIC PARTY, et al.,  
Defendants

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261<sup>ST</sup> JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

MAR 27 2012 VM

At 4:08 P.M.  
Amalia Rodriguez-Mendoza, Clerk

FINAL SUMMARY JUDGMENT

By cross-motions for summary judgment, the parties ask the Court to determine the constitutionality of various provisions of the Texas Election Code ["TEC"] that provide a private cause of action against persons and corporations who violate Texas campaign finance laws. The King Street Patriots ["KSP"] contend that the statutes infringe on their First Amendment rights of free speech and association under the United States Constitution. They also contend that the discovery process in a case filed under the statutory private causes of action subjects them to unlawful searches and seizures prohibited by the Fourth Amendment under the U.S. Constitution. KSP further challenges various statutory provisions on due process, vagueness, and overbreadth grounds. Specifically, KSP contends the following provisions in the TEC are facially unconstitutional: TEC §§ 251.001(2) - (10), (12), and (14); 253.031(c), 253.037(a)(1), 253.062, 253.094, 253.097, 253.104, 253.131, 253.132, and 273.081. The parties asked that the constitutional claims be severed into this separate lawsuit, so that they could be determined prior to the merits of the underlying allegations. The Texas Democratic Party and Democratic candidates ["TDP"] contend that KSP made unlawful political contributions to the Texas Republican Party and various Republican candidates by training poll watchers in cooperation with the Republican party and its candidates and subsequently offering the watchers' services only to the party and its candidates. They also contend that KSP violated the TEC by holding candidate forums only for Republican candidates. TDP contends these were political contributions and/or expenditures properly regulated by the TEC.

Plaintiffs are King Street Patriots, Catherine Englebrecht, Bryan Englebrecht, and Diane Josephs [collectively "KSP"].<sup>1</sup> According to their answer and counterclaim, King Street Patriots, Inc. was formed as a non-profit Texas corporation on December 30, 2009, with the stated purpose "To provide education and awareness with [sic] the general public on important civic and patriotic duties." KSP reviewed public information regarding voter registration in Harris County, reported findings to the Harris County Voter Registrar, and trained several hundred poll

<sup>1</sup> The claims at issue are stated in Defendants' Motion to Transfer Venue, and Subject Thereto, Motion for Severance, Plea to the Jurisdiction, Original Answer and Counterclaim originally filed in Cause No. D-1-GN-11-002363, *Texas Democratic Party, et al. v. King Street Patriots, Inc., et al.* in the 261<sup>st</sup> District Court of Travis County, Texas. In the severance order, the Court realigned the parties in this cause. For clarity, the Court will refer to the parties by name in this Order.

watchers who served during the 2010 general election. KSP conducts weekly meetings at which speakers address topics of interest to citizens in the Houston area or regarding "protecting the integrity of elections." KSP collects donations at its meetings by "passing the hat." Further, according to their counterclaim, politician speakers are "strictly informed" that the group is nonpartisan and politicians may not campaign. Finally, KSP states it has made no contributions to any candidate or politician. 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.

Defendants [collectively "TDP" and plaintiffs in the underlying cause] contend that KSP is a political committee subject to the reporting requirements of the Texas Election Code and that KSP violated the TEC. In addition, KSP made improper corporate donations. Accordingly, TDP seeks damages under the TEC and asks the Court to enjoin KSP from continuing to violate the TEC. TDP agrees that the constitutional issues should be resolved before the underlying cause can proceed, given KSP's refusal to respond to discovery. TDP offered the following summary judgment evidence: The affidavits of Ann Bennett, Gerald Birnberg, and Anthony Gutierrez, documents concerning KSP (e.g. screen shots of KSP website), two videos produced by KSP, and the Rule 11 stipulations entered by the parties. The affidavits establish that KSP did not offer TDP the opportunity to participate in candidate forums, use of trained poll watchers, or candidate support via KSP's website or office.

### **Declaratory Relief**

The parties each ask the Court to make declarations with respect to the constitutionality of the statutes under the Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ch. 37. This Court does not have jurisdiction to issue advisory opinions. If the declaration will not resolve a live controversy that binds the parties, the Court should not and may not grant declaratory relief. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 223 (Tex. 2002).

### **Standards of Review for First Amendment Issues**

With respect to restrictions on campaign contributions, the Supreme Court has applied a relatively complaisant review of the First Amendment effect because of the danger of *quid pro quo* influence that can directly flow from contributions and the State's interest in prevention corruption and the appearance of corruption. See *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) and *Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010). Therefore, contribution limits are reviewed under an "exacting" scrutiny which requires the State to show a "substantial relation" between the limits and a "sufficiently important governmental interest" as opposed to the strict

scrutiny applied to restrictions on independent expenditures. *Citizens United v. FEC*, 130 S.Ct. at 914.

Disclosure requirements are reviewed under the same standard because of the State's "informational interest."

[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

*Buckley I*, 424 U.S. at 66 (footnote omitted).

Because of a perceived lower risk of corruption from independent expenditures (called "direct campaign expenditures" in Texas), the Supreme Court has subjected any limits on such expenditures to strict scrutiny and requires the State "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S.Ct. at 898. Because an independent expenditure, i.e. one made by a third party that is not coordinated or controlled by a candidate, is closer to the speech of the speaker (spender) and more distant from the risk of *quid pro quo* corruption, the State has less interest in burdening that speech. The Supreme Court did, however, uphold reporting and disclosure requirements in *Citizens United*, 130 S.Ct. at 914-15.

**I. In its first ground for summary judgment, KSP contends that the private cause of action provisions are unconstitutional because they violate the Due Process Clause, the First Amendment, and the Fourth Amendment of the United States Constitution.**

In this ground, KSP challenges TEC §§ 253.131, 253.132 and 273.081 which provide a private cause of action for damages to opposing political candidates and committees affected by a violation of the TEC and permit injunctive relief to stop continuing violations respectively. The purpose of enforcement provisions is to deter violations and encourage enforcement by candidates and other direct participants in the process. . *Osterberg v. Peca*, 12 S.W.3d 31, 49 (Tex.2000). The constitutionality of the provisions being enforced will be addressed in later grounds but will be presumed for this discussion. The statutes at issue are as follow:

**Sec. 253.131. LIABILITY TO CANDIDATES.**

(a) A person who knowingly makes or accepts a campaign contribution or makes a campaign expenditure in violation of this chapter is liable for damages as provided by this section.

- (b) If the contribution or expenditure is in support of a candidate, each opposing candidate whose name appears on the ballot is entitled to recover damages under this section.
- (c) If the contribution or expenditure is in opposition to a candidate, the candidate is entitled to recover damages under this section.
- (d) In this section, "damages" means:
  - (1) twice the value of the unlawful contribution or expenditure; and
  - (2) reasonable attorney's fees incurred in the suit.
- (e) Reasonable attorney's fees incurred in the suit may be awarded to the defendant if judgment is rendered in the defendant's favor.

**Sec. 253.132. LIABILITY TO POLITICAL COMMITTEES.**

- (a) A corporation or labor organization that knowingly makes a campaign contribution to a political committee or a direct campaign expenditure in violation of Subchapter D is liable for damages as provided by this section to each political committee of opposing interest in the election in connection with which the contribution or expenditure is made.
- (b) In this section, "damages" means:
  - (1) twice the value of the unlawful contribution or expenditure; and
  - (2) reasonable attorney's fees incurred in the suit.
- (c) Reasonable attorney's fees incurred in the suit may be awarded to the defendant if judgment is rendered in the defendant's favor.

KSP contends the Legislature has made an unconstitutional delegation of enforcement authority because the statutes fail to "supply standards sufficient to guide a party's discretion." [KSP motion, quoting *Biener v. Calio*, 209 F.Supp.2d 405, 412 (D.Del. 2002)]. According to KSP, granting a private party enforcement authority without procedural safeguards runs afoul of the Constitution. KSP argues that the Due Process Clause, First Amendment and Fourth Amendment require that the statute impose a threshold akin to a probable cause finding that a violation is occurring before a private party may "initiate an investigation," i.e. obtain discovery in the civil cause of action. The lack of express standard subjects KSP to abuse of the discovery process with a chilling effect on its free exercise of political speech and association as protected by the First Amendment. KSP also contends that it may not be held liable on a showing of less than clear and convincing evidence because the First Amendment is at issue. Next, KSP contends that the availability of injunctive relief operates as a prior restraint on free speech. Finally, KSP contends that it has a privacy interest in its files and papers that is protected by the

Fourth Amendment requirement of probable cause because the State could possibly use the fruits of private litigation in its own prosecution of KSP in a separate enforcement action.

As discussed below, the Court DENIES KSP's motion for summary judgment on this ground including all subarguments, GRANTS TDP's motion for summary judgment on these issues, and HOLDS that Tex. Election Code §§ 253.131, 253.132, and 273.081 are facially constitutional under the Due Process Clause, the First Amendment, and the Fourth Amendment.

While the Court recognizes the vital importance of the Constitutional protections invoked by KSP to the free, full, open exchange of ideas necessary to an informed electorate, the Court also notes that the State and its citizens have a corresponding interest in transparency in the election process that must be balanced in the constitutional analysis. The Court begins with the presumption that a statute is constitutional. *Brooks v. Northglenn Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). The burden here is on KSP to prove that the statutes at issue are unconstitutional. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002). If a statute can be construed to be constitutional, the Court should adopt that construction. *Brooks*, 141 S.W.3d at 169. See also Tex. Gov. Code § 311.021. The Court construes a statute to give effect to the Legislature's intent as indicated by the language used and the context in which the statute was enacted. *Osterberg*, 12 S.W.3d at 38. If possible, a statute should be construed "in a manner to avoid constitutional infirmities." *Id.*, 12 S.W.3d at 51. Further, "[a] reasonable construction of a statute by the administrative agency charged with its enforcement [here the Texas Ethics Commission] is entitled to great weight." *Id.* For purposes of this discussion, the Court assumes that the underlying statutes being enforced under §§ 253.131, 253.132, and 273.081 are constitutional as KSP's challenge in this ground goes solely to the statutory mechanism of enforcement.

The Texas Supreme Court has already held that private enforcement of the TEC does not in itself violate the Constitution. In *Osterberg v. Peca*, 12 S.W.3d 31, 48-50 (Tex.2000), the Texas Supreme Court held TEC § 253.131 to be constitutional and rejected the litigant's claim that private enforcement of the State's reporting laws did not advance the State's compelling interest. *Id.*, 12 S.W.3d at 48. The Court found that the purpose of § 253.131 is to

'deter violators and encourage enforcement by candidates and others directly 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.

*Id.* 12 S.W.3d at 49 [Citations omitted]. The mode of enforcement is within the discretion of the Legislature, and the motivations of the private party in bringing suit are irrelevant because the court ultimately decides whether the defendant "acted unlawfully and thus could be subject to liability." *Id.* Because the private cause of action advances legitimate state interests, the Texas Supreme Court found the statute to be constitutional. The Court finds that the *Osterberg* rationale applies equally to Tex. Elec. Code § 253.132 which establishes a private cause of action for political committees.

KSP contends that *Osterberg* does not foreclose its constitutional challenge because it did not address the due process arguments presented here, mistakenly presumed only one enforcement action, and did not address a challenge to injunctive relief. The Court agrees that *Osterberg* does not preclude constitutional challenges to the statute on different grounds. *Osterberg*, 12 S.W.3d at 49.

KSP's due process argument focuses on its speculation that the lack of specific standards in the statute will permit a political opponent (whether a candidate or committee) unfettered access to their private information. "In other words, King Street Patriots must lay bare and expose themselves to their political opponents on nothing more than an 'allegation' of wrongdoing." KSP Motion for Summary Judgment, p. 6. Because there is no probable cause or similar threshold required before discovery, it will be forced to respond to discovery even though it may ultimately prevail on the merits, which results in a chilling effect on First Amendment rights. As noted above, the Court construes a statute in the context in which it is enacted. Sections 253.131 and 253.132 do not give a private party "unbridled discretion" to seize private information of KSP or to investigate matters protected by the First Amendment. KSP Motion, p. 8.

Contrary to KSP's analysis, the statutes at issue do not exist in a vacuum, nor has KSP cited any authority that requires the Court to determine their constitutionality in a vacuum. A civil enforcement action is subject to the Texas Rules of Civil Procedure, the Texas Rules of Evidence, and laws governing the conduct of civil litigation in Texas. The procedural safeguards contained therein provide KSP with the means to avoid the disclosure of privileged material before a hearing or review by a court. The Court, not the plaintiff, decides what material is discoverable and has means and authority to craft appropriate limits and protection from disclosure. State law also provides litigants the means to present constitutional challenges to the statutes and seek an accelerated disposition of legal issues before discovery if appropriate – as KSP has done in this case. Sections 253.131 and 253.132 also provide a disincentive for unmeritorious suits in that they allow prevailing defendants to recover attorney fees. Recovery of attorney fees is in addition to sanctions available for filing a frivolous lawsuit or pleadings as well as sanctions for abuse of discovery rules. A court further has inherent power to craft appropriate guidelines for litigation. The procedural protections in place for civil litigation in Texas satisfy the requirements of the Due Process Clause and provide adequate protection for a litigant's First Amendment rights while balancing the State's interest in enforcing its campaign

finance laws. The authority cited by KSP with respect to "probable cause" and the burden of proof applicable to defamation of a public official are not applicable to this case. The Court DENIES KSP's motion for summary judgment on these grounds. KSP has offered no authority that compels an extension of Fourth Amendment protection or the heightened standard of proof under the circumstances governed by the statutes at issue. The Court declines to do so.

KSP further complains that the Texas statute "allows for an unlimited number of private parties to sue" and holds open the possibility that the State can sue for damages and criminal sanctions and the Texas Ethics Commission can also impose penalties for the same violation. Because KSP can be subject to multiple awards of damages and penalties, the statute is not "tailored to the state's interest in enforcing its laws but is aimed at providing damages to those harmed." KSP Motion, p. 20. Accordingly, the multiple penalties are unconstitutional infringements on KSP's Free Speech and must be struck down. Any "damages must be limited to *actual damages* – damages with 'clear and convincing' evidence that they were the result of something akin to 'actual malice.'" KSP's Motion, p. 20 [emphasis in original]. The Court does not agree that the statutory language subjects it to an "unlimited number" of private suits. The statutes limit private litigants to candidates on the ballot or political committees of opposing interest, i.e. parties who are damaged by the unlawful conduct at issue. The Legislature has created a statutory cause of action that provides damages to injured parties and established the amount of damages in direct relation to the amount that was wrongfully contributed or expended. Again, the Court notes that these private causes are subject to limits imposed by Texas law. A defendant in a suit under the TEC has procedural protections to improper suits. Standing is a jurisdictional issue that may be raised at the outset of a suit. In addition, the Court finds that the statutes are sufficiently tailored to the State's enforcement interest to withstand a facial challenge. An award of damages is one means of deterring violations and enforcing the underlying requirements.

KSP also contends that § 273.081 is unconstitutional because it authorizes a Court to enter an injunction when there is a "threatened violation" of the law. An injunction under such circumstances operates as an unconstitutional prior restraint of speech.

#### **Sec. 273.081. INJUNCTION.**

A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.

Again, KSP fails to address the legal context in which this law was enacted and will be applied. KSP focuses on "in danger of being harmed" and "threatened violation" as establishing that an injunction issued on those bases would severely burden speech and provide "an unjustified means of regulating political speakers;" however, the extraordinary nature of injunctive relief is necessary to deter or prohibit violations where money damages are inadequate. In the context of elections, a finding of wrongdoing after the votes have been cast cannot unring the bell. Injunctive relief recognizes that time is of the essence in the enforcement of the provisions since

the primary purpose of political contributions and expenditures is to influence the outcome of elections. The statute properly permits a Court to enjoin an ongoing violation of law. *See Cook v. Tom Brown Ministries*, No. 08-11-00367-CV (Tex. App. – El Paso February 17, 2012, slip op.). The Court notes that this section is a means to enforce the reporting statutes and limits embodied in the Texas Election Code. The section does not regulate speech on the basis of content. If TDP establishes that KSP has violated or continues to violate the TEC and it (TDP) is being harmed, injunctive relief is proper to prevent a violation. *Id.* Further, an order granting or denying an injunction may be reviewed by interlocutory appeal. Finally, with respect to all three statutes, the specific standards are contained in the underlying statutes being enforced. The State has a recognized interest in regulating campaign contributions and disclosure of who is providing financing to candidates and measures. The Court DENIES KSP's motion for summary judgment on this ground. The statutes are narrowly tailored to the State's interests. An injunction in this context does not constitute a prior restraint in Free Speech analysis as it is not content based.

Finally, the Legislature has crafted complementary means of enforcement. The private causes of action recognizes the enforcement interest of those directly affected or injured by violations. The State's cause of action protects the interests of the electorate of the State in the balancing of interests effected by the Texas Election Code. The Texas Ethics Commission, as the agency charged with enforcing the laws, must have the means to fulfill that duty. The variance in enforcement means in itself does not implicate the First Amendment. *Osterberg*, 12 S.W.3d at 49-50. As TDP notes, enforcement of a constitutional regulation is no more of a limitation on speech than the regulation itself. TDP's Motion for Summary Judgment, p. 22-23. [Citing *Osterberg*]. KSP does not complain that the enforcement statute itself creates any uncertainty about whether KSP's conduct was subject to regulation under the TEC. The statutes are appropriately tailored to further these interests.

Accordingly, the Court DENIES KSP's motion for summary judgment on this ground in its entirety, GRANTS TDP's motion for summary judgment, and HOLDS that Tex. Election Code §§ 253.131, 253.132, and 273.081 are facially constitutional under the Due Process Clause, the First Amendment, and the Fourth Amendment.

**II. In its second ground for summary judgment, KSP contends that the ban on unauthorized corporation contributions and expenditures is unconstitutional under the First Amendment and the Equal Protection Clause.**

In this ground for summary judgment, KSP contends TEC § 253.094(a) is unconstitutional.

**Sec. 253.094. CONTRIBUTIONS PROHIBITED.**

- (a) A corporation or labor organization may not make a political contribution that is not authorized by this subchapter.



In other words, a corporation may only make a political contribution if it is specifically permitted under Subchapter D of Chapter 253 of the Texas Election Code at § 253.091, *et al.* Section 253.092 permits a political committee that is incorporated solely for liability purposes to opt out of the limitations of Subchapter D. Section 253.093 imposes the limits on certain other associations or entities whether they are incorporated or not.

KSP takes seemingly contradictory positions with respect to the regulation of corporations' political speech under the TEC. First, it argues that the TEC oppressively restricts its political speech by banning political contributions by corporations, but it then argues that the exceptions to the "ban," i.e. the ways a corporation is permitted to exercise political speech, are so numerous as to dilute the State's legitimate interests. Neither argument has merit. KSP's challenge to the limitations on corporate contributions rests on *Citizens United v. FEC*, 130 S.Ct. 876 (2010). KSP contends that the Supreme Court's holding regarding restrictions on corporate independent expenditures should be extended to corporate contributions. The Court does not agree that *Citizens United* compels this construction. The Court notes that other courts which have considered the effect of *Citizens United* have recognized the distinction between the interests and treatment of contributions and expenditures and continued to follow the Supreme Court holdings in *FEC v. Beaumont*, 539 U.S. 146 (2003) as controlling on the issue of corporate contributions.<sup>2</sup> This Court need not make that determination because the Texas Court of Criminal Appeals has considered this issue and found that *Beaumont* is the controlling authority with respect to corporate contributions. *Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010). This Court follows *Ellis* and applies the *Beaumont* standard in reviewing KSP's constitutional challenge. "Contribution regulations [are] justified so long as they were 'closely drawn to match a sufficiently important interest.'" *Ex parte Ellis*, 309 S.W.3d at 83 [quoting *Beaumont*, 539 U.S. at 162]. The *Ellis* court noted that the U.S. Supreme Court has "explained that 'restrictions on political contributions have been treated as merely "marginal" speech restrictions subject to relatively complaisant review under the *First Amendment*, because contributions lie closer to the edges than to the core of political expression.'" *Ellis*, 309 S.W.3d at 84-85 [quoting *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003)]. Limits on contributions are "an accepted means to prevent *quid pro quo* corruption." *Ellis*, 309 S.W.3d at 85 [citing *Citizens United v. FEC*, 130 S.Ct. 876, 901-02 (2010)]. The *Ellis* went on to hold that TEC § 253.094(a) was sufficiently tailored to withstand vagueness and overbreadth challenges. *Ellis*, 309 S.W.3d at 82-92.

Although § 253.094(a) is stated in terms of a ban, it clearly subjects that general prohibition to the exceptions stated in Subchapter D. A corporation is permitted to "make campaign contributions from its own property in connection with an election on a measure only to a political committee for supporting or opposing measures exclusively," TEC § 253.096. "A corporation. . . may make one or more direct campaign expenditures from its own property for the purpose of communicating directly with its stockholders or members, as applicable, or with

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<sup>2</sup> The Court declines KSP's invitation to follow the aberrant decision of the U.S. District Court for the Eastern District of Virginia in *U.S. v. Danileczyk*, 791 F.Supp.2d 513 (E.D. Va. 2011).

the families of its stockholders or members." TEC § 253.098. "A corporation or labor organization may make one or more expenditures to finance nonpartisan voter registration and get-out-the-vote campaigns aimed at its stockholders or members, as applicable, or at the families of its stockholders or members." TEC § 253.099. "A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee." TEC § 253.100. A corporation may make a contribution from its own property to a political party except within 60 days of a general election. TEC § 253.104.

Subchapter D also contains express prohibitions. "A political committee assisted by a corporation. . . may not make a political contribution. . . in whole or part from money that is known by a member or officer of the political committee to be dues, fees, or other money required as a condition of employment. . . ." TEC § 253.101. A corporation is prohibited from using coercion "to obtain money or anything of value to be used to influence the result of an election or to assist an officeholder." TEC § 253.102(a). A corporation is likewise prohibited from making a loan for campaign or officeholder purposes. TEC § 253.103.

Considering the "ban" on corporate political contributions, in the context of the entire subchapter, the Court finds that the statute is "closely drawn to match a sufficiently important interest." *Ex parte Ellis*, 309 S.W.3d at 83 [quoting *Beaumont*, 539 U.S. at 162]. The Court DENIES KSP's motion for summary judgment on this ground. Rather than a "ban" on corporate speech, the statute provides a corporation limited means to express political speech through political contributions in a manner that furthers the State's interest in a transparent electoral process while limiting the effect of "war chest" influence. The Court further finds KSP's arguments with respect to content based and speaker based restrictions to be without merit. Even if strict scrutiny applied, the Court finds that TEC § 253.094(a) passes constitutional muster on all grounds urged by KSP.

Finally, the Court rejects KSP's invitation to overrule *Beaumont* and *Ellis* and its contention that neither applies to this case.

The Court DENIES KSP's Motion for Summary on this ground including subparts in its entirety, GRANTS TDP's motion on this ground, and HOLDS that Tex. Elec. Code § 253.094(a) is facially constitutional.

**III. In its third ground for summary judgment, KSP contends that the definitions of "contribution" and "expenditure" are unconstitutionally vague and overbroad.**

In this ground, KSP challenges the definitions of "contribution" and "expenditure" as unconstitutionally vague and overbroad. Because these terms are constitutionally infirm according to KSP, it contends they render the definitions of "campaign contribution," "officeholder contribution," "political contribution," "campaign expenditure," "direct campaign

expenditure," "political expenditure," and "political committee" unconstitutional on the same bases.

The *Ellis* court has already considered vagueness and overbreadth challenges to the definitions related to contributions and found them to pass facial constitutional muster, in the context of a criminal prosecution. This Court follows the *Ellis* analysis.

When First Amendment freedoms are implicated, a criminal law<sup>3</sup> must: (1) be sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited, (2) establish determinate guidelines for law enforcement, and (3) be sufficiently definite to avoid chilling protected expression. . . . 'But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'

*Ellis*, 309 S.W.3d at 86 [citing *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996); quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)].

KSP lodges essentially the same arguments with respect to the definitions of expenditures. The Court follows the *Ellis* court analysis with respect to these definitions as well. The Court finds that the definitions at issue are sufficient to give a "person of ordinary intelligence" reasonable notice of what is prohibited with appropriate guidelines for enforcement. The definitions are sufficiently tailored to State interests to withstand KSP's facial challenges. *Ellis*, 309 S.W.3d at 82-92. KSP's motion for summary judgment as to the identified definitions is DENIED. TDP's motion for summary judgment as to the constitutionality is GRANTED.

**IV. In its fourth ground for summary judgment, KSP contends that the definition of "political committee" is unconstitutional.**

In this ground, KSP contends that the regulation of political committees under the TEC unconstitutionally burdens Free Speech. Imposing political committee (PC) status "forces persons to institutionalize themselves, comply with complex laws, and report on a continuous basis" – thus burdening speech. See KSP's Motion, p. 52. KSP contends the definition of "political committee" is unconstitutional because it does not include the major purpose test as a limit on who is considered a PC subject to reporting requirements. The TEC provides:

**"Political committee"** means a group of persons that has as a principal purpose accepting political contributions or making political expenditures.

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<sup>3</sup> Part of KSP's challenge is that the statutes should be subject to stricter scrutiny because they carry criminal penalties in addition to the private cause of action (although no criminal prosecution is at issue in this suit). *Ellis* considered the definitions in this context. Multiple courts have addressed similar challenges on the basis of vagueness arising from the use of "in connection with," "indirect," and intent. The Court finds KSP's arguments on these points unpersuasive.

TEC § 251.001(12). KSP objects to this test because it relies on the subjective intent of the group; however, the statute relies upon objective factors – accepting political contributions and making political expenditures. KSP challenges the definition of a general purpose political committee for the same reason. The Court finds this argument unpersuasive.

KSP also contends the definition is unconstitutional because it has a "zero dollar threshold," in other words, a group may be a PC under the statute if it has never accepted a political contribution or made a political expenditure. While that is true with respect to the definition, the TEC does not impose any requirements on a PC until it reaches a \$500 threshold in contributions or expenditures. Only then is a PC subject to reporting requirements.

KSP next challenges the General-Purpose Committee definition.

**"General-purpose committee"** means 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*.

TEC § 251.001(14) (alleged vague terms italicized). KSP contends the terms are vague because they focus on subjective elements and turn on the intent of the speaker. The Court finds the terms are discernible by a person of ordinary intelligence when viewed in the context of the statute, particularly compared to a specific-purpose committee which is expressly limited to an identified candidate or measure.

Finally, KSP challenges the imposition of PC reporting requirements via §§ 253.062 and 253.097 on individuals acting alone who make direct campaign expenditures exceeding \$100 and corporations acting alone that make direct campaign expenditures on a measure. Those provisions permit the direct campaign expenditures without the appointment of a campaign treasurer so long as they comply with the PC reporting requirements. KSP contends this is an improper expansion of the regulation of PCs without compliance with the major purpose test. KSP also contends the \$100 threshold is too low to justify the burden of the reporting requirements.

The Court finds the statutes are not vague and are sufficiently related to an important state interest to survive this facial challenge. The Court DENIES KSP's motion for summary judgment on this ground and GRANTS TDP's motion for summary judgment.

**V. In its fifth ground for summary judgment, KSP challenges the 30 and 60 day "blackout" periods.**

In this ground, KSP contends the 30 and 60 day "blackout" periods are unconstitutional bans on speech.

**Sec. 253.031. CONTRIBUTION AND EXPENDITURE WITHOUT CAMPAIGN TREASURER PROHIBITED.**

(c) A political committee may not knowingly make or authorize a campaign contribution or campaign expenditure supporting or opposing a candidate for an office specified by Section 252.005(1) in a primary or general election unless the committee's campaign treasurer appointment has been filed not later than the 30th day before the appropriate election day.

**Sec. 253.037. RESTRICTIONS ON CONTRIBUTION OR EXPENDITURE BY GENERAL-PURPOSE COMMITTEE.**

(a) A general-purpose committee may not knowingly make or authorize a political contribution or political expenditure unless the committee has:

- (1) filed its campaign treasurer appointment not later than the 60th day before the date the contribution or expenditure is made; and
- (2) accepted political contributions from at least 10 persons.

TDP responds that this Court does not have jurisdiction to grant declaratory relief with respect to §§ 253.031(c) or 253.037(a) because they are not at issue in this case. Accordingly, any relief would be an advisory opinion that is not binding on the parties.<sup>4</sup> After a review of the record, the facts alleged, and the evidence presented, the Court agrees.

The Court DENIES KSP's Motion on this ground.

**VI. In its sixth ground for summary judgment, KSP contends that the criminal penalties for violation of Texas campaign finance laws violate the Eighth Amendment.**

In its final ground, KSP contends that the penalties associated with restrictions on corporations (third degree felony) violate the Eighth Amendment of the U.S. Constitution as excessive punishment grossly disproportionate to the crime. Although TDP has alleged that KSP violated TEC §§ 253.094 and 253.104 which carry the possibility of criminal sanction, the State is not a party to this suit, and TDP has not and cannot seek imposition of a criminal sanction. Any ruling by this Court on KSP's claim would be an improper advisory opinion for which this Court lacks jurisdiction.

The Court DENIES the Motion for Summary Judgment by King Street Patriots et al. in its entirety. The Court GRANTS Plaintiffs' (Texas Democratic Party et al.) Motion for Summary

<sup>4</sup> TDP raises the same argument with respect to KSP's challenge to the definitions of officeholder contributions and expenditures.

Judgment on Defendant's Counterclaim in its entirety. The Court declines to rule on the constitutionality of the definitions of officeholder contribution and officeholder expenditure, the 30 and 60 day "blackout" periods, and the potential criminal penalty for violations. The Court is without jurisdiction to grant declaratory relief on those issues. In the event that the Court has inadvertently failed to expressly address each argument raised by the parties, all arguments have been fully considered, and it is the Court's intent that this is a Final Judgment that disposes of all issues.


**DECLARATORY RELIEF**

In accord with the ruling on the cross-motions for summary judgment, the Court makes the following declarations:

1. Tex. Election Code §§ 251.001(2), (3), (5), (6), (7), (8), (10), (12), and (14); 253.031, 253.037, 253.062, 253.094, 253.097, 253.104, 253.131, 253.132, and 273.081 are facially constitutional.
2. The Court lacks jurisdiction to grant declaratory relief with respect to Tex. Election Code §§ 251.001(4) and (9) officeholder definitions; "blackout" periods contained in Tex. Election Code §§ 253.031(c) and 253.037(a); and criminal penalties contained in Tex. Election Code §§ 253.094(c), 253.003(c), 253.101, 253.102, 253.103, 253.104.

All relief not granted herein is DENIED.

Signed this 27 day of March, 2012


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 JOHN K. DIETZ  
 JUDGE PRESIDING