Cause No. D-1-GN-10-001924

TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party, and JOHN WARREN, in his Capacity as Democratic Nominee For Dallas County Clerk, Plaintiffs, vs. TEXAS GREEN PARTY, KAT SWIFT, Individually and in her capacity as Chairman of the Texas Green Party, TAKE INITIATIVE AMERICA, INC., TIM MOONEY, UNKNOWN DONORS, AND THE 2010 UNKNOWN NOMINEES OF THE TEXAS GREEN PARTY, Defendants.	§ § § § § § § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353rd JUDICIAL DISTRICT

DEFENDANTS' MOTION TO TRANSFER VENUE,
AND SUBJECT THERETO, MOTION FOR SEVERANCE,
PLEA TO THE JURISDICTION, ORIGINAL ANSWER AND COUNTERCLAIM

TO THE HONORABLE COURT:

King Street Patriots, Catherine Engelbrecht, Bryan Engelbrecht and Diane Josephs, defendants, and Counter-Plaintiffs, in the above-entitled and numbered cause, file their motion to transfer venue, and subject thereto, motion for severance, plea to the jurisdiction, original answer and counterclaim, in response to Plaintiffs' Second Amended Original Petition, Plaintiffs' Supplemental Petition, and Plaintiffs' Application for Temporary Injunction, and would respectfully show the Court as follows:

I. MOTION TO TRANSFER VENUE

1. The claims or actions asserted against King Street Patriots, Mr. and Mrs. Engelbrecht and Mrs. Josephs should be transferred from Travis County, which is not a proper county for venue, to Fort Bend County, a proper county for venue.

2. Defendants specifically deny that Plaintiffs can maintain venue in Travis County against King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs pursuant to Texas Civil Practice & Remedies Code, §15.002(a)(1).

3. Defendants specifically deny that Travis County is the county in which all or a substantial part of the events or omissions giving rising to the claims asserted against King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs.

4. Defendants specifically deny that King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs made any unlawful political expenditures or accepted contributions in Travis County.

5. Defendants specifically deny that King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs performed any political activities in Travis County with funds unlawfully obtained.

6. Defendants specifically deny that King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs failed to make any reports to the Texas Ethics Commission in Travis County required by any applicable law.

7. Defendants specifically deny that that any claims or actions alleged against King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs arise out of the same transaction, occurrence, or series of transactions or occurrences allegedly giving rise to the claims or actions alleged against the other defendants in this litigation.

8. The claims or action asserted against King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs should be transferred to Fort Bend County, which is a proper county for venue because Mr. and Mrs. Engelbrecht are, and have been at all times relevant to Plaintiffs' alleged claims, a resident of Fort Bend County, Texas. *See* Tex. Civ. Prac. & Rem. Code, §15.002(a)(2).

9. Based upon the foregoing, because Plaintiffs have not established that venue is proper in Travis County, Texas against King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs, they hereby request transfer of this action to Fort Bend County, Texas.

II. MOTION FOR SEVERANCE

10. Subject to and without waiver of their motion to transfer venue, Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs move for a severance of the claims and causes of action asserted against them from the claims and causes of action asserted against the other defendants.

11. Plaintiffs have improperly joined Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs to this case. *See* Tex. R. Civ. P. 41.

12. The claims and causes of action asserted against Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs and the other defendants in this case do not arise out of the same transaction or occurrences and/or no questions of law and fact common to all defendants will arise in the action. *See* Tex. R. Civ. P. 40.

13. According to the Texas Supreme Court, "[a] claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and

issues." *F.F.P. Operating Partners, L.L.P. v. Duenez,* 237 S.W.3d 680, 693 (Tex. 2007). The Court further explained that "avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow a severance." *Id.* Each of these requirements is satisfied in this case.

14. As Plaintiffs' Second Amended Original Petition and Plaintiffs' Supplemental Petition and Plaintiffs' Application for Temporary Injunction and Plaintiffs' Brief In Support of Same reveal, Plaintiffs have asserted multiple causes of action. *See* Plaintiffs' Second Amended Original Petition ("Second Amended Petition") at 10-12; Plaintiffs' Supplemental Petition and Plaintiffs' Application for Temporary Injunction and Plaintiffs' Brief In Support of Same ("Supplemental Petition") at 3-6.

15. The claims against Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs that are proposed to be severed could have and should have been independently asserted in a separate lawsuit. Nothing precluded Plaintiffs from asserting the claims now made against these defendants in a separate lawsuit.

16. The claims against Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs that are proposed to be severed are not so interwoven with the remaining action that it involves the same facts and issues. The two sets of defendants are entirely unrelated. They have had no dealings or contacts with each other. The claims and facts giving rise to the claims are completely independent.

17. Granting the motion to sever will do justice, avoid prejudice, and further the convenience of the parties and the court. Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs are from the Houston area. The claims and causes of action

asserted against these defendants relate to their activities in the Houston area. They have had no dealings or contacts with the other defendants.

18. Based upon the foregoing, subject to and without waiver of their motion to transfer venue, Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs respectfully request that the claims and causes of action asserted against them be severed into a separate lawsuit, and then transferred to the district court of Fort Bend County, where venue is proper.

III. PLEA TO THE JURISDICTION

19. Subject to and without waiver of their motion to transfer venue, and motion for severance, Defendants make a plea to the jurisdiction, objecting to this Court's jurisdiction over the claims asserted by Plaintiffs against Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs.

20. Plaintiffs do not have standing to assert the claims made against these Defendants.

21. A plea to the jurisdiction is proper to challenge a party's lack of standing. *See M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 710-711 (Tex. 2001); *Waco I.S.D. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000).

22. Standing focuses on who is the correct party to bring the suit. *Patterson v. Planned Parenthood of Houston, Inc.*, 971 S.W.2d 439, 442 (Tex. 1998).

23. Plaintiffs lack standing to assert a claim to enforce of Section 22.353 of the Texas Business Organizations Code against Defendants King Street Patriots, Mr. and Mrs. Engelbrecht, and Mrs. Josephs.

24. "Standing is a constitutional prerequisite to maintaining suit in either federal or state court." *Williams v. Huff*, 52 S.W.3d 171, 178 (2001) (*citing Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). A party suing under a statute must establish standing, or the right to make a claim, under that statute. *Id.* Plaintiffs do not automatically have standing to enforce the provisions of a statute, even if they suffer harm from a violation of the statute. *See Brown v. De la Cruz*, 156 S.W.3d 560, 567 n. 42 (Tex. 2004) (*citing Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979) ("The fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.").

25. Texas courts "apply a 'strict rule of construction' to statutory enforcement schemes and imply causes of action only when the drafters' intent is clearly expressed from the language as written." *Witkowski v. Brian, et al.*, 181 S.W.3d 824, 831 (Tex. App. – Austin 2003, no pet.) (*quoting Brown*, 156 S.W.3d at 567). The question of "[w]hether a statute or a contract provides a specific cause of action or a right of enforcement requires [courts] to construe the statutory and contractual language as a matter of law." *Id.* at 830 (*citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 321 (Tex. 2000) (Hecht, J., concurring)). Moreover, "a right of enforcement should not be implied simply because the statute 'fails to adequately protect intended beneficiaries.'" *Id.* at 831 (*quoting Brown*, 156 S.W.3d at 567).

26. Section 22.353 by its own terms has no provision for a private cause of action. It simply provides certain requirements for non-profit business entities in Texas. Plaintiffs are correct in noting that Section 22.354 of the Texas Business Organizations Code provides that failure to comply with the requirements of Section 22.353 is a Class B

misdemeanor. However, with no explicit provisions in Section 22.353 providing standing for a private right of action to enforce the terms of the statute and no other statute providing for such private right of action to specifically enforce the terms of Section 22.353, it is quite clear that Section 22.354 is the only remedy for any alleged violation of Section 22.353.

27. Plaintiffs lack standing to bring an action to enforce Section 22.353. As such, any enforcement must be left to the proper authorities. To the extent that Plaintiffs may cite any cases invoking the "necessary implication" doctrine, those cases have no authoritative weight in Texas as the Texas Supreme Court specifically rejected such a theory. See *Brown*, 156 S.W.3d at 567.

IV. ORIGINAL ANSWER AND DEFENSES

28. Subject to and without waiver of their motion to transfer venue, motion for severance and plea to the jurisdiction, Defendants generally deny the claims asserted by Plaintiffs in Plaintiffs' Second Amended Original Petition, Plaintiffs' Supplemental Petition, and Plaintiffs' Application for Temporary Injunction in accordance with Texas Rule of Civil Procedure 92.

29. Subject to and without waiver of their motion to transfer venue, motion for severance and plea to the jurisdiction, further pleading, and in the alternative to the extent necessary, Defendants assert the following defenses to the claims and causes of action set forth in Plaintiffs' Second Amended Original Petition, Plaintiffs' Supplemental Petition, and Plaintiffs' Application for Temporary Injunction:

29.1. Plaintiffs lack standing to assert the claims and causes of action asserted against Defendants.

29.2. Plaintiffs' claims and causes of action are precluded and/or limited by the First Amendment to the Constitution of the United States.

29.3. Plaintiffs' claims and causes of action are precluded and/or limited by the Fourth Amendment to the Constitution of the United States.

29.4. Plaintiffs' claims and causes of action are precluded and/or limited by the Eighth Amendment to the Constitution of the United States.

29.5. Plaintiffs' claims and causes of action are precluded and/or limited by the Fourteenth Amendment to the Constitution of the United States.

V. COUNTERCLAIM

30. Subject to and without waiver of their motion to transfer venue, motion for severance and plea to the jurisdiction, Defendants and Counter-Plaintiffs King Street Patriots, Catherine Engelbrecht, Bryan Engelbrecht and Diane Josephs assert the following counterclaim against Plaintiffs and Counter-Defendants Texas Democratic Party, Boyd L. Richie, 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 2010 Democratic Nominee for Harris County Clerk, and would respectfully show the Court as follows:

Introduction

31. Counter-Plaintiffs King Street Patriots, Inc., Catherine Engelbrecht, Bryan Engelbrecht, and Dianne Josephs bring this civil action for declaratory and injunctive relief

arising under the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

32. Counter-Plaintiffs are a group of concerned residents from the Houston area who simply decided to get involved in the political process. For so doing, they have been haled into court. They exercised their First Amendment freedoms reasonably expecting that doing so would not lead to the threat of excessive fines and even criminal punishment. They now pray this Court to vindicate their rights by declaring several provisions of the Texas Election Code (challenged herein) as contrary to the Constitution of the United States.

33. This counter-complaint is a facial challenge to the constitutionality of several provisions of Titles 15 and 16 of the Texas Election Code. Specifically, the challenged provisions are Texas Election Code sections 251.001(2), (3), (4), (5), (6), (7), (8), (9), (10), (12), (14), 253.031(c), 253.037(a)(1) and (b), 253.062, 253.094, 253.097, 253.104, 253.132, and 273.081. These statutes all regulate the political speech of the Counter-Plaintiffs.

34. Plaintiffs Texas Democratic Party, Boyd Richie, John Warren, and Ann Bennett brought suit, under color of state law, *see* 42 U.S.C. § 1983, to enforce various provisions of the Texas Election Code. Specifically, Plaintiffs allege that Counter-Plaintiffs have violated at least eight provisions of the Texas Election Code. They seek an injunction, as well as damages, as permitted by Texas law. Counter-Plaintiffs now file this counterclaim to protect their constitutional rights. The length of this counterclaim is a function of the number of allegations levied against them and is a reflection, in part, of the gravity of the freedoms at stake as well as the multitude of constitutional flaws in these statutes, all of which impose criminal penalties.

35. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. This restriction is applied to the states through the Fourteenth Amendment.

36. Freedom of speech is the norm, not the exception. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). Texas, however, has flaunted this fundamental premise by establishing a statutory scheme that bans all political speech that is not specifically authorized by statute. *See* Tex. Elec. Code §§ 253.002, 253.094.

37. Laws that burden political speech are subject to strict scrutiny under the First Amendment. *Citizens United*, 130 S. Ct. at 898. Laws that violate the First Amendment include: those that are overbroad, thereby chilling speech, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); those that impose political committee status without limiting such status to groups who have the major purpose of electing or nominating a clearly identified candidate, *N.C. Right to Life v. Leake*, 525 F.3d 274, 287–89 (2008) ("*NCRL III*"); those that regulate campaign finance with an inappropriate monetary threshold, *N.C. Right to Life v. Leake*, 344 F.3d 418, 430 (2003) ("*NCRL II*"); those that are not appropriately tailored to meet a sufficient state interest, *NCRL III*, 525 F.3d at 290; and those that impose a prior restraint on speech, *Citizens United*, 130 S. Ct. at 895–96.

38. The right to engage in political speech and the right to associate for the purpose of advancing political beliefs is "fundamental." *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987). A right to privacy in one's associations is included in the right to associate. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91 (1982).

39. Compelled disclosure of political affiliations and activities imposes a substantial burden on First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976); *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 466–63 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–60 (9th Cir. 2010). Providing a private cause of action against political opponents forces compelled disclosure when discovery in the action is initiated. As one circuit court of appeals noted, compelling disclosure of a political organization's internal information can infringe on the right to associate:

> [D]isclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights.

Perry, 591 F.3d at 162 (internal footnote omitted).

40. Once a political organization is forced to turn over its private information, the harm cannot be undone. *Perry*, 591 F.3d at 1158. This is especially so when a political organization's opponents can use the discovery process to fish at will through private information.

41. The First Amendment protects information related to associational rights from the eyes of a state or a state actor. *NAACP*, 357 U.S. at 465. It also requires that laws set high standards (especially in the context of political speech) that clearly delineate when relief should be granted, so as not to chill political speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–84 (1964) (striking down a law that carried a presumption of actual malice with political speech because a higher evidentiary standard was required).

42. In a First Amendment facial challenge, a law may be invalidated as overbroad if "'a substantial number of its applications are unconstitutional, judged in relation to the statute's

plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citation omitted).

43. A criminal statute is void for vagueness—that is, it violates the Due Process Clause of the Fourteenth Amendment—if (1) its lack of definitive standards fails to apprise persons of ordinary intelligence of the prohibited or prescribed conduct, or (2) because of its lack of precision, it presents the opportunity for arbitrary enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

44. In addition, laws that are impermissibly vague and that touch on freedoms of speech and association violate the First Amendment because such laws chill protected speech and association by compelling speakers to self-censor what they would otherwise be permitted to say and do.

45. Furthermore, when civil and criminal penalties attach to violations of laws that touch on First Amendment rights—as is the case here—and when the laws are too vague to notify a person of ordinary intelligence as to what conduct is prescribed or prohibited, the agency charged with administering the law effectively usurps the power of 16th and 17th-century licensors—the kind of power the First Amendment was drawn to prohibit. This is so because those who wish to escape criminal and civil sanctions must, as a practical matter, implore the agency for an advisory opinion as to whether their proposed speech violates the law. *See Citizens United*, 130 S. Ct. at 895–96 (given the complexity of the regulations, the deference courts show to administrative determinations, and the threat of criminal liability, speakers "must ask a governmental agency for prior permission to speak"). Thus, impermissibly vague laws also operate as an unconstitutional prior restraint on speech.

46. Prior restraints on speech "are the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976), and the Supreme Court has held that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

47. The Fourth Amendment requires probable cause and a warrant before a party acting under color of state law can search and seize private information and property. U.S. Const. Amend. IV; *see also Katz v. United States*, 389 U.S. 347, 356–57 (1969). The Fourth Amendment especially protects situations such as this where severe criminal penalties can be imposed based on the speech-based information found during the search.

48. The Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Content-based restrictions raise equal protection concerns "because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992).

49. The Eighth Amendment protects against cruel and unusual punishment. U.S. Const. amend. VIII. Laws are cruel and unusual when they impose punishments that are grossly out of proportion to the crime committed. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

50. Counter-Plaintiffs seek declaratory relief and an injunction to prohibit the original Plaintiffs from prosecuting the original action. Counter-Plaintiffs assert that the private cause of action is unconstitutional because it contravenes the First, Fourth, and Fourteenth Amendments; and further, that each of the other statutory provisions listed in paragraph 3 are likewise unconstitutional because they violate the First, Eighth, or Fourteenth Amendments, or a

combination of those amendments. A state—or anyone else acting under color of state law—has no interest in enforcing unconstitutional laws.

51. Finally, Counter-Plaintiffs seek declaratory relief and an injunction preventing the original Plaintiffs from initiating discovery in this action until there has been a final resolution of the constitutional questions raised herein.

Facts

52. In 2009, a group of concerned residents from the Houston area decided that they wanted to be responsible citizens and engage in the political process. This group of citizens named themselves the King Street Patriots.

53. This new group was led by Catherine Engelbrecht, a 40-year-old wife and mother of two children. Prior to her being involved with King Street Patriots, Catherine Engelbrecht, like many of the people who attend King Street Patriots' events, had not been involved in the political process—she was busy raising her children, being an officer of her children's school's PTO, and working with her husband in their small business.

54. King Street Patriots was formed as a Texas non-profit corporation on December 30, 2009. Its purpose is "[t]o provide education and awareness with the general public on important civic and patriotic duties." It has applied for 501(c)(4) status with the Internal Revenue Service.

55. With their new-found desire to become involved civically, Catherine Engelbrecht and the King Street Patriots decided that a good way to participate was to help ensure that elections are free and fair. The King Street Patriots assisted anyone who was interested in this project in becoming a poll watcher. The King Street Patriots did not anticipate that they would

uncover anything out of the ordinary, but the poll watchers that the King Street Patriots had assisted reported very troubling observations.

56. As a result, the King Street Patriots, realizing that fair and free elections are fundamental to the operation of the republic, decided to start a new project focused on the integrity of the voter rolls. The King Street Patriots reviewed public information concerning voter registration information for Harris County. After reviewing the public information, they turned over their findings to the Harris County Voter Registrar.

57. Leading up to the 2010 election, the King Street Patriots again offered to train anyone interested in serving as a poll watcher for any party or candidate. Several hundred people received the King Street Patriots' poll-watcher training and observed the 2010 election to help ensure that election laws were followed.

58. The King Street Patriots also have weekly meetings at which speakers discuss topics of interest to concerned citizens in the Houston area. During the meeting, a cowboy hat is passed around amongst the attendees to gather donations. Often the speakers are persons involved in protecting the integrity of elections or are politicians who have expertise in areas of interest to Houston area citizens. When the speakers are politicians, they are strictly informed that King Street Patriots is nonpartisan and that the politicians are not to campaign or promote themselves at the King Street Patriots event. The King Street Patriots have not made any monetary contributions to any candidate or politician.

Count 1
Tex. Elec. Code §§ 273.081, 253.131, and 253.132
The Provision of a Private Right of Action Violates the U.S. Constitution

59. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

60. The statutory sections that provide for a private right of action, wherein citizens can sue to enforce the provisions of the Texas Election Code, violate the First and Fourteenth Amendments to the U.S. Constitution.

61. Three sections under the Texas Election Code provide for a private right of action.

62. Section 273.081 dictates who may seek an 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."

63. Section 253.131 gives certain candidates a private right of action for damages:

> (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.

64. And section 253.132 gives certain political committees a private cause of action for damages:

> (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.

Prior Restraint on Speech.

65. Section 273.081 (private right of action for injunction) operates in a substantial number of its applications as a prior restraint on speech.

66. Because section 273.081 allows injunctions to issue whenever a person "is in danger of being harmed" by a mere "threatened violation" of the Texas Election Code, it amounts to an unconstitutional prior restraint on speech.

Due Process of Law.

67. All three sections that provide for a private right of action violate the First Amendment, as well as the Due Process Clause of the Fourteenth Amendment, because they fail to set forth a clear standard as to what threshold showing must be made to initiate discovery.

68. The Due Process Clause of the Fourteenth Amendment requires that before an investigation (here, discovery) can commence in a case that implicates First Amendment freedoms, there must be an objective standard, clearly set forth by law, as to what threshold showing must be made to proceed with the investigation. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234, 252–55 (1957).

69. All three sections that provide for a private right of action violate the First Amendment and the Fourteenth Amendment's Due Process Clause because they allow certain citizens to initiate lawsuits against their fellow citizens without any guidance as to what threshold showing must be made before discovery can commence.

Free Speech and Due Process of Law.

70. In addition, all three sections that provide for a private right of action violate the First Amendment, as well as the Due Process Clause of the Fourteenth Amendment, because they fail to adequately circumscribe the scope of permissible discovery.

71. A person or group may not be compelled to divulge information that would trespass on the freedoms of political speech and association absent a "compelling" interest to justify such political exposure, *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 463 (1958), particularly where such information is to be divulged to one's political opponents, *see FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 382–84, 387–88 (D.C. Cir. 1981) (implying impropriety of a federal agency, "whose members are nominated by the President," of probing into the political affairs of the President's political opponents).

72. Materials likely to be sought in discovery in a case like this are extremely "delicate" in nature, and their subject matter "represents the very heart of the organism which the First Amendment was intended to nurture and protect: political expression and association." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Specifically, any material likely to be sought will "relate[ ] to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Id.* at 387. Discovery may very well encompass such information as all internal communications relating to which candidates and which political committees a group or individual considered supporting, as well as any number of other contemplated or enacted political strategies or political affiliations. *See id.* at 388. Such information "is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations, since release of such information . . . carries with it a real potential for chilling the free exercise of political speech and association guarded by the First Amendment." *Id.*

73. This statutory defect (i.e., failing to adequately circumscribe the scope of permissible discovery) is particularly egregious in the context of section 273.081, because that section permits an injunction to issue upon the mere showing of a "threatened violation" of the

Texas Election Code that places a person "in danger of being harmed." The phrases "threatened violation" and "in danger of being harmed" are themselves vague and ill-defined and offer no security for the protection of First Amendment free speech and associational rights. It is not inconceivable, indeed it seems quite likely, that a group would have to divulge—as part of discovery in an action under section 273.081—all internal communications that so much as *contemplated* supporting or opposing certain measures, issues, candidates, officeholders, political parties, or political committees because that would constitute precisely the kind of evidence that would tend to show a "threatened violation."

74. Were these sections aimed at vesting a governmental agency, such as the Texas Ethics Commission, with investigative authority (and they are not), they would still be unconstitutional for their lack of a defined threshold for initiating discovery, and for their failure to circumscribe the permissible scope of discovery. Given, however, that these sections are aimed at giving one's *political opponents* the broad authority to initiate proceedings and conduct discovery, their constitutional flaws are even more flagrant.

No Standards for Burden of Proof.

75. Moreover, the three sections that provide a private right of action are unconstitutional as contrary to the First and Fourteenth Amendments because they do not provide any standard as to the proper burden of proof to prevail in a citizen suit.

76. In ordinary litigation, plaintiffs prevail by showing merely that a preponderance of the evidence favors them. Where the First Amendment is at issue, however, a defendant may not be found liable absent clear and convincing evidence. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (holding that speakers may not be punished for criticizing governmental officials—even if their speech contained "'half-truths'" and "'misinformation,'"—

unless such speech created a "clear and present danger of the obstruction of justice" (citation omitted)).

77. The three sections that authorize a private right of action are unconstitutional because they do not require citizen-plaintiffs to make a clear and convincing proof in order to prevail on their claims.

Fourth Amendment.

78. Finally, the three sections that authorize a private right of action provide violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

79. When a citizen or citizen-group brings suit under section 273.081, 253.131, or 253.132, that person or group is acting under color of state law.

80. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

81. Because the statues here do not require at least a showing of some minimum threshold that there has been a violation of the law (i.e., something akin to probable cause), and because Plaintiffs here are acting under color of state law, any discovery initiated under sections 273.081, 253.131, or 253.132 constitutes an unreasonable (and therefore an unconstitutional) search or seizure under the Fourth Amendment.

82. Where the subject matter of the things to be seized is based on the content of protected First Amendment speech and associational rights, "and the basis for the seizure is the ideas which they contain," *Stanford v. Texas*, 379 U.S. 476, 485–86 (1965), an even higher

standard applies. *Id.*; *Marcus v. Search Warrant*, 367 U.S. 717, 730–31 (1961). Specifically, there must be a "step in the procedure before seizure designed to focus searchingly on the question" of what may be constitutionally seized, in light of the First Amendment, and what may not. *Marcus*, 367 U.S. at 732.

83. Because the three sections that authorize a private right of action do not provide safeguards to distinguish what may and what may not be discoverable, under the First Amendment, they violate both the First Amendment's protection of privacy of political association and political speech and the Fourteenth Amendment's guarantee of due process of law.

Count 2
Tex. Elec. Code §§ 253.094 and 253.104
The Prohibition on Corporate Contributions to Candidates, Political Parties, and Political Committees Violates the U.S. Constitution

84. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

85. The First Amendment protects the freedoms of political speech and association.

86. Political contributions are a form of political speech and political association.

87. Texas law proscribes all corporate political contributions not specifically authorized by statute. Specifically, Texas Election Code section 253.094(a) states:

> A corporation ... may not make a political contribution ... that is not authorized by this subchapter.

Citizens United Rejected the Alleged Interest in Addressing So-Called "Corporate" Corruption.

88. The Supreme Court has previously upheld a federal ban on corporate contributions to candidates. *FEC v. Beaumont*, 539 U.S. 146, 149, 162–63 (2003). That holding, however, was undermined by *Citizens United*. In *Citizens United*, the Supreme Court held that

the government has no authority whatever to ban political speech "simply because the speaker is an association that has taken on the corporate form." 130 S. Ct. at 904–08. In other words, the government may not single out speakers and restrict their speech based on the mere fact that they have chosen to take on the corporate form. In short, after *Citizens United*, it is no longer permissible to treat corporate political speech any different from noncorporate political speech.

89. Texas's general ban on corporate political contributions violates the underlying premise of *Citizens United* because it permits noncorporate groups and individuals to make political contributions, but bans corporations from making the same speech.

The General Ban on Corporate Contributions Is "Woefully Underinclusive."

90. The general ban on corporate contributions is "woefully underinclusive"—and thus is not properly tailored to any state interest—because, regardless of what state purpose may be alleged, there are so many exceptions to the general rule "as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

91. Examples of exceptions to the general ban on corporate contributions include:

a. Corporations may pay the administrative expenses of a general-purpose political committee, Tex. Elec. Code § 253.100, even though "contributions to defray the administrative expenses of a general-purpose committee are political contributions," Op. Tex. Ethics Comm'n 132 (1993).

b. Corporations may finance the solicitation of political contributions to a general-purpose political committee from their stockholders or employees, or from families of their stockholders or employees, Tex. Elec. Code § 253.100(b), even though "[c]osts incurred in generating contributions to a

political committee are political expenditures," Op. Tex. Ethics Comm'n 362 (1997).

c. Corporations may make candidate literature available to their employees, provided that the corporation provides all candidates the same opportunity to do so. This despite the fact that if a corporation made available only a single candidate's literature and materials, it would "unquestionably be making a prohibited corporation campaign contribution." Op. Tex. Ethics Comm'n 336 (1996).

d. Corporations may hold a candidate forum where candidates address the corporations' stockholders or employees, provided that corporations make the opportunity available to all candidates. This despite the fact that "the use of corporate resources to allow a particular candidate or a particular candidate's representative to address an audience and advocate his election would be a prohibited corporate contribution to the candidate." Op. Tex. Ethics Comm'n 340 (1996).

e. Corporations may make political contributions to political parties to be applied to the "normal overhead and administrative or operating costs" incurred by the party, provided that such contributions are not made within sixty days of a general election. Tex. Elec. Code § 257.002(a), 257.004(a). The Texas Ethics Commission has ruled that this provision allows a corporation to finance the entire cost of purchasing or constructing a building to be used as permanent party headquarters. Op. Tex. Ethics Comm'n 176 (1993).

f. Corporations may make political contributions to political parties to be applied to the costs of administering a primary election or convention held by the party. Tex. Elec. Code § 257.002(a).

g. Partnerships and limited liability companies may make political contributions, despite the fact that contributions from such entities present substantially similar risks of corruption based on *quid pro quo* political arrangements (e.g., dollars for votes). *See* Op. Tex. Ethics Comm'n 383 (1997); Op. Tex. Ethics Comm'n 108 (1992).

Content- and Speaker-Based Restriction.

92. The general ban on corporate political contributions is an unconstitutional content-based, and speaker-based, restriction on speech.

93. The government may not single out certain speakers any more than it may single out particular content. *Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

94. The law here is content-based because corporations are free to make all kinds of contributions (e.g., charitable, educational, religious, scientific, artistic, etc.) *except political contributions*.

95. It is speaker-based because only corporations are targeted. Other similarly situated entities, such as partnerships and limited liability companies, are free to make political contributions.

96. Because the general ban on corporate political contributions is a content-based, speaker-based restriction on speech, it is presumptively invalid. Because it is not narrowly tailored to a compelling governmental interest, it is unconstitutional under the First Amendment.

Equal Protection.

97. Also, because the general ban on corporate political contributions singles out particular speech (political speech) and particular speakers (corporations), it is contrary to the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Vagueness and Overbreadth.

98. The general ban on corporate political contributions is unconstitutionally vague and overbroad because it relies on the unconstitutionally vague and overbroad term "political contribution," as discussed below in Count 4.

Count 3
Tex. Elec. Code § 251.001(2) and (6)
The Definitions of "Contribution" and "Expenditure" Violate the U.S. Constitution

99. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

100. The definitions of "contribution" and "expenditure," as defined in Texas Election Code subsections 251.001(2) and (6), respectively, are unconstitutionally vague.

101. Texas law defines "contribution" as "a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer." Tex. Elec. Code § 251.001(2).

102. Texas law defines "expenditure" as "a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment." Tex. Elec. Code § 251.001(6).

103. Under Texas law, the terms "contribution" and "expenditure" are used to proscribe certain activities and to trigger certain obligations, the violation of which give rise to criminal liability. *See, e.g.*, Tex. Elec. Code § 253.003, .062, .094.

Vagueness.

104. The phrase "any other thing of value," as used in the definitions of "contribution" and "expenditure," is unconstitutionally vague because it does not adequately apprise persons of ordinary intelligence as to what precisely is prescribed or prohibited, nor does it adequately curtail against the possibility of arbitrary enforcement, in this case by private citizens acting under color of state law.

105. The phrase "direct or indirect," as used in the definition of "contribution," is unconstitutionally vague because it does not adequately apprise persons of ordinary intelligence as to what precisely is prescribed or prohibited, nor does it adequately curtail against the possibility of arbitrary enforcement, in this case by private citizens acting under color of state law.

106. The imprecision of these phrases has the effect of chilling protected First Amendment expression, and act, effectively, as prior restraints on speech. They also violate the Fourteenth Amendment's Due Process Clause.

Overbreadth.

107. The definitions of "contribution" and "expenditure," as defined in Texas Election Code subsections 251.001(2) and (6), are also unconstitutionally overbroad.

108. The phrase "any other thing of value," as used in the definitions of "contribution" and "expenditure," is unconstitutionally overbroad because a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.

109. The phrase "direct or indirect," as used in the definition of "contribution," is unconstitutionally overbroad because a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.

Count 4
Tex. Elec. Code § 251.001(3), (4), and (5)
The Definitions of "Political Contribution," "Campaign Contribution," and "Officeholder Contribution" Violate the U.S. Constitution

110. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

111. The definitions of "campaign contribution," "officeholder contribution," and "political contribution," as defined in Texas Election Code subsections 251.001(3) through (5), respectively, are unconstitutionally vague.

112. Texas law defines "political contribution" as "a campaign contribution or an officeholder contribution." Tex. Elec. Code § 251.001(4).

113. Texas law defines "campaign contribution" as "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." Tex. Elec. Code § 251.001(3).

114. Texas law defines "officeholder contribution" as:

> A contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that:
> (A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and
> (B) are not reimbursable with public money.
>
> Tex. Elec. Code § 251.001(3).

115. The definitions of "political contribution," "campaign contribution," and "officeholder contribution" are unconstitutionally vague and overbroad because they incorporate the term "contribution" which is unconstitutionally vague and overbroad. *See supra* Count 3. Under Texas law, the terms "political contribution," "campaign contribution," and "officeholder contribution" are used to proscribe certain activities and to trigger certain obligations, the violation of which give rise to criminal liability. *See, e.g.*, Tex. Elec. Code § 253.003, .094.

Vagueness.

116. The phrase "in connection with," as used in the definitions of "campaign contribution" and "officeholder contribution," is unconstitutionally vague because it does not adequately apprise persons of ordinary intelligence as to what precisely is proscribed or prohibited, nor does it adequately curtail against the possibility of arbitrary enforcement, in this case by private citizens acting under color of state law.

117. The phrase "on a measure," as used in the definition of "campaign contribution," is unconstitutionally vague because it does not adequately apprise persons of ordinary intelligence as to what precisely is proscribed or prohibited, nor does it adequately curtail against the possibility of arbitrary enforcement, in this case by private citizens acting under color of state law.

118. Defining campaign contributions by reference to the contributor's "intent" is unconstitutional because it is impermissibly vague. Among other things, defining prohibited or prescribed conduct based on the speaker's intent necessarily compels speakers to hedge their message or their activities so as to steer clear of any possible misinterpretation of their actual intent.

Overbreadth.

119. The definitions of "campaign contribution" and "officeholder contribution," as defined in Texas Election Code subsections 251.001(3) and (4), respectively, are also unconstitutionally overbroad.

120. The phrase "in connection with," as used in the definitions of "campaign contribution" and "officeholder contribution," is unconstitutionally overbroad because a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.

121. The phrase "on a measure," as used in the definition of "campaign contribution," is unconstitutionally overbroad because a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.

122. The definition of "political contribution" is unconstitutionally vague and overbroad because it incorporates the terms "campaign contribution" and "officeholder contribution," which are unconstitutionally vague and overbroad. *See supra.*

Count 5
Tex. Elec. Code § 251.001(7), (8), (9), and (10)
The Definitions of "Political Expenditure," "Campaign Expenditure," "Direct Campaign Expenditure," and "Officeholder Expenditure" Violate the U.S. Constitution

123. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

124. The definitions of "political expenditure," "campaign expenditure," "direct campaign expenditure," and "officeholder expenditure," as defined in Texas Election Code subsections 251.001(7) through (10), respectively, are unconstitutionally vague.

125. Texas law defines "political expenditure" as "a campaign expenditure or an officeholder expenditure." Tex. Elec. Code § 251.001(10).

126. Texas law defines "campaign expenditure" as "an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure." Tex. Elec. Code § 251.001(7).

127. Texas law defines "officeholder expenditure" as:

> An expenditure made by any person to defray expenses that:
> (A) are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office; and
> (B) are not reimbursable with public money.
>
> Tex. Elec. Code § 251.001(9).

128. The definitions of "political expenditure," "campaign expenditure," "direct campaign expenditure," and "officeholder expenditure" are unconstitutionally vague and overbroad because they incorporate the term "expenditure" which is unconstitutionally vague and overbroad. *See supra* Count 3.

129. Under Texas law, the terms "political expenditure," "campaign expenditure," "direct campaign expenditure," and "officeholder expenditure" are used to proscribe certain activities and to trigger certain obligations, the violation of which give rise to criminal liability. *See, e.g.*, Tex. Elec. Code § 253.003, .094.

Vagueness.

130. The phrase "in connection with," as used in the definitions of "campaign expenditure" and "officeholder expenditure," is unconstitutionally vague because it does not adequately apprise persons of ordinary intelligence as to what precisely is proscribed or

prohibited, nor does it adequately curtail against the possibility of arbitrary enforcement, in this case by private citizens acting under color of state law.

Overbreadth.

131. The definitions of "campaign expenditure" and "officeholder expenditure," as defined in Texas Election Code subsections 251.001(7) and (9), respectively, are also unconstitutionally overbroad.

132. The phrase "in connection with," as used in the definitions of "campaign expenditure" and "officeholder expenditure," is unconstitutionally overbroad because a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.

133. The definition of "political expenditure" is unconstitutionally vague and overbroad because it incorporates the terms "campaign expenditure" and "officeholder expenditure," which are unconstitutionally vague and overbroad. *See supra.*

Count 6
Tex. Elec. Code § 251.001(12)
The Political Committee Definition Violates the U.S. Constitution

134. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

135. Section 251.001(12) states:

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

Zero-Dollar Threshold.

136. Section 251.001(12) imposes political committee status for spending as little as one dollar relating to an election, or for making or receiving a contribution of as little as one dollar.

137. Section 251.001(12) violates the First Amendment because it lacks a constitutionally sufficient monetary threshold to protect against regulating incidental activity.

Vagueness.

138. The definition of "political committee," as defined in Texas Election Code section 251.001(12), is unconstitutionally vague under the First and Fourteenth Amendments because it incorporates the terms "political contribution" and "political expenditure," which are themselves unconstitutionally vague definitions. *See supra* Counts 4 and 5.

Overbreadth.

139. The definition of "political committee" is unconstitutionally overbroad under the First Amendment because it regulates political speech that the state has no constitutional interest in regulating.

140. If the Court finds that the definitions of "campaign contribution" and "campaign expenditure" are not unconstitutionally vague, then they are overbroad as they reach conduct that Texas has no appropriate interest in regulating. By incorporating these overbroad definitions, the definition of "political committee," as defined in section 251.001(12), also becomes overbroad.

141. Additionally, the definition of "political committee," as defined in section 251.001(12), is overbroad under the First Amendment because it imposes political committee status on groups that do not have the major purpose of nominating or electing a clearly identified candidate as the definition itself regulates groups with only a "principal purpose" that does not have to be related to a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

Count 7
Tex. Elec. Code § 251.001(14)
The General Purpose Committee Definition Violates the U.S. Constitution

142. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

143. Section 251.001(14) states:

> "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.

Vagueness.

144. The definition of a "general-purpose committee," as defined in section 251.001(14), is unconstitutionally vague under the First and Fourteenth Amendments due to its use of the term "political committee" (as challenged in Count 6) and because the undefined terms "supporting," "opposing," and "assisting" are too vague to let a reasonable person know what the law requires and are too vague to let a reasonable government official know how to enforce the law.

145. For example, conduct as simple as choosing to not attend a rally for a candidate could be construed as "opposing," while offering a stick of gum to a candidate could be construed as "supporting," and being employed as a valet could be construed as "assisting" officeholders when parking their cars.

146. In other words, the words "supporting," "opposing," and "assisting" provide no meaningful guidance to any person seeking to understand how the law is to be followed or enforced.

147. In addition, the definition of a "general-purpose committee," as defined in section 251.001(14), is unconstitutionally vague under the First and Fourteenth Amendments because it employs additional vague terms such as "candidates who are *unidentified*," "offices that are *unknown*," "measures that are *unidentified*," and "officeholders who are *unidentified*." Tex. Elec. Code § 251.001(14) (emphasis added).

148. No reasonable person can know when they "support" an "unidentified" candidate, "oppose" an "unknown" office, "assist" an "unidentified" officeholder, or "support" an "unidentified" measure.

Overbreadth.

149. The definition of a "general-purpose committee," as defined in section 251.001(14), includes groups who never clearly identify a candidate to support or oppose and who do not have the major purpose of nominating or electing a candidate.

150. The definition of a "general-purpose committee," as defined in section 251.001(14), is unconstitutionally overbroad under the First Amendment because it regulates groups that lack the major purpose of nominating or electing a clearly identified candidate.

151. If the definition of a "general-purpose committee" is not unconstitutionally vague, then it is unconstitutionally overbroad for sweeping within its regulation conduct that cannot constitutionally be regulated.

Count 8
Tex. Elec. Code § 253.062 and § 253.097
The Direct Expenditure Regulation Violates the U.S. Constitution

152. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

153. Section 253.062 states:

Direct Expenditure Exceeding $100.

(a) Except as otherwise provided by law, an individual not acting in concert with another person may make one or more *direct campaign expenditures* in an election from the individual's own property that exceed $100 on any one or more candidates or measures if:

(1) the individual complies with Chapter 254 as if the individual were a campaign treasurer of a political committee; and

(2) the individual receives no reimbursement for the expenditures.

(b) An individual making expenditures under this section is not required to file a campaign treasurer appointment.

154. And § 251.001(8) states:

"Direct campaign expenditure" means a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure.

155. A "direct campaign expenditure," due to the way it is defined, is the equivalent of an independent expenditure under federal law.

156. The practical effect of the direct expenditure regulation, as set forth in section 253.062, is that an individual can make a "direct campaign expenditure" of more than $100 only if the individual complies with the reporting burdens under Chapter 254—the same reporting burdens imposed on a full-fledged political committee.

157. This means that in order for an individual to spend money to voice her opinions, even if the money is not connected to a candidate in any way (thus negating any connection to candidate corruption), that individual must comply with the same complex reporting burdens required of political parties and large corporations, most of whom have teams of lawyers at their disposal.

158. The Supreme Court took note of the nature of these reporting burdens and described them as "onerous" and "burdensome," and then to illustrate the true complexity involved, noted that less than 2,000 of 5.8 million corporations even attempted to comply with these burdens. *Citizens United*, 130 S. Ct. at 897–98.

159. Imposing political committee reporting burdens on persons, but especially on individuals, is a significant burden on the freedom of speech.

160. Since this burden is not applied to money *contributed* to candidates (by its very definition), the state's interest in such a regulation is not based in an anti-corruption interest.

161. Such a burden on persons triggers strict scrutiny.

162. The direct expenditure regulation is unconstitutional under the First Amendment because it imposes political committee reporting burdens on persons based solely on a low monetary threshold. *Colo. Right to Life Comm., Inc. v. Coffman*, 395 F. Supp.2d 1001, 1021 (D. Colo. 2005) (holding that assigning political committee burdens based on a flat monetary trigger "regardless of the relationship between [the amount] and the total expenditures and/or revenues of the person" is incompatible with the major-purpose test), *aff'd*, 498 F.3d 1137, 1155 (10th Cir. 2007).

163. The statute does not impose such burdens based on whether the person has a major purpose, or even an incidental purpose, of nominating or electing a clearly identified candidate.

164. Section 253.097 is unconstitutional for the same reasons since it incorporates § 253.062 by reference and imposes the same burdens on corporations and labor unions. Section 253.097 states:

> Direct Expenditure on Measure. A corporation or labor organization not acting in concert with another person may make one or more direct campaign expenditures from its own property in connection with an election on a measure if the corporation or labor organization makes the expenditures in accordance with Section 253.061 or 253.062 as if the corporation or labor organization were an individual.

Count 9
Tex. Elec. Code § 253.031(c) and § 253.037(a)(1)
30- and 60-Day Blackout Periods Violate the U.S. Constitution

165. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

166. Section 253.031(c) (the 30-day blackout provision) states:

> 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.

167. Section 253.037(a) (the 60-day blackout provision) states:

> 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.

Complete Ban.

168. The practical effect of § 253.031(c) (the 30-day blackout) is to ban all speech that makes a person register as a political committee if the person did not make sufficient plans to speak 30 or more days before the election.

169. In other words, any person that senses a need to speak on political matters as an election draws near is banned from doing so.

170. Any interest the state may have in regulating speech close to an election is met by requiring disclosure of the speech, at most.

171. A complete ban on speech fails any level of applicable scrutiny as it is not substantially or narrowly related to any valid state interest.

172. Section 253.037(a) (the 60-day blackout) is unconstitutional for the same reasons.

173. The practical effect of section 253.037(a) is to ban all speech by a general-purpose committee for 60 days after its formation and until it has the monetary support of at least ten people.

174. Such a ban on speech is completely unsupported by any state interest. Banning speech for 60 days after formation is a total and complete violation of everything the freedom of speech stands for.

Right of Association.

175. This provision also violates the First Amendment right of association for groups ranging in size from two to nine persons as they are completely prohibited from speaking. In other words, their right to associate is worthless because they cannot amplify their voices together.

Equal Protection.

176. This provision also violates the Equal Protection Clause of the Fourteenth Amendment because groups of two to nine are no different for purposes of this law than groups of ten or more.

Prior Restraint.

177. These provisions also violate the First Amendment because they act as a prior restraint on speech by requiring advance planning of all regulable speech.

178. Prior restraints on speech are evaluated with strict scrutiny.

179. These provisions also place a significant burden on speech which violates the First Amendment.

Count 10
Tex. Elec. Code § 253.037(b)
Contribution Restrictions Violate the U.S. Constitution

180. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

181. Section 253.037(b) states:

> A general-purpose committee may not knowingly make a political contribution to another general-purpose committee unless the other committee is listed in the campaign treasurer appointment of the contributor committee.

182. The practical effect of this section is to force a general-purpose committee to decide, at the time of its formation, which committees it will support.

183. If a new committee is formed after the fact or the original committee decides to support an unlisted committee, it cannot do so because of this complete ban on such activity.

184. This provision is a prior restraint on speech because the general-purpose committee cannot decide who to support as new situations arise. All of its speech (as shown through monetary support) must be planned well in advance of actually needing to speak.

185. Any state interest in knowing who a general-purpose committee supports can be accomplished through the less restrictive means of disclosure.

186. A state's informational or corruption interest (if either exist here) can be satisfied by a report filed at the time each contribution is made.

187. There is no valid state interest to support such a heavy burden on speech by general-purpose committees.

188. This provision violates the First Amendment because it places prior restraints on speech and stifles any speech that may be necessary due to unforeseen or changed circumstances. It places too great a burden on speech to justify such regulation.

Count 11
Tex. Elec. Code § 253.094(c)
The Criminal Penalties Affixed to Certain Violations Contravene the U.S. Constitution

189. Counter-Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

190. Under Texas Election Code section 253.094, a corporation "may not make a political contribution or political expenditure that is not authorized by this subchapter."

191. Violations of section 253.094 are a third-degree felony. Tex. Elec. Code § 253.094(c).

192. Under Texas Election Code section 253.095, an "officer, director, or other agent of a corporation . . . who commits an offense under this subchapter is punishable for the grade of offense applicable to the corporation or labor organization."

193. An individual guilty of a third-degree felony "shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years." Tex. Penal Code § 12.34. In addition to imprisonment, an individual guilty of a third-degree felony "may be punished by a fine not to exceed $10,000." *Id.*

194. The Eighth Amendment forbids the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII.

195. The U.S. Supreme Court has interpreted the Eighth Amendment to prohibit sentences that are grossly disproportionate to the crime committed. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). Three factors are relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction;

and (3) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 2122.

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

197. Texans risk *greater* penalties for engaging in truthful political speech than for participating in a riot, engaging in forgery, burglarizing a commercial or retail establishment, burglarizing a vehicle, driving while intoxicated, running a brothel or an illegal gambling operation, stealing property of up to $20,000, spraying graffiti causing damage up to $20,000, selling obscenity to a minor, or for committing acts that amount to public lewdness, indecent exposure, or criminally negligent homicide—none which rises to the level of a third-degree felony. Tex. Penal Code §§ 19.05 (criminally negligent homicide; state jail felony); 21.07 (public lewdness; class A misdemeanor); 21.08 (indecent exposure; class B misdemeanor); 28.08 (graffiti; state jail felony for up to $20,000 damage); 30.02 (burglary of building other than habitation; state jail felony); 30.04 (burglary of vehicle; class A misdemeanor); 31.03 (stealing property up to $20,000; state jail felony); 32.21 (forgery; class A misdemeanor or state jail felony for most offenses); 42.02 (participating in riot; class B misdemeanor); 43.03 (running a brothel; class A misdemeanor); 43.24 (selling obscenity to minor; class A misdemeanor); 47.04 (keeping a gambling place; class A misdemeanor); 49.04 (driving while intoxicated; class B misdemeanor).

198. Driving while intoxicated, which puts others at risk of death or serious bodily harm, carries a maximum jail sentence of 180 days. Tex. Penal Code § 12.22; 49.04. Yet

engaging in truthful political speech, which puts no one at risk of death or serious bodily harm, can mean up to ten years in prison.

199. The Texas legislature has assigned the same penalty for engaging in truthful political speech as for making a terror threat that puts the public in fear of death or serious bodily harm. Tex. Penal Code § 22.07. Evidently, the Texas legislature feels that the political speech of concerned citizens is on par with the speech of terrorists.

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

VI. PRAYER FOR RELIEF

WHEREFORE, Defendants and Counter-Plaintiffs King Street Patriots, Catherine Engelbrecht, Bryan Engelbrecht and Diane Josephs respectfully request that their motion to transfer venue be granted and that subject to their motion to transfer venue, Defendants and Counter-Plaintiffs respectfully request the following relief:

1. Defendants' motion for severance be granted as requested herein.
2. Defendants' plea to the jurisdiction be granted as requested herein.
3. Plaintiffs take nothing because of their claims.
4. Plaintiffs' case be dismissed with prejudice.
5. Judgment be entered in favor of Defendants and Counter-Plaintiffs.

6. Declaratory judgment that all the challenged provisions of the Texas Election Code are unconstitutional on their face.

7. Temporary and permanent injunctions enjoining Plaintiffs from enforcing the provisions challenged herein.

8. A temporary injunction enjoining Plaintiffs from conducting discovery in this case until a final resolution of the constitutional questions has been obtained.

9. Reasonable costs and attorneys' fees, incurred as a consequence of Counter-Plaintiffs' efforts to safeguard their constitutionally protected rights, pursuant to 28 U.S.C. § 1988, Tex. Elec. Code sections 253.131(e) and 253.132(c), and any other statute or authority.

10. Any other relief this Court in its discretion deems just and appropriate.

Respectfully submitted,

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I certify that on November 15, 2010, a true and correct copy of the foregoing pleading was served in accordance with the Texas Rules of Civil Procedure by fax and email, upon:

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