CASE NO. 15-0320

IN THE SUPREME COURT OF TEXAS

King Street Patriots, Catherine Engelbrecht,
Bryan Engelbrecht and Diane Josephs,

Petitioners,

vs.

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

Respondents.

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

RESPONDENTS' BRIEF

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Preamble

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA , in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk, Defendants and Counter-Plaintiffs below and Appellees herein, respectfully submits this, their Appellees' Brief. In this Brief the Appellees will be referred to collectively as "TDP," and the Petitioners will be collectively referred to as "KSP." The Clerk's Record will be cited by page as "CR ____" and the Appendix hereto by tab number as "App. ____."

Table of Contents

Index of Authorities

Cases

Texas Cases

Federal Cases

Other Cases

Statutes

Rules

Statement of the Case

Nature of the Case:	Suit and counterclaim seeking a declaration whether various provisions of the Election Code, relating to the raising and spending of money and the reporting thereof, are constitutional and, if so, whether the law created a constitutional private right of action in favor of TDP. CR 49 and CR 52-66.
Trial Court:	261th Judicial District Court of Travis County, Texas, the Honorable John K. Dietz, presiding.
Trial Court's Disposition:	Summary judgment for TDP, finding all challenged sections of the Election Code constitutional. CR 473.
Appellate Court:	Third Court of Appeals at Austin, panel consisting of Jones, C.J., and Rose and Goodwin, JJ.
Appellate Court's Disposition:	Affirmed. Opinion by Justice Goodwin holding the challenged sections of the Election Code were constitutional, and that a private right of action for the recovery of damages existed, and was also constitutional. *King Street Patriots v. Texas Democratic Party*, 459 S.W.3d 631 (Tex. App. — Austin 2014, pet. filed).

Reply Issues Presented

First Reply Issue
(In Response to KSP's Issues One and Two)

The courts correctly assumed the challenged statutes were constitutional, and applied the correct standard to determine if this

presumption was correct.

Second Reply Issue
(In Response to KSP's Issues Three through Six)

The challenged provisions of the Texas Election Code are constitutional.

Summary of the Argument

For decades, State and Federal law has required that those who wish to engage in activity that may affect the outcome of a public election, may do so as long as they report such activity in a manner prescribed by law. This reporting serves to inform the voting public. Such reporting has been found by every court to address the issue as critical to discovering and sorting out corruption.

Just as individuals must be seen when they speak or disclosed on campaign literature or television commercials, corporations and entities are required to report their expenditures through political committees. The difference with corporations is that they are often named (i.e., King Street Patriots, Inc.) where an observer has no idea who is behind the corporate curtain. Such condition gives the corporation the right to anonymous speech while the lowly citizen, the only of the two who can vote, is forced to speak publicly. The Legislature has prevented such unfair treatment of individuals by enacting regulations that permit unlimited speech, unlimited

contributions, on any content, but only if the activity is reported through campaign finance reports.

Each of the state laws challenged by KSP is narrowly tailored to require public disclosure. Contrary to KSP's bare assertions, these disclosure regulations have no effect on the ability of corporations, individuals or candidates to speak as they desire or engage in any public dialogue. KSP's lofty language of Free Speech notwithstanding, this case is about transparency in the cut and thrust of politics. If Texas is to go down the path of anonymous donations, its Legislature should choose to do so. This case presents no issue to justify this Court striking down long-ago duly enacted state laws.

The case is made even more insupportable given that most of the statutes at issue have been found constitutional by this Court, the Texas Court of Criminal Appeals and/or the United States Supreme Court. KSP's arguments in this case are nothing less than chimerical. The Court should reject consideration of this case, or alternatively, affirm the well supported decisions of the Court of Appeals and the District Court.

Statement of Facts

The stipulations and evidence below established that KSP, during the 2010 election (and continuing today), engaged in political activities that had the purpose and/or effect of altering or influencing election outcomes. CR 130-175. Money and in-kind contributions were received by KSP to undertake these activities. See *id.* KSP made political expenditures. See *id.* Despite all of this, neither KSP nor an affiliated political committee filed campaign reports as required by law (thereby unlawfully concealing the financial supporters of their efforts). CR 131. TDP filed suit to ensure public disclosure of campaign contributions and to collect statutory damages and attorney's fees under TEXAS ELECTION CODE §§ 253.131-32. CR 49 and CR 52-66. KSP does not contest undertaking activity regulated under the Code, but has instead claimed the applicable statutes are unconstitutional.

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

its motion for summary judgment or in response to TDP's motion for summary judgment. CR 461.

The only evidence offered in this case, other than the stipulation, was presented by TDP. See *id.* TDP's evidence established that the activities of KSP amounted to activities by a political committee. KSP was a political committee under state law or it was a corporation engaged in politics under state law and either way KSP was obligated to file campaign finance reports. This much was not disputed in the evidence below. What is disputed below is whether state laws requiring disclosure are unconstitutional. The Court of Appeals and the District Court were correct to refuse the invitation to be the lonely courts striking down legislatively enacted campaign disclosure laws and this Court should deny review of those decisions or affirm.

Arguments and Authorities

First Reply Issue
(Restated)

> The courts correctly assumed the challenged statutes were constitutional, and applied the correct standard to determine if this presumption was correct.

KSP begins by claiming by addressing the standard used to decide whether the

Election Code is constitutional, and then by claiming that when this standard is applies courts are required to presume the law at issue is not constitutional. Both of KSP's arguments on these points are incorrect — laws are presumed constitutional, and KSP misunderstands the standards used to determine if they are not.

A. The Election Code is Presumptively Constitutional

Taking these issues in reverse order, when the constitutionality of a statute is challenged, courts treat it as "presumptively constitutional," *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex. 2004), and should always try to interpret a statute in a way that makes it constitutional, as opposed to a way that does not. *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009). This is especially true when the claim is a statute is facially unconstitutional, *City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240-41 (Tex. 2001), because facial unconstitutionality is rare. *Wilson v. Andrews*, 10 S.W.3d 663, 670 (Tex. 1999).

The fact KSP brings its challenge on First Amendment grounds does not change the analysis. Neither the Supreme Court of the United States nor this Court has ever recognized the exception to the presumption of constitutionality that applies any time a statute has some affect on free expression. Even statutes directly affecting First Amendment rights generally enjoy the presumption of

constitutionality. *See, e.g., Respect Maine PAC v. McKee*, 562 U.S. 996, 131 S. Ct. 445 (2010); *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 507 U.S. 1301, 113 S. Ct. 1806 (1993) (Rehnquist, C.J.).

There are a few cases where the presumption of constitutionality disappears in a First Amendment context, but they are cases where courts have consistently held no statute may permissible operate: when a law regulates speech based on its content, *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 135 S. Ct. 2218, 2226 (2015); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S. Ct. 2783 (2004), when it imposes a prior restraint, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631 (1963); *Kinney v. Barnes,* 443 S.W.3d 87, 91-94 (Tex. 2014), or when it compels speech. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-58, 94 S. Ct. 2831 (1974). The Election Code provisions challenged by KSP do none of these things.

The authorities KSP cites do not support its claims. They either explicitly recognize that even statutes affecting free expression are presumed constitutional, *Johnson v. State*, 425 S.W.3d 542, 545 (Tex. App. — Tyler 2014), *aff'd*, 2015 WL

5853115 (Tex. Crim. App. Oct. 7, 2015)[1], or else involve content-based speech restrictions. *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim App. 2014); *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Association of Community Organizations for Reform Now ("ACORN") v. Municipality of Golden, Colo.*, 744 F.2d 739 (10th Cir. 1984).

Accepting KSP's claim about what presumption the Court ought to apply in deciding whether the Legislature has violated the Constitution warps our constitutional jurisprudence, necessarily meaning the cases carving out exceptions to the general rule that statutes are presumed constitutional are unnecessary, because all statutes affecting First Amendment rights would be presumed unconstitutional. This is not the law, and as important as the First Amendment is, statutes regulating election financing implicate other important constitutional concerns, such as the

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[1] In making its argument, KSP's cites *Johnson* misleadingly. In *Johnson*, the court did apply a special rule to First Amendment cases, but the rule was not one presuming the statute to be unconstitutional, but rather one broadening when a statute affecting free expression may be found to be facially invalid:

> Generally, a facial challenge to a statute is an assertion that the statute always operates unconstitutionally. An exception to this general rule applies, however, if a statute implicates the First Amendment and is so broad that it may inhibit the constitutionally protected speech of third parties.
>
> *Johnson*, 425 S.W.3d at 546 (internal citations omitted).
>
> The question over overbreadth will be addressed below.

integrity of the electoral process, *KVUE, Inc. v. Moore*, 709 F.2d 922, 937 (5th Cir. 1983), *aff'd*, 465 U.S. 1092, 104 S. Ct. 1580 (1984), an integrity necessary to ensure elections are "fair and honest and in some order, rather than chaos ..." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274 (1974); *accord, Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 245 (1992); *State v. Hodges*, 92 S.W.3d 489, 497 (Tex. 2002).

The court below began its analysis with the presumption that the Election Code was constitutional. This presumption was correct, so the question becomes whether it applied the correct standard to decide if this presumption has been overcome.

B. Tests Used to Determine Constitutionality of Election Code

KSP spends a considerable amount of its Brief arguing against the application of the correct standard used to determine whether the challenged statutes are constitutional. Applying the correct standard of review is important, because it is the review applied to the law (rather than the presumption applied when reviewing the law) that ensures the law achieves a permissible goal in a constitutional manner.

In arguing the Court of Appeals used the wrong test, KSP makes an involved argument asserting there are no less than three separate tests used to determine whether a statue is facially unconstitutional, only one of which KSP claims applies in

this case:

> Test 1: "no set of circumstances exists under which [the challenged law] would be valid," *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095 (1987) (the "*Salerno* test");
>
> Test 2: the challenged law "lacks any plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258 (1997) (the "*Glucksberg* test"); and
>
> Test 3: in free speech cases, the challenged law "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830 (2008); *accord, United States v. Stevens*, 559 U.S. 460, 473 130 S. Ct. 1577 (2010) (the "*Williams* test").

Petitioner's Brief at 34-36.

According to KSP, the court below applied the wrong test, analyzing the constitutionality of the Election Code using the *Salerno* test instead of the *Williams* test. Petitioner's Brief at 38-43. As KSP sees it, if the Court of Appeals had applied the *Williams* test instead of the *Salerno* test, it would have prevailed.[2] There are three distinct problems with this argument.

[2] KSP makes little reference to the *Glucksberg* test, perhaps because the regulation of elections is a compelling state interest, making the sweep of such laws "legitimate," as a general matter. *American Party of Tex. v. White*, 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296 (1974). In any case, the meaning of *Glucksberg* is less than clear: it may be that a statute contrary to settled First Amendment law (such as one regulating speech based on its content or imposing a prior restraint) would be found to lack any "plainly legitimate sweep," which would explain why such statutes are presumptively unconstitutional.

1. Argument was Waived

The first is simple — the argument that the *Williams* test is the only correct one, and therefore the one the Court of Appeals should have applied, was waived.

In the trial court, one of the many arguments KSP made was that the Election Code was objectionable because the restrictions imposed were overbroad. On appeal, however, KSP abandoned this assertion: although KSP did make a facial attack on the statutes, its relevant argument was they were too vague to understand, not that they were overbroad. Appellant's Brief, 18-23, 31-34. As TDP noted, unconstitutional overbreadth was mentioned only twice by KSP, both times in passing, as a general statement of the law. Appellees' Brief at n. 1.

It was not until KSP lost in the Court of Appeals that it decided the issue of overbreadth might be important, raising this afterthought of an argument for the first time in its Motion for Rehearing. *King Street Patriots*, 459 S.W.3d at 647 n. 7. This is too late: in Texas, arguments not raised until rehearing are waived, *Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 885 (Tex. 2001), the fact it might be allowed in some circumstances in the federal system notwithstanding. Petitioner's Brief at 35 n. 7.

This waiver argument is not mere formalism, a procedural trap to ensnare KSP. KSP seeks to materially shift its argument from one it made to one it did not, and then fault the Court of Appeals for allegedly failing to address the argument it did not make. There is no question that overbreadth is a different argument that vagueness, a "second type of facial challenge" allowed in First Amendment cases, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 128 S. Ct. 1184 (2008); *accord, Stevens*, 559 U.S. at 473, and distinct from the vagueness challenge KSP actually made. *Wollschlaeger v. Governor of the State of Fla.*, 797 F.3d 859, 886 n. 13 (11th Cir. 2015) (recognizing there are "two types of facial First Amendment challenges," under *Salerno* and *Williams*); *United States v. Marcavage*, 609 F.3d 264, 273 (3rd Cir. 2010) ("There are two main ways to succeed on a facial challenge in the First Amendment context," *Salerno* and *Williams*). KSP wants to change its argument because this allows it to argue the *Salerno* and *Glucksberg* tests (which govern facial constitutional challenges generally) should not apply, and the *Williams* test (which applies only when the facial challenge is to a statute's overbreadth, an argument arising only in a First Amendment context. *Salerno*, 481 U.S. at 745) does. KSP's claim — that the *Williams* test applies in all cases involving a facial challenge on First Amendment grounds — is not correct, as is

its assertion that the Court of Appeals erred in failing to apply it.

This attempted shift of the argument provides all of the answer needed to KSP's assertion that its case "is all about facial overbreadth and facial vagueness," Petitioner's Brief at 35 — in fact, its challenge was "all about facial vagueness" only, until it lost that argument. KSP asks the Court to either ignore its failure to make the overbreadth argument to which the *Williams* test applies, or else to pound the square peg of the *Williams* test into the round hole of the "too vague to understand" arguments it did make. The Court should decline both these invitations, and instead find KSP's overbreadth argument was waived, and with it the argument that *Williams* governs the Court's analysis of the facial constitutional attack it made on other grounds.

2. Court of Appeals' Decision does not Conflict with Other Authorities

The fact that First Amendment-specific facial overbreadth arguments governed by the *Williams* test are distinct from other kinds of facial constitutional challenges governed by the *Salerno/Glucksberg* tests also answers another of KSP's claims that the Court of Appeals' decision conflicts with some Fifth Circuit precedent because *Williams* and *Salerno/Glucksberg* cannot apply in the same case. Petitioner's Brief at 36-43. This is not so.

– Both *Salerno* and *Williams* Tests Can Apply

Once again, this argument is based on the false supposition that "only" the *Williams* test applies to facial challenges to a law affecting free expression, which KSP claims is the rule announced by the U.S. Supreme Court in *Stevens*. Petitioner's Brief at 37 n. 1. This is not true: the court in *Stevens* said only that the *Williams* test is a "*second* type of facial challenge," *Stevens*, 559 U.S. at 473 (*citing and quoting Washington State Grange*), and did not say it is a "*different* kind of facial challenge." That *Williams* is in addition to and not in lieu of *Salerno* is shown by opinions specifically recognizing a law may be facially invalid for violating the First Amendment both when it can never be constitutionally enforced(usually because it is too vague) "*and* [when it] sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected," *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395 (1992) (emphasis added), i.e., a law can be unconstitutional under both *Salerno* and *Williams*. This means the First Amendment supports two distinct facial challenges – a "the law is never any good" challenge under *Salerno*, and a "the law can be OK, but nevertheless interferes with too much permissible speech" challenge under *Williams*. *Wollschlaeger*, 797 F.3d at 886 n. 13; *Marcavage*, 609 F.3d at 273.

This understanding — that *Salerno* and *Stevens* can both be applied in the same case — is neither controversial or unique. Almost every federal circuit has, post-*Stevens*, either applied both tests in a case involving free expression or affirmatively refused to hold what KSP confidently asserts is the law that *Salerno* cannot apply in such cases. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 77-78 & n. 13 (1st Cir. 2012); *United States v. Farhane*, 634 F.3d 127, 136-39 (2nd Cir.), *cert. denied*, ___ U.S. ___, 132 S. Ct. 833 (2011); *Marcavage*, 609 F.3d at 273-74; *United States v. Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012); *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 426 (5th Cir. 2014); *Speet v. Schuette*, 726 F.3d 867, 872-73 (6th Cir. 2013); *Bell v. Keating*, 697 F.3d 445, 452-53 & n. 2 (7th Cir. 2012); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 685 (8th Cir. 2012) (en banc); *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1314-15 (9th Cir. 2015); *Wollschlaeger*, 797 F.3d at 886 n. 13.

None of the Texas authorities KSP cites proves the contrary. While these cases do invalidate laws because they violate the *Williams* test, none of these courts refuse to apply the *Salerno* test, or hold *Williams* is the "only" test applicable in First Amendment cases. *See, e.g., Ex parte Lo*, 424 S.W.3d 10, 18 (Tex. Crim. App. 2013); *Johnson*, 425 S.W.3d at 550-51; *State v. Taylor*, 322 S.W.3d 722, 725 (Tex. App. —

Texarkana 2010, pet. denied). Again, this makes sense: if the *Williams* test invalidates more laws than would the *Salerno* test (because *Salerno* requires showing the law is never proper, while *Williams* only requires showing it is often improper), courts may prudentially decide a case under *Williams*, obviating the need to consider *Salerno*.

Even the Texas authorities cited by KSP recognize this is the case, because they are based on *Hoffman Estates*, *Taylor*, 322 S.W.3d at 725; *State v. River Forest Development Co.*, 315 S.W.3d 128, 131 (Tex. App. — Houston [1st Dist.] 2010, no pet.), which says when deciding an overbreadth claim the first question a court should ask is whether the law affects constitutionally protected free speech, and if it does not, it should then ask whether it can ever be applied constitutionally. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S. Ct. 1186 (1982). *Hoffman Estates* establishes a template for deciding issues of overbreadth and vagueness, based on the logical idea that if the law does not affect constitutional rights (making *Williams* inapplicable) it may only be invalidated under the more rigorous *Salerno* test. *Hoffman Estates,* 455 U.S. at 494-95.

The two tests are conceptually different, covering different circumstances, so the idea they can both apply in any given case makes sense. A law prohibiting

people with the first name "Yandel" from making political donations to anyone would be unconstitutional because such a blanket prohibition is never permissible, i.e., it fails the *Salerno* test, even though it might pass the *Williams* test because it does not reach a "substantial" amount of constitutionally-protected conduct, affecting only donations made by the (presumably few) persons bearing an unusual name.

— If Both Tests Apply, No Conflict Exists

With this misstatement cleared up, the conflict KSP claims exists between the Court of Appeals and some (but not all) Fifth Circuit authority disappears. With its disappearance, the idea that a court may apply both *Salerno* and *Williams* in deciding a facial challenge to a statute affecting First Amendment rights becomes unsurprising and a statute may be invalidated on First Amendment grounds under either test, depending on the facts. *Justice v. Hosemann*, 771 F.3d 285, 296 & n. 10 (5th Cir. 2014) (applying *Salerno* test; noting *Williams* test would also apply, but litigant "disclaim[ed] any reliance" on it); *accord, Catholic Leadership*, 764 F.3d at 426.

— *Voting for America* is not the Earliest Panel Opinion

In the alternative, KSP's argument that there is a conflict between the Court of Appeals' decision and Fifth Circuit authority is based on the idea that the decision in *Catholic Leadership* (which is plainly in accord with the decision of the

court below) is incorrect, and not valid authority because it was decided after *Voting for Am. v. Steen*, 732 F.3d 382 (5th Cir. 2013), and the earlier panel opinion controls. That the earlier panel is controlling is true (assuming a conflict, absent here), but if so then the controlling authority is not *Voting for America*, but rather the even earlier panel decision in *Roark & Hardee*.

In this case, the Fifth Circuit did exactly as it was told to do in *Hoffman Estates*: it asked if the law at issue (a smoking ordinance) affected constitutionally protected conduct, and when it found it did not it asked whether the law was unconstitutional in all its applications. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 547-55 (5th Cir. 2008). *Roark & Hardee* did exactly what KSP claims cannot be done, applied both the *Salerno* and *Williams* tests, and did so while following the very authorities KSP claims are controlling. *Roark & Hardee*, 522 F.3d at 547-55. This being the case, its application of the law controls over *Voting in America* even if there is some conflict, meaning the decision in *Catholic Leadership* properly followed the earliest panel authority, as did the decision of the court below.

– Why is KSP Pushing for Fewer First Amendment Protections?

Finally, if the First Amendment is so important, KSP never explains why the Court should find *Williams* limits the number of ways a statute allegedly violating

the First Amendment may be challenged. If both tests can apply, KSP has identified no conflict, offers no reason the Court should find a conflict where none exists, gives no basis for the Court to "heal" a non-existent split in Fifth Circuit authority and it has shown no error in the court below.

— So, What Test did the Court of Appeals Apply, Anyway?

Both *Williams* and *Salerno* can apply in any given case, and a law will be found to be unconstitutional if it violates *Salerno* (all laws) or *Williams* (laws affecting free expression only). If the law does not offend either test it is not facially constitutional. So which test did the Court of Appeals apply?

The answer is both, to all the issues presented to it.

In discussing the law governing facial constitutional challenges, the court below cited Texas authority saying a facial challenge succeeds when the party opposing the law proves the statute "always operates unconstitutionally" (the *Salerno* test) and, citing federal authority, in a First Amendment context when "a substantial number of [the law's] applications are unconstitutional" (the *Williams* test). *King Street Patriots*, 459 S.W.3d at 639 (citing, among other authority, *Stevens*). In response to KSP's belated embrace of overbreadth, the Court of Appeals made a second reference to the *Williams* test, while denying KSP's request for rehearing. *Id.*

at 647 n. 7. Despite clearing applying both *Salerno* and *Williams*, KSP chastises the court below both for any mention of *Salerno* (which, under the authorities set forth above, is unobjectionable), Petitioner's Brief at 38, and for allegedly failing to apply the *Williams* test to its decision. *Id.* at 38-40. Even if the Court rejected all the authority set forth above, and accepted that *Salerno* has no application in this case, the opinion shows the Court of Appeals clearly also applied the *Williams* test. This being so, the question becomes what is KSP really complaining about.

3. Conclusion

KSP's argument about applicable standards used to determine facial unconstitutionality is confusing, at best. It claims the Williams is the only test that applies in cases like this one, which is not true. Even if this were not so, KSP never explains why mention of the Salerno test invalidates the opinion, given the Court of Appeals also considered Williams. It tries to create a conflict in Fifth Circuit authority that exists only if one accepts the incorrect premise on which it is based, and then leverage this conflict-that-is-not into a reason to reverse in this case. Finally, raises all of this fuss with respect to an argument it did not think was important enough to make in the court below.

The Texas Election Code either is or is not facially unconstitutional.

Whether it is too vague to enforce is a question on the merits KSP did raise in the Court of Appeals, and will be addressed below. Whether it is unconstitutional because it sweeps too broadly, interfering with too much free expression to be allowed to stand, is also a question on the merits, albeit one KSP did not properly raise. In any case, whether the court below applied Salerno or Williams or both, its determination that KSP failed to bear the heavy burden of overcoming the presumption that the Election Code is constitutional, and failed to prove it is facially unconstitutional, is the correct one.

Second Reply Issue

(In Response to KSP's Issues Three through Six)

The challenged provisions of the Texas Election Code are constitutional.

Nor does KSP prevail on the merits, because the challenged provisions of the Election Code are constitutional.

In its Petition KSP makes two distinct attacks on the Election Code: it claims it is both facially vague and facially overbroad.

A. Unconstitutional Vagueness

As set forth above, claims of vagueness are the only claims KSP pursued in its appeal, and therefore are the only claims the Court ought to consider. This will not

take long, because KSP spends little of its time arguing the Election Code is too vague to understand.

1. When a Law is Unconstitutionally Vague Generally

A law is unconstitutionally vague if and only if it fails to give those affected a reasonable opportunity to know what is required, or so indefinite that any enforcement is necessarily arbitrary or discriminatory, *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 2256 (2015), such as a law telling policemen to arrest "folks what ain't doin' right." Vague laws are objectionable because they "delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis ...," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294 (1972); *accord, Garcia v. State*, 212 S.W.3d 877, 889 (Tex. App. — Austin 2006, no pet.).

Conversely, a law allowing a person of reasonable intelligence to understand what is required or prohibited is not vague, *Grayned*, 408 U.S. at 108, because a reasonable person can read the law and know his conduct is at risk. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. (1998); *United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009), *cert. denied*, 5459 U.S. 914, 130 S. Ct. 1306 (2010).

When a litigant makes a facial attack on a statute on vagueness grounds, he

must show specific cases where the language is too vague, and tie these specific examples to his own circumstances: "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack …" *Hill v. Colorado*, 530 U.S. 703, 733, 120 S. Ct. 2480 (2000). Hypothetical situations, speculation, and theoretical possibilities are of "no due process significance," unless they lead to actual harm. *Hoffman Estates*, 455 U.S. at 508 n. 21 (claimed vagueness was irrelevant, until it resulted in a prosecution under the law).

2. Challenged Election Code Definitions are not too Vague

KSP abandoned most of the challenges it made to the definitions in the Election Code, now claiming only a few are too vague to constitutionally enforce.

– "Political Committee"

The first definition it does challenge is that of "political committee," defined as a "group of persons that has as its principal purpose accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12). KSP claims this definition is too vague because it cannot determine the meaning of the word "principal," and therefore cannot determine when a group's "principal purpose" is to accept contributions or make expenditures. Petitioner's Brief at 83-84. The idea that the word "principal" makes the statute unconstitutionally vague is

preposterous.

Many statutes, state and federal, use the phrase "principal purpose." *See, e.g.*, 26 U.S.C. § 269 (disallowing deductions for expenses incurred when the "principal purpose" of the transaction was to avoid income taxes); 15 U.S.C. § 1692a(6) ("debt collector" is one whose "principal purpose" is to collect debts); 31 U.S.C. § 6304 (grant agreement between the federal government and other units of government is allowed when its "principal purpose" is to "transfer a thing of value" to the other unit of government to allow it to make a necessary acquisition); TEX. BUS. ORG. CODE § 22.401(1) ("church benefits board" must have as its "principal purpose" the administration of a benefits plan for church employees); TEX. EDUC. CODE § 73.302 ("principal purpose" of UT Dental Branch at Houston is to "teach the subjects of dental education"); TEX. INS. CODE § 981.102 (surplus lines policy may not be used unless, in part, the "principal purpose" of its use is to provide necessary insurance coverage). There are literally hundreds of other such federal and Texas state statutes, probably thousands if the other 49 states are included. Even more use similar phrases, such as "major purpose," "primary purpose" or even "purpose." If the Court accepts KSP's argument, all these statutes are also too vague to enforce.

More specifically, KSP's argument has already been rejected by the U.S.

Supreme Court. The definitions of "political committee" about which KSP complains closely mirrors the language in the *Buckley* decision. *Buckley* held states could regulate political committees under certain circumstances:

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

Buckley v. Valeo, 424 U.S. 1, 79, 96 S. Ct. 612 (1976).

Compare this language with the definition of "political committee" in Texas, a group with "a principal purpose [of] accepting political contributions or making political expenditures." TEX. ELEC. CODE § 251.001(12). Other than the substitution of "principal" for "major" (a distinction without a difference), the wording of the Election Code could have been taken from *Buckley* itself. *Buckley*'s approval of this language means Section 251.001(12) cannot be unconstitutionally vague.

– "Specific-Purpose" and "General-Purpose" Committees

KSP makes a similar argument with respect to the definitions of "specific-purpose committees," which are broadly those established to support or oppose a

particular candidate or issue, TEX. ELEC. CODE § 251.001(13), and "general-purpose committees," those which support or oppose candidates or issues more generally. TEX. ELEC. CODE § 251.001(14). According to KSP, these definitions are too vague because they govern committees "supporting or opposing" candidates or issues, and a person of reasonable intelligence cannot tell what it means to support or oppose someone or something. Petitioner's Brief at 85-86.

Interestingly, KSP makes this argument despite the fact the authorities it cites find similar definitions in other jurisdictions are not facially unconstitutional because they are not vague, *see, e.g., North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 289 (4th Cir. 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-64 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112, 127 S. Ct. 938 (2007), as do other authorities KSP does not cite. *See, e.g., Vermont Right to Life Ctt'e*, 758 F.3d 118, 129 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015); *Center for Individual Freedom, Inc. v. Ireland*, 613 F. Supp.2d 777, 796 (S.D.W.Va. 2009); *Voters Educ. Ctt'e v. Public Disclosure Comm'n*, 166 P.3d 1174, 1184 (Wash. 2007), *cert. denied*, 553 U.S. 1079, 128 S. Ct. 2898 (2008); *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 170 n. 64, 124 S. Ct. 619 (2003), *overruled on other grounds, Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310, 130 S. Ct. 876 (2010). KSP cites Justice Scalia's

concurrence in *Wisconsin Right to Life*, Petitioner's Brief at 85, but fails to note the majority in the same case rejected his argument. *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 n. 7, 127 S. Ct. 2652 (2007). How cases reaching the conclusion opposite of the conclusion KSP require the Court to reach support its request, goes unexplained.

More broadly, accepting KSP's argument would mean the Court must accept a person of average intelligence does not know when someone "supports" or "opposes" a candidate or idea. Every election ever held has been based on such support and opposition. The challenged definitions cannot be unconstitutionally vague. If they are, no words used by any legislature would be immune from being set aside.

– "Campaign" and "Political" Contribution

Finally, KSP claims it cannot know the meaning of "campaign contribution," Petitioner's Brief at 86-87, defined as a "contribution" (in turn defined as "a direct or indirect transfer of money, goods, services, or any other thing of value ...," TEX. ELEC. CODE § 251.001(2)) to a "candidate or political committee" with the "intent that it be used in connection with" a run for office or to support or oppose some matter. TEX. ELEC. CODE § 251.001(3). It also objects to the definition of "political

contribution," because it is defined with reference to "campaign contributions." Petitioner's Brief at 88. Again, neither of these objections have any merit.

KSP begins with a charge of circularity, based on the fact campaign contributions go to political committees, and political committees are groups who accept political contributions, a species of campaign contribution. This inter-relationship does not make the definition circular. Campaign contributions are something of value given to politicians. TEX. ELEC. CODE § 251.001(3). If a contribution is given to a group formed to accept such a contribution, the group is a political committee and the contribution a campaign contribution. The fact one is defined with reference to the other does not make it circular, which occurs when the thing to be shown is assumed in the stated premise. In any case, KSP fails to explain why this (non-existent) circularity makes the Election Code unconstitutionally vague.

KSP next assails the fact the definitions use of the word "intent," claiming this also makes the statute too vague to constitutionally enforce. Again, not really. In fact, just the opposite: that a contribution be made with the "intent" that it to be used on a campaign actually limits the scope of what is regulated. But for this intent requirement, any payment for anything (such as the salary for a candidate's staff or to pay for a box of pens) would have to comply with the Election Code, because that

money "supported" a campaign. The "intent" requirement actually *prevents* overbreadth, keeping the definition of "contribution" within reasonable bounds. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 21, 130 S. Ct. 2705 (2010) ("[T]he knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement.").

More broadly, the idea something has been done with a particular "intent" is hardly incomprehensible, *see, e.g., Chacon v. Andrews Distrib. Co., Ltd.,* 295 S.W.3d 715, 722 (Tex. App. — Corpus Christi 2009, pet. denied); *United States v. Brooks*, 681 F.3d 678, 697 (5th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 836, 837 *and* 839 (2013), the concept of "intent" not being unconstitutionally vague, *see, e.g., Colten v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953 (1972); *see also Hill*, 530 U.S. at 732 (concept of "knowingly" not unconstitutionally vague; "The likelihood that anyone would not understand any of these common words seems quite remote"), and in fact "intention" is sometimes read into statutes to prevent them from being found vague. *See, e.g., Texas Med. Providers Performing Abortion Svcs. v. Lakey*, 667 F.3d 570, 581 (5th Cir. 2012) (the phrase "the physician who is to perform the abortion" construed to mean the physician who "intends" or who is "intended" to do so, even

if "unforeseen circumstance" results in abortion being performed by another; statute not unconstitutionally vague).

In an election context, in Texas and elsewhere, the same or similar formulations in other election laws have been found constitutionally sound. *Yamada v. Snipes*, 786 F. 3d. 1182, 1188-1191 (9th Cir. 2015); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1020-21 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217, 131 S. Ct. 1477 (2011); *Ex parte Ellis*, 309 S.W.3d 71, 86-87 (Tex. Crim. App. 2010); *American Ass'n of People with Disabilities v. Herrera*, 580 F. Supp.2d 1195, 1241 (D.N.M. 2008); *see also Hogue v. National Bank of Commerce of San Antonio*, 562 S.W.2d 291, 292-93 (Tex. Civ. App. — Eastland 1978, writ ref'd n.r.e.) ("purpose" in Election Code is synonymous with "intent" or "object").

Finally, if intent was such a hard concept to grasp, no criminal could ever be constitutionally convicted of crime with an intent element. Surely this is not the cost of allowing contributions to political candidates.

3. Conclusion

The Court of Appeals found that none of the Election Code definitions KSP challenged were unconstitutionally vague. *King Street Patriots*, 459 S.W.3d at 645-49. This decision was correct: nothing about the challenged definitions renders them so

hard to understand that they should be found to be so vague as to be facially unconstitutional. KSP's contrary arguments should be rejected.

B. Unconstitutional Overbreadth

Which brings us to the issue KSP would like to make its primary issue, unconstitutional overbreadth. As set forth above, this issue was not raised by KSP on appeal; even its Motion for Rehearing focused on the question of the proper standard used to determine whether the overbreadth it never argued existed applied.

Despite this, KSP spends no less than 34 pages addressing this issue, Petitioner's Brief at 48-82, asserting broadly that the challenged portions of the Election Code are unconstitutional because they impose an excessive burden on constitutionally permissible speech.

For the reasons set forth above, the Court ought not consider these arguments — it should police the boundaries of cases to ensure only matters properly raised, briefed and argued are considered and decided. However, even if it did consider the arguments, it ought to reject them.

1. Standard Used to Determine Overbreadth

TDP need not spend much time on the issue of what makes a law unconstitutionally overbroad, given the extended discussion of the *Salerno* test and

the *Williams* test above. As the Court has recognized, this imposes a high standard, in any case:

> Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitate, and then "only as a last resort." Therefore, the [U.S.] Supreme Court has developed a requirement that the overbreadth must be "substantial" before the statute will be held unconstitutional on its face. In other words, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Only if the statute "reaches a substantial amount of constitutionally protected conduct" may it be struck down for overbreadth.

Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425, 436 (Tex. 1998), *cert. denied*, 526 U.S. 1146, 119 S. Ct. 2021 (1999) (internal citations omitted); *accord, Washington State Grange*, 552 U.S. at 449 n. 6; *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168 (1998). Proof this high standard is met requires the party challenging the law to "describe the instances of arguable overbreadth of the contested law" that should preclude it being enforced. *Washington State Grange*, 552 U.S. at 449 n. 6.

2. Election Code Provisions are Constitutional

In arguing that it has proven the challenged portions of the Election Code are

facial unconstitutional due to their overbreadth, KSP argues that the Election Code definitions are objectionable, because the definitions excessively burden free expression. There are numerous problems with this assertion.

– Definitions Impose no Burden at All

The first is obvious: KSP complains that the definitions impose a burden, when in fact the definitions impose no obligation of any kind. A review of the definitions KSP objects to shows they define certain groups ("political committees," and various sub-sets thereof, and "political contributions" thereto) in a certain way, so some groups and contributions are included and others excluded. TEX. ELEC. CODE §§ 251.001(3), (12) - (14). What these definitions do not do is impose any obligation on the groups receiving contributions that fall within the ambit of the definition to do anything. Rather, other portions of the Election Code impose requirements on those groups to do things, mostly make disclosures about donations received and money spent. *See, e.g.*, TEX. ELEC. CODE §§ 254.121 (required contents of report of specific-purpose committee); 254.127 (specific-purpose committee required to file report when its existence terminates); 254.151 (required contents of report of general-purpose committee).

Instead of assailing the constitutionality of these substantive requirements,

KSP claims the definitions are the problem. No, they are not: without the operative provisions of the Election Code, the definitions are unobjectionable because they themselves impose no burden. If a burden exists it is only because the operative provisions are objectionable, as KSP admits. Petitioner's Brief at 58. So why this focus on the definitions? Again, because KSP seeks to gloss over the fact it is raising an argument it has never made.

In its trial court petition seeking a finding of unconstitutionality, KSP attacked the Election Code's definitions, as well as some of its other provisions, such as the enforcement mechanism (addressed below). CR 473, ¶¶ 59-151, 165-79, and 189-200. It never attacked any of the operative provisions of the Election Code that supposedly create a burden, specifically including the statutes spelling out what needs to be reported by whom and when. *Id.* Not having raised these issues in the trial court, KSP of course did not raise these issues in the Court of Appeals, either. The first discussion — the very first mention — of these supposedly burdensome statutes is in its brief on the merits to the Court. This eleventh hour shift in its argument leaves KSP stuck — its must focus its argument on the statutory definitions because that was its lawsuit attacked, but its argument fails because even if every word KSP has written is wholly accurate and true, the definitions impose no burden

on anyone, and therefore cannot be unconstitutional. The Court should once again refuse to entertain what amounts to an attempted sleight of hand to raise new issues in the Supreme Court.

— Definitions are Constitutional

However, even if KSP had properly presented its argument to the Court, it ought to still be rejected.

KSP's claim is based entirely on the fact the obligations are onerous. This is an odd argument to make, given that the challenge KSP makes is not an "as applied" challenge ("these reporting requirements are burdensome on us, let us show you how"), but rather a facial challenge (which requires either a *Salerno* showing that the requirements are always excessive burdensome as a matter of law, or a *Williams* showing that they are burdensome on a significant amount of speech, enough to make the law unconstitutional, even though it is sometimes not excessively burdensome).

So too is the proof offered by KSP insufficient to prove the degree of onerousness it claims it exists. Although KSP gives a litany of all the things the Election Code requires in any report that must be filed by any party, its list is padded with the inclusion of requirements imposed on reporting generally, many of

which do not apply to the political committees that are obligated to file such reports, but rather apply only to officeholders or candidates, i.e., those holding or seeking to hold elected office. *Compare* Petitioner's Brief at 58-59 *with* TEX. ELEC. CODE § 254.031. Things a political committee are not required to report obviously impose no burden whatsoever, and most of the applicable requirements are for such things as the name of the reporting committee, its address and the like, on a prescribed form. Far from being onerous as a matter of law, these kinds of basic informational requirements (consisting of information not likely to change, and readily known to the political committee making the report) are *insufficiently* onerous to support a Williams test facial challenge to an election reporting law. *Justice*, 771 F.3d at 288-89 (reporting requirement, a "three page form," not onerous; citing cases showing reporting requirements that do not run afoul of the First Amendment).

This essentially leaves only the requirement that political committees report matters related to the money they received. This reporting requirement goes to the heart of the Election Code, allowing citizens to know who is giving money to what office holder or office seeker. This is a problem for KSP, because even after *Citizens United,* reporting requirements intended to disclose information about contributions are not themselves objectionable: disclosure and record-keeping burdens could be

imposed on those involved in politics, *Buckley*, 424 U.S. at 23, 66-82, and may still be. *Citizens United*, 558 U.S. at 366-67; *see also United States v. Danielczyk*, 683 F.3d. 611, 618-19 (4th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174, 195 n. 21 (2nd Cir. 2011), *cert. denied*, 133 S. Ct. 128 (2012); *and see In re Cao*, 619 F.3d 410, 421-23 (5th Cir. 2010), *cert. denied*, 562 U.S. 1286, 131 S. Ct. 1718 (2011) (*Citizens United* did not change the rule that contributions can be regulated). The rationale for why such reporting is worth quoting at length:

> Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a "sufficiently important" governmental interest.
>
> In *Buckley,* the Court explained that disclosure could be justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to [a federal campaign finance law]. There was evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names. The Court therefore upheld [the law] on the ground that they would help citizens make informed choices in the political marketplace. ...
>
> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those

> expenditures. In *McConnell*, three Justices who would have found [a federal campaign finance law] to be unconstitutional nonetheless voted to uphold [its] disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.

Id. (all but non-parenthetical citations and quotations omitted); *accord, Doe v. Reed*, 561 U.S. 186, 195-96, 130 S. Ct. 2811 (2010).

These reporting requirements may be imposed whether the money is being raised for express advocacy, its "functional equivalent," or for any other election-related purpose. *Citizens United*, 558 U.S. at 368 (expressly refusing to "import" distinctions between express advocacy and issue advocacy recognized in *McConnell* into election law reporting requirements); *accord, Delaware Strong Families, v. Attorney Gen. of Del.*, 793 F.3d 304, 308 (3rd Cir. 2015).

Moreover, to the extent the supposedly onerous reporting requirements about which KSP complains require reporting money received, such laws are given a less rigorous First Amendment review than other laws affecting free speech. *Buckley*, 424 U.S. at 23; *Green Party of Conn. v. Garfield*, 616 F.3d 189, 198 (2nd Cir. 2010). Because statutes governing contributions have less effect on speech, they are afforded "relatively complaisant review under the First Amendment." *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 161, 123 S. Ct. 2200 (2003).

Finally, and perhaps most tellingly, KSP's argument about the burden supposedly imposed on political committees by the reporting requirements of the Election Code is completely divorced from the idea that a claimed burden is only constitutionally objectionable if it "prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. Nothing KSP does shows the necessary "substantiality" exists here; the word "substantial" hardly appears in this section of the brief at all, despite being prominently featured before. That the law imposes a burden, even a substantial burden, is not enough, if the burden imposed does not substantially restrict free expression. KSP assumes that laws requiring reporting = burdensome because federal laws governing political action committees were found to be burdensome, at least in some cases. No such showing has been made here.

Even if the Court assumes a hypothetical set of facts could exist resulting in the Election Code imposing excessive burdens on the exercise of free speech, *Williams* (the only test KSP believes applies in a First Amendment context) still requires these burdens to affect a "substantial" amount of speech. While exactly what qualifies as a "substantial" amount of speech is necessarily unclear, but a facial challenge to the constitutionality of the law requires KSP to show this is the case, a burden it has not borne.

This is especially true given that the burdens of which KSP complains are imposed, not on it, but rather on any political committees to which it contributes. TEX. ELEC. CODE §§ 254.031, 254.038, 254.039. KSP has entirely failed to explain why an entity that is already charged with keeping such records and making such reports would be subject to any additional burden beyond those already imposed because of what KSP is doing, as it must to prove the necessary "substantial effect." *Washington State Grange*, 552 U.S. at 449 n. 6. Put another way, unless KSP can prove these constitutionally-approved record keeping requirements require more of political committees because KSP gives them money than it would if KSP does not give them money, it is reduced to arguing facial unconstitutionality based on the fact any reporting requirement is necessarily too onerous to be constitutional. In light of *Buckley* and *Citizens United*, this simply cannot be the case.

3. Conclusion

The Texas Legislature's campaign activity reporting statutes are not unconstitutional and in fact are supported by overwhelming U.S. Supreme Court authority, none of the arguments advanced by KSP overcome these clear holdings.

C. Corporate "Ban" does not Exist, Statute is Constitutional

KSP next assails the constitutionality of Sections 253.091 and 253.094 of the

Election Code, claiming they "ban[ ] corporate … contributions." Petitioner Brief at 88. They do not, and are not constitutionally objectionable.

Section 253.094 of the Election Code says corporations may only make political contributions in a way allowed by the law. TEX. ELEC. CODE § 253.094(a). The law allows them to make "campaign contributions" in any amount, with no limit, if made to a "political committee," TEX. ELEC. CODE § 253.096, which allows corporations to spend on their own account any amount of money. *Sylvester v. Texas Ass'n of Business*, 453 S.W.3d 519, 528 (Tex. App. — Austin 2014, n.p.h.). Effectively, corporations can give any amount of money to a group who supports or opposes any issue or candidate, and can also spend what they please directly:

> Let us be clear. The Election Code has not and does not prohibit any and all corporate contributions … It merely proscribes the parameters under which contributions may be made. Appellees were not barred from pursuing [their political agenda], nor were they banned from speaking. They spoke and spoke loudly. They are not banned from speaking now. They must simply establish the protocol established in the Election Code …

Cook v. Tom Brown Ministries, 385 S.W.3d 592, 604 (Tex. App. — El Paso 2012, pet. denied).

Section 253.094(a) imposes only one limit on corporate political spending: if a corporation wants to support a candidate directly by making a campaign

contribution it may spend an unlimited amount of its money, as long as the money is given to a political committee. TEX. ELEC. CODE § 253.096. This political contribution would then be reported. TEX. ELEC. CODE §§ 254.001(b), 254.031(a)(1).

Texas has decided to allow unrestricted contributions subject to disclosure rather than restricting contributions, letting voters decide if an elected official offers *quid pro quo* to donors. As noted above, such disclosure requirements are constitutional to prevent *quid pro quo* corruption, *Citizens United*, 558 U.S. at 366-67; *Buckley*, 424 U.S. at 25-26, 47-48, which necessarily means it is constitutionally permissible to regulate contributions through the imposition of a reporting requirement. *Buckley*, 424 U.S. at 46-47. Accordingly, these provisions of the Election Code have been found constitutional. *Ellis*, 309 S.W.3d at 87-92; *Cook*, 385 S.W.3d at 604; *accord, Beaumont*, 539 U.S. at 152-63 (generally upholding corporate ban).

KSP spends a great deal of time arguing that *Beaumont* is probably not still good law, after *Citizens United*. Petitioner's Brief at 90-102. This argument ignores one salient fact — unlike the actual bans discussed in the authority KSP cites, "[t]he Election Code has not and does not prohibit any and all corporate contributions ..."

Cook, 385 S.W.3d at 604. Nor does KSP address (or even cite) any of the Texas authorities cited above in its discussion of the non-existent corporate "ban," or explain why these decisions — all of which post-date *Citizens United*, and all of which find the provisions of the Election Code KSP challenged constitutional — are necessarily wrong.

KSP is determined to complain about a "ban" that does not exist. The Texas Election Code was written to address the result in *Citizens United avant la lettre*, allowing corporations to make political contribution they wish, so long as they are made in a way that results in the fact of the contribution to be reported. KSP offers no argument supporting its assertion that this requirement is too vague to be understood (the argument made in the court below) or any proving it necessarily infringes on a substantial amount of protected speech (the argument it now wishes it had made), and so offers no basis for the Court to find this provision is facially unconstitutional.

D. Private Right of Action Provisions is Constitutional

Finally, KSP argues the statute giving TDP the right to sue it when it violates the law is unconstitutional.

1. The Court has Already Resolved This Claim

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

> When an individual breaks Texas's campaign finance laws, [Section 253.131] allows a candidate to enforce those laws by seeking civil damages as a penalty. We agree with the Fifth Court of Appeals, which recognized that section 253.131 is designed to "deter violators and encourage enforcement by candidates and others directly participating in the process, rather than placing the entire enforcement burden on the government." Because state resources for policing election laws are necessarily limited, in many cases section 253.131 is likely to provide the only viable means of enforcing reporting requirements. Preventing evasion of these important campaign finance provisions is a legitimate and substantial state interest.
>
> Furthermore, that the person enforcing the law and receiving damages can be a private party rather than the State does not mean that section 253.131 adds additional restrictions on First Amendment rights.

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

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

Osterberg was correctly decided, because the government has a strong interest in allowing those hurt by another's failure to obey the law to sue the lawbreaker.

Many statutes — ranging from civil rights statutes to securities laws to consumer protection laws to those class actions to RICO — allow citizens to sue wrongdoers for violating a law in order to vindicate the policy underlying the law. *See, e.g., Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964 (1968); *Farmers Gp., Inc. v. Lubin*, 222 S.W.3d 417, 427 (Tex. 2007). Such suits are particularly appropriate where the person has been hurt by the wrongdoing — people who have been harmed "can generally be counted on to vindicate the law." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269-70, 112 S. Ct. 1311 (1992).

Seeking to distinguish *Osterberg*, KSP claims it only decides "*who* can seek and receive damages." Petitioner's Brief at 106 (*quoting Osterberg*, 12 S.W.3d at 49). This quote is taken out of context, and is misleading — the Court was observing the case did not ask whether the damages sought were constitutionally excessive, but only if it is constitutionally permissible to award them to a private party. *Id.* at 49-50. Despite this, KSP uses this quote to try to argue *Osterberg* is not controlling because the law allows it to be sued by any number of potentially aggrieved parties. This is exactly the "constitutionally excessive damages" issue the Court left open, *Id.* at 49 n. 24, and in any case KSP offers no evidence of any kind that this has happened, or would

be likely to happen, an omission fatal to its argument. *Stevens*, 559 U.S. at 485 (facial challenge to statute requires showing a "substantial" threat to speech, not on "fanciful hypotheticals"); *accord*, *Johnson* at * 3; *see also Reagan v. Time, Inc.*, 468 U.S. 641, 651 n. 8, 104 S. Ct. 3262 (1984) (alleged threat must be "realistic"). The Court resolved the question of whether this enforcement was allowed under the First Amendment, exactly the argument KSP makes. *Osterberg*, 12 S.W.3d at 40-45

2. Enforcement does not Violate Due Process

KSP further claims the law violates its due process rights, theorizing the suit and attendant discovery occurs without "standards" governing the process. Petitioner's Brief at 107.

In advancing this argument, KSP ignores the fact that constitutional due process guarantees protects only against state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449 (1974). Private lawsuits do not implicate due process because "[p]rivate use of state sanctioned remedies or procedures does not rise to the level of state action." *Tulsa Prof. Collection Svcs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S. Ct. 1340 (1988); *accord*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53, 119 S. Ct. 977 (1999); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729 (1978).

KSP's claim the right to bring suit is without "standards" is also wrong: the law imposes a standard on who may sue, and for what. TEX. ELEC. CODE § 253.132. No more is required; all lawsuits are based on allegations of wrongdoing — proof comes in the suit. KSP's argument fails because it proves too much — if true, it would make unconstitutional all civil lawsuits. This cannot be right: conclusive proof of a claim is not necessary before suit may be filed, and sustaining KSP's claim would destroy our entire justice system.

Nor is the conduct of the suit standardless. Although some laws must give those enforcing them "explicit standards," this is only true if they "delegat[e] legislative power ... to a Narrow (sic) segment of the community ..." *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 677, 96 S. Ct. 2358 (1976) *see also General Elec. Co. v. New York Dep't of Labor*, 936 F.2d 1448 (2nd Cir. 1991) (collecting similar cases). A law is objectionable for lack of standards not when an injured party may sue, but only when it delegates "to private parties the power to *determine*" the claim, "without supplying standards to guide the private parties' discretion." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665-66 (4th Cir. 1989). An example of such a case is an ordinance allowing boundaries to be fixed by a vote of two-thirds of property owners, which was unconstitutional because it allowed a

majority of private citizens to determine the rights of the minority, without fixing a standard under which the decision was made. *Eubank v. City of Richmond*, 226 U.S. 137, 141-44, 33 S. Ct. 76 (1912).

Here, the rules governing civil litigation hardly fail to provide "explicit standards," mooting KSP's professed due process concerns. *In re Letters Rogatory from the First Ct. of First Instance in Civ. Matters, Caracas, Venezuela*, 42 F.3d 308, 311 (5th Cir. 1995). Nor is this a case where TDP would be the decision-maker; instead, the matter is left to the court or the jury, which is how legal claims are decided.

KSP's basic objection seems to boil down to an expressed concern that some may use the Election Code to bring frivolous claims against political opponents. Even if this is true, it does not mean all Election Code suits are unconstitutional. The danger a plaintiff might bring a frivolous lawsuit always exists, and statutes and rules provide ample safeguards against abuse. TEX. CIV. PRAC. & REM. CODE §§ 9.001, *et seq*., 10.001, *et seq*., TEX. R. CIV. PRO. 13, 215. Why KSP believes these safeguards are insufficient is unexplained and certainly unproven.

3. Associational Rights are Unaffected

These safeguards, which protect litigants in every civil suit, also answer KSP's claim that allowing such a suit would affect its associational rights and threaten free

speech. Petitioner's Brief at 105-06. In addition, KSP's rights would be constitutionally protected in the proper case: any required disclosure would not be required if there is a "reasonable probability" that the disclosure of a person's name "will subject them to threats, harassment, or reprisals from either Government officials or private parties," *Citizens United*, 558 U.S. at 366; *Buckley*, 424 U.S. at 74 (1976); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380-82 (Tex. 1998) (orig. proceeding), such as was most recently a concern in parts of the Civil Rights-era South. *National Ass'n for the Advancement of Colored People v. State of Alabama ex rel. Peterson*, 357 U.S. 449, 462-63, 78 S. Ct. 1163 (1958) (refusing to force the NAACP to produce its membership list to Alabama state officials). However, KSP's alleged generalized dread of unspecified bad consequences not proven likely to occur does not meet this standard given its complete failure to offer a shred of evidence showing a "reasonable probability" of any such danger. *Solers, Inc. v. Doe*, 977 A.2d 941, 957 n. 15 (D.C. Ct. App. 2009); *United States v. Judicial Watch, Inc.*, 371 F.3d 824, 832 (D.C. Cir. 2004); *United States v. Norcutt*, 680 F.2d 54, 56 (8th Cir. 1982).

Nor is there a generalized First Amendment right to "associational privacy," i.e., to keep the identity of members of some association or the other secret. While

associational rights are important, so is the need for open and complete discovery. *Tilton v. Moye*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding). This means discovery is available when necessary to prove a claim, even if it means revealing the identity of a person who would rather remain anonymous, *see, e.g., In re Maurer*, 15 S.W.3d 256, 260 (Tex. App. — Houston [14th Dist.] 2000, orig. proceeding) (mand. denied) (plaintiff could discover identity of those responsible for defamatory statements so he could pursue his claim); *accord, In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988); *United States v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003), a general rule specifically applied in election law cases. *Doe*, 561 U.S. at 198-202 (disclosing names and addresses of those signing petition to repeal a law permissible; state had a interest in protecting the integrity of the electoral process and preventing fraud sufficient to overcome a signatory's right to keep his identity secret).

Finally, as is the case with all discovery, a court's ability to limit the scope of disclosure or enter protective orders moots theoretical First Amendment objections. *Citizens Assoc. for Sound Energy (CASE) v. Boltz*, 886 S.W.2d 283, 288 (Tex. App. — Amarillo 1994, write denied), *cert. denied*, 516 U.S. 1029, 116 S. Ct. 675 (1995); *National Organization for Marriage v. McKee*, 723 F. Supp.2d 236, 240-41 (D. Maine

2010). In light of this, a declaration that the Election Code is unconstitutional would be like using a hammer to kill a fly, gross overkill to address a (non-existent) problem that can be handled in other ways if it ever appears.

4. TDP and Others Have Rights, Too

Finally, a word about TDP's rights. KSP speaks loud and long about its rights while resolutely ignoring the rights of others. *Osterberg*, 12 S.W.3d at 45 (decrying "myopic" view of the First Amendment that honors the petitioners' rights while ignoring others' rights). KSP's rights do not allow it the privilege of deciding whether or not to obey the law, laws creating a safeguard to ensure elections free of the poison of corruption. KSP's claim that laws enforcing these requirements are invalid would consign these rights to the rubbish bin. KSP desires this result; TDP does not; the Court ought not.

Conclusion and Prayer

TDP prays that KSP's Petition for Review be DENIED, for the reasons set forth herein.

In the alternative, TDP prays that if KSP's Petition for Review is granted, that the decision of the Court of Appeals be in all respects AFFIRMED or, if the Court finds that it cannot be affirmed in whole, that it be AFFIRMED in part.

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

Dated this 2nd Day of November, 2015.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Tex. R. App. Pro. 9.4(i)(2), the undersigned hereby certifies that according to the word count function of the computer program used to generate the document, the portions of the Respondents' Brief subject to the rule contain **10,920** words total and that the text thereof is in 14 point Goudy Old Style, with footnotes in 12 point Goudy Old Style.

/s/ Chad W. Dunn
Chad W. Dunn

Certificate of Service

The undersigned here by certifies that, on this, the 2nd day of November, 2015, a true and correct copy of the foregoing Response to Petition for Review was served by the Court's Electronic Case Filing System, on all counsel of record.

/s/ Chad W. Dunn
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