No. 15-0320

In The Supreme Court of Texas

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

Petitioners

v.

Texas Democratic Party; Gilberto Hinojosa, in his capacity as Texas Democratic Party chairman; and Ann Bennett, in her capacity as Democratic nominee for Dallas County clerk,

Respondents

Reply to Response to Petition for Review to The Supreme Court of Texas

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[1] For the readers' convenience, the actual page numbers match the .pdf page numbers. *Cf.* 2D CIR.R.32.1(a)(3) (2015), *available at* http://www.ca2.uscourts.gov/clerk/case_filing/rules/rules_home.html (all Internet sites visited July 30, 2015).

Index of Authorities[2]

Cases

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[2] Asterisks before citations indicate those on which this filing primarily relies. *Cf.* 11TH CIR.R.28-1(e) (2014), *available at* http://www.ca11.uscourts.gov/rules-procedures; D.C. CIR.R.28(a)(2) (2014), *available at* http://www.cadc.uscourts.gov/internet/home.nsf/Content/Court+Rules+and+Operating+Procedures.

This filing cites slip- or manuscript-opinion pages, rather than Westlaw star pages, where bound-volume pagination will later be available, because Westlaw removes star pagination when West issues bound-volume pagination.

Statutes

Rules

Reply to Response[3] to Petition for Review to The Supreme Court of Texas[4]

Petitioners King Street Patriots ("KSP"), Catherine Engelbrecht, Bryan Engelbrecht, and Diane Josephs file this reply in support of their petition for review.

I. The court of appeals applies the wrong test for a facial challenge.

Case law provides "two distinct tests for the facial constitutionality of a law. Test **(1)** … is for the 'typical facial attack,' while Test **(2)** is [for] a law restricting/regulating speech[.]" PET. FOR REVIEW at 20 ("PET.20").

Test **(1)** asks **(a)** whether "no set of circumstances exists under which the law would be valid," or **(b)** whether the law "lacks any 'plainly legitimate sweep[.]'" Test **(2)** asks whether the law "reaches a substantial amount of constitutionally protected conduct." In other

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[3] *Available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=980eb2ce-8526-4ae5-aab4-e9f1e6df070d.

[4] *Available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=853213c5-3523-417f-8457-9fae491c9f9d.

words, Test **(2)** asks whether "a substantial number of the law's applications are unconstitutional, judged in relation to the law's plainly legitimate sweep." PET.20-21 (citations and brackets omitted).

Petitioners challenge the facial constitutionality of a speech law. PET.14. Nevertheless, except as to the contribution definitions, the court of appeals overlooks Test **(2)**, PET.24-25, thereby splitting with other Texas courts, PET.20-27, and the *controlling* Fifth Circuit opinion. PET.23, 25.

Respondents are mistaken.

●First, they say Petitioners did not raise overbreadth below. RESP'TS.' RESP. TO PET. FOR REVIEW at 8 ("RESP.8"). But this challenge is all about facial overbreadth and facial vagueness.[5]

Respondents also say Petitioners may not raise *the test for* a facial challenge, because Petitioners did not raise it in their principal court-of-appeals brief. RESP.8. However, legal arguments about *the test for* a facial challenge arise here, because the court of appeals applied the

[5] "Overbreadth" applies to both as-applied and facial claims. *E.g., Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006). Petitioners present only a facial challenge here. PET.14.

wrong test. PET.24-25. Petitioners may address any issue "addressed"/"passed on" below. *Citizens United v. FEC,* 558 U.S. 310, 323, 330 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995)).

●Second, notwithstanding RESP.8, the fact that the court of appeals "recognized" Test **(2)** does mean that it "used" Test **(2)**, other than *vis-à-vis* the contribution definitions. *See* PET.25.

Except *vis-à-vis* the contribution definitions, the court of appeals used Test **(1)**. PET.24-25. Notwithstanding RESP.9n.1, the court of appeals did not merely make "reference" to Test **(1)**.

●Third, Respondents say the court-of-appeals opinion does not conflict with other authorities. RESP.9-11. But Petitioners have explained how it does. PET.24-27. When Respondents say the court of appeals "applied" *United States v. Stevens,* 559 U.S. 460, 472-73 (2010), they appear to say it "cite[d]" and "used" Tests **(1)** and **(2)**, "just as *Stevens* did." RESP.8-9. However, *Stevens* does not apply Test **(1)** to speech law. It applies *only* Test **(2).** PET.20-21.

The *controlling* Fifth Circuit opinion recognizes this. PET.21 (citing *Voting for Am. v. Steen,* 732 F.3d 382, 387 (5th Cir.2013) (quoting *Stevens,* 559 U.S. at [473])).

Although Respondents believe both Tests **(1)** and **(2)** can apply to speech law, RESP.10-11, they are mistaken, as Petitioners explain. PET.20-21.[6]

II. The court of appeals wrongly presumes the challenged law is constitutional.

The court of appeals wrongly presumes the challenged law is constitutional, thereby splitting with other Texas courts. PET.27-28.

Respondents want this point considered first, RESP.6, but that does not affect the result.

Respondents then disagree with Petitioners, saying the court should presume the challenged law is constitutional, because only

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[6] Except as to the contribution definitions, PET.25, the court of appeals held that Petitioners *lose* on Test **(1)** and did not reach Test **(2)**. PET.24-25. This was wrong. Test **(1)** presents a higher hurdle for challengers than Test **(2)**. PET.22-23n.7. A challenger not clearing the Test **(1)** hurdle still could clear the Test **(2)** hurdle. Therefore, even if both Tests **(1)** and **(2)** could apply to speech law – and they cannot, PET.20-21 – the court of appeals should have applied Test **(2)**, under which Petitioners prevail. PET.28.

content-based law is presumed *un*constitutional. They assert the challenged law is *not* content based. RESP.6. However, as a matter of law, campaign-finance law *is* content based. *See Reed v. Town of Gilbert,* 576 U.S.____, 135 S.Ct. 2218, 2227, 2230 (2015) (holding that law based on whether speech "is designed to influence the outcome of an election" "is content based on its face"). Such law depends "on the communicative content of the" speech. *Id.* at 2227.

Notwithstanding RESP.6-7, the challenged law *does* "refer[] to the content of … expression"; however, it need "not apply to particular statements about particular matters from particular viewpoints" or "refer[] to the content of any expression" to be content based. *See Reed,* 135 S.Ct. at 2230. A "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* (citing *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 537 (1980)).

III. The Merits

A. Texas's political-committee, specific-purpose committee, and general-purpose-committee definitions are unconstitutional.

Texas's political-committee, specific-purpose committee, and general-purpose-committee definitions, TEX. ELEC. CODE 251.001(12), (13), (14), are facially unconstitutional based either on facial overbreadth, PET.29-33, facial vagueness, PET.33-35, or both.

●In disagreeing on **facial overbreadth,** Respondents err.

When law requires an organization itself to *be* a political-committee or a political-committee-like organization to speak, the organization itself speaks and bears political-committee(-like) burdens. PET.29. Notwithstanding RESP.2-3, an organization does *not* speak "through" such a political committee, *cf.* PET.29n.13, because the organization itself must *be* a political committee or political-committee-like organization. PET.29.

Whether organizations are incorporated, RESP.2-3, is irrelevant here. Instead, courts first ask whether "organizations" are "under the control" of candidates or have "the major purpose" under *Buckley v.*

Valeo, 424 U.S. 1, 79 (1976). PET.30.[7] Even if organizations have the *Buckley* major purpose, government still may not trigger political-committee(-like) burdens if the organizations engage in only small-scale speech. *See Sampson v. Buescher,* 625 F.3d 1247, 1249, 1251,[8] 1261 (10th Cir.2010), *cited in Worley v. Detzner,* 717 F.3d 1238, 1250 (11th Cir.), *cert. denied,* 134 S.Ct. 529 (2013), *and Justice v. Hosemann,* 771 F.3d 285, 295 (5th Cir.2014) (*reh'g pet. filed,* Nov. 26, 2014).[9,10]

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[7] Whether persons can vote, RESP.2, is also irrelevant, *see Buckley,* 424 U.S. at 79, although only individuals can vote, and they cannot be political committees. *See Volle v. Webster,* 69 F.Supp.2d 171, 174-77 (D.Me. 1999). Nor can husbands and wives. *Osterberg v. Peca,* 12 S.W.3d 31, 47-48&n.23 (Tex.), *cert. denied,* 530 U.S. 1244 (2000).

[8] The *Sampson* plaintiffs have the *Buckley* major purpose, albeit because of ballot-measure speech. Although *Sampson* does not mention the *Buckley* major-purpose test, the test applies under circuit precedent. *New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 677-78 (10th Cir.2010) ("*NMYO*")); *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1153-55 (10th Cir.2007) ("*CRLC*").

[9] The *Worley* and *Justice* plaintiffs similarly have the *Buckley* major purpose.

[10] Respondents *rightly* do not cite *Catholic Leadership Coalition of Texas v. Reisman,* 764 F.3d 409 (5th Cir.2014), here, because it is distinguishable. In *Catholic Leadership,* a plaintiff-organization – unlike KSP – *accepts* being a political committee and *then* challenges *particular* political-committee burdens one-by-one, *see id.* at 418-19, as others have. *Let's Help Florida v. McCrary,* 621 F.2d 195, 197-98 (5th

While Respondents cite government interests in triggering political-committee(-like) burdens, *see* RESP.2-3 ("transparency" and preventing [*quid-pro-quo*] "corruption"); *cf.* RESP.17 ("*quid*[-]*pro*[-]*quo* corruption"), they go to the government interest part of constitutional scrutiny. *See Buckley,* 424 U.S. at 66-68. The *Buckley* major-purpose test[11] goes to the tailoring part of constitutional scrutiny. PET.31.

Respondents assert Petitioners do not "explain how" Texas law triggering political-committee(-like) burdens fails Test **(2)**, or how Petitioners' own "rights are being violated by" this law. RESP.14. But Petitioners have explained this. PET.18, 29-33. Respondents just disagree with the explanation. They incorrectly assert *Buckley* allows government to trigger political-committee(-like) burdens for all "those involved in politics" (whatever Respondents might mean by that).

Cir.1980), *aff'd without op.,* 454 U.S. 1130 (1982). When organizations do *not* object to being political committees, *Buckley* and *Sampson* rightly do not arise. *Accord Cook v. Tom Brown Ministries,* 385 S.W.3d 592, 594-608 (Tex.-App.-El Paso 2012), *review denied,* (Tex. Dec. 14, 2012); *Joint Heirs Fellowship Church v. Akin,* No.14-20630 (5th Cir.) (not challenging law triggering political-committee(-like) burdens).

[11] Like the *Sampson* small-scale-speech test. *See Canyon Ferry Road Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033-34 (9th Cir.2009).

RESP.14. But that is not what *Buckley* says. PET.30 (quoting 424 U.S. at 79).

Notwithstanding RESP.3, requiring organizations to *be* political committees to speak *can* affect their ability to speak, because political-committee(-like) burdens are "onerous" under *Citizens United,* 558 U.S. at 338-39, and lead some organizations to say their speech is "simply not worth it." *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 255 (1986) ("*MCFL*"), *quoted in Wisconsin Right to Life, Inc. v. Barland,* 751 F.3d 804, 840 (7th Cir.2014) ("*Barland-II*").

Although Respondents say Texas's political-committee(-like) burdens are not onerous, RESP.14, *Citizens United* establishes otherwise. PET.30 (citing 558 U.S. at 338-39).

●Notwithstanding RESP.14, Petitioners also explain **vagueness.** PET.32-34. Respondents do not address the explanation.

While Respondents cite *Johnson v. United States,* 576 U.S.____, 135 S.Ct. 2551 (2015), to say Test **(1)** applies to facial-*vagueness* challenges, *see* RESP.13 (referring to "any enforcement"), they are mistaken. Test **(2)** applies to facial-vagueness challenges to *speech* law.

PET.20-21, 26&n.11; *accord Barland-II,* 751 F.3d at 835-36. *Johnson* does not address speech law. *See* 135 S.Ct. at 2555-56.

B. Texas's campaign-contribution and political-contribution definitions are unconstitutional.

Texas's campaign-contribution definition, TEX. ELEC. CODE 251.001(3), is unconstitutional, because it is circular and intent-based. PET.35-36. To put it mildly, a "definition is not especially helpful" when it is "circular." *Bilski v. Kappos,* 561 U.S. 593, 622 (2010).

Texas's political-contribution definition, TEX. ELEC. CODE 251.001(5), is unconstitutional, because it depends on the vague campaign-contribution definition. PET.36.

Respondents believe there is no circularity when one item is defined with reference to *an*other. RESP.15. But that is not what Texas law does. Instead, the items are defined with reference to *each* other. Hence the circularity: The campaign-contribution definition depends on the political-committee definition, TEX. ELEC. CODE 251.001(3), which depends on the political-contribution definition, *id.* 251.001(12), which depends on the campaign-contribution definition. *Id.* 251.001(5). PET.35.

Respondents also see no problem with basing campaign-finance law on speakers' intent. RESP.15-16. But the U.S. Supreme Court *does* see such a problem. PET.35-36.

C. Texas's corporate-contribution ban is unconstitutional.

Texas's corporate-contribution ban, TEX. ELEC. CODE 253.091, 253.094, is unconstitutional under the First Amendment. Although *FEC v. Beaumont,* 539 U.S. 146 (2003), upholds a corporate-contribution ban, *Citizens United* and *McCutcheon v. FEC,* 572 U.S.____, 134 S.Ct. 1434 (2014), undercut *Beaumont.* PET.37-39.

Respondents say this is "unwarranted" without really explaining why. RESP.18. What they do say is essentially this: Texas law bans the contributions they allege KSP made but not *all* corporate contributions. *See* RESP.16-18. However, Texas law still bans KSP's alleged contributions. Hence Petitioners' challenge to the law. PET.36-39.

Respondents also assert the "constitutionality" of "disclosure requirements" "necessarily means" contribution bans and other limits[12]

[12] Respondents say "regulate" here, RESP.17, but appear to mean something such as "ban or otherwise limit" instead. A *regulation* of speech is not a ban or other limit. PET.18n.4.

are "constitutionally permissible" as well. RESP.17. But that does not follow, because the government interest necessary to regulate – *i.e.,* require disclosure of, PET.18n.4 – contributions is less than the government interest necessary to ban or otherwise limit contributions. *Compare Buckley,* 424 U.S. at 66-68 (addressing disclosure) *with McCutcheon,* 134 S.Ct. at 1441 (addressing a limit (quoting *Citizens United,* 558 U.S. at 359)).

D. The private-right-of-action provisions for enforcing the Texas Election Code are unconstitutional.

The private-right-of-action provisions for enforcing the Texas Election Code, TEX. ELEC. CODE 253.131, 253.132, 273.081, are unconstitutional. PET.39-42.

Although Respondents rely on *Osterberg v. Peca,* RESP.19-20 (citing 12 S.W.3d 31, 49-50 (Tex.), *cert. denied,* 530 U.S. 1244 (2000)), *Osterberg* is distinguishable. PET.40-41.

Respondents submit that saying Petitioners could assert arguments in an as-applied challenge, RESP.20, is no answer to a facial challenge.

Petitioners assert the lack of standards for discovery and initiating a suit violates the Fourteenth Amendment's Due Process Clause. PET.41-42.

Respondents disagree. RESP.22-24.

While Respondents assert that private lawsuits do not implicate the Fourteenth Amendment, RESP.22, they do not address Petitioners' point that the Fourteenth Amendment nevertheless applies here. PET.42.

Finally, notwithstanding RESP.23, Petitioners submit Texas law *does* "delegate[] 'to private parties the power to *determine*' the claim, 'without supplying standards to guide the private parties' discretion.'"[13]

[13] Notwithstanding RESP.21-22, Petitioners bring no Fourth Amendment challenge here. PET.42n.22.

IV. Prayer

The Court should grant review.

Respectfully submitted,

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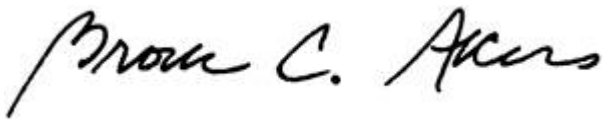

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Certificate of Compliance

I certify that this filing has 2100 words not counting the parts exempt from the word count. *Cf.* TEX.R.APP.P. 9.4(i)(2)(E), 9.4(i)(3).

Randy Elf

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July 30, 2015

Certificate of Service

I hereby certify that a true copy of the foregoing document has been served upon all counsel of record and to court personnel *via* electronic filing and/or first-class mail on this 30th day of July 2015.

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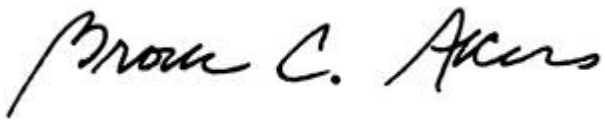

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