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

Petitioners' Brief on the Merits
(Oral Argument Requested)

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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 September 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) (2015), *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

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Petitioners' Brief on the Merits

Statement of the Case

As the court of appeals notes, this is a facial challenge to the constitutionality of Texas Election Code provisions. SECOND OP. at 1-2&n1,[3] 459 S.W.3d 631 (Tex.App.-Austin 2014).

Counter-Defendants/Appellees/Respondents are the Texas Democratic Party; Gilberto Hinojosa, in his capacity as Texas Democratic Party ("TDP") chairman; and Ann Bennett, in her capacity as Democratic nominee for Dallas County clerk. They bring suit against Counter-Plaintiffs/Appellants/Petitioners King Street Patriots, Inc. ("KSP"), Catherine Engelbrecht, Bryan Engelbrecht, and Diane Josephs alleging Texas Election Code violations, *id.* at 2-3, and seeking damages and injunctive relief. Petitioners' counterclaim challenges the

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[3] Texas Supreme Court filings in this action are available at http://www.search.txcourts.gov/Case.aspx?cn=15-0320&coa=cossup. Texas court of appeals filings in this action are available at http://www.search.txcourts.gov/Case.aspx?cn=03-12-00255-CV&coa=coa03. The two court-of-appeals opinions, the district-court order, pertinent Texas law, and other items are in the appendix to the petition, which is available on the same page as other Texas Supreme Court filings. The petition and appendix themselves are available at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=853213c5-3523-417f-8457-9fae491c9f9d&coa=cossup.

facial constitutionality of Texas Election Code provisions. The parties entered into a Rule 11 agreement, under which Petitioners' facial-constitutional challenges were severed into a new action, so that the district court could address them before proceeding further. *See* D.CT. FINAL SUMM. J. ORDER at 2.

The District Court of Travis County, 261st Judicial District (Deitz, P.J.), rejected Petitioners' facial challenge on March 27, 2012. *Id.* at 1-14. The Court of Appeals for the Third Judicial District (Goodwin, J., joined by Jones, C.J., and Rose, J.) affirmed on October 8, 2014. FIRST OP. at 6-30. On Petitioners' rehearing and *en-banc*-reconsideration motion, SECOND OP. at 1, the court, *via* the same panel, revised its opinion and again affirmed on December 8, 2014. *Id.* at 6-30. The court denied Petitioners' subsequent *en-banc*-reconsideration – not panel-reconsideration – motion on March 13, 2015. *Id.* at 1.

Statement of Jurisdiction

The petition for review was timely, because 45 or fewer days passed from the denial of Petitioners' most recent *en-banc*-reconsideration motion to the filing of the petition. *See* TEX.R.APP.P. 53.7(a)(2).

This Court has jurisdiction, because "one of the courts of appeal[] holds differently from a prior decision of another court of appeals ... on a question of law material to a decision of the case;" this is "a case involving the construction or validity of a statute necessary to a determination of the case;" and "an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that ... it requires correction[.]" TEX. GOV'T CODE 22.001(2), (3), (6).

Issues Presented

1. What is the correct test for a facial-constitutionality challenge to a law restricting or regulating speech?

2. Do courts presume a law restricting or regulating speech is constitutional?

3. Are the political-committee and political-committee-like definitions constitutional? TEX. ELEC. CODE 251.001(12) (political committee), (13) (specific-purpose committee), (14) (general-purpose committee).

4. Are the campaign-contribution and political-contribution definitions constitutional? *Id.* 251.001(3), 251.001(5).

5. Is the corporate-contribution ban constitutional? *Id.* 253.091, 253.094.

6. Are provisions creating a private right of action for enforcement of the Texas Election Code constitutional? *Id.* 253.131, 253.132, 273.081.

Statement of Facts

Petitioners draw facts from their November 15, 2010, district-court counterclaim.[4]

In 2009, a group of Houston-area residents wanted to be responsible citizens and engage in the political process. (COUNTERCLAIM ¶52.)

This group – KSP – was led by Catherine Engelbrecht, a wife and mother of two. Mrs. Engelbrecht, like many people at KSP events, had not been involved in politics. She was busy raising her children, being an officer of their school's PTO, and working with her husband in their small business. (COUNTERCLAIM ¶53.)

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[4] *Available at* http://www.libertyinstitute.net/protectingpatriots/Defendant%20KSP's%20Answer%20and%20Counterclaim.pdf.

KSP was formed as a Texas non-profit corporation in 2009 "[t]o provide education and awareness with the general public on important civic and patriotic duties." As of the filing of the counterclaim, KSP had applied for Section 501(c)(4) status with the IRS. (COUNTERCLAIM ¶54.)

Mrs. Engelbrecht and KSP decided that a good way to become involved civically was to help ensure elections are free and fair. KSP assisted anyone interested in becoming a poll watcher. KSP did not anticipate uncovering anything extraordinary, but the poll watchers that KSP had assisted reported troubling observations. (COUNTERCLAIM ¶55.)

As a result, KSP, realizing that free and fair elections are fundamental to the republic, started a new project focused on the integrity of voter rolls. KSP reviewed publicly available Harris County voter-registration information and submitted findings to the county-voter registrar. (COUNTERCLAIM ¶56.)

> [T]hese citizens have discovered a variety of violations of federal law within Harris County, causing the Harris

> Count[]y [t]ax [a]ssessor [c]ollector to investigate. Violations like:
>
> 1. Persons claiming to be noncitizens have been registered to vote[;]
> 2. Names of votes and signatures do not match[;]
> 3. Potential forgeries in voter registration applications[;]
> 4. Voters registered multiple times[.][5]

Leading up to the 2010 election, KSP again offered to train *anyone* interested in serving as a poll watcher for any party or candidate. Several hundred people received KSP poll-watcher training and observed the 2010 election to help ensure that election laws were followed. (COUNTERCLAIM ¶57.) Notwithstanding Respondents' statement, RESP'TS.' RESP. TO PET. FOR REVIEW at 4 ("RESP.4"), KSP

[5] http://www.libertyinstitute.net/protectingpatriots/kingstreetpage.html. This page links to the 72-page report by the voter-registration department of the Harris County tax office. The report is at http://www.libertyinstitute.net/protectingpatriots/ProblemHoustonVotes.pdf.

provided training sessions for *anyone* who wanted to attend, including both Democrats and Republicans.

KSP's counterclaim also described weekly meetings at which speakers discuss topics of interest to Houston-area concerned citizens. During the meetings, a cowboy hat is passed around 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, KSP strictly informs them that it is nonpartisan and that they are not to campaign at KSP events. KSP has made no contribution to any candidate. (COUNTERCLAIM ¶58.)

The court of appeals correctly states the nature of the case, SECOND OP. at 2-6, yet there are additional facts. As the district court noted, KSP

> was formed as a non-profit Texas corporation on December 30, 2009, with the stated purpose "To provide education and awareness with [sic] the general public on important civic and patriotic duties." KSP reviewed public information

> regarding voter registration in Harris County, reported findings to the Harris County Voter Registrar, and trained several hundred poll watchers who served during the 2010 general election. This poll training was done in conjunction with the organization True the Vote3. KSP conducts weekly meetings at which speakers address topics of interest to citizens in the Houston area such as immigration, education, fiscal policy, national defense, as well as "protecting the integrity of elections." KSP collects donations at its meetings by "passing the hat." Further, according to their counterclaim, politician speakers are "strictly informed" that the group is nonpartisan and politicians may not campaign. Finally, KSP states it has made no contributions to any candidate or politician.

D.CT. FINAL SUMM. J. ORDER at 1-2 (alteration in original). In addition, KSP is not under the control of any candidate(s), and provides no indication that it is a political committee or a political-committee-like organization. Nor does KSP make or seek to make contributions or

independent expenditures properly understood under *Buckley v. Valeo,* 424 U.S. 1 (1976);[6] (*see* D.CT. MOT. FOR SUMM. J. BY KSP *ET AL.* at 54 (Aug. 31, 2011)).

Summary of the Argument

There are two distinct facial-constitutionality tests: A stringent test for the typical facial attack, and a relaxed test for laws restricting or regulating speech.[7] The court of appeals errs by applying the stringent test to laws restricting or regulating speech.

The court of appeals also presumes the challenged laws are constitutional. However, this presumption does not apply to laws restricting or regulating speech.

Absent these errors, the court of appeals should have held the challenged laws are facially unconstitutional based on overbreadth, vagueness, or both.

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[6] Under the Constitution, "independent expenditure" means *Buckley* express advocacy, 424 U.S. at 44&n.52, 80, that is not coordinated with a candidate. *Id.* at 46-47, 78.

[7] To "restrict[]" speech is to ban or otherwise limit it. To "regulat[e]" speech is to require "disclosure" of it. *Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082&n.9 (D.Haw. 2010) (emphasis omitted). The challenged laws restrict or regulate speech.

These laws include (a) Texas's political-committee, specific-purpose-committee ("SPC"), and general-purpose-committee ("GPC") definitions, (b) Texas's campaign-contribution and political-contribution definitions, (c) Texas's corporate-contribution ban, and (d) Texas's private-right-of-action provisions for enforcement of the Texas Election Code.

●As for (a): The challenged Texas law – rather than requiring constitutional, *non*-political-committee, *i.e.,* simple, one-time event-driven reports for organizations such as KSP – requires them to register, keep records, and file extensive, ongoing reports.

Such organizational and administrative burdens are "onerous" under *Citizens United v. FEC,* 558 U.S. 310, 338-39 (2010).

Texas law is facially unconstitutional, because it triggers such burdens regardless of whether organizations are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates. *Buckley,* 424 U.S. at 79. Even if organizations have the *Buckley* major purpose*,* government still may not trigger such burdens for organizations engaging in only small-scale speech.

When courts do not comply with *Citizens United* and *Buckley,* the promise of *Citizens United* that organizations are free to engage in political speech, 558 U.S. at 336-66, is not fulfilled. Nevertheless, some courts disregard both *Citizens United's* and *Buckley's* condemnation of and limit on triggering "onerous" political-committee organizational and administrative burdens, *Citizens United, id.* at 338-39; *Buckley,* 424 U.S. at 79, and instead look to the pages of *Citizens United* allowing *non*-political-committee, *i.e.,* simple, one-time event-driven reports, 558 U.S. at 366-71, to justify the same political-committee burdens that *Citizens United* and *Buckley* condemn and limit.

When this happens, the burdens become a parade of horribles. The promise of *Citizens United* that organizations are free to engage in political speech, *id.* at 336-66, is frustrated, as many organizations that are neither "under the control of" candidates nor have "the major purpose" under *Buckley,* 424 U.S. at 79, simply forgo political speech because of the organizational and administrative burdens imposed by political-committee status. Their speech is "simply not worth it." *FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 255 (1986) ("*MCFL*"),

quoted in Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 840 (7th Cir.2014) ("*Barland-II*").

In addition, the SPC and GPC definitions are vague, because they refer to "supporting or opposing" candidates or measures.

●As for (b): Texas's campaign-contribution definition is facially unconstitutional, because it is circular and intent-based. Because the political-contribution definition depends on the campaign-contribution definition, the political-contribution definition is also facially unconstitutional. These definitions are significant here, because they are part of Texas law triggering political-committee and political-committee-like burdens, and because Respondents allege Petitioners have made illegal contributions.

●As for (c): Texas's ban on corporate contributions is facially unconstitutional. Although *FEC v. Beaumont,* 539 U.S. 146, 152-63 (2003), upholds a corporate-contribution ban as-applied to a particular corporation, three more-recent opinions undercut *Beaumont: FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449 (2007) ("*WRTL-II*"), *Citizens United,* and *McCutcheon v. FEC,* 134 S.Ct. 1434 (2014).

●As for (d): Texas's private-right-of-action provisions are facially unconstitutional. They lack standards regarding what showing is necessary to initiate discovery and what is discoverable. But the First Amendment requires both, and *Osterberg v. Peca,* 12 S.W.3d 31 (Tex.), *cert. denied,* 530 U.S. 1244 (2000), does not control here. Furthermore, Texas's private-right-of-action provisions violate the Fourteenth Amendment's Due Process Clause.

Argument

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

There are two distinct tests for the facial constitutionality of a law. Test **(1)**, which courts articulate in two ways, **(a)** and **(b)**, is for the "typical facial attack," while Test **(2)** is for a law restricting or regulating speech:

> [I]n a typical facial attack, [challengers] would have to establish "that [**(1)(a)**] no set of circumstances exists under which [the law] would be valid," *United States v. Salerno,* 481 U.S. 739, 745 (1987), or that the [law **(1)(b)**] lacks any

"plainly legitimate sweep," *Washington v. Glucksberg,* 521 U.S. 702, 740n.7 (1997) (Stevens, J., concurring).

United States v. Stevens, 559 U.S. 460, 472 (2010).

However, "neither *Salerno* nor *Glucksberg* is a speech case." *Id.* In facial-vagueness and facial-overbreadth challenges to *speech* law, the test is relaxed:[8] A court asks *only* whether the law **(2)** "reaches a substantial amount of constitutionally protected conduct." *City of Houston v. Hill,* 482 U.S. 451, 458 (1987) (citations omitted); *see also Kolender v. Lawson,* 461 U.S. 352, 358n.8 (1983) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982)). In other words, the test for facial constitutionality of a law restricting or regulating speech asks *only* whether "a substantial

[8] Respondents say Petitioners did not raise overbreadth below. RESP.8. But this challenge is all about facial overbreadth and facial vagueness.

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 wrong test. Petitioners may address any issue "addressed"/"passed upon" below. *Citizens United,* 558 U.S. at 323, 330 (quoting *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995)).

number of [the law's] applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Stevens,* 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449n.6 (2008)).

This is Fifth Circuit law. *Voting for Am. v. Steen,* 732 F.3d 382, 387 (5th Cir.2013) (quoting *Stevens,* 559 U.S. at [473]). Nevertheless, later Fifth Circuit panels – one of which the Texas court of appeals cites, SECOND OP. at 2n.1, 9, 14, 26 – state that the test for facial constitutionality of speech law is *only in part* whether **(2)** "a substantial number of [the law's] applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Catholic Leadership Coal. of Tex. v. Reisman,* 764 F.3d 409, 426 (5th Cir.2014) (second alteration added) (quoting *Stevens,* 559 U.S. at 473), *quoted in Justice v. Hosemann,* 771 F.3d 285, 296n.10 (5th Cir.2014) (*reh'g en-banc pet. denied* (5th Cir. Aug. 21, 2015)).

By *also* holding a *Salerno/Glucksberg*-like **(1)(a)** unconstitutional-in-all-its-applications or **(1)(b)** *any*-plainly-legitimate-sweep test can apply in facial challenges to *speech* law, *Catholic*

Leadership[9] and *Justice*[10] conflict[11] with *Voting for America,* which holds that – under *Stevens,* 559 U.S. at 473 – the "standard for facial

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[9] 764 F.3d at 426.

[10] 771 F.3d at 296.

[11] *Catholic Leadership* erroneously holds:

> Plaintiffs have two ways to prevail in their facial challenges to [law] because this is a First Amendment case. *First, Plaintiffs can "establish that [***(1)(a)***] no set of circumstances exists under which [the law] would be valid or that the [law* **(1)(b)***] lacks any plainly legitimate sweep." United States v. Stevens,* 559 U.S. 460, 472 (2010) (internal quotation marks and citation omitted). Second, Plaintiffs may also invalidate [law] as overbroad if they demonstrate that [**(2)**] "a substantial number of [the law's] applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Id.* at 473 (internal citations omitted).

764 F.3d at 426 (emphasis added; some alterations added), *quoted in Justice,* 771 F.3d at 296&n.10.

This is unnecessarily complicated: Because Tests **(1)(a)** and **(1)(b)** present a higher hurdle for challengers, those prevailing on Test **(1)(a)** or **(1)(b)** necessarily prevail on Test **(2)**. *See id.* Being alternatives to Test **(2)**, Tests **(1)(a)** and **(1)(b)** are unnecessary.

More fundamentally, *Stevens* does *not* describe "two ways" to "prevail" in "facial challenges" to speech law. *Id.* Instead, *Stevens first* describes the "typical facial attack" and *then* describes the test for facial challenges to *speech* law. *Only the latter analysis, not the former, applies to speech law.* 559 U.S. at 472-73.

challenges" to speech law "is different" from *Salerno* (and, by extension, *Glucksberg*). 732 F.3d at 387.

Being the *earlier* panel opinion, *Voting for America* – not *Catholic Leadership* or *Justice* – controls.[12]

The court of appeals' holding that Test **(1)** applies to speech law simply *cannot* be right. *Buckley* holds speech law facially vague. 424 U.S. at 41-43, 76-77. *Buckley* would have held otherwise under Test **(1)**, because the law is *not* vague as applied to *Buckley* express advocacy. It is *not* vague in *all* its applications. *See id.* at 44.

Nevertheless, the court of appeals first applied a *Salerno*-like unconstitutional-in-all-its-applications test. *See* FIRST OP. at 1, 9, 11, 14, 26-27, 28. When Petitioners initially sought rehearing or *en-banc* reconsideration, the court of appeals *in*correctly changed the standard.

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[12] *See Shami v. CIR,* 741 F.3d 560, 569 (5th Cir.2014) (quoting *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.,* 227 F.3d 326, 330 (5th Cir.2000)).

Texas courts wanting to follow the Fifth Circuit here need not hold that *Catholic Leadership* or *Justice* errs. They need only acknowledge that one Fifth Circuit panel cannot overrule another. *United States v. Torres,* 767 F.3d 426, 430 (5th Cir.2014) (citing *Jacobs v. Nat'l Drug Intelligence Ctr.,* 548 F.3d 375, 378 (5th Cir.2008)).

The revised opinion compounds the *Catholic Leadership* confusion by believing that law which "is constitutional in some of its applications" can somehow "lack[] any plainly legitimate sweep." SECOND OP. at 9 (quoting 764 F.3d at 426). That cannot be right, because "constitutional … applications" are a "plainly legitimate sweep." *Id.*

The revised opinion further quotes *Catholic Leadership:*

> ●The court of appeals says the alternative tests for facial constitutionality of speech law are whether **(1)(b)** the law "lacks any plainly legitimate sweep" or **(2)** "a substantial number of [the law's] applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Id.* (second alteration added).
>
> ●But later, in *applying* its tests, the court of appeals overlooks Test **(2)** and asks whether law **(1)(a)** "is unconstitutional in all circumstances" or **(1)(b)** "lacks any plainly legitimate sweep[,]" *id.* at 14 (mistakenly believing

the latter is the test "in the First Amendment context"),[13] and

●Still later, in *applying* its tests, the court of appeals overlooks Test **(2)** and holds that it "cannot conclude [challenged provisions] violate the First Amendment, that they are unconstitutionally vague, or that they [**(1)(b)**] lack any plainly legitimate sweep." *Id.* at 26.

Thus, except as to the contribution definitions, SECOND OP. at 24n.7, the court of appeals did not apply Test **(2)** – the only correct option.[14]

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[13] It is confusing to observe that Petitioners offer no "evidence" of "threats, harassment, or reprisals" in "a facial challenge" when such "evidence" is for "as-applied challenges[.]" SECOND OP. at 14 (citations omitted).

[14] 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. Notwithstanding RESP.9n.1, the court of appeals did not merely make "reference" to Test **(1)**.

Except as to the contribution definitions, the court of appeals held that Petitioners *lose* on Test **(1)** and did not reach Test **(2)**. This was wrong. Test **(1)** presents a higher hurdle for challengers than Test **(2)**. 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 – the court of appeals should have applied Test **(2)**, under which Petitioners prevail.[15]

The Fifth Circuit correctly recognizes that only Test **(2)** applies to speech law, *Voting for Am.,* 732 F.3d at 387, as do other Texas appellate courts applying only Test **(2)** in civil and criminal appeals regarding speech law. *See, e.g., State v. Johnson,* 425 S.W.3d 542, 546, 550-51 (Tex.App.-Tyler 2014), *review granted* (Tex. April 9, 2014); *Ex parte Lo,* 424 S.W.3d 10, 18 (Tex.Crim.App.2013).

Other Texas courts correctly recognize that Test **(2)** is the test not only for facial overbreadth, but also for facial vagueness, of speech law.

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[15] When Respondents say the court of appeals "applied" *Stevens,* 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)**. Although Respondents believe both Tests **(1)** and **(2)** can apply to speech law, RESP.10-11, they are mistaken.

See, e.g., State v. Taylor, 322 S.W.3d 722, 725 (Tex.App.-Texarkana 2010) (quoting *Lawrence v. State,* 240 S.W.3d 912, 915 (Tex.Crim.App.2007) (citing, in turn, *State v. Holcombe,* 187 S.W.3d 496, 499 (Tex.Crim.App.2006) (citing, in turn, *Hoffman Estates,* 455 U.S. at 495))), *review denied* (Tex. March 2, 2011); *State v. River Forest Dev. Co.,* 315 S.W.3d 128, 131 (Tex.App.-Houston 2010) (citing *Holcombe,* 187 S.W.3d at 499).[16]

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[16] *Holder v. Humanitarian Law Project* establishes that – unlike with facial-*overbreadth* challenges to speech law – to bring a facial-*vagueness* challenge, one must prevail on the corresponding as-applied-vagueness challenge. *See* 561 U.S. 1, 18-20 (2010); *Martinez v. State,* 323 S.W.3d 493, 508n.84 (Tex.Crim.App.2010); *United States v. McRae,* 702 F.3d 806, 837 (5th Cir.2012), *cert. denied,* 133 S.Ct. 2037 (2013).

However, *Humanitarian Law* does not change *the test for* facial vagueness. *See Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 51n.23 (1st Cir.2011), *cert. denied,* 132 S.Ct. 1635 (2012).

While Respondents cite *Johnson v. United States,* 135 S.Ct. 2551 (2015), to say Test **(1)** applies to facial-*vagueness* challenges, *see* RESP.13 (referring to "any enforcement"), they are mistaken. *Johnson* does not address speech law. *See* 135 S.Ct. at 2555-56. Test **(2)** applies to facial-vagueness challenges to *speech* law. *See Barland-II,* 751 F.3d at 812-16, 822, 835-36; *McKee,* 649 F.3d at 51&n.23; *Jordan v. Pugh,* 425 F.3d 820, 828 (10th Cir.2005); *Griffin v. Sec'y of Veterans Affairs,* 288 F.3d 1309, 1330 (Fed.Cir.2002); *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1152 (9th Cir.2001); *Wilson v. State Bar of Ga.,* 132 F.3d 1422, 1429 (11th Cir.1998); *but see Vt. Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 128 (2d Cir.2014) ("*VRLC-II*") (incorrectly holding Test

Indeed, the court of appeals cites decisions of a Texas appellate court and this Court applying only Test **(2)** to speech law. *See* SECOND OP. at 24n.7 (quoting *Ex parte Ellis,* 309 S.W.3d 71, 90-91 (Tex.Crim.App.2010) (citing/quoting, in turn, *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973))); *Comm'n for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 436 (Tex.1998) (quoting *Hill,* 482 U.S. at 458)).

Unless this Court corrects this error, facial challenges to unconstitutional speech laws – not just in this appeal, but in other appeals as well – will fail when they should succeed.

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

The court of appeals "presum[es]" the challenged law is constitutional. SECOND OP. at 7 (quoting *Brooks v. Northglen Ass'n,* 141 S.W.3d 158, 170 (Tex.2004)).

However, *Brooks* is not a *speech*-law challenge. *See* 141 S.W.3d at 160-61. By presuming the challenged law is constitutional, the court of appeals errs. Other Texas courts recognize that in speech-law

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(1) applies to speech law), *cert. denied,* 135 S.Ct. 949 (2015); *Rendon v. Transp. Security Admin.,* 424 F.3d 475, 480 (6th Cir.2005) (same).

challenges, courts do not presume a law is constitutional. *Johnson,* 425 S.W.3d at 546 (citations omitted); *Ex parte Thompson,* 442 S.W.3d 325, 348 (Tex.Crim.App.2014) (addressing content-based speech law[17] (citation omitted)); *Lo,* 424 S.W.3d at 15 (same) (collecting authorities); *accord Doe v. City of Albuquerque,* 667 F.3d 1111, 1120 (10th Cir.2012) (citing *ACORN v. Municipality of Golden,* 744 F.2d 739, 746 (10th Cir.1984)).

Deference to a legislature "cannot limit judicial inquiry" regarding First Amendment rights. Otherwise, they "would be subject to legislative definition"; "the First Amendment as a check on legislative power would be nullified." *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 387n.18 (1984) (citing *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-44 (1978)). *Citizens United,* for example, does not presume speech law is constitutional, and it does not defer to a legislature. *See* 558 U.S. at 336-66. "When [a legislature] finds that a problem exists, [courts] must give that finding due deference; but [a legislature] may not choose an unconstitutional remedy." *Id.* at 361.

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[17] Which political-speech law is as a matter of law. *See Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2227, 2230 (2015).

III. The Merits

Applying the correct facial-constitutionality test and declining to presume law is constitutional,[18] Petitioners prevail.

Petitioners must show the law fails Test **(2)**, *see McConnell v. FEC,* 540 U.S. 93, 207 (2003) (holding that those challenging a law bear the "heavy burden of proving that [the challenged law] is [facially] overbroad" (citing *Broadrick,* 413 U.S. at 613)), yet the U.S. Supreme Court has held that regardless of the scrutiny level, government must prove a law survives scrutiny. *McCutcheon,* 134 S.Ct. at 1445-46, 1456-57 (declining to "parse the differences" between strict scrutiny and closely-drawn exacting scrutiny and holding that the plaintiffs win even under the latter); *id.* at 1452 ("When the [g]overnment restricts speech, the [g]overnment bears the burden of proving the constitutionality of its actions" (citing *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816 (1999))); *WRTL-II,* 551 U.S. at 464 (strict scrutiny (citing *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978))), *quoted in Citizens United,* 558 U.S. at 340; *Nixon v. Shrink Mo. Gov't PAC,* 528

[18] Even presuming the law is constitutional, Petitioners prevail.

U.S. 377, 386, 387-88 (2000) (closely-drawn exacting scrutiny (quoting *Buckley,* 424 U.S. at 16, 25)).

Respondents brought this case as a private right of action. Having chosen to stand in the shoes of the state, Respondents do what the state does, which leads to enforcement of the law. This is an imprimatur for state action.[19] Thus, under *McCutcheon, WRTL-II, Bellotti, Citizens United,* and *Shrink Missouri,* they must prove the law survives scrutiny, regardless of the scrutiny level. *WRTL-II* rejects an assertion that those challenging the constitutionality of a law must demonstrate it is constitutional. 551 U.S. at 464.

Applying the correct facial-constitutionality test and declining to presume law is constitutional, four sets of Texas laws are facially unconstitutional: (a) Texas's political-committee, SPC, and GPC definitions; (b) Texas's campaign-contribution and political-contribution definitions; (c) Texas's corporate-contribution ban, and (d) Texas's private-right-of-action provisions for enforcement of the Texas Election Code.

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[19] *Supra* 22; *infra* 107.

As for (a): The challenged Texas law – rather than requiring constitutional, *non*-political-committee, *i.e.,* simple, one-time event-driven reports for organizations such as KSP – requires them to register, keep records, and file extensive, ongoing reports.

Whether government may trigger such "onerous" organizational and administrative burdens, *Citizens United,* 558 U.S. at 338-39, turns first whether organizations are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley,* 424 U.S. at 79.

Organizations such as KSP engage in *no* "regulable, election-related speech" *under the Buckley major-purpose test, N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 287, 289 (4th Cir.2008) ("*NCRL-III*"), in that they make neither contributions[20] nor independent expenditures properly understood.[21] Under the *Buckley* major-purpose test, they certainly do not devote the *majority* of their spending to contributions or

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[20] Meaning neither direct contributions nor indirect contributions. *Buckley,* 424 U.S. at 23n.24, 46-47, 78. Nothing in federal law, for example, suggests that poll watching or appearing at nonpartisan events is a contribution. *See, e.g.,* 11 C.F.R. 100.51-100.94; *id.* 300.52.

[21] *Supra* 30n.6.

independent expenditures. *See Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 584 (8th Cir.2013) ("*IRLC-II*") (quoting *Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1152 (10th Cir.2007) ("*CRLC*") (citing/quoting, in turn, *MCFL,* 479 U.S. at 252n.6, 262), *followed in N.M. Youth Organized v. Herrera,* 611 F.3d 669, 678 (10th Cir.2010) ("*NMYO*")), *cert. denied,* 134 S.Ct. 1787 (2014).

Because Texas's political-committee, SPC, and GPC definitions reach beyond what the Constitution allows, they are facially unconstitutional, *see NCRL-III,* 525 F.3d at 287-90, as explained in additional detail next.

A. Texas's political-committee, SPC, and GPC definitions are unconstitutional.

Citizens United establishes that registration, recordkeeping, and extensive and ongoing reporting are "onerous" organizational and administrative political-committee burdens, 558 U.S. at 338-39, while *Buckley* allows government to trigger political-committee burdens only for "organizations" that (a) are "under the control of" candidates[22] or (b)

[22] *I.e.,* "in their capacities as candidates[.]" *Wis. Right to Life, Inc. v. Barland,* No.2:10-cv-00669-CNC, DECLARATORY J. & PERMANENT INJ.

have "the major purpose" of "nominat[ing] or elect[ing]" candidates. 424 U.S. at 79, *followed in McConnell,* 540 U.S. at 170n.64 (*overruled on other grounds, Citizens United,* 558 U.S. at 336-66), *and MCFL,* 479 U.S. at 252n.6, 262.

Nevertheless, Texas law triggers political-committee and political-committee-like burdens – sometimes called "PAC" (which is short for "political-action committee") and "PAC-like" burdens – for organizations such as KSP.

1. Texas's political-committee, SPC, and GPC definitions trigger PAC and PAC-like burdens. These burdens are onerous under *Citizens United*.

a. Texas's political-committee, SPC, and GPC definitions trigger PAC and PAC-like burdens.

"'Political committee' means a group of persons that has as a principal purpose accepting political contributions or making political expenditures." TEX. ELEC. CODE 251.001(12).

Texas has two categories of "[p]olitical contribution[s]": Campaign contributions and officeholder contributions. *Id.* 251.001(5).

FOLLOWING *BARLAND-II* at 6, 2015-WL-658465 (E.D.Wis. Jan. 30, 2015, *as amended* Feb. 13, 2015) (unpublished), *available at* http://gab.wi.gov.

"'Campaign contribution' means a contribution[23] to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id.* 251.001(3). "'Officeholder contribution' means 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." *Id.* 251.001(4).

Texas similarly has two categories of "[p]olitical expenditure[s]": Campaign expenditures and officeholder expenditures. *Id.* 251.001(10). "'Campaign expenditure' means an expenditure[24] made by any person in connection with a campaign for an elective office or on a measure.[25]

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23 "'Contribution' means … any … thing of value" with exceptions not material here. TEX. ELEC. CODE 251.001(2).

24 "'Expenditure' means … any … thing of value[.]" *Id.* 251.001(6).

25 Under a newly adopted Texas Ethics Commission ("TEC") rule, an "expenditure" has such a "connection" if it (i) is *Buckley* express advocacy; (ii) is broadcast, print, or electronic speech that has a clearly-identified candidate or measure, runs in the 30 days before an election, is targeted to the relevant electorate, and its only "reasonable

Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure." *Id.* 251.001(7). "Direct campaign expenditure" – a subcategory of "campaign expenditure" – in turn "means a campaign expenditure that does not constitute a campaign contribution by the person making the

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interpretation" is as an appeal to vote for or against the candidate or measure; (iii) is made by a candidate or political committee to "support or oppose" a candidate or measure; or (iv) is a contribution to an organization that, at the time of the contribution, already is a political committee. 1 TEX. ADMIN. CODE 20.1(21)(A)-(B), *available at* https://www.ethics.state.tx.us/rules/proposed_Aug_2015.html#Campaign; *see also id.* 20.1(21)(C) (press exemption); *id.* 20.1(21)(D) (defining "clearly identified").

A TEC staff member advised Petitioners on October 6, 2015, that the TEC adopted this rule on October 5, 2015.

Petitioners – not having had an opportunity to challenge this rule or another rule, *infra* 84n.60, in the courts below – of course do not challenge them here. It suffices here to hold the challenged law facially unconstitutional.

Petitioners point to these rules as yet another of example of Texas law reaching beyond the Constitution. For example, the only-reasonable-interpretation language, 1 TEX. ADMIN. CODE 20.1(21)(A)(ii)(IV); *id.* 20.1(21)(B)(ii)(IV), is akin to the appeal-to-vote test but extends beyond it, because it reaches beyond Federal Election Campaign Act ("FECA") electioneering communications. In addition, after *Citizens United,* the appeal-to-vote test no longer affects whether government may ban, otherwise limit, or regulate speech, and the test is vague. *Infra* 71-72n.44.

expenditure." *Id.* 251.001(8). "'Officeholder expenditure' means 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." *Id.* 251.001(9).

Texas then has three categories of political committees:

> "Specific-purpose committee" means a political committee that does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes:
>
> (A) supporting or opposing one or more:
>
> (i) candidates, all of whom are identified and are seeking offices that are known; or
>
> (ii) measures, all of which are identified;
>
> (B) assisting one or more officeholders, all of whom are identified; or
>
> (C) supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown.

> "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.

Id. 251.001(13)-(14).[26]

To be clear: Texas does *not* require an organization such as KSP to *form/have* a political committee.[27] Instead, as Respondents contend,

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[26] "Out-of-state political committee" is defined in TEX. ELEC. CODE 254.001(15). No such committee is at issue here.

[27] A political committee that an organization *forms/has* is "separate" from the organization. *Citizens United,* 558 U.S. at 337. An organization does not "speak" through a political committee it *forms/has;* such a political committee, not its parent organization, "speak[s]" and bears political-committee burdens. *Id.*

SECOND OP. at 2, an organization such as KSP must itself *be* a political committee, and then either an SPC or a GPC. When an organization itself must *be* a political committee or a political-committee-like organization (such as an SPC or a GPC) to speak, the organization itself speaks and bears PAC or PAC-like burdens. *Barland-II,* 751 F.3d at 812-16, 822, 825-26.[28] The same holds when a "fund" or "account" that is part of the organization must *be* a PAC-like fund/account. *Id.* at 825, 839-40, 844-46 (describing such an account); *Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 868-72 (8th Cir.2012) ("*MCCL-III*") (*en-banc*) (describing such a fund/account); *accord Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 589 (8th Cir.2013) ("*IRLC-II*") (same), *cert. denied,* 134 S.Ct. 1787 (2014).[29]

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[28] Notwithstanding RESP.2-3, an organization does *not* speak "through" such a political committee either. The organization itself must *be* a political committee.

[29] Some courts conflate *forming/having* and *being* a political committee. *See, e.g., Cook v. Tom Brown Ministries,* 385 S.W.3d 592, 601, 604 (Texas-App.-El Paso 2012) (holding that law banning an organization's speech and letting the organization "create its own political committee," which then speaks, does not ban the organization's speech), *review denied* (Tex. Dec. 14, 2012).

Being a Texas political committee, and then either an SPC or a GPC, triggers "onerous" **Track 1,** PAC and PAC-like organizational and administrative burdens for organizations such as KSP. *Citizens United,* 558 U.S. at 338-39:

- Registration.

- Recordkeeping, and

- Reporting that is both extensive, *see id.* at 338 (citation omitted); *MCFL,* 479 U.S. at 253-56&nn.7-9, and "ongoing[,]" *MCCL-III,* 692 F.3d at 871, 873-77&nn.7, 9-10, *i.e.,* "periodic[.]" *MCFL,* 479 U.S. at 255.

Such **Track 1** burdens are unlike constitutional, **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reports, which include neither registration, recordkeeping, nor extensive or ongoing reporting. **Track 2** reporting occurs only for reporting periods when particular speech occurs, *and* the reports are simple, *see MCFL,* 479

U.S. at 262 ("less ... than … the full panoply of" political-committee burdens); 52 U.S.C. 30104(c), (f), (g), compared to extensive reporting.

Registration means a political committee must appoint a treasurer, TEX. ELEC. CODE 252.001, 252.010, 252.011, 252.012, 252.015; *see also id.* 252.0031, 252.0032, 252.004; file the appointment with the appropriate authority, *id.* 252.005, 252.006, 252.007, 252.008, 252.009; provide the name of person making the appointment, plus the treasurer's name, address, and telephone number, and notify the Texas Ethics Commission ("TEC") within 10 days of any change in the treasurer's address, *id.* 252.002; provide (for GPCs) the name of each corporation, union, association, or entity (other than an individual) that directly establishes, administers, or controls the committee; provide the full name of the committee, provide any acronym of a corporation, union, association, or entity if the acronym will used in the committee's name and if the corporation, union, association, or entity directly establishes, administers, or controls the committee; provide the name of each person determining who receives contributions from the committee or for what purposes the committee makes what Texas calls "expenditures"; provide the name of each GPC to which the committee

intends to contribute; amend this information within 30 days of any change; and, if the committee is a GPC, be sure that the name is not the same as or deceptively similar to another GPC's name, and change the name within 14 days of any TEC finding of any such similarity. *Id.* 252.003.

The treasurer must provide written notice of vacating the position. *Id.* 252.013.

Without a treasurer in place, a political committee may not receive contributions cumulatively exceeding $500 or make expenditures cumulatively exceeding $500. *Id.* 253.031(b), (c).

Political committees must file a notice of any change in their registration status. *Id.* 254.129, 254.162.

Political-committee burdens continue until the political committee terminates its registration – *i.e.,* deregisters – by filing a final report, dissolution report, or termination report. *Id.* 254.125, 254.126, 254.127, 254.159, 254.160.

Recordkeeping means keeping records of reportable activity for two years after the reporting containing the information in the records. *Id.* 254.001.

Extensive, ongoing reporting means each political committee[30] must report: Contributions from each person cumulatively exceeding $50 during the reporting period, plus the person's name, person's address, and the date of the contributions; loans to the committee cumulatively exceeding $50 during the reporting period, plus the interest rate, maturity date, collateral, and the lender's name and address; each loan guarantor's name, address, occupation, and employer; the amount of each guarantor's guarantee; the cumulative principal of outstanding loans; the amount of political expenditures cumulatively exceeding $100 during the reporting period, the name and address of persons to which expenditures are made, and the date and purpose of each expenditure; the amount of other payments from contributions, the name and address of persons to which payment are made, and the date and purpose of each payment; the total of contributions received of $50 or less during the reporting period; the total of expenditures of $100 or less during the reporting period; the total of all contributions received; the total of all expenditures; the

[30] Except SPCs with $500 or less in contributions received or expenditures. TEX. ELEC. CODE 254.181, 254.182, 254.183, 254.184.

names of candidates or officeholders benefitting from each direct campaign expenditure by the committee during the reporting period, and the office sought or held; any credit, interest, rebate, refund, reimbursement, or return of deposit "resulting from the use of a political contribution or an asset purchased with a political contribution that is received during the reporting period and the amount of which exceeds $100" plus the name and address of each person from whom "an amount … is received," the date, and the purpose; "proceeds from the sale of an asset purchased with a political contribution that is received during the reporting period and the amount of which exceeds $100" plus the name and address of each person from which "an amount … is received," the date, and the purpose; "any investment purchased with a political contribution that is received during the reporting period and the amount of which exceeds $100" plus the name and address of each person from which "an amount … is received," the date, and the purpose; and any other gain from a political contribution that is received during the reporting period and the amount of which exceeds

$100" plus the name and address of each person from which "an amount … is received," the date, and the purpose. *Id.* 254.031.[31]

Reports must be in the format the TEC prescribes, and the preferred filing method is electronic. *Id.* 254.036. Reports must be filed with the appropriate authority. *Id.* 254.130, 254.163.

Reports must also include the committee's name and address, the treasurer's name, address, and telephone number; any election for which the report is filed; each candidate, measure, or classification of candidates by political party supported; each candidate, measure, or classification of candidates by political party opposed; each officeholder or classification of officeholders by political party assisted; the occupation of each person cumulatively contributing more than $50 to a GPC during the reporting period; contributions made to other

[31] Many state laws, including Texas law, use no term such as "fund" or "account." Nevertheless, they trigger **Track 1,** PAC or PAC-like burdens for the organization but require reporting of only particular income and spending. *VRLC-II,* 758 F.3d at 137. They do not require reporting of *all* income and spending, as federal law does. *Citizens United,* 558 U.S. at 338 (citation omitted). The effect of such state law is the same as if it required a fund/account for political speech: The organization in effect reports a fund/account for political speech. *See Barland-II,* 751 F.3d at 825, 839-40, 844-46; *IRLC-II,* 717 F.3d at 589; *MCCL-III,* 692 F.3d at 868-72.

committees but returned during the reporting period; contributions from corporations or unions; and, for GPCs, contributions from corporations or unions to establish or administer the committee, or to solicit contributions for items in TEX. ELEC. CODE 253.100. *Id.* 254.121, 254.151. As an alternative to the Section 254.151 reporting of contributions received, GPCs with less than $20,000 in their accounts may report contributions from each person cumulatively exceeding $100, the name and address of the contributors, their occupations, and the dates of the contributions, and the total of contributions of $100 or less.

SPC reports must also include information on speech about judicial candidates and judicial officers, *id.* 254.1211 (citing *id.* 254.0611), with additional information in reports by candidates for, or holders, of legislative office or statewide executive-branch office. *Id.* 254.1212 (citing *id.* 254.0612); *see also id.* 254.122 (specifying how SPCs report when they support or oppose candidates in more than one election).

SPC and GPC reports are due January 15 and July 15. *Id.* 254.123, 254.153. Additional reports are due 30 and eight days before

Election Day and eight days before a runoff election. *Id.* 254.124, 254.154 GPCs may alternatively file monthly reports. *Id.* 254.155, 254.156, 254.157, 254.158.

In addition, committees must notify candidates and officeholders in writing of speech for them. *Id.* 254.128, 254.161.

In sum, the challenged Texas law – rather than requiring constitutional, *non*-political-committee, *i.e.,* simple, one-time event-driven reports for organizations such as KSP – requires them to register, keep records, and file extensive, ongoing reports.

b. Texas's political-committee, SPC, and GPC burdens are onerous under *Citizens United*.

Texas's political-committee, SPC, and GPC definitions "trigger[]" PAC and PAC-like burdens, *Barland-II,* 751 F.3d at 812, 815, 818, 822, 826, 827, 832&n.20, 834, 837, 840; *CRLC,* 498 F.3d at 1144, 1153-54,[32] including organizational and administrative burdens such as **(1)** registration, **(2)** recordkeeping, and **(3)** extensive, ongoing reporting, which are "onerous" as a matter of law, *Citizens United,* 558 U.S. at

[32] Thus, the proper challenge is to the definitions, *Buckley,* 424 U.S. at 79 (addressing how "'political committee' is defined"), not the burdens themselves.

339, *quoted in MCCL-III,* 692 F.3d at 872, *and Barland-II,* 751 F.3d at 823, even when there are neither **(4)** limits nor **(5)** source bans on contributions received. *See id.* at 337-40 (mentioning **(1)**, **(2)**, and **(3)** but not **(4)** or **(5)**); *MCFL,* 479 U.S. at 266 (O'Connor, J., concurring) (focusing on **(1)** "organizational restraints"); *Barland-II,* 751 F.3d at 839-40, 844-46 (focusing on **(1)**, **(2)**, and **(3)**); *MCCL-III,* 692 F.3d at 872-73, 876-77 (focusing on **(3)**); *IRLC-II,* 717 F.3d at 596-601 (focusing on **(1)** termination and **(3)**); *cf. Yamada v. Snipes,* 786 F.3d 1182, 1196 (9th Cir.2015) (holding that neither **(4)** nor **(5)** changes the analysis), *cert. pet. filed* (U.S. Aug. 14, 2015) (No.15-215).

Whether organizations are "*capable*" of complying with law – including "complicated and burdensome" law – is irrelevant. *MCCL-III,* 692 F.3d at 874 (emphasis in original).

However, some appellate-court holdings conflict with *Citizens United.*

These include appellate courts that – rather than holding PAC or PAC-like burdens are onerous *as a matter of law* – indulge factual determinations of whether organizations are capable of complying with PAC or PAC-like burdens. *See Yamada,* 786 F.3d at 1196; *Justice,* 771

F.3d at 300 (citing *Worley v. Detzner,* 717 F.3d 1238, 1250 (11th Cir.), *cert. denied,* 134 S.Ct. 529 (2013)[33]); *Vt. Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 137n.17 (2d Cir.2014) ("*VRLC-II*"), *cert. denied,* 135 S.Ct. 949 (2015).

These also include holdings that PAC or PAC-like burdens pose no "undue burden" on speech, *Yamada,* 786 F.3d at 1194, 1195 (quoting *Worley,* 717 F.3d at 1250), and are not "onerous[.]" *Id.* at 1194-95&n.7 (citing *Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 56 (1st Cir.2011), *cert. denied,* 132 S.Ct. 1635 (2012); *VRLC-II,* 758 F.3d at 137-38; *Worley,* 717 F.3d at 1250)).[34]

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[33] *Followed in Vermont v. Green Mountain Future,* 86 A.3d 981, 994 (Vt.2013) ("*GMF*").

[34] *SpeechNow.org v. FEC,* 599 F.3d 686, 697-98 (D.C. Cir.) (*en-banc*), *cert. denied,* 562 U.S. 1003 (2010), which *Yamada* also cites here, addresses federal law.

Citizens United supersedes, *see IRLC-II,* 717 F.3d at 597, a *pre-Citizens United* appellate opinion that *Yamada* also cites here: *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 789-92 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006).

Although *Yamada* also cites *Family PAC v. McKenna,* 685 F.3d 800, 808n.6 (9th Cir.2012), here, *Family PAC* is distinguishable, because the plaintiff – unlike KSP – *is* a political committee under *Buckley, accepts*

being a political committee, and thus does *not* raise the *Buckley* major-purpose test.

Three recent appeals on Texas law by organizations – some of which appear *not* to be political committees under *Buckley* – are also distinguishable: *Tom Brown Ministries, Joint Heirs,* and *Catholic Leadership:*

●In *Tom Brown Ministries,* the defendants challenge law banning their speech and requiring them to *form/have* a political committee to speak. They do *not* challenge other law requiring them – if they *could* engage in their speech – to *be* a political committee and thus do *not* raise the *Buckley* major-purpose test. *See* 385 S.W.3d at 601, 604.

●In two recent Fifth Circuit appeals, plaintiffs also *accept* being political committees and thus do *not* raise the *Buckley* major-purpose test, *see Joint Heirs Fellowship Church v. Akin,* No.14-20630 (5th Cir.) (not challenging law triggering PAC and PAC-like burdens), and *instead* challenge particular political-committee burdens one-by-one, *see Catholic Leadership,* 764 F.3d at 418-19, as others have. *E.g., Let's Help Florida v. McCrary,* 621 F.2d 195, 197-98 (5th Cir.1980), *aff'd without op.,* 454 U.S. 1130 (1982); *see also Canyon Ferry Road Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033-34 (9th Cir.2009) (addressing other plaintiffs not raising the *Buckley* major-purpose test).

The fact that the *Tom Brown Ministries* defendants, *Joint Heirs* plaintiffs, *Catholic Leadership* plaintiffs, and *Canyon Ferry* plaintiffs do *not* raise the *Buckley* major-purpose test does not prevent Petitioners from raising that argument here. *See Webster v. Reprod. Health Servs.,* 492 U.S. 490, 512 (1989) ("plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation" (citing *Caterpillar Inc. v. Williams,* 482 U.S. 386, 398-99 (1987))).

These further include holdings that *Citizens United's* condemnation of political-committee burdens, 558 U.S. at 337-40, applies *only* to speech bans and other limits, not to other extensive organizational and administrative burdens. *See Yamada,* 786 F.3d at 1196n.7; *VRLC-II,* 758 F.3d at 139; *Worley,* 717 F.3d at 1242, 1244, *followed in Justice,* 771 F.3d at 1297; *McKee,* 649 F.3d at 54, 56. These holdings are incorrect. *Citizens United's* condemnation of political-committee burdens applies not only to speech bans and other limits but also to the organizational and administrative burdens that law imposes on the organization itself when it must *be* a political committee or a political-committee-like organization. *Barland-II,* 751 F.3d at 840; *Sampson v. Buescher,* 625 F.3d 1247, 1255 (10th Cir.2010).

Since *Citizens United,* the U.S. Supreme Court has held that although "burdens" and "bans" differ, "the 'distinction between [them] is but a matter of degree' and … 'content-based[35] burdens must satisfy the same rigorous scrutiny[36] as … content-based bans.' Lawmakers

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[35] Which political-speech law is as a matter of law. *Supra* 44n.17.

[36] The scrutiny *level* does not affect the result here. *Infra* 74-75.

may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2664 (2011) (internal citations omitted).

Thus, government "does not alleviate the First Amendment problems" with a "speech" "ban" by allowing organizations to "speak[,]" while triggering PAC or PAC-like "burdens[]" for them. *Citizens United,* 558 U.S. at 337.

2. The *Buckley* major-purpose test applies to state law.

a. Texas law triggers PAC and PAC-like burdens for many organizations that in *no* constitutional way are political committees.

Applying constitutional scrutiny, the U.S. Supreme Court has established the two-track system under which government may regulate[37] political speech.

Under **Track 1,** *Buckley* allows government to trigger PAC or PAC-like organizational and administrative burdens only for "organizations" that are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates. 424 U.S. at

[37] *I.e.,* require disclosure of, which differs from "limit." *Supra* 30n.7.

79.[38] Even if organizations have the *Buckley* major purpose, government still may not trigger such burdens if the organizations engage in only small-scale speech. *See Sampson,* 625 F.3d at 1249, 1251, 1261, *cited in Justice,* 771 F.3d at 295, *and Worley,* 717 F.3d at 1250.[39]

Under **Track 2,** even when government may *not* trigger PAC or PAC-like burdens, the U.S. Supreme Court allows government to require attributions, disclaimers, and *non*-political-committee, *i.e.,* simple, one-time event-driven reports for independent expenditures properly understood, *Buckley,* 424 U.S. at 79-82,[40] and Federal Election Campaign Act ("FECA") electioneering communications, *Citizens United,* 558 U.S. at 366-71.[41] *Barland-II,* 751 F.3d at 836-37, 841.

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[38] For ballot-measure – which Texas simply calls "measure" – speech, see *infra* 72-73n.46.

[39] The *Sampson, Justice,* and *Worley* plaintiffs have the *Buckley* major purpose based on ballot-measure speech.

[40] *Supra* 30n.6.

[41] *Defined in McConnell,* 540 U.S. at 189-94.

However, Texas conflates **Tracks 1** and **2**. The challenged Texas law – rather than requiring constitutional, *non*-political-committee, *i.e.,* simple, one-time event-driven reports for organizations such as KSP – requires them to register, keep records, and file extensive, ongoing reports.

Why are *Buckley* and *Sampson* crucial under **Track 1**?

Political committees, political-committee-like organizations, and political-committee-like funds/accounts "are expensive to administer and subject to extensive regulations." *Citizens United,* 558 U.S. at 337, *quoted in MCCL-III,* 692 F.3d at 872, *and Barland-II,* 751 F.3d at 823. Government may trigger far greater burdens for them than for other organizations. *See MCFL,* 479 U.S. at 251-56&nn.6-9, *cited/quoted in Barland-II,* 751 F.3d at 840.

Such law chills many organizations' speech, because their speech is "simply not worth it." *Id.* at 255, *quoted in Barland-II,* 751 F.3d at 840.[42] Other organizations engage in their speech and either comply with such law while seeking an injunction so that compliance is no

[42] Thus, notwithstanding RESP.3, requiring organizations to *be* political committees to speak *can* affect their ability to speak.

longer necessary, *Yamada,* 786 F.3d at 1186, 1196, or face enforcement/prosecution. SECOND OP. at 2-3.

In any event: To counter as-applied and facial overbreadth, *Barland-II,* 751 F.3d at 839; *see MCFL,* 479 U.S. 252n.6, 262,[43] *Buckley* allows **Track 1** law to reach only "organizations" that "are by definition, campaign related." 424 U.S. at 79. *Buckley* protects organizations "engag[ing] purely in issue discussion[,]" *id.,* plus other *non*-major-purpose organizations, including those making contributions or engaging in express advocacy, *IRLC-II,* 717 F.3d at 581; *MCCL-III,* 692 F.3d at 867; *NCRL-III,* 525 F.3d at 277-78, and even including for-profit organizations. *MCCL-III,* 692 F.3d at 867.

Under **Track 1,** "the major[-]purpose" test, *MCFL,* 479 U.S. at 252n.6 (quoting *Buckley,* 424 U.S. at 79), asks whether organizations articulate in their organizational documents, *see id.* at 241-42, 252n.6, or in their "public statements[,]" *FEC v. GOPAC, Inc.,* 917 F.Supp. 851, 859 (D.D.C. 1996), that they have the *Buckley* major purpose or devote the *major*ity of their spending to contributions to candidates, or

[43] "Overbreadth" applies to both as-applied and facial claims. *E.g., ARLC,* 441 F.3d at 785.

independent expenditures properly understood.[44] *See IRLC-II,* 717 F.3d at 584 (quoting *CRLC,* 498 F.3d at 1152 (citing/quoting, in turn, *MCFL,* 479 U.S. at 252n.6, 262), *followed in NMYO,* 611 F.3d at 678.[45,46,47]

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[44] Noncoordinated *Buckley* express advocacy. *Supra* 30n.6. The "'appeal[-]to[-]vote' test" – once known as the "functional equivalent of express advocacy" – *Citizens United,* 558 U.S. at 335 (quoting *WRTL,* 551 U.S. at 470), is *not* a form of express advocacy. Under *WRTL-II,* 551 U.S. at 474n.7 ("this test is only triggered if the speech" is a FECA electioneering communication "in the first place"), the appeal-to-vote test applied only to FECA electioneering communications, *NCRL-III,* 525 F.3d at 282; *Colo. Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1257-58 (Colo.2012), which by definition are not express advocacy, because they are not expenditures/independent expenditures. *Del. Strong Families v. Denn,* 793 F.3d 304, 311 (3d Cir.2015) ("*DSF*") (citing 52 U.S.C. 30104(f)(3)(B)(ii)). Only expenditures/independent expenditures are express advocacy. *Buckley,* 424 U.S. at 44&n.52, 80. Indeed, one point of regulating FECA electioneering communications was for **Track 2** law to reach beyond express advocacy. *McConnell,* 540 U.S. at 189-94.

After *Citizens United,* the appeal-to-vote test no longer even affects whether government may ban, otherwise limit, or regulate speech. *See* 558 U.S. at 324-26, 365-66, 368-69 (holding that government may *not ban or otherwise limit* FECA electioneering communications that *are* the functional equivalent, and holding that government may *regulate* FECA electioneering communications that are *not* the functional equivalent); *DSF,* 793 F.3d at 308 (quoting *Citizens United,* 558 U.S. at 368); *VRLC-II,* 758 F.3d at 132 (quoting *Citizens United,* 558 U.S. at 369). *Citizens United* thereby "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution. *McKee,* 649 F.3d at 69.

Moreover:

●Under *WRTL-II,* the appeal-to-vote test is vague as to speech *other than* FECA electioneering communications. *See* 551 U.S. at 474n.7 (answering a charge that "our test" is "impermissibly vague" partly by saying "this test is only triggered if the speech" is a FECA electioneering communication "in the first place"). Elsewhere the test "might ... create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech. *Colo. Ethics,* 269 P.3d at 1258 (citing *WRTL-II,* 551 U.S. at 468-69), and

●After *Citizens United,* what remains from *WRTL-II* regarding the test is the conclusion that the test is unconstitutionally vague, even *vis-à-vis* FECA electioneering communications. 551 U.S. at 492-94 (Scalia, J., concurring).

[45] Once it *is* constitutional to trigger **Track 1,** PAC or PAC-like burdens for an organization, government may, subject to further inquiry, *see, e.g., Buckley,* 424 U.S. at 74 ("threats, harassment, or reprisals"), require disclosure of all income and spending by the organization, *see Citizens United,* 558 U.S. at 338 (citation omitted), not just, *e.g.,* contributions made and independent expenditures properly understood.

However, in determining *constitutionality,* one applies the major-purpose test properly understood.

The *McKee/CJF/GMF* express-advocacy/issue-advocacy discussion, *McKee,* 649 F.3d at 54-55; *Comm. for Justice & Fairness v. Bennett,* 332 P.3d 94, 104-05 (Ariz. App. Div.1 2014) ("*CJF*"), *review denied* (Ariz. Apr. 21, 2015); *GMF,* 86 A.3d at 991, 994, is a strawman that misses, *inter alia,* these points.

[46] Because no ballot-measure – which, again, Texas simply calls "measure" – speech is at issue here, it is unnecessary to consider whether such speech allows government to trigger PAC or PAC-like

Organizations such as KSP are like the *NMYO,* 611 F.3d at 678, plaintiffs. They present the easy case under the *Buckley* major-purpose test, because they make neither contributions nor independent expenditures properly understood.

By reaching beyond *Buckley,* Texas law triggers PAC and PAC-like burdens for many organizations that – unlike some other organizations, *see Ariz. Free Enter. Club's Freedom PAC v. Bennett,* 131 S.Ct. 2806, 2813 (2011) ("*AFEC*") – are in *no* constitutional way political committees.

The *Buckley* tests go to the tailoring part of constitutional scrutiny, *Barland-II,* 751 F.3d at 841-42; *Buckley v. Valeo,* 519 F.2d

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burdens. Alternatively, this is a *facial* challenge, Texas law reaches such speech, *supra* 49-53, and the *Buckley* major-purpose test asks whether organizations devote the majority of their spending to contributions to candidates or ballot measures, or independent expenditures properly understood for candidates or ballot measures. *Cf. Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1101n.16 (9th Cir.2003) ("*CPLC-I*") (quoting *MCFL,* 479 U.S. at 252-53); *id.* at 1102-04 (addressing "express ballot-measure advocacy").

[47] Whether organizations are incorporated, RESP.2-3, is irrelevant here. Whether persons can vote, RESP.2, is also irrelevant, 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,* 12 S.W.3d at 47-48&n.23.

821, 869 (D.C. Cir.1975) (*en-banc*), *aff'd/rev'd on other grounds,* 424 U.S. 1 (1976); *see Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1008-12 (9th Cir.2010) ("*HLW*") (addressing – under "Tailoring Analysis" – an *HLW*-created "a priority"-"incidentally" test, a watered-down substitute for the major-purpose test), *cert. denied,* 562 U.S. 1217 (2011), *followed in Yamada,* 786 F.3d at 1198-1200, not the government-interest part, which *Buckley* describes elsewhere. 424 U.S. at 66-68.[48]

Because Texas's political-committee, SPC, and GPC definitions trigger PAC and PAC-like burdens beyond *Buckley*, the definitions fail constitutional scrutiny under the First Amendment, even under substantial-relation exacting scrutiny. *See Barland-II,* 751 F.3d at 840-42; *NMYO,* 611 F.3d at 676.

However, "strict scrutiny" *should* "apply[.]" *MCCL-III,* 692 F.3d at 875 (holding for the plaintiffs-appellants under substantial-relation

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[48] Respondents miss this point by citing *government interests* in triggering PAC or PAC-like burdens here. *See* RESP.2-3.

Notwithstanding RESP.14, *Buckley* does not allow government to trigger PAC or PAC-like burdens for all "those involved in politics" (whatever Respondents might mean by that).

exacting scrutiny). This is because PAC and PAC-like status substantially "burden[s]" speech, *AFEC,* 131 S.Ct. at 2817 (quoting/citing *Citizens United,* 558 U.S. at 340; *MCFL,* 479 U.S. at 256), with "onerous" **Track 1** requirements that *Citizens United* describes and which extend beyond **Track 2,** *non*-political-committee, one-time event-driven reporting.[49]

Regardless of the scrutiny level, such laws are *facially* unconstitutional. *NCRL-III,* 525 F.3d at 287-90.

> The number of as-applied challenges necessary to remedy the over-breadth and vagueness of [Texas law] would involve many different lawsuits and litigation that would take years to conclude. In the meantime, political speakers would be left at sea, and, worse, subject to the prospect that the [s]tate's view of the acceptability of the speaker's point of view would influence whether or not administrative enforcement action was initiated. Nothing in *McConnell,*

[49] *Supra* 55-56.

> *WRTL[-II],* or any First Amendment tradition that we know of forces political speakers to incur these sorts of protracted costs to ascertain nothing more than the scope of the most basic right in a democratic society – the right to engage in discussion of issues of unquestioned public importance.

Id. at 285.

b. PAC and PAC-like burdens are not the "disclosure" that *Citizens United* approved.

Nevertheless, some appellate courts hold that the *Buckley* major-purpose test does not apply to state law. At the heart of these holdings is the belief that *Citizens United's* approval of **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reports, 558 U.S. at 366-71, permits *state* governments – for the sake of disclosure/transparency/information – to trigger **Track 1,** PAC or PAC-like burdens for organizations that either lack the *Buckley* major purpose, *Yamada,* 786 F.3d at 1197-98, 1200-01 (following *HLW*); *VRLC-II,* 758 F.3d at 125n.5, 135-36 (rejecting the *Buckley* major-

purpose test for state law); *McKee,* 649 F.3d at 55-59 (same);[50] *Vermont v. Green Mountain Future,* 86 A.3d 981, 989n.5, 994 (Vt.2013) ("*GMF*") (same); *Comm. for Justice & Fairness v. Bennett,* 332 P.3d 94, 103, 105, 107 (Ariz. App. Div.1 2014) ("*CJF*") (overlooking the *Buckley* major-purpose test), *review denied* (Ariz. Apr. 21, 2015); *Utter v. Bldg. Indus. Ass'n of Wash.,* 341 P.3d 953, 966-67 (Wash.2015) (equating "primary" with "major," which is incorrect, because what is "primary" can be the plurality rather than the majority), *cert. denied,* 83 U.S.L.W. 3893 (U.S. Oct. 5, 2015) (No.14-1397), or have the *Buckley* major purpose but engage in only small-scale speech. *Corsi v. Ohio Elections Comm'n,* 981 N.E.2d 919, 925, 927 (Ohio App.2012) (addressing an organization with the *Buckley* major purpose, citing the FEC's we'll-know-it-when-we-see-it major-purpose test,[51] and rejecting a *Sampson* argument), *appeal not allowed,* 984 N.E.2d 29 (Ohio 2013), *cert. denied,* 134 S.Ct. 163 (2013).

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[50] *Followed in Nat'l Org. for Marriage, Inc. v. Me. Comm'n on Gov't'l Ethics & Election Practices,* No.BCD-15-525, ____A.3d____, Order at 17n.10, 2015-WL-4622818 (Me. Aug. 4, 2015), *available at* http://courts.maine.gov/opinions_orders/supreme/lawcourt/2015/15me103no.pdf.

[51] *See Real Truth About Abortion, Inc. v. FEC,* 681 F.3d 544, 556-58 (4th Cir.2012), *cert. denied,* 133 S.Ct. 841 (2013), *followed in Free Speech v.*

Two other appellate courts – addressing organizations that have the *Buckley* major purpose and unsuccessfully assert they engage in only small-scale speech – cite *Citizens United* pages *366-71* to allow state governments – for the sake of disclosure/transparency – to trigger PAC and PAC-like burdens. *Justice,* 771 F.3d at 296-97; *Worley,* 717 F.3d at 1243-46, 1249.

However, *Citizens United* pages *366-71* do *not* apply here, because the reporting they address/support is only **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reporting. *Citizens United,* 558 U.S. at 369 (recalling that such **Track 2** "disclosure is a less restrictive alternative to more comprehensive [**Track 1**] regulations of speech" (citing *MCFL,* 479 U.S. at 262 (holding, in turn, that the "state interest in disclosure … can be met in a manner less restrictive than imposing the full panoply of [**Track 1**] regulations that accompany status as a political committee" and that if an organization's

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FEC, 720 F.3d 788, 797-98 (10th Cir.2013), *cert. denied,* 134 S.Ct. 2288 (2014). Three appellate courts cite *Citizens United* pages *366-71* in upholding *federal* law triggering political-committee burdens. *SpeechNow,* 599 F.3d at 696, *followed in Real Truth,* 681 F.3d at 548-49, *followed in Free Speech,* 720 F.3d at 790 n.1, 793.

"independent spending bec[a]me so extensive that the organization [had the *Buckley*] major purpose ... , the [organization] would be classified as a political committee" (citing, in turn, *Buckley,* 424 U.S. at 79))));
Barland-II, 751 F.3d at 824, 836-37, 839, 841, *superseding Ctr. for Individual Freedom v. Madigan,* 697 F.3d 464, 477, 482, 484, 488-91, 498 (7th Cir.2012); *MCCL-III,* 692 F.3d at 875n.9; *but see IRLC-II,* 717 F.3d at 589-91 (not following *MCCL-III* as circuit precedent in this respect).

Some appellate courts cite *Citizens United* pages *366-71* and seize on the statement that "disclosure requirements … 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" 558 U.S. at 366 (internal citations omitted). *See Yamada,* 786 F.3d at 1202 (addressing disclaimers); *Worley,* 717 F.3d at 1242-43; *McKee,* 649 F.3d at 56; *GMF,* 86 A.3d at 994; *Corsi,* 981 N.E.2d at 923, 925; *CJF,* 332 P.3d at 103.[52]

But under *pre-* and *post-Citizens United* decisions, a political-committee law need *not* ban or otherwise limit political speech to be

[52] *Accord Free Speech,* 720 F.3d at 792; *Real Truth,* 681 F.3d at 549; *SpeechNow,* 599 F.3d at 696 (each addressing federal law).

unconstitutional. *See AFEC,* 131 S.Ct. at 2816-17&n.5; *Buckley,* 424 U.S. at 79.

Further, even *if* the major-purpose test were a narrowing gloss for *federal* law, *VRLC-II,* 758 F.3d at 136; *Madigan,* 697 F.3d at 487&n.23 (citing *McKee,* 649 F.3d at 59;[53] *HLW,* 624 F.3d at 1009-10), *superseded, Barland-II,* 751 F.3d at 839, the test would still apply as a constitutional principle to *state* law. *See Barland-II,* 751 F.3d at 811, 842; *IRLC-II,* 717 F.3d at 583-84; *MCCL-III,* 692 F.3d at 872 (collecting authorities); *CRLC,* 498 F.3d at 1153-55 (noting, *inter alia,* that *McConnell* did not change the test).

c. The *Buckley* major-purpose test continues to apply to state law.

The *Buckley* major-purpose test applied to state law *pre-Citizens United. NCRL-III,* 525 F.3d at 287-90; *CRLC,* 498 F.3d at 1153-55; *Fla. Right to Life, Inc. v. Lamar,* 238 F.3d 1288, 1289 (11th Cir.2001) ("*FRTL-I*").[54] And it applies to state law *post-Citizens United. Barland-*

[53] *Followed in GMF,* 86 A.3d at 989n.5.

[54] *Aff'g Fla. Right to Life, Inc. v. Mortham,* No.98-770CIVORL19A, 1999-WL-33204523, *4 (M.D.Fla. Dec. 15, 1999) (unpublished) (explaining what the Eleventh Circuit later adopts).

II, 751 F.3d at 834, 839-40, 842, *superseding Madigan,* 697 F.3d at 487&n.23; *MCCL-III,* 692 F.3d at 872; *NMYO,* 611 F.3d at 677-78; *cf. IRLC-II,* 717 F.3d at 593-601 (applying the *Buckley* major-purpose test to PAC-like burdens except registration); *accord Worley,* 717 F.3d at 1252&n.7 (discussing the *Buckley* major-purpose test while addressing an organization that *has* the *Buckley* major purpose).

Otherwise, state governments would have much greater power to suppress political speech in state elections than does the federal government in federal elections. But political speech needs protection from both federal and state governments. *See Am. Tradition P'ship v. Bullock,* 132 S.Ct. 2490, 2491 (2012); *McDonald v. City of Chicago*, 561 U.S. 742, 765, 786-87 (2010) (rejecting "watered-down" "standards" for state governments under "the Bill of Rights" (citations omitted)).

Although the major-purpose test standing alone can "yield[different] results" for "small group[s]" with the *Buckley* major purpose than for "mega-group[s]" lacking it, *Madigan,* 697 F.3d at 489 (quoting *McKee,* 649 F.3d at 59[55]), the major-purpose test does *not* stand alone:

[55] *Quoted in Utter,* 341 P.3d at 966, *and cited in Yamada,* 786 F.3d at 1200.

It is unconstitutional to trigger **Track 1,** PAC or PAC-like burdens for organizations *with* the *Buckley* major purpose but only small-scale speech. *See Sampson,* 625 F.3d at 1249, 1251, 1261, *cited in Justice,* 771 F.3d at 295, *and Worley,* 717 F.3d at 1250.[56]

Parallel to the *Buckley* tests,[57] this supplemental step goes to the tailoring part of constitutional scrutiny. *Canyon Ferry Road Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033-34 (9th Cir.2009).

3. The court of appeals errs in rejecting the facial-overbreadth challenge to Texas law.

Because Texas's political-committee, SPC, and GPC, TEX. ELEC. CODE 251.001(12), (13), (14), trigger PAC and PAC-like burdens for organizations that are neither "under the control of" candidates, *Buckley,* 424 U.S. at 79, nor have *Buckley's* "major purpose[,]" the Texas

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[56] Perhaps because the *Sampson* and *Justice* plaintiffs *have* the *Buckley* major purpose and understandably do not raise the point, *Sampson* and *Justice* overlook the major-purpose test.

[57] *Supra* 73-74.

definitions are facially unconstitutional. *Id.; NCRL-III,* 525 F.3d at 287-90.

The court of appeals rejects Petitioners' facial-overbreadth challenge to these definitions, SECOND OP. at 27-28, even though the definitions mention nothing about being "under the control of a candidate" and lack "the major[-]purpose" test. *Buckley,* 424 U.S. at 79; *NCRL-III,* 525 F.3d at 287-90.

Rather, Texas reaches organizations with "a principal purpose" of accepting[58] contributions or making expenditures. SECOND OP. at 27 (quoting TEX. ELEC. CODE 251.001(12)). Yet "a principal purpose" – or even "the principal purpose" – is different from "the major purpose" under *Buckley, see NCRL-III,* 525 F.3d at 287-90, because "principal" means "first, highest, or foremost in importance, rank, worth, or degree; chief[,]" SECOND OP. at 27 (brackets omitted), while "major" in "the

[58] Other states also trigger PAC or PAC-like burdens partly based on contributions an organization accepts. However, notwithstanding *VRLC-II,* 758 F.3d at 138, the test for *constitutionality* considers contributions an organization *makes,* not contributions it *accepts*. *Supra* 70.

major-purpose test" means "majority."[59] What is "principal" is not necessarily the majority. *See id.*[60]

4. The court of appeals errs in rejecting the facial-vagueness challenge to Texas law.

The court of appeals' definition of "principal" in effect turns "a principal" in the statute, SECOND OP. at 27 (quoting TEX. ELEC. CODE 251.001(12)), into "the principal" and means that organizations without

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[59] *Supra* 70.

[60] A 2014 TEC rule not at issue here, *supra* 51n.25, also reaches beyond the *Buckley* major-purpose test. *See* 1 TEX. ADMIN. CODE 20.1(20)(B)-(C) (defining "Principal purpose" by stating that "[a] group has a principal purpose of accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year" and stating the parallel for "political expenditures"), *available at* https://www.ethics.state.tx.us/rules/proposed_Aug_2015.html#Purpose.

In addition, the same rule states that "[a] group may have more than one principal purpose." *Id.* 20.1(20)(A). The Constitution, however, looks not to *a principal* but to *the major* purpose of an organization, and an organization can have only one major purpose. *See MCFL,* 479 U.S. at 252n.6 (referring to "the major purpose" of an organization and "its organizational purpose," not purposes).

The rule cited here has proposed, redlined amendments that a TEC staff member advised Petitioners on October 6, 2015, were *not* adopted at the TEC's October 5, 2015, meeting, because the TEC is revising and republishing them.

"the principal" purpose of accepting contributions or making expenditures need not comply with PAC or PAC-like burdens under Texas law. *See id.*

While this removes facial vagueness from "a principal" in the law, *see id.,* it does not resolve the facial *overbreadth* of the law. *See NCRL-III,* 525 F.3d at 287-90.[61]

Nor does it remove other vagueness. The SPC and GPC definitions are vague because they refer to "supporting or opposing" candidates or measures. TEX. ELEC. CODE 251.001(13), (14); *see WRTL-II,* 551 U.S. at 493 (Scalia, J., concurring) (calling the appeal-to-vote test vague and saying it "seem[s] tighter" than, *inter alia,* promote-support-attack-oppose in federal law); *Ctr. for Individual Freedom v. Carmouche,* 449 F.3d 655, 663-66 (5th Cir.2006) (upholding "for the purpose of supporting, opposing, or otherwise influencing the

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[61] The court of appeals holds the 30- and 60-day blackout periods are not at issue here. SECOND OP. at 28-29.

Addressing Petitioners' Eighth Amendment challenge, the court of appeals holds Respondents are not entitled to seek criminal penalties. *Id.* at 30.

Petitioners seek no review of these points here.

nomination or election of a person to public office" after holding it reaches only *Buckley* express advocacy), *cert. denied,* 549 U.S. 1112 (2007); *NCRL-III,* 525 F.3d at 289, 301 (approving "support or oppose" when – after *id.* at 281-86 – its reaches only *Buckley* express advocacy); *but see McConnell,* 540 U.S. at 170n.64 (rejecting a *pre-Carmouche* facial-challenge to promote-support-attack-oppose in federal law).

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

Respondents allege Petitioners have made illegal contributions. SECOND OP. at 2.[62]

"Campaign contribution" is defined 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." TEX. ELEC. CODE 251.001(3) (emphasis added).

Notwithstanding SECOND OP. at 24, this is facially unconstitutional.

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[62] Respondents essentially say 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.

This definition is circular: 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). To put it mildly, a "definition is not especially helpful" when it is "circular." *Bilski v. Kappos,* 561 U.S. 593, 622 (2010).[63]

Furthermore, the campaign-contribution definition is intent based, contrary to *WRTL-II,* 551 U.S. at 466-69. An intent-based test affords "no security for free discussion" and "blankets with uncertainty whatever may be said." *Id.* at 467-68. "It compels the speaker[s] to hedge and trim," and places the speakers "wholly at the mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [their] intent and meaning." *Buckley*, 424 U.S. at 43 (addressing vagueness).[64]

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[63] 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.

[64] Respondents see no problem with basing such law on speakers' intent. *See* RESP.15-16. But the U.S. Supreme Court *does* see such a problem.

Section 251.001(5) then defines a "political contribution" as "a campaign contribution or an officeholder contribution." Since the campaign-contribution definition is vague, the political-contribution definition is also vague.[65]

The campaign-contribution and political-contribution definitions are significant here, because they are part of Texas law triggering PAC and PAC-like burdens,[66] and because Respondents allege Petitioners have made illegal contributions.

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

Texas bans corporate and union contributions. TEX. ELEC. CODE 253.091, 253.094:

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

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[65] Petitioners seek no review of other points regarding the contribution and expenditure definitions here. *See* SECOND OP. at 21-24.

[66] *Supra* 49-53.

> (b) A corporation or labor organization may not make a political contribution in connection with a recall election, including the circulation and submission of a petition to call an election.
>
> (c) A person who violates this section commits an offense. An offense under this section is a felony of the third degree.

Id. 253.094.

> This subchapter applies only to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation.

Id. 253.091.

The ban's applying to both corporations and unions resolves Petitioners' Equal Protection challenge, SECOND OP. at 20, yet Petitioners' First Amendment corporate-contribution-ban challenge remains.[67] The court of appeals rejects this challenge, *id.,* by relying on *Ellis,* which relies on *Beaumont*. SECOND OP. at 20.

Although *Beaumont* upholds a corporate-contribution ban, 539 U.S. at 152-63, while *Citizens United* rejects an independent-spending ban, 558 U.S. at 336-66, *post-Beaumont* U.S. Supreme Court opinions undercut *Beaumont*.[68] *See MCCL-III,* 692 F.3d at 879 (following *Beaumont*):

> *Citizens United*'s outright rejection of the government's anti-distortion rationale, *see Citizens United,* 558 U.S. at [349-

[67] A holding that the corporate-contribution ban is facially unconstitutional under the First Amendment would apply to the union-contribution ban as well. Otherwise, Texas law – by treating corporate and union contributions differently – would violate the Equal Protection Clause. *See Dallman v. Ritter,* 225 P.3d 610, 634-35 (Colo.2010).

[68] The U.S. Supreme Court has declined to consider this point absent a split among appellate courts, which have followed *Beaumont* absent the U.S. Supreme Court's considering this point. *E.g.,* SECOND OP. at 20; *IRLC-II,* 717 F.3d at 601.

> 50], as well as the Court's admonition "that the State cannot exact as the price of [state-conferred corporate] advantages the forfeiture of First Amendment rights," *id.* at [351] (quoting *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)) (internal quotation marks omitted), casts doubt on *Beaumont,* leaving its precedential value on shaky ground. *See also Beaumont,* 539 U.S. at 164-65 (Thomas, J., dissenting) (explaining his belief that all campaign finance laws are subject to strict scrutiny and the federal ban on corporate contributions was "not narrowly tailored to meet any relevant compelling interest"); *id.* at 164 (Kennedy, J., concurring) ("Were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' dissenting opinion.").

MCCL-III, 692 F.3d at 879n.12 (first and third alterations added; second alteration in original), *quoted in IRLC-II,* 717 F.3d at 601.

Addressing a federal district-court order striking down a corporate contribution ban, *Giant Cab Co. v. Bailey,* No.13-cv-00426-MCA/ACT, FINDINGS OF FACT & CONCLUSIONS OF LAW 7-8¶¶8-9 (D.N.M. Sept. 4, 2013),[69] *appeal dismissed,* 781 F.3d 1240 (10th Cir.2015) (holding the intervenor-appellant lacked standing to appeal), a leading Democrat,

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[69] *Available at* http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0005525024-0000000000. Pages 7-8¶¶8-9 of *Giant Cab* address contributions by both corporations and government contractors and hold:

> Unless and until the City Council develops an evidentiary record demonstrating (1) a likelihood that there is a perception among Albuquerque voters that corporate campaign contributions lead to "pay to play" corruption or that corporate contributions are employed to circumvent individual contribution limits and (2) that there is a close fit between a complete ban on corporate contributions and the stated goals of reducing the perception among voters of "pay to play" corruption and preventing circumvention of individual contribution limits, §4(f)'s ban on corporate campaign contributions cannot be sustained in the face of a First Amendment challenge.
>
> The portion of Article XIII, § 4(f) providing that "[n]o candidate shall accept a contribution in support of the candidate's campaign from any corporation, limited liability company, firm, partnership, joint stock company or similar business entity or any agent making a contribution on behalf of such a business entity" violates the First Amendment. when [*sic*] applied to business corporations such as Giant Cab.

prominent election lawyer, and former White House counsel to President Barack Obama notes that *Beaumont* – which relies on *Austin,* which *Citizens United* in turn overrules, 558 U.S. at 365 – compares "poorly" to *Citizens United:*

> Reading *Beaumont* today, one is struck by a jurisprudence that measures up poorly to the tone and substance of *Citizens United*. ... [*Beaumont*] upheld a contributions ban with emphasis on the "special characteristics of the corporate structure." [539 U.S.] at 153, quoting *National Right to Work Committee v. [FEC],* 457 U.S. 197[,] 209 (1982). Ten times, [Justice] Souter cited *Austin* ... , and in upholding legislative authority to impose a complete contributions ban, he specifically cites the anti-distortion rationale of *Austin* that the *Citizens United* majority has rejected. *Beaumont* at 158 (the corporations enjoying the "special benefits conferred by the corporate structure ... present the potential for distorting the political process.")[. Justice] Souter also relied heavily on *National Right to Work*

Committee, which rested largely on a view of the particular dangers posed by corporations of any and all sizes to the political process. *Beaumont* at 156 ("*National Right to Work* all but decided the issue" before the Court).

Robert Bauer, *Breaking Bad in Albuquerque? Or: the Question of Corporate Contributions After Citizens United,* More Soft Money Hard Law (Sept. 12, 2013).[70]

Post-Beaumont U.S. Supreme Court opinions undercut *Beaumont* in seven ways.

First, the anti-distortion rationale and interest on which *Beaumont* relies*, see* 539 U.S. at 154, 158, 160, is invalid after *Citizens United,* 558 U.S. at 349-56.

Second, *Beaumont* looks beyond preventing *quid-pro-quo* corruption (or its appearance) to preventing "undue influence" (or its "appearance"), 539 U.S. at 156 (citation omitted), but after *Citizens*

[70] *Available at* http://www.moresoftmoneyhardlaw.com/2013/09/breaking-bad-in-albuquerque-or-the-question-of-corporate-contributions-after-citizens-united.

United, the only cognizable interest in banning or otherwise limiting speech, including contributions, is preventing *quid-pro-quo* corruption (or its appearance). *McCutcheon,* 134 S.Ct. at 1441 (quoting *Citizens United,* 558 U.S. at 359).

Third, *Beaumont* looks to the dissenting-shareholder-protection rationale, 539 U.S. at 154, which is invalid after *Citizens United,* 558 U.S. at 361-62.

Fourth, *Beaumont's* assertion that First Amendment burdens of a corporate-contribution ban are diminished because "individual members of corporations" are "free to make their own contributions," 539 U.S. at 161n.8, conflicts with *WRTL-II's* holding that alternatives do not fix First Amendment problems. Suggesting alternatives is like telling Cohen to wear another jacket. *See* 551 U.S. at 477n.9 (citing *Cohen v. California,* 403 U.S. 15 (1971)[71]). And banning joint activity because

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[71] *Cohen,* a Vietnam era decision, holds that Paul Robert Cohen had a First Amendment right to wear a jacket saying "____ the Draft" in a courthouse. 403 U.S. at 16-26. *WRTL-II* relies on *Cohen:*

> we disagree with the dissent's view that corporations can still speak by changing what they say to avoid mentioning candidates, *post,* at 2702-2703. That argument is akin to telling Cohen that he cannot wear his jacket because he is

individual activity is available vitiates the right of "like-minded persons to pool their resources in furtherance of common political goals[,]" *Buckley,* 424 U.S. at 22, both in an incorporated association and with a chosen candidate or political committee.

Fifth, *Beaumont* suggests "[t]he PAC option allows corporate political participation" by allowing a corporation to make contributions "through its PAC[.]" 539 U.S. at 163. But under *Citizens United,* a political committee that an organization *forms/has* is "separate" from the organization and "does not allow" the organization "to speak." An organization does not "speak" through a political committee that it *forms/has.* 558 U.S. at 337.[72] And under *McCutcheon,* contributions

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> free to wear one that says "I disagree with the draft," *cf. Cohen v. California,* 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, *cf. 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). Such notions run afoul of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian [&] Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573 (1995).

551 U.S. at 477n.9.

[72] *Supra* 53n.27.

are "speech[.]" 134 S.Ct. at 1452 (citing *Playboy Entm't,* 529 U.S. at 816).

Sixth, as for preventing circumvention of valid contribution bans and other limits, *Beaumont,* 539 U.S. at 155 (citation omitted), "valid" is the key word, *id.,* because government may prevent "circumvention," but *not* with otherwise *un*constitutional law; preventing "circumvention" cannot justify otherwise unconstitutional law. *McCutcheon,* 134 S.Ct. at 1452-60; *Republican Party of N.M. v. King,* 741 F.3d 1089, 1102 (10th Cir.2013) ("*RPNM*") ("there can be no freestanding anti-circumvention interest").

> The fact that "speakers find ways to circumvent campaign-finance laws" does not mean preventing circumvention can justify otherwise *un*constitutional law. Otherwise, government could justify limits on contributions to one's own campaign, banning contributions by minors, unconstitutional *Randall v. Sorrell*-like limits, or aggregate contribution limits by somehow preventing "circumvention"

> of the same or other limits. This is contrary to the principle that contribution limits must rise or fall on their own merits.
>
> To put it another way: on the one hand, when law *is* constitutional, there is nothing wrong with *legally* circumventing it; however, there *is* something wrong with *il*legally circumventing it. This is the difference between avoiding and evading taxes – avoiding taxes is legal, while evading them is not. On the other hand, when a court enjoins *un*constitutional law, government may not enforce it, and there is nothing wrong with circumventing it.

James Bopp, Jr., Randy Elf & Anita Y. Milanovich, *Contribution Limits After McCutcheon v. FEC,* 49 VAL.U.L.REV. 361, 367-68 (2015) (emphasis in original) (brackets and footnotes omitted).

Seventh, *Beaumont* expressly defers to a legislature. 539 U.S. at 157, 159, 162n.9. But under *Citizens United,* the First Amendment overrides deference: "When [a legislature] finds that a problem exists,

we must give that finding due deference; but [a legislature] may not choose an unconstitutional remedy." 558 U.S. at 361.[73]

Besides, *Beaumont* does not *facially* uphold a corporate-contribution ban. Rather, it upholds a corporate-contribution ban *as applied* to an *MCFL* corporation. 539 U.S. at 152-63. So even if *post-Beaumont* U.S. Supreme Court opinions did not undercut *Beaumont* – and they do – *Beaumont* would not apply to Petitioners' *facial* challenge. This is because under Test **(2)**,[74] speech law can be constitutional *as applied* to a particular speaker and still be *un*constitutional *facially* when "a substantial number of [the law's] applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Stevens,* 559 U.S. at 473 (quoting *Wash.*

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[73] Respondents assert the "constitutionality" of "disclosure requirements" "necessarily means" contribution bans and other limits are "constitutionally permissible" as well. RESP.17. But that does not follow, because the government interest necessary to regulate – *i.e.,* require disclosure of, *supra* 30n.7 – 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)).

[74] *Supra* 34-35.

State Grange, 552 U.S. at 449n.6), *quoted in Voting for Am.,* 732 F.3d at 387; *see United States v. Danielczyk,* 791 F.Supp.2d 513, 516-19 (E.D.Va. 2011), *rev'd,* 683 F.3d 611, 616 (4th Cir.2012), *cert. denied,* 133 S.Ct. 1459 (2013).

In sum, although *Beaumont* upholds a corporate-contribution ban, 539 U.S. at 152-63, "[s]till, there are other, more instructive precedents. Th[e U.S. Supreme] Court's cases have expressed constitutional principles of broader reach." *Obergefell v. Hodges,* 135 S.Ct. 2584, 2598 (2015). Because these later cases undercut *Beaumont,* this Court should follow the later cases, not *Beaumont*. *See id.* at 2605, 2608.[75] Under the First Amendment, organizations' being incorporated cannot

[75] *Obergefell,* 135 S.Ct. at 2605, 2608, overrules *Baker v. Nelson,* 409 U.S. 810 (1972), reverses an appellate decision following *Baker,* and sides with *other* appellate courts that – by reaching the same result as *Obergefell* – had followed neither *Baker* nor the *Agostini v. Felton* admonition that "if a precedent of this Court [such as *Baker*] has direct application in a case [such as *Obergefell*], yet appears to rest on reasons rejected in some other line of decisions, the [c]ourt of [a]ppeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 521 U.S. 203, 237 (1997) (brackets omitted) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,* 490 U.S. 477, 484 (1989)).

deprive them of the right to contribute. "No longer may this liberty be denied to them." *Id.* at 2605.

Therefore, Texas's corporate-contribution ban fails constitutional scrutiny under the First Amendment, even under "closely[-]drawn" exacting scrutiny. *McCutcheon,* 134 S.Ct. at 1445-46. Regardless of whether strict scrutiny or closely-drawn exacting scrutiny applies, the Court "must assess the fit between [any] stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *Id.* (internal citations omitted).

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective."

Id. at 1456-57 (ellipses omitted) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989)). "Because [there is] a substantial mismatch between [any] stated objective and the means selected to achieve it, [Texas's corporate-contribution ban] fail[s] even under the 'closely[-]drawn' test." *Id.* at 1446.

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

The court of appeals rejects Petitioners' facial-overbreadth and facial-vagueness challenges to Texas's private-right-of-action provisions. SECOND OP. at 14-17; TEX. ELEC. CODE 253.131, 253.132, 273.081.

1. Texas law allows private rights of action.

Texas law allows private rights of action:[76]

[76] 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.'" (emphasis in original).

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

(b) If the contribution or expenditure is in support of a candidate, each opposing candidate whose name appears on the ballot is entitled to recover damages under this section.

(c) If the contribution or expenditure is in opposition to a candidate, the candidate is entitled to recover damages under this section.

(d) In this section, "damages" means:

(1) twice the value of the unlawful contribution or expenditure; and

(2) reasonable attorney's fees incurred in the suit.

(e) Reasonable attorney's fees incurred in the suit may be awarded to the defendant if judgment is rendered in the defendant's favor.

TEX. ELEC. CODE 253.131.

(a) A corporation or labor organization that knowingly makes a campaign contribution to a political committee or a direct campaign expenditure in violation of Subchapter D is liable for damages as provided by this section to each political committee of opposing interest in the election in connection with which the contribution or expenditure is made.

(b) In this section, "damages" means:

(1) twice the value of the unlawful contribution or expenditure; and

(2) reasonable attorney's fees incurred in the suit.

(c) Reasonable attorney's fees incurred in the suit may be awarded to the defendant if judgment is rendered in the defendant's favor.

Id. 253.132.

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.

Id. 273.081.

2. Texas's private-right-of-action provisions are unconstitutional.

Discovery can chill speech. *See Buckley,* 424 U.S. at 68. Texas's private-right-of-action provisions lack standards regarding what showing is necessary to initiate discovery and what is discoverable. But the First Amendment requires both. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-64 (1989); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir.), *cert. dismissed,* 559 U.S. 1118 (2010). If one can allege wrongdoing and then commence discovery to see whether one can prove the claim, then the protections of associational rights hardly have any meaning. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations"). Inadequate safeguards in enforcement proceedings threaten free speech. *See Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965). Because Texas's private-right-of-action provisions

do not delineate the showing necessary to seek discovery in an action, they violate the First Amendment.

Although *Osterberg* rejects a First Amendment challenge to the private-right-of-action provisions, 12 S.W.3d at 49-50, *Osterberg* considers only "*who* can seek and receive damages." *Id.* at 49 (emphasis in original). In addition, *Osterberg* considers that a political speaker will be subject to only one enforcement proceeding. *See id.* ("that the person enforcing the law and receiving damages can be a private party *rather than* the State" (emphasis added)). However, Texas law allows an unlimited number of private parties to sue. *See* TEX. ELEC. CODE 253.131 ("each opposing candidate"), 253.132 ("each political committee"). Each candidate may sue a speaker who violates the law. *Id.* 253.131(b). If the speech at issue in this appeal were regarding one candidate, as in *Osterberg*, 12 S.W.3d at 35-36, there might be only one private claim. However, when many candidates are involved, many candidates may sue. Thus, *Osterberg* does not control here.[77]

[77] In addition, Texas can step in and seek a treble penalty. *See* TEX. ELEC. CODE 253.133.

Moreover, the lack of standards for discovery and initiating a suit, *see* TEX. ELEC. CODE 253.131, 253.132, 273.081, violates the Fourteenth Amendment's Due Process Clause. While the court of appeals recognizes that *Blum v. Yaretsky* holds the Due Process Clause "erects no shield against merely private conduct, however discriminatory or wrong[,]" SECOND OP. at 15 (quoting 457 U.S. 991, 1002 (1988)), *Blum* distinguishes actions where "the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." 457 U.S. at 1003. By undertaking a private right of action, private parties do what the state does, which leads to enforcement of the law. This is an imprimatur for state action. *See* TEX. ELEC. CODE 253.131, 253.132, 273.081. The court of appeals holds that the Due Process Clause applies only when there is state action, *see* SECOND OP. at 15, and when law "delegate[s] legislative power to private citizens[,]" *id.* at 15n.4, but the Due Process Clause also applies when the state gives individuals other powers as well,

including power to enforce existing law. *See Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 122 (1928).[78]

Prayer

The Court should reverse.

The court of appeals applied the wrong test for the facial constitutionality of speech law and wrongly presumed the challenged laws are constitutional.

Absent these errors, the court of appeals should have held the challenged laws are facially unconstitutional.

●Texas's political-committee, SPC, and GPC definitions trigger organizational and administrative burdens that are "onerous" under *Citizens United*. The challenged Texas law – rather than requiring constitutional, *non*-political-committee, *i.e.,* simple, one-time event-

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[78] The court of appeals holds that *Skinner v. Railway Labor Executives Association* forecloses Petitioners' Fourth Amendment challenge. *See* SECOND OP. at 15-16 (citing 489 U.S. 602, 624 (1989) (holding that the Fourth Amendment does not apply to a private party acting on its own initiative)). Notwithstanding RESP.21-22, Petitioners seek no review of this point here.

Petitioners similarly seek no review here of the holding that this law is not a prior restraint. SECOND OP. at 17-18.

driven reports for organizations such as KSP – requires them to register, keep records, and file extensive, ongoing reports.

Texas law is facially unconstitutional, because it triggers such burdens regardless of whether organizations are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley*. Even if organizations have the *Buckley* major purpose, government still may not trigger such burdens if the organizations engage in only small-scale speech.

In addition, the SPC and GPC definitions are vague, because they refer to "supporting or opposing" candidates or measures.

●Texas's campaign-contribution definition is facially unconstitutional, because it is circular and intent-based. Because the political-contribution definition depends on the campaign-contribution definition, the political-contribution definition is also facially unconstitutional.

●Texas's ban on corporate contributions is facially unconstitutional under the U.S. Supreme Court's *post-Beaumont* decisions in *WRTL-II*, *Citizens United,* and *McCutcheon*.

●Texas's private-right-of-action provisions are facially unconstitutional. They lack standards regarding what showing is necessary to initiate discovery and what is discoverable. But the First Amendment requires both. Furthermore, Texas's private-right-of-action provisions violate the Fourteenth Amendment's Due Process Clause.

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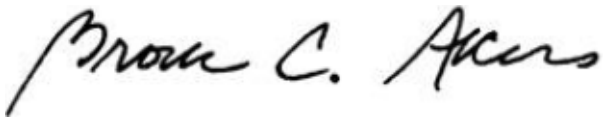

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October 9, 2015

Certificate of Compliance

I certify that this filing has 14,993 words not counting the parts exempt from the word count. *Cf.* TEX.R.APP.P. 9.4(i)(1), 9.4(i)(2)(B), 9.4(i)(3).

Randy Elf

October 9, 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 9th day of October 2015.

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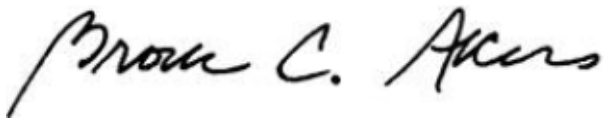

Brock C. Akers