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SUPREME COURT OF TEXAS
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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 in Reply

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Argument

By requiring an organization to be a political committee, and then either a specific-purpose committee ("SPC") or a general-purpose committee ("GPC"), *see* TEX. ELEC. CODE 251.001(12), (13), (14) (defining "Political committee[,]" SPC, and GPC), Texas triggers **Track 1,** registration, recordkeeping, and extensive, ongoing reporting for the organization. (PET'RS' BR. ON THE MERITS 55-62 ("PET'RS'-BR.55-62").)

Whether government may trigger such "onerous" organizational and administrative burdens, *Citizens United v. FEC,* 558 U.S. 310, 338-39 (2010), turns first on whether organizations are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley v. Valeo,* 424 U.S. 1, 79 (1976).[3] Even when organizations have the *Buckley* major purpose, government may not trigger such burdens for organizations engaging in only small-scale speech. *See Sampson v. Buescher,* 625 F.3d 1247, 1249, 1251,

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[3] For ballot-measure – which Texas simply calls "measure" – speech, see PET'RS'-BR.72-73n.46 (addressing the *Buckley* major-purpose test *vis-à-vis* measure speech).

1261 (10th Cir.2010), *cited in Justice v. Hosemann,* 771 F.3d 285, 295 (5th Cir.2014), *and Worley v. Detzner,* 717 F.3d 1238, 1250 (11th Cir.), *cert. denied,* 134 S.Ct. 529 (2013). (PET'RS'-BR.67-68.)[4]

Petitioner Texas King Street Patriots, Inc. ("KSP"), a group of Houston-area residents engaging in the political process, is a Texas non-profit corporation. To ensure free and fair elections, KSP assisted anyone interested – including Democrats and Republicans – in becoming a poll watcher. When poll watchers reported troubling observations, KSP focused on the integrity of voter rolls and prepared a report describing violations of law in Harris County. (PET'RS'-BR.25-28.)

KSP's counterclaim also describes weekly KSP meetings at which speakers discuss topics of interest to Houston-area concerned citizens. Politician-speakers are not to campaign at KSP events. (PET'RS'-BR.28.)

KSP is not under the control of any candidate(s), provides no indication that it is a political committee or a political-committee-like organization, and does not make or seek to make contributions or

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

independent expenditures properly understood under *Buckley*. (PET'RS'-BR.28, 29-30.)[5]

Nevertheless, Respondents assert KSP's speech suffices *under Texas law* – although *not* under the *Buckley* major-purpose test – to subject KSP to the full panoply of organizational and administrative burdens imposed on political committees, including SPCs and GPCs.

Although Respondents contend that KSP engaged in speech triggering political-committee and political-committee-like (sometimes called "PAC" and "PAC-like") burdens for KSP, such burdens chill many organizations' speech, thereby effectively killing the promise of *Citizens United,* 558 U.S. at 336-66, that they are free to speak. (PET'RS'-BR.31-33, 47-62, 69-70.)

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

Notwithstanding RESP'TS.' BR. 20 ("RESP'TS'-BR.20"),[6] nothing is "confusing" here.

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[5] Under the Constitution, "independent expenditure" means *Buckley* express advocacy that is not coordinated with a candidate. (PET'RS'-BR.30n.6.)

Petitioners present only facial challenges (PET'RS'-BR.22-23), and *United States v. Stevens* articulates two distinct tests for the facial constitutionality of a law. Test **(1)** is for the "typical facial attack," while Test **(2)** is for a law restricting or regulating speech. 559 U.S. 460, 472-73 (2010).

Test **(1)** asks whether "[**(1)(a)**] no set of circumstances exists under which [the law] would be valid," *id.* at 472 (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)), or whether the law **(1)(b)** lacks any "plainly legitimate sweep[.]" *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 740n.7 (1997) (Stevens, J., concurring)). However, "neither *Salerno* nor *Glucksberg* is a speech case." *Id.* (PET'RS'-BR.34-35.)

Test **(2)** – the *only* test, *see, e.g., Stevens,* 559 U.S. at 472-73, for facial-vagueness and facial-overbreadth challenges to *speech* law – asks whether the law "reaches a substantial amount of constitutionally protected conduct." *City of Houston v. Hill,* 482 U.S. 451, 458 (1987)

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[6] Texas Supreme Court filings in this action are available at http://www.search.txcourts.gov/Case.aspx?cn=15-0320&coa=cossup. (PET'RS'-BR.22n.3.)

(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, Test **(2)** asks whether "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. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449n.6 (2008)). (PET'RS'-BR.35-36 (brackets in original).)[7]

Nevertheless, the court of appeals initially and incorrectly says Tests **(1)(b)** and **(2)** are the alternative tests for the facial constitutionality of speech law. (PET'RS'-BR.39 (quoting SECOND OP. at 9, 459 S.W.3d 631 (Tex.App.-Austin 2014)).) Then, in *applying* its tests, the court of appeals incorrectly overlooks Test **(2)** except as to the contribution definitions. (PET'RS'-BR.39-40 (citing SECOND OP. at 14, 26, 24n.7).)

[7] *Stevens,* rather than presenting "three separate tests" (RESP'TS'-BR.9) presents two separate tests, **(1)** and **(2)**, and articulates Test **(1)** in two ways: **(1)(a)** and **(1)(b)**. (PET'RS'-BR.34-36.)

Notwithstanding RESP'TS'-BR.20, the court of appeals applied Test **(2)** nowhere else.

The court of appeals held that Petitioners lose on Test **(1)** and, except as to the contribution definitions, 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. (PET'RS'-BR.41.)

The court of appeals' holding that Test **(1)** applies to speech law simply *cannot* be right. For example, among the *Buckley* holdings are that speech law is 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. (PET'RS'-BR.38.)

●Respondents' assertion that Petitioners have waived arguments takes two forms (RESP'TS-BR.11-13), both of which Petitioners have addressed. (PET'RS'-BR.35n.8.)

The first form is that Petitioners did not assert in the court of appeals that only Test **(2)** applies to speech law. (RESP'TS'-BR.11, 12.) Respondents do not address the refutation of this (*see* RESP'TS'-BR.11-13): 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. (PET'RS'-BR.35n.8 (quoting *Citizens United,* 558 U.S. at 323, 330).)

The second form is that Petitioners asserted not overbreadth but vagueness in the court of appeals. (RESP'TS'-BR.11-12, 13.) However, as Respondents understand, overbreadth[8] is a First Amendment challenge (RESP'TS'-BR.12),[9] and vagueness[10] of state law is a Fourteenth Amendment challenge. *See Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) (referring to "due process"), *cited in* RESP'TS'-BR.22. In the court of appeals, Petitioners' raised both First Amendment facial-

[8] Whether facial or as-applied. (*See generally* PET'RS'-BR.70n.43.)

[9] With this caveat: The Fourteenth Amendment applies the First Amendment to the states. *Gitlow v. New York,* 268 U.S. 652, 666 (1925) (freedom of speech and freedom of the press).

[10] Whether facial or as-applied. (*See generally* PET'RS'-BR.42n.16.)

overbreadth challenges (*e.g.,* APPELLANTS' BR. 7-9, 11-12, 14-16, 23-31) and Fourteenth Amendment facial-vagueness challenges. (*E.g.,* APPELLANTS' BR. 6-7, 19, 21, 32-33.)

Thus, Petitioners have waived nothing.

And notwithstanding RESP'TS'-BR.12, Test **(2)** applies not only to facial-overbreadth challenges but also to facial-vagueness challenges. (PET'RS'-BR.35, 41-42&n.16 (collecting authorities).) Otherwise, *Buckley* would have come out differently on facial vagueness.[11] Nevertheless, Respondents cite *Salerno* to say Test **(2)** is for only facial-overbreadth challenges, not facial-vagueness challenges. (RESP'TS'-BR.12.) However, the cited *Salerno* sentence says the U.S. Supreme Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745 (citation omitted). This concept "does not change *the test for* facial vagueness." (PET'RS'-BR.42n.16 (emphasis in original) (citation omitted).) Instead, this concept means that "unlike with facial-*overbreadth* challenges to speech law – to bring a facial-*vagueness* challenge, one must prevail on the corresponding as-

[11] *Supra* 17.

applied-vagueness challenge." (PET'RS'-BR.42n.16 (emphasis in original) (internal citations omitted).)

●Respondents' next say Test **(1)** can apply to speech law. (RESP'TS'-BR.13-19.)) Respondents are mistaken.[12]

Besides, applying both Tests **(1)** and **(2)** to speech law is unnecessarily complicated: Because Test **(1)** presents a higher hurdle for challengers, those *prevailing* on Test **(1)** necessarily prevail on Test **(2)**.[13] Thus, even if Test **(1)** could apply to speech law – and it cannot – Test **(1)** would be unnecessary. (PET'RS'-BR.37n.11, 41.)

Respondents disagree that those prevailing on Test **(1)** necessarily prevail on Test **(2)** and give an example: They say law banning speech by people named "Yandel" would fail Test **(1)**, yet not Test **(2)**, because few people are named "Yandel." (RESP'TS'-BR.16-17.) However, that formulates Test **(2)** incorrectly. Test **(2)** would look *not* to all people

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[12] *Supra* 15-17. But even if Respondents were right – and they are not – the court of appeals should have applied Test **(2)**, under which Petitioners prevail. *Supra* 17.

[13] In other words, if they clear the higher hurdle, they *will* clear the lower one. Meanwhile, those losing on Test **(2)** necessarily lose on Test **(1).** If they do not clear the lower hurdle, they will *not* clear the higher one.

and ask whether "a substantial number" are named "Yandel." Rather, Test **(2)** would look *only* to people named "Yandel." This is because Test **(2)** asks whether "'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 (emphasis added) (quoting *Wash. State Grange,* 552 U.S. at 449n.6). In looking to the "applications" and "sweep" of the law, courts do *not* look to where the law does *not* "appl[y]" or to what it does *not* "sweep" in. *Id.*[14] Thus, a "Yandel" ban would fail not only Test **(1)** but also Test **(2)**.

Voting for America v. Steen, 732 F.3d 382, 387 (5th Cir.2013) (quoting *Stevens,* 559 U.S. at [473]), correctly applies only Test **(2)** to speech law. Subsequent Fifth Circuit panel opinions get this wrong, yet *Voting for America* is the *controlling* Fifth Circuit opinion. (PET'RS'-BR.36-38.) Respondents' assertion that *Voting for America* is not controlling, because there is an on-point *pre-Stevens* Fifth Circuit panel

[14] Otherwise, government could *always* draw the applications and sweep broadly enough so that law would survive Test **(2)**. That is not how the Constitution works. *See United States v. Lopez,* 514 U.S. 549, 600 (1995) (Thomas, J., concurring) ("one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce" (emphasis in original)).

opinion (RESP'TS'-BR.17-18) overlooks that *Stevens* trumps *pre-Stevens* holdings, *see* U.S. CONST. art. III §1, and that *Voting for America* – being the earliest *post-Stevens* Fifth Circuit panel opinion on the subject – controls *post-Stevens.* (PET'RS'-BR.36-38.)

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

The court of appeals wrongly presumes the challenged speech law is constitutional. (PET'RS'-BR.43-44.)

Respondents – like the court of appeals – quote *Brooks v. Northglen Association,* 141 S.W.3d 158, 170 (Tex.2004), to say the court of appeals gets the presumption right (RESP'TS'-BR.6); SECOND OP. at 7, without addressing Petitioners' point that *Brooks* is distinguishable, because it is not a *speech*-law challenge. (PET'RS'-BR.43.)

Respondents then say "the presumption of constitutionality disappears in a First Amendment context ... when a law regulates speech based on its content" (RESP'TS'-BR.7 (citing *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2226 (2015) ("Content-based laws ... are presumptively unconstitutional")), yet Respondents overlook *Reed's* holding that political-speech law – such as the challenged law – *is*

content based as a matter of law. (PET'RS'-BR.44n.17 (citing 135 S.Ct. at 2227, 2230).)

While Respondents' criticism of Petitioners' cite to *State v. Johnson,* 425 S.W.3d 542, 546 (Tex.App.-Tyler 2014), is correct here (*compare* RESP'TS'-BR.7-8&n.1 *with* PET'RS'-BR.44), Respondents' other criticisms of Petitioners' cites here depend on the incorrect presumption that the challenged law is *not* content based. (*See* RESP'TS'-BR.8.)

Besides, whatever government's power to promote "the integrity of the electoral process" (RESP'TS'-BR.9), government must stay within constitutional boundaries, a principle as old as the republic, *see Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), which Petitioners address next.

III. The Merits

Respondents do not disagree that they must prove the challenged law survives constitutional scrutiny, regardless of the scrutiny level. (*Compare* RESP'TS'-BR.32 *with* PET'RS'-BR.44-45.)

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. (PET'RS'-BR.46.)

As for (a): Organizations such as KSP engage in *no* "regulable, election-related speech" *under the Buckley major-purpose test* in that they make neither contributions nor independent expenditures properly understood.[15] (PET'RS'-BR.47 (quoting *N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 287, 289 (4th Cir.2008) ("*NCRL-III*")).) Indeed, Respondents do not assert that KSP makes independent expenditures *properly understood,*[16] and Respondents' previous contentions that KSP *makes* contributions (PET'RS'-BR.86 (citing SECOND OP. at 2)) are almost gone. (*See* RESP'TS'-BR.4 ("Money and in-kind contributions were *received by* KSP to undertake these activities. KSP made political expenditures" (emphasis added) (internal citations omitted); *but see* RESP'TS'-BR.40 (referring without citation to "political committees to which it [*i.e.,* KSP] contributes").)

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[15] *Supra* 14n.5.

[16] *Supra* 14n.5.

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

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.

When Petitioners charge that law fails constitutional scrutiny under the First Amendment, it is no answer to say it is "clear" and "extends no more broadly than necessary to implement" itself. AMICUS CAMPAIGN LEGAL CTR. BR. 27n.11 ("AMICUS-BR.27n.11"). Clarity goes to as-applied or facial vagueness, a Fourteenth Amendment claim distinct from as-applied and facial overbreadth under the First Amendment.[17] And saying law survives the First Amendment when it "extends no more broadly than necessary to implement" *itself* strips the First Amendment of all its power. Under that standard, *any* law would survive constitutional scrutiny. When would a law ever extend further than necessary to implement *itself*? A law can extend beyond the Constitution, yet it can hardly extend beyond itself.

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[17] *Supra* 18.

The challenged Texas law – rather than requiring **Track 2,** 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. These are **Track 1,** PAC and PAC-like burdens. (PET'RS'-BR.49-62.) Respondents do not disagree. (*See* RESP'TS'-BR.33-35.)[18]

Notwithstanding RESP'TS'-BR.34, Petitioners previously discussed such **Track 1,** PAC and PAC-like burdens (APPELLANTS' BR. 24-27), yet Petitioners challenge the definitions, not the burdens (PET'RS'-BR.24¶3), so Respondents' accusation that Petitioners have "attempted sleight of hand to raise new issues in the Supreme Court" is meritless. (RESP'TS'-BR.35.)

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

Notwithstanding AMICUS-BR.5 and AMICUS-BR.26, Petitioners detail why PAC and PAC-like organizational and administrative burdens are "onerous" as a matter of law under *Citizens United,* 558

[18] Nor do Respondents disagree that Texas law in effect requires a fund/account for political speech. (PET'RS'-BR.60n.31.)

U.S. at 338-39. (PET'RS'-BR.62-67.) Respondents offer few disagreements.

●Because PAC and PAC-like burdens are "onerous" as *a matter of law* (PET'RS'-BR.62-67), there is nothing "odd" about saying they are "onerous" in "a facial challenge[,]" and there is no need to "offer[]" "proof" of onerosity. (RESP'TS'-BR.35.) While Respondents charge Petitioners have "padded" the PAC and PAC-like burdens, their only cite is to TEX. ELEC. CODE 254.031, which they incorrectly say applies only to officeholders or candidates. (RESP'TS'-BR.35-36.) Respondents' and Amicus's denying the onerosity of PAC and PAC-like burdens (RESP'TS'-BR.36; AMICUS-BR.36-37) does not change *Citizens United*. And comparing Texas's PAC and PAC-like burdens to a "three[-]page form" (RESP'TS'-BR.36; AMICUS-BR.36) understates the burdens. (PET'RS'-BR.55-62.)

Suggesting that PAC and PAC-like burdens are merely "what a prudent person or group would do" (AMICUS-BR.37 (quoting *Worley,* 717 F.3d at 1250)) is laughable. Just how many persons or groups would voluntarily take on PAC or PAC-like burdens such as Texas's? Not many (*see* PET'RS'-BR.55-62), which is why *FEC v. Massachusetts*

Citizens for Life, Inc., observes that many organizations simply forgo political speech, because the organizational and administrative burdens imposed by political-committee status make their speech "simply not worth it." (PET'RS'-BR.32 (quoting 479 U.S. 238, 255 (1986) ("*MCFL*")).) So how can Amicus call these "minimal burdens" and "modest burdens"? (AMICUS-BR.26, 37, 40; *accord* AMICUS-BR.5.) As a matter of law, they are neither minimal nor modest under *Citizens United,* 558 U.S. at 338-39. (PET'RS'-BR.62-67.)

●Suggesting that the proper challenge is to the PAC or PAC-like burdens, not the political-committee or political-committee-like definition (RESP'TS'-BR.33-35), conflicts with *Buckley,* 424 U.S. at 79. (PET'RS'-BR.62n.32.) Respondents do not address *Buckley* here. (*See* RESP'TS'-BR.33-35.) A political-committee or political-committee-like definition triggers the burdens, and the proper challenge is to the definition. (PET'RS'-BR.62n.32.) Six appellate courts follow *Buckley* in this respect. *See NCRL-III,* 525 F.3d at 288-89; *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 811, 812, 832-33, 834, 838, 839-40, 843-44 (7th Cir.2014) ("*Barland-II*"); *Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 872 (8th Cir.2012) ("*MCCL-III*") (*en-banc*);

Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1139, 1153-55 (10th Cir.2007) ("*CRLC*"); *FEC v. Fla. for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir.1982); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir.2010) (citation omitted); *but see Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 588 (8th Cir.2013) ("*IRLC-II*") ("consider each challenged disclosure requirement in isolation"), *cert. denied,* 134 S.Ct. 1787 (2014). Five appellate courts split from *Buckley* and unnecessarily convert political-committee-definition challenges into political-committee-burdens challenges. *See Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 55-59 (1st Cir.2011), *cert. denied,* 132 S.Ct. 1635 (2012); *Vt. Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 137 (2d Cir.2014) ("*VRLC-II*"), *cert. denied,* 135 S.Ct. 949 (2015); *Yamada v. Snipes,* 786 F.3d 1182, 1186, 1188, 1194-97 (9th Cir.2015), *cert. pet. filed* (U.S. Aug. 14, 2015) (No.15-215); *Vermont v. Green Mountain Future,* 86 A.3d 981, 992 (Vt.2013) ("*GMF*"); *Corsi v. Ohio Elections Comm'n,* 981 N.E.2d 919, 924 (Ohio App.2012), *appeal not allowed,* 984 N.E.2d 29 (Ohio 2013), *cert. denied,* 134 S.Ct. 163 (2013).

●Notwithstanding AMICUS-BR.28 and AMICUS-BR.39, **(1)** registration, **(2)** recordkeeping, and **(3)** extensive, ongoing reporting are

"onerous" organizational and administrative burdens even when there are neither **(4)** limits nor **(5)** source bans on contributions received. (PET'RS'-BR.62-63.)

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.

The challenged Texas law – rather than requiring **Track 2,** 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. These are **Track 1,** PAC and PAC-like burdens. (PET'RS'-BR.49-62.)

Petitioners detail **Track 1** and **Track 2** under constitutional law and detail why the *Buckley* major-purpose test, plus the *Sampson* small-scale-speech test, are crucial under constitutional law. (PET'RS'-BR.67-76.) Petitioners offer few disagreements.

While the U.S. Supreme Court has not applied the *Buckley* major-purpose test to state law (AMICUS-BR.4), it has not accepted such a case.[19]

●Amicus asserts the *Buckley* major-purpose test is just a narrowing gloss for federal law (AMICUS-BR.4, 27-29) without addressing Petitioners' refutation of that: Even if the test were a narrowing gloss for federal law, it would still apply as a constitutional principle to state law. (PET'RS'-BR.80 (citations omitted).)

Although the *Buckley* major-purpose test does not apply when (state) law triggers "only [**Track 2,** *non*-political-committee] disclosure obligations[,]" *Ctr. for Individual Freedom v. Madigan,* 697 F.3d 464, 488 (7th Cir.2012), *superseded, Barland-II,* 751 F.3d at 839, it does apply – even *post-Citizens United* and notwithstanding AMICUS-BR.28, AMICUS-BR.39, *Madigan,* 697 F.3d at 488, and *Human Life of Washington, Inc. v. Brumsickle,* 624 F.3d 990, 1013-14 (9th Cir.2010)

[19] Notwithstanding AMICUS-BR.31n.13, *certiorari* denials carry no weight on the merits. *See, e.g., Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917-18 (1950) (op. of Frankfurter, J.); *Brown v. Allen,* 344 U.S. 443, 542-43 (1953) (Jackson, J., concurring); *Darr v. Burford,* 339 U.S. 200, 226-28 (1950) (Frankfurter, J., dissenting).

(“*HLW*”), *cert. denied,* 562 U.S. 1217 (2011) – when (state) law triggers “[**Track 1,** PAC or PAC-like] disclosure obligations” – meaning **(1)** registration, **(2)** recordkeeping, and **(3)** extensive, ongoing reporting, even without **(4)** limits or **(5)** source bans on contributions received. *See Barland-II,* 751 F.3d at 839-40, 842; *MCCL-III,* 692 F.3d at 872; *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 677-78 (10th Cir.2010) (“*NMYO*”); *CRLC,* 498 F.3d at 1141; *Cal. Pro-Life Council v. Getman,* 328 F.3d 1088, 1091-92, 1096 (9th Cir.2003) (“*CPLC-I*”) (*pre-HLW*); *cf. Worley,* 717 F.3d at 1252&n.7.

Whether organizations “engage in activity that may affect the outcome of a public election” (RESP’TS’-BR.2) is not the standard for whether government may trigger **Track 1** PAC or PAC-like burdens for organizations. Rather, the standard is whether they are “under the control” of candidates or have the *Buckley* major purpose. Even when organizations have the *Buckley* major purpose, government may not trigger such burdens for organizations engaging in only small-scale speech. (PET’RS’-BR.67-68.) Other courts have recognized this (PET’RS’-BR.67-76), so this Court would not be “lonely” in joining them. (RESP’TS’-BR.5.)

While Respondents cite government's interest in "allowing citizens to know who is giving money to what office holder or office seeker" (RESP'TS'-BR.36) and while Respondents and Amicus cite "inform[ation]" interests, "disclosure" interests, and "transparency interests" (RESP'TS'-BR.2-3; AMICUS-BR.1, 37, 40), such interests in information/disclosure/transparency go to the *government-interest* part of constitutional scrutiny. *See Buckley,* 424 U.S. at 66-68. The same is true of government's interest in preventing *quid-pro-quo* "corruption" (RESP'TS'-BR.2; AMICUS-BR.1) or its appearance. *See Buckley,* 424 U.S. at 67. However, the *Buckley* major-purpose test and the *Sampson* small-scale-speech test go to the *tailoring* part of constitutional scrutiny. (PET'RS'-BR.73-74, 82.)[20] The tailoring test does not ask whether law is "narrowly tailored to require disclosure." (RESP'TS'-BR.3.) That cannot be the tailoring test. Under such a test, no "disclosure" law would ever fail constitutional scrutiny, because all

[20] Notwithstanding RESP'TS'-BR.10n.2, the existence of a government "interest" – even a "compelling" government interest – is not the end of the analysis. Law must also survive the tailoring analysis.

“disclosure” laws “require disclosure.” (*Id.*) That is not constitutional scrutiny. It is a tautology.

Whether organizations are “corporations” (RESP’TS’-BR.2) and whether they seek to engage in “anonymous” speech (RESP’TS’-BR.2-3) have no bearing on whether government may trigger PAC or PAC-like burdens for them. (PET’RS’-BR.67-68, 73n.47.) Anyway, anonymous speech is not even at issue here.

Notwithstanding RESP’TS’-BR.3, the U.S. Supreme Court has not addressed “the statutes at issue” here. To whatever extent lower Texas courts have addressed these statutes (RESP’TS’-BR.3), those orders and opinions do not control in this Court. *See* TEX. CONST. art. V §1.

Saying that *Buckley* “upheld FECA’s disclosure requirements” (AMICUS-BR.40) misses the whole point of *Buckley’s* discussion of **Track 1** and **Track 2** law under the First Amendment. *See* 424 U.S. at 79-82; (PET’RS’-BR.67-68).

While Respondents say **Track 1** reporting requirements “may be imposed … for any … election-related purpose” (RESP’TS’-BR.38), they do not address a crucial point: 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 the *constitutionality* of law triggering **Track 1,** PAC or PAC-like burdens in the first place, one applies the major-purpose test properly understood. (PET'RS'-BR.72n.45.)

Respondents want some "complaisant" scrutiny level for the law Petitioners challenge. (RESP'TS'-BR.38.) Whatever they may mean by that, strict scrutiny and substantial-relation exacting scrutiny are the only options. Strict scrutiny *should* apply, but Petitioners prevail either way. (PET'RS'-BR.74-75.) Besides, the opinion Respondents cite for "complaisant" scrutiny is *FEC v. Beaumont,* which addresses *closely-drawn* exacting scrutiny for a speech *ban.* (RESP'TS'-BR.38 (quoting 539 U.S. 146, 161 (2003).) Even if *Beaumont* applied here – and it does not – *McCutcheon v. FEC* enhances and supersedes *Beaumont's* complaisant version of closely-drawn exacting scrutiny. *See* 134 S.Ct. 1434, 1446-47, 1456-57 (2014).

While Respondents assert Petitioners have not shown the law is facially unconstitutional (RESP'TS'-BR.39), Petitioners have done just that. (*E.g.,* PET'RS'-BR.67-76, 82-84.)

In one of the most puzzling sentences of all, Respondents say Texas law would impose PAC and PAC-like burdens *not* on KSP but on organizations to which KSP contributes. (RESP'TS'-BR.40.) However, Respondents are the ones who charge KSP must be a political committee. (PET'RS'-BR.53-54 (citing SECOND OP. at 2).) This triggers PAC and PAC-like burdens for KSP. (PET'RS'-BR.54-62.)

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

The challenged Texas law – rather than requiring **Track 2,** 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. These are **Track 1,** PAC and PAC-like burdens. (PET'RS'-BR.49-62.)

Respondents and Amicus assert *Citizens United* pages *366-71* allow government to trigger PAC and PAC-like burdens (RESP'TS'-BR.37-38; AMICUS-BR.38) without addressing Petitioners' explanation

that this is incorrect. These *Citizens United* pages address/support not **Track 1,** PAC or PAC-like burdens but **Track 2,** *non*-political-committee, one-time event-driven reporting. (PET'RS'-BR.76-80.)

While Amicus says *MCFL* is "not a disclosure case" (AMICUS-BR.38) it has holdings about **Track 1,** PAC and PAC-like registration, recordkeeping, and extensive, ongoing reporting. (PET'RS'-BR.32, 48, 49, 55, 56, 69, 70, 71, 73n.46, 75, 78, 84n.60; *see also* PET'RS'-BR.63 (citing *MCFL,* 479 U.S. at 266 (O'Connor, J., concurring).)

And all the courts Amicus cites as rejecting the *Buckley* major-purpose test (AMICUS-BR.29-31&n.12) have holdings that Petitioners have already addressed. The basis of these holdings is the wrong conclusion about *Citizens United* pages *366-71*. These courts all incorrectly believe *Citizens United* pages *366-71* allow government to trigger PAC and PAC-like burdens. (PET'RS'-BR.76-80.)

Amicus is also incorrect in suggesting that Tenth Circuit opinions do not hold that the *Buckley* major-purpose test applies to state law. (*Compare* AMICUS-BR.31 *with* PET'RS'-BR.48, 71, 73, 80-81 (citing *NMYO; CRLC*).)

Amicus's discussion of political-committee registration thresholds (AMICUS-BR.31-32&n.15) misses the point that comparing registration thresholds is not the test for the constitutionality of law triggering PAC-like burdens as applied to organizations *lacking* the *Buckley* major purpose. *See IRLC-II,* 717 F.3d at 589.

Furthermore, Amicus is incorrect in saying *Barland-II,* 751 F.3d at 839, does not supersede *Madigan* on the *Buckley* major-purpose test. (*Compare* AMICUS-BR.32 *with* PET'RS'-BR.80.)

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

Petitioners explain why the *Buckley* major-purpose test, plus the *Sampson* small-scale-speech test, must continue to apply to state law. (PET'RS'-BR.80-82.) Petitioners discern no disagreements other than what Petitioners address elsewhere in this reply.

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

Because Texas's political-committee, SPC, and GPC definitions, TEX. ELEC. CODE 251.001(12), (13), (14), trigger PAC and PAC-like burdens beyond *Buckley,* they are facially unconstitutional. (PET'RS'-BR.82-84.)

While Respondents see no difference between "principal purpose" in Texas law, and "the major purpose" under *Buckley* (*see* RESP'TS'-BR.25), they are mistaken for reasons that Petitioners have explained and which Respondents do not address: What is principal is not necessarily the majority. (PET'RS'-BR.83-84.)

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

●Respondents protest that "a principal" in the statute, TEX. ELEC. CODE 251.001(12), is not vague. (RESP'TS'-BR.23-25.) Since the court of appeals in effect turned "a principal" into "the principal," Petitioners agree. (PET'RS'-BR.84-85.)

●Nevertheless, the SPC and GPC definitions are vague because they refer to "supporting or opposing" candidates or measures. TEX. ELEC. CODE 251.001(13), (14); (PET'RS'-BR.85-86).

Respondents disagree (RESP'TS'-BR.26-27) and cite *NCRL-III* and *Center for Individual Freedom v. Carmouche,* 449 F.3d 655, 663-66 (5th Cir.2006), *cert. denied,* 549 U.S. 1112 (2007), without addressing Petitioners' explanation that *NCRL-III* and *Carmouche* support

Petitioners. (PET'RS'-BR.85-86.) Meanwhile, Amicus misreads *Carmouche*. (*Compare* AMICUS-BR.35 *with* PET'RS'-BR.85-86.)

Respondents (RESP'TS'-BR.26) and Amicus (AMICUS-BR.5, 33-35) also cite *McConnell v. FEC,* 540 U.S. 93, 170n.64 (2003), which Petitioners acknowledge while noting it is *pre-Carmouche*. (PET'RS'-BR.86.)

Notwithstanding RESP'TS'-BR.27, no part of the *FEC v. Wisconsin Right to Life, Inc.,* plurality, including 551 U.S. 449, 474n.7 (2007) ("*WRTL-II*"), addresses the vagueness of words such as "supporting" or "opposing."

●Finally, Respondents says that if these words are vague, then all words are vague. (RESP'TS'-BR.27.) That is not true. For example, *Buckley* express advocacy is not vague. *See* 424 U.S. at 44&n.52, 80.

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

Texas's campaign-contribution and political-contribution definitions, TEX. ELEC. CODE 251.001(3), (5), are unconstitutionally vague. (PET'RS'-BR.86-88.)

●One reason is circularity. (PET'RS'-BR.87.) Respondents disagree by saying, first, that defining "one … with reference to the other" is not vague. (RESP'TS'-BR.28.) Respondents do not address Petitioners' refutation of that (*see* RESP'TS'-BR.28): That is not what Texas law does. Instead, Texas law defines items with reference to *each* other. Hence the circularity. (PET'RS'-BR.87n.63.)

Notwithstanding RESP'TS'-BR.28, Petitioners explain why circular law is vague: A "definition is not especially helpful" when it is "circular." (PET'RS'-BR.87 (quoting *Bilski v. Kappos,* 561 U.S. 593, 622 (2010).)

●While "intent" may "limit[]" the Election Code (RESP'TS'-BR.28), it is still vague in political-speech law. (PET'RS'-BR.87.) How is anyone to know the intent of the speaker? (*See* PET'RS'-BR.87.) Under *WRTL-II,* 551 U.S. at 466-69, "intent" is out of bounds. (PET'RS'-BR.87.) Respondents do not address *WRTL-II.* (*See* RESP'TS'-BR.28-30.) Amicus says this is *dictum,* but it is not, even under Amicus's explanation. (*See* AMICUS-BR.24.) *WRTL-II,* 551 U.S. at 466-69, *holds* that "intent" is out of bounds.

Amicus attempts to distinguish *WRTL-II* by saying it is about spending[21] for political speech, not contributions. (AMICUS-BR.24-25.) Amicus asserts that under *Buckley,* 424 U.S. at 24, vagueness concerns are "less" for definitions regarding contributions than for definitions regarding spending. (AMICUS-BR.25.) However, "less" is not the same as "nonexistent," and under *Buckley,* 424 U.S. at 23n.24, a contribution definition as it appears in a statute is vague. The same is true in Texas law. (PET'RS'-BR.87.) The fact that the "intent standard does not stand alone" in Texas law (AMICUS-BR.26) does not solve the problem.

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

Texas's corporate – and, by extension, union – contribution ban, TEX. ELEC. CODE 253.091, 253.094, is facially unconstitutional. (PET'RS'-BR.88-102.)

Notwithstanding RESP'TS'-BR.42, this is not about "disclosure" requirements, including any "reporting requirement." (*See, e.g.,* PET'RS'-BR.99n.73.)

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[21] Amicus says it is about "expenditures" (AMICUS-BR.24), but that is an incorrect use of "expenditure." *Supra* 14n.5.

Petitioners agree (PET'RS'-BR.86n.62) with Respondents that Texas does not ban *all* corporate contributions. (RESP'TS'-BR.41-43 (citing TEX. ELEC. CODE 253.096).)

Respondents believe this solves the problem. (RESP'TS'-BR.41-42.) They quote *Cook v. Tom Brown Ministries* to say "corporate contributions" are permissible when corporations "simply establish the protocol established in the Election Code[.]" (RESP'TS'-BR.41 (quoting 385 S.W.3d 592, 604 (Texas-App.-El Paso 2012), *review denied* (Tex. Dec. 14, 2012)).)[22]

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[22] This passage from *Tom Brown Ministries,* 385 S.W.3d at 604, also goes to a point that Petitioners have already addressed. (*Compare* RESP'TS'-BR.41 *with* PET'RS'-BR.54n.29, 96.) *Tom Brown Ministries* holds 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. (PET'RS'-BR.54n.29 (quoting 385 S.W.3d at 601, 604).)

This is incorrect. (PET'RS'-BR.54n.29, 96.) A political committee that an organization "create[s]" (PET'RS'-BR.54n.29 (citing 385 S.W.3d at 601, 604)) – *i.e.,* a political committee that an organization *forms/has* – is separate from the organization. So requiring an organization to create – *i.e., form/have* – a political committee and let only the political committee speak bans the organization's speech. (PET'RS'-BR.53n.27, 96.)

This does not solve the problem, because "the protocol established in the Election Code" (*id.*) is that the law bans all corporate and union contributions except those that the Election Code allows. (PET'RS'-BR.88-89 (quoting TEX. ELEC. CODE 253.091, 251.094).) Respondents do not mention that Section 253.096 allows only corporate or union contributions for *measures* and only *one type of* corporate or union contribution for measures. TEX. ELEC. CODE 253.096 ("A corporation or labor organization may make campaign contributions from its own property in connection with an election on a measure only to a political committee for supporting or opposing measures exclusively"). This provides no relief to corporations or unions wanting to make contributions that the law bans. Telling persons that Texas bans the contributions they want to make but not other contributions is like telling Cohen that the law bans his jacket but not others'. Under the First Amendment, it is no answer to tell someone to "wear another jacket." (PET'RS'-BR.95&n.71.)

Speech includes both spending, *Citizens United,* 558 U.S. at 337, and contributions. (PET'RS'-BR.96-97 (quoting *McCutcheon,* 134 S.Ct. at 1452).)

Once the Court acknowledges the ban (*see* PET'RS'-BR.88-89), there is no disagreement among the parties on the remaining issue – *i.e.,* the facial constitutionality of the ban – because Respondents do not disagree (*see* RESP'TS'-BR.42) that the U.S. Supreme Court has "undercut" (PET'RS'-BR.90) *Beaumont,* 539 U.S. at 152-63, the opinion upholding such a ban. (PET'RS'-BR.90-102.)

Tom Brown Ministries misses this when it unnecessarily addresses *Citizens United.* *See* 385 S.W.3d at 603-04. Why "unnecessarily"? Because once the *Tom Brown Ministries* defendants' speech became contributions to a political committee,[23] *Tom Brown*

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[23] As an aside: Their speech did not have to be contributions.

Please recall that the *Tom Brown Ministries* defendants challenged law banning their speech and requiring them to *form/have* a (separate) political committee and let only the (separate) political committee speak. (PET'RS'-BR.65n.34 (citing 385 S.W.3d at 601, 604).)

They did *not* challenge other law requiring them – if they *could* engage in their speech – to *be* a political committee. (*Id.*) Had they asserted they wanted to engage in their speech themselves, without *forming/having* a (separate) political committee, and had they successfully asserted it is unconstitutional to make them *be* a political committee, there would have been no corporate contributions to a political committee, because there would have been no political committee in the first place. (*See id.*) Then the *Tom Brown Ministries* defendants' speech would have been not contributions but spending.

Ministries could have simply held that banning or otherwise limiting contributions – including corporate contributions – for *measure* speech[24] has been unconstitutional since 1981. *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 296-300 (1981) (invalidating such limits) (quoting, *inter alia, Let's Help Fla. v. McCrary,* 621 F.2d 195, 199 (5th Cir.1980)).[25]

And since the speech was about recall elections rather than candidate elections, it was ballot-measure speech, *see Citizens for Clean Gov't v. City of San Diego,* 474 F.3d 647, 651 (9th Cir.2007), which Texas simply calls "measure" speech. *Tom Brown Ministries,* 385 S.W.3d at 602 (citing TEX. ELEC. CODE 251.001(19)).

Banning or otherwise limiting spending – including corporate spending – for *measure* speech has been unconstitutional since 1978. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 767-68 (challenged law), 776-95 (reasoning), 795 (holding) (1978).

Not until 2011 – after *Citizens United,* 558 U.S. at 336-66 – did Texas repeal its ban on corporate spending for political speech, including measure speech. *Tom Brown Ministries,* 385 S.W.3d at 603 (citing TEX. ELEC. CODE 253.094(b)).

[24] Only measure speech was at issue in *Tom Brown Ministries*. *Supra* 46n.23.

[25] Texas still bans some corporate contributions for measures. *Compare* TEX. ELEC. CODE 251.091, 253.094, 253.096 *with Joint Heirs Fellowship Church v. Akin,* ____F.App'x____, No.14-20630, manuscript-op. at 5-9

That point did not arise in the *Tom Brown Ministries* trial court or court of appeals. *See, e.g.,* 385 S.W.3d at 602-04. Instead, the *Tom Brown Ministries* analysis addresses *Citizens United. Id.* at 603-04. That was unnecessary when only *measure* speech was at issue. *See Citizens Against Rent Control,* 454 U.S. at 296-300.

Here, by contrast, Petitioners' challenge to a contribution ban (PET'RS'-BR.88-89) reaches beyond measure speech (PET'RS'-BR.72n.46), so *Citizens Against Rent Control* does not allow Petitioners to prevail. Thus, Petitioners raise *WRTL-II, Citizens United,* and *McCutcheon* to address the facial constitutionality of the ban. (*See* PET'RS'-BR.90-102.)

Again, once the Court acknowledges the ban (*see* PET'RS'-BR.88-89), there is no disagreement among the parties on the remaining issue – *i.e.,* the facial constitutionality of the ban – because Respondents do not disagree (*see* RESP'TS'-BR.42) that the U.S. Supreme Court has "undercut" (PET'RS'-BR.90) *Beaumont,* 539 U.S. at 152-63, the opinion upholding such a ban. (PET'RS'-BR.90-102.)

(*available at* http://www.ca5.uscourts.gov/opinions/unpub/14/14-20630.0.pdf), 2015-WL-6535336 (5th Cir.2015) (unpublished).

However, Amicus disagrees. In so doing, Amicus initially misses the "judicial authority" and the explanation of how *post-Beaumont* Supreme Court opinions "undercut" *Beaumont* (*compare* AMICUS-BR.10 *with* PET'RS'-BR.90-102) and then addresses the authority.

●In addressing the first and third of Petitioners' seven points, Amicus incorrectly says *Beaumont* does not rely on the anti-distortion or dissenting-shareholder-protection rationale. (*Compare* AMICUS-BR.13-15 *with* PET'RS'-BR.94-95.) However, 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. And *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.

●In addressing Petitioners' second point, Amicus asserts that government may ban or otherwise limit contributions to prevent *quid-pro-quo* corruption without explaining how banning contributions *by corporations and unions* prevents *quid-pro-quo* corruption. (*Compare* AMICUS-BR.13-15 *with* PET'RS'-BR.94-95.)

With the Supreme Court having undercut *Beaumont,* just what about corporate and union contributions in particular inherently causes

quid-pro-quo corruption or its appearance? Amicus offers two incorrect answers. First, Amicus's *Beaumont*-based fear of "earnings" being converted into "political 'war chests'" (AMICUS-BR.14) is the anti-distortion rationale that *Citizens United,* 558 U.S. at 349-56, undercuts. Second, in fearing "circumvention of [valid] contribution limits" (AMICUS-BR.14 (quoting *Beaumont,* 539 U.S. at 155) (alteration in *Beaumont*)), Amicus does not appreciate that "valid" is the key word. (PET'RS'-BR.97 (quoting *Beaumont,* 539 U.S. at 155).)[26] Government's interest in preventing "circumvention" neither (a) saves otherwise *in*valid law nor (b) allows government to prevent "circumvention" of *valid* law with *in*valid law, *McCutcheon,* 134 S.Ct. at 1452-60, because the *only* justification for banning or otherwise limiting speech – including contributions – is the prevention of *quid-pro-quo* corruption or its appearance. *Id.* at 1441 (quoting *Citizens United,* 558 U.S. at 359).[27]

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[26] Elsewhere, Amicus even omits "valid." (*See* AMICUS-BR.17 (citing – not *quoting* this time – *Beaumont,* 539 U.S. at 155).)

[27] *Pre-McCutcheon* U.S. Supreme Court opinions (AMICUS-BR.17n.8) would not trump *McCutcheon,* even if they supported Amicus's point, which they do not. "Even *pre-McCutcheon* Supreme Court opinions rely on an 'anti-circumvention' rationale to uphold contribution limits only when they are 'otherwise valid[.]'" James Bopp, Jr., Randy Elf & Anita

In other words, "there can be no freestanding anti-circumvention interest." *Republican Party of N.M. v. King,* 741 F.3d 1089, 1102 (10th Cir.2013) ("*RPNM*"); (*compare* AMICUS-BR.17-18 *with* PET'RS'-BR.97-98).

●In addressing Petitioners' sixth point, Amicus disagrees on circumvention and in effect asserts that preventing circumvention of law is a free-standing interest. Amicus is mistaken. (*Compare* AMICUS-BR.17-18 *with* PET'RS'-BR.97-98.) Amicus gives an example of circumvention of currently *valid* law. (*See* AMICUS-BR.18 ("The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the

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Y. Milanovich, *Contribution Limits After McCutcheon v. FEC,* 49 VAL.U.L.REV. 361, 367-68 (2015) (citing *McConnell,* 540 U.S. at 138 n.40 (referring to "circumvention of otherwise valid contribution limits" (citing, in turn, *Beaumont,* 539 U.S. at 161-62)); *id.* at 185 (same); *id.* at 205 (referring to "circumvention of valid contribution limits" (brackets omitted) (quoting *Beaumont,* 539 U.S. at 155 (quoting, in turn, *FEC v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 456&n.18 (2001) ("*Colo. Republican-II*"))); *Randall v. Sorrell,* 548 U.S. 230, 259 (2006) (quoting *Colo. Republican-II,* 533 U.S. at 453); *McConnell,* 540 U.S. at 126, 129, 134, 137, 139, 144 (quoting *Colo. Republican-II,* 533 U.S. at 456), 145, 163, 165, 170, 171-72, 174, 176; *Beaumont,* 539 U.S. at 160&n.7; *Colo. Republican-II,* 533 U.S. at 446 (quoting *Buckley,* 424 U.S. at 47), 453, 455, 457&n.19, 460&n.23, 461, 465&n.28; *Cal. Med. Ass'n v. FEC,* 453 U.S. 182, 197-98&n.18 (1981)).

donor also channels 'massive amounts of money' to Smith through a series of contributions to PACs that have stated their intention to support Smith" (quoting *McCutcheon,* 134 S. Ct. at 1453)).) While government may prevent circumvention with *valid* law, that is different from trying to (a) prevent circumvention of otherwise *in*valid law or (b) prevent circumvention of *valid* with *in*valid law. (PET'RS'-BR.97-98.) Amicus's *McCutcheon* example is an example of (b) – an effort to prevent "circumvention" of currently valid law (a base-contribution limit) with *in*valid law (an aggregate-contribution limit, which is a cumulative-contribution limit). *McCutcheon,* 134 S.Ct. at 1452-60. While Amicus says "the circumvention scheme involving PACs identified by the *McCutcheon* court is similarly a threat in the corporate context" (AMICUS-BR.18), what Amicus calls a "circumvention scheme" does *not* justify the law challenged in *McCutcheon,* 134 S.Ct. at 1452-60.

●In addressing Petitioners' fourth and fifth points, Amicus says *Beaumont* does not "condition" its upholding of a ban on the availability of alternatives. (AMICUS-BR.18n.9.) Whatever Amicus means by that, *Beaumont's* holding that the 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. *See* 551 U.S. at 477n.9. And *Beaumont's* holding that "[t]he PAC option allows corporate political participation" by allowing a corporation to make contributions "through its PAC[,]" 539 U.S. at 163, conflicts with *Citizens United,* under which a political committee that an organization *forms/has* is "separate" from the organization and "does not allow" the organization "to speak." And under *McCutcheon,* contributions are "speech[.]" 134 S.Ct. at 1452 (citing *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816 (1999)). Notwithstanding AMICUS-BR.38, an organization does not "speak" through a political committee that it *forms/has. Citizens United,* 558 U.S. at 337. (PET'RS'-BR.95-96.)

●In addressing Petitioners' seventh point, Amicus bases significant discussion on the premise that Petitioners are urging that the scrutiny level[28] change for the law at issue. (AMICUS-BR.3, 11-13

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[28] Amicus confuses "standard of review" with scrutiny level. (AMICUS-BR.11) These are entirely different concepts. A standard of review can be something such as *de-novo,* clear error, or abuse of discretion. *E.g.,* SECOND OP. at 6-7. A scrutiny level can be something such as strict

(discussing PET'RS'-BR.98-99).) But that is not what Petitioners say. (PET'RS'-BR.98-99.) Instead, Petitioners note that *Beaumont* expressly defers to a legislature, 539 U.S. at 157, 159, 162n.9, but *Citizens United* overrides such deference. 558 U.S. at 361. In holding contribution law unconstitutional, a court can apply closely-drawn exacting scrutiny rather than strict scrutiny, *McCutcheon,* 134 S.Ct. at 1446-47, 1456-57, and still avoid deferring to a legislature. *See id.* at 1452-60.

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

Texas's private-right-of-action provisions, TEX. ELEC. CODE 253.131, 253.132, 273.081, are facially unconstitutional. (PET'RS'-BR.102-08.)

While Respondents rely on *Osterberg v. Peca* (RESP'TS'-BR.44-46 (discussing12 S.W.3d 31 (Tex.), *cert. denied,* 530 U.S. 1244 (2000)), the crucial point of disagreement is over whether *Osterberg* decides only "*who* can seek and receive damages." (RESP'TS'-BR.45 (quoting PET'RS'-BR.106.)) Petitioners submit that it does.

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scrutiny, substantial-relation exacting scrutiny, or closely-drawn exacting scrutiny. (PET'RS'-BR.45-46, 74-75.)

Respondents' reject Petitioners' due-process contentions, because Respondents say that a *private* right of action involves no *state* action. (RESP'TS'-BR.46.) But those bringing a private right of action stand in the shoes of the state. Therefore, the Due Process Clause applies. (PET'RS'-BR.107-08.)

Respondents reject Petitioners' contention that the law is standardless by saying it says who may sue and for what. (RESP'TS'-BR.47.) But the Constitution requires more, and the problem with the lack of standards is that there are no standards for discovery and initiating a suit. (PET'RS'-BR.107.)

Nor is it an answer to *facially* unconstitutional law that those against whom it can be enforced may bring an *as-applied* challenge regarding "threats, harassment, or reprisals" once enforcement begins (RESP'TS'-BR.49) or that courts can "enter protective orders." (RESP'TS'-BR.50.)

Prayer

The Court should reverse.

The challenged Texas law – rather than requiring **Track 2,** 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. These are **Track 1,** PAC and PAC-like burdens. (PET'RS'-BR.49-62.)

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

The court of appeals should have held the challenged laws are facially unconstitutional:

●Texas's political-committee, SPC, and GPC definitions.

●Texas's campaign-contribution definition and political-contribution definition.

- Texas's ban on corporate contributions, and
- Texas's private-right-of-action provisions.

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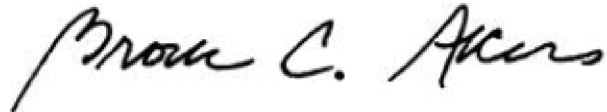

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November 17, 2015

Certificate of Compliance

I certify that this filing has 7315 words not counting the parts exempt from the word count. *Cf.* TEX.R.APP.P. 9.4(i)(1), 9.4(i)(2)(C), 9.4(i)(3).

Randy Elf

November 17, 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 17th day of November 2015.

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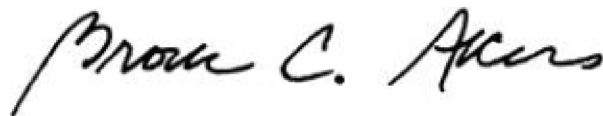

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