CAUSE NO. 15-0320

IN THE SUPREME COURT OF TEXAS

KING STREET PATRIOTS, CATHERINE ENGELBRECHT, BRYAN ENGELBRECHT and DIANE JOSEPHS,

Petitioners

v.

TEXAS DEMOCRATIC PARTY, GILBERTOA HINOJOSA, in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk, 55th Judicial District,

Respondents

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

RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

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Preamble

Come now, the Texas Democratic Party, GILBERTO HINOJOSA in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk. In this Response the Respondents will be collectively referred to as "TDP," and the Petitioners will be collectively referred to as "KSP." .The Clerk's Record will be cited by page as "CR ____" and the Appendix hereto by tab number as "App. ____."

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Statement of the Case

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

Reply Issues Presented

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

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

presumption was correct.

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

The challenged provisions of the Texas Election Code are constitutional.

Summary of the Argument

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

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

individuals by enacted regulations that permit unlimited speech, unlimited contributions, on any content, but so long as the activity is reported through campaign finance reports.

Each of the state laws challenged by KSP is narrowly tailored to require public disclosure. Contrary to KSP's bare assertions, these disclosure regulations have no effect on the ability of corporations, individuals or candidates to speak as they desire or engage in any public dialogue. KSP's lofty language of Free Speech notwithstanding, this case is about transparency in the cut and thrust of politics. If Texas is to go down the path of anonymous donations, its Legislature should choose to do so. It is ironic messengers on behalf of conservative citizens ask this, a judicial Court to strike down duly enacted state laws.

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

Statement of Facts

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

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

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

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

Arguments and Authorities

First Reply Issue
(Restated)

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

A. Statutes are Presumptively Constitutional

KSP begins by addressing the standard used to decide whether the Election Code is constitutional. This puts the cart before the horse; the first question is whether the statutes are presumed constitutionality. They are.

When the constitutionality of a statute is challenged, courts treat it as "presumptively constitutional." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex. 2004). This is especially true when the claim is the statute is facially unconstitutional, *City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240-41 (Tex. 2001), because facial unconstitutionality is rare. *Wilson v. Andrews*, 10 S.W.3d 663, 670 (Tex. 1999).

KSP First Amendment challenge does not change the analysis. Laws are only presumed unconstitutional if they are "content-based," *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783 (2004); *United States v. Playboy Entertainment Gp., Inc.*, 529 U.S. 803, 817, 120 S.Ct. 1878 (2000); *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013), defined as targeting speech "based on its communicative content," i.e., the "message expressed." *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 2015 WL 2473374 at * 6 (June 18, 2015) (ordinance treated signs differently whether they were political or commercial, permanent or temporary).

The statutes here are not content-based. They do not apply to particular

statements about particular matters from particular viewpoints, and make no reference to the content of any expression. Rather, they regulate certain political contributions, whatever "message" the contributor hopes to send. These laws are not content-based but content-neutral, and so presumptively constitutional.

B. Court of Appeals Applied Correct Standard

The Court of Appeals properly began its analysis by presuming the statutes are constitutional, making it KSP's burden to prove they are not. *King Street Patriots*; App. 1 at 8-10. Despite this, KSP argues the Court of Appeals used the wrong test, an involved argument boiling down to the claim that the facial unconstitutionality test is different in First Amendment cases. Petition at 20-27. KSP argues it need not prove the challenged provisions of the Election Code are unconstitutional in every application (a test KSP calls the "*Salerno* test"), but instead must prove the Election Code unconstitutionally regulates a number of constitutional expressions outside its "plainly legitimate sweep." Petition at 21 (*citing United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577 (2010)) (the "*Stevens* test"). There are at least three problems with KSP's position.

1. Arguments were Waived

The first is the argument was waived.

As TDP noted, the question of unconstitutional overbreadth was mentioned only twice by KSP in its brief, both times in passing. Appellees' Brief at p. 33, fn. 3. The case KSP now claims is so seminal, *Stevens*, was not cited at all. The issue only became important after KSP lost, so this afterthought of an argument was raised in its Motion for Rehearing. This is too late: arguments not raised until rehearing are waived. *Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 885 (Tex. 2001).

2. Court of Appeals Used the Correct Standard

Even if the argument was not waived, it ought to be rejected because KSP ignores what the Court of Appeals did. After recognizing a statute may be facially unconstitutional if it can never be applied constitutionally, the Court of Appeals recognized a facial challenge on First Amendment grounds can succeed if a "substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *King Street Patriots*; App. 1 at 9, i.e., it applied the *Stevens* test. Significantly, both KSP and the court below use the *exact same quotation* from *Stevens*. *Compare King Street Patriots*; App. 1 at 9 *with* Petition at 21. If the court below used the test announced in *Stevens* KSP identifies as correct, it

is hard to see how it "appli[ed] the wrong test for a facial challenge."[1]

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

Knowing this, KSP strives to show this use of *Stevens* somehow nevertheless creates a conflict the Court must resolve. No conflict exists: the cases KSP cites follow *Stevens*, either citing it directly, *Voting for Am. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013); *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 426 (5th Cir. 2014), or recognizing the test without citing *Stevens*. *Lo*, 424 S.W.3d at 14, 18; *State v. Johnson*, 425 S.W.3d 542, 550-51 (Tex. App. — Tyler 2014, p.d.r. granted). The court below clearly applied *Stevens*, *King Street Patriots*; App. 1 at 9, 24, 26 & n. 7, meaning its decision does not conflict with other cases KSP identifies that ask when statutes are too vague to enforce, Petition at 26-27, a conceptually different issue in any case.

Some cases do cite both *Salerno* and *Stevens*, just as *Stevens* did. *Stevens*, 559 U.S. at 472-73. This is because a statute may be invalidated on First Amendment grounds under either test. *Justice v. Hosemann*, 771 S.W.3d 285, 296 & n. 10 (5th

[1] KSP does claim even if the Court of Appeals announced the correct test it used the wrong one. Petition at 24-25. Not so: the reference to the *Salerno* test was in a discussion of the interplay between the facial challenge KSP made and the as-applied challenge it did not. When resolving KSP's facial challenges the court below specifically used a *Stevens* analysis. *King Street Patriots*; App. 1 at 9, 14, 26.

Cir. 2014) (applying *Salerno* test; noting *Stevens* test would also apply, but litigant did not rely on it); *accord; Catholic Leadership*, 764 F.3d at 426.

KSP argues *Stevens* is the only test used in First Amendment cases, and so *Catholic Leadership* confused both the issue and the court below. But *Stevens* does not say this — it specifically refused to, saying only that its test is a "second type of facial challenge." *Stevens*, 559 U.S. at 473 (*citing Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184 (2008)). The understanding that *Salerno* and *Stevens* can both apply is neither controversial or unique — other circuits find both tests apply in First Amendment cases or affirmatively refuse to hold *Salerno* does not apply. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 77-78 & n. 13 (1st Cir. 2012); *United States v. Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012); *Speet v. Schuette*, 726 F.3d 867, 872-73 (6th Cir. 2013); *Bell v. Keating*, 697 F.3d 445, 452-53 & n. 2 (7th Cir. 2012); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 685 (8th Cir. 2012) (en banc); *Center for Conservative Politics v. Harris*, 784 F.3d 1307, 1314-15 (9th Cir. 2015); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123-24 (10th Cir. 2012)

Finally, KSP never explains why the Court should find *Stevens* limits the number of ways a statute allegedly violating the First Amendment may be

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

C. Conclusion

KSP works hard to convince the Court that the Court of Appeals applied incorrect presumptions and the wrong test to decide the case, creating conflicts the Court must resolve. This is not the case: the court below and all the courts KSP cites, recognize and apply *Stevens* exactly the way KSP says it should be applied. There is simply nothing for the Court to correct nor is there a conflict for it to resolve.

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

The challenged provisions of the Texas Election Code are constitutional.

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

A. Overbreadth and Vagueness Generally

In its Petition KSP makes two distinct attacks on the Election Code: it claims

it is both overbroad and unconstitutionally vague.

A law is unconstitutionally overbroad under the First Amendment if it would be unconstitutional in a "substantial number" of cases, when compared with the "plainly legitimate sweep," i.e., what it may permissible do. *Stevens*, 559 U.S. at 473; *Washington State Grange*, 552 U.S. at 449 n. 6. This imposes a high standard. In the words of the Court:

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

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

overbreadth of the contested law." *Washington State Grange*, 552 U.S. at 449 n. 6.

A law is unconstitutionally vague if it fails to give those affected a reasonable opportunity to know what is required, or so indefinite that any enforcement is necessarily arbitrary or discriminatory. *Johnson v. United States*, ___ S.Ct. ___, 2015 WL 2473450 at * 4 (June 26, 2015). Vague laws may be prohibited, because they "delegate [ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis ...," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972). Conversely, a law a person of reasonable intelligence can understand is not too vague. *Grayned*, 408 U.S. at 108.

B. Election Code Provisions are Constitutional

The Court of Appeals correctly found the challenged provisions of the Elections Code are not facially unconstitutional under these standards.

1. Definitions of "Committees" are Constitutional

KSP objects to the Election Code's definitions of "political committee," a group whose "principal purpose is to accept political contributions and make political expenditures," Tex. Elec. Code § 251.001(12), "general-purpose committee," a political committee formed to support candidates or "unidentified" ballot measures, TEX. ELEC. CODE § 251.001(14), and "specific-purpose committee,"

a one supporting specific candidates or issues. TEX. ELEC. CODE § 251.001(13).

KSP claims the definitions are overbroad, and necessarily require it to keep records, a burden KSP characterizes as "onerous." Nothing shows this is the case, *compare Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310, 338-39, 130 S.Ct. 876 (2010) (record and reporting requirements under federal law) *with Justice*, 771 F.3d at 288-89 (citing cases showing reporting requirements that do not run afoul of the First Amendment), and in any event KSP does not explain how this supposed burden reaches to a "substantial" amount of constitutionally-protected behavior.

Nor are disclosure and record-keeping requirements necessarily objectionable: they may properly be imposed on those involved in politics, *Buckley v. Valeo*, 424 U.S. 1, 23, 66-82 96 S.Ct. 612 (1976), and KSP fails to explain how its rights are violated by being made to do what the law requires. This is especially true given the burdens of which KSP complains are imposed on any political committee to which it contributes rather than KSP. TEX. ELEC. CODE §§ 254.031, 254.038, 254.039.

Nor are these definitions too vague to understand. A person of average intelligence can sit down, read them, and understand what they require. *King Street Patriots*; App. 1 at 26-27; *see also Buckley*, 424 U.S. at 79 (definition almost identical to definition approved the Supreme Court).

2. Definitions of "Contributions" are Constitutional

A similar analysis applies to KSP's challenge to definitions of "contributions." "Contribution" is defined as any transfer of "money, goods, services, or any other thing of value," TEX. ELEC. CODE § 251.001(2), and may be a "political contribution" (either a "campaign contribution or an officeholder contribution." TEX. ELEC. CODE § 251.001(5)) or a "campaign contribution" (a contribution made to a candidate or political committee for use in connection with a campaign or ballot measure. TEX. ELEC. CODE § 251.001(3)).

KSP begins with a charge of circularity, noting campaign contributions go to candidates or political committees, and political committees are groups who accept political contributions. Petition at 35. Not really. Campaign contributions are things of value given for use in a campaign. TEX. ELEC. CODE § 251.001(3). If a contribution is given to a group formed primarily to accept such a contribution, the group is a political committee and the contribution a campaign contribution. The fact the one is defined with reference to the other does not make it circular, which occurs when the thing to be shown is assumed in the stated premise.

KSP next assails the use of the word "intent," claiming this also makes the statute too vague to constitutionally enforce. Petition at 35-36. Not really. The idea

something has been done with a particular "intent" is hardly incomprehensible, *see, e.g., Chacon v. Andrews Distrib. Co., Ltd.*, 295 S.W.3d 715, 722 (Tex. App. — Corpus Christi 2009, pet. denied), the concept of "intent" is not unconstitutionally vague, *see, e.g., Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953 (1972), and similar formulations in other election laws have been found constitutionally sound. *Yamada v. Snipes*, ___ F. 3d. ___, 2015 WL 2384944 at * 4-7 (9th Cir. May 20, 2015); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1020-21 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217, 131 S.Ct. 1477 (2011); *Ex parte Ellis*, 309 S.W.3d 71, 86-87 (Tex. Crim. App. 2010). TDP notes that if intent was such a hard concept to grasp, no criminal could ever be constitutionally convicted.

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

KSP next assails the constitutionality of Sections 253.091 and 253.094 of the Election Code, claiming they "ban[ ] corporate ... contributions." Petition at 36. They do not, and are not constitutionally objectionable.

Section 253.094 of the Election Code says corporations may only make political contributions in a way allowed by law. TEX. ELEC. CODE § 253.094(a). The law allows them to make "campaign contributions" in any amount, with no limit, if made to a "political committee," TEX. ELEC. CODE § 253.096, and allows

corporations to spend on their own account any amount. *Sylvester v. Texas Ass'n of Business*, 453 S.W.3d 519, 528 (Tex. App. — Austin 2014, n.p.h.). Effectively, corporations can give any amount of money to a group who uses it to support or oppose an issue or candidate, and spend what they please directly. Not much of a "ban."

Section 253.094(a) imposes only one limit on corporate political spending: if a corporation wants to support a candidate directly by making a campaign contribution it may spend an unlimited amount of its money, as long as the money is given to a political committee. TEX. ELEC. CODE § 253.096. This political contribution would be reported, which is the purpose of the political committee requirement. TEX. ELEC. CODE §§ 254.001(b), 254.031(a)(1). Texas has decided to allow unrestricted contributions subject to disclosure rather than restricting contributions. In this way, the state allows voters to decide if an elected official offers *quid pro quo* to donors.

As noted above, disclosure requirements are constitutional to prevent *quid pro quo* corruption, i.e., bribes. *Citizens United*, 558 U.S. at 366-67; *Buckley*, 424 U.S. at 25-26, 47-48. This necessarily means it is constitutionally permissible to regulate contributions. *Buckley*, 424 U.S. at 46-47; *United States v. Danielczyk*, 683 F.3d. 611,

618-19 (4th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174, 195 n. 21 (2nd Cir. 2011), *cert. denied*, 133 S.Ct. 128 (2012); *see also In re Cao*, 619 F.3d 410, 421-23 (5th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1718 (2011) (*Citizens United* did not change the rule that contributions can be regulated).

Also, KSP claims to make no direct political expenditures; but it admits to making contributions. *King Street Patriots*; App. 1 at 19-20. While it might be entitled to do the former, it is not entitled to do the latter unless it follows the law. Accepting KSP's argument would result in not only an unwarranted expansion of the *Citizen United* decision in a case where the issue is not presented, but it would also create a conflict with the authority cited above.

4. Private Right of Action Provisions are Constitutional

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

– The Court has Resolved This Claim

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

When an individual breaks Texas's campaign finance laws, [Section

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

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

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

Osterberg was correctly decided, because the government has a strong interest in allowing those hurt by another's failure to obey the law to sue the lawbreaker. Many statutes — ranging from civil rights statutes to securities laws to consumer protection laws to those class actions to RICO — allow citizens to sue wrongdoers for violating a law in order to vindicate the policy underlying the law. *See, e.g., Fox v.*

Vice, ___ U.S. ___, 131 S.Ct. 2205, 2213 (2011); *Farmers Gp., Inc. v. Lubin*, 222 S.W.3d 417, 427 (Tex. 2007). Such suits are particularly appropriate where the person has been hurt by the wrongdoing – people who have been harmed "can generally be counted on to vindicate the law." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269-70, 112 S.Ct. 1311 (1992).

Seeking to distinguish *Osterberg*, KSP claims it only decides "*who* can seek and receive damages." Petition at 11 (*quoting Osterberg*, 12 S.W.3d at 49). This quote is taken out of context, and is misleading – the Court was observing the case did not ask whether the damages sought were constitutionally excessive, but only if it is constitutionally permissible to award them to a private party. *Id.* at 49-50. The Court resolved the question of whether this enforcement was allowed under the First Amendment, exactly the argument KSP makes. *Id.* at 40-45.

KSP also objects that nothing in the statutes preclude multiple suits by multiple private parties. Petition at 12, 41. KSP offers no evidence that this has or would be likely to happen, and even if it did, KSP could argue this results in a severe penalty that violates the First Amendment as applied, an issue the Court explicitly left open. *Osterberg*, 12 S.W.3d at 49 n. 24.

– Statutes do not Allow Unconstitutional "Search"

KSP next argues the law is objectionable because it results in an unconstitutional "search." Exactly what is being "searched" is unclear, but from context KSP seems to argue civil discovery is a search. It is not.

The Fourth Amendment simply does not apply to a search by a private party. *Sinkker v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614, 109 S.Ct. 1402 (1989); *Miles v. State*, 241 S.W.3d 28, 34 (Tex. Crim. App. 2007). The authorities KSP cites recognize this, *Stanford v. Texas*, 379 U.S. 476, 477-79, 85 S.Ct. 506 (1965) (search warrant to allow the police to search for evidence of Communist Party membership), and even support TDP's position. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 61, 109 S.Ct. 916 (1989) (fact RICO can be used to enforce obscenity laws did not make enforcement unconstitutional).

The Fourth Amendment specifically does not preclude civil discovery, *Kaull v. Kaull*, 26 N.E.2d 361, 374-75 (Ill. Ct. App. 2014); *Estate of Schwartz*, 514 N.Y.S.2d 875, 876-77 (Sur. Ct. 1987). The only time courts limit discovery is when there is a "reasonable probability" that disclosure of the information will subject someone to threats or reprisal. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380-82 (Tex. 1998) (orig. proceeding). KSP offers no proof this would happen, and

its abstract dread of unspecified consequences not shown likely to occur fail to support its argument. *United States v. Judicial Watch, Inc.*, 371 F.3d 824, 832 (D.C. Cir. 2004); *United States v. Norcutt*, 680 F.2d 54, 56 (8th Cir. 1982). KSP cannot plausibly claim to be in the same position as the NAACP was in Alabama in the 1960's, *National Ass'n for the Advancement of Colored People v. State of Alabama ex rel. Peterson*, 357 U.S. 449, 462-63, 78 S.Ct. 1163 (1958) (refusing to force NAACP to produce its membership lists to the state), and offers no basis to find private, court supervised, civil discovery is precluded by the Fourth Amendment.

– Enforcement does not Violate Due Process

KSP also claims the law violates its due process rights, theorizing the suit and attendant discovery occurs without "standards" governing the process.

Again, KSP ignores that constitutional due process guarantees protects only against state action,. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449 (1974). Private lawsuits do not implicate due process because "[p]rivate use of state sanctioned remedies or procedures does not rise to the level of state action." *Tulsa Prof. Collection Svcs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340 (1988).

KSP's claim the right to bring suit is without "standards" is also wrong: the law imposes a standard on who may sue, and for what. TEX. ELEC. CODE § 253.132.

No more is required; all lawsuits are based on allegations of wrongdoing — proof comes in the suit. Conclusive proof of a claim is not necessary before suit may be filed; sustaining KSP's claim would destroy our entire civil justice system.

Nor is the conduct of the suit standardless. Although some laws must give those enforcing them "explicit standards," this is only true if they "delegat[e] legislative power ... to a Narrow (sic) segment of the community ..." *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 677, 96 S.Ct. 2358 (1976) *see also General Elec. Co. v. New York Dep't of Labor*, 936 F.2d 1448 (2nd Cir. 1991) (collecting similar cases). A law is objectionable for lack of standards, not when an injured party may sue, but only when it delegates "to private parties the power to *determine*" the claim, "without supplying standards to guide the private parties' discretion." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665-66 (4th Cir. 1989). The rules governing civil litigation hardly fail to provide "explicit standards," and TDP is not the decision-maker.

KSP's basic objection is that some might use the Election Code to bring frivolous claims against political opponents. Even if this is true, it does not mean all Election Code suits are unconstitutional. The danger a plaintiff might bring a frivolous lawsuit always exists, and statutes and rules provide ample safeguards

against abuse. TEX. CIV. PRAC. & REM. CODE §§ 9.001, *et seq.*, 10.001, *et seq.*, TEX. R. CIV. PRO. 13, 215. Why KSP believes these safeguards are insufficient is unexplained.

C. Conclusion

Having started by claiming *Stevens* imposes the test used to determine when a law is unconstitutional, allowing laws to be invalidated on First Amendment grounds when they are overbroad or too vague, KSP does little to connect its challenges to the Election Code to the test. It must do more than identify a theoretical case where the Election Code might be unconstitutional; it must show the law affects a substantial number of cases it cannot properly regulate. Nor is it enough to claim to understand what the law's definitions mean; the words are so impossible to parse that no reasonable person (as opposed to KSP) can understand them.

KSP fails to bear this burden. Its arguments work only if the Court ignores the authorities that do not support KSP's position. The Court should reject KSP's claims for failing to meet the burdens of proving a facial constitutional challenge.

Conclusion and Prayer

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

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

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

Dated this 20th day of July, 2015.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Tex. R. App. Pro. 9.4(i)(2), the undersigned hereby certifies that according to the word count function of the computer program used to generate the document, the portions of the Response to the Petition for Review subject to the rule contains 4170 words total and that the text thereof is in 14 point Goudy Old Style font.

/s/ Chad W. Dunn
Chad W. Dunn

Certificate of Service

The undersigned here by certifies that, on this, the 20th day of July, 2015, a true and correct copy of the foregoing Response to Petition for Review was served by the Court's Electronic Case Filing System on all counsel of record.

/s/ Chad W. Dunn
Chad W. Dunn

APPENDIX 1

459 S.W.3d 631
Court of Appeals of Texas,
Austin.

King Street Patriots, Catherine Engelbrecht, Bryan Engelbrecht and Diane Josephs, Appellants
v.
Texas Democratic Party; Gilberto Hinojosa, Successor to Boyd Richie, in His Capacity as Chairman of the Texas Democratic Party; John Warren, in His Capacity as Democratic Nominee for Dallas County Clerk; and Ann Bennett, in her Capacity as the Democratic Nominee for Harris County Clerk, 55th Judicial District, Appellees

NO. 03–12–00255–CV
| Filed: December 8, 2014 |
Rehearing Overruled March 13, 2015

Synopsis

Background: Political party brought action against nonprofit corporation, seeking damages and injunctive relief and alleging violations of election law. Corporation counterclaimed for declaratory relief, alleging that certain election laws were unconstitutional. Following severance of the counterclaim, the District Court, Travis County, John K. Dietz, J., 2012 WL 6057405, granted political party summary judgment. Corporation appealed.

Holdings: On overruling of motion for rehearing, the Court of Appeals, Melissa Goodwin, J., held that:

[1] election laws that created private right of action for opposing candidates to bring actions against corporation to recover damages for violations of Election Code did not violate right of association;

[2] election laws that created private right of action to recover damages for violations did not violate due process;

[3] law that allowed a person who was being harmed by violation of Election Code to appropriate injunctive relief did not amount to prior restraint on speech;

[4] statutes prohibiting corporate political contributions did not violate free speech or equal protection;

[5] Election Code was not facially unconstitutionally vague under the First Amendment in allegedly failing to provide clear definition of terms expenditure and contribution; and

[6] Election Code definitions for political committees were not unconstitutionally vague or facially unconstitutional under the First Amendment.

Affirmed.

West Headnotes (27)

[1] Constitutional Law
Advisory Opinions

An "advisory opinion" addresses a theoretical dispute, a dispute that does not involve a real and substantial controversy involving a genuine conflict of tangible interests.

Cases that cite this headnote

[2] Declaratory Judgment
Jurisdiction not enlarged

Uniform Declaratory Judgments Act (UDJA) is merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.

Cases that cite this headnote

[3] Declaratory Judgment
Necessity

A party seeking declaratory relief must show that a requested declaration will resolve a live controversy between the parties.

Cases that cite this headnote

[4] Constitutional Law
Facial invalidity

To sustain a facial challenge, a party generally must establish that the statute, by its terms, always operates unconstitutionally.

Cases that cite this headnote

[5] Constitutional Law
Facial challenges

In a facial challenge to a statute based on the First Amendment, even if the challenged statute is constitutional in some of its applications, a plaintiff may prevail by establishing that the statute lacks any plainly legitimate sweep. U.S. Const. Amend. 1.

Cases that cite this headnote

[6] Constitutional Law
Substantial impact, necessity of

Plaintiffs may invalidate a statute as overbroad if they demonstrate that a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Cases that cite this headnote

[7] Constitutional Law
Strict or heightened scrutiny; compelling interest

"Strict-scrutiny review" of a statute's constitutionality requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

Cases that cite this headnote

[8] Declaratory Judgment
Corporations

Declaratory Judgment
Corporations, carriers and public utilities

Declaratory relief was not available to nonprofit corporation on claim that election law that created private right of action to bring actions against a corporation or labor organization to recover statutory damages for violations of the Election Code violated the First Amendment on theory that the laws allowed recovery for damages based on issue advocacy; political party's claim seeking damages against corporation for Election Code violation did not involve speech concerning issues, but rather involved campaign contributions made by corporation, and thus, declaration based on constitutional challenge on speech concerning issues would not have resolved a live controversy between the parties. U.S. Const. Amend. 1; Tex. Elec. Code Ann. §§ 253.131, 253.132.

Cases that cite this headnote

[9] Constitutional Law
Political Rights and Discrimination

Election Law
In general; power to regulate campaign finance

Election laws that created private right of action for opposing candidates and for political committees to bring actions against a corporation or labor organization to recover statutory damages for violations of the Election Code did not violate right of association under First Amendment. U.S. Const. Amend. 1; Tex. Elec. Code Ann. §§ 253.131, 253.132.

1 Cases that cite this headnote

[10] Constitutional Law
Elections, Voting, and Political Rights

Election Law
In general; power to regulate campaign finance

Election laws that created private right of action for opposing candidates and for political committees to bring actions against a corporation or labor organization to recover statutory damages for violations of the Election Code did not violate due process; a private suit brought under the Election Code had procedural safeguards in place to protect defendants from unnecessary or overly intrusive discovery, and such suits were subject to the laws that applied to civil suits generally, such as the Texas Rules of Civil Procedure and the Texas Rules of

Evidence. U.S. Const. Amend. 14; Tex. Elec. Code Ann. §§ 253.131, 253.132.

Cases that cite this headnote

[11] Constitutional Law

Applicability to Governmental or Private Conduct; State Action

The Due Process guarantees only provide protection against state action. U.S. Const. Amend. 14.

Cases that cite this headnote

[12] Constitutional Law

Politics and Elections

Injunction

Elections, Voting, and Political Rights

Election Code provision that allowed a person who was being harmed or was in danger of being harmed by a violation or threatened violation of the code to seek injunctive relief to prevent the violation from continuing or occurring did not amount to a prior restraint on speech in violation of the First Amendment; section applied to the entire Election Code, allowing injunctions in many different contexts, and it limited the scope of injunctive relief to appropriate injunctive relief. U.S. Const. Amend. 1; Tex. Elec. Code Ann. § 273.081.

Cases that cite this headnote

[13] Constitutional Law

Prior Restraints

A "prior restraint" is an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] Constitutional Law

Corporate contributions

Constitutional Law

Contributions and expenditures

Election Law

Corporations

Statutes prohibiting corporate political contributions did not violate free speech or equal protection; regulation served compelling governmental interests, preventing war chest corruption and serving to prevent individuals from using the corporate form to circumvent contribution limits. U.S. Const. Amends. 1, 14; Tex. Elec. Code Ann. §§ 253.091, 253.094.

Cases that cite this headnote

[15] Constitutional Law

Justification for exclusion or limitation

Constitutional Law

Voting and political rights

Under either a free speech or equal protection theory, a content based regulation of political speech in a public forum is valid only if it can survive strict scrutiny. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[16] Constitutional Law

Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties

A law is unconstitutionally vague if it fails to give those affected by it a reasonable opportunity to know what is required or when it is so indefinite that any enforcement is necessarily arbitrary or discriminatory.

Cases that cite this headnote

[17] Constitutional Law

Law Enforcement; Criminal Conduct

In the context of statutes that impose criminal penalties and impact First Amendment interests, close examination of the specificity of a statutory limitation is required; in such circumstances, vague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the

boundaries of the forbidden areas were clearly marked. U.S. Const. Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**

Narrowing, requirement of

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. U.S. Const. Amend. 1.

Cases that cite this headnote

[19] **Declaratory Judgment**

Corporations, carriers and public utilities

Because the definitions of the terms "officeholder" and "measure" as used in Election Code were not at issue in action brought by political party against nonprofit corporation for violations of the election law regarding campaign contributions, any declaratory relief as to their constitutionality would be advisory, and thus, the Court of Appeals would not consider the terms. Tex. Elec. Code Ann. § 251.001(4, 9).

Cases that cite this headnote

[20] **Constitutional Law**

Campaign finance, contributions, and expenditures

Election Law

Corporations

Election Code, which limited campaign contributions by corporations, was not facially unconstitutionally vague under the First Amendment in allegedly failing to provide a clear definition of terms expenditure and contribution; terms were sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what was prohibited and the definitions provided appropriate guidelines for enforcement. U.S. Const. Amend. 1; Tex. Elec. Code Ann. § 251.001(2-10).

Cases that cite this headnote

[21] **Constitutional Law**

Campaign finance, contributions, and expenditures

Election Law

Corporations

Definitions of contributions and expenditures in Election Code, which limited campaign contributions by corporations, were not overbroad and thus did not violate the First Amendment. U.S. Const. Amend. 1; Tex. Elec. Code Ann. § 251.001(2-10).

Cases that cite this headnote

[22] **Constitutional Law**

Prohibition of substantial amount of speech

An overbroad statute, which violates the First Amendment, sweeps within its scope a wide range of both protected and non-protected expressive activity. U.S. Const. Amend. 1.

Cases that cite this headnote

[23] **Constitutional Law**

First Amendment in General

Constitutional Law

Overbreadth in General

To vindicate First Amendment interests and prevent a chilling effect on the exercise of First Amendment freedoms, the overbreadth doctrine allows a statute to be invalidated on its face even if it has legitimate application, and even if the parties before the court have suffered no constitutional violation. U.S. Const. Amend. 1.

Cases that cite this headnote

[24] **Constitutional Law**

Use as last resort; sparing use

The overbreadth doctrine, under which a statute is invalidated as violating the First Amendment, is "strong medicine" that should be employed sparingly and only as a last resort. U.S. Const. Amend. 1.

Cases that cite this headnote

[25] Constitutional Law

Political action committees

Election Law

Political action committees or issue committees

Election Code definitions for political committees were not unconstitutionally vague or facially unconstitutional under the First Amendment; plain language of section limited "political committee" status to groups with a principal purpose of accepting political contribution or making political expenditures, and applying the phrase's common meaning limited the reach of the definition. U.S. Const. Amend. 1; Tex. Elec. Code Ann. § 251.001(12, 13, 14).

1 Cases that cite this headnote

[26] Declaratory Judgment

Counterclaim for declaratory relief in other action

Trial court did not have jurisdiction to grant declaratory relief to nonprofit corporation in its constitutional challenge to election law with respect to provisions placing 30- and 60-day blackout periods on contributions from political committees because they were not at issue in political party's action against corporation for election law violations, and thus, any relief would have been advisory. Tex. Elec. Code Ann. §§ 253.031, 253.037.

1 Cases that cite this headnote

[27] Sentencing and Punishment

Application to governmental or private action

Trial court did not have jurisdiction to address nonprofit corporation's claim that criminal penalties in election law violated the Eighth Amendment; State was not a party to the action, and political party that brought election code violation action against corporation was not entitled to seek criminal penalties. U.S. Const. Amend. 8; Tex. Elec. Code Ann. §§ 253.003(e), 253.094(c), 253.095, 253.101(b), 253.102(c), 253.103(c), 253.104(c).

Cases that cite this headnote

***635 ON MOTION FOR REHEARING**

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 261ST JUDICIAL DISTRICT, NO. D–1–GN–11–02363, HONORABLE JOHN K. DIETZ, JUDGE PRESIDING

Attorneys and Law Firms

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K. Scott Brazil, Chad Wilson Dunn, Brazil & Dunn LLP, Houston, TX, Dicky Grigg, Spivey Grigg, LLP, Austin, TX, for Appellees.

Before Chief Justice Jones, Justices Rose and Goodwin

OPINION

Melissa Goodwin, Justice

We withdraw our opinion issued on October 8, 2014, and substitute this one in its place. We overrule appellants' motion for rehearing.

This appeal is limited to facial challenges to the constitutionality of various Election Code provisions. *See* Tex. Elec. Code §§ 251.001, 253.003, 253.031, 253.037, 253.091, 253.094, 253.095, 253.101, 253.102, 253.103, 253.104, 253.131, 253.132, 273.081; Act of June 19, 1987, 70th Leg., R.S., ch. 899, § 1, 1987 Tex. Gen. Laws 2995, 3009 (former sections 253.062 and 253.097, repealed 2011). Facing cross-motions for summary judgment, the trial court ruled against appellants King Street Patriots (KSP), Catherine Engelbrecht, Bryan Engelbrecht, and Diane Josephs, the parties facially challenging the constitutionality of the Election Code provisions. The trial court concluded that it did not have jurisdiction to consider some of appellants' constitutional challenges and, as to the remaining challenges,

the trial court upheld the constitutionality of the Election Code provisions at issue. For the reasons that follow, we affirm the trial court's judgment. [1]

BACKGROUND

The Texas Democratic Party, Boyd Richie, [2] in his capacity as Chairman of the Texas Democratic Party, John Warren, in his capacity as Democratic nominee for Dallas County Clerk, and Ann Bennett, in her capacity as the Democratic nominee for Harris County Clerk, 55th Judicial District (collectively "TDP"), brought suit against appellants seeking damages and injunctive relief based upon alleged Election Code violations. *See* ***636** Tex. Elec. Code §§ 253.131, 253.132, 273.081. Their allegations included that KSP made unlawful political contributions to the Texas Republican Party and its candidates (collectively "TRP") with regard to the 2010 general election by training poll watchers in coordination with the TRP and then offering the poll watchers' services only to the TRP. TDP also alleged that, based upon its political activities, KSP was "a sham domestic nonprofit corporation" and "an unregistered and illegal political committee." TDP asserted claims against KSP for Election Code violations based upon KSP's status as a political committee and its status as a corporation.

Appellants answered and filed a counterclaim. They asserted that KSP was formed as a non-profit Texas corporation on December 30, 2009, to "provide education and awareness" to the "general public on important civic and patriotic duties." They stated that they "decided that a good way to participate was to help ensure that elections are free and fair" and that they "assisted anyone who was interested in this project in becoming a poll watcher." Their counterclaim sought declaratory relief challenging the constitutionality of Election Code provisions. Appellants claimed that the Election Code provisions at issue violated the First, Fourth, Eighth, and/or Fourteenth Amendments to the United States Constitution. *See* U.S. Const. amends. I, IV, VIII, XIV, § 1.

The parties entered into a rule 11 agreement to sever appellants' counterclaim challenging the facial constitutionality of the Election Code provisions into a separate cause number by agreed order and to abate the remaining claims until the new cause was resolved. Per that agreement, the trial court severed KSP's counterclaim into this cause and realigned the parties. The parties then filed cross-motions for summary judgment. *See* Tex. R. Civ. P. 166a.

In their motion for summary judgment, TDP urged that the applicable provisions of the Election Code were facially constitutional. *See* Tex. Elec. Code §§ 251.001, 253.031, 253.094, 253.104, 253.131, 253.132, 273.081. Among the grounds asserted to support summary judgment, TDP argued that sections 251.001, 253.094, and 253.131 had already been determined constitutional. To support this ground, TDP cited the opinions in *Ex parte Ellis*, 309 S.W.3d 71 (Tex.Crim.App.2010), *Osterberg v. Peca*, 12 S.W.3d 31 (Tex.2000), and *Castillo v. State*, 59 S.W.3d 357 (Tex.App.–Dallas 2001, pet. ref'd).

Appellants countered in their motion for summary judgment that the applicable Election Code provisions were facially unconstitutional. Among the grounds asserted to support summary judgment in their favor, appellants urged that: (i) the sections creating private rights of action for Election Code violations, *see* Tex. Elec. Code §§ 253.131, 253.132, 273.081, violated the First, Fourth, and Fourteenth Amendments; (ii) the sections prohibiting corporate contributions and expenditures, *see id.* §§ 253.091, .094, were unconstitutional under *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), and violated the First and Fourteenth Amendments; (iii) the definitions of contributions and expenditures, *see* Tex. Elec. Code § 251.001(2)–(10), were unconstitutionally overbroad and vague; (iv) the definitions of political committees, *see id.* § 251.001(12), (14), were unconstitutionally overbroad and vague and violated the First Amendment; (v) the direct expenditure sections, *see id.* former §§ 253.062, .097, violated the First Amendment; (vi) the sections with "thirty and sixty day blackout periods," *see id.* §§ 253.031(c), .037(a), violated the First ***637** Amendment; and (vii) the sections providing criminal penalties, *see id.* §§ 253.003, .094, .101, .102, .103, .104, violated the Eighth Amendment.

Appellants did not offer summary judgment evidence to support their motion. TDP's evidence included affidavits, documents, and videos concerning KSP's recruitment and training of poll watchers. [3] The parties also stipulated to the following facts:

a. King Street Patriots, during and in advance of the 2010 General Election for State and County Officers, conducted, at its own expense, a training and recruitment

program for poll watchers. Many of these KSP located and trained poll watchers were subsequently appointed to serve under Texas Election Code §§ 32.002–.003 by the Harris County Republican Party Chairman and/or Republican Nominees with regard to the 2010 General Election for State and County Officers.

b. Plaintiffs, the Texas Democratic Party, Boyd Richie, John Warren, and Ann Bennett, using the private right of action found in Tex. Elec. Code §§ 273.081, 253.131, and 253.132, intend to enforce Texas Election Code sections 251.001(2), (3), (4), (5), (6), (7), (8), (9), (10), (12), (14), 253.031(c), 253.037(a)(1) and (b), 253.062, 253.094, 253.097, and 253.104 against Defendants–Counterclaimants, King Street Patriots, Catherine Engelbrecht, Bryan Engelbrecht and Diane Josephs, based on alleged political speech the Defendants–Counterclaimants have engaged in, and intend to continue to engage in, in the future.

The trial court granted summary judgment against appellants and in favor of TDP. The trial court declared that Election Code sections 251.001(2), (3), (5), (6), (7), (8), (10), (12), and (14), 253.031, 253.037, 253.094, 253.104, 253.131, 253.132, and 273.081 and former sections 253.062 and 253.097 were facially constitutional. The trial court also concluded that it did not have jurisdiction to grant declaratory relief with respect to sections 251.001(4) and (9), the officeholder definitions, sections 253.031(c) and 253.037(a), the "blackout" periods, and the criminal penalties contained in sections 253.094(c), 253.003(e), 253.101, 253.102, 253.103, and 253.104. The trial court concluded that it did not have jurisdiction with respect to those provisions because they were not at issue in the case. This appeal followed.

ANALYSIS

Appellants bring six issues on appeal, primarily tracking the grounds raised in their motion for summary judgment. Appellants challenge the constitutionality of the sections of the Election Code that create a private right of action, the sections ***638** that allegedly "ban" corporate contributions and expenditures, the section defining various terms, the sections allegedly creating "blackout" periods, and the sections containing criminal penalties for violations of the Election Code. Appellants contend that the trial court erred by concluding that it did not have jurisdiction with respect to some of these challenged Election Code provisions and that it erred by declaring the remaining Election Code provisions facially constitutional.

Standards of Review

We review a trial court's summary judgment rulings de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex.2005). To prevail on a traditional motion for summary judgment, the movant must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex.2003). When, as is the case here, both parties move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex.2004).

We also review matters of statutory construction de novo. *See Texas Mun. Power Agency v. Public Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex.2007). Of primary concern in construing a statute is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex.2009); *Osterberg*, 12 S.W.3d at 38. "We thus construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results." *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex.2010) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex.2008)). We consider the entire act, not isolated portions. *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex.2008).

We also interpret statutes, if possible, in a way that makes them constitutional. *See City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex.2009). "A statute is presumptively constitutional." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex.2004) (citing *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex.1996)); *see also* Tex. Gov't Code § 311.021(1).

Declarations Addressing Constitutionality of Statutes

[1] [2] [3] Declaratory relief is available to resolve constitutional challenges to statutes. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011 ("UDJA"). The separation of powers article of the Texas Constitution, however, prohibits courts from issuing advisory opinions. Tex. Const. art. II,

§ 1; *see Brown v. Todd*, 53 S.W.3d 297, 302 (Tex.2001) (advisory opinion decides "abstract questions of law without binding the parties"). An advisory opinion addresses a "theoretical dispute," a dispute that does not involve "a real and substantial controversy involving a genuine conflict of tangible interests." *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 846 (Tex.App.–Austin 2002, pet. denied). Accordingly, the UDJA has been interpreted "to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.1993); *see also Texas Health Care Info. Council*, 94 S.W.3d at 846 ("A declaratory judgment ***639** action does not vest a court with the power to pass upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication."). As such, a party seeking declaratory relief must show that a requested declaration will resolve a live controversy between the parties. *See Texas Health Care Info. Council*, 94 S.W.3d at 846.

[4] The constitutional challenges at issue here are limited to facial challenges. To sustain a facial challenge, a party generally " 'must establish that the statute, by its terms, always operates unconstitutionally.' " *City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240–41 (Tex.2001) (citing *Barshop*, 925 S.W.2d at 627 (citing *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex.1995))); *see Combs v. STP Nuclear Operating Co.*, 239 S.W.3d 264, 272 (Tex.App.–Austin 2007, pet. denied) (comparing facial and as-applied constitutional challenges and noting that "[a] party seeking to invalidate a statute 'on its face' bears a heavy burden of showing that the statute is unconstitutional in all of its applications").

[5] **[6]** Among their constitutional challenges, appellants claim that the Election Code provisions at issue violate their free speech and associational rights under the First and Fourteenth Amendments. *See* U.S. Const. amends. I, XIV, § 1. In a facial challenge to a statute based on the First Amendment, even if the challenged statute is constitutional in some of its applications, a plaintiff may prevail by establishing " 'that the statute lacks any plainly legitimate sweep.' " *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 426 (5th Cir.2014) (quoting *United States v. Stevens*, 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks and citation omitted)). "Plaintiffs may also invalidate a statute as overbroad if they demonstrate that 'a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *Id.* (quoting *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577 (internal citations omitted)).

The United States Supreme Court has stated the importance of First Amendment rights in the electoral context on many occasions. In *Citizens United*, the Supreme Court explained:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." ... For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.

558 U.S. at 339–40, 130 S.Ct. 876 (internal citations omitted).

The Supreme Court, however, has applied differing standards in the electoral context depending on whether the statute at issue addresses political expenditures, contributions, or disclosure requirements. For example, when reviewing statutes governing corporate contributions and disclosure requirements, the Supreme Court has articulated the test as whether the statute is closely drawn to match a sufficiently important governmental interest. *See Doe v. Reed*, 561 U.S. 186, 196, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010) (noting that "exacting scrutiny" review applies when considering First Amendment challenges to disclosure requirements in the electoral context); ***640** *Citizens United*, 558 U.S. at 366–67, 130 S.Ct. 876 (noting that disclosure requirements are subject to " 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest" (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976))); *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 161, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003) (noting that challenges to limits on corporate contributions pass constitutional muster if " 'closely drawn' to match a 'sufficiently important interest' " (citation omitted)).

[7] In contrast, when reviewing statutes governing corporate independent expenditures in the electoral context, the Supreme Court used a strict-scrutiny review. *See Citizens United*, 558 U.S. at 340, 130 S.Ct. 876 ("Laws that burden

political speech are 'subject to strict scrutiny.' "). Strict-scrutiny review "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' " *Id.* (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007)); *Buckley*, 424 U.S. at 39, 96 S.Ct. 612 (noting that restrictions on political expenditures "limit political expression 'at the core of our electoral process and of the First Amendment freedoms' " (quoting *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968))); *see also McCutcheon v. Federal Election Comm'n*, —— U.S. ——, 134 S.Ct. 1434, 1444–45, 188 L.Ed.2d 468 (2014) (plurality op.) (declining to revisit distinction in *Buckley* between contributions and expenditures and corollary distinction in applicable standards of review). Within this framework, we turn to appellants' issues.

Private Right of Action

In their first issue, appellants challenge the constitutionality of the sections creating a private right of action for Election Code violations. *See* Tex. Elec. Code §§ 253.131, 253.132, 273.081. Appellants contend that these provisions on their face violate the First Amendment, the Fourth Amendment, and the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amends. I, IV, XIV, § 1. They assert that the provisions infringe upon speech and associational rights: that they "lack guidelines regarding what showing is necessary to initiate an investigation," "lack sufficient standards to protect discovery abuse," and have "enormous potential for abuse." They also urge that the injunction section, section 273.081, is an improper prior restraint on speech.

a) Sections 253.131 and 253.132

Section 253.131 creates a private right of action for opposing candidates, and section 253.132 creates a private right of action for political committees, to bring actions against a corporation or labor organization to recover statutory damages for violations of the Election Code. *See* Tex. Elec. Code §§ 253.131, .132. Sections 253.131 and 253.132 state:

> § 253.131. Liability to Candidates
>
> (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 ***641** 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.
>
> § 253.132. Liability to Political Committees
>
> (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. §§ 253.131, .132. Appellants focus on the lack of standards within the private-right-of-action sections regarding what showing is necessary to initiate investigation or discovery and what is discoverable, arguing that discoverable evidence must satisfy a heightened showing of relevance in the context of the First Amendment.

The trial court upheld the constitutionality of these sections based in part on the Texas Supreme Court's opinion in *Osterberg*. In that opinion, the Texas Supreme Court faced a constitutional challenge to section 253.131 based on the First

Amendment's free speech and associational rights. 12 S.W.3d at 48. The supreme court held that the private right of action created in section 253.131 was constitutional, reasoning that private enforcement advanced a "sufficient state interest":

> Section 253.131 is designed to "deter violators and encourage enforcement by candidates and others directly participating in the process, rather than placing the entire enforcement burden on the government." ... Because state resources for policing election laws are necessarily limited, in many cases section 253.131 is likely to provide the only viable means of enforcing reporting requirements. Preventing evasion of these important campaign finance provisions is a legitimate and substantial state interest.... Furthermore, that the person enforcing the law and receiving damages can be a private party rather than the State does not mean that section 253.131 adds additional restrictions on First Amendment rights.

Id. at 49 (internal citations omitted). Although the court did not address section 253.132, the rationale for concluding that section 253.131 does not violate First Amendment rights applies equally to section 253.132.

[8] Appellants urge that *Osterberg* does not control here. They distinguish the issue before this Court from the one addressed in *Osterberg* because, in that case, the challenge concerned *who* could recover damages and only one opposing candidate brought the suit. Appellants argue that the issue here is different because their focus is on the language in sections 253.131 and 253.132 that allows multiple parties to seek damages for the same Election Code violation. For example, they urge that multiple candidates may sue and recover damages when the challenged ***642** speech is about issues. However, the dispute here concerns alleged improper contributions by KSP to the TRP and its candidates, not issue advocacy by KSP. Declaratory relief is only available if the declaration will resolve a live controversy that binds the parties, *Texas Ass'n of Bus.*, 852 S.W.2d at 444, therefore, we decline to consider appellants' constitutional challenge based upon speech concerning issues. Further, whether the statute is unconstitutional as-applied to a particular circumstance, such as multiple candidates suing to recover damages for the same speech about issues, is not the dispositive question before us, given that appellants' facial challenge requires them to prove the statute is unconstitutional in all circumstances or, in the First Amendment context, "that the statute lacks any plainly legitimate sweep." *See Reisman,* 764 F.3d at 426.

[9] Appellants urge that the private-right-of-action sections do not provide necessary safeguards to avoid chilling the First Amendment fundamental right of privacy in association, "particularly where one must divulge such information to political opponents." In the context of as-applied challenges, courts have found that the constitution provides protection from disclosure of a person's identity in the context of associational rights if there is a "reasonable probability" that the disclosure will subject the person to "threats, harassment, or reprisals from either Government officials or private parties." *Citizens United,* 558 U.S. at 367, 130 S.Ct. 876; *Buckley,* 424 U.S. at 74, 96 S.Ct. 612; *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376, 380–82 (Tex.1998) (orig. proceeding). But appellants only bring a facial challenge to the statutes at issue. *See Citizens United,* 558 U.S. at 367, 130 S.Ct. 876 (acknowledging as-applied challenge may be available based upon showing that there was reasonable probability that disclosure would subject persons to threats, harassment, or reprisals). Appellants also did not offer summary judgment evidence that would support a finding that there is a "reasonable probability" that disclosure via discovery would subject them to "threats, harassment, or reprisals." *See id.* As such, precedent does not support appellants' argument that subjecting a person to suit and discovery under the Election Code facially violates First Amendment associational rights.

[10] Appellants' arguments also focus on the lack of standards for discovery and initiating a suit within the private-right-of-action provisions to support their position that the provisions violate the Due Process Clause and the Fourth Amendment. *See* U.S. Const. amends. IV, XIV, § 1. They urge that the private-right-of-action provisions violate the Fourth Amendment because they do not require a showing of probable cause prior to allowing discovery. They contend that discovery initiated by a person acting under color of state law is a Fourth Amendment search and, therefore, that probable cause is required. Otherwise, they urge, the government could circumvent probable cause requirements by awaiting discovery in a civil proceeding. As to the Due Process Clause, appellants urge that the sections fail to provide the necessary "procedural safeguards" to prevent " 'unbridled discretion' *via* discovery to seize constitutionally protected documents and communications, even if the private enforcers lose on their claims."

[11] The Due Process guarantees, however, only provide protection against state action. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340,

99 L.Ed.2d 565 (1988); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); ***643** *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (noting that since 1883, "principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States" and that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrong"). [4] Similarly, the Fourth Amendment protections generally only apply to state action. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Although the Fourth Amendment provides protection against a search or seizure by a private party if the private party is acting as an instrument or agent of the government, there was no evidence that TDP was acting as an agent or instrument of the government here, *see id.* and, even if there were such evidence, that would not satisfy appellants' burden to show that the statute is facially unconstitutional. *See City of Corpus Christi*, 51 S.W.3d at 240–41.

In any case, a private suit brought under the Election Code has procedural safeguards in place to protect defendants from unnecessary or overly intrusive discovery. Such suits are subject to the laws that apply to civil suits generally, such as the Texas Rules of Civil Procedure and the Texas Rules of Evidence. The Texas Rules of Civil Procedure provide guidelines for discovery and allow trial courts to limit discovery to protect confidential information. *See* Tex. R. Civ. P. 192.6. The rules, as well as statutes, also allow trial courts to award sanctions for discovery abuse and remedies for frivolous suits. *See, e.g.*, Tex. Civ. Prac. & Rem. Code §§ 10.001–.006; Tex. R. Civ. P. 13, 215. And sections 253.131 and 253.132 allow the recovery of attorney's fees for a successful defendant. *See* Tex. Elec. Code §§ 253.131(e), .132(c).

We conclude that the trial court did not err by granting summary judgment in favor of TDP with respect to sections 253.131 and 253.132 and by declaring those sections facially constitutional.

b) Section 273.081

[12] **[13]** Section 273.081 states that "[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. Appellants argue that section 273.081 is "a prior restraint" on speech. *See Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393 (Tex.App.–Austin 2000, no pet.). "A prior restraint is an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur." *Minton*, 33 S.W.3d at 393. Appellants also argue that the section fails strict-scrutiny review and that it is not narrowly tailored to an important governmental interest. ***644** Appellants focus on the language in section 273.081 that allows injunctive relief to a "person," not just a political opponent, based upon "threatened" harm. Appellants argue that no compelling interest justifies enjoining political speech.

The plain language of section 273.081, however, does not support appellants' assertion that the section on its face violates the prohibition on prior restraints. *See Scott*, 309 S.W.3d at 930. The section applies to the entire Election Code, allowing injunctions in many different contexts. *See* Tex. Elec. Code § 273.081; *In re Gamble*, 71 S.W.3d 313, 318 (Tex.2002) (orig. proceeding) (discussing injunctive relief provided by section 273.081 in context of violation of section 141.032 by party chair); *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 608 (Tex.App.–El Paso 2012, pet. denied) (mem. op.) (reversing trial court's denial of injunctive relief for Election Code violation and ordering city clerk to decertify and return recall petitions); *Ramirez v. Quintanilla*, Nos. 13–10–00449–CV, 13–10–00450–CV, 13–10–00454–CV, 2010 WL 3307370, at *15–16, 2010 Tex. App. LEXIS 6861, at *43–44 (Tex.App.–Corpus Christi Aug. 20, 2010, pet. denied) (mem. op.) (affirming temporary injunction enjoining special election). The section also limits the scope of injunctive relief to "appropriate injunctive relief." Tex. Elec. Code § 273.081. And an order granting a temporary injunction is subject to interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(4). Given the scope and limits of the injunctive relief available under section 273.081, we conclude that this section is not facially unconstitutional or a "prior restraint" on speech. *See Minton*, 33 S.W.3d at 393.

We conclude that the trial court did not err by granting summary judgment in favor of TDP with respect to section 273.081 and by declaring the section facially constitutional. We overrule appellants' first issue.

Corporate Contributions and Expenditures

[14] **[15]** In their second issue, appellants argue that sections 253.091 and 253.094 are unconstitutional because they "ban" corporate contributions and expenditures. *See* Tex. Elec. Code §§ 253.091, .094. They argue that the corporate "ban" on contributions and expenditures fails strict-scrutiny review under *Citizens United.* As part of this issue, appellants also argue that the restrictions are content based and violate the equal protection clause and that speech restrictions that differentiate among speakers are subject to strict scrutiny. Content-based restrictions have been held to raise equal protection concerns "because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson v. Freeman,* 504 U.S. 191, 197 n. 3, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). "Under either a free speech or equal protection theory, a content based regulation of political speech in a public forum is valid only if it can survive strict scrutiny." *Id.*

Section 253.091 sets forth the types of entities that are subject to subchapter D, the subchapter addressing corporations and labor organizations. Tex. Elec. Code § 253.091. The section includes non-profit corporations—such as KSP—as entities subject to subchapter D. *See id.* Prior to its amendment in 2011, section 253.094(a) limited corporate political contributions and expenditures to those expressly allowed in the subchapter. *See* Act of June 19, 1987, 1987 Tex. Gen. Laws at 3009. In 2011, section 253.094(a) was amended to delete corporate political expenditures. It now reads:

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

***645** Tex. Elec. Code § 253.094(a). Section 253.094 was amended after the *Citizens United* pinion in which the Supreme Court held that the government may not prohibit corporate independent political expenditures. 558 U.S. at 365, 130 S.Ct. 876. [5]

At this stage of the parties' dispute, TDP's claim as to section 253.094 is not based on alleged political expenditures by KSP, but alleged contributions made by KSP. [6] s to the contribution limitations that section 253.094 places on the entities specified in section 253.091, appellants ask this Court to expand the holding in *Citizens United.* We decline to do so. The Supreme Court in *Citizens United* continued to distinguish between expenditures and contributions and expressly stated that it was not reconsidering corporate contribution limits. 558 U.S. at 358–60, 130 S.Ct. 876; *see McCutcheon,* 134 S.Ct. at 1444–45 (discussing *Buckley* and reasons for distinguishing between political expenditures and contributions in context of First Amendment). Further, we are guided by the Supreme Court's analysis in *Beaumont* and the Texas Court of Criminal Appeals' analysis in *Ex parte Ellis.* In *Beaumont,* the Supreme Court rejected an as-applied challenge to corporate contribution limitations. 539 U.S. at 163, 123 S.Ct. 2200. Upholding the constitutionality of the corporate contribution regulation at issue, the Supreme Court found that the regulation served compelling governmental interests, preventing "war chest" corruption and serving to prevent individuals from using the corporate form to circumvent contribution limits. *Id.* at 154–55, 123 S.Ct. 2200. The Texas Court of Criminal Appeals in *Ex parte Ellis* concluded that the opinion in *Citizens United* did not have any effect on its jurisprudence relating to corporate contributions and upheld section 253.094 as facially constitutional, guided in part by the *Beaumont* opinion. 309 S.W.3d at 83–85, 92.

Appellants also urge that section 253.094 violates the equal protection clause because it bans contributions by corporations but not labor unions. But, as previously stated, section 253.094 also applies to labor organizations. *See* Tex. Elec. Code § 253.094. Guided by the directives in *Beaumont* and *Ex parte Ellis,* we conclude that the trial court did not err by granting summary judgment in favor of TDP with respect to appellants' constitutional challenges to the corporate contribution limitations and by declaring section 253.094 facially constitutional. We overrule appellants' second issue.

Contribution and Expenditure Definitions

In their third issue, appellants argue that the definitions of contribution, campaign contribution, officeholder contribution, political contribution, expenditure, campaign expenditure, direct campaign expenditure, officeholder expenditure, and political expenditure are unconstitutionally vague. *See* Tex. Elec. Code § 251.001(2)-(10).

[16] **[17]** **[18]** A law is unconstitutionally vague if it fails to give those affected by it a reasonable opportunity to know what is required or when it is so indefinite that ***646** any enforcement is necessarily arbitrary or discriminatory. *City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *Commission for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 437–38 (Tex.1998). In the context of statutes that impose criminal penalties and impact First Amendment interests, "[c]lose examination of the specificity

of [a] statutory limitation is required." *Buckley*, 424 U.S. at 40–41, 96 S.Ct. 612. "In such circumstances, vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.' " *Id.* at 41 n. 48, 96 S.Ct. 612 (internal citation omitted). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Appellants focus on the words "direct" and "indirect" and the phrase "any other thing of value" in the definitions of contribution and the phrase "any other thing of value" in the definitions of expenditure to support their position that the general definitions are unconstitutionally vague. *See* Tex. Elec. Code § 251.001(2), (6). For purposes of this appeal, the Election Code defines a contribution to mean "a direct or indirect transfer of money, goods, services, or any other thing of value" and an expenditure to mean "a payment of money or any other thing of value." *Id.* § 251.001(2), (6). Appellants also raise additional concerns with the definitions of the different types of contributions and expenditures. Focusing on the phrases "contribution," "political committee," "the intent," and "in connection with ... a measure," they contend that the definition of campaign contribution is circular and vague. Section 251.001(3) defines a "campaign contribution" to mean "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." *See id.* § 251.001(3). Appellants argue that "in connection with a campaign ... on a measure" cannot be construed to exclude "general issue advocacy" and, therefore, is vague and unconstitutional.

Appellants make similar arguments as to the definition of an officeholder contribution. Section 251.001(4) defines an "officeholder contribution" to mean 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." *See id.* § 251.001(4). Appellants make the same argument and address intent, as well as contending that the words "defray" and "in connection with" are vague. Finally, because a "political contribution" is defined as a "campaign contribution" or an "officeholder contribution," appellants urge that this definition is also vague for the reasons stated above. *See id.* § 251.001(5).

Turning to the definitions of different types of expenditures, the Election Code defines a "campaign expenditure" to mean "an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure." *Id.* § 251.001(7). "A 'direct campaign expenditure' means a campaign expenditure that does not constitute a campaign contribution by the person ***647** making the expenditure." *Id.* § 251.001(8). Appellants contend that the words "in connection with" are vague when considering their impact on political speech about a measure, especially because the definition includes political speech after an election. Appellants further urge that the definitions include "general issue advocacy" and, therefore, are unconstitutional. Appellants make the same vagueness argument as to the definition of "officeholder expenditure" as they make as to the definition of "officeholder contribution." *See id.* § 251.001(9). The definition of officeholder expenditure also includes the word "defray" and the phrase "in connection with." Finally, appellants urge that the definition of political expenditure is vague because it uses the terms "campaign expenditure" and "officeholder expenditure." *See id.* § 251.001(10).

[19] As an initial matter, the trial court concluded that it did not have jurisdiction to consider the challenged officeholder definitions. *See id.* § 251.001(4), (9). We agree. Because the officeholder definitions were not at issue between these parties, any declaratory relief as to their constitutionality would be advisory. *See Todd*, 53 S.W.3d at 302 (noting that courts do not have jurisdiction to render advisory opinions). For the same reason, we decline to address appellants' arguments addressing the word "measure" in the various definitions. *See id.* The parties' dispute concerns KSP's activities in connection with campaigns for elective office, not their activities in connection with a measure. *See id.*

[20] **[21]** **[22]** **[23]** **[24]** Appellants' remaining arguments challenging the definitions are controlled by the analysis and reasoning in *Ex parte Ellis.* In the context of alleged improper corporate contributions and a criminal prosecution, the Texas Court of Criminal Appeals considered vagueness and overbreadth challenges to the contribution definitions and found the definitions to be

facially constitutional. *See* 309 S.W.3d at 82–92. The *Ellis* court found that the definitions were "sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what [was] prohibited" and that the definitions provided appropriate guidelines for enforcement. *Id.* Although the *Ellis* court did not address the expenditure definitions, the same rationale for concluding that the contribution definitions are facially constitutional applies to the expenditure definitions. Following the *Ellis* court's analysis, we conclude that appellants failed to establish that the definitions at issue are facially unconstitutional and that the trial court did not err in its summary judgment rulings as to these definitions. We overrule appellants' third issue. [7]

***648 Political Committee Definitions**

In their fourth issue, appellants contend that the definitions of political committee, specific-purpose committee, general-purpose committee, and the now-repealed direct expenditure sections are facially unconstitutional because they violate the First Amendment and are unconstitutionally vague. *See* Tex. Elec. Code §§ 251.001(12), (13), (14), 253.062, 253.097; Act of June 19, 1987, 1987 Tex. Gen. Laws at 3009.

a) Political Committee Definitions

[25] The Election Code defines a political committee to mean "a group of persons that has as a principal purpose accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12). A specific-purpose political committee supports or opposes identified candidates or measures, *id.* § 251.001(13), and a general-purpose political committee "has among its principal purposes ... supporting or opposing" two or more unidentified candidates or one or more unidentified measures or "assisting two or more officeholders who are unidentified." *Id.* § 251.001(14). Appellants focus on the phrases "supporting or opposing" and "assisting two or more officeholders" and the inclusion of "unidentified" measures, candidates, and officeholders and "unknown" offices in the general-purpose committee definition. *See id.*

Appellants argue that strict scrutiny applies, but that, even if exacting scrutiny applies, the statutes are facially unconstitutional. Appellants focus on the analysis by the Supreme Court in *Citizens United* and *Buckley* concerning regulation of political committees. The Supreme Court in *Citizens United* observed that political committee status is "burdensome," "onerous," "expensive to administer and subject to extensive regulation." *See* 558 U.S. at 337, 130 S.Ct. 876. In *Buckley*, the Supreme Court construed the federal definition of "political committee" to encompass only organizations "under the control of a candidate[s]" or organizations with the "major purpose" to nominate or elect candidates. 424 U.S. at 79, 96 S.Ct. 612; *see Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253 n. 6, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986).

Appellants argue that because the definitions of political committee in the Election Code do not have a "major purpose" or "under the control of a candidate" test that they are facially unconstitutional. Appellants urge that allowing an organization to speak only if it becomes a political committee equates with banning the organization's speech when the organization decides that the speech is "simply not worth it." *See Massachusetts Citizens for Life, Inc.*, 479 U.S. at 255, 107 S.Ct. 616. They also urge that the political committee definitions are unconstitutional because they have a zero-dollar threshold and that they are unconstitutionally vague because "[a] speaker cannot know when it has this 'principal purpose.' " They urge that the definitions do not provide fair warning and subject speakers to "arbitrary and discriminatory application," thereby chilling ***649** speech. *See Buckley*, 424 U.S. at 41 n. 48, 96 S.Ct. 612.

Mindful that appellants' challenge to the definitions is a facial challenge, we cannot conclude that these definitions violate the First Amendment, that they are unconstitutionally vague, or that they lack any plainly legitimate sweep. *See Morales*, 527 U.S. at 52, 119 S.Ct. 1849; *Reisman*, 764 F.3d at 426; *compare Massachusetts Citizens for Life, Inc.*, 479 U.S. at 263–65, 107 S.Ct. 616 (holding that federal statute prohibiting corporate expenditures "as applied" to newsletter by nonprofit, nonstock corporation formed to promote "pro life" causes was unconstitutional as a violation of First Amendment). The plain language of section 251.001(12) limits "political committee" status to groups with "a principal purpose of accepting political contributions or making political expenditures." The Election Code does not define the words "principal purpose" so we apply their common meaning. "Purpose" means "[t]he object toward which one strives or for which something exists; goal; aim." *American Heritage Dictionary of the English Language* 1062 (1973). "Principal" means "[f]irst, highest, or foremost in importance, rank, worth, or degree; chief." *Id.* at 1041. Applying the phrase's common meaning limits the reach of the definition, and the definition also expressly encompasses the definitions of political contributions and expenditures, further defining and narrowing the classification. *See* Tex. Elec. Code §

251.001(5), (10). The definitions of specific-purpose and general-purpose also distinguish between and narrow the different types of political committees on the basis of whether the measure or candidates at issue are identified and known or unidentified and unknown.

Viewing the definitions as a whole and in context with each other, they are "sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what [was] prohibited" and provide appropriate guidelines for enforcement. *See Ex parte Ellis*, 309 S.W.3d at 82–92; *see also Buckley*, 424 U.S. at 41 n. 48, 96 S.Ct. 612; *Parker*, 249 S.W.3d at 396. We therefore conclude that the challenged definitions are not unconstitutionally vague or facially unconstitutional under the First Amendment.

b) Former Sections Addressing Direct Expenditures

As part of their fourth issue, appellants argue that the direct expenditure requirements contained in former sections 253.062 and 253.097 are unconstitutional because they force political committee burdens on individuals. *See* Act of June 19, 1987, 1987 Tex. Gen. Laws at 3009. Former section 253.062 required an individual to comply with reporting requirements when the individual made a direct campaign expenditure exceeding $100, and former section 253.097 required a corporation or labor organization to comply with former section 253.062 as an individual when the corporation or labor organization made direct expenditures in connection with an election on a measure. *See id.* As previously stated above, the parties' dispute concerns KSP's activities in connection with campaigns for elective office, not its activities in connection with a measure, and TDP's claim concerns alleged contributions by KSP, not expenditures. *See id.* We therefore decline to address appellants' arguments addressing these two sections. *See Todd*, 53 S.W.3d at 302. We overrule appellants' fourth issue.

30 and 60 day periods

[26] In their fifth issue, appellants argue that the 30 and 60 day "blackout" periods in sections 253.031 and 253.037 are unconstitutional. *See* Tex. Elec. Code §§ 253.031(c), .037(a). Section 253.031(c) prohibits a political committee from making ***650** a campaign contribution or expenditure supporting or opposing specified candidates unless its campaign treasurer appointment has been on file for at least 30 days. *Id.* § 253.031(c). Section 253.037(a) prohibits a general-purpose committee from making a political contribution or expenditure unless its campaign treasurer appointment has been on file for at least 60 days and it has accepted political contributions from at least 10 persons. *Id.* § 253.037(a). Appellants argue that the State does not have an interest in prohibiting speech for a period of time after a group is formed or in prohibiting expenditures and contributions by groups of fewer than 10 people. They contend that the 10–person minimum is unconstitutional because the government has no interest in ensuring that political speech has a base of support and violates the right of association of any group of persons smaller than 10 persons.

The trial court concluded that it did not have jurisdiction to grant declaratory relief with respect to these provisions because they were not at issue in this case and, therefore, any relief would be advisory. *See Todd*, 53 S.W.3d at 305. Appellants argue that the trial court's conclusion that it did not have jurisdiction was in error because appellants must abide by the deadlines in these provisions to engage in political speech. The parties also stipulated that TDP "intended to enforce" sections 253.031(c) and 253.037(a) against appellants. TDP's petition, however, does not raise section 253.037, and limits the alleged violation of section 253.031 to the failure to appoint a campaign treasurer at all. We therefore agree with the trial court that it did not have jurisdiction to consider appellants' constitutional challenges to these provisions. On this basis, we overrule appellants' fifth issue.

Criminal Penalties

In their sixth issue, appellants argue that the criminal penalties in the Election Code violate the Eighth Amendment. *See* Tex. Elec. Code §§ 253.003(e), 253.094(c), 253.095, 253.101(b), 253.102(c), 253.103(c), 253.104(c). The specified offenses under the Election Code are third-degree felonies and subject to punishment by imprisonment "not more than 10 years or less then 2 years." Tex. Penal Code § 12.34. In addition to imprisonment, a corporate officer "may be punished by a fine not to exceed $10,000." *Id.* The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[27] The trial court did not address appellants' constitutional challenges to the criminal penalties in the Election Code because it concluded that it did not have jurisdiction to do so. In its order, the trial court reasoned that the State is not a party and that TDP was not entitled to seek criminal penalties and, therefore, that any ruling would be an improper advisory

opinion. *See Todd,* 53 S.W.3d at 305. We agree and, on this basis, overrule appellants' sixth issue.

CONCLUSION

Having overruled appellants' issues, we affirm the trial court's final summary judgment.

All Citations

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Footnotes

1 To the extent appellants assert as-applied constitutional challenges in the severed suit, we express no opinion as to the merits of those challenges. *See Combs v. STP Nuclear Operating Co.,* 239 S.W.3d 264, 272 (Tex.App.–Austin 2007, pet. denied) (noting that "party making an as-applied challenge need only show that the statute is unconstitutional because of the manner in which it was applied in a particular case" and that as-applied challenge is "fact specific"); *see also Catholic Leadership Coal. of Tex. v. Reisman,* 764 F.3d 409, 426 (5th Cir.2014) (noting that facial and as-applied challenges "have different substantive requirements" and comparing as-applied and facial constitutional challenges in context of challenges to Texas Election Code).

2 Gilberto Hinojosa replaced Boyd Richie as the Chairman of the Texas Democratic Party following Hinojosa's election at the Texas Democratic Party State Convention.

3 TDP presented affidavits from the Chair of the Harris County Democratic Party, the Deputy Executive Director for the Texas Democratic Party, and Bennett. They testified regarding KSP's "assistance" and "support" of the TRP during the 2010 general election cycle and KSP's poll watcher program. The Chair of the Harris County Democratic Party testified:

> The poll watchers recruited and trained by KSP for service in Harris County were all appointed by Republican nominees or the Harris County Republican Party. The KSP never offered to provide poll watchers for or on behalf of the Harris County Democratic Party. I attended at least one meeting at the Harris County Attorney General's Office at which the representative of the Harris County Republican Party discussed and acknowledged the coordinated efforts between the KSP and the Harris County Republican Party in connection with training and assigning poll watchers.

4 We also are not persuaded by the cases cited by appellants to support their position that the private-right-of-action provisions violate the Due Process Clause. Unlike the statutes at issue here, those cases involved laws that delegated legislative power to private citizens. *See, e.g., Eubank v. City of Richmond,* 226 U.S. 137, 141–44, 33 S.Ct. 76, 57 L.Ed. 156 (1912); *General Elec. Co. v. New York Dep't of Labor,* 936 F.2d 1448, 1454–55 (2d Cir.1991) (collecting similar cases). For example, an ordinance allowing boundaries to be fixed by a vote of two thirds of a particular group of property owners was found to be unconstitutional because it allowed a majority of private citizens to determine the rights of the minority without fixing a standard under which the decision was made. *Eubank,* 226 U.S. at 141–44, 33 S.Ct. 76.

5 We disagree with appellants' contention that the trial court failed to address the expenditure component of former section 253.094. In the final summary judgment, the trial court expressly referenced the 2011 amendment to section 253.094 that removed expenditures.

6 TDP's counsel confirmed at oral argument that TDP's claim for statutory damages based upon a violation of section 253.094 was limited to alleged political contributions made by KSP. *See* Tex. Elec. Code § 253.094. Their fourth amended original petition conforms with counsel's statements at oral argument.

7 On rehearing, appellants focus on the overbreadth doctrine. To the extent appellants challenge the definitions based upon this doctrine, we also reject that challenge. "An overbroad statute 'sweeps within its scope a wide range of both protected and non-protected expressive activity.' " *Commission for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 435 (Tex.1998) (citation omitted). "To vindicate First Amendment interests and prevent a chilling effect on the exercise of First Amendment freedoms, the overbreadth doctrine allows a statute to be invalidated on its face even if it has legitimate application, and even if the parties before the court have suffered no constitutional violation." *Ex parte Ellis,* 309 S.W.3d 71, 90–91 (Tex.Crim.App.2010) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). "The overbreadth doctrine is 'strong medicine' that should be employed 'sparingly' and 'only as a last resort.' " *Id.* (quoting *Broadrick,* 413 U.S. at 613, 93 S.Ct. 2908). " '[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Id.* (quoting *Broadrick,* 413 U.S. at 615, 93 S.Ct. 2908). "Only if the statute 'reaches a substantial amount of constitutionally protected conduct' may it be struck down for overbreadth." *Benton,* 980 S.W.2d at 436 (quoting *City of Houston v. Hill,* 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987)). On this record, we decline to strike down the challenged definitions as facially unconstitutional based on

the overbreadth doctrine. *See id.*; *see also* *Clements v. Fashing,* 457 U.S. 957, 972 n. 6, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (overbreadth exception to traditional requirement of standing may not apply where First Amendment rights may be litigated on a case by case basis).

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