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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 15-0320

In the Supreme Court of Texas

KING STREET PATRIOTS, CATHERINE ENGELBRECHT, BRYAN ENGELBRECHT, AND DIANE JOSEPHS,
Petitioners,

v.

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, 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,
Respondents.

On Petition for Review
from the Third Court of Appeals, Austin

BRIEF FOR THE STATE OF TEXAS AS *AMICUS CURIAE*

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

To the Honorable Supreme Court of Texas:

King Street Patriots should not be subject to liability or discovery under the Election Code because the plain text of the Code's definition of "political committee" does not extend to the activities of King Street Patriots alleged in this lawsuit—for at least two independent reasons. King Street Patriots is not alleged to have formed a joint intent with another person to engage in campaign-related speech, and it has not made direct contributions or expressly advocated a particular result in a campaign. King Street Patriots should, therefore, prevail in the severed cause of action that remains in the district court.

Because King Street Patriots should prevail as a matter of law in the severed cause of action, the textual interpretation of the Election Code outlined in this brief resolves four of King Street Patriots' issues in the petition for review. And the two remaining facial challenges fail under existing precedent.

Interest of Amicus Curiae[1]

This brief responds to the Court's order inviting the Solicitor General to express the views of the State of Texas.

Statement of Facts

This appeal arises from a severed counter-claim in a lawsuit brought by the Texas Democratic Party against King Street Patriots. *See* CR.49-51. The parties have stipulated to two facts. CR.50 ¶ 59.

[1] No fee has been paid for the preparation of this brief.

As the court of appeals recited, the parties do not dispute that King Street Patriots is a non-profit corporation, that it provided poll-watcher training, or that it hosted events at which individuals spoke on political topics. *See King Street Patriots v. Texas Democratic Party*, 459 S.W.3d 631, 637 (Tex. App.—Austin 2015, pet. granted). King Street Patriots asserts in the relevant live pleading, CR.17 ¶ 58, as well as in its appellate briefing, Pet. Merits Br. at 28, that it does not provide direct contributions to any candidate or campaign, and that speakers invited to its events are informed that "King Street Patriots is nonpartisan and that the politicians are not to campaign or promote themselves." CR.17 ¶ 58.

Plaintiffs' pleadings omit factual allegations that would be necessary to establish an Election Code violation. As discussed below, the factual allegations cannot establish a basis for a legal conclusion that King Street Patriots is a "political committee" under the Election Code. *E.g.*, CR.59 (alleging various violations of provisions governing political committees, but not alleging that King Street Patriots is a "political committee" as defined by the text of the Code). Plaintiffs nowhere assert that King Street Patriots is subject to regulation under the Election Code except by making the conclusory assertion that it is a corporation engaged in direct contributions or express advocacy. Plaintiffs also seem to assume (incorrectly) that any speech by a corporation on a political matter during an election constitutes a campaign-related expenditure. *E.g.*, CR.56 (asserting that organizing attendance at a legislative hearing is a political expenditure). Based on their view that King Street Patriots is automatically a political committee, plaintiffs seek discovery regarding all

of King Street Patriots' financial information, among other things, to establish violations of the appoint-and-report regulations. *See* CR.56.

Summary of the Argument

I. Four of the six issues in this case depend on the scope of the Election Code's definition of a "political committee," as political committees must satisfy certain regulations such as appointing a treasurer and making periodic reports of their activities. Under the plain text of the Election Code, King Street Patriots does not qualify as a "political committee" on this record—and cannot have violated the law by declining to appoint a treasurer and file reports—for at least two independent reasons:

First, the Election Code regulates "committees," which are defined as a group of persons working together with a shared intent to fund or make expenditures on behalf a candidate or an issue in an election. This requires two separate entities to have the requisite joint intent. There is no allegation here that King Street Patriots had a joint intent with a separate entity.

Second, the Election Code regulates only certain types of campaign-related speech—direct contributions to candidates or independent expenditures that include "express advocacy" of a particular outcome in an election. *Osterberg v. Peca*, 12 S.W.3d 31, 51-52 (Tex. 2000). King Street Patriots affirmatively denies that it has engaged in either direct contributions or express advocacy; in fact, one of King Street Patriots' arguments is that the Election Code would be unconstitutional if it reached non-campaign activity that does not expressly advocate for a particular election outcome. *See* Pet. Merits Br. at 73 ("Organizations such as [King Street Patriots] . . .

are the easy case . . . because they make neither contributions nor independent expenditures properly understood.").

Nor do plaintiffs' legal allegations in the severed lawsuit below support a claim that King Street Patriots is a political committee. Plaintiffs' live petition asserts that King Street Patriots has violated the Election Code's appointment and reporting requirements for political committees because it is a corporation that has engaged in political speech. But that allegation no longer constitutes a valid pleading because the provisions placing restrictions on such corporate speech have been repealed. Plaintiffs' remaining factual allegations cannot support the legal allegation that King Street Patriots has functioned as a "political committee" under the statute's plain text. There is, therefore, no viable lawsuit to enforce the Election Code's appoint-and-report requirements. And because the only relevant allegations establish that King Street Patriots did not engage in direct contributions or express advocacy, its speech activities would not have triggered Election Code oversight in any event.

II. This proper, limited construction of the Election Code to exclude King Street Patriots from the definition of a "political committee" resolves four of the six issues raised in the petition for review. First, this construction renders the definition of "political committee" valid, by reaffirming the *Osterberg* Court's narrowed construction of the scope of the term direct campaign expenditure, which is part of the "political committee" definition. Second, this proper construction removes any alleged vagueness problems, as *Osterberg* recognized. Third, this construction sidesteps any need to select the definitive test for evaluating a free-speech facial challenge, because this limited construction removes any overbreadth problems

regardless of what standard applies (and, in all events, it allows King Street Patriots to engage in the very speech it asserts a desire to engage in). And fourth, this construction forecloses any need to determine whether a presumption of statutory validity applies in the First Amendment context, because this construction of the statute's plain text confirms its validity without any need to apply such a presumption here.

The other two facial challenges fail under existing precedent. The private right of action is valid under *Osterberg*, 12 S.W.3d 48-50. And the ban on corporate direct contributions does not violate the First Amendment under *FEC v. Beaumont*, 539 U.S. 146, 149 (2003), which remains binding precedent, unless and until the Supreme Court chooses to overrule it.

* * *

The State currently expresses no opinion on an issue that has not been raised by the petition for review: whether an as-applied First Amendment challenge would succeed in the severed claim that remains in the trial court. King Street Patriots' concerns about the use of discovery raise substantial issues regarding the chilling of political speech and the freedom of association. But, given the robust procedural protections afforded by the Texas judicial system—and in particular by the Citizens Participation Act's procedural provisions, which could have been a vehicle for challenging the claims that remain pending in district court while avoiding invasive discovery—such a claim should be based on the facts of a particular case as opposed to a sweeping facial challenge. Nor does the State express any opinion as to whether the procedural protections against discovery would be stronger than the federal case

law interpreting the First Amendment, *see Davenport v. Garcia*, 834 S.W.2d 4, 10-11 (Tex. 1992), because the parties have not advanced that argument in these facial challenges.

ARGUMENT

I. UNDER THE PLAIN TEXT OF THE ELECTION CODE, KING STREET PATRIOTS IS NOT A "POLITICAL COMMITTEE."

Both sides in the litigation have presumed that King Street Patriots is a "political committee" under the Election Code and, as a matter of law, subjected to the Code's reporting and oversight requirements for political committees. *But see Osterberg*, 12 S.W.3d at 47-48 & n.23 (concluding that husband and wife could not be required to form political committee separate from their marriage before engaging in direct campaign expenditures). But under the text of the Election Code governing political committees, King Street Patriots is not a political committee (and thus could not possibly violate the appoint-and-report requirements for political committees) based on the activities described in the stipulations and pleadings at issue in this case.[2] This is so for at least two independent reasons: (1) none of the alleged facts satisfy the textual requirement that two separate entities had a joint intent to engage in campaign expenditures, and (2) King Street Patriots engaged in neither direct contributions to candidates or campaigns nor any speech expressly advocating a particular outcome in an election.

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[2] Certain provisions of the Election Code, which formerly regulated corporate speech based on corporate status, were removed from the Code following *Citizens United v. FEC*, 558 U.S. 310 (2010). *See Sylvester v. Tex. Ass'n of Bus.*, 453 S.W.3d 519, 527-28 (Tex. App.—Austin 2014, no pet.).

A. The Code's definition of "political committee" requires that (1) more than one person (2) share a jointly-held principal purpose (3) to make direct contributions or engage in express advocacy.

Texas campaign-finance law regulates fundraising and expenditures by candidates, officers, and political committees. If an entity qualifies as a political committee, it must appoint a treasurer and comply with various periodic filing requirements if it makes political expenditures or accepts more than $500 in political contributions. TEX. ELEC. CODE § 253.031(b). "Political committee" is defined in the Code as follows:

> "Political committee" means a group of persons that has a principal purpose accepting political contributions or making political expenditures.

Id. § 251.001(12).[3]

The plain text of the Code's definition of "political committee" thus includes three elements: that (1) more than one person be involved (otherwise it would not be a "group"); (2) those multiple persons, as a group, jointly share "a principal purpose"; and (3) this principal purpose must be "accepting political contributions or making political expenditures." This plain text is clear; but even assuming

[3] The Code further distinguishes between general and specific purpose committees. A "general purpose" committee supports or opposes two or more candidates, or an unspecified measure, potentially in multiple elections. TEX. ELEC. CODE § 251.001(14). A "specific purpose" committee is registered as supporting or opposing identified measures, or candidates, of which no more than one is unidentified or seeking an unknown office. *Id.* § 251.001(13); *see* 1 TEX. ADMIN. CODE § 20.1(18). The difference depends on the committee's stated purpose to engage in one specific election versus elections generally. It impacts several technical reporting requirements. *E.g.*, TEX. ELEC. CODE §§ 252.003, .004 (setting out different treasurer-appointment requirements); *id.* § 253.096 (a corporation or labor organization may donate from its own property only to a special purpose committee for that measure election). But the distinction has no effect on whether a group of persons has formed a "committee" and thereby subjected itself to the legal regulation of committees.

arguendo that it were not clear, the Court should still limit the definition of "political committee" to these three elements as a matter of constitutional avoidance to prevent the chilling of political speech protected by the First Amendment.[4]

To resolve many of the issues in this case, it is important to understand how each of these three elements limits the definition of "political committee."

1. Under the first element ("group"), a corporation acting on its own, without acting in concert with separate individuals or entities, cannot meet the definition of a political committee because it is only one person—not a group. *See Lake Travis Citizens Council v. Ashley*, 2016 WL 5296870, No. 1:14-cv-00994-LY, at *2 (W.D. Tex. Mar. 14, 2016) (holding that, "[a]s a singular entity, [a corporation] is not a 'group of persons' as required for classification as a political committee") (citing TEX. ELEC. CODE § 251.001(12); TEX. GOV'T CODE § 311.005(2)).[5] Texas law has long provided that a corporation is defined as a singular "person." TEX. GOV'T CODE § 311.005(2) (corporation defined as a singular "person"); *see Port Arthur*

[4] *Osterberg* applied the doctrine of constitutional avoidance to limit the reach of the Election Code, 12 S.W.3d 50-51, and the Court has applied the constitutional-avoidance doctrine for quite some time. *E.g.*, *Trustees of Indep. Sch. Dist. of Cleburne v. Johnson Cy. Democratic Exec. Comm.*, 122 Tex. 48, 52, 52 S.W.2d 71, 72 (1932) (describing rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." (quoting *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909)). This standard of interpretation—that any textually based reading of a statute that satisfies the Constitution is preferred to striking the provision down as unconstitutional—is a matter of statutory as well as common law in Texas. *E.g.*, *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) (discussing implications of TEX. GOV'T CODE § 311.021 and *Brooks v. Northglen Homeowners Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004)).

[5] A Travis County district court has, in a letter ruling, recently accepted the same argument made by the Texas Ethics Commission. *Tex. Home School Coal., Inc. v. Tex. Ethics. Comm'n*, No. D-1-GN-16-000149 (2016) (attached to this brief as an appendix).

Trust Co. v. Muldrow, 155 Tex. 612, 616, 291 S.W.2d 312, 315 (1956) ("all the courts hold that, generally speaking, a corporation is a person within the meaning of the law" (quoting *Pittsburg Water Heater Co. of Tex. v. Sullivan*, 115 Tex. 417, 422, 282 S.W. 576, 578 (1926)).

2. The second element provides that a group of persons with different purposes cannot constitute a single group manifesting a shared purpose. The "principal purpose" requirement is the only qualifier on the singular noun "group." That grammatical distinction must be honored. TEX. GOV'T CODE § 311.011(a); *see* Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140-43 (West Publishing 2012) (Legislature is presumed to understand relationship between singular and plural). Because the group must consist of multiple individuals or entities—yet must share a single purpose—it follows that the members of the group must share the same "principal purpose" in order to qualify as a "committee" within the ambit of § 251.001(12).[6] Otherwise, the

[6] Even if a shared intent to make direct contributions or engage in express advocacy were properly alleged as a matter of fact, it would not necessarily trigger the appoint-and-report requirements because of an Ethics Commission rule requiring that the "principal purpose" be measured as a percentage of the group's donations or expenditures, to ensure it is not merely an ancillary purpose of the group. A corporation that relies on donations could potentially engage in express advocacy as an ancillary practice to its main purposes of education and research. The Texas Ethics Commission has adopted a rule preventing these organizations from inadvertently becoming regulated political committees merely because they engage in some small-scale express advocacy. 1 TEX. ADMIN. CODE § 20.1(20). This rule provides a benchmark for assessing the statutory "principal purpose" standard: the principal-purpose prong is satisfied if 25% or more of the donations to the group or its expenditures are used for direct contributions or express advocacy. 1 TEX. ADMIN. CODE § 20.1(20)(B). The term "principal" is not limited to a single purpose, but can impose one of several primary purposes for a group's activities. TEX. ELEC. CODE § 251.001(12) (requiring that a committee have campaign expenditures "as a principal purpose"); *see* NEW

requirement that multiple persons form a group with a single purpose would be rendered meaningless.

3. The third element dictates that even if multiple entities qualify as a group by manifesting a shared purpose, they will be covered by the definition of a political committee only if that shared purpose is to accept "political contributions" or make "political expenditures." TEX. ELEC. CODE § 251.001(12). In other words, this third element requires either (1) direct contributions to candidates or campaigns or (2) speech that expressly advocates a particular outcome in an election.

The Election Codes defines "political contribution" as "a campaign contribution or an officeholder contribution," § 251.001(5)—that is, a *direct contribution* to a candidate or campaign, §§ 251.001(3) & (4). *See generally Buckley v. Valeo*, 424 U.S. 1, 46-48 (1976) (per curiam) (explaining the distinction between direct contributions to candidates versus independent expenditures).

While the Election Code then defines "political expenditure" to include any "campaign expenditure or an officeholder expenditure,"[7] § 251.001(10), this Court

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OXFORD AMERICAN DICTIONARY 1388 (3rd ed. 2010) (defining "principal" as "first in order of importance; main" and giving a plural example, "*the country's principal cities*").

[7] The Texas statute distinguishes between a "direct campaign expenditure," which "does not constitute a campaign contribution by the person making the expenditure," TEX. ELEC. CODE § 251.001(8), and the two categories of activity that can trigger the "committee" definition. In effect, a "direct campaign expenditure" is an "independent campaign expenditure," as that term is used in federal law. *Osterberg*, 12 S.W.3d at 36 n.2. Direct expenditures that constitute direct advocacy, made by individuals not acting in concert with another, are regulated under a separate reporting system, consistent with the idea that the Code regulates campaign related activities, only. TEX. ELEC. CODE § 254.261(a) (requiring persons who make direct expenditures of more than $100 to report those expenses). A "direct campaign expenditure" does not, by rule, include

in *Osterberg* narrowed this definition to avoid constitutional problems identified by the Supreme Court in *Buckley*, 424 U.S. at 80. *See Osterberg*, 12 S.W.3d 50-51. Specifically, *Osterberg* held that the Election Code's definition of campaign expenditures is limited to "expenditures that '*expressly advocate*'" a particular outcome in an election.[8] *Id.* at 51 (emphasis added); *see also* 1 TEX. ADMIN. CODE § 20.1(21) (requiring that the communication "expressly advocate[] the election or defeat of a clearly identified candidate"); *id.* § 24.17(a) ("An expenditure to finance a voter registration or get-out-the-vote drive is not a political expenditure if the drive encourages voting in general but does not encourage voting for or against a measure, candidate, officeholder, or political party."). So the Election Code's statutory phrase "campaign expenditures," under *Osterberg*'s limiting construction, does not include issue or campaign speech that does not use "explicit words of advocacy." *Buckley*, 424 U.S. at 43.

Thus, under the third element, a group of multiple entities with a joint intent to engage in political speech still does not qualify as a "political committee" unless it

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contributions that are made without consent or approval of the officeholder or candidate receiving it. *See* 1 TEX. ADMIN. CODE §§ 20.1(5), 20.1(21).

[8] "Express advocacy" is a high standard, requiring "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52. Speech that does not use "explicit words of advocacy" does not count as express advocacy. *Id.* at 43. In other words, express advocacy does not include "*the functional equivalent* of express advocacy"—that is, speech without explicit words of advocacy yet "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (plurality op.) (emphasis added); *see also Citizens United*, 558 U.S. at 324-25; 1 TEX. ADMIN. CODE § 20.1(21).

has a principal purpose of (1) making direct contributions to candidates or campaigns or (2) engaging in express advocacy for a particular outcome in an election.

B. Under a plain-text reading of the Election Code, King Street Patriots is not a "political committee."

Many of King Street Patriots' concerns derive from the fact that, it presumes, the plaintiffs' view of the Election Code will determine the scope of discovery in this case, even though King Street Patriots has engaged only in non-campaign activity. *E.g.*, Pet. Merits Br. at 73 (suggesting that King Street Patriots should be exempt from regulation under *Buckley* because it has not engaged in express advocacy). But as explained above, no "political committee" exists under the Code if only a single entity has engaged in campaign-related activity or if neither direct contributions nor express advocacy has been made.

Either rationale is a sufficient, independent basis to conclude that King Street Patriots is not a "political committee" under the Code. No one suggests that it has acted in concert with any other person, corporate or natural, for the joint purpose of raising funds to engage in campaign-related activity. And King Street Patriots has disavowed making any direct contributions, while further asserting that it has never engaged in independent expenditures that expressly advocate for a particular outcome in an election.[9] *See, e.g.*, CR.34 ¶ 140 (King Street Patriots argues that scope

[9] At least one of plaintiffs' allegations is that King Street Patriots organized a group attendance at a legislative committee regarding a particular issue, CR.56—a type of speech activity that qualifies as issue advocacy and nothing close to expressly advocating the outcome of a particular election.

of committee regulation is unconstitutional because it extends to speech activity not tied to the result of a campaign).

Nor do plaintiffs even make an allegation regarding whether King Street Patriots' principal purpose is to make direct contributions or expressly advocate.[10] The live pleadings in this severed claim thus establish that King Street Patriots is not, as a matter of law, a "political committee" within the meaning of the Election Code. And Texas law already provides mechanisms for avoiding discovery on facially-inadequate legal pleadings.

All of the other relief requested in the underlying lawsuit has to do with penalties and administrative requirements for political committees that do not appoint a treasurer and file periodic reports. *See* CR.59. An entity that does not meet a definition for a statute's coverage is not regulated under that statute. *See State v. Central Power & Light Co.*, 139 Tex. 51, 55-56, 161 S.W.2d 766, 768 (1942) (contract

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[10] For example, plaintiffs assert that King Street Patriots created training materials and videos to train poll watchers as a matter of fact, but merely assert as a conclusion of law that these materials were created with "political expenditures." *See* CR.54. That legal allegation cannot be valid because it is not supported by the necessary assertion of fact that the training materials constituted "express advocacy." *See Osterberg*, 12 S.W.3d 50-51. Plaintiffs' factual allegations throughout their live petition do not, on their face, describe express advocacy or coordination with a campaign, yet their petition erroneously characterizes the money used to fund those activities as political contributions and/or expenditures. *E.g.*, CR.57 (asserting only that King Street Patriots forums are not "independent" from campaigns because candidates of a particular party have spoken there); *see also* CR.55 (alleging that speech was intended "to affect" an election or elections, but not that it constituted express advocacy or coordination with a campaign). Plaintiffs' averment that the poll watcher trainings were held "in coordination with Republican Party officers," CR.58, fails to assert a donation in connection with a campaign, which is what the Election Code's text requires, TEX. ELEC. CODE § 251.001(3).

with municipal corporation could not violate antitrust statute where municipal corporation did not fall within definition of "person," "corporation," or "association of persons" set out in statute). Because, properly understood, the Election Code's definition of "political committee" does not apply to King Street Patriots' activities, King Street Patriots was not required to appoint a treasurer and is not subject to sanction under the Code.

* * *

King Street Patriots asserts that, to be constitutional under U.S. Supreme Court precedent, an entity that is not under the control of any candidate, is not a political committee by its own admission or under the principal purpose test, and does not seek or make direct contributions cannot be subject to political-committee regulations. Pet. Merits Br. at 68 (suggesting that King Street Patriots should not be subject to appointment and reporting requirements because it does not engage in direct contributions or express advocacy); Reply Br. at 12-13 (summarizing King Street Patriots' view of *Buckley*); *id.* at 24 (explaining that there is no allegation that King Street Patriots engages in independent expenditures supporting candidates); *see also id.* at 26.

But the Texas Election Code's definition of "political committee" already excludes such entities from its coverage. Under *Osterberg*, the Texas Election Code applies only to (1) direct contributions and (2) independent expenditures that constitute express advocacy. Thus, an entity is not subject to the appointment and reporting requirements if its expenditures are *both* not controlled by a campaign *and* do not advocate for a particular outcome in an election. Because King Street Patriots

has made no direct contributions or engaged in express advocacy, there is no provision of the Election Code as currently written that applies to King Street Patriots' activities (providing polling-place observer training and hosting events that were not tied to the outcome of a particular campaign). And even if King Street Patriots had been involved in some regulated campaign activity, the appoint-and-report requirements would not apply unless more than $500 were involved, the money was raised with a shared intent with other individuals or entities that it be used for direct contributions or express advocacy, and those expenditures constituted a "principal purpose" of King Street Patriots and those other individuals or entities. None of these things has been alleged.

II. The Challenged Provisions of the Election Code Are Facially Constitutional Under Existing Precedent.

By adopting Part I's statutory interpretation of the Election Code's definition of "political committee," the Court can uphold that definition (and the related subsidiary definitions to which it refers) as properly limited to avoid the unconstitutional chilling of political speech. This reading of the statute resolves four of the six issues on appeal. First, the Code's definition of "political committee" is valid. Second, the narrowness of this definition, properly construed, means that the statute has a plainly "legitimate sweep" under the authorities urged by King Street Patriots, *e.g.*, *United States v. Stevens*, 559 U.S. 460, 472 (2010)—so there is no need to address the proper standard for a free-speech facial challenge under the overbreadth doctrine, as the statute is valid under any of the tests that might apply. Third, application of plain text and First Amendment principles avoids the chilling of speech, so there is no

need to determine whether there is a presumption of constitutionality of statutes in a free-speech facial challenge. And fourth, the two vagueness challenges to the Election Code's provisions can be rejected by applying by the limited definitions explained above in Part I, as the Court did in *Osterberg*.[11]

That leaves two issues: the facial constitutionality of (5) the private right of action and (6) the ban on corporate direct contributions.

A. The Private Cause of Action is Not Facially Unconstitutional Under *Osterberg*.

King Street Patriots suggests that it violates the United States Constitution for a private right of action to exist for enforcing Texas political-committee regulations. *See* Pet. Merits Br. at 102 (discussing TEX. ELEC. CODE §§ 253.131, .132, 273.081). This argument boils down to an assertion that the possibility of discovery by a private party itself always constitutes an unconstitutional restriction on speech because the plaintiff determines the scope of the complaint, Pet. Merits Br. at 105-07, coupled with an assertion that undergoing discovery on First Amendment issues impairs the freedom of association, *see* Pet. Merits Br. at 104-05.

The Court has already upheld one of the relevant provisions against a similar challenge in *Osterberg*, 12 S.W.3d 48-50. The other provisions cannot be

[11] King Street Patriots' appellate briefing argues that each individual defined term is "vague" and therefore unconstitutional. *See* Pet. Merits Br. at 84 (suggesting that vagueness would be avoided only if the text of the statute were focused solely on "express advocacy" as described in *Buckley v. Valeo*, 424 U.S. 1 (1976)). King Street Patriots does not place these terms in the context of the statute as a whole, nor does its argument address that the Court has already held that the term "direct campaign expenditure" is equivalent to the term "independent expenditure," as used in federal jurisprudence, and applied *Buckley* to narrow the scope of the term to include only statements advocating for victory or defeat for a candidate or measure. *Osterberg*, 12 S.W.3d at 51.

unconstitutional merely because they allow a similar private right of action. And here, King Street Patriots' concerns about discovery in this case can all be avoided through the proper statutory interpretation of "political committee" in Part I. After all, Texas law distinguishes between allegations of fact, which are taken as true, and assertions of law, which can be challenged prior to litigation. *E.g.*, *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam) (distinguishing factual allegations, which are taken as true, from legal theories, which are addressed *de novo* on appeal). Multiple procedural mechanisms allow a defendant to narrow the scope of a plaintiff's allegations to meet the requirements of the underlying cause of action. *E.g.*, TEX. R. CIV. P. 91a (dismissal based on baseless cause of action); *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998) (applying TEX. R. CIV. P. 91 (special exceptions)); *In re National Lloyds Insurance Co.*, No. 15-0452, 2016 WL 6311286, at *4 (Tex. Oct. 28, 2016) (orig. proceeding) (mandamus available where discovery not related to properly pleaded claim).[12] It is, thus, emphatically not the case that a defendant is without recourse to challenge baseless allegations or avoid the imposition of baseless discovery.

A particularly powerful procedural mechanism, not mentioned by the parties, allows pre-discovery dismissal of invalid claims that would chill speech: the Citizens

[12] There is also the potential for greater substantive protection. While King Street Patriots repeatedly refers to prior-restraint jurisprudence, it cites only federal precedent. The Texas Constitution's standard for prior restraint is more restrictive than the U.S. Constitution's provisions. *Davenport*, 834 S.W.2d at 10-11. That issue is not before the Court here, because the parties have not raised it. *See Osterberg*, 12 S.W.3d at 40-41 (declining to apply the *Davenport* line of cases where it was not raised).

Participation Act. TEX. CIV. PRAC. & REM. CODE § 27.001-.011; *see id.* § 27.005(b) (Act applies to claims regarding free speech, petition, and association rights); *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding). Under the construction of "political committee" explained above in Part I, King Street Patriots would not be covered as a political committee because it (1) is alleged to have taken no activity that amounts to direct contributions or express advocacy and (2) is not alleged as a matter of fact to constitute a "committee" under the $500 minimum, shared intent, and principal-purpose tests. Thus, King Street Patriots could file for pre-discovery dismissal and the award of attorney's fees under the Citizens Participation Act, and plaintiffs' claim as pleaded should be dismissed under the statutory interpretation in Part I. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c) (claim relating to exercise of free speech dismissed if plaintiff cannot "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question"). And the limited scope of the litigation to resolve that Citizens Participation Act dismissal motion would allow King Street Patriots to avoid plaintiffs' discovery as a matter of law. *See Lipsky*, 460 S.W.3d at 589. The Act thus serves as an important check on any potentially speech-chilling litigation tactics that could be used through the private right of action.

To be sure, requiring a group to disclose the identity of its donors would raise significant constitutional issues. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 370 (2010). But the Citizens Participation Act creates an exception to Texas pleading practice that gives defendants significant opportunities to dismiss invalid claims chilling speech, petition, and association rights—before discovery can occur. Under

the Act, a plaintiff cannot simply plead the elements of a political committee—in an attempt to obtain speech-chilling discovery—without having "clear and specific evidence" at the pleading phase to support such allegations. TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see id.* § 27.003(c) (motion to dismiss stays discovery); § 27.006(b) (allowing only limited discovery necessary to determine propriety of lawsuit); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Thus, litigation should never reach the discovery phase if a plaintiff lacks clear and specific evidence that an entity satisfies the Code's definition of political committee. King Street Patriots can thus obtain pre-discovery dismissal here under the facts pleaded by the parties, by invoking the Citizens Participation Act, if the statutory interpretation of "political committee" outlined above in Part I is accepted.

B. Texas's Ban on Corporate Direct Contributions Does Not Violate the First Amendment Under *FEC v. Beaumont*.

Binding U.S. Supreme Court precedent holds that government may ban corporations from making direct contributions to candidates without violating the First Amendment. *FEC v. Beaumont*, 539 U.S. 146, 149 (2003). Language in the Court's subsequent opinion in *Citizens United*, 558 U.S. at 336-66, could be read to undermine *Beaumont*. *See, e.g.*, *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc) ("*Citizens United*'s outright rejection of the government's anti-distortion rationale, as well as the Court's admonition 'that the State cannot exact as the price of [state-conferred corporate] advantages the

forfeiture of First Amendment rights,' casts doubt on Beaumont, leaving its precedential value on shaky ground." (citations omitted)). But "[i]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). Texas's ban on corporate direct contributions, TEX. ELEC. CODE § 253.094, thus does not violate the First Amendment, unless and until the U.S. Supreme Court chooses to overrule *Beaumont*.

PRAYER

The Court should construe the Election Code to conclude that King Street Patriots is not a "political committee" given the activities alleged in this severed proceeding and, having done so, reject the facial constitutional challenges.

Respectfully submitted.

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No. 15-0320

In the Supreme Court of Texas

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

v.

Texas Democratic Party; Gilberto Hinojosa, 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,
Respondents.

On Petition for Review
from the Third Court of Appeals, Austin

APPENDIX

Tab A: Letter Ruling Granting PTJ

Filed in The District Court
of Travis County, Texas
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At 3:53 P M.
Velva L. Price, District Clerk

353RD DISTRICT COURT

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December 9, 2016

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Re: Cause No. D-1-GN-16-000149; *Texas Home School Coalition, Inc. v. Texas Ethics Commission;* In the 261st Judicial District, Travis County, Texas

Counsel:

After considering Plaintiff's Motion for Summary Judgment, Plaintiff's Motion for Reconsideration, Defendant's Motion for Summary Judgment, and Defendant's Plea to the Jurisdiction, the responses, replies, evidence, pleadings, authorities, and arguments of counsel, the Court GRANTS Defendant's Plea to the Jurisdiction and DENIES all other relief requested.

The record reflects that Texas Home School Coalition, Inc. ("THSC") is a nonprofit corporation. Texas Ethics Commission ("TEC") acknowledges that, as such, it is treated as a singular "person," not a group of persons, under the Texas Election Code. *See* TEX. GOV'T CODE, Sec. 311.005(2). TEC acknowledges that only "groups of persons" are subject to the rules in controversy, which would not subject THSC to enforcement, unless it joins efforts with others.

The record reflects that THSC has "from time to time conduct[ed] advocacy in concert with other organizations," presumably voluntarily and with knowledge of the challenged rules. *See* Affidavit of Tim Lambert, Paragraph 19. The record is unclear, however, as to whether THSC intends to or will do so in the future.

Hypothetically, such future concerted activities could involve receiving contributions and/or making expenditures that could, based on the particular facts and circumstances, lead to an investigation, and possibly enforcement actions. However, nothing in the record reflects that

THSC is under investigation or that TEC has threatened any type of investigation of or enforcement against THSC for past or current activities.

The record also reflects that THSC "is affiliated with the Texas Home School Coalition Political Action Committee ('THSC PAC'), a registered political action committee ... [and that] much of the work that had previously been undertaken by THSC PAC ... has been undertaken by THSC in recent years," again, presumably voluntarily and with knowledge of the challenged rules. *See* Lambert Affidavit, Paragraph 20.

In fact, the parties have previously stipulated that THSC "will not use more than 20 percent of its resources on political expenditures" and that if it complies with that stipulation "THSC is not a political committee ... for purposes of enforcement of Title 15 of the Election Code, whether or not such enforcement occurs during or after 2014." *See* Stipulation and Order (09/04/14); Cause No. 5:14-cv-00133-C; *Texas Home School Coalition Association, Inc. v. Matthew Powell, et al;* In the U.S. District Court (N. Dist. – Lubbock Division).

The record reflects that THSC "intends to engage in materially similar activities in the 2015-2016 election cycle as it did in the 2013-2014 election cycle," but without specificity as to whether they intend to act alone or in concert with others. The record further reflects that THSC "expects to spend roughly the same amount on express advocacy or its functional equivalent, in absolute terms, in the 2015-2016 election cycle that it did in the 2013-2014 election cycle," which was the subject of the federal court action involving the above-referenced Stipulation and Order. *See* Lambert Affidavit, Paragraphs 22-23. Again, this evidence was without specificity as to the expected impact of the 20% threshold on the 2015-2016 election cycle.[1]

While the record reflects Mr. Lambert's opinion that THSC's proportional spending on express advocacy "could" increase (Lambert Affidavit, Paragraphs 24-25), that belief is otherwise unsupported. Instead, the record merely contains Mr. Lambert's "concern" that "*[i]f* THSC were deemed to constitute a political committee," it would be "forced" to greater expenditures of time, effort and resources to comply with requirements of the rules. (Lambert Affidavit, Paragraph 27, emphasis added).

Mr. Lambert's affidavit also states that THSC "may choose to engage in express advocacy through a separate but associated political committee . . . ." *See* Lambert Affidavit, Paragraph 28. Likewise, Mr. Lambert "fears" that TEC "could" conclude that it is a political committee. *Id.* at Paragraph 33.

"Persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate plaintiffs" to have standing to challenge the rules in this case. *See, Younger v. Harris,* 401 U.S. 37, 42 (1971). To prove standing, THSC must show, among other things, that it has suffered "injury in fact ... that is ... actual or

[1] Additionally, the Court notes that due to the passage of time, the 2015-2016 election cycle has now virtually concluded, mooting the present controversy.

imminent, not conjectural or hypothetical ...." *Heckman v. Williamson County,* 369 S.W.3d 137, 154-55 (Tex. 2012). On the record before the court, THSC's fears do not sufficiently rise to the level necessary to meet the standing requirements to challenge the rules here.

Thank you for your professionalism, presentation and patience, and let us know if you have any questions or concerns.

Sincerely,

Tim Sulak
353rd Judicial District Court

xc: Ms. Velva L. Price, District Clerk