



2017 WL 570468 (Tex.) (Oral Argument)

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Supreme Court of Texas

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

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; et al.

No. 15-0320  
February 7, 2017

### **Oral Argument**

#### Appearances:

James Bopp, Jr., The Bopp Law Firm, P.C., Terre Haute, IN, for Petitioner.

Chad W. Dunn, Brazil & Dunn, Houston, TX, for Respondent. Scott A. Keller, Office of the Attorney  
General-Solicitor General Division, State of Texas, Austin, TX, for Amicus Curiae.

#### Before:

Chief Justice Nathan L. Hecht; Justices Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Debra  
H. Lehrmann, Jeffrey S. Boyd, John P. Devine and Jeffrey V. Brown.

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CHIEF JUSTICE NATHAN L. HECHT: We'll hear argument in 15-0320, King Street Patriots v. the Texas  
Democratic Party.

MARSHAL: May it please the Court.

Mr. Bopp will present argument for petitioners. Petitioners have reserved five minutes for rebuttal.

### **ORAL ARGUMENT OF JAMES BOPP JR. ON BEHALF OF THE PETITIONER**

ATTORNEY JAMES BOPP JR: May it please the Court.

The first -- this case involves a First Amendment facial challenge to several provisions of Texas campaign finance law. I'd like to first put this case in context. The First Amendment protects the four indispensable democratic freedoms that are essential for citizens' participation in our democracy. Political speech is at the core of the First Amendment and is



highly protected because political speech is essential to self-government by the people. As a result, the First Amendment provides that Congress shall make no law abridging the freedom of speech, etc., a truly rigorous task.

Now, central to the First Amendment's protection of political speech is its prohibition on overbroad and vague laws. These laws chill speech and -- and permit arbitrary and capricious enforcement which we have seen in this case and frankly, in other recent cases in Texas.

JUSTICE DEBRA H. LEHRMANN: Mr. Bopp, can I ask you? If we conclude as a court that the word "intent" is not problematic, does that mean you lose on vagueness?

ATTORNEY JAMES BOPP JR: If the words are not ambiguous then we -- we lose on vagueness.

JUSTICE DEBRA H. LEHRMANN: And does it -- and does it revolve around that -- that particular word "intent?"

ATTORNEY JAMES BOPP JR: It -- it involves first the plain meaning of the words and then, if -- if it's ambiguous, you have rules of construction that you look to. One would be legislative intent but another, which is significant in this case, is agency construction of these words. This comes into play several times regarding words such as in connection with in particular.

JUSTICE DEBRA H. LEHRMANN: No, I'm referring to the word "intent" within the definition of campaign contribution --

ATTORNEY JAMES BOPP JR: Mm-hmm.

JUSTICE DEBRA H. LEHRMANN: -- means a contribution to a candidate or political committee that's offered or given with the intent that it be used in connection with blah, blah, blah.

ATTORNEY JAMES BOPP JR: Yes. Well, that -- that word the court -- U.S. Supreme Court has dealt with in the context of campaign finance regulation repeatedly, and said that intent cannot be used as a benchmark to determine the significance or the regulability of political speech just like the effect also cannot be used to affect whether or not the speech is subject to regulation.

So that -- that word -- I don't -- while it -- it may have vagueness associated with the strongest case, I think, is that it's a factor that the court -- U.S. Supreme Court has already precluded from being considered.

JUSTICE DEBRA H. LEHRMANN: I guess my question is, if we determine that -- that -- that's not the case, and if the word "intent" is not going to be dispositive then do you lose on that argument?

ATTORNEY JAMES BOPP JR: I'm sorry, I don't understand your question.

JUSTICE DEBRA H. LEHRMANN: I -- I'm just saying that you're -- I'm asking whether or not that word is really the crux of that part of your argument.

ATTORNEY JAMES BOPP JR: Well, it's -- it's one of the arguments against the definition of contribution, you know, campaign contribution, etc., but the principal argument that we made regarding that is that it's circular. In other words, each one of the definitions regarding contributions cite to the other and we end up at the same place. You start at campaign contribution that is a contribution to a political committee, you go to a political committee definition and you find out that it is a -- a group of persons accepting political contributions, you go to political contributions and you find that it means a campaign contribution. So you've gone in an exact circle and end up at the very same place. So --

JUSTICE EVA M. GUZMAN: What does -- circularity though does that, in and of itself, make a definition unconstitutionally vague or is that a -- a factor that we should consider?



ATTORNEY JAMES BOPP JR: Well, it -- it -- without other meaningful definitions, it does make it vague. And --

JUSTICE EVA M. GUZMAN: Unconstitutionally vague.

ATTORNEY JAMES BOPP JR: Yes, constitutionally, yes. I mean, the -- the precision in the First Amendment context is a hallmark of regulation. It is a more vigorous vagueness test than what is normally employed to a normal, you know, to a statute that do not impinge upon First Amendment free speech protected activity. So to have a circular definition that political committee -- that campaign contribution means political committee means then political contribution which means campaign contribution is you have no meaningful definition anywhere to what all -- all of these mean.

Now, one of the first errors of that the -- the court below which I think affected the entire decision is that the -- the court below presumed that the law is constitutional. Now, that is of course the normal rule, but that is not the rule most -- most assertedly is not the rule when you have a statute that regulates political speech based upon its content. The most recent case on that is Reed v. Town of Gilbert, 2015, where they said unequivocally speech "designed to influence the outcome of election" is "content-based in -- on its face."

So content-based regulations of speech are not entitled to the normal presumption of constitutionality, in fact, they're -- they're viewed skeptically because once again the -- we have a core democratic value at stake essential to the ability of citizens to participate in our democracy and that is to be able to talk about the government politicians, what is happening, and without being fearful that -- that they will cross some vague line or secondly, of course, be swept up in an otherwise valid statute that has legitimate scope but is substantially overbroad. So both the overbreadth doctrine and the First Amendment vagueness doctrine are intended to protect the citizens involved within our -- our election.

Now, the -- of course, we challenge the definition of political committee, and -- and there are two problems with the definition of political committee. First is that there are multiple principal purposes that an organization can have and if one of them is to support or oppose candidates then that triggers political committee status and regulation.

Now, the court of appeals provide a narrowing construction that said that there -- there is actually only one principal purpose in their construction of that statute. Now, the problem with that is this contrary to plain language. First, the words, "a principal purpose" is certainly true that it is -- would be the -- an important or most important purpose but there can be, of course, multiple principal purposes of an organization and in fact that's quite common to have not for profit organizations with multiple purposes.

Well, if you go then to the definition of specific purpose committee and general purpose committee which we challenge, you actually find them explaining that -- that you can be a specific purpose or general purpose committee if, as to specific purpose committee, the -- commit a political committee does not have among its principal purposes multiple, those of a general purpose committee but does have among its principal purposes support for one or more identified candidate, same with the definition of general purpose committee that has, quote, among its principal purposes the support or opposition to two or more unidentified candidate.

Now, you know, this is critical because advocacy groups need to know and understand when it is they're gonna bump up against the campaign finance law and in particular when they are gonna be subject to PAC burdens.

CHIEF JUSTICE NATHAN L. HECHT: Is King Street Patriots a political committee?

ATTORNEY JAMES BOPP JR: Not under the constitution but --

CHIEF JUSTICE NATHAN L. HECHT: Under the statute?

ATTORNEY JAMES BOPP JR: I'm sorry?

CHIEF JUSTICE NATHAN L. HECHT: Under the statute, is it a political committee?



ATTORNEY JAMES BOPP JR: The way it's interpreted -- they -- they can overbroad the statute. And certainly, in accordance with the interpretation of the Texas Democratic Party, it is. And -- and --

CHIEF JUSTICE NATHAN L. HECHT: What's King Street Patriot's position?

ATTORNEY JAMES BOPP JR: We are not. Under a proper -- under the constitution, we are not.

CHIEF JUSTICE NATHAN L. HECHT: Under the statute?

ATTORNEY JAMES BOPP JR: We don't know, your Honor.

CHIEF JUSTICE NATHAN L. HECHT: You don't know [inaudible].

ATTORNEY JAMES BOPP JR: It's vague and overbroad. We don't know. And -- and there's been no constructions of this statute --

CHIEF JUSTICE NATHAN L. HECHT: So you disagree with the state?

ATTORNEY JAMES BOPP JR: I'm sorry?

CHIEF JUSTICE NATHAN L. HECHT: You disagree with the state?

ATTORNEY JAMES BOPP JR: Yes, I disagree with the state, and I'm not sure which aspect you're asking me about though.

CHIEF JUSTICE NATHAN L. HECHT: The aspect about whether you're a political committee. They say -- the state says you're not.

ATTORNEY JAMES BOPP JR: Well, you know, we wish we knew that that was true, but we have no confidence that that is true. And if you approve the -- the statutes as written, we're gonna go back to a district court and spend huge sums of money in order to litigate whether or not one of our principal purposes is to do expenditures in connection with an election and in connection with -- is vague and -- and overbroad and we're gonna -- and also litigate because they have also alleged that we made contributions, whether or not we made contributions in connection with an election.

JUSTICE EVA M. GUZMAN: Has it --

ATTORNEY JAMES BOPP JR: Now, the only court that has provided a narrow construction, the Osterberg court did not construe any of ones that are applicable here. It only construed the direct campaign expenditure definition. And that is, you know, in federal law that would be the independent expenditure requirement, that is, the one time of that driven report that an individual must file if they do in accordance with that construction, expressly advocate the election or defeat of a clearly identified candidate.

Same construction U.S. Supreme Court in Buckley gave to its independent expenditure report, but there is no other construction and -- and, of course the problem, you know, with construction is, you know, you first have to pass as I've already mentioned when we're talking about principal purposes, you -- you have to pass the plain meaning of the statute, but secondly, you're really not here to rewrite these statutes.

And in connection with -- to say that those words "in connection with" actually say expressly advocate the electoral defeat of a clearly identified candidate, if you wanna use Buckley's formulation in express terms, using words like "vote for," "vote against," etc. Well, this sounds like a legislature.



JUSTICE DON R. WILLETT: Mr. Bopp, what -- what lasting precedential force does Beaumont have? I mean, it hasn't been overruled, but has it practically been overtaken? Are we still bound by it?

ATTORNEY JAMES BOPP JR: Well, your -- your -- the -- you're obligated to -- to apply the current analysis employed by the Supreme Court on particular issues, alright? There are -- there are three justifications in Beaumont for upholding the federal ban.

The third one is not applicable here and that is the anti-circumvention interest. The anti-circumvention interest is -- and for instance, in *Cali. Med*, they upheld the \$5,000 limit to political committees and they said one -- the reason was to prevent circumvention of the -- at that time \$1,000 --

JUSTICE DON R. WILLETT: Your view is -- your view, if the other two rationales for the ruling --

ATTORNEY JAMES BOPP JR: Have been superseded.

JUSTICE DON R. WILLETT: -- have been overtaken by subsequent doctrinal developments --

ATTORNEY JAMES BOPP JR: Yeah.

JUSTICE DON R. WILLETT: -- then we can disregard and -- and pay no mind that Beaumont has not been expressly overruled.

ATTORNEY JAMES BOPP JR: Yes. They relied upon in Beaumont the Austin analysis that the involvement -- simple involvement of corporations distorted the political system. That was expressly overruled in *Citizens United*.

What -- the second ground was quid pro quo corruption. And if you look at Beaumont, they were really using not the current definition but the -- there was influence, you know, undue influence could be exercised by corporations in giving contributions. Well, now, it is literally quid pro quo corruption. And -- and what justification can be offered or what facts support the proposition? It's simply giving \$5, a corporation giving \$5 to a candidate necessarily involves a quid pro quo corruption exchange.

Now, the third and I want to finish on anti-circumvention. Remember in federal law, there were contribution limits, \$1,000 to candidates, that they were trying to protect from circumvention by the limit on contributions to political committees or, in Beaumont, by the corporate prohibition.

In Texas, there are no contribution limits to protect so there is no circumvention in interest that the State of Texas can assert because there are no contribution limits to be protected. So not only do you have two interests that have been undermined substantially that were used in Beaumont to uphold the corporate ban, but the third one, and I -- it seems to me -- and if you read the amicus brief for the Brennan Center which I have, it seems to be the predominant interest, circumvention is simply not applicable. There are no contribution limits here to prevent the circumvention up.

Now --

CHIEF JUSTICE NATHAN L. HECHT: Your time is expired.

ATTORNEY JAMES BOPP JR: Thank you. Yes, it is.

CHIEF JUSTICE NATHAN L. HECHT: Are there any other questions?

Thank you, Mr. Bopp.

ATTORNEY JAMES BOPP JR: Thank you.



CHIEF JUSTICE NATHAN L. HECHT: I think we'll hear from the amicus first.

MARSHAL: May it please the Court.

Mr. Keller will present argument for the amicus curiae, the State of Texas.

**ORAL ARGUMENT OF SCOTT A. KELLER ON BEHALF OF STATE OF TEXAS, AS AMICUS CURIAE,  
SUPPORTING THE RESPONDENT**

ATTORNEY SCOTT A. KELLER: Thank you, Mr. Chief Justice, and may it please the Court.

The definition of political committee is valid because it's limited by three key elements that come from its plain text in *Osterberg v. Peca*'s narrowing of that text.

First, it requires a group of persons to act which means multiple, natural or corporate individuals must act together.

The second, this group must have a jointly held principal purpose.

And third, that purpose must be to make, and this is important, either direct contributions to candidates or expressly advocate the outcome of an election. And that limit comes from this Court's *Osterberg* precedent which has already narrowed the definition of political expenditure. And that applies not only to the definition of a direct campaign expenditure but also the definition of political expenditure of campaign expenditure.

In *Osterberg*, the Court noted expressly that Texas Ethics Commission had construed the phrase "campaign expenditure" not just direct campaign expenditure to be limited. And so my friend on behalf of Kings Street Patriots is arguing for a limiting construction of that term that this Court in *Osterberg* has already adopted. And when you apply those three elements here, King Street Patriots is not a -- a political committee as has been pleaded in this case for at least two independent reasons.

First, there is no allegation that it has a jointly held intent with any other person, and second there is no allegation it has made direct contributions to candidates or expressly advocated the outcome of an election. There are allegations about supporting poll watchers or having people attend legislative hearings. Those do not come anywhere close to express advocacy.

The standard for express advocacy as *Buckley v. Valeo* noted is extremely high. It needs words of direct express advocacy such as "vote for," "vote against," "Smith for Congress." And so what has been pleaded in this lawsuit and in the severed lawsuit, even if it remains back in the trial court does not come close to satisfying that.

And so King Street Patriots is not a political committee under that narrow definition. There are no vagueness issues. There are no overbreadth problems. You don't need to reach the issue of whether there would be a presumption of constitutionality. The *Osterberg* limitation and these three key elements of having a group with a jointly held principal purpose to make direct contributions or express advocacy already narrowed the limit and the limits of what that definition entails.

JUSTICE DON R. WILLETT: Beaumont is still controlling precedent?

ATTORNEY SCOTT A. KELLER: *FEC v. Beaumont* is still controlling precedent. The Supreme Court, just a few months ago, summarily reversed in a case *Bosse v. Oklahoma* and noted that it is the prerogative of the United States Supreme Court itself to overrule one of its precedents.



JUSTICE DEBRA H. LEHRMANN: And what was your -- what is your argument in response to Mr. Bopp's answer to that question?

ATTORNEY SCOTT A. KELLER: It is the prerogative of the United States Supreme Court to overrule one of its precedents. It has not overruled *Beaumont*. *Beaumont* remains binding precedent, and *Citizens United* has language that possibly undermines various rationales as the Eighth Circuit en banc has noted in the case that we've cited in our brief. But it is the United States Supreme Court's prerogative to overrule one of its precedents and while there may be doctrinal inconsistencies between *Beaumont* and *Citizens United*, this Court will be bound by the binding precedent in *Beaumont*.

JUSTICE EVA M. GUZMAN: Is Chief Justice Jones' dissent in *Sylvester v. TAB*, does that advance your argument or inform your argument on the definition of a principal purpose? The way he would have construed it he [inaudible] dissent and didn't prevail.

ATTORNEY SCOTT A. KELLER: Well, the position taken by the Texas Ethics Commission is you can have multiple principal purposes and the text, as my friend has noted, it says a principal purpose. Now the Texas Ethics Commission has rightly construed that statute to mean that you'd have to have 25 percent or more of your activities that would be going to that to satisfy the principal purpose test.

But that -- that can't be examined in a vacuum, it needs to be examined in the context of the other elements. It would have to be a group, multiple people with a jointly held principal purpose to engage in direct contributions or express advocacy. So even if you could have multiple principal purposes, the statute is still sufficiently limited given *Osterberg's* limiting construction as well. And the groups will be able to determine when political committee status is triggered because of those other limitations on the definition of political committee. And so in construing the term "principal purpose" you'd have to also examine that in the context of the other elements that narrow what a political committee means.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

ATTORNEY SCOTT A. KELLER: Thank you.

CHIEF JUSTICE NATHAN L. HECHT: Thank you, Mr. Keller.

MARSHAL: May it please the Court.

Mr. Dunn will present argument for respondents.

#### **ORAL ARGUMENT OF CHAD W. DUNN ON BEHALF OF THE RESPONDENT**

ATTORNEY CHAD W. DUNN: Mr. Chief Justice, may it please the Court.

A 110 years ago, a notion swept this nation as to concerns of corporate involvement and politics. Congress, President Theodore Roosevelt moved forward with reforms to ensure that corporate coffers couldn't be used to influence outcomes, and the State of Texas did the same. But much like we always do in Texas, we went a slightly different way than the federal government went and other states went. We decided that everyone can play in politics in Texas with one principle, the public, the electorate will know where the money comes from. That is the principle that I stand here before you today asking you to affirm.



Now, the awesome responsibility to strike down a statute as unconstitutional is strong medicine as this Court and the U.S. Supreme Court has recognized. There are good reasons our legislators 110 years ago put in forth these laws and there's good reasons for decades they have kept them. Many states across the nation have laws nearly identical to the ones being challenged to this case today and they do so because they serve a critical purpose and that is to inform the electorate.

Now, I'll turn to the specific issues in this case but I think the Court needs to understand, if it goes down the road of my friend Mr. Bopp or Mr. Keller, and of the state's analysis in this case, what it will do is ensure that never again will people know who supports candidates for office because this is what will happen. Corporations with generic names will be set up by single individuals, all the contributions for a particular candidate will go to that corporation and that corporation will show up as the singular donor on a candidate's form to the Texas Ethics Commission. And never again will the public have any idea who supports.

Now, if this Court wants to open the political process to Uber and Lyft and Exxon and Pinterest, and other corporations to use corporate profits to determine who ought to prevail in cases, it should tread carefully and it should consider that that very decision is a legislative decision. That is a decision that our elected representatives have made and should continue to make.

Now this --

CHIEF JUSTICE NATHAN L. HECHT: What is your response to the state's argument as amicus about whether King Street Patriots is a political committee?

ATTORNEY CHAD W. DUNN: King Street Patriots -- first, I think the argument misses the mark and I'm not trying to avoid the question. I -- I assure you I will get to it and answer it in a moment. But first and foremost, King Street Patriots is a corporation. And a corporation under Texas law cannot make a contribution to the Republican Party of Harris County or to Republican candidates for office without setting up a political committee which they didn't do in this case.

So the state's position it misses the point, the state pretends as though the political question or the political committee question is determinative but it's not. Under state law, a corporation cannot provide in kind or cash contributions to a candidate. That's what happened here. The reason for that is not --

CHIEF JUSTICE NATHAN L. HECHT: To a candidate?

ATTORNEY CHAD W. DUNN: I beg your pardon?

CHIEF JUSTICE NATHAN L. HECHT: To a candidate?

ATTORNEY CHAD W. DUNN: To -- yes, the summary judgment evidence which again isn't mentioned by the state, not cited by the state in the brief, hasn't been stated here today is that King Street Patriots, in addition to poll watchers, ran a telephone bank in favor of support of Rick Perry for governor, ran candidate forums on behalf of other Republican candidates, and all of this is uncontested summary judgment evidence in the record in this case.

And so those contributions to the party in the form of poll watchers -- and the reason we know they were contributions to the party, and the reason we know that there was coordination with the party is that under state law, only candidates and political parties can appoint poll watchers.

King Street Patriots admits that it recruited, it spent money, and it trained poll watchers and then it bequeath them to the Republican Party and the Republican candidates who then appointed them as poll watchers in -- in elections in Harris County and around the state. Now, that in and of itself is not malicious behavior, that in and of itself is the cut and thrust of politics, but in Texas for over a hundred years, we've said if you're going to do it, the public has the right to know who's paying for it.

And the only reason that King Street Patriots gets caught in the -- in the net that it attempts to describe is because it was the first to come along and take laws that had been perfectly clear and both complied with by both sides and decide it wasn't going to do them. It didn't go into federal court or into state court and challenge the laws as unconstitutional, it just flooded them. It just decided it wouldn't do it.

And so, we have a unique condition here. Seven years after King Street Patriots came on the scene in 2010, we still as a public, have no idea who funds their activities. You have my clients, my party, the other Republican Party, other Republican candidates, judicial officers who run for office, legislators, they, day in day out disclose who is supporting their campaigns.

So make no mistake about it. What's at stake today is opening the floodgates to secret funding of elections.

JUSTICE JEFFREY S. BOYD: If King Street Patriots had made their poll watchers available to the Democratic Party or Democratic candidates, would that affect your constitutional analysis?

ATTORNEY CHAD W. DUNN: We don't believe so because, nevertheless, that would still be a contribution to a party. It's a long-standing precedent, ethics commission rules, practices of -- of folks -- if you took -- take it -- set -- let's set aside the poll watcher for an example. Let -- let's take a pollster --

JUSTICE JEFFREY S. BOYD: Right. But let me let me finish on the question I'm getting at because much has been said about this case including in the briefs about the fact, the allegation at least, that King Street Patriots made these trained poll watchers available to Republican candidates and the Republican Party but not to Democratic candidates and the Democratic Party. And I'm just trying to make clear, in your view, that factor, that allegation is not relevant to the constitutional analysis.

ATTORNEY CHAD W. DUNN: That's true. It's not relevant to the constitutional analysis. It is uncontested evidence in the record below that the poll watchers were only provided to the Republican Party. But you can imagine a scenario --

JUSTICE JEFFREY S. BOYD: So is that fact relevant to any legal issue before us?

ATTORNEY CHAD W. DUNN: Well, it's relevant to application of the -- not -- not before the Court right now because the only thing before the Court right now is the facial constitutional challenge, but ultimately, it's relevant to the case because it goes to show whether or not a contribution was made to a candidate.

And I guess -- I'm not trying to quarrel with you, the reason I -- the reason I hesitate to say it doesn't -- I mean, the reason I say it doesn't matter that the contribution was only made for Republicans is take for example a particular donor, oftentimes, they may give to a Republican candidate in this race and a Democratic candidate in that race. Either way, both of those are contributions. They're political contributions.

And that's also -- since we're on this subject, explains why this is a content neutral regulation and why it's been upheld by this Court and others since its adoption because it -- it's not that King Street Patriots has its own set of rules, it's that King Street Patriots decided not to follow the rules that everybody else follows, and that's what's really at stake in this case.

You know, on the point of the political committee, we don't get to the political committee analysis that Texas wants us to undertake because we had a corporation that gave a political contribution. That's not permitted. It says if a corporation wants to do that under Chapter 253 of the code, it has to set up a political committee.

And the reason that the law set it up that way is because individuals can set up corporations called King Street Patriots or Citizens for Good Government or Joe Likes the Law, and the public has no way of knowing who is behind that speech.



So, unlike the federal government, who initially banned corporations from participating in politics, Texas says you can do so but you have to set up a political committee and you have to file reports.

CHIEF JUSTICE NATHAN L. HECHT: It's -- it's hard to see how training poll watchers expressly advocates a particular outcome in an election which we said is the test for political contribution.

ATTORNEY CHAD W. DUNN: Well, ultimately, that --

CHIEF JUSTICE NATHAN L. HECHT: I mean, the expenditure in Osterberg.

ATTORNEY CHAD W. DUNN: I beg your pardon, Judge?

Ultimately, that would be a fact question determined by the trial court, but this Court is -- is stuck with the record of the evidence in this case presented by my clients, it's uncontested. And if poll watchers were the -- I beg your --

CHIEF JUSTICE NATHAN L. HECHT: I'm asking you about poll watchers. How can that -- how can training poll watchers, even if it was for one party or one candidate, expressly advocate a particular outcome in an election?

ATTORNEY CHAD W. DUNN: Well, poll watchers -- the same way a pollster would or a canvasser, or a male consultant would, individuals who provide services to the campaign of benefit that are in furtherance of election of the -- that party's candidates or that candidate in particular.

And so in this case, the reason that the political party send down their own poll watchers is because those poll watchers observe with a trained eye from the standpoint of the candidate or the party that they support. They're part and partial of the election apparatus.

CHIEF JUSTICE NATHAN L. HECHT: Well, I don't -- I don't -- so are hamburgers that they used to eat but -- but it's hard to see how that's express advocacy.

ATTORNEY CHAD W. DUNN: Well, and it would be true, for example, and has been true for decades that if a political donor or corporation wanted to buy sandwiches and hamburgers for a political campaign, that that is a political contribution that buying dinner for the campaign staff, although it doesn't have anything to do with advocating, it assists in the enterprise which has this singular goal of advocating and electing particular candidates.

JUSTICE JEFFREY S. BOYD: Your argument is that the -- the money spent to train and provide poll watchers was a contribution not that it was an expenditure on behalf of the candidates.

ATTORNEY CHAD W. DUNN: That's correct. It was a contribution to the candidates who appointed these poll watchers and -- and in many cases to the Harris County Republican Party who appointed the poll watchers.

But I do wanna make sure the Court understands, poll watchers are only part of this. There was a phone bank in support of the Governor. There were candidate forums in support of Republican candidates. So you can't resolve the case purely on the poll watcher and I'm sorry, Judge, Justice, if --

JUSTICE JEFFREY S. BOYD: [inaudible]

ATTORNEY CHAD W. DUNN: -- if I interrupted.

JUSTICE JEFFREY S. BOYD: No, you're good.

ATTORNEY CHAD W. DUNN: Okay. So ultimately, what this case gets down to is first, whether or not there's a private right of action and whether that private right of action is constitutional. And of course this Court has already

resolved that question in *Osterberg v. Peca* decision.

And there's a reason that the legislature chose to allow individual parties to pursue claims for violation of campaign finance laws. The reason for that is in our low tax, low regulation and a low fees state, the state doesn't have the resources to enforce all of its laws and in particular its election laws. And as this Court recognized in *Osterberg*, it only makes sense to allow the candidates and the parties who are subjected to abuse of the campaign finance systems enforce it.

There's no reason for this Court to set aside that ruling today. And the parade of horrors that we hear from Mr. Bopp and King Street Patriots hasn't come true. These laws have been on the books for decades. We haven't seen rampant litigation between parties and candidates about campaign finance laws. In fact, we've seen just a handful of cases -- important cases that most political actors have complied with. And --

JUSTICE EVA M. GUZMAN: Of course that's no evidence the fact that we haven't seen it on whether it's had a chilling effect on -- on people not coming into the arena because they want to avoid the [inaudible] so really, it's -- it's of no evidence.

ATTORNEY CHAD W. DUNN: Well, that's sort of fighting with a ghost, your Honor. There's no evidence here in the file presented by King Street Patriots or anyone else that somebody has been precluded from making political statements or giving political speech because of these laws. And if that's been going for 110 years, I would think there'd be some evidence of it today or at least a description of it.

The reality here is, is that everybody has been able to speak as much and as often as they want. They just had to identify who it was that was supporting them, making those argument.

JUSTICE DEBRA H. LEHRMANN: Did you answer the question about whether or not it's your -- or what your opinion is about whether King Street Patriots is a PAC?

ATTORNEY CHAD W. DUNN: We believe it is a political committee, and we believe that's supported by the regulation of the laws. First, it's a corporation so it couldn't have done what it wanted to do anyway, but it is a collection of individuals by the uncontested evidence in the record. They passed the hat, individuals made contributions, those contributions that were then put to work for particular candidates and political parties. That's a political committee and that's what the state -- indeed a husband and wife were found by this Court in *Osterberg v. Peca* to be a political committee.

Now, it carved out that an exception for married couples, but it nevertheless recognized that the statute, years and years ago, has shown that when people put their money together for a common purpose, that is a political committee. I don't think the court even gets to the question though because the law is perfectly clear that a corporation has to set up as a political committee if it wants to undertake electoral activities.

Now, after we get past the fact that there should be a private cause of action, we then get to the complaint about definitions in the statute. I wanna point out that many of the definitions in the Texas statute -- indeed the very structure of the Texas statute in many ways tracks the structure of the federal disclosure statutes, all of which had been challenged ad nauseam and all of which except for in *Citizen United* independent expenditures has been upheld. This is an independent expenditure case.

And as the Austin Court of Appeals correctly noted, there's no claim in this case arguing about King Street Patriots expenditures independent from candidates and parties.

JUSTICE DON R. WILLETT: As a -- as constitutional matter, is there any kind of meaningful practical functional difference between an expenditure on behalf of a candidate or a PAC as opposed to a contribution to a candidate or a PAC?



ATTORNEY CHAD W. DUNN: Yes. And the reason that there's a difference is because as soon as you open that door, you allow a corporation to receive all of the funding and be a singular donor to a candidate. That's why contributions are treated separately.

Contributions are treated separately from independent expenditures because it forces the candidate and the party to identify people who are making contributions to them. And the Supreme Court in *Doe v. Reed* and *Citizens United* even reaffirmed that disclosure law, systems set up to just ensure that the disclosure happens are constitutional.

But there's other reasons that the Supreme Court in *Buckley* and then later also in *Citizens United* and of course in *FEC v. Beaumont* treated contributions different for a number of reasons. They talk, one, about war-chest corruption.

Imagine, for example, if Uber takes its corporate profits and puts it entirely behind a judge to defeat another judge who's ruled against Uber. Using corporate profits, profits that were earned because of a product or a service of the market place to retard or perturb open elections, undermines the democracy which is why legislators and -- and congressional members going back 100 years have concluded the same. That is not at stake. War-chest corruption is not at stake in an independent expenditure case.

There's also the appearance and the concern of quid pro quo corruption. One of the cases we recently saw on this is the West Virginia Supreme Court where certain judges were supported by a litigant before the court, and disclosure rules were the only reason the public knew about that potential quid pro quo corruption.

JUSTICE JEFFREY S. BOYD: So -- so if you and I sat down and decided to pool our money and make contributions to specific candidates, would we then be a political committee -- political committee subject to all the requirements of a political committee?

ATTORNEY CHAD W. DUNN: Yes.

JUSTICE JEFFREY S. BOYD: And yet the definition of political committee says nothing about making political contributions.

ATTORNEY CHAD W. DUNN: I'm -- I'm not sure I understand your Honor's question.

JUSTICE JEFFREY S. BOYD: Political committee is a group of persons that has, as a principal purpose, accepting political contributions or making political expenditures, says nothing about making political contributions. And you've agreed with Justice Willett that there's a constitutional distinction and therefore -- and -- and there certainly appears to be a statutory one between making political expenditures and making political contributions.

ATTORNEY CHAD W. DUNN: Well, the -- the law as it's always been enforced is that individuals make contributions to a group, whether it's two, or 10, or 100 and then spend it on the election for their support [inaudible] candidates, that is a political committee and the parties have operated as such.

Now, if the court wants to --

JUSTICE JEFFREY S. BOYD: Well, but now we've got a party who for the first time is coming in and saying, yeah, but that's not what it says, and when you start looking at it it's circular and we don't know what it means. So the law has always sort of assumed that's what it means but now we -- we have to hear -- we have to decide arguments that a party has come in to say, it's unconstitutionally vague because that's not really what it says. We don't know if we're a political committee or not.

ATTORNEY CHAD W. DUNN: Well, that -- the court, of course, focuses on the one definition and one section of the code. There has been decades worth of ethics commission rulings and court rulings on this subject so it wasn't as though *King Street Patriots* looks at a single sentence in a statute and says, my God, I can't make sense of this, and that's exactly the issue in *Buckley v. Valeo* where the U.S. Supreme Court said, these rules have been in place for a



while. There's a -- it's a common practice. Individuals know how they operate.

JUSTICE JEFFREY S. BOYD: An ethics commission interpretation or rule can defeat facial unconstitutionality of a statute?

ATTORNEY CHAD W. DUNN: Well, facial unconstitutionality of the statute would only apply if -- if this -- if it had been demonstrated, number one, that a -- a sufficient amount of speech had been precluded as a result of the regulation. There's no evidence of that at all in the case.

The other test which the court of appeals properly used is in order to support a facial challenge is to show that the law has no constitutional application.

Now, perhaps on development of an evidentiary record in the -- in the trial court below, King Street Patriots can support an as-applied constitutional challenge, we submit that they cannot, but they certainly cannot submit under either test that there is a facial challenge and that this law is unconstitutional in all respects.

Now, in addition to the contribution and expenditure test, the King Street Patriots has challenged whether or not corporations individually should be banned from making political contributions. This is a topic that hasn't been discussed at length here today and it hasn't been discussed at length or really at all in the state's brief.

But the fact remains is that the state statute, and again, this gets aside from the definitional issue, the state statute makes it clear that a corporation cannot make political contributions, and to do so, it must set up a political committee. Regardless of the definitions which we think are perfectly clear, the statute as to whether or not a corporation can participate in this way, is absolutely clear and there's been little to no argument in support of -- in opposition to that.

What I would like to say in closing is that I understand in our politics as it exists today in Texas and nationally, that my clients don't come to this Court as perhaps the most sympathetic litigant, to some, but we don't come here on behalf of a particular politics or policy or individuals. We come here on behalf of what has always been a bipartisan idea which is in order for politics and elections to work, the public needs to have information. And that information they must get. It doesn't have to be handed to him but it does have to be available.

And our legislators, Republican, Democrats, independents and the like, in this state have always said that the public has a right to know. We could talk about esoteric constitutional rules. We can talk about rulings and decisions that almost exclusively support our side's position in this case, but really, ultimately, what it gets down to is, do we want singular corporations to be set up, to collect all of the money including corporate money, international corporation money and be able to give it to candidates anonymously.

Is that good for any of us? Is that good for any political party or any political candidate? And the answer is no, and the Court should affirm the legislature.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Dunn.

Mr. Bopp, you have five minutes I believe.

**REBUTTAL ARGUMENT OF JAMES BOPP JR. ON BEHALF OF THE PETITIONER**

ATTORNEY JAMES BOPP JR: Three seconds? I'm sorry?



CHIEF JUSTICE NATHAN L. HECHT: Five minutes.

ATTORNEY JAMES BOPP JR: Thank you.

The -- first, to correct the record, we have said unequivocally that there as a result of our poll training, we did not just direct them or offer them to the Republican Party. We did not discriminate between Democrats and Republicans who wanted to be trained, and we did nothing as far as directing any of them in any direction to any party.

JUSTICE PHIL JOHNSON: And that's in the record?

ATTORNEY JAMES BOPP JR: Yeah, it is in the record. Yes.

JUSTICE PAUL W. GREEN: What about the phone bank? Was there a phone bank?

ATTORNEY JAMES BOPP JR: Yes. There -- there are phone -- there have been phone banks on different issues including legislative, you know, lobbying and -- and others. What are you referring to?

JUSTICE PAUL W. GREEN: But -- but not to specific candidates?

ATTORNEY JAMES BOPP JR: We -- we have never advocated the election or defeat of any candidate, and we're unequivocal on that and -- and no one has asserted that -- that we have.

Now, however, that issue about training poll watchers actually gets the cart before the horse and unfortunately, I think, the AG has the cart before the horse. He came here to argue whether King Street Patriots is a political committee under the current statute.

Well, that's the part that has been severed -- where they have sued us and then we're gonna go back to the Travis County to litigate after you decide what statutes and what standards are gonna be applied to make that determination. That's the issue before you. And if we are arguably affected by this, we can challenge these statutes, but certainly now on their face as we have, and in the future as applied if that becomes necessary. When --

JUSTICE JEFFREY S. BOYD: So when determining the facial constitutionality of the statute, is it proper for us to consider Buckley and Osterberg?

ATTORNEY JAMES BOPP JR: Yes. Yes, definitely. Buckley, of course, is the prevailing constitutional case on the particular issues involved here. In other words, whether speech in order not to be vague, has to expressly advocate the election or defeat of a clearly identified candidate. And, of course, we have -- don't have those restrictions here.

JUSTICE JEFFREY S. BOYD: What the Solicitor General said was that, in deciding whether this language is facially unconstitutional, we have to construe the language by incorporating the Buckley express advocacy standard. Do you agree with that?

ATTORNEY JAMES BOPP JR: No. Because, you -- you have your own standard on -- on how you construe statutes. And, you know, look -- you know, a lot of people come to me and they say, can I do X. And some of them say, I -- I went looked at the statute. I have never had anyone come to me and say, oh, I looked at the statute and then I also did a research of the cases and I found this case in the Texas Supreme Court that said the words, in connection with actually means expressly advocate election or defeat of a clearly identified candidate.

You know, part of your responsibility is to ensure that average people can actually look at what you do and comply. In Citizens United they add in Wisconsin Right to Life the court expressly condemned the idea, did you have to go higher a legal expert to decide what's the definition of political committee? What is the speech that I can engage in and when and what are the standard?

JUSTICE DON R. WILLETT: Mr. Dunn -- Mr. Dunn says the -- the upshot of a ruling in your favor would open the floodgates to the secret funding of elections and you say what?

ATTORNEY JAMES BOPP JR: I say there's two -- the disclosure interest can be satisfied two different ways. The first is by imposing on the entire organization, reporting of everything they do, and the Supreme Court with respect to overbreadth said that the only time you can do that is if it's your major purpose to elect or nominate candidates, to subject the entire organization, to reporting all its contributors, all its expenditures and suffer all the administrative and organizational burdens.

The second is an event-driven report. That is the report that Citizens United upheld as a disclosure. That is the report that Buckley upheld after construing an independent expenditure report to require express advocacy. And that report will report, one, what the expenditure was and if the legislature decides to do that, also can require the reporting of donors that gave money for that purpose.

In other words that is your part or designated contribution, for, to fund the -- those political -- in this case, independent expenditures. That is perfectly legal and, in fact, you have that here, called the direct campaign report -- that is an independent expenditure report. The -- the only, quote, problem is that the legislature only applied that report to individuals. They're perfectly entitled if they choose to apply it to organization, but that's their decision so that is the alternative that is constitutional here.

And I thank you.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Bopp.

The case is submitted. We'll take another brief recess.