

# IN THE SUPREME COURT OF TEXAS

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No. 97-1027

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ROBERT AND OLGA OSTERBERG, PETITIONERS

v.

PETER S. PECA, JR., RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

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**Argued on September 8, 1998**

JUSTICE GONZALES, concurring.

I agree with the Court that the Texas Election Code's direct-campaign-expenditure disclosure requirements, with the exception of the in-concert provision, survive the Osterbergs' specific constitutional challenges. This Court appropriately rejects the Osterbergs' argument that the Code's approach to regulation — which begins with a rule generally forbidding direct campaign expenditures but makes that rule subject to specified exceptions — is facially unconstitutional.

The Court also correctly concludes that persons may be held civilly liable for violating the reporting requirements without proof that they knew they were breaking the law. On its face, section 253.131 of the Texas Election Code is ambiguous.<sup>1</sup> It would be reasonable to construe the statute as requiring proof that the person making the campaign contributions or expenditures knew it

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<sup>1</sup>*See* TEX. ELEC. CODE § 253.131(a) (“A person who knowingly makes or accepts a campaign expenditure or makes a campaign expenditure in violation of this chapter is liable for damages as provided by this section.”).

violated the Code before civil liability could attach. However, as the Court properly advises, our primary aim is to give effect to the Legislature's intent.<sup>2</sup> And as the Court points out in two other sections of the Election Code, the Legislature demonstrated that it clearly knew how to require that the actor have knowledge of the Election Code before being charged with a violation. The Court's construction is further supported by the fact that sections 253.003(b), 253.005(a), and 253.131(a) were all amended in the 1987 revision of the Election Code.<sup>3</sup>

I write separately, however, to make clear that although the Court upholds the Code against most of the specific constitutional arguments that the Osterbergs make, the disclosure requirements are not immune from other constitutional attacks. In particular, I am concerned that the Code's disclosure requirements, as applied, may be so cumbersome for ordinary citizens that they unduly burden free speech. The Osterbergs intimated this but did not clearly raise it as a constitutional challenge.<sup>4</sup>

The Court correctly observes that direct-campaign-expenditure disclosure requirements can be permissible restraints on political communication. Disclosure requirements serve important state interests, such as informing voters of a candidate's key sources of support, thus facilitating predictions of the kinds of legislation the candidate may support. And as the United States Supreme

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<sup>2</sup>See *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984) (“The canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policy-making and legislative functions of duly-elected representatives. Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.”) (citations and internal quotation marks omitted).

<sup>3</sup>See Act of May 30, 1987, 70<sup>th</sup> Leg., R.S., ch. 899, § 1, 1987 Tex. Genl Laws 2995, 3005 & 3011 (current version at TEX. ELEC. CODE §§ 253.003(b), 253.005(a), 253.131(a)).

<sup>4</sup>In their brief, the Osterbergs characterized the Texas Election Code as a “complex patchwork” of laws. To illustrate this point, they noted that a pro-Peca political committee, staffed largely by lawyers, did not know how to comply with the Code, and needed Peca's help.

Court observed in *Buckley v. Valeo*,<sup>5</sup> “disclosure requirements — certainly in most applications — appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.” But the sheer complexity of the requirements, coupled with the severe consequences of non-compliance, may very well chill the activism of ordinary individuals who lack the sophistication or experience needed to understand and comply with the Code.

The first difficulty one encounters with the Code is coping with its definitions, which spell out the scope of its regulatory provisions.<sup>6</sup> A “direct campaign expenditure” is defined as “a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure.”<sup>7</sup> A “campaign expenditure,” in turn, is “an expenditure made by any person in connection with a campaign for an elective office or on a measure.”<sup>8</sup> A “campaign contribution,” by contrast, is “a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure.”<sup>9</sup>

These definitions are not very lucid. For one thing, it may not be apparent, from the perspective of an ordinary citizen, that “in connection with a campaign” refers solely to communications expressly advocating the election, passage, or defeat of a clearly identified candidate or measure. It is also not clear whether a coordinated expenditure — one made in cooperation or consultation with a candidate — is a campaign contribution or a direct campaign

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<sup>5</sup>424 U.S. 1, 68 (1976).

<sup>6</sup>*See* TEX. ELEC. CODE § 251.001.

<sup>7</sup>*Id.* § 251.001(8).

<sup>8</sup>*Id.* § 251.001(7).

<sup>9</sup>*Id.* § 251.001(3).

expenditure. How a coordinated expenditure is characterized is important, for it determines who — the candidate or the person making the expenditure — has the burden of reporting it. So an ordinary citizen must consult the Ethics Commission Rules (or a lawyer) to clarify this ambiguity: “A campaign expenditure is not a contribution from the person making the expenditure if . . . it is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure was made.”<sup>10</sup>

At least one thing is clear. An “expenditure” is defined very broadly to include “a payment of money or any other thing of value.”<sup>11</sup> An expenditure as minor as the cost of drafting or copying an issue-oriented handbill or mailing a letter may trigger the Code's requirements.<sup>12</sup>

Texas's regulatory scheme for direct campaign expenditures begins with Chapter 253 of the Texas Election Code. Section 253.002 prohibits a person from knowingly making or authorizing a direct campaign expenditure unless the expenditure is authorized by Subchapter C.<sup>13</sup> This general prohibition does not apply to corporations, labor organizations, candidates, political committees, or campaign treasurers acting in an official capacity, whose expenditures are regulated under other Code provisions.<sup>14</sup>

Subchapter C, comprised of Sections 253.061 through 253.063, describes the circumstances under which an ordinary citizen can make a direct campaign expenditure. Section 253.061 provides

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<sup>10</sup>1 TEX. ADMIN. CODE 20.1.

<sup>11</sup>TEX. ELEC. CODE § 251.001(6).

<sup>12</sup>See Op. Tex. Ethics Comm'n No. 177 (1993) (stating that expenditures include “the cost of producing . . . brochures plus any distribution costs, such as postage”).

<sup>13</sup>See TEX. ELEC. CODE § 253.002.

<sup>14</sup>See *id.* § 253.002(b) (listing exceptions).

that an individual may make direct campaign expenditures of up to \$100 if he or she is “not acting in concert with another person” and receives no reimbursement for the expenditures.<sup>15</sup> Section 253.062 allows an individual “not acting in concert with another person” to make direct campaign expenditures exceeding \$100 if “the individual complies with Chapter 254 as if the individual were a campaign treasurer of a political committee.”<sup>16</sup>

Chapter 254 spells out the detailed record-keeping, report-filing, and written-notice requirements with which a campaign treasurer must comply. First, “[e]ach campaign treasurer of a political committee shall maintain a record of all reportable activity” containing “the information that is necessary for filing the reports required by this chapter” and “preserve the record for at least two years.”<sup>17</sup> Second, a campaign treasurer must, under pain of committing a Class A misdemeanor, “deliver written notice of [any political expenditure] to the affected candidate or officeholder not later than the end of the period covered by the report in which the reportable activity occurs.”<sup>18</sup> Third, the Code details the contents required in the reports, the entities to which they must be sent, and the various reporting periods that apply.<sup>19</sup>

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<sup>15</sup>*Id.* § 253.061.

<sup>16</sup>*Id.* § 253.062(a)(1).

<sup>17</sup>*Id.* § 254.001.

<sup>18</sup>*Id.* § 254.128; *accord*, Op. Tex. Ethics Comm'n No. 331 (1996) (“An individual 'not acting in concert with another person' who makes a direct campaign expenditure supporting a candidate is also required to give notice to the candidate.”); *see also* TEX. PENAL CODE § 12.21 (providing punishment of up to \$4,000 and one-year's confinement in jail for committing a Class A Misdemeanor).

<sup>19</sup>*See* TEX. ELEC. CODE §§ 254.121 - 254.184.

As the majority opinion illustrates, the reporting requirements are not trivial.<sup>20</sup> Fortunately, the Commission has made compliance easier by making forms and campaign finance guides available over the Internet.<sup>21</sup> But the fact that those forms and guides are tailored for political committees, not individuals, makes an ordinary citizen's task of completing the forms that much more complicated.

Even after an ordinary citizen divines what information must be reported and how to report it, determining the proper filing authority with whom to file the reports is no easy task. Because the Code itself does not make this clear,<sup>22</sup> one must turn to the Ethics Commission Rules for guidance. These Rules instruct an individual making a direct campaign expenditure under Section 253.062 to file reports as if the individual were a campaign treasurer of a specific-purpose political committee.<sup>23</sup> There are different filing authorities depending on the office sought by the candidate supported or opposed by a specific-purpose political committee. Committees supporting or opposing candidates for a seat in the state legislature or on the state board of education or for other statewide and multi-county district offices must file reports with the Texas Ethics Commission.<sup>24</sup> Committees seeking

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<sup>20</sup>See \_\_\_ S.W.2d at \_\_\_ (discussing many of the details that must be provided in the reports).

<sup>21</sup>See Texas Ethics Commission, *Ethics Commission Forms & Instructions* (last modified July 13, 1999) <<http://www.ethics.state.tx.us/filinginfo/forms&in.htm>>.

<sup>22</sup>Section 253.062 requires an individual to file as if he or she were the campaign treasurer of a political committee. See TEX. ELEC. CODE § 253.062. The Code, however, provides different filing requirements depending on whether the committee is special- or general-purpose. Compare *id.* § 254.130 with *id.* § 254.163 (specifying different filing authorities for the different committee types); see also *id.* §§ 251.001(13)&(14) (defining special- and general-purpose committees). And the Code simply does not indicate which of these two committees — general-purpose or specific-purpose — an individual under Section 253.062 is supposed to model.

<sup>23</sup>See 1 TEX. ADMIN. CODE § 22.5(b)(2).

<sup>24</sup>See *id.* § 20.3.

to influence elections for county, district, or precinct offices must file their campaign treasurer appointments with the county clerk, elections administrator, or tax assessor-collector, as designated by the particular county.<sup>25</sup> The filing authority for committees seeking to influence elections for other offices varies.<sup>26</sup> If, because the committee is supporting or opposing more than one candidate, reports must be filed with multiple authorities, the committee may choose to file the reports with the commission only.<sup>27</sup>

And the complexity does not end there. An individual cannot expect to file just one report and be done with it. The Code sets forth several reporting periods in which reports are required, even if no expenditures are made.<sup>28</sup> Reports must be filed semi-annually,<sup>29</sup> thirty days before the election,<sup>30</sup> and eight days before the election.<sup>31</sup> Also, expenditures above a specified threshold made in the nine days preceding the election must be reported in telegram reports.<sup>32</sup> Only by filing a dissolution report with a sworn statement that no further reportable expenditures are expected is the individual relieved of filing additional reports.<sup>33</sup>

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<sup>25</sup>*See id.* § 20.5.

<sup>26</sup>*See id.* §§ 20.3 - 20.7.

<sup>27</sup>*See id.* § 20.9.

<sup>28</sup>*See* TEX. ELEC. CODE § 254.031(b) (“If no reportable activity occurs during a reporting period, the person required to file a report shall indicate that fact in the report.”).

<sup>29</sup>*See id.* § 254.123.

<sup>30</sup>*See id.* § 254.124(b).

<sup>31</sup>*See id.* § 254.124(c).

<sup>32</sup>*See id.* § 254.038.

<sup>33</sup>*See id.* § 254.126.

In summary, the Code's reporting requirements are cumbersome and complicated. As a result, the Code may deter ordinary citizens from disseminating their own views on elections or ballot measures. This raises the question, yet unanswered by the United States Supreme Court, of whether a set of disclosure requirements can be so onerous that they violate the First Amendment.<sup>34</sup>

In *Buckley*, it is true, the United States Supreme Court upheld substantially similar reporting requirements.<sup>35</sup> Subjecting those disclosure requirements to a “strict standard of scrutiny,”<sup>36</sup> the Court concluded that “[t]he burden imposed by § 434(e) is . . . a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.”<sup>37</sup> But although *Buckley* upheld the disclosure requirements of the Federal Election Campaign Act on their face, it did not hold that the requirements would be invariably free of further constitutional scrutiny. The Court readily admitted that “[t]here could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.”<sup>38</sup> While the Court there was concerned with the threat of reprisals a minor party or

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<sup>34</sup>*Cf. Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (suggesting that permissible free speech restrictions should be “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with”) (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)).

<sup>35</sup>*See* \_\_\_ S.W.2d at \_\_\_ & n.19 (discussing the federal requirements).

<sup>36</sup>*Buckley*, 424 U.S. at 75.

<sup>37</sup>*Id.* at 82.

<sup>38</sup>*Id.* at 71.

independent candidate might face, that concern would also be appropriate in a case proving that the Code's requirements are so onerous that they chill political activity by ordinary citizens.<sup>39</sup>

It is the Legislature's prerogative to structure this State's campaign finance laws. But that prerogative is subject to constitutional limitations. This State's campaign finance laws must not unduly burden the political speech of ordinary citizens. There could well be future cases in which this issue is raised and proof shown of a chilling effect serious enough that the Code's requirements cannot be constitutionally applied. That has not, however, been done in this case. Accordingly, I concur.

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Alberto R. Gonzales  
Justice

OPINION ISSUED: July 29, 1999

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<sup>39</sup>Similar concerns for ordinary citizens are echoed in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-38 (1995), in which an ordinary citizen who composed, printed, copied, and distributed handbills opposing a proposed school tax levy was fined for not including declarations on the handbills containing her name and address. In striking down the Ohio statute, the Supreme Court attempted to relieve the tension this action created with *Buckley* by reiterating “that the federal Act, while constitutional on its face, may not be constitutional in all its applications.” *Id.* at 356 n.21.