

# 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 ENOCH, joined by JUSTICE O'NEILL, dissenting.

When a statute is susceptible of two reasonable constructions, one of which raises serious constitutional concerns and the other of which does not, it is axiomatic that we should prefer the construction that raises no constitutional doubts. Here, both the trial court and the court of appeals construed the Election Code provision at issue, section 253.131(a), to impose the requirement that, before civil liability will attach against a person, that person must "know" that the campaign contribution or expenditure at issue violated the Code. That construction is reasonable. But the Court chooses another construction of the pertinent provision, one that raises serious concerns about the statute's constitutionality. Like the trial court and the court of appeals, I believe that section 253.131 affords a private cause of action only for knowing violations of the Code. And because there is no evidence that the Osterbergs knew they were violating the Election Code when they failed to timely comply with its reporting requirement, I respectfully dissent.

Section 253.002 of the Election Code makes direct campaign expenditures unlawful unless

the person making the expenditure complies with Subchapter C to Chapter 253.<sup>1</sup> Subchapter C contains two sections — 253.061 and 253.062. Of these, because Mr. Osterberg spent more than \$100 on the television ad, only section 253.062 is relevant. It provides:

(a) Except as otherwise provided by law, an individual not acting in concert with another person may make one or more direct campaign expenditures in an election from the individual's own property that exceed \$100 on any one or more candidates or measures if:

(1) the individual complies with Chapter 254 as if the individual were a campaign treasurer of a political committee . . . .<sup>2</sup>

Under section 254.154, a political committee's campaign treasurer is required to file two reports, one no later than thirty days before election day,<sup>3</sup> and the other no later than the eighth day before election day.<sup>4</sup> The contents of these reports are specified in sections 254.031 and 254.121 of the Election Code.<sup>5</sup>

To facilitate enforcement of section 253.002, section 253.131 of the Election Code creates a private cause of action against a "person who *knowingly* makes or accepts a campaign contribution or makes a campaign expenditure in violation of [Chapter 253 of the Election Code]."<sup>6</sup> To decide this case, we must determine whether the word "knowingly" in section 253.131(a) modifies the entire succeeding clause including the phrase "in violation of [the Election Code]," or whether it only

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<sup>1</sup> See TEX. ELEC. CODE § 253.002(b)(1) (unless otherwise specified, all statutory citations are to the Election Code).

<sup>2</sup> § 253.062.

<sup>3</sup> § 254.154(b).

<sup>4</sup> § 254.154(c).

<sup>5</sup> §§ 254.031, -.121; see also 1 TEX. ADMIN. CODE § 22.5.

<sup>6</sup> § 253.131(a) (emphasis added).

modifies the phrase "makes a campaign expenditure." I agree with the court of appeals' conclusion that for Mr. and Mrs. Osterberg to be liable to Judge Peca for violating the Election Code, Judge Peca had to present some evidence that the Osterbergs were aware that their actions violated the Code.<sup>7</sup>

But the Court adopts Judge Peca's argument that "knowingly" in section 253.131(a) modifies only the act of contributing or spending, not violating the code; that is, all that a person needs to "know" before that person can be held liable is the fact of a contribution or expenditure, not that the contribution or expenditure violated the Election Code. The Court accepts Judge Peca's claim that any other construction of section 253.131(a) would make "ignorance of the law" a defense.<sup>8</sup> Thus, the Court concludes that "in section 253.131[(a)], 'knowingly' applies only to whether one is making a 'campaign contribution' or 'campaign expenditure'" as defined by the statute.<sup>9</sup>

The Court justifies divorcing "knowingly" from the Election Code violation by claiming that two other provisions in the Election Code demonstrate that the Legislature knew how to require that a defendant have actual knowledge that his conduct was illegal when it wanted such a requirement.

I reiterate the Court's argument:

The Legislature made clear in other sections of the Election Code when it specifically wanted to require a person to know the law is being violated. *See, e.g.,* TEX. ELEC. CODE § 253.003(b) ("A person may not *knowingly* accept a political contribution *the person knows to have been made in violation of this chapter.*") (emphasis added); § 253.005(a) ("A person may not knowingly make or authorize a political expenditure wholly or partly from a political contribution *the person knows to have been made in violation of this chapter.*") (emphasis added). The Legislature clearly knew how to require that the actor have knowledge of the Election Code before being

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<sup>7</sup> 952 S.W.2d at 126-27.

<sup>8</sup> *See* \_\_\_ S.W.2d at \_\_\_ (citing TEX. PENAL CODE § 8.03(a)).

<sup>9</sup> *Id.* at \_\_\_.

charged with a violation. Because the Legislature did not include a similar knowledge requirement in section 253.131[(a)], we should not presume to add that requirement ourselves.<sup>10</sup>

I disagree. The Court's construction produces the ironic result that only *candidates* like Judge Peca are protected from civil liability when unaware that they are violating the Election Code, while *ordinary citizens* like Mr. and Mrs. Osterberg can be liable for twice the amount they expend for even the most innocuous of unknowing violations. Neither the Election Code's structure nor section 253.131(a)'s language compel this construction. Rather, the Code provisions on which the Court relies equally suggest legislative intent that all persons, candidates and citizens alike, are protected from civil liability for unlawful expenditures or contributions, whether made or received, unless they knew that the expenditures or contributions violated the Code. Section 253.003(b) imposes liability for accepting a contribution only when the person knows the contribution violated the Code. Section 253.005(a) imposes liability for making an expenditure from a contribution only when the person knows the contribution violated the Code. Likewise, section 253.131(a) shields a person from liability for making an expenditure or a contribution that violates the Code unless the person knows the expenditure or contribution violates the Code. All three provisions share a common underpinning—there is no liability unless the person knows the contribution or expenditure violated the Code.<sup>11</sup>

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<sup>10</sup> *Id.* at \_\_\_\_.

<sup>11</sup> Other provisions of the Election Code employ the same structure as section 253.131(a) to focus on whether the person knew a contribution or expenditure violated the Code. *See* § 253.0341(d) ("A person who knowingly makes or accepts a contribution [to a legislative caucus] in violation of this section is liable for damages to the state in the amount of triple the value of the unlawful contribution."); § 253.132(a) ("A corporation or labor organization that knowingly makes a campaign contribution to a political committee or a direct campaign expenditure in violation of Subchapter D is liable for damages as provided by this section to each political committee of opposing interest . . ."); § 253.133 ("A person who knowingly makes or accepts a political contribution or makes a political expenditure in violation of this chapter is liable for damages to the state in the amount of triple the value of the unlawful contribution or expenditure.").

I believe we are obliged to give section 253.131(a) this construction. We have stated that "it is our duty as a court to construe statutes in a manner which avoids serious doubt of their constitutionality."<sup>12</sup> We followed unequivocal United States Supreme Court precedent in making this statement.<sup>13</sup> Not surprisingly, other state courts uniformly adhere to this rule of statutory construction.<sup>14</sup> And here, application of the rule leads inexorably to the conclusion that in section 253.131(a), "knowingly" modifies the entire clause, including "in violation of [the Code]."<sup>15</sup>

The Court's construction, on the other hand, compels consideration of a host of constitutional issues. In fact, the Court declares that a portion of the Election Code is unconstitutional as applied to the Osterbergs.<sup>16</sup> And Justice Gonzales's concurring opinion identifies yet another significant constitutional problem posed by the Court's construction. Justice Gonzales correctly points out that the Code's reporting requirements are so complex and cumbersome that they may unconstitutionally chill ordinary citizens' exercise of their free speech rights.<sup>17</sup> Pointedly, Justice Gonzales's

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<sup>12</sup> *Federal Sav. & Loan Ins. Corp. v. Glen Ridge I Condominiums, Ltd.*, 750 S.W.2d 757, 759 (Tex. 1988); see also *State v. Edmond*, 933 S.W.2d 120, 124 (Tex. Crim. App. 1996); *Miami Indep. Sch. Dist. v. Moses*, 989 S.W.2d 871, 876 (Tex. App.—Austin 1999, pet. pending); cf. *Camp v. Gulf Production Co.*, 61 S.W.2d 773, 777 (Tex. 1933).

<sup>13</sup> See *Glen Ridge I*, 750 S.W.2d at 759 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986)); see also *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 628-29 (1993); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

<sup>14</sup> See, e.g., *Slayton v. Shumway*, 800 P.2d 590, 595 (Ariz. 1990); *People v. Superior Court*, 917 P.2d 628, 633 (Cal. 1996); *State v. Globe Communications Corp.*, 648 So.2d 110, 113 (Fla. 1994); *State v. Petersilie*, 432 S.E.2d 832, 838 (N.C. 1993); *Baptist Med. Ctr. of Okla., Inc. v. Aguirre*, 930 P.2d 213, 219 (Okla. 1996); see also 16A AM. JUR.2D § 176 at 56-57 (1998).

<sup>15</sup> § 253.131(a).

<sup>16</sup> See \_\_\_ S.W.2d at \_\_\_.

<sup>17</sup> See \_\_\_ S.W.2d at \_\_\_ (Gonzales, J., concurring).

constitutional concern is limited to how the Code applies to "ordinary citizens."<sup>18</sup> The unstated rationale for this limit is both apparent and telling — under the Court's construction, only "ordinary citizens," and not candidates, can be held liable for unknowing violations of the labyrinthine reporting requirements. Thus, the Court's chosen construction not only forces it to consider several issues about the Code's constitutionality (and even to find a particular provision unconstitutional), it also raises and leaves unresolved the very significant constitutional doubt Justice Gonzales so ably describes. That doubt exists only because of the Court's construction of section 253.131(a); it does not exist when the Code is reasonably construed to require actual awareness that an expenditure violates the Code before civil liability attaches.

But the Court criticizes my construction of the Election Code by arguing that it "would hamper section 253.131(a)'s purpose by undermining its enforceability. Enforcement would be problematic because future cases would focus on whether the defendant knew the specific code provisions, and whether the defendant operated under a correct legal interpretation."<sup>19</sup> The Court contends that it would undercut legislative intent to construe the statute to allow "[a] defendant [to] avoid civil enforcement simply by refusing to learn the election laws."<sup>20</sup> This is absurd. First, parties can prove "knowing" violations of the Election Code the same way they prove other claims with a "knowing" element — primarily through circumstantial proof from which an inference of knowledge can be made. Second, even if a knowledge requirement is problematic, it's the standard the Legislature chose. As the Court acknowledges, "it is within the Legislature's province, not ours, to

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<sup>18</sup> *Id.* at \_\_\_\_.

<sup>19</sup> \_\_\_\_ S.W.2d at \_\_\_\_ (citations omitted).

<sup>20</sup> *Id.* at \_\_\_\_.

establish the degree of knowledge necessary to violate a statute."<sup>21</sup> Finally, the Court's construction suffers from the same so-called problems it identifies with my construction. In fact, it compounds them by adding the further irony that *citizens like Mr. Osterberg* can be held liable under the Election Code without knowing they violated it, while *candidates like Judge Peca* can violate the Code with impunity so long as they follow the Court's blueprint of "refusing to learn the election laws." The more sensible approach, and the one that avoids constitutional doubts, is to construe the Election Code consistently as requiring knowing violations before civil liability attaches.

I agree with the court of appeals' conclusion that there is no evidence that Olga Osterberg knowingly violated the Election Code.<sup>22</sup> The only evidence Judge Peca cites to support the existence of a knowing violation by Robert Osterberg is that Albert Biel heard Judge Peca's remarks at the February 8, 1994 bar luncheon about Mr. Osterberg's lack of compliance with the Election Code, and that at some point Mr. Biel told Mr. Osterberg about these comments. This is no evidence that Mr. Osterberg knew that he was violating the Election Code when he failed to make a report no later than eight days before the election. Mr. Osterberg does not dispute that he violated the Election Code by not making this report in a timely fashion. But Judge Peca presented no evidence showing *when* Mr. Osterberg found out about Judge Peca's comments. The timing of the violation is important to the knowledge requirement. The violation occurred on that date when the report was to be filed. There is no evidence in this record that Osterberg was aware *on or before that date* that the Election Code required the report to be filed. Had Judge Peca presented evidence that Mr. Biel reported Judge Peca's comments to Mr. Osterberg *before* the report was due, my conclusion would be different. But

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<sup>21</sup> *Id.* at \_\_\_ n.3.

<sup>22</sup> 952 S.W.2d at 128.

Judge Peca offered no such evidence. Accordingly, there is no evidence that Osterberg knowingly violated the Election Code.

The Court misconstrues section 253.131(a), and its analysis of the constitutional issues raised by the parties is unnecessary. Under the proper reading of section 253.131(a), Judge Peca had the burden to prove Mr. Osterberg knowingly violated the Election Code. Judge Peca failed to meet that burden. Accordingly, I dissent.

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Craig T. Enoch  
Justice

Opinion delivered: July 29, 1999