

# 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 CHIEF JUSTICE PHILLIPS, JUSTICE HANKINSON, and JUSTICE O'NEILL, dissenting.

Because the Osterbergs made arguments in their motion for rehearing that merit discussion, I withdraw my July 29, 1999 dissenting opinion and substitute the following.

This is a statutory construction case. Ironically, the Court's chosen construction of section 253.131(a) of the Election Code gives less protection to Texas citizens engaged in the core First Amendment activity of speaking about an election than the United States Supreme Court's chosen construction of the federal child obscenity act has given to peddlers of child pornography. Because there is no evidence the Osterbergs knew they were violating the Election Code when they failed to timely comply with its reporting requirements, 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 concerning expenditures — 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 Chapter 254, 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) .

<sup>2</sup> *Id.* § 253.062.

<sup>3</sup> *Id.* § 254.154(b).

<sup>4</sup> *Id.* § 254.154(c).

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

<sup>6</sup> TEX. ELEC. CODE § 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 their actions violated the Code.<sup>7</sup>

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>8</sup> We followed unequivocal United States Supreme Court precedent in making this statement.<sup>9</sup> Not surprisingly, other state courts uniformly adhere to this rule of statutory construction.<sup>10</sup> And here, the constitutional implications of imposing liability on persons for engaging in protected speech under the First Amendment mandate the conclusion that in section 253.131(a), "knowingly" modifies the entire clause, including "in violation of [the Code]."<sup>11</sup>

The television ads that Robert Osterberg designed and had produced and aired were political speech. As such they are protected by the First Amendment.<sup>12</sup> Because independent campaign

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

<sup>8</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. denied); *cf. Camp v. Gulf Prod. Co.*, 61 S.W.2d 773, 777 (Tex. 1933).

<sup>9</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>10</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>11</sup> TEX. ELEC. CODE § 253.131(a).

<sup>12</sup> *See F.E.C. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("Independent expenditures constitute expression . . . at the core of our electoral process and of the First Amendment freedoms.").

expenditures implicate First Amendment concerns, a law that requires reporting or disclosing campaign expenditures passes constitutional muster only if it "bears a sufficient relationship to a substantial governmental interest."<sup>13</sup>

Moreover, such a law cannot bring within its sweep any "innocent" violations. In construing a statute somewhat similar in structure to section 253.131(a), the United States Supreme Court held that the word "knowingly" in the federal child obscenity act had to apply to the age of the performer and the sexually explicit nature of the material, and not merely to the element of transporting such materials.<sup>14</sup> The Supreme Court indicated that this construction of the act was not its "most natural grammatical reading,"<sup>15</sup> but because it is presumed that Congress did not intend an unconstitutional act, that construction must be the one it intended.<sup>16</sup> Otherwise, the act would punish persons who knew only that they were engaged in protected First Amendment activity. An act having such an effect is not constitutionally permissible.<sup>17</sup>

The analysis is even more compelling here for at least two reasons. First, Robert Osterberg, in making the expenditure for which Judge Peca sought to hold him liable, was exercising his fundamental First Amendment freedom of speaking out about the election of public officials.<sup>18</sup> A

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<sup>13</sup> *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

<sup>14</sup> *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

<sup>15</sup> *X-Citement Video*, 513 U.S. at 68.

<sup>16</sup> *Id.* at 68-69.

<sup>17</sup> *Id.* at 72-73; *see also Manual Enters., Inc. v. Day*, 370 U.S. 478, 492-93 (1962); *Smith v. California*, 361 U.S. 147, 150-53 (1959); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

<sup>18</sup> *See F.E.C.*, 479 U.S. at 251.

statute that punished him solely for engaging in this core First Amendment activity, without more, would be unconstitutional.<sup>19</sup> Yet that is precisely what the Court's construction does. The Court says "knowingly" modifies only the act of spending money. But spending money on core First Amendment speech cannot, in and of itself, be against the law — there has to be something more. And a statute that punished a person who knew only that he had engaged in innocent First Amendment activity would be unconstitutional — the Constitution requires that he know something more.<sup>20</sup> In *X-Citement*, that something more happened to be the age of the performer and the sexually explicit nature of the materials. Here, that something more happens to be the fact that the expenditure had to be reported.

Second, it is grammatically sound to give the statute at issue in this case the reading compelled by the Constitution, whereas it was not for the statute at issue in *X-Citement*. The Supreme Court's observation that its construction of that statute was not "[t]he most natural grammatical reading"<sup>21</sup> was, as the dissenting opinion pointed out, an "understatement to the point of distortion — rather like saying that the ordinarily preferred total for two plus two is four."<sup>22</sup> That statute reads:

- (a) Any person who—
- (1) *knowingly* transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

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<sup>19</sup> See, e.g., *X-Citement*, 513 U.S. at 72-73.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.* at 68.

<sup>22</sup> *Id.* at 81 (Scalia, J., dissenting).

- (A) the producing of such visual depiction involves the use of a *minor engaging in sexually explicit conduct*; and  
(B) such visual depiction is of such conduct;  
(2) *knowingly* receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or *knowingly* reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—  
(A) the producing of such visual depiction involves the use of a *minor engaging in sexually explicit conduct*; and  
(B) such visual depiction is of such conduct . . . .<sup>23</sup>

As the emphasized language indicates, in sections (a)(1) and (a)(2) the word "knowingly" is very remote from the phrase "minor engaging in sexually explicit conduct" — the words do not even appear in the same subsection, and they are separated by clauses involving the elements of transport or distribution and of visual depiction. And again, as the dissent noted, "[t]he word 'knowingly' is contained, not merely in a distant phrase, but in an entirely separate clause from the one into which [the Court's] opinion inserts it."<sup>24</sup> Nonetheless, the Court, to preserve the statute's constitutionality, chose the *un*grammatical construction that "knowingly" must modify the element "minor engaging in sexual conduct."

Here, the phrase we must construe 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>25</sup> The word "knowingly" modifies the phrase containing "in violation of [the Election Code]," and these words are nowhere near as remote from one another as

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<sup>23</sup> 18 U.S.C. § 2252 (quoted in *X-Citement*, 513 U.S. at 68) (emphasis added).

<sup>24</sup> *X-Citement*, 513 U.S. at 81 (Scalia, J., dissenting).

<sup>25</sup> EX. ELEC. CODE § 253.131(a) (emphasis added).

the relevant words are in the *X-Citement* statute. And while it may be "natural" to give the statute the reading the Court does today, it is no less "natural," and indeed it is grammatically sound, to take the Constitution into account and construe "knowingly" to modify the entire succeeding phrase, including "in violation of [the Election Code]."

*X-Citement's* method of statutory construction is particularly instructive. There, the federal child obscenity act either criminalized transporting material when the person doing so knew the material involved minors and was sexually explicit, in which case it would have been constitutional. And that's exactly what the *X-Citement* majority concluded. Or, the act criminalized transporting such material merely when the person transporting it knew it was being transported, in which case it would have been unconstitutional. And that's what the *X-Citement* dissent concluded.

Likewise here, the Election Code says one of two things. Either it says that a person can be punished simply because that person knowingly made an expenditure, in which case it would be unconstitutional. Or, it says that a person can be punished if that person makes an expenditure with knowledge that the expenditure violates the Election Code, in which case (assuming the statute is free of other constitutional defects) it would be constitutional.

But despite these compelling reasons for my construction, the plurality and the concurrence<sup>26</sup> misconstrue *X-Citement* and instead adopt 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 a person needs to "know" before that person can be held liable is the fact of a contribution or

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<sup>26</sup> Justice Gonzales does not join part V of Justice Abbott's opinion, in which Justice Abbott responds to my reading of *X-Citement*.

expenditure, not that the contribution or expenditure violated the Election Code. As its reason for doing so, the Court<sup>27</sup> accepts Judge Peca's claim that any other construction of section 253.131(a) would make "ignorance of the law" a defense.<sup>28</sup> In short, the Court chooses Judge Peca's construction, supporting an abstract concept, rather than a construction supporting the First Amendment. 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>29</sup>

The Court justifies divorcing "knowingly" from the Election Code violation by claiming that two other provisions in the Election Code demonstrate the Legislature knew how to require that a defendant have actual knowledge 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 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>30</sup>

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<sup>27</sup> Justice Gonzales does, however, join part II of Justice Abbott's opinion; in part II, the Court construes the "knowingly" requirement in section 253.131(a).

<sup>28</sup> *See* \_\_\_ S.W.3d at \_\_\_ (citing TEX. PENAL CODE § 8.03(a)).

<sup>29</sup> *Id.* at \_\_\_.

<sup>30</sup> *Id.* at \_\_\_.

I disagree. Not only does the Court's construction render the Act unconstitutional, it also 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 compels this unconstitutional 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 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>31</sup>

But the Court criticizes my construction of the Election Code by arguing that it "would

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<sup>31</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* TEX. ELEC. CODE § 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."); *Id.* § 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 . . ."); *Id.* § 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.").

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>32</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>33</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. Over 40 years ago the United States Supreme Court considered an argument similar to the Court's and rejected it:

It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.<sup>34</sup>

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 establish the degree of knowledge necessary to violate a statute."<sup>35</sup> Finally, the Court's construction suffers from the same

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<sup>32</sup> \_\_\_ S.W.3d at \_\_\_ (citations omitted).

<sup>33</sup> *Id.* at \_\_\_.

<sup>34</sup> *Smith v. California*, 361 U.S. 147, 154 (1959) (citations omitted).

<sup>35</sup> \_\_\_ S.W.3d at \_\_\_ n.4.

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 Olga Osterberg knowingly violated the Election Code.<sup>36</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 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 Mr. Osterberg was aware *on or before that date* that the Election Code required the report to be filed. Had Judge Peca presented some evidence supporting a reasonable inference that Mr. Biel reported Judge Peca's comments to Mr. Osterberg *before* the

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<sup>36</sup> 952 S.W.2d at 128.

report was due, my conclusion would be different. But Judge Peca offered no such evidence. Accordingly, there is no evidence Mr. Osterberg knowingly violated the Election Code.

The Court misconstrues section 253.131(a). Under the proper, constitutional 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: February 3, 2000