No. PD-1465-13
Court of Appeals No. 03-11-00087-CR

TO THE

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS	**§**	**APPELLANT**
VS.	**§**	
THOMAS DALE DELAY	**§**	**APPELLEE**

On Appeal from the 331ST JUDICIAL DISTRICT COURT
Travis County, Texas

BRIEF OF THE WYOMING LIBERTY GROUP AND CENTER FOR COMPETITIVE POLITICS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

FROM THE COURT OF APPEALS FOR THE
THIRD JUDICIAL DISTRICT OF TEXAS AT AUSTIN

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Wyoming Liberty Group is a nonpartisan public policy research organization, advancing the principles of liberty, free markets, and limited government. It is a tax exempt, non-profit educational organization operating under Section 501(c)(3) of the Internal Revenue Code. The Wyoming Liberty Group's mission is to prepare citizens for informed, active and confident involvement in government and to provide a venue for understanding public issues in light of constitutional principles and government accountability. It has an interest in educating courts about the role of first principles in constitutional matters and ensuring that fundamental liberties, not government authority, remain protected. The Wyoming Liberty Group will pay shared attorneys' fees incurred in the preparation of this *amici* brief.

The mission of the Center for Competitive Politics is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition. It is a tax exempt, non-profit educational organization operating under Section 501(c)(3) of the Internal Revenue Code. The prosecution at issue threatens the First Amendment rights of individuals wishing to speak and associate by subjecting them to the uncertain reach of vague laws. The Center has a strong interest to ensure that the cherished right to free expression remains paramount and that any laws regulating political conduct are clear and easily understood. The Center for

Competitive Politics will pay shared attorneys' fees incurred in the preparation of this *amici* brief.

SUMMARY OF THE ARGUMENT

The State asks this Court to sanction the criminalization of political speech and association based on the prosecutorial divination of legal requirements found nowhere in the law. Although the State may impose sensible campaign finance laws to prevent the risk of corruption or its appearance in the electoral process, these laws must pay heed to stringent limits that protect First Amendment rights. This *amici* brief addresses the three principal arguments of the State, and analyzes them in light of the protection of the First Amendment.

In Ground One, the State asserts that the money laundering and conspiracy charges in this case result from illegal contributions from corporations to Texans for a Republican Majority PAC (TRMPAC). The State believes that corporations must specifically designate donations to PACs to ensure they are used for permitted purposes. This requirement is nowhere in the law; in 2002 (the year of the events giving rise to this case) the Texas Election Code broadly allowed for corporate donations to PACs for "establishment" or "administration," with little other guidance. TEX. ELEC. CODE § 253.100(a) (2002). Furthermore, in 2002 the law specifically exempted corporate expenditures from disclosure by PACs. TEX. ELEC. CODE § 253.100(d) (2002). A person of ordinary intelligence could not

understand the Election Code to require designation to avoid money laundering charges, much less illegal corporate contributions, meaning this argument—and, as a result, the State's entire case—fails under the scrutiny of the First Amendment vagueness doctrine.

In Ground Two, the State argues that agreement to violate the election code provided the jury with a basis upon which to convict the Appellee. Since none of the acts in question were illegal, this argument is irrelevant. Furthermore, the actions taken by the Appellee and others indicate every effort to comply with the Texas Election Code.

Lastly, in Ground Three the State attempts to salvage its transformation of political engagement to money laundering. Here, the State contends that even lawful acts taken in compliance with the Texas Election Code should be subject to the reach of the money laundering statute when separate, segregated accounts are maintained. In the field of election law and First Amendment jurisprudence, separate segregated accounts formed of political contributions constitute protected bundles of constitutional rights. Each account, each bundle, is not capable of mutual substitution. The State's mistaken attempt to fuse each and every constitutionally protected and lawful transaction into an aggregate, illegal event does not survive review under the First Amendment or the law as it existed in 2002.

This Court should affirm the judgment of the Court of Appeals for the Third Judicial District.

ARGUMENT

I. Introduction

This appeal, after nearly a decade of litigation, pits the rights of free speech and association against unbounded prosecutorial zeal. Fundamentally, in the record before this Court, nothing Mr. DeLay did, said, or might have planned is illegal. The whole of what Appellee contemplated, however, enjoys heightened protection as a type of political speech and association integral to the well functioning of our Republic—the ability to freely associate and support or oppose those in power. *See Citizens United v. Fed. Election Comm'n* (*FEC*), 558 U.S. 310, 349 (2010). Political effectiveness is not a criminal act.

The State asks this Court to continue a prosecutorial witch-hunt. What started as an unfounded prosecution has only evolved into prosecutorial absurdity on stilts. Today, the State of Texas asks this Court to sanction the criminalization of political speech and association based on the prosecutorial divination of legal requirements found nowhere in the law. In support of its argument, the State decidedly sidesteps the law itself and spends much of its time arguing about what political actors must have thought, must have conceived, must have intended in

order to string together the murkiest claim of illegal conduct. "Enough is enough." *FEC v. Wisconsin Right to Life* (*WRTL*), 551 U.S. 449, 478 (2007).

The First Amendment protects the ability of individuals to associate together, to pool their resources, and to effectively engage in the political process. *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014) (plurality opinion). Sensible rules may be imposed to prevent the risk of corruption or its appearance in the electoral process, but government must pay heed to stringent limits imposed against such rules to protect First Amendment rights. *Citizens United*, 558 U.S. at 324. For too long, this has been a case about forgotten boundaries and impetuous prosecutors willing to sacrifice enduring First Amendment principles. However, as was elucidated at the Third Court, and is apparent here, nothing in Texas law permitted this prosecution. Further, the First Amendment flatly prohibits this sort of abuse.

As *amici* with expertise in the field of campaign finance law at the state and federal levels, this brief illustrates why the Third Court was manifestly correct in finding no legal basis to sustain this prosecution. This brief addresses the three principal arguments of the State, analyzing them in light of the protection of the First Amendment. This Court is presented with the opportunity to decide that reasonable compliance with vague laws in the heat of politics should be protected, not punished. The First Amendment, and its considerable election law precedent,

compels this result here, precluding the finding of any wrongdoing and otherwise upholding the ruling of the Third Court.

II. Ground One: The State's Unconstitutionally Vague Construction of the Law Trapped the Appellee in an Arbitrary and Discriminatory Prosecution

The State first argues that individuals may run afoul of the Texas Election Code not by failing to meet any standard written in the law, but by failing to meet requirements arbitrarily invented by prosecutors. In Texas, for "proceeds of criminal activity" to exist for money laundering, these funds must be derived from an offense classified as a felony. TEX. PENAL CODE §§ 34.02(a)(2), 34.01(1) (2002). The State acknowledges that both counts in the Appellee's conviction—money laundering and conspiracy—rest on deriving proceeds from corporate contributions to TRMPAC, which it claims are illegal under the Election Code. State's Br. at 25; *DeLay v. State*, 410 S.W.3d 902, 906 (Tex. App.-Austin 2013); TEX. ELEC. CODE § 253.003(a), (e) (2002). The State then further argues that the court below "failed to view all of the State's evidence of corporate intent in the light most favorable to the prosecution," and extensively reiterates evidence from the trial record to argue corporate contributors "viewed their contributions to TRMPAC as open-ended donations[.]" State's Br. at 25, 28–36. The State's argument rests on a fundamentally vague law and, far worse, it attempts to rewrite the law with its arguments.

For purposes of clarity, the Texas Election Code of 2002 employs election law terms out of their ordinary usage, causing some confusion in terminology with the greater body of election law precedent. Generally, election law defines a "contribution" as the giving of money or valuable assets to a candidate or group while an "expenditure" is money used to produce different kinds of speech. *See, e.g.*, 11 C.F.R. § 100.52 (2014); 11 C.F.R. § 100.111 (2014). The 2002 Texas Election Code contemplated two ways corporations could legally donate funds—through "expenditures" (again, not used in its traditional election law sense) or specific "contributions." Permissible expenditures were defined as direct money donations to PACs for limited purposes. TEX. ELEC. CODE § 253.100(a) (2002). However, the law, as it existed in 2002, did not clearly distinguish between authorized corporate expenditures and contributions only leading to further confusion in this challenge. This brief will use the 2002 Texas Election Code meanings as defined here, and generally reference corporate money given to PACs as "corporate donations," but discussions of other election law precedent will employ election law terms of art in their ordinary usage.

a. Clear Regulatory Standards are Needed to Protect Corporate Expenditures and Contributions

Although some certainly view the act of pooling money and swapping funds as intrinsically tainted, these actions are "beyond question a very significant form of political expression." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290,

299–300 (1981). Campaign contributions are protected under the First Amendment right to free speech because "[a] contribution serves as a general expression of support for the candidate and his views . . . ." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Furthermore, associational freedom is also protected because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of political goals." *Id.* at 22. The specific implications of First Amendment campaign finance jurisprudence for this case (the swapping of different bundles of money) will be discussed in Section IV. For purposes of this section it is sufficient to establish that laws governing campaign finance are subject to the stringent vagueness doctrine of the First Amendment. The provisions of the Texas Election Code at issue must be re-evaluated under this standard, specifically the provision that allows for corporate donations to be used for the establishment or administration of committees like TRMPAC. TEX. ELEC. CODE § 253.100(a) (2002).

The Supreme Court has long considered distinct vagueness doctrines. Generally, vagueness is a due process concern that applies to all laws:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable

> opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (internal citations omitted). The degree of deference afforded to a vague law under the Constitution differs depending on the type of activity the law regulates and the penalty for violating the law. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498–99 (1982). Importantly, "[i]f . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[1] *Id.* at 499. *See also City of Chicago v. Morales*, 527 U.S. 41, 57–60 (1999); *Long v. State*, 931 S.W.2d 285, 287–88 (Tex. Crim. App. 1996) (internal quotations omitted) ("When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness demands a greater degree of specificity than in other contexts").

[1] The Court also considers a more rigorous overbreadth doctrine (a doctrine closely related to vagueness) in First Amendment cases. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) ("In the First Amendment context . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (citation omitted)).

b. Texas Election Law Provisions Defining Permissible Corporate Donations are Void for Vagueness

At the time of the donations that gave rise to this prosecution, the Texas Election Code stated that a "corporation or labor organization may not make a political contribution or political expenditure that is not authorized by this subchapter." TEX. ELEC. CODE § 253.094(a) (2002). Regarding corporate donations to political committees, authorized expenditures were defined simply: "A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee." TEX. ELEC. CODE § 253.100(a) (2002). Notably, a general-purpose committee did not have to report these expenditures as political contributions. TEX. ELEC. CODE 253.100(d) (2002).

The State claims that "to avoid a knowing violation of [§253.094(a)] a corporation's donation to a general purpose committee . . . must have been an *expenditure* specifically designated for the purpose of the 'establishment or administration' of the committee, not a *contribution* with no strings attached." State's Br. at 28. A person of ordinary intelligence would not interpret the law in this way for at least three reasons. First, this distinction-by-designation is found nowhere in the law today and was not present in 2002. Rather, the law simply permits corporate donations to PACs for certain purposes. It does and did not impose any express designation requirement. Reading the law, it is only through

entirely subjective extrapolation one might think to undertake the State's requirement.[2]

Second, the specifics of how to make this distinction are even murkier, as even today the Texas Ethics Commission provides no forms or examples for either corporate donors or general-purpose committees to make the designation. *See Forms and Instructions*, TEX. ETHICS COMM'N, http://www.ethics.state.tx.us/main/forms.htm (last visited May 28, 2014). Nevertheless, at oral argument before the court below, the State expressed confidently that designations were required with certain specificity, and distinguished between hypothetical designations provided by the court with equal confidence. Of course, none of these designation requirements exist anywhere other than in the minds of certain Texas prosecutors.

Finally, it is more plausible that a person of ordinary intelligence would consider the fact that since Texas law did not require reporting corporate expenditures as contributions, that this was an adequate distinction for purposes under the law at the time. *See* TEX. ELEC. CODE § 253.100(d) (2002) ("An expenditure under this section is not reportable by the general-purpose committee

[2] *Compare Ex Parte Ellis* (*Ellis I*), 279 S.W.3d 1, 21 (Tex. App.-Austin 2008) ("[C]omplexity is not synonymous with unconstitutional vagueness.") *with Citizens United*, 558 U.S. 310, 324 (2010) ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926))).

as a political contribution under chapter 254"). So long as money was not used for actual contributions to candidates, and the record shows the funds here were not, an "expenditure" would most reasonably be interpreted as funding any other activity performed by a general purpose committee and germane to its purpose other than contributing to state candidates. *See State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) ("criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused").

c. The *Ellis* Courts Erred Factually and Legally in Considering the Vagueness of the Texas Election Code

The State bases its expansive interpretation of the law in part on *Ellis II*, where this Court stated that "[a] corporation must designate the purpose of the political contribution." *Ex Parte Ellis* (*Ellis II*), 309 S.W.3d 71, 88 (Tex. Crim. App. 2010); State's Br. at 27 n.10. In that case, however, this Court examined the Texas Election Code as it existed in 2009, not 2002, and did not have full briefing on issues of election law and constitutional concerns relevant to its disposition.

Ellis II involved distinct questions of vagueness, but the parties failed to raise at least one vagueness concern to this Court. "Here, no one has argued that the money laundering statute implicates First Amendment activity, and we have no reason to think that it does so." *Ellis II*, 309 S.W.2d at 80. But there is a reason to think that it does so. Texas had never before applied its money laundering prohibition to substantive requirements of its Election Code.

In this case, the very foundation of the prosecutor's legal theory rests upon the murky merger of Texas's money laundering provisions and its election law requirements—all of which gives rise to the distinct problems of vagueness found in this near decade-long constitutional litigation. In Texas, under the prosecution's theory, no one can rest assured they have followed the law by simply complying with the Texas Election Code. Instead, they must predict how prosecutors would overlay criminal money laundering provisions to that Code, decipher murky questions of intent, and otherwise pinpoint and follow requirements found nowhere in the law.

Although in *Ellis II* this Court accurately described the test of First Amendment vagueness when considering the Election Code, its application was incorrect for both factual and legal reasons. 309 S.W.3d at 86. The case largely focused on the constitutionality of banning corporate contributions, and erred by assuming the donations in question were, in fact, contributions. *Id.* at 86–88.

When this Court actually considered § 253.100(a), which governs permitted corporate expenditures, it looked to the law as it existed since an extensive amendment in 2009, not the law as it existed in 2002. *Id.* at 88; *see* Appendix B. As a matter of factual consideration, this Court erred in that analysis. *Spence v. State*, 325 S.W.3d 646, 650 (Tex. Crim. App. 2010) (courts must focus on the

"literal text to determine the objective meaning of that text at the time of its enactment").

In reading the 2009 version of the law, the *Ellis II* Court stated:

> The corporation is permitted to make expenditures for the maintenance and operation of the committee. The Legislature set out a list of twelve items included as qualifying expenditures (e.g., office equipment and utilities) and a list of eight items for which expenditures may not be made. It appears that contributions made by such a corporation to such a committee would not be considered to be expenditures. But even assuming that they could be considered the same, it is nevertheless clear that § 253.100 contemplates expenditures made by a corporation for certain purposes. A contribution with no strings attached would not qualify as such an expenditure.

309 S.W.3d at 88 (citations omitted). As it pertained to *Ellis II* and the present case, the Texas Election Code did *not* provide such an exhaustive definition and listings in 2002. *See* TEX. ELEC. CODE §253.100 (2002) (Attached as Appendix A). It did not define qualifying and non-qualifying expenditures as the 2009 version did. *Id.* This factual error gave rise to legal errors in the Court's analysis of the vagueness claims surrounding the Election Code.

In 2002, § 253.100(a) allowed for corporate dollars to be used for the "establishment and administration" of general purpose committees with no further guidance, and the law made no reference to corporate support of "maintenance and operation" of these committees. *Compare* TEX. ELEC. CODE §253.100 (2002)

(Appendix A) *with* TEX. ELEC. CODE § 253.100 (2014) (Appendix B). The law offered no examples of what constituted qualifying expenditures or prohibited expenditures in 2002. Before 2003, the law clearly stated that expenditures were not reportable as contributions. TEX. ELEC. CODE § 253.100(d) (2002).

This Court must consider how the Appellee read the law as it was worded when he allegedly broke it, not as it was worded seven years later.[3] Under the law at the time, corporate donors could not be expected to provide explicit designations with donations, nor could general purpose committees be expected to make such a designation.

The *Ellis* cases, and the State's case here, plainly leave corporate donations in Texas subject to "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109; *see Ellis I*, 279 S.W.3d at 23; *Ellis II*, 309 S.W.3d at 89–90; State's Br. at 26–38. Although in some instances a certain act may be deemed illegal simply because of the intention behind it, in First Amendment law—especially campaign finance—this is a most dangerous practice. *See Speiser v. Randall*, 357 U.S. 513,

[3] Even if § 253.100 read in 2002 as it does today, this Court's interpretation in *Ellis II* was strained. Even with the added examples of expenditures, the list provided is not exhaustive. TEX. ELEC. CODE § 253.100(a) (2014) ("[A] corporation may make an expenditure for the maintenance and operation of a general-purpose committee, *including* an expenditure for…." (emphasis added)). Furthermore, one must wonder, given the state of the law since 2009, whether the State's theory requires corporate designations to be so specific as to ensure they are used for "telephone and Internet services" or "general office and meeting supplies." *Id.*

526 (1958) ("The vice of the present procedure is that, where particular speech falls close to the line separating lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized"). The Supreme Court has repeatedly criticized and overruled not only complex intent-based election laws, but the extensive inquiries required to enforce them. *See Citizens United*, 558 U.S. at 324; *WRTL*, 551 U.S. at 467–68 (rejecting an intent-based test to distinguish between issue advocacy and express advocacy). Historically speaking, the case against the Appellee now stands among the most chilling—certainly the longest—of these inquisitions.[4]

When it suits the State's arguments, it recognizes the need for clarity: "As this Court has remarked, [Texas's] 'legislature knows how to create an explicit requirement when it intends to do so,' and it did not do so here." State's Br. at 46, *citing McIntosh v. State*, 52 S.W.3d 196, 200 (Tex. Crim. App. 2001). Alas, for Ground One, the State argues for requirements that are not explicit in the law, much less reasonably implicit. The State has adopted the position of policymaker,

[4] In an *amici* filing with the court below, the authors of this brief extensively illustrated the arbitrary and discriminatory enforcement that actually occurred in this case and provided a detailed comparison of how this Court and other courts in Texas have given due respect to the exercise of First Amendment rights. *See* Brief of the Center for Competitive Politics and Wyoming Liberty Group as *Amici Curiae* in Support of Appellant at 7–13, 24–28, DeLay v. State, 410 S.W.3d 902 (Tex. App.-Austin 2013), *available at* http://wyliberty.org/wp-content/uploads/2011/12/Delay-Appeal-Final-12-15-2011.pdf.

and urges this Court to allow the jury below to follow the State's invention. The State's version of the Election Code, however, does not exist but for its arbitrary and discriminatory formulation against the Appellee. Under the State's theory, corporate donations given with a disclaimer that they should be used for "any lawful purpose" might be illegal on Tuesday while those given on Thursday with a disclaimer that they should only be used for the "establishment or administration of the PAC" may be perfectly valid. Since the law itself does not spell out these requirements, speakers are left wholly at the mercy of Texas prosecutors to decide when political actors comply with the law.

The vagueness of the Election Code's regulation of corporate donations to political committees must foreclose criminal prosecution, for it did not provide Appellee with a reasonable opportunity to comply as the State sees fit. This first ground forecloses any charge of money laundering or conspiracy, but the State continues and gallingly argues that following well-established precedents and common practices in campaign finance law constitutes money laundering.

III. Ground Two: Random Statements do not Make Legal Acts Illegal

The State's second argument contends that intent alone, shown through a hodgepodge of statements, demonstrates the illegality of the money swaps in question. However, the State ignores the fact that no matter how many statements

it collects, each act carefully complied with the Texas Election Code, precluding, as a matter of law, the finding of any criminal wrongdoing here.

In reviewing the lower court's evidence about what corporations intended when contributing to TRMPAC, the Third Court concluded that "witnesses from the corporations that gave money to TRMPAC uniformly testified that they intended to comply with the law and that they made their respective donations with the intent that they be used for lawful purposes." *DeLay*, 410 S.W.2d at 909. Still, assuming *arguendo* that corporations were shown to possess the requisite intent to violate the law, their subsequent actions were woefully insufficient to do so. As a matter of law, it then follows that even a string of incriminating statements cannot transform fundamentally legal acts into illegal ones.

In *United States v. Ovideo*, the Fifth Circuit found that a defendant who thought he was selling heroin, but actually was not, could not be found guilty of attempted distribution because the combined acts and intent did not form a cognizable crime. 525 F.2d 881, 884 (5th Cir. 1976). The doctrine of legal impossibility exists "where the act if completed would not be a crime, although what the actor intends to accomplish would be a crime." *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995). Thus, where statements evincing criminal intent attach to perfectly innocent conduct, no cognizable crime can be found. Similarly, no matter how long a list of statements the State might produce

illustrating supposedly criminal intent, it is legally impossible to find a violation of the law since the underlying money swap was perfectly legal.

At the time of the acts in this case, the Texas Election Code plainly stated that "[a] corporation . . . may make one or more political expenditures to finance the establishment or administration of a general-purpose committee." TEX. ELEC. CODE § 253.100 (2002). The first act, the giving of $190,000 by corporations to TRMPAC, was legal so long as it helped with the "establishment or administration" of the PAC. *Id.* The only Texas Ethics Advisory Opinion available at the time to give meaning to this requirement provided that "[c]ontributions that support the operation of a general-purpose committee ultimately support the carrying-out of the committee's principal purposes, including the making of political expenditures in connection with elections and officeholder assistance." Tex. Ethics Advisory Opinion 132 (1993), *available at* http://www.ethics.state.tx.us/opinions/132.html. Thus, corporate donations, like those at issue here, given to assist a committee in making legal political expenditures help with its core functions.

Texas election law freely permitted PACs to give money to groups in other states, so the second act, TRMPAC's transfer of funds out of state to the NRSEC, was likewise legal. *See* TEX. ELEC. CODE § 253.094 (2002); *see also* Tex. Ethics Advisory Opinion 208 (1994), *available at*

http://www.ethics.state.tx.us/opinions/208.html. Lastly, Texas law allows for out-of-state groups to contribute to Texas candidates. TEX. ELEC. CODE § 253.032 (1995). The third act, the Republican National State Elections Committee (RNSEC)'s contributions to Texas candidates, was legal under the Texas Election Code.

The Appellee's careful compliance with Texas's complicated election law requirements did nothing to stop a lone prosecutor from bringing charges against Mr. DeLay. In Ground Two of its brief, the State attempts to paint a dizzying array of conflicting, damaging statements that might illustrate some nefarious intent behind why corporations gave funds to finance the money swaps in question. Evidence about purportedly false and contradictory statements take up much of the meat of this argument. *See* State's Br. at 39–43. But none of these statements are legally relevant since the complained about conduct was perfectly legal. *See Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 459 (Tex. 1998) (intent requirements insufficient to save law from vagueness deficiencies). Because of this, the Third Court did not err in its review of corporate intent.

IV. Ground Three: Money is not "Like Beans"

From the very start, the trial court injected a maelstrom of confusion about the money swap in question and its constitutional protection. Outside of

specialized election law precedent, where money swaps are the norm,[5] some interpret these transactions to be just another form of dirty politics.[6] Others find it difficult to separate diffuse transactions involving disparate funds and instead simply cobble every transaction, cent, and dollar into the same lump sum. The District Court judge certainly did so. In his view, "I don't care if you put [money] in one pocket and took money out of the other pocket. Money is absolutely fungible. It's like beans." Laylan Copelin, *DeLay defense: Money swap was common*, THE STATESMAN, Nov. 2, 2010, http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2010/11/02/delay_defense_money_swap_was_c.html. This theme continues in Ground Three today.

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[5] *See* Brief of the Center for Competitive Politics and Wyoming Liberty Group as *Amici Curiae* in Support of Appellant at 11–13, DeLay v. State, 410 S.W.3d 902 (Tex. App.-Austin 2013) *available at* http://wyliberty.org/wp-content/uploads/2011/12/Delay-Appeal-Final-12-15-2011.pdf.

[6] Even in other areas of the law, sharp distinctions between different sources of funds remain important. Under the federal money laundering framework, courts examine the extent of comingling of tainted and untainted funds to determine whether an account may be targeted under the law. *See, e.g., Securities and Exchange Comm'n v. Byers*, 637 F.Supp.2d 166 (S.D.N.Y. 2009). Only once comingling of tainted and untainted funds has occurred in one account may the funds be deemed tainted under the law. *Id.* at 177–78; *United States v. Garcia*, 37 F.3d 1359, 1365–66 (9th Cir. 1994); *Securities and Exchange Comm'n v. Better Life Club of Am., Inc.*, 995 F.Supp. 167, 181 (D.D.C. 1998). Likewise, bankruptcy law and divorce law, to name a few, preserve this important distinction. *See, e.g., Barton v. Barton*, 973 P.2d 746, 748 (Idaho 1999); *Barrington v. Barrington*, 290 S.W.2d 297, 301 (Tex. App. 1956); *Allard v. Pac. Nat'l Bank*, 663 P.2d 104, 110 (Wash. 1983). The same concern is even stronger in election law.

Importantly, nothing magically transforms isolated, individual transactions into an aggregate, communal transaction subject to oversight by the State of Texas. This mistaken aggregate view is the State's fundamental flaw in analyzing the conduct at issue here. Each and every donation maintains its own distinct characteristics, legal formalities, and constitutional protections. Contributions made by Citizen Smith may not be substituted for those of Citizen Jones. They are not the same. Likewise, contributions made by the Target Corporation may not be treated in a fungible fashion as equivalent to contributions made by random citizens. Each contribution is distinct and not capable of mutual substitution.

At the time this Court considered the *Ellis I* (2008) and *II* (2010) matters, important developments in election law had not yet, or were just, occurring. *See, e.g.*, *Citizens United*, 130 S.Ct. 876; *EMILY'S List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011). These illustrate why Appellee's thoughtful efforts to comply with the Texas Election Code merit serious constitutional protection and preclude the prosecution as a matter of law.

a. The Importance of Federal Election Law

In Ground Three, the State argues that the Third Court erred when it required that "dollars derived from the criminal activity must be the same dollars returned via the money laundering transaction." State's Br. at 44. It also argues

that reliance on federal election law precedent is inappropriate since the State charged DeLay with violations of the Texas Election Code and state money laundering, not federal election law. Throughout, the State fails to appreciate that it is the underlying constitutional safeguards found in federal election law precedent that must apply here to protect First Amendment conduct.

Government may restrict and regulate campaign contributions to address the risk of corruption or its appearance. However, such authority is not open-ended. Rules and restrictions must be "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. Texas remains able to craft legislation to combat corruption, but it may do so only within recognized, constitutionally appropriate lines. It could not, for example, place limits on how much speech citizens could produce for or against candidates. *Id.* at 19. Nor could it broadly ban corporations from supporting ballot measures. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Just the same, when it comes to regulating corporate contributions and their recipients, Texas must abide by certain guiding principles to comport with the First Amendment to the United States Constitution. *See, e.g.*, *Citizens United*, 558 U.S. 310; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (overruled). These rules ensure that the state's interest in preventing corruption is met in a manner sensitive to First Amendment interests.

Texas cannot immunize itself from the reach and constraint of the First Amendment by tacking its money laundering statute onto its election law provisions. However they are titled, state laws that inhibit the ability of individuals to associate freely, to speak out about political causes and candidates of the day, and to otherwise exercise First Amendment freedoms must pass the same constitutional scrutiny applied to all campaign finance laws. Consequently, Texas may not haphazardly apply its money laundering provisions or ignore the well-settled protection enjoyed by separate, segregated accounts for different types of political money.

One principle well established in election law precedent is the non-fungibility of money that funds political speech and association. That is, separate funds in segregated accounts represent different bundles of constitutional rights that are not capable of mutual substitution. *See, e.g.*, *Citizens United*, 558 U.S. at 337 ("A PAC is a separate association from the corporation. So the PAC exemption from [the] ban . . . does not allow corporations to speak"); *WRTL*, 551 U.S. at 477 n.9 (forcing a group to spend funds out of a segregated fund that is subject to limits instead of its general treasury is a spending restriction); *EMILY's List*, 581 F.3d at 12 (maintaining separate accounts for hard money and soft money protects against comingling of funds and preserves important First

Amendment interests); *Carey*, 791 F.Supp.2d at 131–32 (separate, segregated accounts sufficient to protect against risk of corruption).

Money given to the hypothetical Texans for a Better Texas Tomorrow, for example, by foreign nationals and placed in one account receives no constitutional protection. *See Bluman v. FEC*, 766 F.Supp.2d 1 (D.D.C 2011), *aff'd* 132 S.Ct. 1087 (2012) (upholding ban on foreign contributions). But money given to the same hypothetical organization by a small group of elderly citizens for use in advertisements about healthcare and placed in a secondary account receives heightened protection. *Buckley*, 424 U.S. at 22 (contributions allow "like-minded persons to pool their resources in furtherance of common political goals"). However disliked other funds may be, funds appropriately received from lawful transactions do not lose their constitutional significance or protection. Rather, each account, each bundle, must be analyzed separately according to the constitutional interests and rights at stake.[7] Ignoring these distinctions and lumping all accounts and transactions into one fuzzy blot eliminates constitutional safeguards.

Distinctions between different types of election funds are traditionally understood as distinctions between "hard money" and "soft money." In election law, "hard money" is funds that comply with a given jurisdiction's source and

[7] This is principally because each contribution has its own independent meaning and serves "as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1448 (2014) (quoting *Buckley*, 424 U.S. at 21–22).

amount limitations while "soft money" is funds from other sources, like corporate or union contributions. *See McConnell v. FEC*, 540 U.S. 93, 122–23 (2003). While hard money may be strictly regulated, its presence does nothing to eliminate the rigorous protection afforded to other funds and the speech or association inherent in it.

Federal election law precedent—fully applicable to the proceedings here—is aptly on point. In both *Wisconsin Right to Life* and *Citizens United*, the Supreme Court considered the argument that restrictions placed on corporate electioneering communications might be valid because corporations could fund these through a wholly separate account. *See WRTL*, 551 U.S. at 477 n.9; *Citizens United*, 558 U.S. at 337. In each case, the Court recognized the separate, distinct nature of each account and did not treat a separate PAC account as synonymous, or capable of mutual substitution, with the general treasury funds of a corporation. This is because each separate account is legally different and involves different constitutional protections for purposes of First Amendment free speech and association analysis.

In *EMILY's List v. FEC*, the DC Circuit Court of Appeals ruled that overly restrictive regulations applicable to non-profit entities[8] engaged in political speech and association were unconstitutional. 581 F.3d 1. There, EMILY's List was a

[8] These are non-connected, non-profit advocacy corporations similar to TRMPAC in this challenge. *See EMILY's List*, 581 F.3d at 8 n.7.

hybrid political group. It exercised its constitutional rights in two traditional ways. First, it spent funds on expenditures for advertising, get-out-the-vote efforts, and voter registration drives. *Id.* at 12. Second, it made direct contributions to candidates and parties. *Id.* Although EMILY's List engaged in these dual functions, the Court noted that a "non-profit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates." *Id.*

It is evident from *EMILY's List* that although government may have valid reasons to target the risk of corruption stemming from some forms of electoral spending, it may not do so in a way that is unduly burdensome. Thus, a hybrid entity like EMILY's List or TRMPAC might decide to engage in all sorts of electoral advocacy and support through the making of both expenditures and contributions. But government is not free to unduly restrict expenditure-only funds simply because an entity carefully maintained contribution-only funds in a different account. *Id.* So long as the actor in question complied with the relevant law in handling particular funds, the law may not impose additional burdens.

Likewise, the D.C. District Court decided in *Carey* that maintaining separate soft and hard money accounts was the proper cure against any risk of corruption arising out of the use of these funds. 791 F.Supp.2d at 130–31. There, the FEC, much like Texas here, sought to impose additional requirements found nowhere in

the law due to its dislike of these dual accounts. But the court would not allow it, recognizing that the use of a separate, segregated fund to handle funding for contributions was "narrowly tailored to achieve that objective [in remedying a risk of corruption]." *Id*. at 131.

Like EMILY's List, TRMPAC did "not suddenly forfeit its First Amendment rights" when it decided to lawfully accept corporate donations and send them out of state. *EMILY*'s *List*, 581 F.3d at 12. Corporate expenditures for the "establishment or administration" of the PAC were permissible under the law. TEX. ELEC. CODE § 253.100(a) (2002). Even corporate contributions were permitted as interpreted by a Texas Ethics Advisory Opinion as those that help carry out the principal purpose the group "including the making of political expenditures in connection with elections." Tex. Ethics Advisory Opinion 132 (1993). Thus, TRMPAC's acceptance of corporate funds to further its principal purpose by being used in money swaps to allow for individual contributions was entirely legitimate under the law as it existed in 2002. Texas was not free to impose extra-statutory requirements on the acceptance of corporate expenditures, *see* State's Br. at 25–37, invalidate money swaps based on prosecutorial alchemy, *see* State's Br. at 37–44, or otherwise unduly encumber innocent First Amendment political speech and association. But for close to a decade this is precisely what this prosecutorial witch-hunt has attempted to do.

The constitutional standards described in this section are not somehow unique to the operation of federal election law. Rather, they were developed as supplementary doctrines of the First Amendment—fully applicable to state regulations that closely abut the fundamental rights of free speech and association. These standards give clarity to the boundaries of permissible government regulation and unconstitutional overreach. *See, e.g.*, *New York Progress and Protection PAC v. Walsh*, 2014 WL 1641781 (S.D.N.Y. April 24, 2014) ("Defendants attempt to limit *SpeechNow*, but just as the First Amendment was applied to that case, the same First Amendment, applied here to the State law, must yield the same result"). Just as First Amendment precedent informs that separate, segregated accounts properly cure any risk of corruption between contribution-only and expenditure-only accounts in *EMILY's List* and *Carey*, so too must the same First Amendment principles take hold here. Texas may not unduly restrict the rights of organizations simply because they maintain separate, segregated accounts and lawfully accept corporate expenditures.

In its last hurrah, the State attempts to argue that even if federal election law were applicable, a prosecution could be had under federal conduit provisions. State's Br. at 47 n.20. Tellingly, the State's interpretation of the Federal Election Campaign Act ("FECA") is as wrong as its interpretation of the Texas Election Code. In this argument, the State argues that because federal law prohibits making

a contribution in the name of another, the same rationale would prohibit money swaps. *See* 2 U.S.C. § 441f. However the State may stretch it, federal election law does not work in this manner.

The FECA's prohibition against conduit, or "straw man," contributions does not prevent money swaps. Rather, a "straw donor contribution is an *indirect* contribution from *A*, through *B*, to the campaign. It occurs when *A* solicits *B* to transmit funds to a campaign in *B*'s name, subject to *A*'s promise to advance or reimburse the funds to *B*." *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010). Here, were federal law applicable, TRMPAC's money swaps would not have constituted a prohibited conduit contribution. In short, corporations did not solicit TRMPAC to transmit funds to state campaigns in the PAC's name with a promise to reimburse the PAC for the funds spent. Nor was there any sort of coordination attempt to hide the true contributor of the funds in question.

The Appellee complied with the law under the federal scenario. Corporations donated funds to TRMPAC, TRMPAC sent those funds to the RNSEC, the RNSEC spent those funds in states where they were legal, and the RNSEC made other legal contributions to state candidates in Texas from accounts derived of lawful contributions. This is permissible because money swaps are entirely permissible under federal law. In one enforcement matter, the FEC unanimously approved a swap of $10,000 in nonfederal funds in exchange for

$10,000 in federal funds concerning the Orange County Republican Executive Committee. *See* Matter Under Review ("MUR") 6212, Lew M. Oliver, III, Orange County Republican Executive Committee (FEC 2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044263573.pdf. Likewise, in Advisory Opinion 2006-33, the FEC concluded that a fundraising plan by a federal PAC and several state PACs would not violate the law even in the event of money swaps of corporate and non-corporate funds. FEC Advisory Opinion 2006-33 (National Association of Realtors), *available at* http://saos.fec.gov/aodocs/2006-33.pdf. Try as it may, the State simply can show no violation of federal or state election law in this case.

Recently, the Federal Election Commission took no action against yet another money swap involving federal and state funds. *See* MUR 5878, Arizona State Democratic Central Committee (FEC 2013), Statement of Reasons ("SOR") of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, *available at* http://eqs.fec.gov/eqsdocsMUR/13044342628.pdf. In upholding the validity of federal to state party money swaps, three commissioners explained in a Statement of Reasons that these "transfers allow for the efficient use of funds in all of the locations sending and receiving transfers and thereby further the associational rights of the contributors to the parties." *Id.* at 10. The same SOR concluded that

federal for nonfederal money swaps are contemplated by federal election law and entirely lawful. *Id.* at 10–11.

Even federal courts examining the legality of different money swaps have upheld their legality under the FECA. The D.C. Circuit held that the FEC may not treat two independently legal transactions as one illegal one. *In re Sealed Cases*, 223 F.3d 775, 782 (D.C. Cir. 2000). Instead, each transaction or act must be reviewed for its own singular compliance with the law. A host of advisory opinions and enforcement matters from the FEC equally support this proposition. *See, e.g.*, MUR 6212, Orange County Republican Executive Committee; MUR 4250, Republican National Committee (FEC 2000), SOR of Chairman Darryl R. Wold and Commissioners Lee Ann Elliott and David M. Mason, *available at* http://eqs.fec.gov/eqsdocsMUR/00002B38.pdf; FEC Advisory Opinion 2006-33 (National Association of Realtors).

Impassioned as they may be, the State's arguments about money swaps fail to appreciate how they operate and their legality under either federal or Texas law.

b. The State's Argument Makes Compliance with Election Law Impossible

By superimposing money laundering provisions on top of the Texas Election Code, the State makes it impossible to sensibly comply with election law. The State contends that the Third Court erred by requiring that that dollars derived from supposed criminal activity be the same dollars returned through a money

laundering transaction. State's Br. at 44–52. In the State's view, this imposes an additional statutory hurdle unnecessary to find a violation. In other words, Texas argues that wholly separated and segregated funds derived through lawful transactions should be subject to the reach of the money laundering statute with seemingly no limiting principle. The State's argument essentially undoes the Texas Election Code by finding criminal violations of the law through careful acts taken to be in compliance with its operation—specifically, the maintenance of separate, segregated accounts.

Suppose two different groups operating in 2002 attempted to exercise their First Amendment rights by speaking out about immigration issues and supporting certain candidates running for office. They each accepted corporate expenditures, but in very different ways. Under either scenario, and in accord with the State's theory, no sensible path of compliance with the Texas Election Code could be had—for either responsible or irresponsible actors.

Assume in 2002, a hypothetical PAC, the Strong Borders PAC, wishes to maximize its advocacy and fully exercise its First Amendment rights by speaking about issues and candidates in upcoming elections. The PAC would establish Account A that consists of funds raised from individuals in compliance with source and amount restrictions found in the Texas Election Code. These could be freely contributed to Texas candidates. Suppose the PAC wanted to accept corporate

funds to help with its establishment or administration. It would then create Account B composed of corporate funds to do exactly this. Corporate funds received could then be very clearly shown to be in compliance with the law because they could be traced in and out of this separate account. Transactions made with corporate funds would then be lawful, assuming they met other requirements of the law. But the only way a reasonable actor could demonstrate compliance with the law would have been to maintain separate, segregated accounts allowing for easy tracing of these different kinds of funds.

Assume a different hypothetical PAC, the Open Borders PAC, accepted both corporate and individual contributions to maximize its advocacy. Assume further that it was less than careful about its compliance with the law. It raised lawful funds from individuals and corporations, but—unlike the Strong Borders PAC—it simply deposited them into the same account. Thereafter, it spent its funds on a mixture of get out the vote activity, candidate contributions, and expenditures supporting or opposing candidates. By comingling the funds, it would be difficult, if not impossible, for the Open Borders PAC to show compliance with the law. In doing so, it might accidentally spend corporate money on illegal candidate contributions. And it would make itself a very easy target for complaints about improper or illegal use of corporate money in Texas elections if it acted this way.

If this Court is to take the State's third argument seriously, ordinary actors in 2002 would have had no way to comply with the Texas Election Code and the State's money laundering provisions. Both responsible and irresponsible actors would be punished equally under the law. Groups like the Open Borders PAC would have comingled funds, difficult tracing problems, and the problem of proof of compliance with the law. Groups who demonstrated good faith efforts to be in careful compliance with the law, like the Strong Borders PAC, who established and maintained separate, segregated accounts, and who carefully followed the Texas Election Code with utmost precision would likewise have been penalized. In short, accepting the State's argument as true would permit Texas to have free rein to charge individuals with violation of money laundering provisions no matter how careful they were in complying with the Texas Election Code. This is because the State's argument is predicated upon a belief that prosecutors may shape, add, or subtract compliance requirements on the go rather than have them fixed in the law itself. *See* State's Br. at 46 (internal citations omitted) (the "'legislature knows how to create an explicit requirement when it intends to do so,' and it did not do so here").

The very reason why groups would maintain separate, segregated accounts (though not required by the law in 2002) would be to facilitate compliance with the law in a provable fashion. Further, by preventing comingling of funds, this

practice would have been sufficient—as election law precedent recognizes—to meet the government's need to prevent corruption (the illegal use of corporate dollars) while protecting First Amendment rights (the legal, but limited, use of corporate dollars and legal, but less regulated, use of individual dollars). Still, the State insists on a Catch 22, "heads I win, tails you lose" approach to statutory interpretation. *See WRTL*, 551 U.S. at 471.

Certainly, there must have been a reasonable way to interpret the Texas Election Code as it existed in 2002. Under the State's theory, compliance proves nearly impossible. The only means of escaping criminal penalties would be to guess what sort of disclaimer a prosecutor would like to see accompany corporate donations and ensure each and every corporate check included this verbiage. Of course, nowhere in the Texas Election Code is this required, nor is the content of said disclaimers spelled out. Even this might not be enough. Assuming the never-defined corporate disclaimer requirement is met, any purported "agreement" to use lawful out-of-state contributions based on a money swap for corporate money might also render compliance efforts invalid. This, too, is never spelled out in the law, leaving the scope of this "agreement" theory to the whim of prosecutors while leaving the First Amendment in limbo.

Another method of interpreting the Texas Election Code as it existed in 2002 would be to resolve all ambiguities in favor of speakers and the First Amendment.

See WRTL, 551 U.S. at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor"); *see also Johnson*, 219 S.W.3d at 388 ("criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused"). This approach would simply treat the otherwise lawful exchange and use of funds in the political process as protected forms of First Amendment conduct. *See McCutcheon*, 134 S.Ct. at 1448 (quoting *Buckley*, 424 U.S. at 21–22) (a contribution serves "as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate"). Where ambiguities exist in the law, judicial interpretations should favor those actors who took thoughtful steps, like the Appellee, to comply with vague requirements rather than sanction a prosecutorial net criminalizing all sorts of innocent conduct based on whim.

Against all precedent, the State argues that this Court accept the indefensible proposition that prosecutors be permitted to invent substantial portions of the law as they go along. But the First Amendment, especially as it relates to election law, compels a different interpretation. *McCutcheon*, 134 S.Ct. at 1451 (quoting *WRTL*, 551 U.S. at 457) (government may combat corruption, but it must safeguard the First Amendment in doing so and "err on the side of protecting political speech rather than suppressing it"). Here, Appellee and others adopted a reasonable interpretation of a vague provision of the Texas Election Code that

regulates conduct under the First Amendment—monetary support for candidates, groups, and issues. Individuals should not be forced to guess what the new prosecutorial fiat of the day will be. Rather, the First Amendment ensures that their acts of speech and association are protected against this very sort of prosecutorial misconduct, precluding any conviction here as a matter of law.

V. Conclusion

The documentary film *The Big Buy* captures the impartiality of the State in this case. *See generally* THE BIG BUY: TOM DELAY'S STOLEN CONGRESS (Brave New Films 2006). Notably, one part of the film features Democratic legislators who left the state of Texas while the House considered redistricting, allegedly the result of the elections related to this case. Discussing their short-lived victory against redistricting, Democrat State Representative Garnet Coleman glibly remarks that "we beat them by taking advantage of the rules that existed."

Such is the story behind this case, a case that should never have been brought. The Texas Election Code may need reform, but this is not to be done retroactively by prosecutorial fiat. The legislature makes and amends laws—indeed, it has amended the Election Code during this case.[9] But while the law existed as it did in 2002, Appellee acted wholly within his statutory and

[9] *Compare* TEX. ELEC. CODE §253.100 (2002) (Appendix A) *with* TEX. ELEC. CODE § 253.100 (2014) (Appendix B).

constitutional rights. After more than a decade persecuting Tom DeLay's political life, this prosecution must end.

Money swaps might be unsavory. Indeed, politics is dirty, but this case represents the worst kind of dirt: criminalizing political speech and association.

PRAYER FOR RELIEF

For the reasons stated herein, *amici* request that this Court affirm the judgment of the Court of Appeals for the Third Judicial District.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 2, 2014, a true and correct copy of this ***Amici Curiae*** **Brief of the Wyoming Liberty Group and Center for Competitive Politics in Support of Appellee** was served by electronic filing on appellate counsel of record in this proceeding as listed below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2).

1. Exclusive of the exempted portions set out in Tex. R. App. P. 9.4(i)(1), this document contains 9,761 words.
2. This document was prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14 for text and footnotes.

/s/ Roger B. Borgelt

Roger B. Borgelt

APPENDIX A

From its enactment in 1987 until 2003, Tex. Elec. Code § 253.100 read as follows:

Sec. 253.100 EXPENDITURES FOR GENERAL-PURPOSE COMMITTEE.

(a) A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee.

(b) A corporation may make political expenditures to finance the solicitation of political contributions to a general-purpose committee assisted under Subsection (a) from the stockholders, employees, or families of stockholders or employees of one or more corporations.

(c) A labor organization may engage in activity authorized for a corporation by Subsections (a) and (b). For purposes of this section, the members of a labor organization are considered to be corporate stockholders.

(d) An expenditure under this section is not reportable by the general-purpose committee as a political contribution under Chapter 254.

APPENDIX B

Since 2009, Tex. Elec. Code § 253.100 has read as follows:

Sec. 253.100 EXPENDITURES FOR GENERAL-PURPOSE COMMITTEE.

(a) A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee. In addition to any other expenditure that is considered permissible under this section, a corporation may make an expenditure for the maintenance and operation of a general-purpose committee, including an expenditure for:

(1) office space maintenance and repairs;

(2) telephone and Internet services;

(3) office equipment;

(4) utilities;

(5) general office and meeting supplies;

(6) salaries for routine clerical, data entry, and administrative assistance necessary for the proper administrative operation of the committee;

(7) legal and accounting fees for the committee's compliance with this title;

(8) routine administrative expenses incurred in establishing and administering a general-purpose political committee;

(9) management and supervision of the committee, including expenses incurred in holding meetings of the committee's governing body to interview candidates and make endorsements relating to the committee's support;

(10) the recording of committee decisions;

(11) expenses incurred in hosting candidate forums in which all candidates for a particular office in an election are invited to participate on the same terms; or

(12) expenses incurred in preparing and delivering committee contributions.

(b) A corporation may make political expenditures to finance the solicitation of political contributions to a general-purpose committee assisted under Subsection (a) from the stockholders, employees, or families of stockholders or employees of one or more corporations.

(c) A labor organization may engage in activity authorized for a corporation by this section. For purposes of this section, the members of a labor organization are considered to be corporate stockholders.

(d) A corporation or labor organization may not make expenditures under this section for:

(1) political consulting to support or oppose a candidate;

(2) telephoning or telephone banks to communicate with the public;

(3) brochures and direct mail supporting or opposing a candidate;

(4) partisan voter registration and get-out-the-vote drives;

(5) political fund-raising other than from its stockholders or members, as applicable, or the families of its stockholders or members;

(6) voter identification efforts, voter lists, or voter databases that include persons other than its stockholders or members, as applicable, or the families of its stockholders or members;

(7) polling designed to support or oppose a candidate other than of its stockholders or members, as applicable, or the families of its stockholders or members; or

(8) recruiting candidates.

(e) Subsection (d) does not apply to a corporation or labor organization making an expenditure to communicate with its stockholders or members, as applicable, or with the families of its stockholders or members as provided by Section 253.098.