IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAKE TRAVIS CITIZENS COUNCIL, Plaintiff, v. NATALIA ASHLEY, in her official capacity as Executive Director of the Texas Ethics Commission, Defendant.	Civil Case No. 1:14-cv-00994- LY

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT AND PERMANENT AND PRELIMINARY INJUNCTIONS

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INTRODUCTION[1]

Lake Travis Citizens Council ("The Citizens Council") is a nonprofit corporation organized under the Texas Business Organizations Code and § 501(c)(4) of the Internal Revenue Code (codified at 26 U.S.C. § 501(c)(4)). Yet the State of Texas wants to deem The Citizens Council a "political committee" if it disseminates its desired communications. A "political committee" is a private association that, by law, has its every receipt and disbursement opened to public view and government inspection. Political committees must hire certain personnel, take a specified form, file repeated reports with the government, and forsake funding from certain individuals and, in some cases, corporations or unions. *See generally, FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). This is the reason the U.S. Supreme Court stated, in an act of constitutional avoidance, that it would not even consider allowing a legislature to apply political-committee status to an association that is not "under the control of a candidate" or whose "major purpose . . . is [not] the nomination or election" of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

Political-committee status can pertain only to those groups whose "major purpose" is the election or nomination of a candidate, and whose campaign speech is "unambiguously campaign related." *Id.* at 81. Speech that is "express advocacy" is unambiguously campaign related; meaning speech that, in precise terms, advocates the election or defeat of a clearly identified candidate to office. *Id.* at 45, n. 52.

Now, the Texas Ethics Commission (the "State")—eager to sweep more private associations into political-committee status than the Constitution will allow—has removed both safeguards. It has reversed *the* "major purpose" test by deeming an organization whose overall activities are a majority (74.99%) issue advocacy, and only a minority (25.01%)

[1] Plaintiff incorporates by reference each and every allegation in its Complaint.

express advocacy, to be swept into political committee status. *See* TEC Rule § 20.1(20)(C) ("[m]ore than 25 percent of its annual expenses [are] political expenditures").[2] And the State has redefined "express advocacy" to involve communications that *do not* expressly advocate the election or defeat of a candidate, or even the election or defeat of a ballot measure. For example, Rule § 20.1(20) says the definition of '"political expenditures' includes direct campaign expenditures," and that a "campaign expenditure" can include speech about a ballot measure that occurs "*after [the] election*" for which the ballot measure has passed. Tex. Elec. Code § 251.001(7)(emphasis added). But speech about a ballot measure in an election that has passed cannot, *a fortiori*, be speech that expressly advocates the measure's election or defeat.

The March 1, 2016, election approaches, and this pre-enforcement action seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-02 and 42 U.S.C. §§ 1983 and 1988 to bar the enforcement of provisions of the Texas Election Code (the "Election Code") and Texas Administrative Code that violate the First and Fourteenth Amendments to the U.S. Constitution. Plaintiff, The Citizens Council, claims that Sections 251.001(7) (defining "campaign expenditure") and 251.001(12) (defining "political committee") of the Election Code are unconstitutionally vague and overbroad under *Buckley* and its progeny, and because they are not properly tailored to any State interest. The Citizens Council also claims that Texas Ethics Commission Rule § 20.1(20) [3] (defining "principal purpose") is unconstitutionally overbroad because it conflicts with myriad federal precedent, and because it is not tailored to any State interest.

[2] Passed by the Texas Ethics Commission on October 29, 2014 (codified at 1 TX. ADMIN. CODE § 20.1(20)).
[3] Passed by the Commission on October 29, 2014 (codified at 1 TEX. ADMIN. CODE § 20.1(20)).

BACKGROUND

The Citizens Council does not have the major purpose of influencing the outcome of any election; rather, its major purpose is to promote social welfare:

> . . . the mission of the Corporation [is] to make life better for the citizens, businesses, and communities in the Lake Travis area by (a) identifying and analyzing issues that affect our communities; (b) championing issues and causes we believe in by educating and mobilizing citizens and collaborating with businesses, community, and government; and (c) providing funding and non-monetary resources to foster positive impacts in our communities.

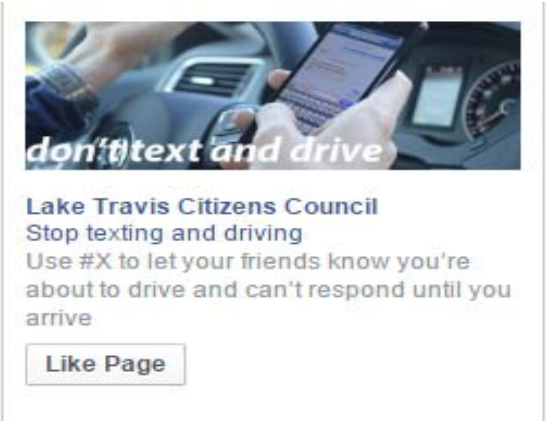
See Complaint ¶ 9. Indeed, nothing in The Citizens Council's organizational documents or in its public statements indicates that The Citizens Council has the major purpose of influencing the results of an election.

In 2014, The Citizens Council produced and planned to disseminate multiple Facebook advertisements designed to: (a) identify the issues most important to residents of the Lake Travis community; (b) educate residents of the Lake Travis community about propositions that would appear on the local ballot in the 2014 general election and encourage them to vote; and (c) champion issues and causes The Citizens Council believes in. The Complaint contains detailed information about each Facebook advertisement, and a true and correct screenshot of each is included below.

The Citizens Council spent $500 to disseminate Facebook Ad #1 (Ranking of Local Issues):

The Citizens Council spent $500 to disseminate Facebook Ad #2 (Water Restrictions):

The Citizens Council spent $500 to disseminate Facebook Ad #3 (Stop Texting and Driving):



The Citizens Council spent $25 to disseminate Facebook Ad #4 (Vote Today!):

The Citizens Council did not spend the additional $100 it had budgeted to disseminate Facebook Ad #4 (Vote Today!) because it reasonably feared that doing so might trigger civil and criminal penalties. The Citizens Council believes that Facebook Ad #4 (Vote Today!) does not constitute express advocacy regulated by the Election Code. Consequently, it would not file any reports with the Ethics Commission if it disseminated Facebook Ad #4 (Vote Today!). Nevertheless, the term "an expenditure made by any person *in connection with* a campaign for an elective office or on a measure," could be read to capture Facebook Ad #4 (Vote Today!). *See* Tex. Elec. Code § 251.001(7). Thus, because of vagueness in the law, The Citizens Council self-silenced rather than risk penalties that could be fatal to an organization its size.

The Citizens Council spent $500 to disseminate Facebook Ad #5 (Support Proposition 1):

The Citizens Council did not spend the additional $75 it had budgeted to disseminate Facebook Ad #5 (Support Proposition 1) because it reasonably feared that doing so could subject it to "political committee" status, which would trigger burdensome requirements and jeopardize its donors' associational rights. *See* TX Admin. Code § 20.1(20); *see also* Tex. Elec.

Code § 251.001(12). Proposition 1, the subject of Facebook Ad #5, provided for more recreational fields to service Lakeway's growing population. Support for Proposition 1 was entirely consistent with, and in furtherance of, The Citizens Council's mission. That is, its incidental support for the issue presented by Proposition 1 arose from its legitimate tax-exempt purpose. What's more, supporting Proposition 1 did not consume the principal share of The Citizens Council's budget. Requiring The Citizens Council to register as a political committee—and comply with the attendant requirements to appoint a treasurer,[4] keep detailed records,[5] and submit comprehensive reports to the State[6] would be unduly burdensome, particularly given its small size and limited resources. Imposing political-committee status would further jeopardize the associational rights of The Citizens Council's donors.

Although the 2014 general election has passed, The Citizens Council must now seek injunctive relief to prevent immediate and irreparable harm in the future. The Citizens Council will likely produce and disseminate communications similar to Facebook Ad #4 (Vote Today!), as well as communications that contain express advocacy, prior to the March 1, 2016, election. *See* Declaration of Amy Casto, **"Exhibit A."**

Absent injunctive relief, Sections 251.001(7) and 251.001(12) of the Election Code and Rule § 20.1(20) will continue to apply to The Citizens Council in an infinite "rinse and repeat" cycle, causing an ongoing and imminent threat of the same irreparable harm The

[4] Tex. Elec. Code § 252.001.
[5] Tex. Elec. Code § 254.001(b)-(e).
[6] Tex. Elec. Code §§ 254.031-254.043 ("Political Reporting Generally"); 254.121-254.130 ("Reporting by Specific-Purpose Committee"); 254.151-254.164 ("Reporting by General-Purpose Committee"); 254.181-254.184 ("Modified Reporting Procedures; $500 Maximum in Contributions or Expenditures"); 254.232 ("Liability to State").

Citizens Council suffered prior to the 2014 general election.[7, 8] To prevent this, The Citizens Council seeks declaratory and injunctive relief to immediately bar the enforcement of the challenged statutes and rule.

ARGUMENT

I. PLAINTIFF HAS MET THE STANDARD FOR A PRELIMINARY INJUNCTION

The requirements for injunctive relief are well established. The plaintiff must show "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Byrum v. Landreth*, 566 F. 3d 442, 445 (5th Cir. 2009). The record here demonstrates that The Citizens Council is entitled to both preliminary and permanent injunctive relief, as the facts satisfy the preliminary injunction factors and there is no other adequate remedy at law.

A. Plaintiff Will Prevail on the Merits

1. Section 251.001(7) (Defining "Campaign Expenditure") Is Unconstitutionally Vague and Overbroad.

In order to pass constitutional muster, a law must be sufficiently clear that "men of common intelligence" need not "guess at its meaning." *Hynes v. Mayor & Council of Borough*

[7] A controversy is "capable of repetition" where there exists a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *FEC v. Wisc. Right To Life*, 551 U.S. 449, 463 (2007) (quotations omitted).
[8] Subsequent to the approval of Proposition 1 during the November 2014 election, at least one Travis County Commissioner and press reports have stated that Travis County may hold an additional bond election to finance improvements to the land acquired through Proposition 1, including ball fields, courts, concession stands, restrooms, and parking lots. If this bond election occurs, then The Citizens Council will produce and disseminate communications similar to Facebook Ad #5 (Support Proposition 1) in support of the additional bond package.

of Oradell, 425 U.S. 610, 620 (1976). This is particularly so in the First Amendment context, as "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Nevertheless, Texas law defines the type of expenditures that trigger registration and reporting requirements as those for speech "*in connection with* a campaign for an elective office or on a measure." Tex. Elec. Code § 251.001(7). The U.S. Supreme Court has repeatedly held that virtually identical language under federal law is unconstitutionally vague and overbroad.

In its landmark *Buckley v. Valeo* ruling, "in order to avoid problems of overbreadth, the Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Mass. Citizens for Life,* 479 U.S. at 248-49 ("*MCFL*") (quoting *Buckley*, 424 U.S. at 80). *Buckley* explained that "express advocacy" includes words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44, n. 52. *Buckley* noted that, so construed, the disclosure obligations at issue would "not reach all partisan discussions," but only that which "expressly advocate[s] a particular election result," and thereby ensured that the disclosure obligations did not apply in an "impermissibly broad" manner. *Id.* at 79-80. The Court has continued to reiterate that "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote . . .." *MCFL*, 479 U.S. at 249. *See also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665-66 (5th Cir. 2006) ("*CFIF*") (narrowly construing state law defining expenditure as made "for the purpose of supporting, opposing, or influencing" an election).

This distinction is even more important in the ballot measure context. Indeed, before *Buckley* reached the Supreme Court, it was reviewed by an *en banc* panel of the D.C. Circuit, which "held [only] *one provision* [of the omnibus federal campaign finance reform at issue], § 437a, unconstitutionally vague and overbroad on the ground that the provision is 'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance. No appeal . . . [was] taken from that holding," and it remains good law to this day. *Buckley*, 424 U.S. at 11 n. 7. Yet, pursuant to TEC Rule § 20.1(20)(C) (defining "principal purpose"), the State would have deemed The Citizens Council a "political committee" for engaging in just this type of activity prior to the 2014 election.

Section 251.001(7) (defining "campaign expenditure") employs the language that *Buckley*, *MCFL*, and *CFIF* found unconstitutionally vague unless narrowed to apply only to express advocacy. *Buckley*, 424 U.S. at 43-44; *MCFL*, 479 U.S. at 248-50 (relying on *Buckley*), *CFIF*, 449 F. 3d at 664 (same). This vagueness forced The Citizens Council to refrain from disseminating Facebook Ad #4 (Vote Today!)—a communication that does not advocate an electoral result—to avoid running afoul of Texas law. Such chilling of speech in and of itself constitutes First Amendment harm. *CFIF*, 449 F.3d at 660 ("Controlling precedent thus establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing."). Thus, the State cannot bear its burden to establish that Texas's definition of "campaign expenditure" is not unconstitutionally vague and overbroad, and The Citizens Council will succeed on the merits. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("political speech must prevail against laws that would suppress it, whether by design or inadvertence," and constitutional

scrutiny "*requires the Government to prove* that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (citing *Wis. Right to Life*, 551 U.S. at 464 (opinion of Roberts, C. J.)) (emphasis supplied).

2. Rule § 20.1(20) (Defining "a Principal Purpose") Is Unconstitutionally Overbroad, Both Facially and As Applied to The Citizens Council.

a) *Citizens United v. FEC* supports Plaintiff's Argument.

The Citizens Council notes the U.S. Supreme Court's decision in *Citizens United,* 558 U.S. at 371, which upheld federal disclaimer and disclosure requirements for "electioneering communications." Based upon this holding, the State will likely argue that *any* disclosure regime it wishes to impose is constitutional under *Citizens United*. Thus, it is important to recognize from the outset that an "electioneering communication" is a creature of federal statute, a precise term of art created by Congress with the Bipartisan Campaign Reform Act of 2002 ("BCRA") and codified at 2 U.S.C. § 434(f)(3)(A) [now 52 U.S.C. § 3014(f)(3)(A)]. There is no such thing as an "electioneering communication" under Texas law, nor is there another term by any other name that remotely describes such a communication. Thus, any disclosure that may or may not attach to this federal term "electioneering communication" is irrelevant here.

Further, it is critical to understand the particular disclosure statute upheld in *Citizens United*. An "electioneering communication" is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is aired within sixty days before a general election, or thirty days before a primary election, in the jurisdiction in which the candidate is running. 52 U.S.C. § 30104(f)(3).[9] Pursuant to

[9] Several state legislatures have passed legislation since 2002 to define and impose reporting requirements for certain statutorily defined communications that mention or refer to a

federal law, any person who spends more than $10,000 on electioneering communications within a calendar year must file ***a single disclosure statement*** with the Federal Election Commission. 52 U.S.C. § 30104(f)(1).[10] That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of the contributors who contributed for the purpose of furthering electioneering communications. *Id.* at § 30104(f)(2); 11 C.F.R. § 104.20(c)(9).[11]

In other words, the Court upheld one-off disclosures for communications that satisfy a set of criteria specifically defined under federal law. The Federal Election Commission was not attempting to require Citizens United to register as a political committee if it aired *Hillary: The Movie*, nor did the Court contemplate such a consequence. Indeed, the opinion explicitly mentions that Citizens United "accepts a small portion of its funds from for-profit

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"clearly identified candidate" within a specified number of days preceding an election. The Texas legislature has not passed any legislation that defines or regulates an analogous category of communications.

[10] *See also, e.g.,* Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 Federal Election Commission (Dec. 26, 2007)).

[11] Note the regulation only requires reporting of those contributions made for the purpose of making electioneering communications (i.e., the required disclosure stems from the intent of the donor, not the ultimate use of the contribution by the recipient). A single out-of-circuit district court has concluded that 11 C.F.R. § 104.20(c)(9) was unreasonably promulgated under the Administrative Procedure Act and the Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Van Hollen v. FEC*, 74 F. Supp. 3d 407 (D.D.C. 2014). That decision is currently being appealed. In any event, the *Citizens United* Court was manifestly aware of the effect of 11 C.F.R. 104.20(c)(9), which was cited in briefing before the Court and in the opinion of the three-judge district court from which Citizens United appealed. *E.g.* Brief for Appellee at 5, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) ("The statement must identify . . . all those who contributed '$1,000 or more to the corporation . . . for the purpose of furthering electioneering communications.' 11 C.F.R. § 104.20(c)"); *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (three-judge court) ("Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications.").

corporations." *Citizens United*, 558 U.S. at 319. This is important because, had the Court's opinion required Citizens United to register as a political committee, then the organization would have been in violation of federal law's ban on accepting corporate contributions. 2 U.S.C. § 441b(a) [now 52 U.S.C. § 30118].

Unlike the type of one-off disclosure upheld in *Citizens United*, requiring an organization to succumb to a "political committee" regime involves far more comprehensive regulations—and thus, far more significant burdens on speech. In Texas, that requires an organization to appoint a campaign treasurer, who must file either "Form GTA" or "Form STA", keep detailed accounts of all contributions received and expenditures made, and file periodic reports with the Ethics Commission. *See, e.g.*, Tex. Elec. Code §§ 251.001(8), 254.031, and 254.121-.164. And, as noted *supra*, classifying an organization as a political committee can significantly impact the type and amount of contributions it may receive. *See, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (disclosure can deter donors).

b) Texas's definition of "principal purpose" is unconstitutional because it is not tailored to the State's interest in disclosure.

The State classifies political committees as organizations engaged in 74.99% issue advocacy and 25.01% electoral activity in any given calendar year. But an organization may be regulated as a PAC only when (1) a statute classifies it as such and (2) that statute is constitutional. As the U.S. Supreme Court noted in *MCFL*, PAC regulations "impose administrative costs that many small entities may be unable to bear." *MCFL*, 479 U.S. at 254. Thus, "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id*. at 255. "The fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [that statute] as an

infringement on First Amendment activities." *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958)).

Such burdens have explicitly included donor disclosure. As *Buckley* found, "encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since [the 1958 Civil Rights case of] *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley*, 424 U.S. at 64. This means that there must "be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 64-65 (citations omitted).

The burden here, too, falls upon the State. *See e.g., Citizens United*, 458 U.S. at 340. This searching review is essential because, even when dealing with freedoms lying further from the core of the First Amendment than political ones, constitutional tailoring depends upon "whether the speech restriction directly and materially advances the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). It is highly unlikely, on these facts, that the State can meet this weighty burden.

Indeed, compared to federal law's one-off disclosures of electioneering communications that are "less restrictive alternative[s] to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369 (citing *MCFL*, 479 U.S. at 262), Rule § 20.1(20) is just the type of comprehensive regulation that "can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee . . .." *MCFL*, 479 U.S. at 262. Therefore, in this context, *Citizens United* demonstrates that the Commission's new "25 percent rule" is *anything but* tailored to the State's informational interest. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–45, and n. 6-7 (1982), unless "*the* major purpose of [the entity] is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79 (emphasis added); *see also MCFL*, 479 U.S. at 252 n.6; *N.C. Right to Life v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *Colo. Right to Life v. Coffman*, 498 F.3d 1137, 1156 (10th Cir. 2007); *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 712, (4th Cir. 1999); *Alliance for Colo.'s Families*, 172 P.3d 964, 972-73 (Colo. Ct. App. 2007).[12]

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[12] The State may point to *Nat'l. Organization for Marriage, Inc. v. McKee,* 649 F.3d 34 (2011) ("NOM"), to argue the Constitution now tolerates "non-major-purpose PACs." But the moniker is misleading. Whereas Texas attempts to make an organization without a major purpose of campaign activity report every receipt and disbursement, Maine does not impose this requirement. In Maine, "major-purpose PACs report all expenditures, including operational and administrative expenses." *NOM* at 42. But so-called "non-major-purpose PACs report 'only those expenditures made for the purpose of promoting, defeating or influencing a ballot question or the nomination or election of a candidate.'" *Id.* (internal citations omitted).

This requirement is unremarkable. Federal law has long required "persons other than political committees" to report their independent expenditures, 52 U.S.C. § 30104(c), and federal law has recently required corporations and unions not registered as political committees to report "disbursements for electioneering communications," as well as any contributors to the same. *See* discussion at p. 12, *supra.* Indeed, in upholding the Maine provision, the First Circuit held that the "reporting requirements" for non-major-purpose PACs "are well tailored to Maine's informational interest" because they require "disclosure *only* of the candidates or [ballot] campaign the non-major-purpose PAC supports or opposes, its expenditures made to support or oppose the same," and "any contributors who have given . . . to the PAC to support or oppose a candidate or campaign." *Id.* at 58 (emphasis added).

B. The Citizens Council Will Suffer Immediate and Irreparable Injury Absent the Requested Injunction

The loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury. *Ingebretsen v. Jackson Public School Dist.*, 88 F. 3d 274, 280 (5th Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Since The Citizens Council could not disseminate Facebook Ad #4 (Vote Today!) and Facebook Ad #5 (Support Proposition 1) without risking civil and criminal liability, triggering burdensome registration and reporting requirements, and jeopardizing the associational rights of its donors, The Citizens Council was forced to mute itself prior to the 2014 general election.

The Citizens Council will be forced to continue curtailing its speech in the immediate future without the judicial relief sought here. As noted, The Citizens Council will produce and disseminate communications prior to the March 1, 2016, election. Because Sections 251.001(7) and 251.001(12) of the Election Code and Rule § 20.1(20) have chilled and will continue to chill these particular expressive activities, The Citizens Council will (again) suffer immediate and irreparable injury absent injunctive relief.

C. The Balance of Hardships Weighs Heavily in The Citizen Council's Favor

A preliminary injunction is warranted because the ongoing injury to The Citizens Council outweighs the potential harm to the State. Faced with the Hobson's Choice of forgoing constitutionally-protected conduct or facing the immediate threat of civil and criminal penalties, The Citizens Council will continue to suffer irreparable constitutional harm. By contrast, the State suffers no comparable injury if the Court grants a preliminary injunction.

The U.S. Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather than

stifling speech," and that "the tie goes to the speaker, not the censor." *Wisc. Right to Life*, 551 U.S. at 474 (plurality). "The harm and difficulty in changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far worse that an election continue under an unconstitutional regime than the [State] experience difficulty or expense in altering that regime." *Foster v. Dilger*, No. 3:10-cv-00041, 2010 WL 3620238, at *7 (E.D. Ky. Sept. 9, 2010).

D. The Injunction Requested Will Serve the Public Interest

The U.S. Supreme Court "has long viewed the First Amendment as protecting a marketplace for the class of different views and conflicting ideas. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981). The Citizens Council wishes to participate in that marketplace of ideas, but the restrictions at issue in this case target speech and association when "[t]he First Amendment has its fullest and most urgent application." *Citizens United*, 558 U.S. at 339 (citations omitted). Therefore, an injunction will serve the public interest by reaffirming our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

II. THE CITIZENS COUNCIL'S MOTION IS A QUESTION OF LAW

The unconstitutionality of the provisions of the Election Code and Texas Administrative Code at issue here are pure questions of law which, without disputed facts, do not require an evidentiary hearing or further fact-finding before issuing injunctive relief. *See Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F. 2d 334 (5th Cir. 1984). This Court may, therefore, provide preliminary or permanent injunctive relief upon hearing this motion. Fed. R. Civ. P. 65(a)(2). The Citizens Council requests such merger.

III. BOND REQUIREMENTS WOULD IMPOSE A SIGNIFICANT BURDEN ON PLAINTIFF

A plaintiff, under Fed. R. Civ. P. 65(c), must provide "security . . . to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Court, however, may "elect to require no security at all" when deemed proper. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F. 2d 300 (5th Cir. 1978). In this case, where the likelihood of harm to the non-moving party is slight, it is appropriate to waive this requirement.

CONCLUSION

For all the reasons stated above, Plaintiff's Motion for Declaratory Judgment and Permanent and Preliminary Injunctions should be granted.

Dated: November 6, 2015

Respectfully submitted,

By: _/s/ Chris K. Gober_____

Chris K. Gober (Lead Counsel)
Texas Bar No. 24048499
gober@goberhilgers.com
Stephen M. Hoersting*
hoersting@goberhilgers.com
GOBER HILGERS PLLC
1005 Congress Avenue, Suite 430
Austin, TX 78701
Telephone: (512) 354-1787
Facsimile: (877) 437-5755

ATTORNEYS FOR PLAINTIFF

Allen Dickerson*
adickerson@campaignfreedom.org
CENTER FOR COMPETITIVE POLITICS
124 West Street South
Suite 201
Alexandria, VA 22314
Telephone: (703) 894-6800

*Motion for *pro hac*
admission forthcoming

CERTIFICATE OF CONFERENCE

On November 5, 2015, Plaintiff's counsel conferred with Defendants' counsel, Melissa Holman, who responded that Defendant opposed this Motion for Declaratory Judgment and Permanent and Preliminary Injunctions.

/s/ Chris K. Gober
Chris K. Gober

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Melissa R. Holman
Attorney in Charge
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

/s/ Chris K. Gober
Chris K. Gober