CASE NO. 03-12-00255-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

KING STREET PATRIOTS, CATHERINE ENGELBRECHT, BRYAN ENGELBRECHT and DIANE JOSEPHS,

***Appellants*,**

vs.

TEXAS DEMOCRATIC PARTY, GILBERTOA HINOJOSA, in his capacity as Chairman of the Texas Democratic Party, JOHN WARREN, in his capacity as Democratic nominee for Dallas County Clerk, and ANN BENNETT, in her capacity as the Democratic Nominee for Harris County Clerk, 55th Judicial District,

***Appellees*.**

On Appeal from the 261st Judicial District Court of
Travis County, Texas
Trial Court Cause No. D-1-GN-11-002363

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER IN SUPPORT OF APPELLEES

Kelly G. Prather,
kgreenwood@midtownlegal.com
(TX Bar No. 00796670)
THE GREENWOOD PRATHER LAW FIRM
1300 McGowen Street
Houston, TX 77004
Tel.: (713) 333-3200
Fax: (713) 621-1449

J. Gerald Hebert
(VA Bar No. 38432)
Tara Malloy
(NY Bar No. 4251005)
Paul S. Ryan
(D.C. Bar No. 502514)
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
Fax: (202) 236-2222

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STATEMENT OF INTEREST

Appellants King Street Patriots *et al*. ("KSP") challenge the constitutionality of Texas's restriction on corporate contributions to state candidates, officeholders and political committees, Tex. Elec. Code §§ 253.091-253.104, and its disclosure and organizational requirements connected to "political committees," Tex. Elec. Code §§ 251.001, 253.031, -.037. All of the challenged laws are vital to preventing corruption and ensuring transparency in elections, and have become yet more crucial in light of the Supreme Court's recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which invalidated longstanding restrictions on corporate and union expenditures to influence elections.

Amicus curiae Campaign Legal Center (CLC) is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing the campaign finance and election laws throughout the nation. The CLC has participated in numerous past cases addressing corporate restrictions and political disclosure, including *Citizens United*, *FEC v. Wisconsin Right to Life (WRTL),* 551 U.S. 449 (2007), and *McConnell v. FEC*, 540 U.S. 93 (2003). The CLC thus has substantial expertise in litigation regarding the specific types of laws at issue in this case and a longstanding, demonstrated interest in the constitutionality and efficacy of such laws.

All parties have consented to the CLC's participation as *amicus curiae* in this case.[1] No person or entity other than the CLC and its counsel made a monetary contribution to this brief's preparation or submission.

[1] Consent was obtained from Chad W. Dunn on behalf of appellees and James Bopp, Jr. on behalf of appellants.

SUMMARY OF ARGUMENT

In this case, KSP stretches the Supreme Court's recent decision in *Citizens United* beyond the breaking point in its challenge to Texas's restriction on corporate contributions and its political committee disclosure requirements. *See* Appellants' Brief (June 28, 2012) ("Appl't Br."); Defendants' Original Answer and Counterclaim (Nov. 15, 2010) ("Counterclaim"). The district court below rejected KSP's attempt to extend the holding in *Citizen United* to this case and dismissed its counterclaim in its entirety. *Texas Democratic Party (TDP) v. King Street Patriots*, slip op., No. D-1-GN-11-002363 (Tex.Dist. Mar. 27, 2012). Because both Supreme Court and lower court precedents do not support the radical result KSP seeks here, *amicus* respectfully urges this Court to affirm the district court and reject KSP's baseless challenge to Texas's campaign finance laws.

In the memorandum of law that follows, *amicus curiae* will focus on three of KSP's arguments pertaining to the corporate contribution restriction.

First, KSP lacks standing to challenge the corporate contribution restriction on Eighth Amendment grounds. As the district court noted, the state is not a party to this litigation, and KSP therefore does not face criminal penalty. Slip op. at 13.

Second, KSP's principal attack on the corporate contribution restriction is the argument that *Citizens United* called into question several earlier decisions of the Supreme Court upholding corporate contribution restrictions, most recently *FEC v. Beaumont*, 539 U.S. 146 (2003). But KSP has no legal support for this position. *Citizens United* reviewed only the federal restriction on corporate expenditures, not the restriction on corporate contributions, and therefore has no direct application to this case. 130 S. Ct. at 909. Furthermore, the expenditure restriction reviewed by *Citizens United* and the contribution restriction under review here are

subject to different standards of scrutiny and are supported by different governmental interests: the reasoning of *Citizens United* therefore does not even indirectly impact Texas's corporate contribution restriction. This was recognized by *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App.-Austin 2008), *aff'd but criticized on other grounds*, 309 S.W.3d 71 (Tex. Crim. App. 2010), wherein the Texas Court of Criminal Appeals upheld Texas's restriction in the wake of *Citizens United*. Indeed, the only judicial authority cited by KSP in support of its argument, a Virginia district court case, *U.S. v. Danielczyk*, 788 F. Supp. 2d 472 (E.D. Va. 2011), *opinion clarified on denial of reconsideration*, 791 F. Supp. 2d 513 (E.D. Va. 2011), was recently reversed by the Fourth Circuit Court of Appeals. *U.S. v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012). All courts that have considered the argument that KSP raises here have dismissed it as wholly lacking merit.

Finally, equally untenable is KSP's argument that the definition of "political contribution," a term used by the corporate contribution restriction, is unconstitutionally vague. Texas courts recently rejected a virtually-identical challenge to the state corporate contribution restriction in *Ex parte Ellis*, holding that the definition of "contribution" was not facially unconstitutional due to vagueness. 309 S.W.3d at 88-89

Amici will not review in detail KSP's claims pertaining to the political committee disclosure requirements, and the definitions of "expenditure" and "political committee," Tex. Elec. Code §§ 251.001(6)-(10), (12), (14), upon which the requirements are premised. It is evident, however, that these claims also lack merit and should be dismissed. In 2010 alone, the Supreme Court twice upheld, by overwhelming 8-1 votes, laws requiring political disclosure. *Citizens United*, 130 S. Ct. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions). Far from questioning

campaign finance disclosure, *Citizens United* stressed that disclosure is subject to relatively relaxed judicial review and is justified because "enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. Furthermore, the U.S. Courts of Appeals for the First Circuit, the D.C. Circuit, the Ninth Circuit and the Eleventh Circuit have all recently upheld political committee disclosure regimes at least as extensive as that of Texas. *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied Keating v. FEC*, 131 S. Ct. 553 (2010) (upholding organizational, reporting and record-keeping requirements applicable to federal political committees); *Human Life of Washington v. Brumsickle,* 624 F.3d 990 (9th Cir. 2010), *cert. denied* 131 S. Ct. 1477 (2011) (upholding disclosure requirements applicable to "political committees" that supported or opposed candidates or ballot propositions); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 58-59 (1st Cir. 2011), *cert. denied* 132 S. Ct. 1635 (2012) (upholding definition of "non-major-purpose" political committees and attendant disclosure requirements); *Nat'l Org. for Marriage v. Sec. State of Fla.*, 753 F. Supp.2d 1217, 1222 (N.D. Fla. 2010), *aff'd* 2012 WL 1758607 (11th Cir. May 17, 2012), *pet. reh'g filed* (June 7, 2012) (upholding PAC-style disclosure law applicable to "electioneering communication organizations").[2]

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[2] KSP attacks Texas's statutory definitions and related political committee disclosure requirements on multiple grounds, including that the definitions are unconstitutionally vague and that Texas impermissibly imposes political committee disclosure requirements on groups who do not have as their "major purpose" the nomination or election of a candidate. Appl't Br. at Section VI.E.

Amicus curiae wishes to bring to the court's attention a number of lower court decisions that have rejected similar challenges brought against the disclosure laws of multiples states following the *Citizens United* decision. First, in terms of the vagueness challenge, courts have accepted a range of state law definitions of the term "political committee" that do not hew to a standard of express advocacy. For instance, the Ninth Circuit upheld a Washington state law that defined "political committee" in a manner similarly to Texas, i.e., as "any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition," which has as its "primary or one of the primary purposes" "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Human Life*, 624 F.3d at 997, 1008. Similarly, the First Circuit upheld Maine's definition of "non-major-purpose PAC" and accompanying

For all these reasons, the challenged laws are constitutional, and the district court should be affirmed.

ARGUMENT

I. Texas's Restriction on Corporate Contributions to Candidates, Officeholders and Political Committees Is Constitutional.

A. Corporate Contribution Restrictions Are a Standard Component of Federal and State Campaign Finance Laws.

KSP contends that Texas's restriction on corporate campaign contributions is so extraordinarily punitive so as to implicate the Eighth Amendment. Appl't Br. at 35-41. As an initial matter, the state is not involved in this case, and consequently, criminal penalties are not a possibility, as the district court noted. Slip op. at 13. KSP therefore lacks standing to challenge Texas's corporate contribution restriction on Eighth Amendment grounds.

However, even in the abstract, KSP's argument is untenable. For over a century, restrictions on corporate campaign contributions have been a key component of campaign finance laws at both the federal and state level, and often have been accompanied by criminal

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disclosure requirements although it did not conform to an express advocacy standard. *See McKee*, 649 F.3d at 62-63 n.39 (upholding a statute defining "a non-major-purpose PAC to mean an entity that crosses the requisite threshold of contributions or expenditures 'for the purpose of promoting, defeating or influencing in any way' a candidate election").

Second, the weight of recent case law has also rejected KSP's argument that political committee status cannot be imposed for the purpose of disclosure on "non-major purpose" groups. *See*, *e.g*., *McKee*, 649 F.3d at 59 ("We find no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute."); *Human Life*, 624 F.3d at 1011 (rejecting "the notion that the First Amendment categorically prohibits the government from imposing disclosure requirements on groups with more than one 'major purpose'"); *Sec. State of Fla.*, 753 F. Supp. 2d at 1222 (noting that "[t]here is no major purpose requirement because the statutes do not impose full-fledged political-committee like burdens upon NOM"), *aff'd* 2012 WL 1758607 (11th Cir. May 17, 2012); *Iowa Right to Life Comm., Inc. (IRTL) v. Tooker*, 795 F. Supp. 2d 852, 867 n.29 (S.D. Iowa 2011) (rejecting claim that "that a state may not impose 'PAC-style burdens' on an organization unless that organization has the major purpose of making independent expenditures").

penalties. Further, both the federal law and its state counterparts have been upheld on multiple occasions as entirely consonant with the First Amendment.

Federal law has restricted corporate campaign contributions since 1907. Tillman Act, Ch. 420, 34 Stat. 864 (1907).[3] The current Federal Elections Campaign Act (FECA) makes it unlawful "for any corporation whatever, or any labor organization, to make a contribution … in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing office . . . ." 2 U.S.C. § 441b(a). FECA, however, allows a corporation to establish a political action committee to make campaign contributions, and to pay its administrative expenses – a choice often referred to as the "PAC option." 2 U.S.C. § 441b(b)(2)(C). The PAC is barred from using corporate treasury funds to finance its political contributions. 2 U.S.C. § 441b(a). Instead, the PAC can solicit voluntary contributions from the connected corporation's "restricted class" (i.e., shareholders and executive and administrative personnel and their families) in compliance with the federal contribution limits. 2 U.S.C. § 441a(a)(1), 441b(b)(4); 11 C.F.R. § 114.5. Violation of these provisions carries a penalty of fines or imprisonment not to exceed one year for contributions aggregating up to $25,000 during a calendar year, and imprisonment not to exceed five years for contributions aggregating over that amount. 2 U.S.C. § 437g(d).

The Supreme Court has repeatedly affirmed the constitutionality of the federal restriction over the law's hundred-year history. In 1982, the Court upheld the federal law, or more

[3] The Tillman Act prohibited on corporate campaign contributions in federal elections on penalty of fine and imprisonment. Ch. 420, 34 Stat. 864. This 1907 statute was amended several times, and eventually incorporated into FECA, the current federal campaign finance statute. *See* 2 U.S.C. § 441b.

specifically, its attendant PAC restrictions, as applied to a nonprofit corporation that sought to make contributions to federal candidates through its corporate PAC. *FEC v. Nat'l Right to Work Comm*., 459 U.S. 197 (1982). In 2003, the Supreme Court again affirmed the constitutionality of the federal restriction on corporate contributions in a more direct challenge to the law in *Beaumont*. *See* Section I.B. *infra* for further detail.

The Texas prohibition on corporate campaign contributions predated even the federal restriction. Four years before the federal restriction was enacted, Texas Governor S. W. T. Latham signed into law House Bill No. 45, which made it unlawful for "[a]ny corporation, or officer thereof" to "directly or indirectly, furnish[], loan[], or give[] any money or thing of value … to any campaign manager or to any particular candidate or person to promote the success of such candidate for public office." H.B. 49 § 137, *in* THE LAWS OF TEXAS, 1903-1905 (Volume 12), at 157, *available at* http://texashistory.unt.edu/ark:/67531/metapth6695/m1/187/. The penalties have changed, and the scope of the restriction has been expanded to prohibit contributions from labor organizations, but the basic legislative proscription remains materially the same 110 years later. *See* Tex. Elec. Code § 253.094(a). Although the law strictly limits corporate and union political contributions, it does not operate as a complete ban on their election activity. Like federal law, Texas law allows corporations to form a PAC, i.e., to "pay the administrative expenses of a general purpose political committee." Tex. Elec. Code § 253.100. But the corporation may not use its resources to fundraise "other than from its stockholders or members, as applicable, or the families of its stockholders or members." *Id.* at § 253.100(b), (d)(5).

Although its legislature led the way in limiting the influence of corporate money in elections in 1903, Texas is now one of more than twenty states to prohibit direct corporate

contributions to candidates.[4] Every state makes a violation of the law punishable by fine, and Texas is one of fourteen states that also provide for imprisonment as a penalty.[5] These state restrictions on corporate contributions have been tested in courts around the country and have passed constitutional muster. The laws of Alaska,[6] Iowa,[7] and Minnesota[8] have recently been upheld, as well as those of New York City[9] and San Diego, California.[10]

Despite the widespread existence of corporate contribution restrictions and the prevalence of imprisonment and high fines as punishment for violations, KSP nonetheless maintains that the

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[4] The other states include Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, West Virginia, Wisconsin and Wyoming. *See State Limits on Contributions to Candidates*, National Conference of State Legislatures (Jan. 20, 2010), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

[5] *See* ARIZ. REV. STAT. ANN. § 16-919; CONN. GEN. STAT. ANN. § 9-613; IOWA CODE ANN. §§ 68A.503, 68A-701; KY. REV. STAT. ANN. §§ 121.025, 121.990; MASS. GEN. LAWS ANN. ch. 55, § 8; MICH. COMP. LAWS ANN. § 169.254; MINN. STAT. ANN. § 211B.15; N.C. GEN. STAT. § 163-278.19; N.DAK. CENT. CODE 16.1-08.1-03.3; OHIO REV. CODE ANN. § 3599.03; 21 OKL. STAT. ANN. § 187.2; 25 CONS. PENN. STAT. §§ 3253, 3543; S. D. COD. LAWS § 12-27-18; TEX. ELEC. CODE § 253.094(a); WIS. STAT. ANN. § 11.38, 11.61.

[6] *Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir. 2003) (upholding Alaska ban on corporate contributions to political parties).

[7] *IRTL*, 795 F. Supp. 2d 852, at 869.

[8] The Court of Appeals vacated this decision on July 12, 2011 when it granted appellants' petition for an *en banc* rehearing on a different claim relating to Minnesota's political disclosure requirements. Order granting rehearing, No. 10–3126 (8th Cir. July 12, 2011). Following the grant of this petition, appellants requested to rebrief their claim relating to the state corporate contribution restriction as well, but Court rejected this request. Order denying appellants' motion for supplemental briefing, No. 10–3126 (8th Cir. July 27, 2011). It is unclear whether the Court of Appeals will reconsider the corporate contribution restriction claim, but at oral argument for the rehearing, the Court indicated that it was not likely to reconsider this claim. *See* Oral Argument (Sept. 21, 2011) (audio), at 12:45, *available at* http://www.ca8.uscourts.gov/cgi-bin/new/getDocs.pl?case_num=10-3126&from=inter ("Mr. Bopp, I think you probably arguing uphill on that to get this Court to overrule the Supreme Court.").

[9] *Ognibene v. Parkes*, 599 F. Supp. 2d 434 (S.D.N.Y. 2009), *aff'd*, 671 F.3d 174 (2d Cir. 2011), *cert. denied* 2012 WL 950086 (S. Ct. June 25, 2012) (No. 11-1153) (upholding extension of existing municipal ban on corporate contributions to prohibit political contributions from LLCs, LLPs and general partnerships).

[10] *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

Texas law violates the Eight Amendment, claiming that its two-year minimum term of imprisonment (ten-year maximum term) is "grossly disproportionate" to the acts proscribed by the law. Appl't Br. at 38 (citing Tex. Elec. Code §§ 253.094(c), 253.095; Tex. Penal Code § 12.34). The district court noted, however, that KSP does not face criminal sanctions in this matter, and consequently refused to provide an "improper advisory opinion" on this issue. Slip op. at 13. Its decision should be affirmed.

But even if KSP did have standing to challenge the law on Eighth Amendment grounds, its argument is simply untenable in light of the criminal penalties imposed by the federal contribution ban and more than a dozen other state corporate contribution bans. Certainly, *amicus curiae* is aware of no case in which a sentence of two years for campaign finance-related violations has been invalidated as inflicting unconstitutionally cruel and unusual punishment.

Nor do the legal authorities offered by KSP support its theory that the penalties prescribed by Tex. Elec. Code § 253.094(c) are grossly disproportionate to the prohibited acts. KSP cites only *Graham v. Florida,* 130 S. Ct. 2011 (2010), *as modified* (July 6, 2010), but there, the Supreme Court considered a sentence of life imprisonment without parole for a juvenile non-homicide offender. Appl't Br. at 38. Furthermore, the Court in *Graham* affirmed the principle that the Eighth Amendment "does not require strict proportionality between crime and sentence," *id. at* 2021 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)), noting that the Court in the past had previously upheld sentences such as life without parole for possession of cocaine, 25 years to life for the theft of a few golf clubs under California's so-called "three-strikes" sentencing guidelines, and 40 years imprisonment for possession of marijuana with distribution. KSP's argument that a two-year minimum term of imprisonment for illegal corporate

contributions qualifies as "grossly disproportionate" is thus inconsistent with the standard set by the Supreme Court authority it cites.

B. *Citizens United* Does Not Directly or Indirectly Impact the Constitutionality of the Corporate Contribution Restriction.

KSP's principal argument against the corporate contribution restriction is that the "logic" of *Citizens United* "supersedes *Beaumont* and *Ellis*" and renders Texas's corporate contribution restriction unconstitutional. Appl't Br. at 16; *see also* Counterclaim at ¶¶ 88-89. But the district correctly rejected KSP's contention that "*Citizens United* compels this conclusion," slip op. at 9, and its decision should be affirmed.

The problem with KSP's argument is two-fold. First, *Citizens United* did not directly consider the constitutionality of corporate contribution restrictions; instead, the controlling precedent on this subject is the Supreme Court's 2003 *Beaumont* decision. Second, the reasoning of *Citizens United* does not even indirectly impact the constitutionality of corporate contribution restrictions because expenditure restrictions and contribution restrictions are subject to fundamentally different constitutional analyses.

KSP does not dispute that *Citizens United* reviewed only a restriction on corporate expenditures, not a restriction on corporate contributions, and therefore has no direct application to this case. Indeed, the Supreme Court stated expressly that "Citizens United has not made direct contributions to candidates, and it is not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 130 S. Ct. at 909 (emphases added). The only Supreme Court case to directly consider the constitutionality of a corporate contribution restriction was *Beaumont*, and the *Citizens United* Court in no way suggested that *Beaumont* was in doubt.

Nevertheless, KSP contends that the "logic" of *Citizens United* indirectly undermines the constitutionality of corporate contributions and implicitly overrules *Beaumont*. Appl't Br. at 15. But KSP has no basis for this radical extension of *Citizens United*. It is black-letter law that expenditure restrictions and contribution restrictions are subject to different standards of scrutiny and are supported by different governmental interests. *Citizens United*'s analysis of the former therefore has no bearing on the constitutionality of the latter.

First, different standards of review apply to expenditure restrictions and contribution restrictions. Beginning with *Buckley*, the Court has held "that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial … restraints on the quantity and diversity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Consequently, a statutory restriction on expenditures must satisfy strict scrutiny review. *Citizens United*, 130 S. Ct. at 898; *WRTL,* 551 U.S. at 464; *Buckley*, 424 U.S. at 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley,* 424 U.S. at 20-21. As a result, a contribution restriction "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotations omitted); *see also Buckley*, 424 U.S. at 25. That Texas "bans" corporate contributions instead of limiting such contributions does not change this analysis. The *Beaumont* Court emphasized that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association," and applied only "closely drawn" scrutiny to the federal "ban" on corporate contributions. 539 U.S. at 161-62

(internal quotations omitted). *See also Ex parte Ellis*, 309 S.W.3d at 85 (declining to apply strict scrutiny to Texas corporate contribution ban).

Consistent with this precedent, the Court in *Citizens United* applied strict scrutiny to the challenged corporate expenditure restriction. 130 S. Ct. at 898. But the Court's application of strict scrutiny to an expenditure restriction in no way suggested that a corporate contribution restriction must also be reviewed under strict scrutiny. To conclude otherwise would upend the longstanding framework for determining the scrutiny applicable to campaign finance laws. As noted by the Second Circuit, "although the [Supreme] Court's campaign-finance jurisprudence may be in a state of flux" after *Citizens United*, "*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law." *Green Party v. Garfield*, 616 F.3d 189, 199 (2d. Cir. 2010), *cert. denied* 131 S. Ct. 3090 (2011).

Second, expenditure restrictions and contribution restrictions are justified by different governmental interests, and thus *Citizens United*'s analysis of expenditure restrictions does not even have indirect relevance to this case. In *Austin* and earlier precedents, restrictions on corporate expenditures were found to further two governmental interests: first, the interest in ensuring that the expenditure of corporate funds amassed in the "economic marketplace" did not distort the "political marketplace," *see Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990), *quoting FEC v. Massachusetts Citizens for Life (MCFL),* 479 U.S. 238, 257 (1986), and second, the desire to protect shareholders from the unapproved corporate use of their investment dollars to fund campaign-related advocacy, *see id.* at 670-71 (Brennan, J., concurring). By contrast, corporate contribution restrictions have been justified on the basis of wholly different governmental interests. In *Beaumont*, the Court noted that the federal restriction on corporate contributions prevented "corporate earnings from conversion into political 'war

chests,'" and thereby was "intended to 'preven[t] corruption or the appearance of corruption.'" 539 U.S. at 154, *quoting National Conservative PAC (NCPAC) v. FEC*, 470 U.S. 480, 496-97 (1985). Relatedly, the Court found that "another reason for regulating corporate electoral involvement" was to "hedge[] against their use as conduits for 'circumvention of [valid] contribution limits.'" *Id.* at 155, *quoting FEC v. Colorado Republican Federal Campaign Comm*., 533 U.S. 431, 456 and n.18 (2001).[11]

In *Citizen United*, the majority found that the interest in preventing corruption and the appearance of corruption, although a compelling interest, did not justify a restriction on corporate independent expenditures because their independence obviated any corruptive potential. 130 S. Ct. at 904-11. But the Court's decision that the anti-corruption interests failed to support a corporate expenditure restriction did not call into question this interest with respect to a corporate contribution restriction, as KSP claims. Appl't Br. at 15-16. To the contrary, the *Citizen United* majority was careful to distinguish between expenditure restrictions and contribution restrictions in its analysis of the applicability of the anti-corruption interest. It noted that "contribution limits … unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." 130 S. Ct. at 908. The Court further noted that the *Buckley* Court "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption," but "did not extend this rationale to independent expenditures." *Id.* It acknowledged that *Buckley* found that large contributions could be given "to secure a political quid pro quo," *id., citing Buckley*, 424 U.S. at 26, but found that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only

[11] To be sure, *Beaumont* acknowledged that the interests set forth in *Austin* also supported the federal corporate contribution restrictions, but the Court made clear that the contribution restrictions were justified principally by the state interests in preventing quid pro quo corruption and the circumvention of the individual contribution limits. 539 U.S. at 154-56.

undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id., citing Buckley*, 424 U.S. at 47 (emphasis added). Thus, far from questioning whether a corporate contribution restriction is supported by the state's anticorruption interest, the *Citizens United* majority emphasized that such interest repeatedly had been found to justify restrictions on contributions.[12]

Thus, even if this court had the authority to disregard a controlling Supreme Court precedent – which it does not – KSP has no basis for its claim that the reasoning of *Citizens United* implicitly overruled *Beaumont*.

C. Following *Citizens United*, the Lower Courts Have Been Unanimous in Recognizing the Validity of *Beaumont*.

Because expenditure restrictions and contribution restrictions are subject to fundamentally different constitutional analyses, the legal reasoning in *Citizens United* does not even indirectly impact the constitutionality of a corporate contribution restriction – or the continuing vitality of the *Beaumont* decision. This has been the unanimous conclusion of those courts that have addressed the validity of *Beaumont* in the wake of *Citizens United*.

Indeed, the Texas Court of Criminal Appeals is one of the many courts that has held that the constitutionality of corporate contribution restrictions is unaffected by the *Citizens United* decision. *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App.-Austin 2008), *aff'd but criticized on other grounds*, 309 S.W.3d 71 (Tex. Crim. App. 2010). KSP criticizes the holding of the lower court,

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[12] Because of the different constitutional analyses applicable to contribution restrictions and expenditure restrictions, the Supreme Court has frequently upheld contribution restrictions while striking down expenditure restrictions with respect to the same political actor. For instance, in *Buckley*, the Court upheld the challenged limits on contributions to federal candidates, 18 U.S.C. § 608(b) (1970 ed., Supp. IV), yet simultaneously invalidated the limits on expenditures by federal candidates, *id.* § 608(a), (c). 424 U.S. at 23-30, 54-59. Similarly, the Court upheld the limits on contributions to independent political committees in *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981), but four years later, struck down limits on certain expenditures by such political committees in *NCPAC*, 470 U.S. at 501.

i.e., the Austin Court of Appeals, but in a clear oversight, KSP fails to mention that the Austin Court of Appeals' ruling was subsequently affirmed by the Texas Court of Criminal Appeals in a 2010 decision that specifically analyzed the possible impact of *Citizens United* on Texas's corporate contribution restriction.

The defendants in *Ex parte Ellis* attacked the same provisions of the law that KSP attacks here, contending that *Citizens United* marked a "philosophical shift in the Court's treatment of restrictions on corporate free speech" that rendered the Texas corporate contribution ban unconstitutional. 309 S.W.3d at 85. But while acknowledging that *Citizens United* "remov[ed] restrictions on independent corporate expenditures," the Court of Criminal Appeals unambiguously "disagree[d] with [defendants'] contention that the decision [in *Citizens United*] has had <u>any effect</u> on the Court's jurisprudence relating to corporate <u>contributions</u>." *Id.* (emphasis added). The Court of Criminal Appeals instead recognized that *Citizens United* had reaffirmed the distinction drawn by *Buckley* between direct political contributions and independent expenditures, both in terms of the standard of scrutiny applied and the governmental interests implicated by the two types of law. *Id.* at 84-86. Based on this reasoning, *Ex parte Ellis* held that *Citizens United* had not in any way undercut the constitutionality of the Texas corporate contribution restrictions, nor the rationales articulated in *Beaumont* for such restrictions. *Id.* at 86.

Similarly, the Ninth Circuit Court of Appeals recently found that *Beaumont* was unaffected by the *Citizens United* decision when it upheld a San Diego law prohibiting political contributions by "non-individual entities" (e.g., corporations, labor unions and other groups) to candidates, political parties and certain other political committees. *Thalheimer*, 645 F.3d at 1124-26. The Thalheimer plaintiffs had argued that *Citizens United* implicitly overruled

Beaumont, asserting that *Citizens United* had found that the government's interest in preventing circumvention of the contribution limits was no longer valid. The Ninth Circuit, however, rejected this theory, concluding that "there is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions." *Id.* at 1125.

In addition to the cases discussed above, the Courts of Appeals for both the Second and Eighth Circuits, as well as the U.S. District Court for the Southern District of Iowa, have also found that *Beaumont* remains the controlling precedent on the subject of corporate contribution restrictions in the wake of *Citizens United*. *See Ognibene*, 671 F.3d at 195 ("*Citizens United* preserves the anti-corruption justification for regulating corporate contributions, based on its clear distinction between expenditures and contributions, and the lack of an express rejection of the corporate ban, which has existed since the first federal campaign finance law in 1907."); *MCCL*, 640 F.3d at 318-19[13]; *IRTL*, 795 F. Supp. 2d at 869 (noting that "pursuant to *Beaumont*, [Iowa] can generally ban all direct corporate contributions") (quoting *MCCL*, 640 F.3d at 319). *See also Green Party*, 616 F.3d at 199 ("*Beaumont* … remain[s] good law.").

The only court that deviated from this consensus following *Citizens United* was the U.S. District Court for the Eastern District for Virginia in *U.S. v. Danielczyk*, which KSP makes the centerpiece of its challenge to Texas's corporate contribution restriction. However, the Fourth Circuit Court of Appeals recently reversed the district court, *see* 683 F.3d at 619, thus eliminating the only legal authority cited by KSP in support of its argument.

Danielczyk is a criminal case alleging a number of campaign finance violations, including that the defendants directed corporate contributions from for-profit corporations to Hillary

[13] *See supra* note 8 for the full history of this case.

Clinton's 2008 Presidential campaign in violation of the federal corporate contribution restriction at 2 U.S.C. § 441b. The district court initially dismissed the charges relating to illegal contributions on grounds that *Citizens United* had implicitly invalidated § 441b. *Danielczyk*, 788 F. Supp. 2d at 493-94. In its dismissal, the district court failed to consider or even cite *Beaumont*. In response to public criticism, the district court reconsidered its initial holding to take into account *Beaumont*, but it refused to change its ruling, arguing that *Beaumont* did not control because it applied to contributions from a non-profit, whereas *Danielczyk* concerned contributions from a for-profit corporation. *Danielczyk II*, 791 F. Supp. 2d 513 at 517-18.

The Fourth Circuit reversed the district court and affirmed the constitutionality of § 441b is constitutional on June 28, 2012, the same day KSP filed its merits brief in this case. *Danielczyk*, 683 F.3d. at 614. KSP's brief thus did not take into account this reversal and its argument relies on invalid precedent.

In this recent decision, the Fourth Circuit held that "*Beaumont* clearly supports the constitutionality of § 441(b)a and *Citizens United* . . . does not undermine *Beaumont*'s reasoning on this point." *Id*. at 615. Addressing the assertion that *Citizens United* repudiated *Beaumont*, the court noted that that *Citizens United* did not discuss *Beaumont* and the Supreme Court explicitly declined to address the constitutionality of the ban on direct contributions. *Id.* at 617. It also highlighted that *Citizens United*'s "'corporations-are-equal-to-people' logic" did not "necessarily appl[y] in the context of direct contributions," noting that to hold otherwise would upend "the well-established principle that independent expenditures and direct contributions are subject to different standards of scrutiny and supported by different government interests." *Id*.

With this Fourth Circuit decision, all courts that have considered the constitutionality of corporate contribution restrictions following *Citizens United* have unanimously held that *Beaumont* controls and that these restrictions are constitutional.

D. Neither the Statutory Definition of "Political Contribution," Nor the Corporate Contribution Restriction, Is Vague or Overbroad.

KSP charges that the statutory prohibition on corporate "political contributions" is unconstitutionally vague and overbroad insofar as it relies upon the definition of "political contribution" at Tex. Elec. Code § 251.001(5). Appl't Br. at 19-21; Counterclaim at ¶ 98. However, as noted by the district court below, slip op. at 11, Texas courts recently rejected a virtually-identical challenge to the state corporate contribution restriction in *Ex parte Ellis*. Furthermore, the Supreme Court has rejected the proposition that the analogous federal definition of "contribution" is vague or overbroad.

Texas law provides that a "political contribution" is "a campaign contribution or an officeholder contribution." *Id*. at § 251.001(5). A "campaign contribution," in turn, is "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id*. at § 251.001(3). And an "officeholder contribution" is "[a] contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that … are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office…." *Id*. at § 251.001(4).

KSP attacks these definitions on various grounds, arguing that the phrase "in connection with," in the definitions of "campaign contribution" and "officeholder contribution," is unconstitutionally vague, and that the definitions rely upon an impermissible "intent standard."

Appl't Br. at 19-20; Counterclaim at ¶¶ 116, 118.[14] Both of these claims are foreclosed by *Ex parte Ellis*, however, which rejected a similar challenge.

1. "In connection with" language

In *Ellis*, the Court of Criminal Appeals found that the "in connection with" language was no broader than the "for the purpose of influencing" language in the federal definition of "contribution" that was approved by the U.S. Supreme Court in *Buckley*. 309 S.W.3d at 88-89. As the *Ellis* Court noted, the Supreme Court has declined to impose a narrowing construction on the federal definition of "contribution," or to apply an "express advocacy" test. *Id.*

Federal law defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (emphasis added). Both the definition of "contribution" and the definition of "expenditure" in FECA rely on the same operative phrase: "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure").

In *Buckley*, the Supreme Court addressed the "for the purpose of influencing" language, and found that it was neither vague nor overbroad in connection to the definition of contribution.

To be sure, the *Buckley* Court held that this phrase did raise vagueness concerns in connection to the definition of "expenditure" as applied to individuals and to groups that did not have campaign activity as their major purpose, and consequently construed "expenditure" narrowly for individuals and such groups to encompass "only funds used for communications

[14] KSP also complains that the definition of "contribution" is unconstitutionally vague, Tex. Elec. Code § 251.001(2), which it alleges renders the term "political contribution" unconstitutionally vague. Appl't Br. at 19. Even if this Court were to accept the claim that the definition of "contribution" is vague, however, the corporate contribution restriction at issue here does not contain the term "contribution," but rather relies on the term "political contribution," which has an additional, independent definition, as discussed in Section I.D. *Id*. at §§ 253.094(a), 251.001(5). Thus, the sufficiency of the definition of "contribution" standing alone is irrelevant to this case.

that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. 1, 79-80 (emphasis added). *See also Osterberg v. Pena*, 12 S.W.3d 31, 50-51 (Tex. 2000). But, by contrast, the Court found that the same phrase "presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that:

> Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

424 U.S. at 24. The *Buckley* Court thus recognized that in the bounds of the "general understanding" of a political contribution (i.e., funds "provided to a candidate or political party or campaign committee" or "given to another person or organization that are earmarked for political purposes") the statutory definition of "contribution" was sufficiently clear and did not require the limiting gloss of express advocacy.

Based upon this principle articulated in *Buckley*, the Court of Criminal Appeals in *Ellis* found that the definition of "political contribution," upon which the corporate contribution ban was premised, passed constitutional muster. 309 S.W.3d at 88-89.

2. "Intent" standard

Ex parte Ellis also rejected KSP's argument that the Texas definition of "political contribution" is impermissible because it relies on an alleged "intent" standard. *See* Appl't. Br. at 19-20. As the Court of Criminal Appeals highlighted, the use of an intent standard does not automatically render a statute unconstitutionally vague in the First Amendment context, contrary to KSP's claims. 309 S.W.3d at 89-90 (quoting *U.S. v. Williams*, 553 U.S. 285, 306 (2008)).

Further, the possibility that intent may be difficult to establish is the problem of the State, not the defendant; it remains the burden of the State to demonstrate the "applicable culpable mental states." *Id*. at 90.

KSP cites no authority that would call *Ex parte Ellis* into question. It cites *dicta* from *WRTL* that discusses the potential chill that may result when an "intent" standard is used to define the types of independent expenditures are subject to regulation. *See* Appl't Br. at 19-20 (citing *WRTL*, 551 U.S. at 466-69). Specifically, the *WRTL* Court was considering whether it should use an "intent-and-effect test" to determine whether certain "electioneering communications" were the "functional equivalent of express advocacy." 551 U.S. at 465. The Court made clear, however, that its concerns regarding an "intent test" were connected to "the difficulty of distinguishing between discussions of issues on the one hand and advocacy of election or defeat of candidates on the other," or in other words, the difficulty of distinguishing between different types of independent spending. *Id.* at 467. The Court in no way suggested that such concerns would arise in the context of defining a "contribution." Indeed, *Buckley* had stressed that defining a "contribution" was less sensitive than defining an "expenditure" due to the "limiting connotation created by the general understanding of what constitutes a political contribution." 424 U.S. at 24. The "limiting connection" was that something of value had to actually be "provided" to a candidate or political party, or to another "person or organization" "for political purposes." *Id.* (emphasis added).

Here, a corporation will only potentially be in violation of Texas law when it actually "provides" something of value to a candidate, officeholder or political committee. The intent standard does not stand alone, but rather is an additional element that the state has to

demonstrate. Hence, the requirement that the state demonstrate a "culpable mental state" narrows the reach of the law and offers added protection to corporate actors.

CONCLUSION

For the foregoing reasons, Texas's restriction on corporate political contributions, as well as its political committee disclosure requirements, are consistent with the First Amendment. Accordingly, this Court should affirm the district court's judgment below.

Respectfully submitted,

/s/ Kelly G. Prather
Kelly G. Prather,
kgreenwood@midtownlegal.com
(TX Bar No. 00796670)
THE GREENWOOD PRATHER LAW FIRM
1300 McGowen Street
Houston, TX 77004
Tel.: (713) 333-3200
Fax: (713) 621-1449

J. Gerald Hebert,
ghebert@campaignlegalcenter.org
(VA Bar No. 38432)
Tara Malloy,
tmalloy@campaignlegalcenter.org
(NY Bar No. 4251005)
Paul S. Ryan,
pryan@campaignlegalcenter.org
(D.C. Bar No. 502514)
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
Fax: (202) 736-2222

Counsel for *Amicus Curiae*
Campaign Legal Center

Dated: August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2012, I electronically filed a true and correct copy of the foregoing BRIEF AMICI CURIAE FOR CAMPAIGN LEGAL CENTER with the Clerk of Court using the Texas Online eFiling for courts system and confirmed that the following counsel of record are registered for electronic service:

Chad W. Dunn
4201 FM 1960 West, Suite 530
Houston, Texas 77068
E-mail: chad@brazilanddunn.com

K. Scott Brazil
4201 FM 1960 West, Suite 550
Houston, Texas 77068

Dicky Grigg
SPIVEY & GRIGG, L.L.P.
48 East Avenue
Austin, Texas 78701
E-mail: dicky@grigg-law.com

Michael S. Hull
HULL HENRICKS, L.L.P.
Chase Tower
221 W. 6th Street, Suite 960
Austin, Texas 78701-3407
E-mail: mhull@hhm-llp.com

James Bopp, Jr.
Jared Haynie
Austin Hepworth
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
E-mail: jboppjr@aol.com

Brock C. Akers
PHILLIPS & AKERS, P.C.
3200 Southwest Freeway, Suite 3200
Houston, Texas 77027
E-mail: Brock.Akers@phillipakers.com

Margaret A. Wilson
807 Brazos Street, Suite 1014
Austin, Texas 78701
E-mail: margaret.wilson.tx@sbcglobal.net

Kelly J. Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
Justin E. Butterfield
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
E-mail: jmateer@libertyinstitute.org

Jonathan M. Saenz
LIBERTY INSTITUTE
900 Congress, Suite 220
Austin, Texas 78701
E-mail: jsaenz@libertyinstitute.org

I further certify that on this 3rd day of August, 2012, I provided courtesy copies of the BRIEF AMICI CURIAE to the foregoing counsel of record herein by email where email addresses were known.

/s/ Kelly G. Prather
Kelly G. Prather