

defeat of clearly identified candidates for state and local offices in the State of Texas in accordance with the Election Code. For the purposes of determining the application of *Citizens United* and its progeny to the issues raised in this case, the term "direct campaign expenditure" is interchangeable with the term "independent expenditure," as the latter is defined in federal law and discussed in *Citizens United*. See TEC Ethics Advisory Op. No. 489 (Apr. 21, 2010).

3. The only campaign expenditures that Texans for Free Enterprise intends to make will be direct campaign expenditures. To fund its direct campaign expenditures, Texans for Free Enterprise intends to solicit and accept political contributions from individuals and corporations for the express purpose of making such expenditures.

4. The Election Code prohibits Texans for Free Enterprise from accepting political contributions that total more than \$500 without first registering as a political committee; therefore, Texans for Free Enterprise registered with the Texas Ethics Commission ("TEC") as a general-purpose committee. As a general-purpose committee, however, the Election Code prohibits Texans for Free Enterprise from accepting political contributions from corporations for the purpose of making direct campaign expenditures. This prohibition applies to Texans for Free Enterprise despite the fact it intends to operate as a direct campaign expenditure-only committee ("DCE-Only Committee") and will *not* make contributions—whether direct or in-kind—to candidates running for state or local offices in the State of Texas.

5. As applied, the provisions of the Election Code that prohibit corporations from making political contributions to DCE-Only Committees for the purpose of making direct campaign expenditures and prohibit DCE-Only Committees from accepting such

contributions violate Texans for Free Enterprise's rights to freedom of speech and association under the First Amendment. Texans for Free Enterprise is not challenging the prohibitions or restrictions on direct contributions made to candidates or candidate committees.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this case under 28 U.S.C. §§ 1331, 1343(a)(3), and 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b).

PARTIES

8. Plaintiff Texans for Free Enterprise is a nonprofit corporation organized under the Texas Business Organizations Code and formed as a "political organization" under Section 527 of the Internal Revenue Code. It is registered with the TEC as a general-purpose committee and is subject to Title 15 of the Election Code.

9. Defendant Texas Ethics Commission is the governmental agency charged with administering and enforcing the provisions of the Election Code at issue in this case. The Texas Ethics Commission is located at 201 East 14th Street, 10th Floor, Austin, Texas 78701.

10. Defendant David A. Reisman is the Executive Director of the Texas Ethics Commission. He is sued in his official capacity.

STATEMENT OF FACTS

11. This complaint seeks declaratory and equitable relief barring the TEC from prohibiting corporations from making political contributions to DCE-Only Committees for

the purpose of making direct campaign expenditures, thereby permitting Texans for Free Enterprise to accept political contributions from corporations for such purpose.

12. Texans for Free Enterprise was formed as a "political organization" under Section 527 of the Internal Revenue Code and was incorporated as a Texas nonprofit corporation on July 23, 2012. Specifically, Texans for Free Enterprise was formed for the purpose of making direct campaign expenditures to expressly advocate for the election or defeat of clearly identified candidates for state and local offices in the State of Texas in accordance with the Election Code, as amended by the Texas Legislature in 2011. As a singular entity, Texans for Free Enterprise will allow like-minded individuals and corporations the freedom to associate together and pool their funds, thus amplifying their voices beyond what they could achieve on their own.

13. Pursuant to Section 251.001(8) of the Election Code, Texans for Free Enterprise's campaign expenditures will be direct campaign expenditures made without the prior consent or approval of the candidate(s) supported. A "[d]irect campaign expenditure means a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure." Tex. Elec. Code § 251.001(8). In TEC Ethics Advisory Op. No. 331 (July 12, 1996), the TEC stated, "A direct campaign expenditure, in contrast to a contribution, is a campaign expenditure supporting a candidate that is made without the prior consent or approval of the candidate." *See also* 1 Tex. Admin. Code § 20.1(5) (defining "direct campaign expenditure"); TEC Ethics Advisory Op. No. 489 (Apr. 21, 2010).

14. For the purposes of determining the application of *Citizens United* and its progeny to the issues raised in this case, the term "direct campaign expenditure" is

interchangeable with the term "independent expenditure," as the latter is defined in federal law and discussed in *Citizens United*. See TEC Ethics Advisory Op. No. 489 (Apr. 21, 2010). Federal campaign finance law defines an independent expenditure as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17); 11 C.F.R. § 100.16(a) (2011). Federal campaign finance law broadly defines a person as "an individual, partnership, committee, association, corporation, labor organization, and any other organization, or group of persons." 2 U.S.C. § 431(11); 11 C.F.R. § 100.10 (2011).

15. Texans for Free Enterprise operates independently of any political candidates and political party committees it supports with its direct campaign expenditures, and its bylaws require it to operate wholly independent of any of these persons or entities.

16. To comply with Section 253.031 of the Election Code, Texans for Free Enterprise registered with the TEC as a general-purpose committee on August 31, 2012. As part of that filing, Texans for Free Enterprise attached a cover letter notifying the TEC of its intent to operate as a DCE-Only Committee.

17. Pursuant to Section 257.037 of the Election Code, Texans for Free Enterprise will not knowingly make or authorize a campaign expenditure until it has been registered with the TEC for at least 60 days and has accepted political contributions from at least 10 persons. Texans for Free Enterprise plans to begin making direct campaign expenditures to expressly advocate for the election or defeat of clearly identified candidates for state and

local offices in the State of Texas beginning on October 30, 2012, prior to the general election.

18. Texans for Free Enterprise has never made a contribution—whether direct or in-kind—to any political candidate, political committee, or political party committee.

19. Under its bylaws, Texans for Free Enterprise cannot make contributions or donations of any kind to any TEC-regulated committees, and any campaign expenditures will be made without the prior consent or approval of the candidate(s) supported.

20. Texans for Free Enterprise intends to solicit and accept political contributions from individuals and corporations to fund direct campaign expenditures and pay administrative expenses. Potential individual and corporate donors will be informed that their political contributions may be used for political advertising that advocates the election or defeat of candidates running for state or local offices in the State of Texas, and some of Texans for Free Enterprise's solicitations will refer to particular candidates by name.

21. In *Citizens United*, the Supreme Court held that the only permissible justification for restrictions on campaign expenditures is the prevention of *quid pro quo* corruption or the appearance thereof. The Court found that independent expenditures (*i.e.*, "direct campaign expenditures" under Texas law) do not pose a threat of *quid pro quo* corruption and, therefore, no means by which to ban them could be constitutional. ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S.Ct. at 909. Notably, the Court also held that there is no justification for treating corporations and individuals differently under the umbrella of independent expenditures. *Id.* at 900.

22. Indeed, every federal court that has considered the implications of *Citizens United* on independent expenditure-only political committees has been in agreement: laws limiting contributions from U.S. citizens and corporations to a political committee for the purpose of making independent expenditures are unconstitutional. See *SpeechNow.org v. FEC*, 599 F. 3d 686, 696 (D.C. Cir. 2010) (*en banc*) ("[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011) (invalidating restrictions on contributions to political committees that are used for independent expenditures); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F. 3d 684 (9th Cir. 2010) (striking down a law that prohibited "persons" from making any independent expenditures if they receive contributions above certain amounts); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011) (finding a state law unconstitutional to the extent that it limited contributions to committees engaged solely in independent spending for political speech); *Vt. Right to Life Comm., Inc. v. Sorrell*, No. 2:09-cv-188, 2012 WL 2370445, at *63 (D.Vt. June 21, 2012) ("The State's arguments do not provide grounds to doubt the broadly-held view that states may not limit contributions independent-expenditure-only groups receive from single sources"); *Lair v. Murry*, 2012 WL 1739252, at *8 (D. Mont. May 16, 2012) (State law "is unconstitutional to the extent that it prohibits corporations from making contributions to political committees that use those contributions for independent expenditures" and "to the extent that it prevents political committees from receiving those contributions."); *Yamada v. Weaver*, No. 10-00497 JMS-RLP, 2012 WL 983559 (D. Haw. March 21, 2012)

(invalidating a statute that placed limitations on contributions to organizations that engage in independent expenditures only); *Mich. Chamber of Commerce v. Land*, 725 F.Supp.2d 665 (W.D. Mich. 2010) (granting a preliminary injunction enjoining the state from restricting corporate contributions to a political committee for the purpose of making expenditures in connection with a campaign where those expenditures are in no way directly or indirectly coordinated with any candidate or the candidate's campaign committee, political party, or political party); *Republican Party of N.M. v. King*, No. 11-CV-900 WJ/KBM, 2012 WL 219422, at *7 (D.N.M. Jan. 5, 2012) ("New Mexico does not have an anti-corruption interest capable of justifying contribution limits if those contributions are to be used exclusively for independent expenditures."); *Personal PAC v. McGuffrage*, — F.Supp.2d —, 2012 WL 850744 (N.D. Ill. 2012) (striking down a state law that imposed contribution limits on individuals, corporations, labor organizations, political party committees, political action committees, and candidate political committees as applied to contributions to independent expenditure-only political committees); After *Citizens United*, the 82nd Legislature of Texas passed House Bill 2359 to amend the Election Code to incorporate the TEC's advisory opinion regarding changes to the constitutionality of the code. H.B. No. 2359, 82nd Leg. (Tex. 2011). In relevant part, the bill repealed all sections of the code prohibiting a single corporation from making direct campaign expenditures. The Legislature, however, did not repeal or amend the statutes to permit corporations to make political contributions to a general-purpose committee or DCE-Only Committee for the same purpose.

23. Despite the *Citizens United* ruling and its progeny, the TEC continues to apply Chapter 253 of the Election Code to prohibit Texans for Free Enterprise from accepting political contributions from corporations for the purpose of making direct campaign

expenditures, even if it operates as a DCE-Only Committee. Specifically, Section 253.094(a) of the Election Code states "A corporation or labor organization may not make a political contribution that is not authorized by [subchapter D]." While Section 253.100 of the Election Code provides for a limited exception permitting a corporation, acting alone or with one or more other corporations, to make one or more expenditures for the "maintenance and operation" costs of a general-purpose committee, no provision in this subchapter authorizes a corporation to make political contributions to a political committee or DCE-Only Committee for the purpose of making direct campaign expenditures. In turn, Section 253.003(b) states "A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter," thereby prohibiting Texans for Free Enterprise from accepting such contributions.

24. Counsel to Texans for Free Enterprise has had multiple telephone conferences with Natalia Ashley, the former General Counsel of the TEC who now serves as Special Counsel to the TEC, regarding direct campaign expenditures. During each of those telephone conferences, Ms. Ashley consistently confirmed that the applicable statutes prohibit a nonprofit corporation that has registered as a general-purpose committee from accepting funds from corporations for the purpose of making direct campaign expenditures, even if the nonprofit corporation operates as a DCE-Only Committee.

25. During a telephone conference with Ms. Ashley that occurred prior to the TEC's meeting on August 30, 2012, counsel to Texans for Free Enterprise inquired about the process for seeking an advisory opinion from the TEC regarding the issues raised in this case. Ms. Ashley informed counsel that the TEC would not consider the requested advisory opinion during the TEC's meeting on August 30, 2012, meaning that an advisory opinion

regarding the issues raised in this case would not be considered by the TEC until after the 2012 general election. Regardless, while reasonable reliance on an advisory opinion from the TEC can provide a defense to prosecution, Texans for Free Enterprise and its potential donors remain vulnerable to a felony prosecution for engaging in its intended activities unless and until the issues raised in this case are resolved by the Texas Legislature or the courts.

26. Pursuant to Section 402.042 of the Texas Government Code, Texans for Free Enterprise is not authorized to request an advisory opinion from the Texas Attorney General on questions of law.

27. A violation of Chapter 253 of the Election Code carries both civil and criminal penalties for violations, including felony charges and monetary damages. Pursuant to Section 253.132 of the Election Code, the monetary damages for knowingly making an unlawful direct campaign expenditures require paying twice the value of the unlawful expenditure to each political committee of opposing interest in the election and reasonable attorney's fees. Pursuant to Section 253.133 of the Election Code, the monetary damages for knowingly accepting an unlawful political contribution require paying triple the value of the unlawful contribution to the State of Texas.

28. Since Texans for Free Enterprise cannot accept political contributions from corporations for the purpose of making direct campaign expenditures without fear of prosecution, it is being prevented from receiving available political contributions from like-minded corporations that would choose to associate and pool their funds with Texans for Free Enterprise, thus amplifying their voices beyond what they could achieve on their own.

29. But for the uncertainty in the Election Code and the substantial likelihood of being subjected to a felony prosecution, Texans for Free Enterprise would immediately seek to solicit and accept political contributions and pledges from corporations that would be used to fund direct campaign expenditures prior to the 2012 general election and future elections.

30. Without being able to accept political contributions or pledges from corporations for the purpose of making direct campaign expenditures, Texans for Free Enterprise cannot fully and effectively accomplish its mission for the 2012 general election and future elections.

31. As a result, Texans for Free Enterprise is faced with the Hobson's Choice of giving up constitutionally-protected conduct or facing the immediate threat of severe civil and criminal penalties. In this regard, Texans for Free Enterprise has suffered irreparable injury to its rights under the First Amendment and has no adequate remedy at law without declaratory and injunctive relief from this Court.

32. Texans for Free Enterprise has met the requirements for injunctive relief: (1) the ruling in *Citizens United* and its progeny make clear that Plaintiff will likely prevail on the merits; (2) the loss of First Amendment freedoms, even for minimal periods of time, causes Plaintiff immediate and irreparable injury; (3) any harm caused to the State is far outweighed by the loss of Plaintiff's constitutionally protected freedoms; and (4) the injunction will serve the public interest if Plaintiff and all other DCE-Only Committees—whether like-minded or opposed—can speak freely with all constitutional resources at their disposal.

COUNT I
VIOLATION OF FIRST AMENDMENT RIGHTS TO FREE SPEECH AND ASSOCIATION
(42 U.S.C. § 1983)

33. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

34. The provisions of the Election Code that prohibit corporations from making political contributions to DCE-Only Committees for the purpose of making direct campaign expenditures, thereby prohibiting Texans for Free Enterprise from accepting such contributions, violate Texans for Free Enterprise's rights to freedom of speech and association under the First Amendment.

35. After the United States Supreme Court held that the only permissible justification for restrictions on campaign expenditures is the prevention of *quid pro quo* corruption or the appearance thereof and "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *Citizens United*, 130 S.Ct. at 909, Texas has no constitutional justification to limit or prohibit corporations from making political contributions to DCE-Only Committees for the purpose of making direct campaign expenditures.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. A declaration that the contribution restrictions contained in Sections 253.094(a) and 253.003(b) of the Texas Election Code, and in any applicable rules and regulations regarding those provisions, violate the First Amendment when applied to political contributions to direct campaign expenditure-only committees for the purpose of making direct campaign expenditures.

2. Preliminary and permanent injunctions enjoining Defendants from enforcing the contribution restrictions contained in Sections 253.094(a) and 253.003(b) of the Texas Election Code, and in any applicable rules and regulations regarding those provisions, when applied to political contributions to direct campaign expenditure-only committees for the purpose of making direct campaign expenditures.

3. All costs and attorney's fees pursuant to 42 U.S.C § 1988 and any other applicable statute or authority.

4. Any other relief that the Court deems just and appropriate.

5. For the foregoing reasons, Plaintiff respectfully requests that the Court enter judgment against Defendants consistent with the relief requested.

Dated: September 26, 2012

Respectfully submitted,

Texans for Free Enterprise

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been filed in accordance with the Electronic Case Files System of the Western District of Texas on this the 26th day of September 2012, which will provide a copy to:

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