

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

_____)	
LAKE TRAVIS CITIZENS COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Case No. 2:14-cv-00994
NATALIA ASHLEY, in her official capacity)	
as Executive Director of the Texas Ethics)	
Commission,)	
)	
Defendant.)	
_____)	

VERIFIED COMPLAINT

Plaintiff Lake Travis Citizens Council (“Citizens Council”) files this Verified Complaint against Defendant Natalia Ashley, in her official capacity as Executive Director of the Texas Ethics Commission (“the State”). In support of this Verified Complaint, Plaintiff says:

INTRODUCTION

1. The Citizens Council brings this suit to protect their constitutional rights to free speech and freedom of association as guaranteed by the First Amendment, rights which are being infringed under the threat of civil and criminal punishment.

2. Specifically, this is a civil action seeking 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 (“Election Code”) and Texas Administrative Code that violate the First Amendment and Fourteenth Amendment to the United States Constitution.

3. The Citizens Council claims that Sections 251.001(7) (defining “campaign expenditure”) and 251.001(12) (defining “political committee”) of the Election Code are void for vagueness and unconstitutionally overbroad because they conflict with the United States Supreme Court’s ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny and are *not* narrowly tailored to serve a compelling state interest.

4. The Citizens Council further claims that Texas Ethics Commission Rule § 20.1(20), codified at 1 Tex. Admin. Code § 20.1(20), (defining “a principal purpose”), passed by the Commission on October 29, 2014, is unconstitutionally overbroad because it is not narrowly tailored to serve a compelling state interest. As a result, the rule infringes the free speech and associational rights of individuals and organizations by deeming the Citizens Council a political committee even though their major purpose is not the nomination or election of a candidate.

JURISDICTION AND VENUE

5. This case arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution; therefore, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a). This Court also has jurisdiction pursuant to the Declaratory Judgment Act, codified at 28 U.S.C. §§ 2201 and 2202.

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

PARTIES

7. Plaintiff Lake Travis Citizens Council is a nonprofit corporation organized under the Texas Business Organizations Code that is exempt from federal income taxes pursuant to Section 501(c)(4) of the Internal Revenue Code, codified at 26 U.S.C. § 501(c)(4). The Citizens Council is located in Travis County, Texas.

8. Defendant Natalia Ashley is the Executive Director of the Texas Ethics Commission, and she is sued in her official capacity. The 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. Upon information and belief, Defendant Ashley may be served with process at such address.

STATEMENT OF FACTS

A. The Citizens Council's Major Purpose and Planned Communications in 2014 Are for the Promotion of the Social Welfare of Its Community.

9. The Citizens Council's major purpose is not the nomination or election of candidates, but instead the promotion the social welfare of its community:

... 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 Certificate of Formation of Lake Travis Citizens Council (a true and correct copy of which is attached hereto to as "**Exhibit A**"). As a singular entity, the Citizens Council will allow like-minded donors the freedom to associate together and pool their funds, thus amplifying their voices beyond what individual donors could achieve on their own.

10. Amy Casto is a member of the Citizens Council's Board of Directors and serves as President of the organization. She is familiar with its operations and the events leading to this lawsuit and verifies on personal knowledge the facts herein that are pertinent to the Citizens Council.

11. 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.

12. Based upon the Citizens Council's current and expected receipts, the Citizen Council's total annual budget for the calendar year 2014 is \$2,200. The Citizen Council's fiscal year begins January 1 and ends December 31.

13. Based upon this annual budget, the Citizen Council produced and planned to disseminate multiple Facebook advertisements designed to: (a) identify the most important issues in the Lake Travis community, as ranked by Lake Travis residents; (b) educate Lake Travis residents about propositions that will appear on the local ballot for the 2014 general election and encourage them to vote; and (c) champion issues and causes the Citizens Council believes in.

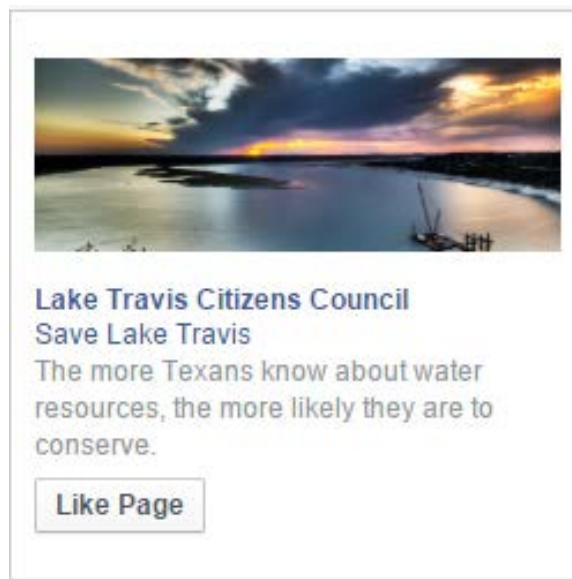
14. The Citizens Council produced and planned to disseminate five Facebook advertisements. A true and correct screenshot of Facebook Ad #1 (Ranking of Local Issues) is included here:



15. Clicking the advertisement, Facebook Ad #1 (Ranking of Local Issues), directs a person to a survey in which they rank the following issues: (a) high property or sales taxes; (b) traffic congestion; (c) water shortage; (d) rapid development in the area; and (e) lack of recreational facilities.

16. The Citizens Council planned to spend \$500 to disseminate this Facebook advertisement. The Citizens Council has already spent \$500 (100 percent) of the allocated budget to produce and disseminate this Facebook advertisement.

17. A true and correct screenshot of Facebook Ad #2 (Water Restrictions) is included next:



18. The Citizens Council planned to spend \$500 to disseminate this Facebook advertisement. The Citizens Council has already spent \$500 (100 percent) of the allocated budget to produce and disseminate this Facebook advertisement.

19. A true and correct snapshot of Facebook Ad #3 (Stop Texting and Driving) is included next:



20. The Citizens Council planned to spend \$500 to disseminate this Facebook advertisement. The Citizens Council has already spent \$500 (100 percent) of the allocated budget to produce and disseminate this Facebook advertisement.

21. A true and correct copy of Facebook Ad #4 (Vote Today!) is included next:



22. The Citizens Council planned to spend \$125 to disseminate this Facebook advertisement. The Citizens Council has spent \$25 (20 percent) to produce the copy for the advertisement, but the Citizens Council has not yet spent any funds to disseminate this

Facebook advertisement. The Citizens Council planned to spend the remaining \$100 (80 percent) on November 4, 2014.

23. A true and correct screenshot of Facebook Ad #5 (Support Proposition 1) is included next:



24. The Citizens Council planned to spend \$575 to disseminate this Facebook advertisement. The Citizens Council has already spent \$500 (~87 percent) of the allocated budget to produce and disseminate this Facebook advertisement, and the Citizens Council planned to spend the remaining \$75 (~13 percent) on November 4, 2014.

25. The Citizens Council has disbursed a total of \$2025 in 2014, and its budget planned for an additional disbursement of \$100 for Facebook Ad #4 (Vote Today!) and an additional disbursement of \$75 for Facebook Ad #5 (Support Proposition 1).

26. The Citizens Council had not made, and does not plan to make, any disbursements for the purpose of expressly advocating for or against any candidate for public office.

B. The Citizens Council Fears that the Planned \$100 Expenditure to Disseminate Facebook Ad #4 (Vote Today!) on November 4th Will be Deemed to Be a Political Expenditure and Campaign Expenditure.

27. Because it is unclear to the Citizens Council how the State will apply Sections 251.001(7) (defining “campaign expenditure”) and 251.001(10) (defining “political expenditure”) of the Election Code to Facebook Ad #4 (Vote Today!), the Citizens Council has a reasonable fear that engaging in its desired advocacy will subject the Citizens Council to civil and criminal penalties.

28. Courts have long recognized that “the distinction between campaign advocacy and issue advocacy ‘may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.’” *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) (“*WRTL II*”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)). Therefore, discussion of issues often mentions candidates. In contrast, “[i]ssue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their decisions.” *Id.* at 470.

29. Facebook Ad #4 (Vote Today!) does not constitute “express advocacy” or the “functional equivalent of express advocacy” under the applicable precedents established by the Supreme Court in *Buckley* and *WRTL II*. Rather, the Citizens Council believes that Facebook Ad #4 (Vote Today!) constitutes genuine issue advocacy currently not regulated by the Election Code.

30. In accordance with the standards set forth in *Buckley* and *WRTL II*, the Citizens Council would not file any Texas Ethics Commission reports as contemplated in

Chapter 254 of the Election Code if it were to disseminate Facebook Ad #4 (Vote Today!) as originally planned.

31. In contrast to *Buckley* and *WRTL II*, Section 251.001(10) of the Election Code defines “political expenditure” as “a campaign expenditure or an officeholder expenditure.”

32. Section 251.001(7) of the Election Code broadly defines “campaign expenditure” as “an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.”

33. In other words, Sections 251.001(10) and 251.001(7) can be read together as “a political expenditure is an expenditure made by any person in connection with a campaign for an elective office or on a measure.”

34. Therefore, even though Facebook Ad #4 (Vote Today!) clearly does not expressly advocate for or against any candidate or measure, the Citizens Council reasonably fears that the State will nonetheless deem its expenditure to disseminate Facebook Ad #4 (Vote Today!) to be “an expenditure made by any person *in connection with* a campaign for an elective office or on a measure.”

35. Further, it is unclear and unstated what contextual factors may be considered when the State interprets “in connection with a campaign for an elective office or on a measure,” which means it is extremely difficult for the regulated community, including the Citizens Council, to know whether a disbursement is, in fact, “in connection with a campaign for an elective office or on a measure.” The void-for-vagueness doctrine requires the law to be so clear that “men of common intelligence” need not “guess as to its meaning.”

See Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 620 (1976). Likewise, such vagaries enable discriminatory and arbitrary enforcement by the State.

36. In other words, the Citizens Council is justifiably concerned that the phrase “in connection with a campaign . . . on a measure” will be applied by the State to encompass the Citizens Council’s Facebook Ad #4 (Vote Today!), which admittedly mentions voting and was going to be disseminated on Election Day to encourage citizens in the Lake Travis area to vote.

37. If the disbursement to disseminate Facebook Ad #4 (Vote Today!) were deemed to be a political expenditure and campaign expenditure, then it would be considered a “direct campaign expenditure” pursuant to Section 251.001(8) because it was “made without the prior consent or approval of any candidate(s).”¹ Pursuant to Texas Ethics Commission Rule § 22.6 and Section 254.261, any organization such as the Citizens Council that makes such an expenditure is required to file a report with the Texas Ethics Commission and comply with Chapter 254 of the Election Code “as if the person were the campaign treasurer of a general-purpose committee.” Tex. Elec. Code § 254.261(a).²

38. Further, if the disbursement to disseminate Facebook Ad #4 (Vote Today!) were deemed to be a “direct campaign expenditure” pursuant to Section 251.001(8), then

¹ In Texas Ethics Commission Ethics Advisory Op. No. 331 (July 12, 1996), the Texas Ethics Commission 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(20)(5) (defining “direct campaign expenditure”); Texas Ethics Commission Ethics Advisory Op. No. 489 (Apr. 21, 2010).

² Despite the fact that the Texas Ethic’s Commission’s guidance regarding direct campaign expenditures explicitly focuses on “prior consent or approval of the candidate,” a person’s expenditure in support or opposition to a ballot measure is subject to the reporting requirements contained in Section 254.261 of the Election Code.

the State may require the Citizens Council to also explicitly indicate on Facebook Ad #4 (Vote Today!) that it is political advertising, even though it is not, and comply with the disclosure requirements specified in Section 255.001 of the Election Code.

39. The Citizens Council's confusion over whether Facebook Ad #4 (Vote Today!) would have to comply with Section 255.001 is exacerbated by the fact that the applicable statute explicitly states that it applies only to "political advertising containing express advocacy", but Section II of the Texas Ethics Commission's "Political Advertising" guide (a true and correct copy of which is attached hereto to as "**Exhibit B**") states that "political advertising is deemed to contain express advocacy if it is authorized by a candidate, an agent of a candidate, or a political committee filing campaign finance reports." In other words, there is an inherent inconsistency between the statute and the Texas Ethics Commission's guide that begs the obvious question: Is an issue advertisement that does not contain express advocacy nonetheless deemed express advocacy if it is disseminated by a person that must comply with Chapter 254 of the Election Code "as if the person were the campaign treasurer of a general-purpose committee"?

40. Due to the uncertainty as to whether the State will apply Sections 251.001(7) (defining "campaign expenditure") and 251.001(10) (defining "political expenditure") of the Election Code to Facebook Ad #4 (Vote Today!), not to mention the uncertainty as to whether Chapter 254 and/or Section 255.001 would be implicated, the Citizens Council is concerned that the dissemination of the advertisement as planned will subject the organization to burdensome registration and reporting requirements, risk the associational rights of the Citizen Council's donors by disclosures, and subject the organization to civil and criminal charges and associated burdensome litigation.

41. Further, a determination by the State that the disbursement to disseminate Facebook Ad #4 (Vote Today!) is a campaign expenditure (and thus a political expenditure), then such disbursement could cause the Citizens Council to qualify as a political committee (for a detailed explanation of the applicable statute and rule, see Section C below). Registering as a political committee will be both overly burdensome for the Citizens Council due to its limited resources and potentially jeopardize the freedom of association rights of the Citizens Council's donors because registering as a political committee will deter present and would-be donors from associating with the Citizens Council.

42. Finally, should the Citizens Council be investigated as a result of disseminating Facebook Ad #4 (Vote Today!), the Citizens Council reasonably fears that such an investigation will damage the long-term efficacy of the organization, cause harm to the persons who choose to affiliate with the organization, and ultimately require the organization to turn over internal and confidential documents that will be made public.

43. As a result, the Citizens Council is being forced to mute itself by not distributing Facebook Ad #4 (Vote Today!) as planned, and it will be forced to continue curtailing similar speech in the future without the judicial relief sought in this action.

44. The broad-sweeping language of Section 251.001(7) (defining "campaign expenditure") is *not* narrowly tailored to serve a compelling state interest, and the ostensible breadth of this statute has caused actual damage to the Citizens Council because it has incurred \$25 in costs to produce the mockup of an advertisement that it cannot disseminate as planned.

45. Furthermore, the State has infringed on the Citizens Council's constitutionally-protected rights, causing irreparable injury, by violating the Citizens Council's First Amendment rights to freedom of speech and association and by forcing the Citizens Council to seek judicial relief because it wishes to speak on matters of public policy without unwarranted governmental intrusion and restriction.

46. In materially similar situations in the future, the Citizens Council intends to disburse funds to disseminate communications materially similar to Facebook Ad #4 (Vote Today!), some of which will mention voting and issues that will appear on the ballot. It is likely that such communications will be disseminated prior to elections when the public and candidates will be more attentive to such issues. Given such plans, there is a strong likelihood that the issues and questions giving rise to this action will recur in the future.

47. The Citizens Council has no adequate remedy at law.

48. For the foregoing reasons, the Citizens Council is seeking a declaratory judgment that Section 251.001(7) of the Election Code is unconstitutionally vague and overbroad, as well as injunctive relief enjoining the State from enforcing this provision against the Citizens Council for disseminating Facebook Ad #4 (Vote Today!) on November 4, 2014, and similar communications prior to future elections.

C. The Citizens Council Fears that the Planned \$75 Additional Expenditure to Disseminate Facebook Ad #5 (Support Proposition 1) on November 4th Will Require the Organization to Register as a Political Committee.

49. Section 251.001(12) of the Election Code defines "political committee" as "a group of persons that has as *a principal purpose* accepting political contributions or making political expenditures." (emphasis added).

50. Under Texas law, a political committee is required to appoint a campaign treasurer, who must file either an Appointment of A Campaign Treasurer By A General-Purpose Committee (Form GTA) or Appointment of A Campaign Treasurer By A Specific-Purpose Committee (Form STA), keep detailed accounts of all contributions received and expenditures made, and file periodic reports with the Texas Ethics Commission. *See, e.g.*, Tex. Elec. Code §§ 251.001(8), 254.031, and 254.121-.164.

51. Political committees that fail to comply with such registration, recordkeeping, and reporting requirements are subject to civil penalties under Section 254.232 of the Election Code and criminal penalties under Section 254.041 of the Election Code. For example, the civil penalty may be three times the amount that was required to be reported by the committee. Tex. Elec. Code § 254.232. A criminal penalty for an untimely or incomplete report can be punishable as a Class C misdemeanor. Tex. Elec. Code § 254.041.

52. On October 29, 2014, the Texas Ethics Commission formally adopted Rule § 20.1(20), which interprets Section 251.001(12) of the Election Code as follows:

(20) Principal purpose--A group has as a principal purpose of accepting political contributions or making political expenditures, including direct campaign expenditures, when that activity is an important or a main function of the group.

(A) A group may have more than one principal purpose.

(B) A group has as a principal purpose accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year. Whether the contributor intends to make a political contribution is determined by the reasonable expectation of the contributor as to how the contribution will be used and includes an analysis of:

(1) the content of the group's public statements regarding its fundraising efforts, goals, or support of or opposition to candidates, officeholders, or measures;

(2) the group's government filings and organizational documents, including mission statements; and

(3) the group's other activities that are unrelated to accepting political contributions or making political expenditures.

(C) A group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses and other resources to make political expenditures within a calendar year. The following shall be included for purposes of calculating the threshold:

(1) the value of the time spent by the group's employees or volunteers on activities related to making political expenditures compared to other activities; and

(2) the amount of money and in-kind donations spent on political expenditures compared to other expenditures.

(3) For the proportion in paragraph (2), the proportional share of administrative expenses attributable to political expenditures should be included. (For example, if the group sends three mailings a year and each costs \$10,000, if the first two are issue based newsletters and the third is a direct advocacy sample ballot, and there were no other outside expenditures, then the proportion of the administrative expenses attributable to political expenditures would be 33 percent.) Administrative expenses include but are not limited to:

- a. employee compensation and benefits;
- b. contractor payments;
- c. rent;
- d. office expenses; and
- e. computer equipment and services.

(D) In this section, the term "political expenditures" includes direct campaign expenditures.

1 Tex. Admin. Code § 20.1(20).

53. Currently, exactly 24.7 percent of the Citizens Council's expenditures in 2014 have been for disseminating Facebook Ad #5 (Support Proposition 1); however, if the

Citizens Council adheres to its 2014 budget and disseminates all five Facebook ads as planned, then 26.1 percent of the Citizens Council's annual expenses will be for disseminating Facebook Ad #5 (Support Proposition 1).

54. Since Facebook Ad #5 (Support Proposition 1) contains express advocacy in support of Proposition 1, such expenditures would require the Citizens Council to register as a political committee pursuant to Section 251.001(12) of the Election Code and Texas Ethics Commission Rule § 20.1(20).

55. However, since the Citizens Council has been forced to mute itself by not distributing Facebook Ad #4 (Vote Today!) due to the uncertainty of the applicability of various Election Code provisions, the additional \$75 expenditure to disseminate Facebook Ad #5 (Support Proposition 1) would mean that 27.4 percent of the Citizens Council's annual expenses will contain express advocacy.

56. If the Citizens Council must comply with the 25 percent threshold contained in Rule § 20.1(20), which interprets Section 251.001(12) of the Election Code, spending the additional \$75 to disseminate Facebook Ad #5 (Support Proposition 1) will require the organization to register as a political committee. That, of course, will require the Citizens Council to appoint a campaign treasurer, who must file either an Appointment of A Campaign Treasurer By A General-Purpose Committee (Form GTA) or Appointment of A Campaign Treasurer By A Specific-Purpose Committee (Form STA), keep detailed accounts of all contributions received and expenditures made, and file periodic reports with the Texas Ethics Commission. *See, e.g.*, Tex. Elec. Code §§ 251.001(8), 254.031, and 254.121-.164.

57. Because the Citizens Council would automatically be deemed a political committee under Texas law if it spends the additional \$75 to disseminate Facebook Ad #5 (Support Proposition 1), the Citizens Council is being forced to mute itself by not distributing Facebook Ad #4 (Vote Today!) as planned. Further, the organization will be forced to continue curtailing similar speech in the future without the judicial relief sought in this action.

58. To be clear, if Proposition 1 succeeds, it will allow the City of Lakeway to purchase 70 acres of land for recreational use on Bee Creek Road adjacent to Lake Travis Middle School. According to the official government website of the City of Lakeway, the City has been discussing leasing the land to Lake Travis Youth Association for a sports complex that the association would operate and maintain. *See* City of Lakeway, City News (October 30, 2014), *available at* <http://www.lakeway-tx.gov/civicalerts.aspx?AID=587>.

59. In other words, the Citizens Council is being forced to withhold its planned communication to advocate for more recreational fields for children to service Lakeway's rapidly growing population because a \$75 dollar disbursement would have subjected the Citizens Council to the State's burdensome political committee regime. It is hardly the nefarious purpose that the Texas Ethics Commission likely had in mind when they adopted Rule § 20.1(20).

60. The State has infringed on the Citizens Council's constitutionally-protected rights, causing irreparable injury, by violating the Citizens Council's First Amendment rights to freedom of speech and association and by forcing the Citizens Council to seek judicial relief because it wishes to speak on matters of public policy without unwarranted governmental intrusion and restriction.

61. In materially similar situations in the future, the Citizens Council intends to disburse funds to disseminate communications materially similar to Facebook Ad #5 (Support Proposition 1). Given such plans, there is a strong likelihood that the issues and questions giving rise to this action will recur in the future.

62. The Citizens Council has no adequate remedy at law.

63. For the foregoing reasons, the Citizens Council is seeking a declaratory judgment that Texas Ethics Commission Rule § 20.1(20), which interprets Section 251.001(12) of the Election Code, is unconstitutionally overbroad, as well as injunctive relief enjoining the State from enforcing such provision. In the alternative, the Citizens Council is seeking a declaratory judgment that Texas Ethics Commission Rule § 20.1(20) is unconstitutional as applied to the Citizens Council, as well as injunctive relief enjoining the State from enforcing such provision against the Citizens Council.

64. The Citizens Council is also seeking a declaratory judgment that Section 251.001(12) of the Election Code is unconstitutionally vague, as well as injunctive relief enjoining the State from enforcing this provision against the Citizens Council for disseminating Facebook Ad #5 (Support Proposition 1) on November 4, 2014, and similar communications prior to future elections.

COUNT I

Tex. Elec. Code § 251.001(7) (defining “campaign expenditure”) The Statute is Facially Vague.

65. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

66. The Election Code defines “campaign expenditure” as “an expenditure made by any person in connection with a campaign for an elective office or on a measure.

Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.” Tex. Elec. Code § 251.001(7).

67. The void-for-vagueness doctrine requires the law to be so clear that “men of common intelligence” need not “guess as to its meaning.” *See Hynes*, 425 U.S. at 620 (1976).

68. The operative words “in connection with a campaign” render the statute vague because they:

ultimately depend . . . upon a judicial judgment (or is it—worse still—a jury judgment?) concerning “reasonable” or “plausible” import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker’s subjective evaluation of the important or unimportance of the challenged speech. In this critical area of political discourse, the speaker[s] cannot be compelled to risk felony [or other] prosecution with no more assurance of impunity than [their] prediction that what [t]he[y] say[] will be found susceptible of some “reasonable interpretation other than [to promote or oppose] a specific candidate.” Under these circumstances, “many person, rather than undertake the considerable burden (and sometimes risk) vindicating their rights through case-by-case litigation, will simply choose to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citations omitted).

WRTL II, 551 U.S. at 493-94 (Scalia, J., concurring in part and concurring in the judgment) (brackets in original omitted).

69. Section 251.001(7) of the Election Code is facially vague.

COUNT II

Tex. Elec. Code § 251.001(7) (defining “campaign expenditure”) The Statute is Unconstitutionally Vague as Applied to Issue Ads.

70. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

71. The Election Code defines “campaign expenditure” as “an expenditure made by any person in connection with a campaign for an elective office or on a measure.

Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.” Tex. Elec. Code § 251.001(7).

72. Issue advocacy in the context of electoral politics is discussion of public issues and candidates without “explicit words” or by “express terms advocating the election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 43-44, 45 (1976).

73. “Express advocacy” is communications that are “explicit words” or by “express terms advocate the election or defeat of a clearly identified candidate.” *Id.*

74. The void-for-vagueness doctrine requires the law to be so clear that “men of common intelligence” need not “guess as to its meaning.” *See Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976).

75. Section 251.001(7) of the Election Code is unconstitutionally vague as applied to the Citizen Council’s issue ad, Facebook Ad #4 (Vote Today!).

COUNT III
Tex. Elec. Code § 251.001(7) (defining “campaign expenditure”)
The Statute is Facially Overbroad.

76. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

77. The Election Code defines “campaign expenditure” as “an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.” Tex. Elec. Code § 251.001(7).

78. Issue advocacy in the context of electoral politics is discussion of public issues and candidates without “explicit words” or by “express terms advocating the

election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 43-44, 45 (1976).

79. “Express advocacy” is communications that are “explicit words” or by “express terms advocate the election or defeat of a clearly identified candidate.” *Id.*

80. Issue advocacy is afforded absolute protection under the First Amendment; only express advocacy can be regulated. *Id.* at 80.

81. Notably, these are the standards under the Constitution, and they apply to state law. Neither the State of Texas nor the Texas Ethics Commission determine these standards, *see, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), any more than the Topeka school board could determine the constitutional standard in *Brown v. Board of Education*, 347 U.S. 483 (1954). Therefore, the State may not change the definition of express advocacy that has been set forth by the Supreme Court.

82. Section 251.001(7) of the Election Code is facially overbroad.

COUNT IV

Tex. Elec. Code § 251.001(7) (defining “campaign expenditure”) The Statute is Unconstitutionally Overbroad as Applied to Issue Ads.

83. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

84. The Election Code defines “campaign expenditure” as “an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.” Tex. Elec. Code § 251.001(7).

85. Issue advocacy in the context of electoral politics is discussion of public issues and candidates without “explicit words” or by “express terms advocating the

election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 43-44, 45 (1976).

86. “Express advocacy” is communications that are “explicit words” or by “express terms advocate the election or defeat of a clearly identified candidate.” *Id.*

87. Issue advocacy is afforded absolute protection under the First Amendment; only express advocacy can be regulated. *Id.* at 80.

88. Notably, these are the standards under the Constitution, and they apply to state law. Neither the State of Texas nor the Texas Ethics Commission determine these standards, *see, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), any more than the Topeka school board could determine the constitutional standard in *Brown v. Board of Education*, 347 U.S. 483 (1954). Therefore, the State may not change the definition of express advocacy that has been set forth by the Supreme Court.

89. Section 251.001(7) of the Election Code is unconstitutionally overbroad as applied to the Citizen Council’s issue ad, Facebook Ad #4 (Vote Today!).

COUNT V

1 Tex. Admin. Code § 20.1(20) (defining “a principal purpose”) The Rule is Facially Overbroad.

90. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

91. Texas Ethics Commission Rule § 20.1(20), which interprets the “political committee” definition contained in Section 251.001(12) of the Election Code, states, in part, that:

A group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses and other resources to make political expenditures within a calendar year.

92. In the First Amendment context, plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–45, and n. 6-7, unless “the major purpose of [the entity] is the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (emphasis added); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1156 (10th Cir. 2007); *N.C. Right to Life, Inc. 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).

93. Implicit in this constitutional protection is that the major purpose of an organization is determined either by its central purpose, as evidenced by its public statements of its purpose, or the major purpose can be determined relative to the *majority* of its disbursements, i.e., more than 50 percent.

94. “In general, to mount a successful facial attack, the challenger must establish that no set of circumstances exists under which the Act would be valid. The requirement is different in the First Amendment context, where we recognize the overbreadth doctrine. With regard to facial First Amendment challenges, the challenger need only show that a statute or regulation might operate unconstitutionally under some conceivable set of circumstances.” *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (quoting, in part, *United States v. Salerno*, 481 U.S. 739, 745, (1987) (internal quotation marks omitted)).

95. Because Rule § 20.1(20), which interprets Section 251.001(12) of the Election Code, concludes that a “political committee” is a group that expends more than 25

percent of its annual expenses on political expenditures in a calendar year, Rule § 20.1(20) is unconstitutionally overbroad on its face.

COUNT VI

1 Tex. Admin. Code § 20.1(20) (defining “a principal purpose”) The Rule is Unconstitutional as Applied to the Citizens Council.

96. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

97. Texas Ethics Commission Rule § 20.1(20), which interprets the “political committee” definition contained in Section 251.001(12) of the Election Code, states, in part, that:

A group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses and other resources to make political expenditures within a calendar year.

98. A law or In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495, and nn. 6 and 7, 102 S.Ct. 1186, 71 L.Ed.2d 362. unless “the major purpose of [the entity] is the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (emphasis added); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1156 (10th Cir. 2007); *N.C. Right to Life, Inc. 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).

99. Implicit in this constitutional protection is that the major purpose of an organization is determined either by its central purpose, as evidenced by its public

statements of its purpose, or the major purpose can be determined relative to the *majority* of its disbursements, i.e., more than 50 percent.

100. Because Rule § 20.1(20), which interprets Section 251.001(12) of the Election Code, would require the Citizens Council to register as a political committee if it disseminates its communications as planned, Rule § 20.1(20) is unconstitutionally overbroad as applied to the Citizens Council and its major purpose.

COUNT VII
Tex. Elec. Code § 251.001(12) (defining “political committee”)
The Statute is Unconstitutionally Vague.

101. The Citizens Council realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

102. The Election Code defines “political committee” as “a group of persons that has as a principal purpose accepting political contributions or making political expenditures.” Tex. Elec. Code § 251.001(12).

103. The void-for-vagueness doctrine requires the law to be so clear that “men of common intelligence” need not “guess as to its meaning.” *See Hynes*, 425 U.S. at 620 (1976).

104. The operative words “a principal purpose” render the statute vague because they:

ultimately depend . . . upon a judicial judgment (or is it—worse still—a jury judgment?) concerning “reasonable” or “plausible” import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker’s subjective evaluation of the important or unimportance of the challenged speech. In this critical area of political discourse, the speaker[s] cannot be compelled to risk felony [or other] prosecution with no more assurance of impunity than [their] prediction that what [t]he[y] say[] will be found susceptible of some “reasonable interpretation other than [to promote or oppose] a specific candidate.” Under these circumstances, “many person, rather than undertake the considerable burden (and sometimes risk) vindicating their rights

through case-by-case litigation, will simply choose to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citations omitted).

WRTL II, 551 U.S. at 493-94 (Scalia, J., concurring in part and concurring in the judgment) (brackets in original omitted).

105. Section 251.001(12) of the Election Code is facially vague.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. A declaration that the “campaign expenditure” definition contained in Section 251.001(7) of the Texas Election Code is unconstitutionally vague, both facially and as applied to the Citizens Council’s issue ad, Facebook Ad #4 (Vote Today!).

2. A declaration that the “campaign expenditure” definition contained in Section 251.001(7) of the Texas Election Code is unconstitutionally overbroad, both facially and as applied to the Citizens Council’s issue ad, Facebook Ad #4 (Vote Today!), and not narrowly tailored to serve a compelling state interest.

3. Preliminary and permanent injunctions enjoining the State from enforcing the “campaign expenditure” definition contained in Section 251.001(7) of the Election Code.

4. A temporary restraining order enjoining the State from enforcing the “campaign expenditure” definition contained in Section 251.001(7) of the Election Code.

5. A declaration that Texas Ethics Commission Rule § 20.1(20), codified at 1 Tex. Admin. Code § 20.1(20), is unconstitutionally overbroad, both facially and as applied to the Citizens Council and its major purpose, and not narrowly tailored to serve a compelling state interest.

6. Preliminary and permanent injunctions enjoining the State from enforcing Texas Ethics Commission Rule § 20.1(20), codified at 1 Tex. Admin. Code § 20.1(20).

7. A temporary restraining order enjoining the State from enforcing Texas Ethics Commission Rule § 20.1(20), codified at 1 Tex. Admin. Code § 20.1(20).

8. A declaration that the “political committee” definition contained in Section 251.001(12) of the Texas Election Code is unconstitutionally vague on its face.

9. Preliminary and permanent injunctions enjoining the State from enforcing the “political committee” definition contained in Section 251.001(12) of the Texas Election Code.

10. A temporary restraining order enjoining the State from enforcing the “political committee” definition contained in Section 251.001(12) of the Texas Election Code.

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

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

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

Dated: October 31, 2014

Respectfully submitted,

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