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

CATHOLIC LEADERSHIP COALITION OF TEXAS, et al. Plaintiffs, v. DAVID A. REISMAN, in his official Capacity as Executive Director of the Texas Ethics Commission, et al. Defendants.	Civil Case No. 1:12-cv-00566-SS PLAINTIFFS' REPLY TO TEC DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs have challenged Texas Election Code § 253.037(a) both facially as a prior restraint on protected political speech and as applied to a general-purpose committee's independent expenditures (IEs) ("direct campaign expenditures" in Texas). In two leading prior restraint cases, the Supreme Court invalidated pre-registration laws that were narrowly targeted attempts to regulate activity much more dangerous than speech about candidates.[1] In *Thomas*, the State attempted to defend its speech-restrictive law by characterizing it as a "registration statute and nothing more," which was imposed "merely for previous identification." 323 U.S. at 526. The Court rejected this justification.[2] If a pre-registration requirement is invalid, *Thomas* and *Watchtower Bible* apply with even greater force to invalidate Texas's 60-day waiting period

[1] *See Thomas v. Collins*, 323 U.S. 516 (1945) (requirement that paid "labor organizers" register before soliciting union members); *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002) (requirement that door-to-door canvassers register with city before visiting residents).

[2] The Court stated famously, "[a] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.* at 540.

and ten-contributor requirements, which continue to squelch speech even after registration.[3] Moreover, because political contributions are protected speech,[4] § 253.037(a) is facially unconstitutional in all its applications, not just as applied to IEs.

Apart from the prior restraint analysis, § 253.037(a) is a "law[] that burden[s] political speech," and so must be "narrowly tailored" to achieve a "compelling interest." *See Arizona Free Enterprise v. Bennett*, 131 S. Ct. 2806, 2817 (2011). As explained in Plaintiffs' memorandum in support of their motion for preliminary injunction at pages 24-31, the State lacks any cognizable interest to support its temporal ban on expenditures as applied to IEs.

The State argues that § 253.037(a) imposes mere "organizational and reporting requirements" on political committees. TEC Defendants' Resp. at 1 (hereinafter "State's Response"). If that were so, TLC-IPA, which has been registered with the Commission since June 7, and which has already disclosed its contributors in these court proceedings, would be permitted to speak. Nevertheless, even if it were a disclosure statute, § 253.037(a) is not

[3] *Thomas* has already been applied in the campaign finance context to invalidate a state reporting requirement that effectively banned IEs in excess of $1,000 during the last five days before an election. S*ee Florida Right to Life, Inc. v. Mortham*, No. 98-770CIVORL 19A, 1999 WL 33204523, *2 (M.D. Fla. Dec. 15, 1999) (order) (not designated for publication), *affirmed in part on other grounds by Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001), *and reversed in part on other grounds by Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318 (11th Cir. 2001). Texas imposes an even *lower* threshold of $500, applicable to *aggregate* expenditures (whereas the law in *Mortham* applied per candidate), and over a *longer* period of time (60 days instead of 5 before an election).

[4] *Buckley* recognized "making a contribution, like joining a political party, serves to affiliate a person with a candidate[,]" and "enables like-minded persons to pool their resources in furtherance of common political goals." 424 U.S. at 22. Thus, even when direct candidate contributions are at issue, "[t]he Court has recognized…that contribution limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify." *Randall v. Sorrell*, 548 U.S. 230, 247-48 (2006) (emphasis in original) (invalidating state limits on contributions as too low). A *prior restraint* on protected political contributions is certainly such a restriction, and particularly when it restricts an association of individuals from doing what one wealthy individual may do immediately.

remotely "narrowly tailored." It applies to *all candidate-focused speech*, at *all times*, in *all media*. The Supreme Court has stated that "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986).[5] If these admonitions mean anything, no disclosure regime may be applied in such a way that it actually silences the speaker. *See Thomas*, 323 U.S. at 531 (while conceding state power to "regulate labor unions…to protect the public interest," "[s]uch regulation…whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly").[6] As the *Mortham* court held, "a prior disclosure requirement is not necessary to satisfy the state's interests, as articulated by the *Buckley* Court." 1999 WL 33204523, *3.[7] Further, no statute preventing individuals of modest means from speaking jointly, while wealthy individuals and corporations can speak immediately in unlimited amounts, can be said to be carefully tailored to target corruption.[8]

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[5] Even under the "closely drawn" scrutiny applicable to direct contributions to candidates, government must "avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25.

[6] Because § 253.037(a) imposes a "direct quantity restriction" on speech by an "association of persons" that prevents them from using the "indispensable instruments of effective political speech," *Buckley*, 424 U.S. at 18, it cannot be characterized as a "time, place, or manner" restriction. *See id.* Even in the time, place, and manner context, however, this provision would be invalid because it does not allow any "ample alternative channels for communication." *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[7] In *Mortham*, writing in1999, the federal district court noted that while *Buckley* upheld an "after-the-fact" reporting requirement, and the Sixth Circuit upheld a "contemporaneous disclosure" requirement, the defendants had not cited, and the court was unable to locate, "any case upholding a disclosure requirement prior to publication." 1999 WL 33204523, *3.

[8] *See, e.g.*, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981) (invalidating law prohibiting spending on speech "in concert with one or more others in the exercise of the right of association" while "an affluent person can, acting alone, spend without limit").

The First Amendment protects freedom of association as well as speech, and thus accords groups of persons speaking through political committees the same protection applicable to individuals. *FEC v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 494 (1985) invalidated a $1,000 ceiling on IEs by political committees, expressly "reject[ing] the notion that the PAC's form of organization or method of solicitation diminishes their entitlement to First Amendment protection." "The…freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify the voice of their adherents.'" *Id.* (internal citations and punctuation omitted).[9]

The State's assertion that the TLC-IPA's speech may be curtailed because a separate organization, the TLC, is entitled to First Amendment protection is without merit. When the Federal Election Commission claimed that the federal ban on corporate "electioneering communications" was permissible because corporations could speak through a separate entity (a PAC), the *Citizens United* majority thoroughly rejected this defense. *Citizens United*, 130 S. Ct. at 897 ("A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban…does not allow corporations to speak.").[10] The speaker—not the government—retains the discretion to decide through which particular association she will speak, and one's involvement in or even *control of* multiple organizations does not somehow mean the

[9] *See also Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person *or group* can spend on political communication during a campaign necessarily reduces the quantity of expression….") (emphasis added).

[10] The majority reached this conclusion despite the fact that Citizens United had administered "one of the most active conservative PACs in America" "for over a decade," and operated "multiple '527' organizations that engage in partisan political activity." *See Citizens United*, 130 S. Ct. at 944, n. 40 (Stevens, J., dissenting).

State can silence any one of them. Moreover, Plaintiffs are challenging § 253.037(a) facially, and the Court is not limited to considering the particular circumstances of the TLC-IPA.

The Court can fashion preliminary injunctive relief that will protect Plaintiffs' rights before the runoffs with limited effect on the overall campaign finance framework. First, Plaintiffs have demonstrated "likely success on the merits" of their claim that § 253.037(a) is a forbidden prior restraint on political speech, and the State has utterly failed to sustain its burden of offering any "compelling" or even "sufficient" justification. Because Plaintiffs challenge § 253.037(a) facially as a prior restraint, and because contributions as well as IEs are protected speech,[11] § 253.037(a) should be enjoined in all its applications. During this preliminary stage, such an injunction would not have to reach § 253.031(b)'s pre-registration requirement, as TLC-IPA is already registered, although Plaintiffs reserve the right to continue prosecuting their challenge to § 253.031(b) for purposes of declaratory and permanent injunctive relief.

While § 253.037(a) is facially unconstitutional, if the Court is inclined to enjoin the provision as applied only to a general purpose committee's IEs, such an order could simply enjoin the provision's application to "direct campaign expenditures" as defined at Texas Election Code § 251.001(8) and title 1, Texas Administrative Code, § 20.1(5). The Court could also enjoin § 253.037(a) as applied to a "general-purpose committee engaged only in direct campaign expenditures."[12]

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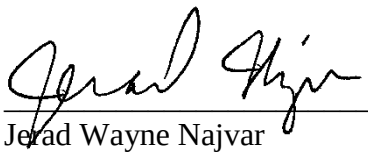
[11] See *supra* note 2.

[12] The fact that Texas has heretofore not recognized such limited-purpose committees is obviously no bar to such relief, and such an order would be easily administrable by the Commission. For example, the Commission could accept a letter of intent, just as the FEC did after the decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). *See* FEC Adv. Op. No. 2010-09 (Club for Growth), n. 1. A copy of the current letter suggested by the FEC when a federal committee intends to raise unlimited funds to engage in IEs is attached as Exhibit A.

Similarly, the Court could preliminarily enjoin enforcement of § 253.094(a) against TLC or TLC-IPA "as applied to contributions from TLC to support direct campaign expenditures," or even "as applied to contributions from TLC to be utilized solely with respect to direct campaign expenditures." Plaintiffs have no objection to substituting the term employed by the Texas Election Code for the federal term "independent expenditures." Plaintiffs note, however, that the language suggested by the State, *see* State's Resp. at 2, would appear to be unduly restrictive because authorizing TLC-IPA to utilize TLC contributions to "*make* direct campaign expenditures" does not unambiguously authorize use of such contributions for *fundraising for* IEs, which is one of TLC-IPA's intended uses of the TLC's contact list. *See* VC ¶ 27.[13]

Dated: July 16, 2012

Respectfully submitted,



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[13] While TLC-IPA was formed with the intent to only make IEs, *see* VC ¶ 17, the State's suggested language is also unconstitutionally restrictive to the extent it denies a committee the right to utilize an account separate from its "direct campaign expenditure" account to collect and disburse funds for direct or in-kind contributions to candidates. The Commission cannot offer a constitutionally sufficient reason for requiring establishment of a wholly separate entity to conduct contribution activity when utilization of separate accounts prevents commingling of funds and thus addresses any cognizable corruption threat. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

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Certificate of Service

I certify that a true and correct copy of the foregoing Plaintiffs' Reply to TEC Defendants' Response to Motion for Preliminary Injunction has been served upon the following on this 16th day of July, 2012 via the Court's CM/ECF electronic filing system:

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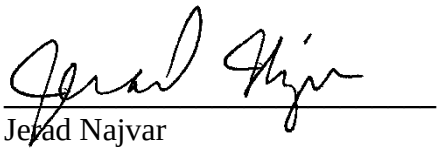

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