

No. 12-50732

**In the  
United States Court of Appeals  
for the Fifth Circuit**

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CATHOLIC LEADERSHIP COALITION OF TEXAS, DBA TEXAS LEADERSHIP COALITION,  
AND TEXAS LEADERSHIP COALITION – INSTITUTE FOR PUBLIC ADVOCACY,  
*Appellants,*

v.

DAVID A. REISMAN, in his official capacity as Executive Director of the Texas  
Ethics Commission; HUGH C. AKIN; JIM CLANCY; TOM HARRISON; PAUL W.  
HOBBY; BOB LONG; PAULA M. MENDOZA; TOM RAMSAY; and CHASE UNTERMEYER,  
in their official capacity as members of the Texas Ethics Commission; Susan Reed,  
in her official capacity as District Attorney for Bexar County, Texas,  
*Appellees.*

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On Appeal from the United States District Court  
for the Western District of Texas, Austin Division  
No. 1:12-cv-00566, Hon. Sam Sparks, Judge Presiding

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**APPELLANTS' EMERGENCY MOTION FOR INJUNCTION**

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### **CORPORATE DISCLOSURE STATEMENT**

Appellant Catholic Leadership Coalition of Texas, dba Texas Leadership Coalition (TLC), files this disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1, stating as follows:

There is no parent corporation or publicly held corporation owning 10% or more of TLC's stock.

### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Catholic Leadership Coalition of Texas, dba Texas Leadership Coalition (TLC) - Appellant. It is represented in the Fifth Circuit and in district court by:

Jerad Wayne Najvar  
NAJVAR LAW FIRM  
One Greenway Plaza  
Suite 225  
Houston, Texas 77046

Stephen M. Hoersting  
700 E. Schantz Ave.  
Dayton, OH 45419

2. Texas Leadership Coalition – Institute for Public Advocacy (TLC-IPA) - Appellant. TLC-IPA is also represented in the Fifth Circuit and district court by Messrs. Najvar and Hoersting.
3. David A. Reisman, Hugh C. Akin, Jim Clancy, Tom Harrison, Paul W. Hobby, Bob Long, Paula M. Mendoza, Tom Ramsay, and Chase Untermeyer (the "Commission Defendants") – Appellees. The Commission defendants/appellees are represented in district court by:

Erika Kane  
Angela Colmenero  
General Litigation Division  
Office of the Attorney General  
PO Box 12548  
Austin, TX 78711

4. Susan A. Reed, District Attorney for Bexar County, Texas – Appellee. Ms. Reed is represented in district court by:

Susan Bowen  
Bexar County District Attorney's Office  
300 Dolorosa St., 5th Floor  
San Antonio, TX 78205

*s/ Jerad Najvar*  
Jerad W. Najvar

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**MAY IT PLEASE THE COURT:**

Pursuant to Fifth Circuit Rules 27.3, 27.5, and 34.5, appellants Catholic  
Leadership Coalition of Texas, commonly known as the Texas Leadership  
Coalition (TLC), and Texas Leadership Coalition – Institute for Public Advocacy  
(TLC-IPA), respectfully move to expedite this appeal from the order of the United  
States District Court for the Western District of Texas entered July 20, 2012

denying their motion for preliminary injunction. Appellants have filed a notice of appeal. The jurisdiction of this Court rests on 28 U.S.C. § 1292(a)(1).

#### NATURE OF THE EMERGENCY

At 1:20 p.m. Central Time on Friday, July 20, 2012, Judge Sparks denied appellants' motion for a preliminary injunction against enforcement of provisions of the Texas Election Code that criminalize appellants' desired political speech if engaged in before the primary runoff elections. *See* Preliminary Injunction Order, July 19, 2012 (Doc. 32) ("the Order") (attached).<sup>1</sup> Early voting in those elections begins today (July 23rd), and Election Day is July 31st. While the district court agreed with appellants that "[t]his case raises serious questions about the constitutionality of certain provisions of the Texas Election Code, and in particular whether they constitute impermissible prior restraints on the First Amendment rights of certain political committees," *id.* at 1, and that "portions of these sections are very likely unconstitutional," *id.* at 4, the court denied the injunction to provide the State with more time to muster a constitutionally sufficient justification, *id.* Yet the State's task is a legal impossibility. That is because the challenged provisions operate as a ban on appellants' independent expenditures, and *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 909 (2010), held *as a matter of*

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<sup>1</sup> While Judge Sparks signed the Order July 19, it was entered on the docket July 20 at approximately 1:20 p.m.

*law* that independent expenditures do not implicate any cognizable governmental interest sufficient to justify restrictions on such speech. This constitutes legal error and is subject to *de novo* review. In the absence of an injunction, appellants will be forced to remain silent until after the primary runoffs are committed to history, an occurrence which would "unquestionably constitute irreparable injury" to their First Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Given the timing of the entry of the Order on the district court's docket Friday, it was impossible for appellants to file this motion before 2 p.m. that date. *See* 5th Cir. R. 27.3. Appellants did immediately file their notice of appeal with the district court, and contacted the clerk's offices at both the district court and the Fifth Circuit to notify them of this filing and seek expedition of the opening of a Fifth Circuit cause to facilitate electronic filing.

#### **SUMMARY OF ISSUES**

This case involves a First Amendment challenge to section 253.037(a) of the Texas Election Code, which imposes a prior restraint on protected political expression. Specifically, the provision decrees that before a political committee such as the TLC-IPA may "make or authorize" more than \$500 in aggregate "political expenditures," it must (1) wait 60 days after registration with the Texas Ethics Commission (the Commission) and (2) collect contributions from ten persons. TLC-IPA registered with the Commission on June 7, which is 54 days

before Election Day and 46 days before the start of Early Voting. Despite the fact that TLC-IPA has been registered for more than six weeks now, it is prohibited from engaging in any meaningful amount of speech in favor of its desired candidates because the requisite 60 days have not yet elapsed and because it has collected only six pledged contributions (totaling \$1,600). Supplemental Verified Statement of Philip C. Sevilla (attached). Further contributions will be forthcoming if the provision is enjoined, freeing the TLC-IPA to speak.

The TLC-IPA has developed specific plans for a print advertisement that will be mailed to 15,000 individuals with a slate of endorsed candidates in time for the runoffs. Additionally, if this Court grants preliminary relief and time still permits, appellant TLC-IPA stands ready to contract with third parties to produce and broadcast a radio advertisement for a specific candidate. *Id.* It cannot presently do so because of section 253.037(a).

This case further involves a First Amendment challenge to section 253.094(a), Texas's general ban on corporate contributions, as applied to prevent the TLC, a 501(c)(4) nonprofit entity, from contributing its contact list to TLC-IPA for use exclusively in support of TLC-IPA's independent expenditures; specifically, TLC-IPA desires to use the contact list for fundraising for and distribution of its independent expenditure advertisements.

Pursuant to Federal Rule of Appellate Procedure 2 and Fifth Circuit Rule 34.5, this appeal may be expedited upon a showing of good cause. Good cause plainly exists here.

It is well established that the "loss of First Amendment freedom for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. As appellants explain in their verified complaint and supplemental verified statement filed in the district court, TLC-IPA is suffering a present injury to its First Amendment rights because it is forced to wait until after the election to spend any meaningful amount of funds advocating for the candidates who share its values. Early Voting began this morning, and every day that passes represents an irreparable loss to the appellants' speech rights. TLC and TLC-IPA are likewise injured because they may not presently transfer the TLC's contact list for use with TLC-IPA's independent expenditures, if and when the expenditures are permitted. While appellants are suffering daily deprivation of their rights as voters go to the polls this week, if this Court agrees with appellants, despite the extreme time pressure, there remains time to issue an injunction to permit appellants to speak before Election Day. If this appeal is not expedited for decision prior to the runoff election on July 31, appellants will be forced to abstain from communicating their views with runoff voters. Conversely, expedition of this appeal would not harm appellees, who have already briefed the relevant issues before the district court.

### PROPOSED SCHEDULE

Appellants therefore propose the following schedule for the disposition of this appeal, which is designed to afford the Court the maximum opportunity to issue a decision by a date that would still permit appellants to engage in their desired speech. Appellants believe that an injunction issued by the end of **Thursday, July 25, 2012** would permit them time to contract for the printing and distribution of their desired direct-mail advertisement, and may still permit them to place their desired radio advertisement.

Brief of appellants:	Filed contemporaneously with motion
Briefs of appellees:	Tuesday, July 24, 5 p.m.
Reply brief of appellants (if any)	Wednesday, July 24, 9 a.m.
Oral argument (if any)	Thursday, July 25

Should this Court wish to proceed with briefing in a more expedited fashion so as to afford more time for deliberation, appellants stand ready to comply with any deadlines the Court sets.

Undersigned counsel certifies (1) that this motion was preceded by multiple telephone calls to opposing counsel (Erika Kane, with the Office of the Attorney General on behalf of the Commission defendants, is opposed; Susan Bowen, attorney for DA Reed, could not be reached but presumably is opposed); and to the clerk's office today, and (2) that the facts supporting emergency consideration of this motion are true and complete to the best of counsel's knowledge. *See* 5th Cir. R. 27.3.

Appellants' brief and an appendix are attached to this motion. Appellants have requested the hearing transcript of the July 12 hearing and the court reporter advises that it should be completed and emailed to counsel by Tuesday or Wednesday. Counsel will file it immediately upon receipt. There were no live witnesses at the hearing but only legal argument.

Respectfully submitted,

*s/ Jerad Najvar*

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ATTORNEYS FOR APPELLANTS

### **CERTIFICATE OF SERVICE**

I certify that the foregoing document was filed with the Court in electronic format through the CM/ECF system, on the 23rd day of July, 2012. A copy of the document was served on counsel of record, as listed below, through the CM/ECF system, and/or by certified mail, return receipt requested, on the same date:

By CMRRR:

Erika Kane  
Angela Colmenero  
General Litigation Division  
Office of the Attorney General  
PO Box 12548  
Austin, TX 78711

Susan Bowen  
Bexar County District Attorney's Office  
300 Dolorosa St., 5th Floor  
San Antonio, TX 78205

I further certify that I emailed courtesy copies of these documents to opposing counsel immediately upon filing.

*s/ Jerad Najvar*  
Jerad W. Najvar

### **Certificate of Electronic Compliance**

Counsel also certifies that on July 23, 2012, the foregoing Emergency Motion to Expedite Appeal was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF system.

Counsel further certifies that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the

paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Microsoft Security Essentials and is free of viruses.

s/ Jerad Najvar  
Jerad W. Najvar