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No. _____

IN THE SUPREME COURT OF TEXAS

IN RE TOM BROWN, SALVADOR GOMEZ, BEN MENDOZA, ELIZABETH BRANHAM, WORD OF LIFE CHURCH OF EL PASO, TOM BROWN MINISTRIES, and EL PASOANS FOR TRADITIONAL FAMILY VALUES, *Relators*,

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Original Proceeding Arising Out of the Eighth District Court of Appeals
Cause No. 08-11-00367-CV
(Chief Justice Ann Crawford McClure, Hon. Guadalupe Rivera and Hon. Christopher Antcliff)

PETITION FOR WRIT OF MANDAMUS

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IDENTITY OF PARTIES AND COUNSEL

In accordance with Rule 52.3 of the Texas Rules of Appellate Procedure, the following list identifies all parties and counsel involved in the underlying lawsuit and this mandamus action so that the Justices may evaluate the need to recuse or disqualify themselves:

RELATORS: TOM BROWN, SALVADOR GOMEZ, BEN MENDOZA, ELIZABETH BRANHAM, WORD OF LIFE CHURCH OF EL PASO, EL PASOANS FOR TRADITIONAL FAMILY VALUES, AND TOM BROWN MINISTRIES

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PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

This is an emergency petition for mandamus seeking (1) an order of this Court to stay the Eighth District Court of Appeals decision dated February 17, 2012, (2) directing Respondents to vacate and set aside the February 17 decision and judgment, and (3) directing Richarda Momsen to re-certify the signatures. Relators submit this Petition for Writ of Mandamus, Appendix, and Record in accordance with Rule 52 of the Texas Rules of Appellate Procedure.

STATEMENT OF THE CASE

Mayor John Cook, in his individual capacity, filed suit in the County Court at Law Number Three of El Paso County, Texas, before Judge Javier Alvarez, against Tom Brown Ministries, Word of Life Church of El Paso, Tom Brown, El Pasoans for Traditional Family Values ("EPTFV"), Salvador Gomez, Ben Mendoza, Elizabeth Branham, and Richarda Momsen, solely in her official capacity as El Paso City Clerk, seeking to enjoin the use of petitions to call a recall election (Case No. 2011-DCV-02792).[1] The Mayor alleged Election Code violations and sought injunctive relief, declaratory relief, and damages.

The Mayor at first sought a Temporary Restraining Order to enjoin the submission of the petitions for a recall election. This was granted. But the TRO was rescinded two days later upon further reflection of the court.

A hearing was held on October 24, 25, and 26, and November 21 and 22 of 2011. The trial court denied the Mayor's request to stop the election. The judge did not issue any findings of fact, or conclusions of law.

The Mayor then filed an expedited appeal with the Eighth District Court of Appeals. The parties before the court of appeals were the parties before the trial court. On February 17, 2012, the appeals court issued its opinion, authored by Chief Justice McClure and joined by Justices Rivera and Antcliff, ordering the City Clerk to decertify and return the recall petitions, and stopping the election. *Cook v. Tom Brown Ministries,*

[1] Defendants Tom Brown Ministries, Word of Life Church of El Paso, Tom Brown, El Pasoans for Traditional Family Values, Salvador Gomez, Ben Mendoza and Elizabeth Branham are referred to as "Relators."

____ S.W.3d ____, No. 08–11-00367-CV, 2012 WL 525451, at *2 (Tex.App.-El Paso Feb. 17, 2012). There were no rehearing motions. *Cf.* Tex. R. App. P. 53.2(d).

On February 20, 2012, Respondent Momsen de-certified the signatures on the recall petitions, and on February 28, 2012, the El Paso City Council cancelled the recall election.

On February 28, 2012, Respondent Cook filed a notice non-suiting the City Clerk from the case, which was granted on February 29, 2012.

The Relators then filed an Emergency Petition for Expedited Review with this Court and a Motion to Stay the Appeals Court Ruling.

STATEMENT OF JURISDICTION

The Supreme Court has original jurisdiction to issue a writ of mandamus against respondents in this matter under Tex. Const. Art. V. §3 and §6, and under the Texas Government Code Sections 22.001(a)(3), 22.001(a)(6) and 22.002. This case presents issues of construction under the Texas Election Code, and the Eighth District Court of Appeals' decision conflicts with United States Supreme Court precedent.

Additionally, the exceptional circumstances raised by this petition for writ of mandamus are of such importance to the proper functioning of democratic government, including the public's confidence and participation in that government, that they require this Court's intervention. The appeals court's decision stopping an election is diametrically opposed to every other court in Texas to consider the issue, including this Court. *See Blum v. Lanier*, 997 S.W.2d 259, 263 (1999) ("We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the

judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process…. An injunction that delays the election would be improper…."); *City of Austin v. Thompson*, 147 Tex. 639, 219 S.W.2d 57, 59 (1949) (district court is without authority to enjoin even a void election); *Ex parte Barrett*, 120 Tex. 311, 37 S.W.2d 741, 742 (1931) (injunction against holding an election is outside the general scope of judicial power); *City of Dallas v. Dallas Consol. Elec. St. Ry. Co*., 105 Tex. 337, 148 S.W. 292, 295 (1912) (declined to enjoin canvassing of votes on ground that election was illegal); *Leslie v. Griffin*, 25 S.W.2d 820, 821–22 (Tex. Comm'n App.1930, judgm't adopted) (same); *Winder v. King*, 1 S.W.2d 587, 587–88 (Tex. Comm'n App.1928, judgm't adopted) (refused to enjoin official from calling election); *City of McAllen v. Garza*, 869 S.W.2d 558, 561 (Tex.App.—Corpus Christi 1993, writ denied)(refused to enjoin allegedly void election); *Kolsti v. Guest*, 565 S.W.2d 556, 557 (Tex.Civ.App.—Austin 1978, no writ) (declined to enjoin official from placing referendum on ballot); *Ellis v. Vanderslice*, 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ) (declined to enjoin official from certifying petition for local option election); *Stroud v. Stiff*, 465 S.W.2d 407, 408 (Tex.Civ.App.—Amarillo 1971, no writ) (refused to enjoin city for proceeding under election resolution); *Ramirez v. Quintanilla*, Nos. 13–10–00449–CV, 13–10–00450–CV, 13–10–00454, 2010 WL 3307370 (Tex.App.-Corpus Christi Aug. 20, 2010) (in determining whether §273.081 permits a court to enjoin an election, stated, "[i]n short, if the matter is one that can be judicially resolved in time to correct deficiencies in the ballot without delaying the election, then injunctive relief may provide a remedy that cannot be adequately obtained through an

election contest."); *Cahill v. Bertuzzi*, No. 13-09-00183-CV, 2010 WL 2163136 (Tex.App.-Corpus Christi May 27, 2010) (stating that §273.081 of the election code gives the trial court jurisdiction to enjoin violations of the election code, but the relief requested must not seek to delay or cancel an election).

Right after the appeals court rendered its decision, the El Paso District attorney convened a grand jury to receive the petitions and possibly indict those involved in the recall effort. *See* Motion to Stay, Exhibit A. If this decision is allowed to stand, the public's confidence in the democratic process will be severely damaged.

Appeal to the Court of Appeals would have been futile and time is of the essence. This is an election case. The election that the appeals court stopped was scheduled for April 12, 2012. The next election date is May 12, 2012.

ISSUES PRESENTED

(1) It is well settled Texas law that courts are not to enjoin an election.[2] Here, it is uncontested that the El Paso Clerk received a sufficient number of valid signatures from qualified El Paso voters to hold a recall election. The El Paso City Council then called for the recall election to be held on April 14, 2012. But the court of appeals stopped the election because it determined one of the supporters of the recall effort did not form a proper committee. Should this Court stay the appeals court ruling and order that the signatures on the recall petitions be re-certified.

[2] *Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999) ("We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process…. An injunction that delays the election would be improper…")

(2) The court of appeals held that Relators made a contribution. However, a contribution necessarily involves a transfer, Tex. Elec. Code 251.001(2); *see Buckley v. Valeo,* 424 U.S. 1, 23 n.24 (1976), and there was no transfer here. Should this Court stay the appeals court ruling and order that the signatures on the recall petitions be re-certified.

(3) The court of appeals upheld the requirement that Relators make measure-only contributions only to measure-only committees. Tex. Elec. Code 253.094(b). The court of appeals thereby upheld what in effect is the Texas ban on Relators' making contributions by other means. Should this Court stay the appeals court ruling and order that the signatures on the recall petitions be re-certified.

(4) If Relators' speech was independent spending for political speech, rather than a contribution, may Texas ban or limit the independent spending for political speech? May Texas force Relators to form a (separate) political committee and let only the political committee engage in political speech?

(5) May Texas force Relators themselves to be a political committee to engage in their political speech?

(6) In *Citizens United v. Federal Election Commission*, 558 U.S. ____, 130 S.Ct. 876, 896-914 (2010), the Court ruled that the government may not restrict spending for political speech because the speaker is a corporation. Here, the Mayor seeks to stop an election because the Word of Life Church is a corporation. Are the Mayor's actions in attempting to enforce a restriction of spending for political speech unconstitutional as they are premised on the Church's corporate status?

STATEMENT OF FACTS

Relators include a few people and organizations who simply want to speak out on important issues affecting their community. In 2010, various El Paso citizens formed EPTFV as a specific-purpose committee to support a "traditional family values" referendum in the November 2, 2010, election. *Cook v. Tom Brown Ministries,* 2012 WL 525451, at *2. EPTFV organized and led the effort to pass the referendum, and on election day, the voters approved the referendum. *Id*.

However, on June 14, 2011, the El Paso City Council voted to amend an ordinance, and in so doing, overturned the purpose of the referendum. *Id.* at *3. Many believed that the Council's actions to be directly contrary to the express will of the people who voted for and passed the traditional family values referendum. *See id.*

Upset that the referendum's purpose had been overturned, various El Paso citizens began to circulate recall petitions against Mayor Cook and Representatives Byrd and Ortega. On July 18, 2011, Salvador Gomez, Ben Mendoza, and Elizabeth Branham each filed notices of intent to file recall petitions against Mayor Cook and Representatives Byrd and Ortega to make these individuals accountable to the electorate. (PX 22, 23, 24). EPTFV was involved as it believed the recall effort was directly tied to EPTFV's purpose of promoting the traditional family values referendum. *See Cook v. Tom Brown Ministries*, 2012 WL 525451, at *3. Tom Brown became personally involved in the recall effort as well. *See* Brief of Appellant app. at Tab 3; *Cook v. Tom Brown Ministries*, 2012 WL 525451, at *1.

After filing notice of intent to circulate recall petitions, Relators proceeded to print and circulate these petitions. The expenses associated with printing were incidental and necessary to print petitions adequately for three different individuals. But no expenditures were made with the pre-approval of any candidate or officeholder. (RR Vol. 6 p. 130).

Relators were able to collect enough signatures, and submitted them to the City Clerk for verification. The City Clerk testified that she received "thousands" more signatures than necessary, and verified the signatures. *Cook v. Tom Brown Ministries*, 2012 WL 525451, at *7. The City Council then called for the recall election for April 14, 2012, or May 12, 2012. *Id.* The trial court held a hearing on the temporary injunction. *Id.* at *7. The District Attorney of El Paso, Jamie Esparza, testified that he was criminally investigating Election Code violations. (R.R. Vol. 2 p. 71-76). Violation of the Election Code is a third degree felony and carries a penalty of up to ten years in prison. (*Id*. at 33). Fearing criminal repercussions from their testimony, many witnesses pleaded the Fifth Amendment. (*See, e.g. id.* at Vol. 2 p. 134, 151-52; Vol. 3 p. 16; Vol. 6 p. 76-77; Vol. 8 p. 17). These citizens were appalled at being hauled into court for their political speech, and felt their own government had betrayed them. (*Id.* at Vol. 3 p. 45).

While the trial court denied the Mayor's request to stop the election, the appeals court reversed. The appellate court began its analysis by treating Relators' speech activities as political contributions and subjecting them to all of the requirements under the Code that apply to contributions to candidates. The court did not analyze whether Relators' speech activities were a "transfer" as required by law, or whether the speech activities were political expenditures. Indeed, the court did not make the necessary

analysis of whether the Relators' speech can even be prohibited as political contributions. *See Cook v. Tom Brown Ministries*, 2012 WL 525451, at *14, *17-18 n.8.

Because the court concluded that Relators' speech activities were contributions, it then held that such contributions were invalid as they were not made as required by the Election Code.[3] *Id*. at *17. The court concluded that the Mayor was in danger of harm, and ordered the Clerk to decertify the signatures and stop the election. *Id.* at *26.

SUMMARY OF THE ARGUMENT

This case involves free speech. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people….The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government and a necessary means to protect it." *Citizens United*, 130 S.Ct. at 898 (citations and quotation marks omitted).

Neither Texas, nor any governmental entity, can place the kind of burdens on political speech that the Court of Appeals upheld in its opinion. This case involves people speaking on matters of public importance, including speaking against certain elected officials. These people now face possible prison time and thousands of dollars in attorneys' fees simply for engaging in their speech.

The Court of Appeals erred in applying and interpreting the Texas statutes and the binding precedent.

[3] Thus, the decision, if not reversed, could result in citizens facing prison time for a third degree felony, and paying thousands of dollars in damages, simply for engaging in political speech. Nothing more.

First, the remedy the Court of Appeals issued is not appropriate for the alleged deficiencies it found, nor is it permitted under the well established Texas doctrine of separation of powers.

Second, there was no transfer in this case, so there was no contribution, much less an illegal contribution. What the Mayor is claiming is an illegal contribution is not a contribution at all.

Third, if it was a contribution, Texas may not ban or limit it.

Fourth, if it was not a contribution, it was independent spending for political speech, so Texas may not ban or limit it. Nor may Texas force Relators to *form* a (separate) political committee and let only the political committee speak.

Fifth, the government has not asserted that the non-political-committee Relators themselves must *be* a political committee to engage in their political speech. Texas may also not force the non-political-committee Relators themselves to *be* a political committee to engage in their political speech.

Sixth, the Texas Election Code bans the speech of corporations based on their identity as corporations. This contravenes Supreme Court case law.[4]

ARGUMENT AND AUTHORITIES

I. Stopping the election violated the separation of powers doctrine.

The people of El Paso have spoken, and they want an election to recall the Mayor and Representatives Byrd and Ortega. More than a sufficient amount of signatures were

[4] In addition, any award of attorneys' fees against Relators is improper as the Appeals Court ruled that the recall matter is a measure, and not a matter in opposition to a candidate. *See Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011); Tex. Elec. Code Ann. 253.131.

collected. The City Clerk verified the signatures as authentic, and the petitions were submitted to the City Council. The City Council called for the election to be held on April 14, 2012, or May 12, 2012. Thus, to enter any kind of injunction now would be an unprecedented judicial act to stop an election which would violate the Separation of Powers Doctrine. *See Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999) ("We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process…. An injunction that delays the election would be improper….")

II. Relators made no contribution.

Under Texas law, a contribution is "a direct or indirect *transfer* of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a *transfer*." Tex. Elec. Code 251.001(2) (emphasis added). Even more fundamentally, *Buckley* establishes as a matter of constitutional law that a contribution must also involve a transfer. *See* 424 U.S. at 23 n.24.

As a matter of not only statutory law but also constitutional law, there was no contribution in this action, because there was no transfer. For example, Relators did not transfer anything to Mayor Cook as a candidate, nor is there any indication that anyone else was a candidate under Texas law. *See* Tex. Elec. Code 251.001(1)(A)-(H). Nor could Relators have transferred anything to EPTFV, because under the holding of the court of appeals, EPTFV did not have a properly appointed or designated treasurer, nor

did EPTFV "re-purpose" itself to be a "special purpose committee" for the recall effort. 2012 WL 525451, at *11, *12. If, as the court of appeals held, EPTFV was not properly a political committee for the recall effort, it could not have received contributions for the recall effort. *See, e.g., id.* Thus, Relators did everything themselves. *See, e.g., id.* at*4-5, *9. While the court of appeals held Relators made a contribution, the court did not say what transfer occurred. *See, e.g., id.* at *9. Perhaps because there was no transfer.

Besides, as the court of appeals held, Relators did not form a new political committee for the recall effort. *See, e.g., id.* Relators were the only ones who engaged in the effort to recall Mayor Cook. Since Relators did not form a political committee, or whatever label Texas may use, *see* Tex. Elec. Code 251.001(12)-(14), there was no one left to whom they could have transferred anything regarding the recall election. This is all the more reason to hold that there was no transfer, no contribution, and therefore the court of appeals erred in holding Relators made an illegal contribution.

III. It is unconstitutional to ban, or limit, contributions to ballot-measure committees, including recall election committees.

As a matter of law, Relators' involvement in the recall campaign was not a contribution. *Supra* Part II. Even if there were contributions, it is unconstitutional (a) to require contributions, including corporate contributions, in connection with a ballot measure to be made only to a measure-only committee, and it is unconstitutional (b) to ban, or limit, contributions, including corporate contributions, in connection with a ballot measure, including a recall election.

A. It is unconstitutional to require contributions in connection with a ballot measure to be made to a measure-only committee.

The court of appeals concluded that an election to recall an elected officer is a "measure" under the Election Code. 2012 WL 525451, at *8. Corporations may make contributions in connection with a measure-only election. Tex. Elec. Code 253.096. However, they may make them "only to a political committee" that "exclusively" "support[s] or oppos[es] measures[.]" *Id.*

This requirement is unconstitutional. The *only* constitutionally cognizable interest in limiting contributions is the interest in preventing *quid-pro-quo* corruption of candidates. *Citizens United*, 130 S.Ct. at 909. "The risk of corruption perceived in cases involving candidate elections … simply is not present in a popular vote on a public issue," such as a measure. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("*CARC*"). Therefore, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure," *id*. at 299, even when the speaker is a corporation. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778-85 (1978). Thus, limits on contributions in connection with ballot measures are *per se* unconstitutional.[5]

[5] If a political committee that makes contributions in connection with a measure also makes contributions to candidates, the State may require that committee to maintain segregated bank accounts for those contributions to ensure that corporate contributions it receives are not passed through to candidates, but are used only to support measures. *See Carey v. FEC*, 791 F.Supp.2d 121, 131-32 (D.D.C. 2011) ("[M]aintaining two separate accounts is a perfectly legitimate and narrowly-tailored means to ensure no cross-over between soft and hard money."). The State may not simply ban all contributions to committees that engage in non-measure speech. *See Thalheimer v. City of San Diego*, 09-CV-2862-IEG BGS, 2012 WL 177414, *13 (S.D. Cal. Jan. 20, 2012) ("[A]n independent expenditure committee that makes expenditures to support a candidate 'does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account' subject to … source and amount limitations.") (quoting *EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009).

The court of appeals concluded that Relators violated Section 253.096 by making campaign contributions in connection with a measure-only recall election without properly making the contributions to a measure-only committee. 2012 WL 525451, at *9. This conclusion was erroneous. Section 253.096 is void because the State cannot constitutionally require those contributions to be made only to a measure-only committee.

B. It is unconstitutional to ban, or limit, contributions in connection with a recall election.

The Election Code bans a corporation from "mak[ing] a political contribution in connection with a recall election, including the circulation and submission of a petition to call an election[,]" Tex. Elec. Code 253.094(b), when the circulation and submission are a contribution. *See id.* 251.001(2). The court of appeals found that Relators violated Section 253.094(b) by making political contributions in connection with the campaign to recall Mayor Cook. *See* 2012 WL 525451, at *9. The court of appeals' conclusion was erroneous because the State cannot constitutionally ban, or limit, contributions in connection with recall elections, even when made by a corporation.

Farris v. Seabrook is instructive. *Farris* upheld a district court's decision to enjoin preliminarily a limit on contributions to recall committees. 667 F.3d 1051, 1060 (9th Cir. 2012). The court first noted, "The Supreme Court has concluded that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Id*. at 1058 (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011), parenthetically). The "anticorruption interest justifies limits on contributions to political

committees operated by candidates themselves," to "political parties," and to "multicandidate political committees." *Id*. (citations omitted). However, "[the Ninth Circuit] and the Supreme Court have rejected contribution limits as applied to committees having only a tenuous connection to political candidates," *id*., such as political committees making independent expenditures or otherwise engaging in only independent spending for political speech. *Id*. at 1059 (citing *Long Beach Chamber of Commerce v. Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010) (applying *Citizens United* to strike statute banning persons from making independent expenditures if they accepted contributions above a certain threshold)).[6]

The court found that "political committees seeking to recall officials do not coordinate their spending with candidates for office," and therefore "expenditures by recall committees are similar to independent expenditures." *Id.* "Given that recall committees 'do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent,' they do not have the sort of close relationship with candidates that supports a

[6] The court of appeals in the present case did not apply *Citizens United* correctly. *See* 2012 WL 525451, at *11-12. It is immaterial that *Citizens United* did not involve corporate contributions. In *Citizens United*, the Supreme Court held as a matter of law that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S.Ct. at 909. The same is true for corporate *contributions*, if made for the purpose of independent expenditures, or other speech activities that are not coordinated with a candidate. *See e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-21 (9th Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) ("Given [the] analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.").

Numerous other circuits and district courts hold contributions made for the purpose of independent spending for political speech cannot be limited, whether made by individuals or corporations. *See Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011); *EMILY's List v. FEC*, 581 F.3d 1, 9-11, 14 & n.13, 15 n.14 (D.C. Cir. 2009); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 292-93 (4th Cir. 2008) ("*NCRL-III*"); *Republican Party of New Mexico v. King*, 11-CV-900 WJ/KBM, 2012 WL 219422 (D. N.M. Jan. 5, 2012); *Yamada v. Kuramoto*, 744 F. Supp. 2d 1075, 1085-87 (D. Haw. 2010) (applying *Long Beach,* granting a preliminary-injunction motion in part, and inadvertently denying a motion the plaintiffs did not make).

threat of actual or apparent corruption." *Id.* (quoting *Long Beach,* 603 F.3d at 696). Because the anti-corruption interest is not implicated in recall campaigns, the court held the contribution limit to be impermissible. *Id*. at 1060.

Section 253.094(b) also imposes an impermissible ban on contributions in connection with recall campaigns. Recall campaigns do not implicate the anti-corruption interest and therefore contributions in connection with those campaigns cannot be limited, even when made by a corporation.[7] The court of appeals' conclusion that Relators violated Section 253.094(b) was erroneous. Section 253.094 is void because the State cannot constitutionally ban, or limit, corporate contributions in connection with a recall campaign.

IV. If Relators' political speech is an expenditure, Texas may not ban it.

A "campaign expenditure" that is "in connection with a measure" is a "contribution" only if it is a "contribution to a political committee supporting or opposing the measure." 1 Tex. Admin. Code 20.1(5)(B). Since that did not happen here, *see supra* Part II, the alleged contributions are expenditures.

If Relators' political speech is an expenditure, rather than a contribution, then it is independent spending for political speech, so the government may not ban Relators' speech, *see Citizens United,* 130 S.Ct. at 896-914, especially since there is no contention that Relators are foreign nationals. *See id.* at 911 (citing 2 U.S.C. 441e).

[7] Section 253.094(b) is also unconstitutional as-applied to Relators' speech because none of their speech was coordinated with a candidate. They did not coordinate speech with Mayor Cook, nor is there any indication that anyone else was a candidate under Texas law. *See* Tex. Elec. Code 251.001(1)(A)-(H).

Contrary to the apparent belief of the court of appeals, *see* 2012 WL 525451, at *11, requiring an organization to *form* a (separate) political committee – or whatever label Texas may use, *see* Tex. Elec. Code 251.001(12)-(14) – and let only the political committee speak is a ban on the speech of the organization itself. Why? Because an organization's political committee is a "a separate legal entity[,]" *California Med. Ass'n v. FEC,* 453 U.S. 182, 196 (1981), and "a separate association from" the organization. *Citizens United,* 130 S.Ct. at 897. An organization does *not* speak through its political committee, *see id.,* so allowing the political committee to speak does not allow the organization itself to speak. *Id.*

V. Texas may not force the non-political-committee Relators to be a political committee to engage in their speech.

The government has not asserted that the non-political-committee Relators themselves must *be* a political committee[8] – or whatever label Texas may use, *see* Tex. Elec. Code 251.001(12)-(14) – to engage in their political speech. Forcing such Relators to *be* a political committee would also be unconstitutional. While it is true that EPTFV is already a political committee, Relators never had to *form* EPTFV to engage in political speech in the first place. *See supra* Part IV.

As a matter of *law,* not fact, political-committee status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also "onerous[,]" *id.* at 898; *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 477 n.9 (2007) ("*WRTL-II*") (citing *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 253-55 (1986) ("*MCFL*")), because

[8] As opposed to *forming* a (separate) political committee that would then engage in the speech.

political committees "are expensive and subject to extensive regulations." *Citizens United,* 130 S.Ct. at 897.

These are "well-documented and onerous burdens," *WRTL-II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), regardless of whether government bans an organization itself from speaking and says only an organization's political committee may speak, *see, e.g., Citizens United,* 130 S.Ct. at 897, or whether government requires the organization itself to be a political committee. *See, e.g., id.* (noting that allowing the organization to speak would "not alleviate the First Amendment problems"). While it is one thing to assert that *non*-political-committee disclosure requirements "do not prevent anyone from speaking," *id.* at 914 (quoting *McConnell v. FEC,* 540 U.S. 93, 201 (2003)); *see* 2012 WL 525451, at *11 (quoting *Citizens United,* 130 S.Ct. at 916 (discussing *non*-political-committee disclosure requirements), full-fledged political-committee burdens are another matter.

Political-committee requirements are burdensome and onerous even if they include "only" (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive reporting requirements yet not (4) limits or (5) source bans on contributions received. *See Citizens United,* 130 S.Ct. at 897-98 (mentioning (1), (2), and (3), but not (4) or (5)).

With such burdens in mind, *Buckley* establishes that government may define an organization as a political committee or otherwise impose political-committee burdens only if (a) it is "under the control of a candidate" or candidates, or (b) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates,

in the jurisdiction. 424 U.S. at 79, *followed in McConnell,* 540 U.S. at 170 n.64, *and MCFL,* 479 U.S. at 252 n.6, 262; *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1153-54 (10th Cir. 2007) ("*CRLC*") (noting that *McConnell* did not change the test (citations omitted)); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 287-90 (4th Cir. 2008) ("*NCRL-III*").

Determining whether an organization is "under the control of a candidate" or candidates is straightforward. There is no indication in the record that Relators are under the control of a candidate,[9] not even as Texas defines one. *See* Tex. Elec. Code 251.001(1)(A)-(H).

Determining whether an organization passes the major-purpose test is also straightforward. *See CRLC,* 498 F.3d at 1152. The law provides two methods to determine whether an organization passes the major-purpose test. Either suffices. The first method considers how the organization has articulated its mission in its organizational documents, *see MCFL,* 479 U.S. at 241-42, 252 n.6, or in public statements. *FEC v. GOPAC, Inc.,* 917 F. Supp. 851, 859 (D.D.C. 1996). The second method considers whether, in carrying out its mission, the organization devotes the majority of its spending to contributions to candidates or independent expenditures[10] for

[9] *Cf. New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*") (citing *Buckley,* 424 U.S. at 79); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010); *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 394-96 (D.C. Cir.), *cert. denied,* 454 U.S. 897 (1981); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982).

[10] Meaning express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, and not coordinated with a candidate, the candidate's agents, the candidate's committee, or a party, which is the standard under the Constitution. *See id.* at 39-51, 74-81; *McConnell,* 540 U.S. at 219-23. The phrase "independent spending" in *CRLC,* 498 F.3d at 1152 (citing/quoting *MCFL,* 479 U.S. at 252 n.6, 262), refers to express advocacy as defined in *Buckley. MCFL,* 479 U.S. at 249.

candidates. *CRLC,* 498 F.3d at 1152, *followed in New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 678 (10th Cir. 2010) ("*NMYO*); *NCRL-III,* 525 F.3d at 289. Applying these two methods here reveals there is no indication in the record that Relators have the major purpose of nominating or electing a candidate or candidates.

Assuming, without conceding, that government may define organizations as political committees based on ballot-measure speech,[11] these two methods would also focus on contributions to the proponents of ballot measures themselves and on "independent expenditures" for ballot measures. The latter would mean speech urging passing or defeating a ballot measure which speakers do not coordinate with the ballot-measure proponent. Applying these two methods here reveals there is *still* no indication that the non-political-committee Relators pass the major-purpose test.

Therefore, it would be unconstitutional to force the non-political-committee Relators to *be* a political committee.

VI. *Citizens United* prohibits restrictions on political expenditures which are based on the corporate identity of the speaker.

In *Citizens United*, the Court stated that any restriction on spending for political speech may not be based on the corporate identity of the non-foreign-national speaker:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others…. Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the

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[11] *See National Org. for Marriage, Inc. v. McKee,* ____ F.3d ____, ____, 2012 WL 265843 at *3-4 (1st Cir. Jan. 31, 2012), *pet. for cert. pending* (U.S.); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1012-14 (9th Cir. 2010) ("*HLW*), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011); *but see Sampson v. Buescher,* 625 F.3d 1247, 1255-58 (10th Cir. 2010); *California Pro-Life Council v. Randolph,* 507 F.3d 1172, 1187-89 (9th Cir. 2007) ("*CPLC-II*").

> Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

130 S.Ct. at 899; *cf. id.* at 911 (citing 2 U.S.C. 441e).

For present purposes, the Court succinctly said, "If the First Amendment has any force, it prohibits Congress from fining or imprisoning citizens, or associations of citizens, for simply engaging in political speech" and that "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id*. at 904 and 913.

PRAYER

Relators seek (1) an order of this Court to stay the Eighth District Court of Appeals decision dated February 17, 2012, (2) directing Respondents to vacate and set aside the February 17 decision and judgment, and (3) directing Richarda Momsen to re-certify the signatures.[12]

Respectfully submitted, this 16th day of March, 2012.

/s/ Kevin H. Theriot

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[12] The Mayor has non-suited the City Clerk and now claims that any appeal of the Eighth Circuit's ruling is moot. But a live controversy still exists as the appeals court's ruling ordered the signatures to be de-certified, which has occurred, and the election has currently been stopped. The City Clerk is a party to this mandamus proceeding, and the Court can order her to re-certify the signatures.

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, a true and correct copy of the foregoing was served by sending a copy of the same via facsimile to the following:

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/s/ Kevin H. Theriot
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CERTIFICATION

Pursuant to Rule 52.3(j) of the Texas Rules of Appellate Procedure, I hereby certify that I have reviewed the Relator's Petition for Writ of Mandamus and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Kevin H. Theriot
Kevin H. Theriot

APPENDIX

Opinion, Court of Appeals Eighth District of Texas, El Paso, Texas ..... Tab 1

Judgment, Court of Appeals Eighth District of Texas, El Paso, Texas..... Tab 2

Trial Court's Order Denying Plaintiff's Motion for Temporary Injunction ..... Tab 3

Text of Texas Election Code Sections 253.094, 253.003, 253.005, 253.031 ..... Tab 4

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOHN F. COOK, Appellant, v. TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO, TOM BROWN, EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN MENDOZA, ELIZABETH BRANHAM, AND RICHARDA MOMSEN, SOLELY IN HER OFFICIAL CAPACITY AS EL PASO CITY CLERK, Appellees.	§ § § § § §	No. 08-11-00367-CV Appeal from the County Court at Law Number Three of El Paso County, Texas (TC# 2011-DCV-02792)

O P I N I O N

This is an accelerated interlocutory appeal of the trial court's order denying injunctive relief sought by Appellant, John F. Cook, who is the duly-elected Mayor of the City of El Paso.[1] In his individual capacity, Cook filed suit for injunctive and other relief against Appellees Tom Brown Ministries (TBM), Word of Life Church (WOL Church), Tom Brown (Brown), El Pasoans for Traditional Family Values (EPTFV), Salvador Gomez (Gomez), Ben Mendoza (Mendoza), Elizabeth Branham, (Branham), (collectively, "Appellees") and Richarda Momsen in her official capacity as El Paso City Clerk (the City Clerk). Cook sought to enjoin the use of recall petitions to call an election to recall Cook as Mayor of El Paso, and City Representatives Susie Byrd and

[1] Cook seeks relief in his individual capacity only and not in his official capacity as Mayor of El Paso.

Steve Ortega from their respective offices because the petitions were knowingly and improperly financed, gathered, circulated, and submitted in violation of the Texas Election Code (Election Code). *See* TEX. ELEC. CODE ANN. § 253.094(b) (as amended June 17, 2011) (West Supp. 2011), §§ 253.003, 253.005, 253.031, 253.095, 253.131, 273.081 (West 2010). In four issues, Cook now appeals the trial court's denial of his request for injunctive relief.

BACKGROUND

Brown is the President, Chairman of the Board of Directors, and Pastor of a non-profit corporation, WOL Church.[2] Brown also served as the chairman of EPTFV, a specific-purpose political committee under the Election Code. As a specific-purpose committee, EPTFV was created for the specific purpose of supporting a measure described as "traditional family values" to be decided by election on November 2, 2010. Brown and EPTFV organized and led an effort to secure passage of Ordinance Number 017456, the "Traditional Family Values Ordinance," which provided in part, "[T]he City of El Paso endorses traditional family values by making health benefits available only to city employees and their legal spouse and dependent children." Ordinance Number 017456 was approved at the November 2, 2010, election.

On January 13, 2011, EPTFV filed a campaign finance report, including purpose and totals covering the period of October 22, 2010 through December 31, 2010. As had previously been described in such reports filed on September 29, 2010, and October 25, 2010, EPTFV's stated purpose in its filing was to support a measure described as "traditional family values" with an election date of November 2, 2010.

Thereafter, on June 14, 2011, the El Paso City Council amended Ordinance Number

[2] In a civil case, we accept as true the facts stated in a brief unless another party contradicts them. TEX. R. APP. P. 38.1(g).

017456, effectively restoring benefits to those persons who would have lost their benefits if the ordinance had not been amended. Cook, as Mayor, cast the tie-breaking vote.

Brown thereafter informed City Council that WOL Church, a corporation, could lawfully circulate recall petitions and would do so. WOL Church's social networking page on Facebook identifies its website as "www.tbm.org," which is also the website for TBM.[3] In a June 2011 statement on www.tbm.com, Brown stated that he and EPTFV, the specific-purpose committee, had decided to join in the recall efforts and specifically stated:

> We need you to help as well. Will you be willing to sign the petition and go the extra mile and circulate it? If so, please click here to volunteer and make your commitment.

On July 14, 2011, EPTFV filed Texas Ethics Commission Form SPAC wherein the committee changed its address and listed its campaign treasurer as "Ronald F. Webster or Gilbert T. Gallegos." The form included an address for Ronald Webster but was signed by Gilbert T. Gallegos. The report did not identify a purpose such as supporting, opposing, or assisting a candidate, officeholder, or measure, or an election date, and did not include reports regarding contributions or expenditures.

On July 18, 2011, Salvador Gomez, Ben Mendoza, and Elizabeth Branham filed notices of intent to file recall petitions against Mayor Cook, and City Representatives Susie Byrd and Steve Ortega, respectively. On or about July 18, 2011, Brown issued a social media statement encouraging the public to "[c]all the church to sign the petition." Brown did not resign from his position as Chairman of EPTFV until August 23, 2011.

Temporary Restraining Order

[3] On June 30, 2011, the website included a disclaimer, which stated: "This internet site is owned by Tom Brown and not the church. Tom Brown in his official capacity as pastor of Word of Life Church neither encourages or discourages the recall of the Mayor and Representatives."

On September 12, 2011, Cook filed suit seeking a temporary restraining order, injunctive relief, declaratory judgment, and other relief. Stating that efforts to initiate a recall election are not exempt from Texas campaign finance laws, including those that govern the participation of for-profit and not-for-profit corporations in such activity, Cook asserted that that TBM, EPTFV, and the individual Appellees were "liable for their actions as agents, officers, or directors of corporations that violated the Election Code in the circulation and submission of recall petitions in this matter." TEX. ELEC. CODE ANN. §§ 253.091 (West 2010), 253.094 (West Supp. 2011). Noting the ten-day timeframe within which the City Clerk is required to examine and certify the recall petitions, Cook timely sought relief as provided under Section 273.081 of the Election Code and other relevant provisions prior to the submission of the petitions for certification. TEX. R. CIV. P. 680; TEX. ELEC. CODE ANN. § 273.081 (West 2010); TEX. CIV. PRAC. & REM. CODE ANN. § 65.001 (West 2008). The trial court issued a temporary restraining order enjoining any further circulation of petitions and scheduled a temporary-injunction hearing for September 26, 2011.

On September 13, 2011, the following day, Tom Brown, who was *not* a named defendant in Cook's motion for a temporary restraining order and application for temporary injunction, filed a motion along with "all of the other named defendants," seeking to dissolve the temporary restraining order. On September 14, 2011, in response to the motion to dissolve, the trial court convened the parties, heard arguments from counsel but did not receive any evidence in support of the motion to dissolve the temporary restraining order, entered an order dissolving a portion of the temporary restraining order prohibiting the circulation of petitions and then granted affirmative relief rather than maintaining the status quo.

During that proceeding, Cook: (1) challenged Brown's standing to seek dissolution of the restraining order as he was not a named defendant and no other defendants had filed answers; (2) stated that the proceedings were not contesting an election; noted that he had requested mediation or the appointment of a master of Chancery to review evidence regarding the procurement of the petitions; (3) noted that the Texas Legislature has singled-out recall elections for special treatment by enacting Section 253.094(b)'s corporate-contribution prohibition and Section 273.081's designated relief permitting courts to enjoin illegal acts under the Election Code; (4) contended that allowing petitions that were circulated and submitted in violation of Election Code restrictions on corporate involvement in the process to call an election to recall an officeholder would expressly disregard the Legislature's intent in enacting Section 253.094(b) of the Election Code; and (5) argued that the trial court could not craft an exception to the Legislature's creation of a statutory exception permitting injunctive relief for Election Code violations. The trial court noted that Cook may be "absolutely right" that fraud and illegality may have taken place and asked if the trial court had the power to stop an election to thwart the rule of the public.

Cook argued that it was proper for the trial court, under these statutory provisions, to enjoin the illegal acts prohibited by Section 253.094(b) because he was not seeking to enjoin an election or to contest election results and the trial court had no discretion but to review the issues under the statutes as written.

The trial court announced:

> I don't want to deny the Mayor that right. But at the same time I don't want to deny the people of El Paso the right to recall their elected official. . . . If it is illegal, if you find illegality, fraud, irregularity, cannot a District Judge under 233 declare this a void election ab initio, to simply say this is a void election, folks, from the very beginning . . . [a]nd that's it. And then you go and then you [go] through a process of having another election . . . at the cost of you, the citizens of El Paso

county.

Cook reiterated that allowing an illegal election to proceed and then declaring it invalid *ab initio* could be repeated *ad infinitum* without giving meaning to the Legislature's instruction. The court replied, "I want to give meaning to that section [253.094(b)] . . . but more important is the will of the people."

The trial court also noted that its office had received calls from signatories to the petition asking if their signatures were valid or invalid and Cook's counsel noted that "[w]e have received calls . . . about a lot of other issues or irregularities . . . not in evidence . . [or] . . . before the Court today." The trial court again stated that it did "not want to thwart the will of the people," would allow recall petitions to be presented to the City Clerk, and would:

> [F]orce [Cook] at [the] end of this process . . . to file [a] 233 petition and say, Judge, we've got a void election *ab initio*. It's void at the inception. Period.
>
> And then you go to, you know, Court, District Judge, to if that District Judge says yes we've got a -- a void election, then you start the process and it's going to cost the City of El Paso a lot of money.
>
> But that's what the people want. . . . That's that's democracy. . . . [T]he Court doesn't want to get in the way of an election.

Thereafter, on September 15, 2011, the trial court dissolved several of the provisions within the temporary restraining order, including restrictions related to the circulation of recall petitions by TBM, WOL Church, EPTFV, Gomez, Mendoza, and Branham and the submission of the petitions to the City Clerk until further order of the Court. The dissolution order further granted affirmative relief by ordering the City Clerk to accept all original recall petitions.

Writ of Mandamus and Certification of Petitions

That same day, Cook filed in this Court a petition for writ of mandamus and a motion for emergency temporary relief. On September 22, 2011, one week later, the City Clerk certified that

the requisite number of qualified electors had signed petitions in support of the recall. This Court dismissed Cook's mandamus petition on October 3, 2011, because the temporary restraining order had expired by its own terms and all issues related thereto had become moot. *In re John F. Cook*, No. 08-11-00274-CV, 2011 WL 4543490 (Tex.App. -- El Paso October 3, 2011, orig. proceeding).

Temporary Injunction Hearing

A temporary-injunction hearing was conducted over five days during October and November 2011. In the early part of the hearing, the District Attorney was called as a witness and testified that his office was looking into possible criminal violations of the Election Code. As a result, multiple witnesses invoked the Fifth Amendment during their testimony.

EPTFV Treasurer, Ronald Webster, testified that EPTFV was formed in 2010, and he began serving as the treasurer of EPTFV in July 2011, and had been involved with EPTFV since 2009, before its actual inception. Mr. Webster acknowledged that EPTFV had filed with the City Clerk on July 14, 2011, a specific-purpose committee finance report form, which included information regarding EPTFV's change of campaign treasurer and address but did not identify the committee's purpose such as supporting, opposing, or assisting a candidate, officeholder, or measure, an election date, or reports regarding contributions, expenditures, or loans. Mr. Webster testified that the form did not create a new political committee and, as custodian of records, he identified prior EPTFV specific-purpose committee filings, which stated that the committee's purpose was to support a traditional-family-values measure to be decided by election on November 2, 2010. Mr. Webster acknowledged that the Texas Ethics Commission provides online materials and guidelines regarding the information and forms to be filed, and stated that he had both viewed the materials and had made an effort to study them. EPTFV had filed no forms

since July 2011, and had filed no forms in relation to the recall efforts. Mr. Webster confirmed that EPTFV was involved with the effort to recall Cook, Byrd, and Ortega, and that EPTFV had spent more than $3,000 in support thereof. Mr. Webster stated that he was aware that to support or oppose a specific measure and to spend more than $500, a treasurer must be designated along with a specific-purpose committee.[4] He acknowledged that no appointment or designation of a treasurer for any specific-purpose committee other than EPTFV for the previous November 2, 2010, traditional-family-values ordinance election had occurred. Webster did not bring records of contributions and expenditures because of his concern that he would incriminate himself. There is no evidence in the record demonstrating that EPTFV had filed any forms with the Texas Election Commission to "repurpose" the committee or that a new specific-purpose committee was formed for the purpose of supporting a measure to recall officeholders Cook, Byrd, or Ortega.

Both in amended pleadings filed November 23, 2011, as well as during the temporary-injunction hearings, Cook contended that in addition to the campaign finance violations relating to the corporation's contributions in connection with the circulation and submission of petitions to call a recall election, Appellees had expended approximately $4,000 without creating a new specific-purpose committee or designating a committee treasurer, in violation of Sections 253.003, 253.005, and 253.031 of the Election Code.[5] TEX. ELEC. CODE ANN. §§

[4] Each political committee must appoint a campaign treasurer and a political committee may not knowingly accept political contributions totaling more than $500 or make or authorize political expenditures totaling more than $500 at a time when a campaign treasurer appointment for the committee is not in effect. TEX. ELEC. CODE ANN. §§ 252.001, 253.031(b) (West 2010). A violation of these provisions constitutes an offense. *Id.* A person who knowingly makes a political contribution in violation of the Election Code or who knowingly accepts a political contribution the person knows to have been made in violation of Chapter 253 of the Code commits an offense. TEX. ELEC. CODE ANN. §§ 252.001, 253.003 (West 2010). A person who knowingly makes or authorizes a political expenditure wholly or partly from a political contribution the person knows to have been made in violation of Chapter 253, other than Section 253.101, commits an offense. TEX. ELEC. CODE ANN. § 253.005(West 2010).

[5] In his third amended petition, Cook cites to a non-existent statute, Section 253.051, but from our review of the record

251.001(2),(3),(5), 253.003, 253.005, 253.031, 253.091, 253.095 (West 2010), 253.094(b) (West Supp. 2011).

On November 28, 2011, without hearing additional argument, the trial court denied Cook's request for injunctive relief. We judicially notice that on January 30, 2012, the El Paso City Council called the recall election and scheduled it for April 14, 2012. A person may appeal from an interlocutory order of a district court that grants or refuses a temporary injunction. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (West 2008).

DISCUSSION

Temporary Injunction

The Election Code entitles a person who is being harmed or is in danger of being harmed by a violation or threatened violation of its provisions to obtain the remedy of injunctive relief to prevent the violation from continuing or occurring. TEX. ELEC. CODE ANN. § 273.081 (West 2010). When, as here, an applicant relies upon a statutory source for injunctive relief, the statute's express language supersedes the common law injunctive relief elements such as imminent harm or irreparable injury and lack of an adequate remedy at law.[6] *Butnaru v. Ford*

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it is apparent from the content of Cook's pleadings, his arguments before the trial court, as well as in his briefs and oral argument before this Court, that Cook intended to cite and rely upon Section 253.031 of the Election Code, which restricts campaign contributions and expenditures at a time when a campaign treasurer appointment for a political committee is not in effect. TEX. ELEC. CODE ANN. § 253.031 (West 2010). Appellees have contended in this appeal that Cook's allegations that Sections 252.001, 253.003, 253.005, and 253.031(b) never appeared in Cook's pleadings, were never presented to the trial court, and formed no part of the proceedings below. While it is true that Cook's live pleading below does not specifically cite to Section 252.001 of the Election Code, which requires the appointment of a campaign treasurer, Cook alleges that the proponent defendants spent money without creating a new political committee or designating a treasurer therefor. Cook cites the other provisions. No named defendant filed special exceptions to Cook's pleadings nor otherwise complained to the trial court about this issue before the trial court ruled. We liberally construe in favor of the pleader those pleadings not challenged by special exceptions. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). We look to the pleader's intent and supply every fact "that can reasonably be inferred from what is specifically stated." *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982).

[6] Under common law, a temporary injunction does not issue as a matter of right but is an extraordinary remedy.

Motor Co., 84 S.W.3d 198, 210 (Tex. 2002) (recognizing that requirements for establishing right to common-law injunctive relief differ from those where injunctive relief is authorized by statute); *Marauder Corp. v. Beall*, 301 S.W.3d 817, 820 (Tex.App.--Dallas 2009, no pet.); *Avila v. State*, 252 S.W.3d 632, 648 (Tex.App.--Tyler 2008, no pet.); *David Jason West and Pydia, Inc. v. State,* 212 S.W.3d 513, 519 (Tex.App.--Austin 2006, no pet.).

Standard of Review

The purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru*, 84 S.W.3d at 204; *Pharaoh Oil & Gas, Inc. v. Ranchero Esperanza, Ltd.*, 343 S.W.3d 875, 880 (Tex.App.--El Paso 2011, no pet.). The status quo is the "last, actual, peaceable, non-contested status that preceded the pending controversy." *See State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). The continuation of illegal conduct, however, cannot be justified as preservation of the status quo. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 773 (Tex.Civ.App.--Houston [1st Dist.] 1970, no writ) ("In an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of expressed law, the status quo to be preserved could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation.").

A decision to grant or deny a temporary injunction rests within the trial court's sound discretion. *Butnaru*, 84 S.W.3d at 204; *Pharaoh Oil & Gas, Inc.*, 343 S.W.3d at 880. In reviewing the trial court's order granting or denying injunctive relief, we do not review the merits

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Butnaru, 84 S.W.3d at 204. An applicant seeking a temporary injunction under common law must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* If the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard, an injury is irreparable. *Id.*

of the underlying case. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). We reverse the trial court's order granting or denying injunctive relief only if an abuse of discretion is shown. *Butnaru*, 84 S.W.3d at 204.

We do not substitute our judgment for that of the trial court unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204; *Johnson v. Fourth Ct. of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *Davis*, 571 S.W.2d at 861-62; *Pharaoh Oil & Gas, Inc.*, 343 S.W.3d at 881. We view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary as to exceed the bounds of reasonable discretion. *Pharaoh Oil & Gas, Inc.*, 343 S.W.3d at 881. An abuse of discretion does not exist if the trial court bases its decisions on conflicting evidence. *Bailey v. Rodriguez*, 351 S.W.3d 424, 426 (Tex.App.--El Paso 2011, no pet.), *citing Davis*, 571 S.W.2d at 862.

However, our review is much less deferential regarding the resolution of legal issues. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *In re Phelps Dodge Magnet Wire Co.*, 225 S.W.3d 599, 603 (Tex.App.--El Paso 2005, orig. proceeding); *In re Dillard Department Stores, Inc.*, 153 S.W.3d 145, 149 (Tex.App.--El Paso 2004, orig. proceeding) (mandamus cases addressing trial court's alleged abuse of discretion with respect to resolution of legal issues). A trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker*, 827 S.W.2d at 840. Where the facts definitively indicate that a party is in violation of the law, a trial court no longer possesses discretion but must enjoin the violation. *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 107 (Tex.App.--San Antonio 2000, no pet.); *Priest v. Texas Animal Health Com'n*, 780 S.W.2d 874, 876 (Tex.App.--Dallas 1989, no writ); *City of Houston v.*

Memorial Bend Util. Co., 331 S.W.2d 418, 422 (Tex.Civ.App.--Houston 1960, writ ref'd n.r.e.). Consequently, a court abuses its discretion if there is a clear failure to analyze or apply the law correctly. *Walker*, 827 S.W.2d at 840; *In re Dillard*, 153 S.W.3d at 148.

ISSUES

ISSUES ONE AND TWO

In Issues One and Two respectively, Cook asks:

> (1) Does a Texas trial court have the discretion to refuse to enforce the Texas Election Code, and enjoin corporate entities and labor organizations from illegally providing resources and organizing recall election campaigns, despite the prohibitions of . . . Section 253.094 of the Texas Election Code; and
>
> (2) Does a Texas trial court have the discretion to refuse to enforce Texas election laws prohibiting persons from making political expenditures in excess of $500 without forming a political committee, appointing a campaign treasurer, and filing the appointment with the appropriate authority, as required by Sections 252.001, 253.002, and 253.031 of the Texas Election Code, and refuse to enjoin such violations?

Advisory opinions decide abstract questions of law without binding the parties. *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). Under the separation-of-powers doctrine, courts are prohibited from issuing advisory opinions, which are a function of the executive branch of government. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

Issues One and Two ask that we rule on abstract questions of law without application to the facts of this case, which would bind the parties. Because we are unable to render advisory opinions on abstract questions of law without binding the parties, Issues One and Two are overruled. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 223 (Tex. 2002); *Brown*, 53 S.W.3d at 302. However, we are not barred from recognizing and applying relevant law, including the questions of law raised within Issues One and Two, to resolve the remaining issues

properly before us.

ISSUE THREE

In Issue Three, Cook asks us to determine whether the trial court abused its discretion by refusing to grant his application for a temporary injunction. If the evidence shows that an Election Code violation has occurred or is occurring and that Cook is being harmed or is in danger of being harmed by the violation or threat of violation of the Election Code provisions, Cook is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring. TEX. ELEC. CODE ANN. § 273.081 (West 2010). No evidence of imminent harm, irreparable injury, or the absence of an adequate remedy at law is necessary to support Cook's entitlement to injunctive relief. TEX. ELEC. CODE ANN. § 273.081 (West 2010); *Marauder Corp.*, 301 S.W.3d at 820; *Avila*, 252 S.W.3d at 648; *West and Pydia, Inc.,* 212 S.W.3d at 519.

Texas Election Code § 253.094(b)

Cook pleaded and argued two bases for injunctive relief under Section 273.081. Cook first alleged violations of Election Code Section 253.094(b). TEX. ELEC. CODE ANN. § 253.094(b) (Contributions Prohibited) (West Supp. 2011).

A corporation is restricted from making a campaign contribution from its own property in connection with a measure-only election unless the contribution is made to a measure-only committee. TEX. ELEC. CODE ANN. § 253.096 (West 2010). However, the Election Code also specifies that a corporation is prohibited from making political contributions in connection with a recall election, including the circulation and submission of petitions to call an election. TEX. ELEC. CODE ANN. § 253.094(b) (West Supp. 2011).

A political contribution includes a campaign contribution, which is defined as a

contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. TEX. ELEC. CODE ANN. § 251.001(3), (5) (West 2010). A "contribution" is defined to include a direct or indirect transfer of money, goods, services, or any other thing of value. TEX. ELEC. CODE ANN. § 251.001(2) (West 2010). Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution. TEX. ELEC. CODE ANN. § 251.001(3) (West 2010). In its *Campaign Finance Guide for Political Committees*, the Texas Ethics Commission states that "A contribution of goods or services is an 'in-kind' contribution" and lists as examples of such contributions donations of money to a political committee, and the donation of materials and labor for printing campaign signs. A promise to give a political committee money after an election to pay debts incurred in connection with an election is a contribution in the form of a pledge.[7]

A political committee is defined as a group of persons that has as a principal purpose accepting political contributions or making political expenditures and each political committee is required to appoint a campaign treasurer. TEX. ELEC. CODE ANN. §§ 251.001(12), 252.001 (West 2010). A specific-purpose committee is a political committee that does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes: (A) supporting or opposing one or more candidates, all of whom are identified and are seeking offices that are known, or measures, all of which are identified; (B) assisting one or more officeholders, all of whom are identified; or (C) supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown. TEX. ELEC. CODE ANN. § 251.001(13) (West 2010). The Election Code defines a "measure" as a question or proposal

[7] Texas Ethics Commission, *Campaign Finance Guide for Political Committees*, at 12 (Feb. 16, 2012) *available* at http://www.ethics.state.tx.us./guides/PAC_guide.pdf.

submitted in an election for an expression of the voters' will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will. TEX. ELEC. CODE ANN. § 251.001(19) (West 2010).

To recall any elected officer of the City of El Paso, a notice of intent to circulate a recall petition must be filed with the City Clerk and circulated petitions must be submitted to the City Clerk within sixty days of such notice. El Paso, Tex., Ordinance 8066 (June 5, 1984). After examination by the City Clerk, if the petition is found to be sufficient, the City Clerk is required to submit the petition to the City Council and, if the officer does not resign, the City Council is required to order that a recall election be held at the next election date permitted by law. El Paso, Tex., Ordinance 8066 (June 5, 1984). Therefore, an election to recall an elected officer of the City of El Paso, including the circulation and submission of a recall petition, constitutes a "measure" under the Election Code. TEX. ELEC. CODE ANN. § 251.001(19) (West 2010).

Cook presented evidence that WOL Church is a corporation and that the corporation's website address is "www.tbm.org." Cook showed both that Brown is the President and Chairman of the Board for the WOL Church, a corporation, and that Brown utilized the corporate website to ask for volunteers to circulate recall petitions in June 2011. On July 1, 2011, the website provided an electronic entry form whereby anyone who desired to circulate a recall petition could register through the website to do so but now included two disclaimers stating that the website was owned by Brown and not WOL Church and a statement that the electronic form was not a petition. On July 21, 2011, the website added a list of "[l]ocations of recall petitions," which included WOL Church and other corporations, a business, and an individual as well as the respective corporate

addresses and phone numbers. Evidence was presented that on August 8, 2011, the website posted a link for the "[r]ecall of the Mayor and City Representatives," and that the disclaimer that the website was owned by Tom Brown was removed.

Brown invoked his Fifth Amendment right to remain silent when he was asked, among other questions, if: (1) the website was identified by the name of WOL Church; (2) WOL Church was responsible for the website and had worked with TBM to publish the information posted on July 21, 2011; (3) WOL Church and TBM are one and the same; (4) through its website and use of its premises, WOL Church circulated petitions to recall Cook, Byrd, and Ortega; (5) WOL Church advertised through the website that the public could go to WOL Church to sign and circulate recall petitions; (6) WOL Church provided its facilities for the signing and circulation of the recall petitions; (7) WOL Church participated in "paying for" the recall petitions; (8) in addition to himself, other officers or directors of WOL Church were circulators of recall petitions; and (9) WOL Church charges for the use of its facilities. In civil proceedings, a trial court may draw an adverse inference against a party who invokes the right to remain silent under the Fifth Amendment. TEX. R. EVID. 513(c); *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed2d 810 (1976); *Wil-Roye Inv. Co. II v. Washington Mut. Bank, FA*, 142 S.W.3d 393, 405 (Tex.App.--El Paso 2004, no pet.); *Tex. Cap. Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 779 (Tex.App.--Houston [1st Dist.] 2001, pet. denied).

The Election Code does not define goods, services, or "thing of value." It is clear that WOL Church, as a corporation, through the use of its website, promoted the circulation of recall petitions, created a portal whereby volunteers could register through WOL Church to circulate petitions, provided the facility and personnel to assist in the signing and circulation of the recall

petitions, and notified the public that recall petitions were available for signing at WOL Church. The evidence establishes that WOL Church made campaign contributions from its own property in connection with a measure-only recall election without properly making the contributions to a measure-only committee, TEX. ELEC. CODE ANN. § 253.096 (West 2010), and that WOL Church, a corporation, made a political contribution in connection with a recall election, including the circulation and submission of petitions to call an election, and failed to make such contribution to a political committee in violation of Sections 253.096 and 253.094(b) of the Election Code. TEX. ELEC. CODE ANN. §§ 253.096 (West 2010), 253.094(b) (West Supp. 2011).

Citizens United

Appellees argue, "Even assuming [Cook] is factually correct, the circulation and submission of recall petitions by [corporations] represents core First Amendment activity" and falls within the protection of the Supreme Court's ruling in *Citizens United*. *Citizens United v. Fed. Election Comm'n*, --- U.S. ---, ---, 130 S.Ct. 876, 913, 917, 175 L.Ed.2d 753 (2010).

In *Citizens United v. Fed. Election Comm'n*, the United States Supreme Court held that a federal statutory restriction on "corporate independent expenditures" was unconstitutional. *Id.* The Supreme Court also recognized that "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' . . . and 'do not prevent anyone from speaking[.]'" *Id.* at 914, *citing Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *and McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 203-209, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003).

After *Citizens United* was decided, the Texas Legislature amended Section 253.094(b) to omit restrictions upon corporations making "direct campaign expenditures" under the Texas

Election Code.[8] TEX. ELEC. CODE ANN. § 253.094(b) (West Supp. 2011) as amended by Acts 2011, 82nd Leg., R.S., ch. 1009, §§1, 2, 2011 Tex. Sess. Law Serv. (H.B. 2359) (West 2011).

In *Ex parte Ellis*, a post-*Citizens United* case, the Texas Court of Criminal Appeals determined that *Citizens United* had no effect upon the jurisprudence relating to corporate contributions.[9] *In re Ellis*, 309 S.W.3d 71, 91 (Tex.Crim.App. 2010). In considering vagueness- and overbreadth-challenges to the constitutionality of Section 253.094 of the Election Code, which we do not recite or address here, the Court noted that unless authorized by the Election Code, corporate political contributions are prohibited but recognized that the Election Code permits a corporation to "make campaign contributions from its own property in connection with an election on a measure only to a political committee for supporting or opposing measures exclusively." *In re Ellis*, 309 S.W.3d at 87. Rejecting the constitutional challenges to the Election Code's corporate-contribution restrictions in Section 253.094, the *Ellis* Court held that a corporation may enjoy several alternate avenues for political expression with respect to measures:

> First and most obviously, a corporation may contribute to a political committee devoted exclusively to measures. Second, a corporation may create its own

[8] Under the Texas Election Code, an "expenditure" is a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment. TEX. ELEC. CODE ANN. § 251.001(6) (West 2010). An expenditure made by any person in connection with a campaign for an elective office or on a measure is a "campaign expenditure." TEX. ELEC. CODE ANN. § 251.001(7) (West 2010). A campaign expenditure that does not constitute a campaign contribution by the person making the expenditure is a "direct campaign expenditure." TEX. ELEC. CODE ANN. § 251.001(8) (West 2010). In its *Campaign Finance Guide for Political Committees*, the Texas Ethics Commission notes that a political committee must report any expenditure made from political contributions, even if the expenditure is not for a campaign or officeholder purpose, and identifies as examples of political expenditures the purchasing of stationery for fund-raising letters, the renting of a field to hold a campaign rally, paying people to put up yard signs in connection with an election, a political contribution to a candidate or officeholder by a political committee, and payments to finance a political committee's general operating expenses. Texas Ethics Commission, *Campaign Finance Guide for Political Committees*, at 12-13 (Feb. 16, 2012) *available* at http://www.ethics.state.tx.us./guides/PAC_guide.pdf.

[9] The defendants in *Ellis* had been indicted on charges of unlawful acceptance of corporate political contributions and money laundering and, in a petition for discretionary review before the Court of Criminal Appeals, asserted as erroneous the Austin Court of Appeals' findings that Section 253.094 of the Texas Election Code was neither unconstitutionally vague nor overbroad. *In re Ellis*, 309 S.W.3d at 75, 78 n.39.

> political committee, which can then solicit contributions from the corporation's shareholders, employees, and their families, and any contributions received may then be contributed without being subject to corporate limitations. Finally, a corporation may make independent expenditures (*e.g.,* buy its own issue ads), make press releases, and otherwise have its agents directly engage in communication with respect to a measure (or a candidate, for that matter).

TEX. ELEC. CODE ANN. §§ 253.096, 253.100, 253.092 (West 2010); *In re Ellis*, 309 S.W.3d at 90-92. Regarding the concept of issue advocacy, the Court determined that regardless of whether a measure is slated for election, creation of a corporate political committee for soliciting contributions and making independent expenditures, the second and third avenues recognized in *Ellis*, afford sufficient avenues for corporate free expression. TEX. ELEC. CODE ANN. §§ 253.092, 253.096 (West 2010); *In re Ellis*, 309 S.W.3d at 91-92 (internal citations omitted).

Let us be clear. The Election Code has not and does not prohibit any and all corporate contributions in connection with recall elections. It merely prescribes the parameters under which contributions may be made. Appellees were not barred from pursuing the November 2010 ballot initiative through the special purpose committee known as EPTFV, nor were they banned from speaking. They spoke and spoke loudly. They are not banned from speaking now. They must simply follow the protocol established in the Election Code with which they are already familiar. All they needed to do was "re-purpose" EPTFV or create a new special purpose committee. "Why?", one might ask. Why are these procedures necessary? *Citizens United* tells us precisely why:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, 130 S.Ct. at 916.

While finding that Citizens United was constitutionally empowered to speak, the Court also required it to disclose the identities of the parties who spoke. In accordance with *Citizens United,* the Texas Election Code also requires disclosure. *See* TEX. ELEC. CODE ANN. § 253.094(b) West Supp. 2011). Violations of Section 253.094(b) were established in the trial court below. TEX. ELEC. CODE ANN. § 253.094(b) (West Supp. 2011).

Texas Election Code §§ 253.003, 253.005, and 253.031

Cook next alleged that Sections 253.003, 253.005, and 253.031 of the Election Code have been violated.[10] TEX. ELEC. CODE ANN. §§ 253.003 (Unlawfully Making or Accepting Contribution), 253.005 (Expenditure from Unlawful Contribution), 253.031(b) (Contribution and Expenditure without Campaign Treasurer Prohibited) (West 2010).

A corporation is restricted from making a campaign contribution from its own property in connection with a measure-only election unless the contribution is made to a measure-only committee. TEX. ELEC. CODE ANN. § 253.096 (West 2010). A "measure" means a question or proposal submitted in an election for an expression of the voters' will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will. TEX. ELEC. CODE ANN. § 251.001(19) (West 2010).

A person may not knowingly make a political contribution nor knowingly accept a political contribution the person knows to have been made in violation of Chapter 253 of the Election Code.

[10] Appellees complain that Cook's assertions regarding the alleged violations of Sections 252.001, 253.003, 253.005, and 253.031 were not properly before the trial court and are untimely. However, our review of the record reveals that Cook both presented evidence of these violations and made arguments in support of his request for relief regarding these specific violations during the temporary-injunction hearing, and pleaded the violations in his third amended petition filed on November 23, 2011. The trial court did not enter its order denying the temporary injunction until November 28, 2011. Moreover, our review of the record shows that Appellants never objected to Cook's arguments when made nor to his pleadings prior to the trial court's entry of an order denying relief.

TEX. ELEC. CODE ANN. § 253.003 (West 2010). A person is also prohibited from knowingly making or authorizing a political expenditure wholly or partly from a political contribution the person knows to have been made in violation of Chapter 253. TEX. ELEC. CODE ANN. § 253.005 (West 2010). A political committee is barred from knowingly accepting political contributions totaling more than $500 and may not knowingly make or authorize political expenditures totaling more than $500 at a time when a campaign treasurer appointment for the committee is not in effect. TEX. ELEC. CODE ANN. § 253.031(b) (West 2010). An officer, director, or other agent of a corporation who commits an offense under Chapter 253, Subchapter D of the Election Code, which regulates corporate contributions and expenditures, is punishable for the grade of offense applicable to the corporation. TEX. ELEC. CODE ANN. § 253.094(c) (West Supp. 2011).

Mr. Webster, the treasurer of EPTFV, testified during the temporary-injunction hearing that he had viewed and had attempted to study the Texas Ethics Commission materials regarding specific-purpose committee requirements, and was aware that to support or oppose a specific measure and in order to spend more than $500, a treasurer must be designated for a specific-purpose committee. Webster testified that no new specific-purpose committee was formed with respect to the efforts to recall Cook, Byrd, and Ortega. He acknowledged that no appointment or designation of a treasurer of any specific-purpose committee identified with anything other than EPTFV's previous November 2, 2010, traditional-family-values ordinance election had occurred. According to Webster, EPTFV had proceeded, after the conclusion of its identified purpose, to expend more than $3,000 to support the recall efforts of Cook, Byrd, and Ortega. When asked why he did not bring records of EPTFV's contributions and expenditures to

the hearing, Webster answered that he had not brought the records because he believed he could possibly face criminal liability and invoked his right to remain silent from which it is permissible to draw an adverse inference. TEX. R. EVID. 513(c); *Baxter*, 425 U.S. at 318, 96 S.Ct. at 1558; *Wil-Roye Inv. Co. II*, 142 S.W.3d at 405; *Tex. Cap. Securities, Inc.*, 58 S.W.3d at 779. It is evident that violations of Section 253.031(b) of the Election Code have occurred.

Harm or Danger of Harm

Having determined that provisions of the Election Code have been violated, we next consider whether Cook is being harmed or is in danger of being harmed by the violations. TEX. ELEC. CODE ANN. § 273.081 (West 2010). We conclude that he is.

Uncontroverted is the fact that Cook was duly elected by eligible voters to the office of Mayor in a properly-conducted election. Cook's current term of office expires in May 2013 and, due to term limits, he is ineligible for reelection. Appellees essentially contend that the City is required to call an election to recall a duly-elected officeholder based upon the City Clerk's certification of illegally financed, circulated, and submitted petitions and conduct a recall election at taxpayer expense because Cook, if recalled, may then challenge the legality of the petitions and may contest the illegally-called election. We do not agree. We conclude that when, as here, an entity desiring to have its voice heard in a recall effort, fails to adhere to statutes set forth in the State Election Code by illegally procuring petitions in violation of those statutes, the illegally procured petitions are invalid from their inception inasmuch as they constitute the fruits of illegal activity. The violations are particularly egregious when the evidence establishes that the entity was aware of and had adhered to those same statutes in a prior effort to pass a city ordinance.

A corporation that has made political contributions in connection with a recall election in

violation of the Election Code should not be permitted to benefit from its violations simply because the certification process has occurred. While it is true that criminal penalties may be imposed upon the corporation, such penalties do not address the fact that the corporation's illegal conduct under the Election Code acts to disenfranchise those voters who elected Cook to his office. Cook timely sought judicial intervention in an effort to enjoin the City from using the fruits of WOL Church's improper corporate contributions, including the circulation of the petitions, for the purpose of calling the recall election. But for the trial court's acquiescence to the "will of the people," the improper dissolution of relevant portions of the temporary restraining order and the denial of injunctive relief, the certification would not have occurred and the election would not have been called. Because the matter was one that could have been, and should have been, judicially resolved in time for the proponents to correct deficiencies without delaying the election, injunctive relief was the proper remedy to prevent violations from continuing or occurring and not an election contest. *Blum*, 997 S.W.2d at 263.

Moreover, we note that there is no evidence in the record that certification of petitions acts to do more than certify that eligible individuals, in requisite number, signed the petitions within the proper timeframe for doing so. A clerk's certification of the petitions does not address whether, as here, a corporation has made improper contributions in connection with a recall election, including the circulation and submission of petitions, in violation of the Election Code.

More than $3,000 has admittedly been expended by EPTFV in the recall effort. EPTFV's purpose was identified as supporting a measure involving "traditional family values," and in a November 2010 election, its purpose culminated. As no proper specific-purpose committee exists to support a measure to recall Cook and no designated treasurer therefor exists, we find that

Cook is harmed by these Election Code violations. TEX. ELEC. CODE ANN. §§ 252.001, 253.003, 253.031(b) (West 2010).

Thus, we find that the violations of the Election Code in this case continue to occur, and as such we are authorized by Section 273.081 to enjoin the continued violation by appropriate injunctive relief. TEX. ELEC. CODE ANN. § 273.081 (West 2010).

Abuse of Discretion

Despite having viewed the evidence in the light most favorable to the trial court's order and indulging every reasonable inference in its favor, we find the trial court's order denying injunctive relief is so arbitrary as to exceed the bounds of reasonable discretion. *Pharaoh Oil & Gas, Inc.*, 343 S.W.3d at 881. Because we find that the error relates back to the time of the improper dissolution of the temporary restraining order, prior to the presentment and certification of the petitions, we find that all of the recall petitions submitted to the City Clerk are illegal and invalid.

The trial court was required to apply the law to the facts. *Walker*, 827 S.W.2d at 840; *In re Dillard*, 153 S.W. 3d at 148. We find the trial court failed to do so here. A number of the trial court's comments throughout the proceedings below, such as "I don't want to thwart . . . the will of the people," and it "[d]oesn't matter what I do or say, one side or the other is going to appeal," indicate an abdication of the judicial responsibility it had to enforce the laws. A trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker*, 827 S.W.2d at 840. As the trial court repeatedly stated, its reason for dissolving the temporary restraining order was that it did not wish to thwart the will of the people to recall its elected officials. Because the facts definitively indicate that a party is in violation of the law, the trial court no longer possessed discretion and was required to enjoin the violation. *San Miguel*, 40 S.W.3d at

107. Here, the trial court's actions hindered the judicial process and deprived Cook of the relief to which he was entitled. It is essential to the preservation of the independence of the judiciary and public confidence in the judicial process that a judge be faithful to the law and not be swayed by public clamor or fear of criticism. TEXAS CODE OF JUDICIAL CONDUCT, CANON 3B(2). It is significant, we think, that the trial court lost sight of the fact that a proper application of the law to the facts in this case does not act to bar qualified voters from properly exercising their right to seek a recall of elected officeholders, provided that such right is exercised in accordance with the provisions of the Election Code.

Relief

Because Cook is being harmed by the City's use of petitions illegally-procured because of violations of the Election Code provisions, Cook is entitled to the appropriate injunctive relief to prevent the violations from continuing or occurring. TEX. ELEC. CODE ANN. § 273.081 (West 2010). We disagree with the City Clerk's assertion that the issues are moot because the petitions have been certified. The illegal acts which mar the validity of the petitions cannot be made clean through the certification process. Furthermore, the continuation of the illegal conduct cannot be justified as preservation of the status quo. *In re Newton*, 146 S.W.3d at 651; *Houston Compressed Steel Corp*, 456 S.W.2d at 773.

Appellees additionally argue that a court is barred from stopping or delaying an election. We are guided by the Texas Supreme Court's analysis in *Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999). In that case, Blum was not seeking to enjoin an election but to prevent the City from using a vague and misleading description of a proposed charter amendment. *Blum,* 997 S.W.2d at 263. While agreeing that Blum had no right to delay an election, which would interfere with the

elective process in a manner contrary to the separation-of-powers doctrine, the Texas Supreme Court recognized that while an injunction that delays the election would be improper, "an injunction that facilitates the elective process may be appropriate." *Blum,* 997 S.W.2d at 263. Therefore, "if the matter is one that can be judicially resolved in time to correct deficiencies in the ballot without delaying the election, then injunctive relief may provide a remedy that cannot be adequately obtained through an election contest." *Id.* at 263-64.

While we recognize that an injunction to delay an election is not permitted, this is premised on the assumption that the requisite preliminary acts were performed in accordance with the provisions of the Election Code. *See Blum,* 997 S.W.2d at 263. That assumption has been disproven here.

Issue Three is sustained. Because we have sustained Issue Three, we need not address Issue Four. Therefore, because the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion, we reverse the trial court's order denying injunctive relief and render the judgment the trial court should have rendered. *Butnaru*, 84 S.W.3d at 204; *Johnson*, 700 S.W.2d at 918; *Davis*, 571 S.W.2d at 861-62; *Pharaoh Oil & Gas, Inc.*, 343 S.W.3d at 881; TEX. R. APP. P. 43.2(c). The City Clerk is ordered to decertify and return the recall petitions. Having instructed the City Clerk to decertify the petitions, no election thereon may be called or held. TEX. ELEC. CODE ANN. § 273.081 (West 2010). Appellees' Motion to Dismiss Injunctive Claims as Moot filed in this Court on February 7, 2012, is denied.

ANN CRAWFORD McCLURE, Chief Justice

GUADALUPE RIVERA, Justice

CHRISTOPHER ANTCLIFF, Justice

February 17, 2012

Before McClure, C.J., Rivera, J., and Antcliff, J.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOHN F. COOK, Appellant, v. TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO, TOM BROWN, EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN MENDOZA, ELIZABETH BRANHAM, AND RICHARDA MOMSEN, SOLELY IN HER OFFICIAL CAPACITY AS EL PASO CITY CLERK, Appellees.	§ § § § § §	No. 08-11-00367-CV Appeal from the County Court at Law Number Three of El Paso County, Texas (TC# 2011-DCV-02792)

JUDGMENT

The Court has considered this cause on the record and concludes there was error in the trial court's order denying injunctive relief. We therefore reverse the trial court's order denying injunctive relief and render judgment ordering the City Clerk to decertify and return the recall petitions.

We further order that Appellant recover from Appellees the appellate costs incurred by Appellant, for which let execution issue. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 17TH DAY OF FEBRUARY, 2012.

Post-it® Fax Note 7671	Date 3-7-12 # of pages 2
To Joel Oster	From Rose
Co./Dept.	Co. 8th COA
Phone #	Phone # 915-546-2240
Fax #	Fax # 915-541-7257

FILED
NORMA L. FAVELA
DISTRICT CLERK

2011 NOV 28 AM 8 58

EL PASO COUNTY, TEXAS
BY _____
DEPUTY

IN THE COUNTY COURT AT LAW NUMBER THREE
OF EL PASO COUNTY, TEXAS

JOHN F. COOK,

Plaintiff,

v.

TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO, EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN MENDOZA, ELIZABETH BRANHAM and RICHARDA MOMSEN, solely in her official capacity as EL PASO CITY CLERK,

Defendants.

No. 2011-DCV-02792

ORDER ON PLAINTIFF'S PETITION FOR TEMPORARY INJUNCTION

After having heard the evidence, it is the opinion of the Court that Plaintiff's Petition for Temporary Injunction be:

(X) DENIED

~~**( ) GRANTED**~~

Signed: November 28, 2011.

Javier Alvarez

Presiding Judge Javier Alvarez

Effective: June 17, 2011

Vernon's Texas Statutes and Codes Annotated Currentness
Election Code (Refs & Annos)
Title 15. Regulating Political Funds and Campaigns (Refs & Annos)
Chapter 253. Restrictions on Contributions and Expenditures
Subchapter D. Corporations and Labor Organizations (Refs & Annos)

➡➡ § 253.094. Contributions Prohibited

(a) A corporation or labor organization may not make a political contribution that is not authorized by this subchapter.

(b) A corporation or labor organization may not make a political contribution in connection with a recall election, including the circulation and submission of a petition to call an election.

(c) A person who violates this section commits an offense. An offense under this section is a felony of the third degree.

CREDIT(S)

Amended by Acts 1987, 70th Leg., ch. 899, § 1, eff. Sept. 1, 1987; Acts 2011, 82nd Leg., ch. 1009 (H.B. 2359), §§ 1, 2, eff. June 17, 2011.

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Prior Laws:

Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 243.

Acts 1963, 58th Leg., p. 1017, ch. 424, § 108.

Acts 1973, 63rd Leg., p. 1101, ch. 423, § 8.

V.A.T.S. Election Code, art. 14.07.

Acts 1975, 64th Leg., p. 2262, ch. 711, § 8.

Acts 1981, 67th Leg., p. 3326, ch. 873, § 3.

Acts 1983, 68th Leg., p. 2588, ch. 444, § 4.

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Effective:[See Text Amendments]

Vernon's Texas Statutes and Codes Annotated Currentness
Election Code (Refs & Annos)
Title 15. Regulating Political Funds and Campaigns (Refs & Annos)
Chapter 253. Restrictions on Contributions and Expenditures
Subchapter A. General Restrictions (Refs & Annos)

➡➡ § 253.003. Unlawfully Making or Accepting Contribution

(a) A person may not knowingly make a political contribution in violation of this chapter.

(b) A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter.

(c) This section does not apply to a political contribution made or accepted in violation of Subchapter F. [FN1]

(d) Except as provided by Subsection (e), a person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

(e) A violation of Subsection (a) or (b) is a felony of the third degree if the contribution is made in violation of Subchapter D. [FN2]

CREDIT(S)

Amended by Acts 1987, 70th Leg., ch. 899, § 1, eff. Sept. 1, 1987; Acts 1995, 74th Leg., ch. 763, § 2, eff. June 16, 1995.

[FN1] V.T.C.A., Election Code § 253.151 et seq.

[FN2] V.T.C.A., Election Code § 253.091 et seq.

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Prior Laws:

Acts 1951, 52nd Leg., p. 1097, ch. 492, arts. 241, 243.

Acts 1963, 58th Leg., p. 1017, ch. 424, § 108.

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Effective:[See Text Amendments]

Vernon's Texas Statutes and Codes Annotated Currentness
Election Code (Refs & Annos)
Title 15. Regulating Political Funds and Campaigns (Refs & Annos)
Chapter 253. Restrictions on Contributions and Expenditures
Subchapter A. General Restrictions (Refs & Annos)

➡➡ § 253.005. Expenditure from Unlawful Contribution

(a) A person may not knowingly make or authorize a political expenditure wholly or partly from a political contribution the person knows to have been made in violation of this chapter.

(b) This section does not apply to a political expenditure that is:

(1) prohibited by Section 253.101; or

(2) made from a political contribution made in violation of Subchapter F. [FN1]

(c) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

CREDIT(S)

Amended by Acts 1987, 70th Leg., ch. 899, § 1, eff. Sept. 1, 1987; Acts 1995, 74th Leg., ch. 763, § 2, eff. June 16, 1995.

[FN1] V.T.C.A., Election Code § 253.151 et seq.

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Prior Laws:

Acts 1951, 52nd Leg., p. 1097, ch. 492, arts. 238, 241.

Acts 1973, 63rd Leg., p. 1103, ch. 423, §§ 3, 6.

V.A.T.S. Election Code, arts. 14.02, 14.05.

Acts 1975, 64th Leg., p. 2261, ch. 711, §§ 3, 6.

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Effective: June 18, 2005

Vernon's Texas Statutes and Codes Annotated Currentness
Election Code (Refs & Annos)
Title 15. Regulating Political Funds and Campaigns (Refs & Annos)
Chapter 253. Restrictions on Contributions and Expenditures
Subchapter B. Candidates, Officeholders, and Political Committees (Refs & Annos)

➡➡ § 253.031. Contribution and Expenditure Without Campaign Treasurer Prohibited

(a) A candidate may not knowingly accept a campaign contribution or make or authorize a campaign expenditure at a time when a campaign treasurer appointment for the candidate is not in effect.

(b) A political committee may not knowingly accept political contributions totaling more than $500 or make or authorize political expenditures totaling more than $500 at a time when a campaign treasurer appointment for the committee is not in effect.

(c) A political committee may not knowingly make or authorize a campaign contribution or campaign expenditure supporting or opposing a candidate for an office specified by Section 252.005(1) in a primary or general election unless the committee's campaign treasurer appointment has been filed not later than the 30th day before the appropriate election day.

(d) This section does not apply to a political party's county executive committee that accepts political contributions or makes political expenditures, except that:

(1) a county executive committee that accepts political contributions or makes political expenditures shall maintain the records required by Section 254.001; and

(2) a county executive committee that accepts political contributions or makes political expenditures that, in the aggregate, exceed $25,000 in a calendar year shall file:

(A) a campaign treasurer appointment as required by Section 252.001 not later than the 15th day after the date that amount is exceeded; and

(B) the reports required by Subchapter F, Chapter 254, [FN1] including in the political committee's first report all political contributions accepted and all political expenditures made before the effective date of the campaign treasurer appointment.

(e) This section does not apply to an out-of-state political committee unless the committee is subject to Chapter 252 under Section 251.005.

(f) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

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