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VIA EMAIL (public_comment@ethics.state.tx.us)
VIA PRIORITY MAIL

Ms. Natalia Luna Ashley
Executive Director
Texas Ethics Commission
201 East 14th St., 10th Floor
P.O. Box 12070
Austin, Texas 78711-2070

Dear Director Ashley and Members of the Commission,

I write on behalf of the Texas Home School Coalition Association ("THSC") regarding the Board's proposed rule defining the meaning of the term "principal purpose" as used in the Election Code to designate political committees. These comments supplement those that I submitted on September 30 and respond to several issues raised at the Commission's October 5 public meeting.

First, let me respond to Chairman Hobby's statement at the meeting that the Commission "will get this rule done, and then let the courts tell us how to do it." That course of action would be an abdication of the Commission's duty to follow the law. "The elementary rule is that every reasonable construction *must be resorted to* in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added). That obligation is not only the courts', but also this agency's, under longstanding principles of administrative law. *See, e.g.*, *DeBartolo Corp. v. Gulf Coast Trades Council*, 485 U.S. 568, 574 (1988). Not only would it be stunningly irresponsible for the Commission to punt on its obligation to undertake statutory interpretation and enforcement in a manner consistent with governing law, but punting on that obligation in this instance would also invade the speech and associational rights of Texas citizens. Here especially, the Commission's duty is to use its best efforts to ascertain the substance of the law, including limitations on its authority, and proceed accordingly.

Second, that task is not a difficult one: governing case law clearly rejects the view, embodied in the Commission's current regulations and the Proposed Rule, that a group may have more than one "principal purpose" under Texas law. Commissioner Clancy's assertion that the interpretation of the statutory "political committee" definition in *King Street Patriots v. Texas Democratic Party*, 459 S.W.3d 631 (Tex. App.–Austin 2014), and *Sylvester v. Texas Ass'n*

of Business, 453 S.W.3d 519 (Tex. App.–Austin 2014), can be regarded as dicta and therefore ignored is simply wrong.

King Street Patriots involved a facial challenge to the statutory "political committee" definition, which the plaintiffs charged was unconstitutionally vague and overbroad. 459 S.W.3d at 648. The court adopted a limiting construction of the statutory "principal purpose" language to reject that challenge, holding that "the phrase's common meaning limits the reach of the definition" to a purpose which is "[f]irst, highest, or foremost in importance, rank, worth, or degree; chief." *Id*. at 649. By its own terms, that limiting construction necessarily rules out regulation based on a group's *secondary* or *tertiary* purpose. And that limiting construction was integral to the court's decision: had it not read the statutory language that way, the court would have had no basis to conclude that the statutory definition was "sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what was prohibited and provide appropriate guidelines for enforcement." *Id*. (alterations and quotation marks omitted). This is not dicta. *Cf. Casparis v. Fidelity Union Cas. Co.*, 65 S.W.2d 404, 406 (Tex. App.–Austin 1933) (explaining that holdings "essential to the judgment" are not dicta).

Sylvester confirms as much. The appellants in that case argued that the Texas Association of Business ("TAB") subjected itself to regulation as a "political committee" under the statutory definition of that term, 453 S.W.3d at 528—the very same statutory provision and language that is currently contained in the Electoral Code. *See* Tex. Elec. Code § 251.001(12). To avoid constitutional invalidity, the court adopted the same interpretation of the statutory "principal purpose" language as in *King Street Patriots*, holding that "'[p]rincipal' means '[f]irst, highest, or foremost in importance, rank, worth, or degree; chief.'" 453 S.W.3d at 529 n.10. The court went on to explain that TAB did not subject itself to political committee regulation because "its principal purpose was to be an incorporated trade association for the business community." *Id*. at 530. Because *that* was its principal purpose, "accepting political contributions or making political expenditures" could not also be its principal purpose, and it therefore could not be subjected to regulation as a political committee. *Id*. *See also id*. (holding that TAB was not a political committee because "its principal purpose was to be a trade association for the business community"). Again, this was essential to the court's decision and therefore not dicta.

Accordingly, whatever uncertainty there could be over the meaning of the statutory definition of "principal purpose"—in particular, whether a group may have more than one "principal purpose"—has been definitively resolved by the Third Court of Appeals. It has now held twice that a group may have only one principal purpose. That court exercises exclusive appellate jurisdiction over challenges to Commission regulations. *See* Tex. Gov't Code § 2001.038. Its decisions are therefore binding on the Commission. As a matter of stare decisis, that court and those subject to its appellate jurisdiction are bound to reject any broader interpretation of the term, including those contained in the Commission's current regulations and the Proposed Rule, should it be adopted in anything like its current form.

Third, the suggestion of the Commission's general counsel that *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App.–Austin 2008), somehow undermines the holding of *King Street Patriots* and *Sylvester* is false. At issue in *Ellis*, in relevant portion, was whether the statutory definitions

of "political contribution" and "campaign contribution" were unconstitutionally vague and overbroad. *Id*. at 8. In particular, the defendants there argued that, because "a political committee may have purposes or activities other than those subjecting it to regulation under Title 15 of the election code," the challenged definitions may be vague or overbroad with respect to such non-political activities—such as "lobbying, grassroots advocacy, or expressing its views on general issues of policy or public concern"—where "they bear some resemblance to issues arising in a candidate's campaign." *Id*. at 9–10. The court did opine that the Legislature "contemplated that an entity constituting a political committee may have one or more principal purposes other than accepting political contributions and making political expenditures," *id*. at 9, but this is dicta: it is not essential or even relevant to the court's ultimate holdings regarding vagueness and overbreadth. *See id*. at 20–23. In other words, *Ellis* did not require the court to ascertain the breadth of the statutory "political committee" definition, and it therefore did not do so. It contains no holding on the point. *See also Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010) (appeal addressing same issues without purporting to interpret "political committee" definition). That is why neither *King Street Patriots* nor *Sylvester*—each of which directly addressed the breadth of the statutory "political committee" definition—considered *Ellis* to be a relevant authority on that point, and also why the *Sylvester* court was free to reject *Ellis's* dicta that a group may have more than one "principal" purpose.[1]

Finally, the Commission's latest changes to the Proposed Rule's contribution-related provisions do not correct its incompatibility with Texas law. As shown in my previous comments, a group may not be subjected to political committee status based on its acceptance of contributions. While the Commission's revisions do address, in part, the earlier proposal's overreliance on intent-based measures, full compliance with Texas law requires eliminating the contribution-based trigger.

[1] It should be noted that even the dissent in *Sylvester*, which argued that a group could have more than one "principal" purpose, did not cite *Ellis* as supporting that proposition. *See* 543 S.W.3d at 534–35.

It should also be noted that the *Ellis* court lacked the guidance of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which compelled the limiting construction adopted by the *Sylvester* court. *See* 453 S.W.3d at 529–30.

In conclusion, I share the frustration expressed by several members of the Commission that clarifying the Electoral Code's "principal purpose" definition has cost so much in terms of time and effort, with so little to show for it. If the Commission stops trying to resist the imperatives of Texas law and the U.S. Constitution, it can easily craft a rule that is not susceptible to serious legal criticism and that is impervious to legal challenge. And it can do so without undermining timely and meaningful disclosure of campaign-related spending.[2] Again, I thank you for considering these comments and remain available to discuss this matter further with the Commission and its staff.

Sincerely,

Andrew M. Grossman

Counsel to the Texas Home School Coalition Association

[2] *See Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 262 (1986) (recognizing event-based disclosure as "less restrictive than imposing the full panoply of regulations that accompany status as a political committee") (1986). Existing event-based disclosure requirements under Texas law are discussed in my initial comments.