Dear Ms. Ashley and members of the Board,

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" ("Proposed Rule") as used in the Election Code to designate political committees. THSC, as you know, is the plaintiff in a lawsuit challenging the Board's interpretation of that term as violating of the First Amendment.[1] Unfortunately, the Proposed Rule does not remedy that constitutional defect and will not resolve THSC's litigation. Moreover, the Proposed Rule is contrary to clearly established authority applying the First Amendment that is binding on the Board. Accordingly, the Board's enforcement of the Proposed Rule, should it be finalized, could subject the Board's members and potentially its staff to personal liability. On behalf of THSC, I respectfully request that the Board abandon its proposed approach and instead promulgate an interpretation of "principal purpose" that complies with First Amendment requirements, as well as Texas law.

I. Legal Background

A. Statutory Background

Texas campaign-finance law provides for both event- and status-based regulation of individuals and organizations engaging in political speech relating to campaigns. Event-based regulation is triggered by, and applies to, independent expenditures. In particular, a person or organization that makes "direct campaign expenditures in an election" must report those expenditures, as well as any political contributions that it receives. Tex Elec. Code § 254.261(a). A "direct campaign expenditure" is a "campaign expenditure that does not constitute a campaign contribution by the person making the expenditure," and a "campaign expenditure" is a "payment of money or other thing of value" "made by any person in connection with a campaign for an elective office or on a measure." Tex Elec. Code § 251.001(6)–(8). This "includes only those expenditures that 'expressly advocate' the election or defeat of an identified candidate." *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000).

By contrast, status-based regulation applies to a broad swath of conduct by all persons and entities that qualify as or are deemed to be candidates or political committees. For non-candidates, regulation is triggered by "political committee" status. A "political committee" is "a group of persons that has as a principal purpose of accepting political contributions or making political expenditures." Tex Elec. Code § 251.001(12). A "political contribution," as relevant here, is "a contribution to…a 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 § 251.001(3). A "political expenditure," as relevant here, is the kind of "campaign expenditure" described above.

[1] *Texas Home School Coalition Association, Inc. v. Powell*, No. 14-cv-133 (N.D. Tex. filed July 25, 2014).

Political committee status subjects organizations to a host of obligations and restrictions on their speech and association enforced by criminal and civil penalties. For example, they must appoint campaign treasurers, and may not accept contributions totaling more than $500, or spend more than $500 on express advocacy, until a treasurer is appointed. Tex. Elec. Code § 253.031(b). They cannot accept certain contributions from out-of-state-political committees or accept most contributions in cash. Tex. Elec. Code §§ 253.032(a), 253.033(a). Violations of any of these or other provisions are criminal offenses. Tex. Elec. Code §§ 253.003–005.

Political committee status subjects an organization to heavy compliance, accounting, and reporting burdens. Organizations must track all reportable activity, including all contributions, all expenditures, and a variety of details regarding contributions and expenditures. Tex Elec. Code §§ 254.031(a)(1)–(13). They are obligated to use their "best efforts" to track down information regarding contributions and expenditures, Tex Elec. Code § 254.0312(a), and the law is unclear as to whether they may even accept contributions if they are unable to obtain, for example, information about a contributor's occupation. *See* Tex Elec. Code § 254.151. They must file "regular reports" twice per year, "additional reports" twice per year or more for each election in which the committee is involved, and special reports, on expedited timelines, near elections. Tex Elec. Code §§ 254.153–54, 254.039. And they must ensure that their solicitations for contributions comply with state regulations. Tex Elec. Code § 254.0312(b).

These detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer, impose substantial organizational and administrative costs, as well as the risk of civil and criminal penalties for noncompliance. Tex Elec. Code §§ 254.041–042. They also impinge First Amendment rights, by conditioning the right to engage in political speech on burdensome regulatory compliance and on disclosures that may lead to unwanted publicity or even harassment and retaliation, while providing relatively little information of value to the public.

B. Regulatory Background

The application of all of these burdens turns on the estimation of an organization's "principal purpose," a term that is not defined in Texas statutory law. The interpretation of that term is the subject of the Proposed Rule.

The Commission's current interpretation is contained in TEC Rule § 20.1(2). It provides that a group "may have more than one principal purpose" and that a group has a principal purpose "of accepting political contributions or making political expenditures" when "that activity is an important or a main function of the group." For both contributions and expenditures, the regulation sets a threshold of 25 percent of annual contributions or expenditures above which groups are considered to be political committees. Whether a contribution counts as a "political contribution" turns on such things as "the content of the group's public statements regarding its fundraising efforts, goals, or

support of or opposition to candidates, officeholders, or measures;" "the group's government filings and organizational documents, including mission statements;" and "the group's other activities that are unrelated to accepting political contributions or making political expenditures."

Likewise, the calculation of a group's political expenditures does not involve a simple tallying of its political expenditures relative to non-political ones. Instead, the current rule directs a group to also include: "the value of the time spent by the group's employees or volunteers on activities related to making political expenditures compared to other activities;" and "the amount of money and in-kind donations spent on political expenditures compared to other expenditures." As to this latter, a group is direct to count "the proportional share of administrative expenses attributable to political expenditures," including employee compensation and benefits, contractor payments, rent, office expenses, and computer equipment and services. The rule includes an example of this calculation: "if the group sends three mailings a year and each costs $10,000, if the first two are issue based newsletters and the third is a direct advocacy sample ballot, and there were no other outside expenditures, then the proportion of the administrative expenses attributable to political expenditures would be 33%."

C. The Proposed Rule

The Proposed Rule retains this general approach, including the 25-percent thresholds, while making a few minor adjustments to the calculation of a group's expenditure threshold in response to challenges to the existing rule. In particular, it removes volunteer services as an expenditure item and provides that a "group may maintain specific evidence of administrative expenses related only to political expenditures or only to nonpolitical expenditures" and exclude those expenses from the proportion calculation used to attribute administrative expenses and instead apportion them according to their actual amounts. Other changes include clarifying that the denominator in the threshold calculation includes only "annual expenses" and not also "other resources"; abandoning the proportional approach with respect to employee compensation; and enumerating all of the categories of administrative expenses that must be included in calculating the expenditure threshold.

II. The Proposed Rule Violates Texas Law

A. The Proposed Rule Is Contrary to the Plain Meaning of the Election Code

The expansive interpretation of the term "principal purpose" adopted by the Commission in its current rule and reflected in the Proposed Rule is contrary to Texas law because it ignores the plain meaning of the Election Code's words. Texas follows the plain-meaning approach to statutory interpretation. "Undefined terms in a statute are typically given their ordinary meaning." *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180–81 (Tex. 2013). See also Texas Gov't Code § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common us-

age."). To determine the ordinary meaning of a statutory term, Texas courts consider dictionary definitions. See *$1,760.00 in U.S. Currency*, 406 S.W.3d at 181; *Morton v. Nguyen*, 412 S.W.3d 506, 512 (Tex. 2013); *City of Hous. v. Bates*, 406 S.W.3d 539, 547 (Tex. 2013); *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 171–72 (Tex. 2013); *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 656 (Tex. 2012); *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 (Tex. 2012). Indeed, the Texas Supreme Court has espoused a "usual preference for relying on the common meaning of statutory terms," particularly when those terms are "common words that are used frequently in everyday conversation and writing." *Id.*

"Principal" is surely such a word, known well to the Legislature in its ordinary sense, and that ordinary sense precludes the Commission's interpretation. *Black's Law Dictionary*, which Texas courts frequently consult, defines "principal" as "chief; primary; most important." *Black's Law Dictionary* (10th ed. 2014). This particular meaning, limited to a single leading thing, is reflected across the field of ordinary legal usage. A "principal creditor" is one "whose claim or demand greatly exceeds the claims of other creditors." *Id.* A "principal action" is the plaintiff's "main demand." *Id.* A "principal contract" is the main one, "giving rise to an accessory contract, as an agreement from which a secured obligation originates." *Id.* A "principal obligation" is the "primary" one "that arises from the essential purpose of the transaction between the parties." *Id.* A "principal officer" is the one "with the most authority of the officers being considered for some purpose." *Id.* A "principal place of business" is "[t]he place of a corporation's chief executive offices." *Id.* A "principal receiver" is the one "who is primarily responsible for the receivership estate." *Id.* And a "principal right" is the main one, "to which has been added a supplementary right in the same owner." *Id.* No definition contained in *Black's* is consistent with the Commission's position that a "principal" purpose is one that is merely "an important or a main function."

Non-legal dictionaries equally reject the Commission's position. Merriam-Webster Online defines "principal" as "most important, consequential, or influential: chief <the principal ingredient> <the region's principal city>."[2] This is hardly novel. Webster's 1913 dictionary defines "principal" as "[h]ighest in rank, authority, character, importance, or degree; most considerable or important; chief; main." Likewise, *Webster's Third New International Dictionary* (1971) defines "principal" as "most important, consequential, or influential" and offers an illuminating usage example by John Steinbeck: "a chicken stew in which the principal ingredient was not chicken but sea cucumber."

Here it is the Commission that is peddling sea cucumber as chicken stew. In its view, an organization whose principal purpose is unrelated to electoral politics may nonetheless be deemed and regulated as a political committee, forced to shoulder heavy regulatory burdens as a result of engaging in political

[2] Available at http://www.merriam-webster.com/dictionary/principal.

speech incidental to its principal purpose. Simply calling a trade association or an advocacy group or any other civic organization a "political committee" does not make it so. The Legislature used the words "principal purpose," and those words must be accorded their ordinary meaning. If an organization's principle purpose is something other than "accepting political contributions or making political expenditures," then it cannot be regarded as a political committee.

B. The Proposed Rule Conflicts with Governing Interpretations of Texas Law

No speculation is required to conclude that Texas courts would reject the Commission's interpretation of "principal purpose" as contrary to common usage, *because they already have*. The Third Court of Appeals, which exercises exclusive appellate jurisdiction over challenges to Commission regulations, *see* Tex. Gov't Code § 2001.038, addressed that term in two recent cases. In *King Street Patriots v. Texas Democratic Party*, it rejected a vagueness and overbreadth challenge to the statutory definition of "political committee" on the ground, as a matter of common meaning, it is limited to groups with a "purpose" (which it defines as "the object toward which one strives or for which something exists; goal; aim") that is "principal" ("first, highest, or foremost in importance, rank, worth, or degree; chief"). 459 S.W.3d 631, 649 (Tex. App.–Austin 2014). Needless to say, a group's secondary or tertiary purpose—no matter how significant or important it may be—is not its "first" and so cannot be "principal."

The Third Court of Appeals repeated that conclusion, even more emphatically, in *Sylvester v. Texas Association of Business*, 453 S.W.3d 519 (2014). At issue were election-related mailers sent by a nonprofit corporation prior to the 2002 general election. The court rejected the argument that the nonprofit's actions and expenditures could show that it had "a principal purpose of accepting political contributions or making political expenditures," on two independent grounds. First, it adopted the same limiting construction as in *King Street Patriots* so as to avoid "an affront to the First Amendment"—an effective speech ban for certain classes of organizations.[3] *Id*. at 529. Under that limiting construction, there could be no fact issue regarding the nonprofit's principal purpose, given that the undisputed evidence showed that "its principal purpose was to be an incorporated trade association for the business community." *Id*. at 529–30. Second, the court recognized that a broader definition admitting multiple purposes was incompatible with the Election Code as it existed at the time. *Id*. at 529. While the 2002 Code contained the same definition of "political committee" that it does today, *id*. at 523 n.4, its provisions regulating

[3] A limiting construction is a matter of state law. *See Stenberg v. Carhart*, 530 U.S. 914, 944 (2000). To be clear, the court did not address whether a state could, in the abstract, adopt a broader definition of "principal purpose" admitting multiple purposes, holding instead that Texas could not do so because of other provisions of its Election Code. *See* 453 S.S.3d at 529 n.11.

corporations were quite different, with its "overall scheme treat[ing] corporations and political committees as distinct types of entities and subjects them to incompatible provisions." *Id*. at 529. Thus, an interpretation admitting multiple "principal purposes" would impose inconsistent requirements on certain entities and would therefore be "inconsistent with the framework of the Election Code's overall scheme." *Id*. The Legislature having declined to amend the Code's "political committee" definition, even as it has substantially revised other provisions, the same meaning prevails under the current version.

The *Sylvester* court was well aware of the import of its decision, given Judge Jones's dissent. Judge Jones forcefully took issue with the majority's limiting construction of the Election Code's "political committee" definition, arguing that "the only reasonable construction of [the "principal purpose"] language is that the legislature intended to leave open the possibility that a group of persons could have more than one principal purpose." *Id*. at 534 (Jones, J., dissenting). On that basis, Judge Jones would have reversed the trial court's judgment for the nonprofit, because its evidence showed only that "*one* of [its] principal purposes is to promote the interests of the business community," not that it could not have an additional principal purpose relating to electoral politics. *Id*. The majority, however, was unconvinced, concluding that its limiting construction was required to comply with the First Amendment. *Id*. at 529 n.11.

In short, the Commission's broad interpretation of "principal purpose" cannot be reconciled with the definition of that term adopted by the Third Court of Appeals in both *King Street Patriots* and *Sylvester*.

C. The Proposed Rule Improperly Premises Political Committee Status on the Acceptance of Contributions

The Proposed Rule unaccountably discards an element from the Election Code's definition of "campaign contribution" and, as a result, adopts an impermissible interpretation of "political committee" that sweeps up groups based on contributions that they have received. The "campaign contribution" definition, which is incorporated into the definition of "political contribution" and thereby that of "political committee," has three elements: "'Campaign contribution' means [1] a contribution [2] to a…political committee [3] 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 § 251.001(3). The Proposed Rule, however, identifies political contributions, for the purpose of calculating the contribution threshold, based solely on two elements: (1) the fact of the contribution itself and (2) "the reasonable expectation of the contributor as to how the contribution will be used"—reading out of the statute the additional element that a contribution can be a "campaign contribution" only if it is made "to a…political committee."

But the Commission "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous." *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). In particular, it

must "presume the Legislature selected the statute's language with care, choosing each word for a purpose and purposefully omitting words not chosen." *City of Dallas v. TCI West End, Inc.*, 463 S.W.3d 53, 55 (Tex. 2015). Yet that is exactly what the Proposed Rule does not do, instead presuming that a contribution and some indicia of intent alone are sufficient to constitute a political contribution and can, in turn, compel the recipient of that contribution to assume political committee status.

Giving full effect to the statutory text precludes any regulation that forces a group that is not *organized* as a political committee to assume political committee status based on its acceptance of contributions. In other words, contrary to the Proposed Rule's approach, a group cannot be deemed a political committee just because it has accepted some threshold amount of contributions. That is because contributions to such groups cannot ever be "political contributions," given that the group is not (as required for a contribution to qualify as a political contribution) a political committee at the time it accepts them. Accordingly, with respect to contributions, a group may assume political committee status by declaring that it has "a principal purpose [of] accepting political contributions"—which would render contributions to the group eligible to be political contributions, depending on the intent with which they were offered or given—but it cannot be forced to adopt that status based on the contributions that it has accepted.

The Legislature adopted this approach for good reasons. One is to avoid the First Amendment complications inherent in premising regulation based solely on intent-based measures. The Supreme Court recognized in *Buckley v. Valeo* that triggering regulation based on "intent" would "offer[] no security for free discussion." 424 U.S. 1, 43 (1976). Applying *Buckley*, it subsequently held that "an intent-based test would chill core political speech" by rendering the application of regulation in every instance a fact question, subject to "burdensome, expert-driven inquiry, with an indeterminate result." *FEC v. Wis. Rt. To Life, Inc.*, 551 U.S. 449, 468–69 (2007) (Roberts, J.). Basing political committee status solely on intent-based indicia raises the same First Amendment infirmities, and it is quite appropriate that the Legislature acted to "provide a safe harbor for those who wish to exercise First Amendment rights." *Id*. at 467. Indeed, as shown below, that limitation is required.

Second, this approach is sufficient to reach the groups that the Legislature sought to regulate. Political contributions, as relevant here, are "offered or given with the intent that [they] be used in connection with a campaign for elective office or on a measure." Tex. Elec. Code § 651.001(3). Any group that accepts a substantial amount of actual political contributions will inevitably make a commensurate amount of political expenditures, subjecting it to regulation on equal terms with other groups similarly active in electoral politics. Indeed, this approach is perfectly mirrored in the Election Code's event-based reporting regime, which relies on political expenditures alone to trigger reporting obligations with respect to both political expenditures *and* political contributions. *See* Tex. Elec. Code § 254.261(a). Departing from this ap-

proach, as the Proposed Rule does, therefore creates a discontinuity in Texas's campaign-finance law. Any court reviewing this statutory language would be bound to conclude that the Legislature meant what it said and, in addition, that it did not mean to adopt disparate approaches in parallel provisions.

In sum, the Commission has no legal basis to rewrite the Election Code, a power that is solely the Legislature's. The Commission may not depart from the plain meaning of the Code's text by forcing groups to assume political committee status based on their acceptance of contributions.

D. The Proposed Rule Adopts an Arbitrary Calendar-Year Baseline To Ascertain a Group's Principal Purpose

The Proposed Rule adopts an arbitrary one-calendar-year baseline for calculating contribution and expenditure thresholds that reaches groups who do not "ha[ve] as a principal purpose accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12). This baseline does not correspond with any typical pattern of political engagement, and, as a result, a group that devotes as little as 5 or 6 percent of its total expenditures to engaging in electoral politics can be swept up in burdensome regulation. The Commission's approach both conflicts with the statutory language, which reaches only groups that have electoral politics as their principal purpose, and is illogical, arbitrary, and capricious.

The Electoral Code regulates expenditures in Texas political campaigns. But Texas political campaigns do not correspond with calendar years. At the state level, executive officers are elected every four years, senators are elected every four years, and representatives are elected every two years. Accordingly, a group that is engaged in state-level political activities—but without that being anywhere near its principal purpose—is not likely to have the same proportion of political expenditures from year to year. Instead, its political expenditures are likely to be higher in years when there are electoral races relevant to its mission and lower—or perhaps even zero—or other years. For groups that focus on activities in the executive branch of state government, one year of relatively vigorous political spending may be followed by three years with no expenditures at all.

The Proposed Rule ignores this reality in favor of the least likely scenario: a presumption that a group's expenditures in any single calendar year reveal its primary purpose. Thus, under the Proposed Rule's approach, a law-and-order civic association that devotes a bit over one quarter of its budget to political expenditures in an attorney general campaign will be deemed a political committee—even if it makes no political expenditures over the next three years and its total political spending over that period amounts to just 5 or 6 percent of its budget.

The Commission's adoption of a one-calendar-year baseline is completely arbitrary. It corresponds to no regular electoral cycle or typical pattern of electoral politics. Instead, the Commission appears to have manipulated the base-

line in an attempt to ensnare in regulation additional groups that do not, in fact, have the principal purpose of engaging in electoral politics. Selecting a shorter baseline accomplishes that goal because it reduces the amount of non-political spending that can be used to balance out political expenditures in calculating spending proportions. For example, a one-month baseline would reach even more groups, based on their spending during the month before the election, while excluding from consideration the fact that their political spending is likely much less during other months. The Commission's one-year baseline functions in precisely this fashion and is no less arbitrary, with respect to the rhythms of Texas electoral politics, than if the Commission had chosen to focus on expenditures during a particular month or quarter. In this respect, the Proposed Rule's approach is completely disconnected from any reasonable interpretation of the statutory term "political purpose."

The effect of this arbitrary baseline is to impose burdensome regulation on issue-oriented groups that the Legislature never intended to subject to such regulation. For example, a group that focuses on education reform might perceive the need, in the month or so before an election with major consequences for how the Assembly approaches education policy, to engage in additional political expenditures so as to advance its policy-oriented mission. In the Commission's view, those additional expenditures—if they bring the group above the 25-percent threshold for the calendar year—transform the group's primary purpose and render it a political committee. In reality, however, the group's mission and general operations are unchanged, but for the greater regulatory burden it must now bear.

If the Legislature sought to regulate such groups as political committees, it would have said so. Instead, it used the term "principal purpose" and provided an alternative event-based disclosure regime that is tailored for groups that lack the principal purpose of engaging in electoral politics. The Commission may not revisit the Legislature's choice by adopting an arbitrary interpretation of "principal purpose" divorced from the statutory text and reality.

E. The Proposed Rule's Thresholds Include Items that Are Neither Political Contributions or Political Expenditures

Finally, the Proposed Rule is inconsistent with the Electoral Code because it takes account of things that are neither political contributions nor political expenditures in determining political committee status. As described above, the Code's "political committee" definition refers to both "political contributions" and "political expenditures," both terms that are defined by the Code.

In particular, the relevant kind of "political contribution" is one "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 § 251.001(3). The relevant intent is the contributor's, and an intent requirement requires evidence that "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985) (quoting Restatement (Second) of

Torts § 8A (1965)). Accordingly, a contribution is a "political contribution" when the contributor desires that the recipient group use it "in connection with a campaign for elective office or on a measure" (i.e., as relevant here, for express advocacy, *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000)) or is substantially certain that it will be so used.

The Proposed Rule, by contrast, deems "political contributions" based on the "reasonable expectation" of the contributor—a lower, or at least more vague, standard. It declares that this standard must be applied through "analysis" of such extrinsic factors as "the content of the group's public statements regarding its fundraising efforts, goals, or support of or opposition to candidates, officeholders, or measures"; "the group's government filings and organizational documents, including mission statements"; and "the group's other activities that are unrelated to accepting political contributions or making political expenditures." Under this approach, a contribution made by a person who is not aware that a group engages or intends to engage in electoral politics or who is willing to attest that he did not give his contribution "with the intent that it be used in connection with a campaign for elective office or on a measure" could still be counted as a political contribution for purposes of calculating the group's contribution threshold. In this way, the Proposed Rule improperly counts things that are not political contributions in calculating a group's contribution threshold.

Likewise, the Proposed Rule also counts things that are not political expenditures in calculating a group's expenditure threshold. As relevant here, a political expenditure is one for express advocacy, *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000) (holding that "a 'direct campaign expenditure'… includes only those expenditures that 'expressly advocate' the election or defeat of an identified candidate").[4] Yet the Proposed Rule requires that all manner of expenditures that are not express advocacy—including things like proportional shares of office expenses, IT expenses, etc.—be counted as political expenditures in calculating the threshold. This directly contravenes the statutory text.

Even assuming for the sake of argument that, despite *Osterberg*, it is permissible to require groups to count expenditures that are merely in service of express advocacy, the Proposed Rule still goes beyond that, directing groups to include the "proportional share of administrative expenses" irrespective of whether express advocacy is their but-for cause. For example, the Proposed Rule would have a group that spends 20 percent of its budget to prepare and air express advocacy advertisements also include a 20-percent "proportional share" of its "office expenses," even if its office expenses are fixed irrespective of any political spending.

[4] Expenditures that are campaign contributions by the person making the expenditure, as well as officeholder expenditures, may also properly be counted as political expenditures. *See* Tex. Elec. § 251.001(5)–(10).

III. The Proposed Rule Is Unconstitutional

In addition to contravening Texas law, the Proposed Rule also violates the First Amendment to the United States Constitution.

A. The Proposed Rule's Thresholds Are Unconstitutional

The First Amendment prohibits any law "abridging the freedom of speech." U.S. Const. Amend. I. That includes speech relating to matters of politics and public policy, as well as expenditures to fund such speech. For that reason, disclosure requirements are subject to "exacting scrutiny," under which regulation must "promote[] a compelling interest and [be] the least restrictive means to further the articulated interest." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). The Proposed Rule's imposition of "political committee" on groups whose primary objective is not influencing political campaigns fails to satisfy that standard, particularly given that Texas's less-onerous event-based disclosure regime applies to such groups.

The cornerstone of modern First Amendment jurisprudence in the campaign-finance area is the U.S. Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), passing on the constitutionality of the Federal Election Campaign Act. As relevant here, *Buckley* held that independent organizations not engaged in campaign advocacy as their "major purpose" cannot be subject to the complex and extensive regulatory requirements that accompany designation as a political committee. *Id*. at 79. Accordingly, to avoid overbreadth concerns, the *Buckley* Court construed the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," while excluding groups primarily engaged in "issue discussion." *Id*.

The Court fleshed out *Buckley's* "major-purpose rule" in *Massachusetts Citizens for Life v. FEC*, a challenge by a nonprofit corporation (MCFL) to FECA provisions requiring it to establish and submit to regulation as a political committee in order to engage in occasional express advocacy in support of pro-life candidates. 479 U.S. 238 (1986). The nonprofit's "major purpose" was not the nomination or election of a candidate, the Court explained, because "[i]ts central organizational purpose is issue advocacy" and its express advocacy was not "so extensive" relative to its overall spending as to indicate a "primary objective [of] influenc[ing] political campaigns." *Id*. at 252 n.6, 262. Nonetheless, the recordkeeping and reporting burdens of registration, the Court recognized, "create a disincentive for such organizations to engage in political speech" and "make engaging in protected speech a severely demanding task." *Id*. at 254, 256. Also relevant, the Court observed, was that other statutory provisions would require MCFL to disclose political contributions and expenditures. *Id*. at 262. Thus, "[t]he state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id*. Accordingly, the burdens of political committee status were not justified by any compelling state interest and could therefore not be constitutionally applied to

MCFL and similarly situated organizations, but only those whose "major purpose may be regarded as campaign activity." *Id*. at 262–63. *See also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) ("*WRTL*") (rejecting argument that First Amendment was satisfied where corporation could speak through an associated political committee because political committee status "impose[s] well-documented and onerous burdens, particularly on small nonprofits").

The Proposed Rule's attempt to subject issue-oriented organizations like THSC to political committee status is indistinguishable, in relevant respects, from the regulatory approaches rejected in *Buckley* and *MCFL*. As shown above, the Commission's approach imposes substantial organizational and financial burdens on political committees, including onerous recordkeeping and reporting requirements.

In fact, those burdens are greater than those at issue in *Buckley* and *MCFL*. For example, as described above, whereas FECA at that time required disclosure only of certain political contributions and certain political expenditures, the Proposed Rule appears to require disclosure of items that are actually neither. FECA at that time required only quarterly reports, 424 U.S. at 63, whereas Texas law requires that a political committee file eight or more reports, each containing more information than was required by FECA, during each election year that it is active. Tex. Elec. Code §§ 254.153–54, 254.039. Even FECA's dollar-figure trigger for reporting contributions was twice as high (in 1974 dollars!) than Texas' $50 trigger of today. § 254.031(a)(1). *MCFL* found it to be excessive that the corporation in that case, if made to speak through a political committee, would have had to: register with the government and keep its registration up to date; appoint a treasurer; ensure contributions are reported to the treasurer; keep records of all contributions, contributors, and political expenditures; file quarterly reports and election reports containing a variety of financial information; and limit solicitations for political contributions to its members. 479 U.S. at 253–54. But for the last, each one of those burdens are contained in Texas law. Tex. Elec. Code § 252.001–003 (requiring registration and appointment of campaign treasurer); §§ 252.012–13; 254.159–60 (requiring committee to report changes in status of registration); § 254.001 (requiring campaign treasurer to keep records of all contributions, contributors, and political expenditures); §§ 254.031(a)(1)–(4), 254.153–54, 254.039 (requiring regular reports and election reports containing a variety of financial and other information). In fact, Texas law imposes additional burdens, such as the contribution, expenditure, and transfer bans, §§ 254.031(b)–(c), 253.037, and broader recordkeeping and reporting requirements for expenditures, § 254.031(a)(4).

These regulatory requirements "create a disincentive for such organizations to engage in political speech." *MCFL*, 479 U.S. at 254. The logic is straightforward: "[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such du-

ties require a far more complex and formalized organization than many small groups could manage." *Id*. at 254–55. Faced with the burdens at issue in *MCFL*, the Court concluded that "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id*. at 255. That conclusion is inescapable here, where the burdens of political committee status under Texas law are more severe.

Indeed, that was the conclusion of the Seventh Circuit when it recently applied the major-purpose rule to strike down a nearly identical Wisconsin regulatory scheme also adopted in the wake of *Citizens United*. Just as the Commission is attempting here, that state's campaign-finance regulator acted "to bring all independent groups—including newly liberated independent advocacy groups that operate in the corporate form—under the umbrella" of existing Wisconsin campaign-finance law, which resembles Texas' in relevant respect. *Wis. Right to Life, Inc.*, *v. Barland*, 751 F.3d 804, 838 (7th Cir. 2014) ("*Barland II*"). That application of state law, the Court found, "suffers from the same kind of overbreadth as the federal statute at the time of *Buckley*." *Id*. at 839. While the court recognized that "disclosure requirements in the campaign-finance context serve important governmental interests," application of "full-blown PAC duties" to issue-oriented organizations that only occasionally engage in express advocacy imposed a disproportionate burden on their exercise of their First Amendment rights. *Id*. at 841–42. Accordingly, the court limited application of the disclosure regime to "organizations engaged in express election advocacy as their major purpose." *Id*. at 842.

That result is consistent with the reasoning of other circuits to consider the issue. *See also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1155 (10th Cir. 2007) (applying major purpose rule to adopt narrowing construction of state law); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (applying major purpose rule to hold state's definition of "political committee" facially invalid); *N.M. Youth Organized v. Herrara*, 611 F.3d 669, 679 (10th Cir. 2010) (applying major purpose rule to find that state disclosure law was unconstitutional as applied to issue-oriented organizations); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1009–10 (9th Cir. 2010) (upholding state's definition of "political committee" that applied to groups with a "primary purpose" of "supporting or opposing candidates or ballot propositions"); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876–77 (8th Cir. 2012) (applying major purpose rule to enjoin reporting requirements for issue-oriented organizations).

Moreover, the Proposed Rule's regulatory triggers impose burdens beyond disclosure, as well, including limitations on funds transfers and acceptance of certain contributions. This is specifically the kind of substantive burden on speech and association that courts have cited as justifying application of *Buckley's* major purpose rule. *See Barland II*, 751 F.3d at 839–40; *Madigan*, 697 F.3d at 488; *Human Life*, 624 F.3d at 1009–10.

Finally, it should not be surprising that the Seventh Circuit's decision in *Barland II* is directly applicable here, because both cases involve regulators' efforts to extend regulation to the new speakers empowered by *Citizens United*. As the Seventh Circuit explained, the only tool at the disposal of Wisconsin regulators was full-blown political-committee status, because Wisconsin statutes made no allowance for less onerous requirements. 751 F.3d at 841–42. Believing there to be a need for regulation of issue-oriented groups, and "[w]ith the legislature silent, the [Wisconsin] Board cobbled together a regulatory response"—treating everyone as a political committee. *Id*. at 842. The situation, however, is different in Texas, in that the Legislature has crafted a lighter, event-based regulatory scheme for issue-oriented organizations engaging in occasional express advocacy. Yet the Commission, like its counterpart in Wisconsin, is evidently frustrated by these organizations' ability to participate in electoral politics without being subject to its complete regulatory oversight. Nonetheless, the Commission's response, also like that of its counterpart in Wisconsin, is constrained by its statutory authority and by the bounds of the U.S. Constitution.

B. The Proposed Rule Is Unconstitutionally Vague

By employing non-objective factors to trigger regulation of speech, the Proposed Rule "raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." *Buckley*, 424 U.S. at 77–78 (footnote omitted).

Buckley requires that application of campaign-finance requirements, including reporting requirements, to political speech turn on objective factors to avoid chilling First Amendment-protected conduct. At issue was FECA Section 608(e)(1), which purported to limit "any expenditure…relative to a clearly identified candidate." *See id.* at 41–42. Because "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech," the law would be impermissibly vague absent a limiting construction. *Id*. at 41. That "constitutional deficienc[y]," the Court held, "can be avoided only by reading s. 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate," *id*. at 43—in other words, express advocacy. All other communications, or "issue advocacy," fell outside the reach of the Act. *Id*.

The Court applied the same limiting construction, for the same reason, to FECA Section 434(e), which imposed criminal penalties for failure to disclose expenditures made "for the purpose of…influencing" the nomination or election of candidates for federal office, construing it "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate"—again, express advocacy. *Id*. at 77, 80 (footnote omitted). And, as discussed above, to avoid vagueness and overbreadth problems, the Court also limited FECA's definition of "political committee" to "only encompass organizations that are under the control of a candidate or the ma-

jor purpose of which is the nomination or election of a candidate," not "issue discussion." *Id*. at 79.

The Supreme Court reaffirmed the constitutional necessity of objective standards for application of campaign-finance regulation in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (Roberts, C.J.), which rejected an intent- and context-based approaches to identifying advocacy subject to regulation. Instead, it explained, any standard must be objective "to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id*. at 469. On that basis, the Court reaffirmed the constitutional necessity of *Buckley's* core distinction between issue and express advocacy. *Id*. at 469–70.

That is the clear line that the Commission's regulatory approach obliterates. In the Commission's view, the "purpose" and "intent" limitations contained in the Election Code's definitions of "political committee" and "campaign contribution" do not simply refer to express advocacy, but some other factor or set of factors. *See* Tex. Elec. Code § 251.001(12) ("'Political committee' means a group of persons that has as a *principal purpose accepting political contributions or making political expenditures*."); § 251.001(3) ("'Campaign contribution' means 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*.") (emphases added). As shown above, the Commission interprets these provisions to reach organizations whose major purpose is not campaign advocacy through express advocacy, to reach contributions to such organizations that are not earmarked for express advocacy, and to reach expenditures that are not for express advocacy. Issue-oriented organizations therefore face the risk of investigation and criminal and civil penalties for undertaking advocacy that the State believes—based on subjective intent, subjective reception, or other "amorphous considerations of intent and effect," *WRTL*, 551 U.S. at 469—trigger regulatory requirements.

By attempting to blur the edges of regulated conduct, the Commission's approach, just like the ones rejected in *WRTL*, "will unquestionably chill a substantial amount of political speech." *Id*. The fundamental problem, as the Fourth Circuit explained in rejecting application of a similarly amorphous standard in North Carolina law, is that "[t]his sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech." *Leake*, 525 F.3d at 283. So long as it remains in place, "political speakers would be left at sea, and, worse, subject to the prospect that the State's view of the acceptability of the speaker's point of view would influence whether or not administrative enforcement action was initiated" *Id*. at 285.

Indeed, it was for precisely this reason—to avoid serious First Amendment infirmity and vagueness concerns—that the *King Street Patriots* court adopted a limiting construction of the Electoral Code's "political committee" definition.

459 S.W.3d at 649. *See also Sylvester*, 453 S.W.3d at 529 ("Were we to interpret 'principal purpose' in the definition of 'political committee' as suggested by appellants…, the definition would be an affront to the First Amendment."). The Commission's failure to heed that decision's logic potentially subjects its members and its staff to personal liability should they attempt to invade any party's clearly established rights through enforcement of the Proposed Rule. *See* 42 U.S.C. § 1983.

C. The Proposed Rule Cannot Be Constitutionally Applied to an Organization Like THSC

As described above, the Proposed Rule would ensnare organizations that, over the course of the relevant political cycle, spend only a tiny proportion of their total budgets on regulated political activities. This defect in the Commission's approach also has constitutional significance.

Political expenditures amounting to just a few percent of total expenditures over the relevant time period do not reflect any kind of significant purpose at all and are certainly not "so extensive that the organization's major purpose may be regarded as campaign activity"—as the First Amendment requires for a group to be subjected to political committee requirements. *MCFL*, 479 U.S. at 262. Whatever their facial validity, these provisions of the Electoral Code therefore cannot be constitutionally applied to a group like THSC, whose political expenditures over the course of a two-year election cycle amount to about 12 percent of its total expenditures. Even assuming for the sake of argument that a state may impose political committee requirements on an organization because it devotes 25 percent of its total expenditures to express advocacy, that still does not mean that the Commission may apply that threshold on an annual basis, where doing so results in the law's extension to groups that are constitutionally exempt from such regulation. The Supreme Court's focus in *Buckley* and *MCFL*, after all, was the actual purpose and actual activities of groups being regulated, not some artificial measure of their political engagement. There is no reason to believe that the court will be willing to accept such a contrivance in an as-applied challenge to the Commission's regulatory scheme.

IV. The Board Should Comply with the First Amendment and Texas Law

Out of respect for the citizens of Texas, the Texas legislature, and the civic organizations that are the backbone of civil society, the Commission should reverse course and adopt a new approach that complies with both Texas and federal law. That approach should include the following features:

1. **Comply with the major purpose rule.** Only organizations that spend half or more of their total budget on express advocacy should be eligible to be forced into political committee status.

2. **Recognize that an organization can have only one "principal" purpose.** The Commission should not resist common English usage, much less legislative intent and judicial interpretation on this point.

3. **Recognize that contributions cannot force an organization into political committee status**.

4. **Allow groups to choose a reasonable baseline for ascertaining principal purpose that corresponds to their political engagement**. Rather than subject all groups to an arbitrary one-year baseline that corresponds to no relevant political cycle and discourages issue-oriented groups from vigorously engaging in political speech in an election when their issues are at the fore, the Commission should give groups the option of choosing a baseline of one to four years. After all the purpose of political committee regulation is not to serve as a trap for the unwary or to regulate more groups merely for the sake of doing so, but to promote disclosure among those groups that are actually organized for the purpose of engaging in electoral politics. For all others, event-based disclosure (as the Electoral Code already provides) is sufficient to inform the public, without unnecessarily burdening protected speech and association.

5. **Comply with the statutory definitions of "political contribution" and "political expenditure."** With respect to groups engaging in only speech expenditures (i.e., direct campaign expenditures), political contributions are only those made to a group that is already regulated as a political committee and that are made with the specific intent of funding express advocacy. As a matter of Texas law, only express advocacy expenditures can be subject to regulation. As a matter of federal law, the Commission may be able to reach other expenditures undertaken in service of express advocacy, as determined through a but-for test. There is no authority, however, to reach other expenditures, on a proportional basis or otherwise. Attempting to reach such expenditures is not only overbroad but also bad policy, because it will result in confusion and uncertainty among regulated parties, who may be unable to determine until the end of the calendar year how much of their spending counts toward the expenditure threshold.

6. **Strive for clarity.** The Commission is unique in that it "has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'"[5] Its task is not regulating the production of widgets, but speech, and regulating speech demands a keen sensitivity to the evil of vagueness and uncertainty. In this area, intent- and context-based rules are verboten, as are broad commands of "rea-

[5] *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C.Cir. 1981)).

sonableness" and multi-factor assessments. When a person hesitates to speak or to associate with others due to uncertainty in Commission regulations, the Commission has failed.

7. **Eliminate the current regulation's consideration of volunteer activities.** As a logical matter, it is unclear why volunteer activities would be counted as *expenditures* in any instance. In addition, volunteer services are subject to the Electoral Code's "nonreportable personal service" exclusion. Tex. Elec. Code. § 254.033. Moreover, regulation of voluntary association for expressive purposes raises serious First Amendment questions.

To conclude, I thank you for considering these comments and would be pleased to discuss this matter further with the Commission and its staff.

Sincerely,

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