No. 05-13-01010-CR

IN THE COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

DALLAS, TEXAS

DAVID FREDERICK CARY,
Appellant,
v.
THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE 366TH JUDICIAL DISTRICT COURT
OF COLLIN COUNTY, TEXAS

BRIEF OF THE WYOMING LIBERTY GROUP AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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**Motion for pro hac vice admission to be filed*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Wyoming Liberty Group is a nonpartisan public policy research organization, advancing the principles of liberty, free markets, and limited government. It is a tax exempt, non-profit educational organization operating under Section 501(c)(3) of the Internal Revenue Code. The Wyoming Liberty Group's mission is to prepare citizens for informed, active and confident involvement in government and to provide a venue for understanding public issues in light of constitutional principles and government accountability. It has an interest in educating courts about the role of first principles in constitutional matters and ensuring that fundamental liberties, not government authority, remain protected. The Wyoming Liberty Group will pay attorneys' fees incurred in the preparation of this *amicus* brief.

SUMMARY OF THE ARGUMENT

Shortly after the end of the legally baseless prosecution of Tom DeLay, the State of Texas is once again asking a court to ignore the Texas Election Code and transform campaign finance violations into criminal conduct. Rather than pursue the civil penalties provided in the Judicial Campaign Fairness Act—which could total $450,000 in this case—the State seeks to ignore campaign finance laws and subject all political contributions in Texas to potential charges of bribery, money laundering, and organized criminal activity. Campaign finance laws are narrowly tailored to prevent *quid pro quo* corruption without suppressing First Amendment freedoms, and the bribery statute may only be invoked when there is evidence of an express agreement that campaign contributions will be used for official action, when the public official in question would not have taken the action in absence of the exchange. The State failed to prove this at trial, sidestepping its evidentiary burden with a novel but unconstitutional application of the bribery law.

Laws that implicate free speech and association are subject to the most stringent review of vagueness and overbreadth, and the State's application of the bribery statute in this case fails both tests. An ordinary person of reasonable intelligence could not expect the contributions in this case to violate the bribery statute, and in turn the money laundering and organized crime statutes. Instead of recognizing the evidentiary burden required to prove a political contribution is a

bribe, the State uses the exemption in the law for political contributions as a loophole. While claiming it is justified because this would lead to an "absurd result" (that is, inability to prove a crime in this case), if this case becomes precedent it will lead to the absurd result that no one—not even campaign finance attorneys—will be able to reliably tell how political contributions become bribes. Furthermore, even if the state had properly followed the bribery statute, it is also unconstitutionally vague and overbroad to consider filing to run for office and continuing to run for office official actions that a public official can be bribed to undertake.

The charge of money laundering fails with the bribery statute, as well as the charges of organized criminal activity for either charge or tampering with a government record. The Appellant and others involved in this case are likely guilty of numerous Election Code violations, but these violations—even dirty politicking—may not be used to arbitrarily circumvent legal requirements. Upholding David Cary's conviction would turn political campaigning in Texas into organized crime.

ARGUMENT

I. INTRODUCTION

Before this Court is the most recent example of a disturbing trend in Texas: the criminalization of politics. *See generally DeLay v. State*, 2014 WL 4843917 (Tex. Crim. App. 2014). Rushing headlong into the political fray, Texas prosecutors skipped over the law governing the conduct at issue here and instead invented shadowy crimes of bribery, money laundering, even "engaging in organized criminal activity." This was done all because a few Texans came together to support a judicial candidate running for office and incorrectly financed the campaign.

Nothing in this brief lauds the actions of David or Stacy Cary, Stephen Spencer, or Suzanne Wooten. As is clear from the facts pled below, several violations of the Texas Election Code and the Texas Code of Judicial Conduct likely occurred. Texas enjoys ample, and appropriately tailored, remedies in these codes to rectify this sort of behavior. But serious constitutional concerns arise when prosecutors jettison laws finely tuned to First Amendment concerns in favor of far-reaching criminal laws.

Texas is in the midst of a dark age of prosecutorial abuse of First Amendment freedoms. Earlier this month, the Texas Court of Criminal Appeals declared the full innocence of Tom DeLay who, like Appellant here, faced prosecutorial alchemy combining parts of election law with the Penal Code to invent new offenses.

Prosecutors in the *DeLay* case wanted to ignore the law and send a "message"—even though the conduct at issue was wholly lawful. *See* Mike Ward, *Jury convicts DeLay in money-laundering case*, STATESMAN, Nov. 24, 2010, http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2010/11/24/delay_judge_think_about_thanks.html/. Likewise, prosecutors here wish to ignore the Texas Election Code and Judicial Campaign Fairness Act to transform violations of those codes into criminal conduct. Neither the First Amendment nor common sense permits this result.

II. TEXAS'S ANTI-CORRUPTION LAWS MUST BE PROPERLY UNDERSTOOD

The State's brief makes one point abundantly clear: mass confusion abounds about how Texas's anti-corruption laws work and in which instances they apply. To put this in perspective, it is helpful to step back and examine the four ways Texas regulates against corruption and how these regulatory regimes fit here.

a. The Judicial Campaign Fairness Act Governs the Conduct in Controversy

Few approve of corruption, backroom deals, or shadowy political agents. But the mere mention of these is not a reason to ignore applicable law just to invoke exorbitant penalties. The Texas Legislature purposefully designed its anti-corruption laws to protect against the risk of corruption in public dealings while preserving First Amendment liberties. Careful attention must be given to this delicate design—a focus entirely misplaced by the prosecution in this case.

The law that governs the conduct at issue here is found in the Judicial Campaign Fairness Act ("Judicial Act") and the Texas Election Code ("Election Code"). *See* TEX. ELEC. CODE § 253.151 *et seq*; § 1.001 *et seq*. At issue is a hasty and unfortunate plan hatched by the Carys and Spencer to fund a judicial campaign. In controversy are a series of contributions likely violative of the Election Code and Judicial Act totaling some $150,000.00. Clerk's Record ("CR") 639; TEX. ELEC. CODE § 253.155(b)(2).

As a starting matter, § 253.003 of the Election Code sets general restrictions and penalties for contribution violations. However, it does not apply to "a political contribution made or accepted in violation of Subchapter F [Judicial Campaign Fairness Act]." TEX. ELEC. CODE § 253.003(c). Thus, provided the contributions in controversy are "political contributions" to fund a judicial campaign, they must be analyzed under the Judicial Act.

The money at issue here was used to fund the campaign of Suzanne Wooten for District Judge of the 380th Judicial District Court of Collin County, Texas. *See, e.g.*, 7 Trial Transcript ("TR") 118; 8 TR 144. Because the Judicial Act applies to political contributions made in connection with the office of a district judge, its guidelines and penalties apply in this instance. TEX. ELEC. CODE. § 253.151(4). Concretely, that means that had the State relied on the law applicable to the conduct at hand, only civil penalties would be available as a remedy. TEX. ELEC. CODE §

253.176. These penalties are not meek—the State could seek up to three times the amount of the prohibited contributions as a remedy. That would total some $450,000 in this matter.

It can only be assumed that the prosecutors here did not care much for the civil penalties available for violation of the Judicial Act. What developed from this letdown was the invention of a series of crimes, none of which have valid application here. Texas's careful separation of general bribery and anti-corruption laws from the more delicate areas of campaign finance regulation are important for understanding why this prosecutorial theory must be rejected by this Court.

b. Why Use a Scalpel When a Sledgehammer Will do? The Prosecutors Grossly Misapplied Texas's Anti-Corruption Laws

Distinctions between anti-bribery laws and campaign finance requirements matter. Since the Supreme Court's 1976 pronouncement in *Buckley v. Valeo*, governments of all sizes are required to carefully limit their laws preventing corruption against countervailing concerns about First Amendment liberties. 474 U.S. 1 (1974). Although government may enjoy great latitude in how it addresses criminal activity, it must pay special attention to the breathing room required for First Amendment freedoms. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964). Thus, the construction and application of anti-corruption and campaign finance laws must permit substantial breathing room for First Amendment liberties to survive.

Texas has at least four substantive areas of law that may be used to target different types of potentially corrupt political conduct. Anti-bribery provisions, the proverbial sledgehammer of this class, offer latitude in their application because "bribery and extortion, while involving 'speech,' are not protected by the First Amendment." *Sanchez v. State*, 995 S.W.2d 677, 688 (Tex. Crim. App. 1999). On the other end of the spectrum are campaign finance provisions that seek to prevent *quid pro quo* arrangements and generally serve to better inform the electorate about who is spending money in the political process. *See McCutcheon v. Fed. Elec. Comm'n*, 134 S.Ct. 1434, 1450 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption"). The closer that conduct at issue is to political speech and association, the greater the constitutional protections that attach. Laws that burden political speech "are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010) (quoting *Fed. Elec. Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). Here, the State must use the precision of a scalpel to protect First Amendment concerns.

Texas law protects against corruption in judicial elections in four purposefully distinct ways. First, Texas law aims to prevent bribery, or immediate

quid pro quo arrangements, through its Penal Code. *See* TEX. PEN. CODE § 36.02(a)(1), (2), (3), (4). Second, anti-gift laws protect against the buying of general favor from an officeholder. *See* TEX. PEN. CODE § 36.08. Third, the Election Code and Judicial Act "lessen[] the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." *Osterberg v. Peca*, 12 S.W.3d 31, 47 (Tex. 2000) (quoting *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 356 (1995)). Fourth, the Texas Code of Judicial Conduct includes provisions securing the impartiality and integrity of the judiciary. TEX. CODE OF JUDICIAL CONDUCT, Canons 3(B)(1), 4(D), 5.

The Election Code and Judicial Act strike a proper balance between preventing *quid pro quo* corruption while preserving First Amendment interests. Importantly, their penalties are appropriately adjusted to the scope of conduct they regulate—political association and speech. But when prosecutors do not much enjoy the appropriately tailored remedies available for violations of election law, they are not free to contrive new offenses out of the law.

While laws curbing bribery deal with "the most blatant and specific attempts of those with money to influence governmental action," campaign finance law treads lightly in trying to prevent *quid pro quo* arrangements in how campaigns are financed. *Buckley*, 424 U.S. at 28. Because political speech is an "essential mechanism of democracy," the criminalization of political speech and association is

not tolerated except for narrow and compelling reasons. *Citizens United*, 558 U.S. at 339; *see also Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (*per curiam*).

c. The Funding in Question Constitutes Campaign Contributions, not Bribes

The record below thoroughly demonstrates that the funding here constituted political contributions designed to finance Suzanne Wooten's campaign. Under Texas law, political contributions may act as bribes only when the State meets a higher burden to show "an express agreement to take or withhold a specific exercise of official discretion" and that this exercise "would not have been taken or withheld but for the benefit." TEX. PEN. CODE § 36.02(a)(4). A campaign contribution is defined under Texas law 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." TEX. ELEC. CODE § 251.001(3). Lastly, 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).

The State, either misunderstanding or ignoring the Election Code, unconsciously agreed that the funding in question constitutes campaign contributions. After describing the funding scheme, the prosecutor explained that the "money is then used for the benefit of Suzanne Wooten. One hundred thousand dollars is spent on the campaign by March 4th." 2 TR 52, 54. The State's forensic

expert also agreed that the funding in question constitutes political contributions. This expert testified that the money was used "to benefit the campaign." 8 TR 72. Thus, the record below illustrates that the funds in question were raised, exchanged, and spent "in connection with a campaign" to benefit Suzanne Wooten.

At this point, the only way a political contribution can be deemed a bribe under Texas law would be to produce evidence of an "express agreement to take or withhold a specific exercise of official discretion" and that this exercise "would not have been taken or withheld but for the benefit." TEX. PEN. CODE § 36.02(a)(4). However plainly the law reads, the State wishes this Court to rewrite it, explaining that the statute's plain language produces an "absurd result" by requiring this express agreement. State's Br. at 71. But reading requirements out of the law is absurd, since in construing a statute Texas courts "give effect to all its words and, if possible, do not treat any statutory language as mere surplusage." *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006).

Requiring a heightened burden of proof to show that political contributions are bribes is not an act of legislative surplusage. Rather, this burden ensures that prosecutors are not free to arbitrarily transform some contributions into bribes when it suits their taste. Perhaps prosecutors from Travis County do not care much for gun rights and wish to prosecute those who contribute to candidates who support concealed carry liberalization programs. Perhaps prosecutors from Denton County

do not care much for same sex marriages and wish to prosecute those who contribute to candidates who support this cause. All that stands between prosecutorial abuse and important First Amendment rights is the rule of law. In this case, that means the government must meet its heightened burden to prove that the acts in question constituted bribery. Sidestepping this requirement only ensures that future acts of political association—recruiting candidates to run, giving keynote speeches at social functions, and all the ways people interact in a free society—are subject to the boundless, roving eye of political prosecutors in Texas.

Simply because prosecutors are not free to shoehorn any contribution they dislike into the offense of criminal bribery does not mean Texas is without redress. Indeed, the state enjoys remedies found in its Judicial Act and Code of Judicial Conduct to address the situation at hand. Because both of these involve areas of First Amendment concern balanced against the state's anti-corruption interests, they are appropriately tailored. The Judicial Act provides for civil penalties up to three times the amount of the disputed political contribution. The Code of Judicial Conduct authorizes the State Commission on Judicial Conduct to investigate the behavior of suspicious judges and to act accordingly. TEX. CODE OF JUDICIAL CONDUCT, Canon 6(G)(2). Where an express agreement is lacking under the bribery statute, prosecutors may employ the Judicial Act or refer complaints to the State Commission on Judicial Conduct. But prosecutors may not rewrite the bribery

statute to remove legislatively and constitutionally required safeguards. Contrary to the State's assertions, this is not an absurd result. Rather, it reflects the wisdom of the Texas Legislature in applying its bribery statute in limited instances while preserving breathing space for protected forms of political speech and association.

III. THE STATE'S PROSECUTORIAL HEDGE IS AN UNCONSTITUTIONAL BET

At the close of David Cary's trial, the jury was instructed to determine his guilt of engaging in organized criminal activity, or "committing or conspiring to commit" bribery, money laundering, and/or tampering with a governmental record. CR 633–58. The jury was also tasked with examining six individual counts of bribery and one of money laundering. The instructions implement vague and overbroad applications of the bribery and money laundering statutes, which, if allowed to stand, threaten the First Amendment rights of political contributors across Texas. The State's charge to the jury amounts to a hedged bet, unconstitutionally expanding a criminal law to eclipse the Election Code and threaten the political process.[1]

a. The Texas Election Code and Judicial Act Governed Cary's Actions

[1] The State contends that the Appellant waived his constitutional challenge. State's Br. at 98–100. However, "[w]hen freedom of speech is at issue, the Supreme Court will find waiver only in circumstances that are 'clear and compelling.'" *Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex. 2000) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)). In a motion to quash, the Appellant "identified for the trial court the issue to be ruled on and provided the trial court the opportunity to rule" on the First Amendment merits of this prosecution. *Osterberg*, 12 S.W. at 40; CR 218–19. David Cary's First Amendment rights must be considered by this Court.

Before discussing the charges in this case, it is important to discuss the State's radical departure from the Election Code and Judicial Act. The Election Code—and Judicial Act contained within it—exist to govern state political races and prevent corruption or its appearance. Like any law that places restrictions on political engagement, it is not without its problems, because it inevitably punishes and threatens to punish people for improper engagement, which is often free speech or association. Nevertheless, the Code is the main governor of "all general, special, and primary elections held in this state" and "supersedes a conflicting statute outside this code unless this code or the outside code expressly provides otherwise." TEX. ELEC. CODE § 1.002. The bribery statute expressly provides for a narrow instance when political contributions under the Code may be considered bribes, but the State did not follow that limitation.

The sidelining of the Election Code in this case is especially important because the Code does not significantly criminalize campaign finance blunders and violations. Even knowing contribution violations can only lead to Class A misdemeanor charges unless the contributions arise from corporations or labor organizations. *See* TEX. ELEC. CODE § 253.003. In the case of judicial elections under the Judicial Act (the present case), contribution violations are subject only to civil penalty. TEX. ELEC. CODE §§ 253.003(c), 253.155(f). Although the inchoate offense of conspiracy applies to the Election Code, this is only for its few felony

offenses. TEX. ELEC. CODE § 1.018; *see* TEX. PEN. CODE § 15.02(a) (requiring intent to commit a felony). Certainly, several charges under the Judicial Act and civil lawsuits could have been brought against the Carys, Steve Spencer and Suzanne Wooten, respectively, with no First Amendment problems. But they were not. Instead, the State asks this Court to uphold charges against the first-time candidacy of Wooten, first-time campaign by Spencer, and—specifically in this case—the first illegal contributions by Stacy Cary as organized crime.[2]

b. As Applied, the Bribery Statute is Unconstitutionally Vague and Overbroad

The Supreme Court has long considered distinct vagueness doctrines. Generally, vagueness is a due process concern that applies to all laws:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc

[2] Notably, the Election Code and the Organized Crime provision of the Penal Code do not work together. *Compare* TEX. ELEC. CODE § 1.002(b) ("This code supersedes a conflicting statute outside this code unless this code or the outside statute expressly provides otherwise.") *with* TEX. PENAL CODE § 71.02.

> and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (internal citations omitted). The degree of deference afforded to a vague law under the Constitution differs depending on the type of activity the law regulates and the penalty for violating the law. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498–99 (1982). Importantly, "[i]f . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499. *See also City of Chicago v. Morales*, 527 U.S. 41, 57–60 (1999); *Long v. State*, 931 S.W.2d 285, 287–88 (Tex. Crim. App. 1996) (internal quotations omitted) ("When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness demands a greater degree of specificity than in other contexts").

On its face, the bribery statute recognizes the primacy of the Election Code and the importance of political contributions by requiring significant evidence to elevate political contributions to bribery. Political contributions under the Election Code can only be considered bribes if "[1] the [contribution] was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion [2] if such exercise of official discretion would not have been taken but for the benefit[.]" TEX. PEN. CODE § 36.02(a)(4). In this case, it would ostensibly require the jury to not only decide that Judge Wooten expressly agreed to accept Stacy Cary's contribution in exchange for

running for office, continuing to run for office, or issuing favorable rulings, but that she would not have taken one or all of these actions otherwise. Furthermore, "direct evidence of the express agreement [would] be required in any prosecution under this subdivision." *Id.* Unfortunately, rather than comply with this subdivision the State elaborately circumvented it.

The bribery statute further excepts political contributions from qualifying as bribery outside of the context of part (a)(4) of the statute. TEX. PEN. CODE § 36.02(d). Harnessing this as a loophole rather than an additional buttress of its burden of proof, the State argues the jury could decide whether the transfers in question were political contributions, and then consider charges under parts (a)(1)–(2) of the statute. *See* CR 638–648; State's Br. at 68–75. This application of the bribery statute is unconstitutionally vague and overbroad and cannot survive First Amendment scrutiny.

i. Vagueness

In this case the transfers cannot be reasonably understood by a person of ordinary intelligence to implicate the bribery statute. At trial, it was amply established that the transfers from Stacy Cary were used by Stephen Spencer for Suzanne Wooten's campaign—and even that a number of these transfers were quickly turned around and used for campaign expenses. *See, e.g.*, 7 TR 118; 8 TR 144; *see also Cary v. State*, 2014 WL 4261233 at *41–*43 (Tex. App.–Dallas 2014)

(FitzGerald, J., dis.) (Unpublished). Wooten did not report these contributions, but her payments for Spencer's invoices were drawn from her campaign account and also relate directly to campaigning. *See* 5 TR 35–37 (detailing payments from Wooten to Spencer). If this does not establish that Stacy Cary's transfers were contributions, then all campaign contributions could implicate the bribery statute, and would all but guarantee "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108–09.

The State's application is nothing less than a vague exercise in burden shifting onto David Cary. The State argues that "a rational trier of fact could have reasonably found that Appellant did not *specifically direct* the money to be used to fund Wooten's campaign." State's Br. at 68 (emphasis added). There is no way to specifically direct the use of contributions in the Election Code; contributors contribute, and candidates report these contributions. Nevertheless, the state repeats: "the jury could have reasonably inferred that Appellant had no *specific intent* for the payments issued by his wife to be used exclusively 'in connection with a campaign for office or on a measure[.]'" State's Br. at 74 (emphasis added). Especially when dealing with conduct as central to free speech as campaign contributions, criminal triggers must be spelled out in the law, not assumed. To be sure, this is not the first time that prosecutors for the State have added requirements to the Election Code and, by extension, the Penal Code, but this practice must fail

here as it has before. *See DeLay v. State*, 410 S.W.3d 902, 912 (Tex. App.–Austin 2013), *aff'd DeLay*, 2014 WL 4843917 ("[A]lthough the Election Code prohibits a corporation from making contributions unless authorized by Subchapter D, it does not require a corporation to report or expressly designate the uses that it authorizes when making a donation.")

By contrast, in this situation a person of ordinary intelligence would understand the bribery statute to require *the State* to establish exactly what the money in question was intended to be used for *outside of campaigning* in order to convict someone of bribery. TEX. PEN. CODE § 36.02(a)(4). This must be established with evidence of an express agreement, far beyond records of phone calls and text messages. *See* 7 TR 206–07. The jury instructions, however, exempt this completely, and allowed the jury to decide whether part (d)'s "exception" applied and then proceed to use the less stringent considerations of parts (a)(1)–(3) of the statute. This amounted to an all-or-nothing approach to the bribery statute. *See* State's Br. at 72 ("[A] rational trier of fact could have found that the State negated the § 36.02(d) exception beyond a reasonable doubt.") Though this certainly could have helped Cary if the jury had recognized the transfers in this case as contributions, this application sacrifices far too many safeguards and, if upheld, will leave the bribery statute unconstitutionally vague. It is better understood that, by its own words, the bribery statute does not apply to political contributions (even

illegal contributions under the Election Code) unless the state proves otherwise under part (a)(4), not part (d) then parts (a)(1), (2) or (3). This not only respects ordinary meaning, but retains every word in the statute. *See Shumake*, 199 S.W.3d at 287.

The vagueness problems do not end with the State's circumvention of part (a)(4) of the bribery statute. Since campaign contributions always have at least some intent to encourage a candidate to run or continue to run for office, the State's use of it as an "exercise of official discretion" is vague as applied. *See McCutcheon*, 134 S.Ct. at 1441 ("[Contributions] embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.") Certainly, to materially induce a candidate to not run for office or to withdraw from a race can plausibly constitute bribery and is distinguishable from campaign contributions. *See Kaisner v. State*, 772 S.W.2d 528, 529 (Tex. App.–Beaumont 1989).[3] But since campaign contributions that encourage candidacy are constitutionally protected, even under the rigorous standard of § 36.02(a)(4) it is hard to envision how an express agreement to run or continue to run for office can pass constitutional muster as a bribe. Under the State's application, no reasonable person (or even experienced

[3] Today, the Election Code even addresses this scenario in a limited capacity. *See* TEX. ELEC. CODE § 2.054 (outlawing "intimidation or . . . means of coercion" to influence or attempt to influence a person to withdraw as a candidate).

politico or election lawyer) can safely predict where a campaign contribution ends and where bribery begins.

To be sure, when respected in its entirety the bribery statute is facially constitutional. In this case, Cary could have been prosecuted as part of a bribery scheme, but the State would have had to prove beyond a reasonable doubt that Wooten made an act in consideration for the illegal contributions, that she would not have acted but for the contributions, and that there was an express agreement between the parties. However, nothing in the trial record comes close to establishing this, and since the jury could convict for something as simple as a "bribe" to "run for office" instead of a bribe to rule in Cary's favor in his family law case, the bribery convictions cannot be salvaged.

ii. Overbreadth

As with vagueness, the unconstitutional overbreadth of the bribery statute is not facial: as written, the law recognizes that only in specific situations can a campaign contribution become a bribe. TEX. PEN. CODE § 36.02(a)(4), (d). However, by asserting that it may circumvent the protections of part (a)(4) of the statute by relying on part (d), the State transforms the bribery statute into an overbroad law that unconstitutionally punished David Cary and threatens all campaign contributions in Texas.

If this Court ignores § 36.02(a)(4), as the State urges, the bribery statute becomes a minefield. This is starkly clear in light of "official discretion" by a candidate including decisions to run for office or to continue to run for office. *Kaisner*, 772 S.W.2d at 529. Campaign contributions are always given with at least some intent that, in return or consideration for the contribution, a candidate will run for office or continue to run for office. *McCutcheon*, 134 S.Ct. at 1441. If the added requirements of showing express agreement and that "such exercise of official discretion would not have been taken or withheld but for the benefit" are omitted—and they would be, as these are only required in (a)(4)—then, indeed, any contribution is suspect.

If "official discretion" includes running for office and continuing to run for office, one must also wonder what campaign activity does not qualify as official discretion. In turn, this means even innocuous agreements between candidates and contributors may be subjected to bribery review. Surely it is not a bribe to offer a political contribution pursuant to an express agreement that the candidate will give a speech to a local organization, attend a fundraiser for another candidate or charitable event, or the like, yet even under the narrow confines of (a)(4) this would only *not* be a bribe if the candidate would have acted, anyway. Under the State's theory, however, all of these acts are likely bribery. An "absurd result," indeed. *See* State's Br. at 71.

This overbreadth is exacerbated by the State's reliance on Judge Wooten's reporting violations as evidence that Stacy Cary's transfers were not political contributions. "[T]he State's precise tracing of the funds demonstrated that Appellant clearly removed *himself* from being a publicly identifiable source of funding-either direct or indirect-for Wooten's campaign." State's Br. at 74 (emphasis added). Assuming David Cary can be tied to Stacy Cary's illegal contributions, even then the Election Code places no reporting requirement for political contributions on contributors. *See* TEX. ELEC. CODE § 254.001 *et seq*. Thus, a citizen's contribution of any amount can become subject to the bribery statute if the recipient candidate fails to report, or reports falsely or erroneously. As made abundantly clear in the trial record, falsely reporting is a likely a vagueness and overbreadth challenge for another day. *See* 7 TR 58–59 (Wooten filed reports); 6 TR 66–185 (prolonged and inconclusive testimony over how, when and what a candidate is supposed to report). In the meantime, it is far too overbroad to make political contributors criminals because of candidates' reporting mistakes.

The bribery law was not meant to be stretched this way. By ignoring §36.02(a)(4), the State circumvented its duty of "proving each and every element of the offense charged beyond a reasonable doubt[.]" CR 649–50. Because of the difficulty of establishing felonious political contributions, the State argues that requirements create "an absurd result" that "could not have been intended by the

legislature." State's Br. at 71. Indeed, when considered in light of the First Amendment, it is and should remain very difficult to turn political activity into a crime. This is not absurd; it is a careful recognition of constitutional rights.

c. The Other Charges Cannot Stand

Bribery is central to this case, and holds together the money laundering charge and the charge of organized criminal activity. Because the bribery charge is unconstitutional as applied, the money laundering conviction must be overturned with it. Finally, because the transfers in question were political contributions, the organized criminal activity charge must be overturned as well.

i. Money Laundering

By the wording of the jury instructions, if the charges for bribery cannot stand—and they cannot—then the convictions for money laundering and its attendance in committing organized criminal activity must fail as well. CR at 639, 649 (identifying bribery as the criminal activity for which the funds in question were laundered). However, the same vagueness and overbreadth problems that infect the State's application of the bribery statute are amplified when the money laundering statute is introduced.

The vague and overbroad application of the bribery statute is offensive enough to political speech in Texas. It is, however, an even more egregious violation of vagueness and overbreadth to suggest that the Election Code—which

provides clear guidance and penalties for illegal campaign contributions—can be blended with the bribery *and* the money laundering statutes. How an experienced campaign finance law practitioner—much less a person of ordinary intelligence—would understand how an illegal contribution becomes a bribe under the State's formulation is incredible enough. It is twice as bewildering to expect citizens to discern an additional step, where illegal individual contributions to judicial candidates—civil violations under the Election Code—can become proceeds of "criminal activity" for purposes of money laundering. TEX. PEN. CODE §§ 34.01, 34.02 (money laundering applies to proceeds of criminal activity; "criminal activity" requires an offense "classified as a felony" under the laws of Texas). This calls forth the Supreme Court's maxim in *Citizens United*:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

558 U.S. at 324, *citing Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Tedious legal amalgamations like the State's must be recognized as a chill on free speech, even if the laws in question respectively pass constitutional muster.

In only one respect does the State deserve credit: this time, at least the money laundering statute was applied to illegal contributions. *See DeLay*, 410 S.W.3d at

916. Nevertheless, the illegal contributions in this case were civil violations and cannot rise to the level of felony absent proof of bribery through §36.02(a)(4) of the Penal Code, which the State did not provide at trial. This conclusion does not leave the State without redress. Ample remedies exist in the Election and Judicial Code to pursue civil penalties.

ii. Tampering With a Government Record and Organized Criminal Activity

The charge of tampering with a government record was only included as part of the organized criminal activity charge and was not charged separately. CR 640–43. With bribery and money laundering eliminated on the basis that the transactions in this case were political contributions, this charge is without merit. The tampering charge against Wooten must arise under the Election Code for filing a false campaign finance report, not the Government Code for failing to report gifts or loans. *See* TEX. ELECTION CODE § 254.001 *et seq*.

Finally, with every charge beneath it either unconstitutional as applied to David Cary or moot, the overarching charge of organized criminal activity cannot stand. It bears noting that, for purposes of First Amendment vagueness and overbreadth, calling the Carys' effort to elect Judge Wooten organized crime is but the final insult to political engagement in Texas.

CONCLUSION

Bribery is a serious crime, but free speech and association are more serious liberties. *See* Benjamin Franklin, *On Freedom of Speech and the Press*, PENN. GAZETTE, Nov. 1737, *reprinted in* MEMOIRS OF BENJAMIN FRANKLIN, Vol. 2, at 431 ("Freedom of speech is a principal pillar of a free government: when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins"). The bribery statute clearly articulates where political contributions end and where bribery begins. The State presented a compelling narrative at trial that certainly leaves many actors in this case with unclean hands—indeed, likely guilty of numerous Election Code violations. But even the dirty politicking seen here, even illegal political contributions, may not be used to arbitrarily circumvent the bribery law's requirements and turn political campaigning in Texas into organized crime.

PRAYER FOR RELIEF

For the reasons stated herein, *amicus* requests that this Court reverse the conviction of the Appellant in 366th Judicial District Court of Collin County, Texas.

Respectfully Submitted,

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**Motion for pro hac vice admission to be filed*

CERTIFICATE OF SERVICE

I certify that on November 3, 2014, a true and correct copy of this ***Amicus Curiae*** **Brief of the Wyoming Liberty Group in Support of Appellant** was served by electronic filing on appellate counsel of record in this proceeding as listed below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this document complies with the type-volume limitations of TEX. R. APP. P. 9.4(i)(2).

1. Exclusive of the exempted portions set out in Tex. R. App. P. 9.4(i)(1), this document contains 6,506 words.
2. This document was prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14 for text and footnotes.

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