No. 03-11-00087-CR

IN THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT
AT AUSTIN, TEXAS

THOMAS DALE DELAY,
Appellant,

v.

STATE OF TEXAS,
Appellee.

On Appeal from the 331st District Court
of Travis County, Texas

BRIEF OF THE CENTER FOR COMPETITIVE POLITICS AND WYOMING LIBERTY GROUP AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Center for Competitive Politics' mission is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition. It is a tax exempt, non-profit educational organization operating under Section 501(c)(3) of the Internal Revenue Code. The prosecution at issue in Texas threatens the First Amendment rights of individuals wishing to speak and associate by subjecting them to the uncertain reach of vague laws. The Center has a strong interest to ensure that the cherished right to free expression remains paramount and that any laws regulating political conduct are clear and easily understood. The Center for Competitive Politics will pay shared attorneys' fees incurred in the preparation of this *amicus* brief.

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 shared attorneys' fees incurred in the preparation of this *amicus* brief.

SUMMARY OF THE ARGUMENT

This Court should overturn the conviction of the Appellant for money laundering and conspiracy to commit money laundering because the alleged predicate offense to both crimes—violating the ban on corporate campaign contributions within the Texas Election code—fails under the First Amendment. The chief constitutional violation at issue in the prosecutorial theory is found in vague laws that criminalize constitutionally protected political conduct.

The predicate offense is made up of a series of political contributions known together as a "money swap," which was entirely legal at the time of the charges. Texas corporations could contribute funds to Texas general purpose committees, general purpose committees could contribute those funds to out-of-state committees, and out-of-state committees could contribute other funds to Texas state candidates. Money swaps were considered in careful compliance with—not circumvention of—the Texas Election Code, and were common practice in Texas and throughout the United States at the time of the alleged crimes. No less than eight other money swaps occurred between 1997 and 2002 in Texas, while nearly 200 others were made nationwide during the same time period.

Campaign contributions are protected under both the First Amendment rights of political speech and association. Texas courts, considering appeals by other defendants in this case, did not recognize this, and thus did not apply the stringent protection of the vagueness doctrine recognized when the First Amendment is implicated. *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App. 2008); *Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010).

Under this doctrine, the law must give a person of ordinary intelligence the reasonable opportunity to know what is prohibited, and must provide explicit standards to prevent arbitrary and discriminatory enforcement. In addition to this, added protection is given to secure breathing room for free speech. Previous cases in Texas have properly recognized First Amendment vagueness problems in laws prohibiting harassment, erotic material and vagrancy—activities on the perimeter of free speech. Political speech, at the core of the First Amendment, must be given at least the same protection by this Court.

The pertinent sections of the Election Code fail under the vagueness doctrine, and thus neither the money laundering or conspiracy charges may stand. Specifically, the laws that prohibit "indirect" corporate contributions while allowing corporate contributions for the "establishment or administration" of general purpose political committees cannot be—and, indeed, were not—reasonably understood to prohibit money swaps, and lack specific standards to prevent arbitrary and discriminatory enforcement. Furthermore, circumstances surrounding the law—that each contribution making up money swaps was legal and that other money swaps occurred in Texas at the same time—illustrate that the law is, in fact, being arbitrarily and discriminatorily enforced.

The Election Code and the money laundering statute both fail because they are not closely drawn to any government interest at hand. Since *Buckley v. Valeo*, the Supreme Court has repeatedly affirmed that campaign contributions may be restricted because of the compelling governmental interest in preventing the corruption or appearance of corruption. However, contribution restrictions must "be closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. 1, 25 (1976). Two recent

cases, *EMILY's List v. Federal Election Comm'n* and *Carey v. Federal Election Comm'n*, have ruled that separate, segregated accounts for hard- and soft-money work to protect against corruption or its appearance without infringing upon First Amendment rights. 581 F.3d 1 (D.C. Cir. 2009); 791 F.Supp.2d 121 (D.D.C. 2011).

The import of *EMILY's List* and *Carey* requires this Court to recognize that, unlike in some money laundering schemes, money is not fungible. Where, as here, a political committee keeps soft- and hard-money separate for separate types of political speech and association, the activities are separate as well. The Texans for a Republican Majority PAC's corporate funds were used for legitimate, legal purposes by the Republican National State Elections Committee. Likewise, RNSEC's contributions to Texas candidates were from a hard-money account of individual contributions and fully complied with Texas law. No agreements or coordination between TRMPAC, the Appellant, and RNSEC causes the funds in question to comingle. To consider these separate contributions as a money laundering scheme plainly erases the constitutional protection afforded to this conduct, for this precedent would chill the free use of funds that pose no risk of corruption and hinder the legitimate use of funds that do.

The Texas Election Code is too vague to support the charges of corporate contributions against the Appellant, and thus money laundering and conspiracy charges are also unsustainable. Furthermore, both the relevant provisions of the Election Code and the money laundering statute are overbroad, and infringe upon core free speech and association. For these reasons, this Court must overturn the conviction of the Appellant.

ARGUMENT

I. INTRODUCTION

Laws must be comprehensible if they are to be valid. *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453 (1939). The State of Texas informs this Court that while nothing Appellant did, said, or might have planned was illegal individually, some hazy combination of his political actions amounted to criminal conduct. Like the Sword of Damocles, Texas's Election Code hung over the necks of many Texans until it fell upon the Appellant.[1] But in a republic founded upon the rule of law, the State's unfounded campaign to stomp out the rights of free speech and association cannot survive constitutional review.

This case was never about the validity of any *individual* section of Texas law. Each provision of the law in question permitted the Appellant and others to associate and speak under the First Amendment. *See* U.S. CONST., amend I. Instead, the prosecution cobbled together odd portions of Texas's criminal and election law to create its own hybrid offense, nowhere defined in the law, and never before applied against anyone similarly situated. Vagueness and constitutional infirmities posed by this confused prosecutorial comingling of the law threaten not just Appellant's rights, but those of all politically-minded Texas citizens.

Of particular importance in this appeal is the strict application of the vagueness doctrine in the context of the First Amendment. Earlier judicial treatment of the

[1] *See Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) ("the value of a sword of Damocles is that it hangs—not that it drops").

challenged provisions applied more permissive review instead of the stricter form of vagueness applied in First Amendment challenges. American courts have long recognized "arbitrary and discriminatory enforcement" as a primary evil that the void for vagueness doctrine is designed to cure. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). Were it otherwise, controversial speakers, disfavored ideas, and minorities would suffer as a result. *See, e.g.*, *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540–44 (1980) (invalidating order forbidding utilities from using bill inserts to discuss "controversial issues of public policy"); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) (protection of the right to publicly discuss issues rests on the "highest rung of the hierarchy of First Amendment values"); *Papachristou*, 405 U.S. at 163 (vague laws impact minority groups deeply given that they are "not alerted to the regulatory schemes" at play). If the vagueness doctrine means anything, it must stand for the proposition that three legal acts cannot become illegal through prosecutorial alchemy.

While some may view the money swaps at issue with deep cynicism, it should be recalled that the giving of money in the political process is a protected act of speech and association under the First Amendment. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386–87 (2000). Speech and association, to be effective, must be funded and that funding must be secure against government interference. *See, e.g.*, *Carey v. Federal Election Comm'n*, 791 F.Supp.2d 121 (D.D.C. 2011) (collecting cases); *SpeechNow.org v. Federal Election Comm'n*, 599 F.3d 686, 695–96 (D.C. Cir. 2010) (no valid government interest in limiting contributions to organizations like SpeechNow);

Meyer v. Grant, 486 U.S. 414, 418 (1988) (limiting money for speech unconstitutionally limits the number of voices speaking); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298–99 (1981) (contributions to ballot committees are protected under the First Amendment). Eliminating funding channels, making compliance difficult, and otherwise obscuring the law infringes on the protections guaranteed under the First Amendment. *See, e.g.*, *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986) ("individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction"). While this case involves a criminal appeal, careful consideration of First Amendment and election law implications is warranted. These principles illustrate that the ordinary money swaps by political actors in Texas are in no way illegal, and their prosecution cannot survive constitutional scrutiny.

II. COMPLIANCE WITH THE TEXAS ELECTION CODE IS NOT CRIMINAL

Before discussing the implications of First Amendment vagueness and overbreadth for the charges against the Appellant, it is helpful to break down the components of those charges and discuss pertinent facts surrounding each. The charges are money laundering and conspiracy to commit money laundering pursuant to TEX. PENAL CODE §§ 34.01–34.03 (2002) and TEX. PENAL CODE § 15.02 (2002), respectively. However, the predicate offense for money laundering and, in this case, conspiracy is drawn from the Texas Election Code. In pertinent part, the Code states that "[a] corporation . . . may not make a political contribution or political expenditure that is not authorized by this subchapter." TEX. ELECTION CODE § 253.094(A) (2002). However,

"[a] corporation . . . may make one or more political expenditures to finance the establishment or administration of a general-purpose committee." TEX. ELECTION CODE § 253.100 (2002). The state contends that the Appellant's actions were not authorized by the Election Code, but as this Section will show, these actions—which, combined, are known as a "money swap"— were legal and a common practice, which bears heavily for the Appellant in the vagueness and overbreadth analyses.

A. Each Contribution was Legal

Never before had the State of Texas alleged a violation of its election law arising out of the garden-variety money swaps at issue in this case. The charges brought against the Appellant arise from three separate types of political contributions, each of which was legal under controlling Texas election law. In sum, the string of contributions from corporations to Texans for a Republican Majority PAC ("TRMPAC") was legal, TRMPAC's ensuing contribution to the Republican National State Elections Committee ("RNSEC") was likewise legal, and RNSEC's contributions to seven candidates for Texas office were fully lawful.

Since 1987, the Texas Election Code has allowed corporate contributions to political action committees (PACs) for certain purposes. At the time of the acts in this case, the Code stated, with no other guidance, that "[a] corporation . . . may make one or more political expenditures to finance the establishment or administration of a general-

purpose committee." TEX. ELECTION CODE § 253.100 (1987).[2] Thus, corporate contributions to PACs were legal.

That TRMPAC transferred a total of $190,000 to an out-of-state political committee, RNSEC, does nothing to establish any violation of Texas law. The Texas Election Code restricts using corporate money for political contributions in Texas candidate elections. However, the Code's limitations cannot restrict corporations from making political contributions in states other than Texas or in national campaigns. *See* TEX. ELECTION CODE § 253.094 (2002). As a result, TRMPAC was fully within its rights when it contributed $190,000 of its corporate funds to RNSEC, which is a national committee.

The last act in question is likewise unproblematic. RNSEC contributed $190,000 to seven candidates for the Texas state legislature from an account made up of individual contributions or other money that could be legally contributed pursuant to Texas law. This should not be overlooked – RNSEC *did not* contribute the TRMPAC funds to Texas candidates, nor did it permit corporate contributions to flow through to candidates. And that was all that was required to comply with Texas law. Since the money was from permitted sources and so long as candidates complied with relevant disclosure provisions of the Election Code, this, too, was legal.[3] *See, e.g.*, TEX. ELECTION CODE § 253.032 (1995) (detailing reporting requirements for out-of-state political committees).

[2] The relevant statutory section employs the term "expenditure" out of its ordinary context in the field of election law. For purposes of clarity in this brief, the money swaps in question will be termed "contributions."

[3] The Texas Ethics Commission website contains 8-day pre-election reports from candidates in the 2002 election that report RNSEC's contributions pursuant to Texas law. *See, e.g.,*

Although these three acts, performed by separate legal entities, were entirely legal, the State asserts that these three acts *in toto* somehow establish a violation of Section 253.094 of the Election Code, and that the actions amount to conspiracy and money laundering. That is, it is alleged that by contributing corporate funds to RNSEC so that the national committee would contribute equivalent funds from *legal* sources to Texas candidates, agents of TRMPAC circumvented the state prohibition on corporate expenditures, or conspired to "launder" these funds. Under the Texas Election Code and controlling principles of constitutional law, the State's arguments are without merit.

These three acts have—until this case—never been viewed as criminal or otherwise in violation of campaign finance law before the prosecution's novel theory came to life. Rather, these sorts of arrangements are commonly known as "money swaps" and are widely practiced in Texas and across the United States. In fact, their very purpose is to *comply* with applicable state regulations, not defy them. That there is such common use of this practice is not evidence of widespread criminal conspiracies ranging from Alaska to Texas, but rather evinces something else entirely: ordinary citizens associating and speaking in compliance with byzantine election law provisions.

TODD BAXTER CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 35, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/243559.pdf (listing a $35,000 contribution from RNSEC);
DWAYNE BOHAC CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 23, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/207347.pdf (listing a $20,000 contribution from RNSEC);
JACK STICK CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 9, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/207398.pdf (listing a $35,000 contribution from RNSEC);
DAN FLYNN CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 20, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/219935.pdf (listing a $20,000 contribution from RNSEC);
RICK GREEN CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 29, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/207295.pdf (listing a $20,000 contribution from RNSEC);
GLENDA DAWSON CANDIDATE / OFFICEHOLDER CAMPAIGN FINANCE REPORT 7, TEX. ETHICS COMM'N, *available at* http://204.65.203.5/public/207177.pdf (listing a $40,000 contribution from RNSEC).

B. "Money Swaps" are Common Practice

Money swaps are the transfer of restricted funds to one group in exchange for contributions of other funds to either the initiating party or directly to candidates. Often, this practice involves state groups sending funds made up of corporate contributions to national organizations for funds made up of individual contributions in return. Swaps occur between state and national parties, political committees, or the like. They can also occur between groups in different states. For example, the fictitious "Texans for a Strong Border" might accept $25,000 in corporate funds, donate them to a national organization who maintains several bank accounts, including one composed only of contributions from individuals, and then have an equivalent amount of money donated to Texas candidates from that separate, segregated and compliant account. The national organization, in turn, would use the restricted funds in a legal way, for example to pay for administrative expenses or run issue campaigns in a state where corporate funds are not restricted. This practice is not an act of subterfuge or conspiracy, but a valid means to exercise First Amendment freedoms while being compliant with the law.

There has not been a recent study on the frequency of money swaps, but at the time of the alleged crime in this case money swaps were common practice. *See* Denise Roth Barber & Kathy Helland, *Passing the Bucks: Money Games that Political Parties Play*, The Institute on Money in State Politics (2003), *available at* http://www.followthemoney.org/press/ReportView.phtml?r=112&PHPSESSID=ac5b65fe5ed1c778f9b80aec0b3e95ff. That Americans across several states and of various political ideologies were doing just what happened here is important because the common

occurrence of these swaps suggests that political actors of ordinary intelligence believed them to be permissible under the law. That evidence suggests that no one, Appellant included, could have understood that Texas law somehow criminalized the acts under review.

1. Texas Money Swaps

Texas is no stranger to political money from other states or from national organizations. As referenced earlier in this Section, this is allowed under the Texas Election Code. *See* TEX. ELECTION CODE § 253.032 (1995). Similarly, the acts in question are entirely permissible under governing provisions of the Federal Election Campaign Act ("FECA"). *See, e.g.*, *In Trades Between Party Committees, Not All Dollars Are Equal*, WASH. POST, Feb. 18, 1997, at A07 (quoting a Federal Election Commission spokesman as saying that exchanges between committees are legal); FEDERAL ELECTION COMM'N CAMPAIGN GUIDE FOR POLITICAL PARTY COMMITTEES 50, *available at* http://www.fec.gov/pdf/partygui.pdf ("state, district and local parties can typically transfer among themselves without limit").[4]

According to reports filed with the Federal Election Commission, between January 1, 2003 and December 31, 2010, national Republican committees transferred approximately $1,893,053 to state and local party committees in Texas. In the same time period, national Democratic committees transferred approximately $2,800,349 to state

[4] Recently, the FEC unanimously approved a swap of $10,000 in nonfederal funds in exchange for $10,000 in federal funds concerning the Orange County Republican Executive Committee. *See* FEC, MUR 6212, Lew M. Oliver, III, Orange County Republican Executive Committee (FEC, March 16, 2010) (finding no reason to believe a violation of the FECA occurred), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044263573.pdf. Likewise, in Advisory Opinion 2006-33, the Commission concluded that a submitted fundraising plan by a federal PAC and several state PACs would not violate the law even if money swaps of corporate and non-corporate funds occurred.

and local party committees.[5] It is unclear if any of this money was in exchange for donations from state parties or other organizations. However, specific studies on money swaps before this period reveal multiple occurrences in Texas.

One study found that between 1997 and 2002, the Texas Democratic Party made eight separate swaps with the Democratic National Committee, yielding $477,500 in Code-compliant funds for the state party. Barber & Helland at 92. The swap between TRMPAC and the RNSEC was not much larger than some of these swaps, and was significantly less than their sum total. The TRMPAC swap also occurred during this timeframe. At the time of the TRMPAC money swap, similar occurrences were happening across the United States and Texas, but only one wayward prosecution was brought.

2. National Money Swaps

Since the 1990s, national organizations have transferred a great deal of state compliant funds to state groups:

> The national parties have transferred considerable amounts of the money they have raised to the state parties. Both parties, in fact, have been giving considerable sums of money, and in particular soft money, to the states in recent years for "party building" and "issue advocacy" activities. In 1995-1996, for instance, the RNC gave $66.3 million, while the DNC gave $74.3 million. In the 2000 federal elections, the two parties raised roughly $500 million in soft money and transferred

[5] This data is compiled from the following Federal Election Commission reports:
NAT'L PARTY TRANSFERS TO STATE/LOCAL PARTY COMMITTEES JAN 1, 2003 – DEC. 31, 2004, FEDERAL ELECTION COMM'N, http://www.fec.gov/press/press2005/20050302party/transtostates2004.pdf;
NAT'L PARTY TRANSFERS TO STATE/LOCAL PARTY COMMITTEES JAN 1, 2005 – DEC. 31, 2006, FEDERAL ELECTION COMM'N, http://www.fec.gov/press/press2007/partyfinal2006/ptytransfersye2006.pdf;
NAT'L PARTY TRANSFERS TO STATE/LOCAL PARTY COMMITTEES JAN 1, 2007 – DEC. 31, 2008, FEDERAL ELECTION COMM'N, http://www.fec.gov/press/press2009/05282009Party/6_PartyTransfers.pdf;
NAT'L PARTY TRANSFERS TO STATE/LOCAL PARTY COMMITTEES JAN 1, 2009 – DEC. 31, 2010, FEDERAL ELECTION COMM'N, http://www.fec.gov/press/bkgnd/cf_summary_info/2010prt_fullsum/10_ptytransfersye2010.pdf.

> $280 million to their respective state parties. *Parties channel their funds in this manner because federal and state regulations are more permissive of state spending of soft money than of federal spending*.

Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 1009 (2002) (emphasis added). Indeed, even if transferred money must follow strict regulations within states, money given to a political group for one purpose allows unrestricted or less restricted funds to be used elsewhere. Money swaps are a logical extension of this:

> [O]ne recent study found that national parties will transfer soft money to state and local parties with the understanding that the state and local parties will make hard money contributions to national candidates . . . . One of the most obvious money swaps occurred during the 1991-1992 election cycle, when the NRCC (National Republican Congressional Committee) transferred $116,000 in soft money to the Oregon Republican Party . . . . The Oregon Republican Party in turn made $6,000 in hard money contributions to House candidates in Oregon and $110,000 in hard money contributions to House candidates in other states, primarily challengers and open-seat candidates in some of the nation's most competitive races.

Id. at 1010.

The "Passing the Bucks" study reveals a large number of money swaps across the country between 1997 and 2002. In California, there were a dozen swaps between state and national organizations, totaling nearly $2 million in soft-money. Barber & Helland at 23. In Florida, the study found 20 swaps, yielding over $6 million. *Id.* at 30–31. Illinois only had six swaps, but they totaled over $1 million in soft-money. *Id.* at 36. Massachusetts also had six swaps, totaling just over a quarter million dollars. *Id.* at 42. The greatest number of swaps occurred in Michigan, with 39 swaps totaling almost $3 million. *Id.* at 49–50. Minnesota saw 17, totaling almost $750,000. *Id.* at 56–58. The

three swaps in Missouri yielded nearly a half million dollars. *Id.* at 64. Thirty-seven swaps in New York resulted in around $2.5 million of soft-money. *Id.* at 70–71. North Carolina saw nearly a half million dollars in eight swaps. *Id.* at 79. Oregon also reached almost a half million dollars in 14 swaps. *Id.* at 85. Washington State had eight swaps, yielding over $800,000. *Id.* at 98. Finally, Wisconsin groups received around $275,000 of soft-money in seven swaps. *Id.* at 105.

Money swaps have long been controversial to some, but are not prohibited under federal law and frequently occur nationwide. This prosecution certainly proves that some zealously believe money swaps ought to be illegal, but mere opinion does not create law, nor does it justify prosecution. Having established the legality of each transaction underlying money swaps and their frequency in Texas and throughout the United States, we turn to the infirmity of the prosecution's invention, built on a vague foundation that cannot survive review under constitutional scrutiny.

III. THE STATE'S USE OF THE MONEY LAUNDERING AND CORPORATE CONTRIBUTIONS STATUTES ARE VOID UNDER THE VAGUENESS DOCTRINE

The giving of money in the context of American political life is an act of constitutional pride, not villainous scorn. *See Citizens Against Rent Control*, 454 U.S. at 299–300 ("Contributions by individuals to support concerted action by a committee advocating a position . . . is beyond question a very significant form of political expression"). And when government bodies begin to regulate in this area, careful constitutional safeguards come into play. Appellant, and appellants in the *Ex Parte Ellis* challenges, raised some vagueness concerns as applied to the money laundering statute in

controversy. *See* Br. for Appellant at 93 n.69 (noting that statutes may violate the Due Process Clause due to vagueness if they do not give a person of ordinary intelligence a reasonable opportunity to understand what is prohibited). But a stricter vagueness doctrine exists that is implicated when fundamental liberties are at stake, and which this brief will distinguish and apply.

Where the rights of free speech or association are implicated, a "more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). If the challenged laws, regulations, or practices of government can be shown to infringe upon First Amendment liberties, added protection is given to secure "breathing room" for those rights. *See, e.g.*, *Smith v. California*, 361 U.S. 147, 150–51 (1959) (the "Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser"). Thus, it is one matter to challenge laws based on an ordinary vagueness claim, but entirely different when the stricter version of the doctrine comes into play. In other words, open-ended money laundering provisions work well, and have been constitutionally upheld, in the context of protecting against drug dealers and acts of terrorism. But they cannot survive as applied to electoral speech and association at the very core of the First Amendment. *Compare Village of Hoffman Estates*, 455 U.S. at 497–503(1982) (applying vagueness doctrine and upholding an ordinance that regulated the business of selling drug paraphernalia) *and United States v. Shah*, 474 F.Supp.2d 492, 495–500 (S.D.N.Y. 2007) (upholding federal provisions prohibiting the provision of

"material support" or assistance to a "foreign terrorist organization"), *with Buckley v. Valeo*, 424 U.S. 1, 40–41 (1976) (construing "expenditure" narrowly to cure vagueness concerns in the context of federal election law).

The Supreme Court long ago explained the standards for evaluating vagueness claims. In *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972), it noted:

> 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 and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.[6]

The Court has repeatedly instructed that these standards must not be applied mechanically. Rather, where challengers argue, for example, that regulation of economic affairs is at issue, a more permissive vagueness test is applied. *See, e.g.*, *Papachristou*, 405 U.S. at 162 (collecting cases). In addition, where the law in question imposes criminal, rather than civil, penalties, "the standards of certainty in statutes punishing offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). And where challenged laws cast uncertainty over protected First Amendment freedoms *and* impose criminal, let

[6] The Supreme Court has had more frequent opportunity to examine the role of unduly vague jury instructions and state definitions guiding them in the context of the torts of defamation or intentional infliction of emotional distress. The Court has often stricken or limited these standards to protect free speech. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350–51 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

alone felony, sanctions, as in Texas, the degree of clarity must be especially high. *See Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969).

In synthesizing an understanding of the import of the vagueness doctrine and recent precedent in First Amendment and election law, consideration of what the Supreme Court stated in *Stromberg v. People of the State of California* is helpful:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

283 U.S. 359, 369 (1931). Understanding the holdings of *Buckley* and its progeny along with the Supreme Court's historical vagueness doctrine lead to but one conclusion: the vagueness doctrine must be especially rigorous to protect a vital component of healthy, democratic life. Whether First Amendment interests are found in billboards, money swaps, or Internet advertisements, the vagueness doctrine ensures that robust speech and association will rule the day, not timidity and fear of government.

In this challenge, Appellant was among the many political actors who reviewed the law and believed his method of associating and speaking was valid under the Election Code. But it was the singular swooping prosecution of the state that mixed never-before-comingled laws and pronounced the Appellant guilty for behavior central to the exercise of his First Amendment rights. Based on the doctrine of vagueness and the protection of the First Amendment, this conviction cannot stand.

A. Distinguishing *Ex Parte Ellis*: A Vagueness Test by any Other Name Just isn't the Same

While election law very much involves the interplay between money, speech, and the protections of the First Amendment, consider what the Court of Criminal Appeals of Texas stated in *Ex parte Ellis* (*Ellis II*):

> [U]nless First Amendment freedoms are implicated, a facial vagueness challenge can succeed only if it is shown that the law is unconstitutionally vague in all of its applications. Here, *no one has argued that the money laundering statute implicates First Amendment activity,* and we have no reason to think that it does so.[7]

309 S.W.3d 71, 80 (Tex. Crim. App. 2010) (emphasis added). Precisely because this challenge does implicate core liberties protected under the First Amendment, heightened review must apply against the state's prosecutorial theory.

No shortage of First Amendment cases demonstrate the infirmities of limiting, blurring, or banning the free flow of money for political speech and association. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991); *Meyer*, 486 U.S. at 422–23; *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Smith*, 361 U.S. at 150. Still, in the *Ellis* appeals the courts held fast to the opposite principle to note that no First Amendment activity was implicated in at least the money laundering provisions. But when laws blur funding for speech and association and subject actors to criminal sanctions, it is proper to invoke the stricter vagueness

[7] The Court of Criminal Appeals spent some time distinguishing exactly the nature of the facial challenge before it with reliance on the Appellants' framing of the issue. Procedurally, however the parties may have pled the case at hand is beyond the point. Once a case is brought, "no general categorical line bars a court from making broader pronouncements of invalidity in properly as-applied cases." *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 893 (2010) (internal quotations and citations omitted). This is especially true where broad remedies are constitutionally required to resolve a claim before the court. *Id.* (as-applied challenges may be transformed into facial challenges if the remedy demands it).

doctrine, not the general vagueness standards applied in the *Ellis* challenges. This distinction is the core constitutional principle this Court must put into effect.

Two earlier appeals by others affiliated with TRMPAC's operations considered, and rejected, vagueness challenges to the Election Code. *See Ex parte Ellis* (*Ellis I*), 279 S.W.3d 1 (Tex. App. 2008); *Ellis II*, 309 S.W.3d 71. In *Ellis I*, the Texas Court of Appeals examined then-current federal precedent to hold that "complexity is not synonymous with unconstitutional vagueness." 279 S.W.3d at 21. The court's reasoning suggested that the appropriate burden where unclear laws operated was to be placed on the *speaker*, not the *government*, in understanding how the law functions. *Id.* at 22 ("the statute places burdens on those making and accepting corporate contributions to designate and to ascertain the purpose of a contribution before giving it or using it in a campaign for elective office. In light of the United States Supreme Court's pronouncements in this area, we cannot find this burden unconstitutional, and we defer to the legislature's judgment on this point"); *But cf. Federal Election Comm'n v. Wisconsin Right to Life* (*WRTL*), 551 U.S. 449, 469 (2007) (appropriate standards for regulation under the First Amendment "must give the benefit of any doubt to protecting rather than stifling speech").[8] The Court of Appeals simply got it wrong when it placed the interpretative burden on *speakers* instead of demanding that government regulate with clarity and simplicity in the first place. *Id.* at 474.

[8] Notably, the *WRTL* Court rejected claims by the government that intent-and-effect tests, like the one suggested by the Texas Court of Appeals in *Ellis I*, adequately protect innocent actors. *WRTL*, 551 U.S. at 468–69 (were intent-and-effect tests accepted, it would lead to a "burdensome, expert-driven inquiry, with an indeterminate result" that is offensive to the First Amendment).

The question of burden shifting is an important one, especially in the framework of a criminal appeal that abuts First Amendment interests. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome"). The Court of Appeals adopted an approach for analyzing vagueness concerns that flies in the face of recognized election law and constitutional precedent. Indeed, a central premise of the vagueness doctrine is that 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." *Grayned*, 408 U.S. at 108. This requires that individuals themselves must be able to assess, in a straightforward manner, the impact imposed by laws on their protected liberties before acting. American courts have never adopted the inverse of this principle, as embraced by the *Ellis* courts, that speakers must roll the dice and take their chances when an unclear and obscure law is at play. Succinctly stated, this is precisely what the vagueness doctrine hopes to avoid. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer wider of the unlawful zone"); *Speiser*, 357 U.S. at 526 ("The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding-inherent in all litigation-will create the danger that the legitimate utterance will be penalized").

Consideration of the claims in *Ellis I* did not comport with more recent election law precedent. In *Ellis I* the court reasoned that if the Election Code suffered from vagueness, reviewing advisory opinions issued by the Texas Ethics Commission, spending time digesting the Texas Administrative Code, and otherwise consulting the Texas Election Code would bring clarity to the terms in controversy. 279 S.W.3d at 13–14, 22–23. But the Supreme Court has resoundingly rejected precisely this argument in election law challenges. In *Citizens United*, the Court explained that government cannot make a vague law constitutional by "carving out a limited exemption through an amorphous regulatory interpretation." 130 S.Ct. at 889. Thus, when vague laws, on their face, fail to provide the requisite clarity as required under controlling standards, they remain vague even when government might "permit" the constitutionally protected conduct by granting regulatory exemptions through an advisory opinion process. *Id*. at 895–96. In short, citizens in a free society cannot be compelled to hire boutique election law attorneys and seek declaratory rulings "before discussing the most salient political issues of our day." *Id*. at 889. But that is exactly what Texas demands.

Understandably, the *Ellis I* challenge was decided before *Citizens United*, which clarified protections against vague enactments that affect First Amendment rights in the context of electoral speech and association. We now know that 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." *Citizens United*, 130 S.Ct. at 889. In contrast with the *Ellis I* holding, complexity often *is* synonymous with unconstitutional vagueness when those laws impinge on protected First Amendment

conduct. Because of this, the *Ellis I* ruling on the constitutionality of the challenged Texas enactments does not comport with more recent guidance from the Supreme Court in this area, necessitating more stringent review in this challenge.

But even in the wake of *Citizens United*, the *Ellis* challenge only got worse. In *Ellis II*, the court went further to state that the challenge to the Texas money laundering law (even when connected to the Election Code) did not implicate First Amendment freedoms. 309 S.W.3d at 80. Because of this, the Court of Criminal Appeals applied a more lax vagueness test to the whole of the challenge, asking whether the law in question was "unconstitutionally vague in *all* of its applications." *Id.* (emphasis added). But the correct standard to be applied where laws cast uncertainty over First Amendment freedoms is whether the "enactment reaches a *substantial* amount of constitutionally protected conduct." *Village of Hoffman Estates*, 455 U.S. at 494 (emphasis added). This remains a question of burden shifting—which remains of fundamental importance to secure the liberties at stake in this appeal.

Neither appellate consideration of the challenged Texas legal provisions adequately embraced the strict protection the vagueness doctrine affords to free speech and association. In this appeal, this Court should recognize and apply the correct version of the vagueness doctrine, as enunciated in *Citizens United*, 130 S.Ct. at 889, and elsewhere, while applying the correct burden against the government instead of speakers, as recognized in *WRTL*, 551 U.S. at 457 (First Amendment demands that courts "err on the side of protecting political speech rather than suppressing it"). Doing so will

illustrate that the challenged provisions cannot withstand constitutional scrutiny due to their facial invalidity.

B. In Other Areas of the Law, Texas Statutes have been Invalidated under Stricter Vagueness Standards

Sometimes it can be puzzling to ascertain why given conduct should receive the heightened protection of strict vagueness protection instead of its more ordinary counterpart. Usually, this arises when the conduct is complicated or difficult to understand. Still, indirect burdens on speech and association are just as offensive to the First Amendment as direct ones. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) ("a [s]tate's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights"); *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008) (mere *possibility* of invoking asymmetrical contribution limit regime constitutes a recognizable First Amendment injury). This pattern of misunderstanding is apparent in the District Court judge's statement that, "I don't care if you put [money] in one pocket and took money out of the other pocket. Money is absolutely fungible. It's like beans." Laylan Copelin, *DeLay defense: Money swap was common*, THE STATESMAN, Nov. 2, 2010, http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2010/11/02/delay_defense_money_swap_was_c.html.

Of course, money is not "like beans" when it involves the exercise of fundamental First Amendment liberties that receive rigorous protection under the Constitution.[9] *See*

[9] In a variety of legal contexts, money is not deemed fungible. Rather, careful attention must be paid to attendant legal protections surrounding each separate fund. *See, e.g., In re Kirtland*, 2011 WL 4621959 (Bankr. D. Idaho 2011) (In the context of bankruptcy and divorce law, "[g]enerally, merely commingling funds in a single bank account does not change separate property's character to community property, unless the commingled account is

Buckley, 424 U.S. at 21 ("Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of political goals"). Because of this, this Court should view the money swap situation in controversy as more similar to other Texas statutory enactments that have been invalidated precisely because they violated the vagueness doctrine.

Texas's ill-defined harassment statute failed to survive constitutional review due to its interference with protected First Amendment liberties in *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). There, Judge Wisdom explained that while the vagueness doctrine serves to protect many important societal interests, chief among them is the "requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 176 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Otherwise, juries, policemen, and prosecutors can attack unpopular individuals and ideas. In *Kramer*, since the Texas legislature failed to define what the terms "annoy" and "alarm" meant, citizens of Texas were "unable to determine what conduct is prohibited by the statute," which was sufficient to render the law unconstitutionally vague. *Id.* at 178. Of note, Judge Rubin dissented in the challenge because, in his view, the terms "annoy" and "alarm" were "two plain English words" easily understood in their ordinary sense. *Id.* at 179. Still, the First Amendment demands greater specificity where cherished liberties are at risk, leading the

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treated as one fund"); *Barrington v. Barrington*, 290 S.W.2d 297, 301 (Tex. App. 1956) (in the context of divorce law, if "a man mixes trust funds with his own, it is said, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own"); *United States v. Rutgard*, 116 F.3d 1270, 1292 (9th Cir. 1997) (interpreting criminal forfeiture provisions, "the government may prevail by showing that all the funds in the account are the proceeds of crime"); *United States v. Moore*, 27 F.3d 969, 977 (4th Cir. 1994) (in the context of fraud, money is not deemed fungible unless "funds obtained from unlawful activity have been combined with funds from lawful activity into a singleasset").

majority to invalidate the Texas harassment law. If existing precedent were to stand unchecked, potentially harassing speech would receive greater constitutional protection than political speech and association deemed integral to the Republic.

Texas has also been on the losing end of challenges to sections of its Alcoholic Beverage Code. *Carico Investments v. Texas Alcoholic Beverage Comm'n*, 439 F.Supp.2d 733 (S.D. Tex. 2006); *see also Wishnow v. State*, 671 S.W.2d 515, 516–17 (Tex. Crim. App. 1984) (en banc); *Texas Alcoholic Bev. Comm'n. v. Wishnow*, 704 S.W.2d 425, 428 (Tex. App. 1985). In *Carico*, the Southern District of Texas held that prohibitions against "immoral, indecent, lewd, or profane" communications by adult-beverage businesses violated the vagueness doctrine. *Id.* at 745–50. The *Carico* court invalidated the challenged provisions, even though they concerned erotic and adult magazines, which typically do not enjoy as robust First Amendment protection as other categories of speech. *Id.* at 747; *see also Woodall v. City of El Paso*, 49 F.3d 1120, 1122 (5th Cir. 1995) ("Erotic non-obscene printed matter [and] films . . . are sheltered by the First Amendment, but enjoy less protection than some other forms of speech, such as political speech").[10] Thus, while Texas enjoyed the expansive ability to regulate the sale of alcohol and to limit obscene expression, its provisions failed to pass constitutional muster due to their inherent vagueness and breadth. Were existing precedent to remain in place, potentially obscene speech would receive greater protection than political speech and association at the core of the First Amendment.

[10]It cannot be the case, as Justice Thomas suggested in his dissent in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 265 (2003) (overruled, in part, by *Citizens United*, 130 S.Ct. 876), that defamers, nude dancers, pornographers, flag burners, and cross burners receive more constitutional protection than individuals engaged in political expression.

Where the City of Austin established an ordinance prohibiting individuals from being in the city during the nighttime "under suspicious circumstances" unless they could provide for a "satisfactory account," the vagueness doctrine protected individuals arrested pursuant to it. *Howard v. State*, 617 S.W.2d 191 (Tex. Crim. App. 1979). There, the court struck the ordinance as violative of the vagueness doctrine due to its inherently malleable application. Without intelligible standards, police officers and prosecutors could make up offenses as they went along according to their own subjective determination. *Id.* at 192. Were current precedent to remain untouched, potentially vagrant conduct would receive greater protection than conduct deemed essential to the well-functioning of a civil society.

In instances where individuals have challenged the constitutional propriety of vague Texas laws, courts have routinely invalidated them under a strict vagueness doctrine to protect First Amendment interests. Here, the case for invalidating the challenged provisions is even more compelling, since the affected conduct is "core political speech for which First Amendment protection is at its zenith." *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 183 (1999) (quoting *Meyer*, 486 U.S. at 425). But instead, Texas courts have granted would-be harassers and pornographers more constitutional protection than individuals proudly exercising their rights of political speech and association. Just as the Supreme Court held in *NAACP v. Button*, "standards of permissible statutory vagueness are strict in the area of free expression" and must be given application in this challenge. 371 U.S. 415, 432 (1963).

C. Proper Interpretation of the Election Code Must Give Breathing Room for Constitutionally Protected Rights

Where a vagueness challenge involves First Amendment concerns, a "criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *Long v. State*, 931 S.W.2d 285, 288 (1996) (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)). This is an especially sweeping standard of review. All that is required is a showing that the law or practice in question infringes on a substantial amount of constitutionally protected conduct under the First Amendment. This constitutes the age-old breathing room rationale supporting the vagueness doctrine—affording innocent actors ample room to exercise their constitutional rights. And this doctrine must be implemented strictly in this challenge to realize this goal.

It should be noted that although less compelling governmental *justification* for the regulation of contributions is demanded, familiar constitutional safeguards still apply. *See, e.g., Dallman v. Ritter*, 225 P.3d 610, 631 (Colo. 2010) (invalidating state constitutional amendment on vagueness grounds that prohibited government contract holders and their families from making, directly or indirectly, contributions to candidates); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999) (striking state definition of political committee and prohibitions on corporate expenditures and contributions). Individuals and groups who make contributions to influence the political process and assist candidates must receive at least the same structural and substantive protection that courts have afforded traditional and non-

traditional speakers. To date, judicial treatment of the Appellant and the related challengers in the *Ellis* claims has not embraced this standard.

Consider the analysis employed by the *Ellis II* court when validating the contribution ban in controversy:

> A corporation violates the law if it makes a contribution to a political committee for the purpose of supporting or opposing a measure if that political committee also contributes to candidates. The exclusivity aspect of the provision seems designed to prevent diversion of funds from an acceptable purpose (supporting or opposing a measure) to an unacceptable purpose (supporting or opposing a candidate). A corporation can be confident that it is following the law if the contribution is given to a political committee devoted exclusively to measures because that political committee cannot make a contribution to a candidate.[11]

309 S.W.3d at 87. Under this analysis, so long as citizens steered far clear of fuzzy prohibitions, or employed other means of communication, such alternatives eliminated any vagueness concerns. This reasoning runs entirely counter to the Supreme Court's instruction, where it has explained that the First Amendment protects one's right "not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. at 424. Thus, evidence of alternatives ways to associate or speak do nothing to cure the imposition on protected First Amendment conduct in the first place. *Massachusetts Citizens for Life*, 479 U.S. 238.

Likewise, the *Ellis I* court applied the wrong version of the vagueness doctrine to the conduct in controversy. 279 S.W.3d 1. The court began with an acknowledgement that the Texas statutory wording "in connection with a campaign is broad." *Id.* at 21.

[11] Outside of the vagueness doctrine, this substantive rule described by the *Ellis I* court now flies in contradiction of federal courts have considered similar issues post-*Citizens United*. This is discussed in Section IV(b), *infra.*

But that complexity and breadth could not lead to a successful vagueness claim. *Id.* Eight years earlier, the Texas Supreme Court agreed with challengers that the term "in connection with" was inherently vague and subject to a narrowing construction, like that found in *Buckley*, to save it from constitutional infirmity. *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000). And while the *Ellis I* court acknowledged *Osterbeg* and *Buckley* with passing familiarity, it did not apply the constitutional demands of either case to the challenge at hand. Had it done so, the court would have been compelled to either strike the provisions facially as violative of Appellants' First Amendment interests or construe them narrowly not to reach the conduct in controversy.

The State of Texas follows the *Ellis I* court's reasoning in arguing that so long as there was an "agreement" to make a "transfer" that was "in connection with a campaign for elective office in Texas," the state Election Code had been violated. Br. for Appellee at 108–09. But it ignores the fatality of this argument under two separate lines of reasoning. First, the State expects political actors to somehow divine the obscure meaning of at least five vague words or phrases as a method for illustrating how the law survives vagueness review. Here, an individual would have to understand what constituted a (1) transfer that was (2) direct or indirect of (3) something of value which (4) included an agreement made (legally enforceable or not) or other obligation incurred to make a (5) "transfer" that is "in connection with a campaign for elective office in Texas." *Id.* The State then argues that if an "agreement" can be proven, then the whole of any other transactions remotely related to that agreement are properly swept into the prosecutorial gambit. In doing so, the state forgets that each term regulating and banning

conduct protected under the First Amendment must be defined with careful precision so as not to run afoul of the vagueness doctrine.

Second, even if the State's argument somehow survived, the resulting contributions at issue in Texas were the result of the RNSEC making contributions from a Texas-law-compliant, separate, segregated fund. That Appellant could have had an agreement for RNSEC to make *lawful* contributions to Texas candidates does nothing to make any portion of the earlier transfers somehow prohibited. This is because the funds in question are not fungible and remain individually protected as discussed in more detail in Section IV, *infra*. Even if the laws in question could somehow be construed to regulate the conduct in question, the stricter version of the vagueness doctrine permits relief even if the laws are "neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant" because an individual is "permitted to raise its vagueness or unconstitutional overbreadth as applied to others." *Gooding*, 405 U.S. at 521 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 620 (1971) (White, J., dissenting)). Thus, if the state could manage to demonstrate that the law could be reasonably understood to apply against the Appellant, the sheer imprecision and blurriness of the provisions in question cannot be found to satisfy the vagueness doctrine on their face, necessitating their invalidation.

Returning to the *Ellis I* court, it reasoned that since government must have less compelling justification to regulate contributions than direct speech in the first place, related constitutional protections must also be attenuated. That premise is mistaken. For example, pornographic speech is on the outer edges of protection of the First

Amendment. However, that has not stopped courts from applying the strict protection of the vagueness doctrine against Texas laws that infringe in this area. *See, e.g.*, *Carico Investments*, 439 F.Supp.2d 733; *Ex parte Morales*, 212 S.W.3d 483, 498 (Tex. App. 2006). Simply because contributions may be regulated in the area of election law with less justification than expenditures does not erase or otherwise mollify the requisite constitutional protections.

When examining the clarity of terms employed in federal election law, consider what the District Court for the District of Columbia noted when discussing *Buckley*: "the Supreme Court cautioned that the broad statutory definition of 'political committee,' which turns on the terms 'contribution' and 'expenditure,' and on the phrase 'for the purpose of influencing any election,' had 'the potential for encompassing both issue discussion and advocacy of a political result' and thus might encroach upon First Amendment values." *Federal Election Comm'n v. GOPAC*, 917 F.Supp. 851, 858–59 (D.D.C. 1996) (quoting *Buckley*, 424 U.S. at 79)). In the *Buckley* tradition, no matter the statutory labels at hand (and "contribution" was one of them), a searching and strict judicial review of the applicable restraint is in order when the law in question might offend protected First Amendment conduct. That same strict standard is equally applicable here.

Within the Texas Election Code as it existed in 2002, speakers knew that a contribution was defined as a "direct or indirect transfer of money, goods, services, or any other thing of value" which would be deemed a "political contribution" if it was a "campaign contribution or an officeholder contribution." TEX. ELECTION CODE §§

251.001(2), 251.001(5) (2002). No one, except perhaps the prosecution, knew what constituted a "direct" or "indirect" transfer of money. Interested speakers also knew that corporate contributions could have been used for the "establishment or administration" of a general purpose PAC. TEX. ELECTION CODE § 253.100 (2002). Speakers could not have known what those terms meant in 2002 since the law did not define them. Speakers also would have known that transfers of funds to other committees outside of Texas, like RNSEC, were legal under the Code. *Ellis I*, 279 S.W.3d at 9. They would have known that corporations could validly give funds in connection with elections in other states. *See* Tex. Ethics Advisory Op. No. 277 (1995), *available at* http://www.ethics.state.tx.us/opinions/277.html. And speakers near and far were aware, as detailed in Section II, *supra*, that a customary practice for individuals of ordinary intelligence around this time was to engage in money swaps since, by most readings of the law, they appeared legal. But certainly no one knew that the State of Texas could, in a single prosecution, invent a new offense out of three legal acts and criminalize constitutionally protected conduct without any clear sense of boundaries or standards.[12]

It cannot be the case that the vagueness doctrine stands for protection against ill-defined speech prohibitions *except* when it comes to election law. Within Texas and without, judges have applied the full vigor of the vagueness doctrine and struck down statutes when states failed to define terms, employed unusually open-ended definitions,

[12] The State of Texas attempts to hang its prosecutorial hat on the theory that since there was an alleged "agreement" in place, this cures any vagueness concerns. *See* Br. for Appellee at 169. Under this theory, the alleged agreement acted to "use these corporate dollars to essentially purchase the contributions to these Texas candidates, not to contribute the corporate funds to political activity in other states." *Id.* But any alleged agreement does not suddenly cause individuals to forfeit the protection of their First Amendment freedoms. *See* Section IV, *infra*. Nor does any alleged agreement convert hard-money funds into soft-money funds. *Id.*

or placed too much reliance on juries, prosecutors, or the police in interpreting the law in question. In this challenge, money swaps implicate the First Amendment every bit as much as the anti-pornography provisions in *Carico* or the anti-harassment prohibitions in *Kramer* did. Just as in these cases, Texas failed to define important terms of its governing code. The state granted deference to government actors to define the prohibition, shifting the burden to speakers to comply with the law, rather than demanding up-front clarity. And a vigorous prosecution of the Appellant occurred based on laws containing no definitions of their prohibitions, which had never been applied against similar actors, and with the full burden of interpreting their ambiguity placed on the individual. If the vagueness doctrine is to retain its import, as it should in our constitutional tradition, it must surely be applied to invalidate the provisions in question here.

D. Money Swaps may not become Money Laundering or Indirect Contributions by Prosecutorial Fiat

Even if the pertinent language of the Election Code could somehow be understood on its face, its language is so void of guidance that it encourages arbitrary and discriminatory enforcement, which proves equally offensive under the vagueness doctrine: "A statute can be impermissibly vague for either of two *independent* reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (emphasis added). Although the United States Supreme Court considers the vagueness

prongs independently, the second prong is often a supplement to the first. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the United States Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 286–93 (2003). However, the Court has emphasized its importance:

> We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement . . . . Statutory language of . . . a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.

Smith v. Goguen, 415 U.S. 566, 574–75 (1974).

As discussed in the previous Section, the "indirect" contribution—what corporations could not do—and "administration" of a general purpose committee—what corporations could do—amount to a very vague set of laws that cannot be reasonably understood to prohibit money swaps. It closely follows that this language opened the door for arbitrary and discriminatory enforcement. Strictly focusing on statutory language should conclude that the indirect contribution charges and, as a result, money laundering charges are void. However, this Court should not ignore circumstances that buttress the vagueness analysis: the State's acknowledgement that every contribution making up money swaps are legal, and the frequency of money swaps.

Vagueness pervades the state's construction of this prosecution. The state all but conceded at trial that each act making up a money swap is legal.[13] Corporations can contribute to Texas PACs, Texas PACs can contribute to out-of-state PACs, and out-of-state PACs can contribute certain funds to Texas candidates. It is a confounding enough situation as to how *any* crime can be concocted out of a series of legal actions,[14] but it is a blatant affront to the First Amendment when those actions individually—and together—implicate free speech. If the Appellant's conviction is allowed to stand, Texans will be left to guess what *other* series of legal political expenditures or contributions could lead to felony conviction, and whether there are other circumstances that could suddenly make the legal contributions addressed in this case felonious. The First Amendment guards against laws that chill speech, and this machination threatens to freeze it under the fear of arbitrary and discriminatory enforcement.

Money swaps are hardly novel, and the prosecution of but one such occurrence is, whether authorized by the statute or not, arbitrary and discriminatory. For purposes of vagueness analysis, the person of ordinary intelligence need not be entirely hypothetical because, as discussed in Section II(b), *supra*, persons and associations made money swaps in Texas and across the United States at the time of TRMPAC's swap. They did so because, like RNSEC's counsel and Texas election law experts, they believed money

[13] The jury instructions contain the following: "The Election Code does not prohibit a corporation from making contributions and expenditures with elections and measures in states other than Texas." Jury Instructions pg. 2, 7; "A general purpose political committee may use corporate contributions that it receives to make any contribution or expenditure that a corporation could make." *Id.* The only missing concession is that PACs such as RNSEC may contribute individual funds to Texas candidates.

[14] Commenting on the celebrated 19th Century English tort case *Allen v. Flood*, the British newspaper *The Spectator* summed up a similar situation quite aptly: "What may be the common law on the case we do not pretend to say, but we hold strongly that to manufacture an illegal act out of a series of legal acts is most dangerous." THE SPECTATOR VOL. 78, Sept. 11, 1897, at 327.

swaps were in careful compliance with—rather than defiance of—the Election Code. 7 RR 28; 15 RR 73, 74. This is not similar to criminals committing robberies in high-crime neighborhoods, who cannot claim a reasonable belief that robbery is not prohibited under the law because others are committing the crime. Rather, in the area of political speech and byzantine election regulations, consensus must inform a great deal towards interpreting the law. When so many participants in an area well-protected by the First Amendment (indeed, an area at the core of free speech) believe that they are following the law, and only suddenly does a prosecution arise against one occurrence of many, it is the law that must fall under scrutiny, not the speakers. The language of the Texas laws, suddenly giving rise to a prosecution, must be viewed as encouraging arbitrary or discriminatory enforcement. Thus, it is not only the vagueness of the statutes themselves, but the vagueness inherent in their combination and the actual arbitrary and discriminatory enforcement at hand that calls for overturning the Appellant's conviction.

Some consider money swaps unsavory; this is certainly the State's position. This Court may agree. But the executive and judicial branches do not make the law, nor do they have the power to enforce laws beyond their meaning. *Grayned*, 408 U.S. at 109. It is for legislature to create law and, when necessary, refine it. If the state of Texas wishes to restrict money swaps, the law must be amended to do so unequivocally. Although this case has already lasted for years and is factually and procedurally dense, the proper remedy is actually quite simple, as North Carolina law illustrates:

> A transfer of funds shall be deemed to have been a contribution made indirectly if it is made to any committee or political party account, whether inside or outside this State, with the intent or purpose of being

> exchanged in whole or in part for any other funds to be contributed or expended in an election for North Carolina office or to offset any other funds contributed or expended in an election for North Carolina office.

N. C. GEN. STAT. § 163-278.19(a1) (1999). This appears to be the only law in the United States that properly prohibits money swaps. It identifies the prohibited conduct with clarity and provides simple and easily understood restrictions for interested actors. The Congress and most state legislatures have not found money swaps to be a problem, or at least not a big enough problem to restrict. Like the State's prosecutors, other states may be under the illusion that prohibiting "indirect" contributions will suffice, but this cannot stand in light of First Amendment vagueness. It lies with legislature to remedy money swaps with a clear law, if indeed they are a problem to be solved.

IV. ANY GOVERNMENT INTEREST IN PREVENTING CIRCUMVENTION OF CAMPAIGN FINANCE LAWS SHOULD BE ADDRESSED IN A NARROWLY TAILORED MANNER

While the vagueness of the Texas Election Code calls for overturning the conviction of the Appellant, other constitutional problems mire this case. The First Amendment requires any law burdening political speech to serve a compelling governmental interest and to be narrowly tailored to address that interest. *Citizens United*, 130 S.Ct. at 898 (citing *WRTL*, 551 U.S. at 464). In other words, the law must address a compelling governmental interest without abridging speech that does *not* implicate that interest. In the context of contribution limits, there must be a "sufficiently important interest" with restrictions that are "closely drawn." *Randall v. Sorrell*, 548 U.S. 230, 231 (2006) (quoting *Buckley*, 424 U.S. at 25). This Section will discuss the compelling governmental interest that justifies restrictions on contributions, case law that

has protected segregated political funds to shield against overreaching laws, and how RNSEC's segregated accounts cured any risk of corruption and prohibit the conclusion that TRMPAC's contributions to RNSEC constituted indirect corporate contributions.

A. Corruption is Narrowly Defined

In *Buckley*, the first comprehensive challenge to the Federal Election Campaign Act, the United States Supreme Court ruled that campaign contributions are protected under the First Amendment because "[a] contribution serves as a general expression of support for the candidate and his views . . . ." 424 U.S. at 21. Furthermore, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of political goals." *Id.* at 22. When a law abridges these First Amendment freedoms, it must serve "a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25. The Court articulated the governmental interest that justifies limits on campaign contributions:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26–27. The Supreme Court has narrowly defined this interest in preventing corruption or its appearance, and overturned overbroad laws that abridge political speech and association.

A recent ruling by the Supreme Court, *Citizens United*, narrowed the corruption rationale further. In this case, the non-profit corporation Citizens United challenged a provision of the Bipartisan Campaign Reform Act that "[made] it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." *Citizens United,* 130 S. Ct. at 897. Attempting to justify this speech ban, the government argued that it targeted corruption or its appearance, but the Court rejected this unequivocally: "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 909.

The Court rejected this use of the anti-corruption interest for many reasons. *Id.* at 903–11. Perhaps most importantly, the Court considered and rejected the idea that the appearance of corruption standard allows restricting speech that may result in "speakers . . . hav[ing] influence over or access to elected officials." *Id.* at 910. Unlike contributions, independent expenditures cannot be quid pro quo corruption or even give the appearance of corruption, because they are directed at the electorate, the citizenry who are supposed to be the influence in a republican government. *Id.* If an independent expenditure is heeded by the electorate—whether the expenditure is from a for-profit corporation, nonprofit corporation, labor union, or individual—that is the very purpose of the First Amendment, not a compelling interest for government regulation. So, following *Citizens United*, contribution limits may be limited by the anticorruption interest, but independent expenditures may not.

Even before *Citizens United*, the Court ruled against contribution limits that were severe enough to be overbroad, or "disproportionate to the public purposes they were enacted to advance." *Randall*, 548 U.S. at 262. In *Randall*, a group of Vermont contributors and candidates for state office challenged, among other things, a law that limited contribution amounts to $200 per election per candidate for statewide office. *Id.* at 249. This limit amounted to "slightly more than one-twentieth" of the contribution limit upheld in *Buckley* for federal candidates, who also run statewide in Vermont because of its small population. *Id.* at 250. The Court overturned this limit because of five factors: its restriction on the amount of funding available for challengers to run competitive campaigns, its burden on political parties (and, consequently, the associational right articulated in *Buckley*), the law's inclusion of volunteer services as contributions, its failure to adjust already-low contribution limits for inflation, and the lack of any governmental interest to justify these burdens. *Id.* at 253–62. Thus, even where the anticorruption interest is correctly identified, narrowly tailored limits must be applied.

Preventing corruption or the appearance of corruption remains a valid governmental interest for contribution limits to this day. However, government responses to risks of corruption must be appropriately tailored lest they infringe on other protected First Amendment interests. In challenges post-*Citizens United*, a variety of federal courts have stricken overbroad restrictions applied to contributions when they reached too far. These cases are instructive for purposes of this appeal, as they shed light

as to why the Texas Election Code fails to be closely drawn to the interest of preventing corruption or its appearance.

B. The Import of Federal Election Law, *EMILY's List* and *Carey*

Under federal election law, organizations that are deemed non-connected political action committees may maintain one "hard-money" account to make contributions to federal candidates while maintaining a "soft-money" account to make non-federal disbursements and donations. 11 C.F.R. 102.5(a) (2011). In election law parlance, hard-money constitutes funds that comply with federal source and amount limitations while soft-money are funds from other sources, like corporate or union contributions. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 122–23 (2003). To cure any risk of corruption associated with soft-money, federal election law requires that two bank accounts be established to keep these funds separate. 11 C.F.R. § 102.5(a)(2) (2011). The law further demands that no transfers may be made between the two accounts held by a committee to ensure that any potentially corrupting influence of the soft-money would be protected against. If separate, segregated accounts work to protect against any concern about anti-corruption interests in federal law, they must work equally well at the state level to accomplish just the same.

Two federal courts have had the opportunity to review federal restrictions applied against what are deemed non-connected committees and their election activities. In both of these cases, non-profit organizations maintained separate bank accounts to fund: a) independent expenditure speech financed by soft-money and b) contributions to candidates or campaigns financed by hard-money. *EMILY's List v. Federal Election*

Comm'n, 581 F.3d 1 (D.C. Cir. 2009); *Carey v. Federal Election Comm'n*, 791 F.Supp.2d 121 (D.D.C. 2011). In each instance, the Federal Election Commission argued that the risk of corruption was just too great for these groups to speak and contribute concurrently. And in each instance, the FEC found itself on the losing end of its arguments in court.

When considering these issues in *EMILY's List*, the D.C. Circuit Court of Appeals reasoned that a "non-profit that makes expenditures to support federal candidates does not suddenly forfeit its *First Amendment* rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account." 581 F.3d at 12 (emphasis added). Thus, in the *EMILY's List* context, the maintenance of a separate, segregated account funded by hard-money represented the appropriately narrow cure against any risk of corruption from soft-money.

In a more recent challenge, *Carey v. Federal Election Comm'n*, the United States District Court for the District of Columbia upheld the principle that establishing separate, segregated accounts was an appropriate cure against any risk of corruption between hard- and soft-money funds. 791 F.Supp.2d at 130–31. While the Federal Election Commission argued that additional barriers, organizational requirements, and limits were needed, the federal court plainly held that the correct cure against any risk of corruption between hard- and soft-money is found in the maintenance of separate, segregated accounts. Even more to the point, the court explained that even if the government could

produce evidence supporting the need for more stringent restrictions on contributions, the government failed in showing why the use of a separate segregated account "is not narrowly tailored to achieve that objective." *Id*. at 131.

Both *EMILY's List* and *Carey* involved organizations engaged in independent expenditure speech as well as contribution campaigns. And both courts held that any risk against the ill effects of soft-money could be guarded against by the use of separate segregated accounts, as federal law permits. Banning or otherwise prohibiting the contributions at issue in those cases would have constituted an unjustifiable burden against the political actors, since more narrow remedies were available to the government.

In this challenge, the transactions in controversy are diffuse, involving not just separate accounts, but separate legal entities, involving diverse transactions, and each in full compliance with Texas law. Whatever evidence may exist to support Texas's ban against direct corporate contributions, its expansive cure fails to pass constitutional scrutiny because, as in *EMILY's List* and *Carey*, the government has selected too blunt an instrument for doing so.

C. Separate Segregated Accounts and Separate Transactions Cure any Risk of Corruption

Just as in the *EMILY's List* and *Carey* scenarios, the use of separate, segregated accounts by the RNSEC here fully acts as a proper prophylactic against any risk of corruption or its appearance. Were it so that soft-money funds contributed to an organization somehow corrupted the entirety of its operations, then the *EMILY's List* and

Carey courts would have upheld the contribution bans at issue before those courts. They did not.

What courts have held is that while soft-money funds might, in some instances, carry a risk of corruption or its appearance, the constitutionally preferred cure is the maintenance of separate, segregated accounts. To rule otherwise would give government the authority to sweep broadly into its regulatory and prohibitory gambit all sorts of speech and association it has no authority over. The appropriate cure, as the *EMILY's List* court stated, for a group "to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account." 581 F.3d at 12. This ensures that the government's valid interest in preventing circumvention of contribution limits is carried out in a manner that is "closely drawn" to the concern at hand. *Randall*, 548 U.S. at 231 (quoting *Buckley*, 424 U.S. at 25). Anything greater is simply over-inclusive and unconstitutional. *Simon & Schuster*, 502 U.S. at 122 (by default, over-inclusive speech regulations fail to pass scrutiny under narrow tailoring analysis).

In the *Carey* challenge, the PAC maintained one bank account that could only accept corporate or unlimited (soft) funds to pay for expenditures for speech—Internet advertisements and the like. 791 F.Supp.2d at 125. It maintained a second bank account that could only accept federal-limited (hard) funds for contributions to candidates or their campaigns. *Id.* Notably, the court did not view the money "like beans" or being perfectly fungible. Instead, it recognized that separate accounts holding separate funds represent different bundles of constitutional interests. This meant on the hard-money side

that funds were compliant with federal law and acceptable as contributions to candidates. It also meant on the soft-money side that funds were unregulated and could be used to support expenditures. But never did the maintenance of a soft-money account give rise to the legal notion that the group's hard-money account became corrupted or that government possessed the bootstrapping authority to regulate more broadly because of the presence of soft-money.

This "*Carey* Cure" must find some appreciable application to the challenge at hand. Here, corporate funds were given to TRMPAC who further donated them to the RNSEC, who then deposited the funds in a separate soft-money account. These funds, as is established in the record, never made their way into Texas as contributions. 14 RR 155-156. However, separate, segregated funds held by RNSEC in a different account that were compliant with the Texas Election Code were contributed to state candidates. 14 RR 106. Under the reasoning of *EMILY's List* and *Carey*, the use of a separate, segregated fund to accept and distribute soft-money is the appropriate cure against any risk of corruption or its appearance as to the activities of the organizations in question. Thus, the actions of RNSEC accepting soft-money in one account and making contributions from another hard-money account are entirely appropriate and constitutionally sound. After all, Texas is under a constitutional obligation not just to identify a government interest for prosecuting the complained-about conduct, but also to ensure that it does not employ too blunt a regulatory instrument in doing so.

The nature of the money swaps and contributions in this case make the risk of corruption even further attenuated than in the *EMILY's List* and *Carey* examples. In

Carey, one organization accepted soft-money in and permitted hard-money out from separate segregated accounts. Here, TRMPAC accepted soft-money in, distributed soft-money out to RNSEC, and RNSEC used distinct hard-money from a separate account to make contributions to state candidates. But somewhere in here, the State assures us, the corrupting influence of soft-money has tainted the Texas electoral process and turned otherwise innocent acts into criminal endeavors.

To be certain, courts have recognized limited risks of corruption or its appearance with soft-money funds. *McConnell*, 540 U.S. at 124–25. But the existence of a governmental interest to regulate said funds does not translate into a blank check to wholly smother the constitutional rights of an organization who accepts them. This, then, is the lesson of *EMILY's List* and *Carey*: the governmental prohibition must match, or be "closely tailored," to the evil at hand. In this very context the closely tailored remedy has been identified, as groups "must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account." *EMILY's List*, 581 F.3d at 12.

Texas may properly insist that organizations like TRMPAC maintain separate accounts for soft- and hard-money funds. It may insist that political action committees limit their use of soft-money funds so long as the state does not unduly regulate other protected conduct at the same time. In other words, it may not suppress a whole class of lawful activity to eliminate the potential of unlawful conduct. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech"). Texas may not treat each and every dollar

held by multiple organizations through diverse transactions "like beans." In the context of election law, money is not fungible. If "Account A" of a political action committee is comprised of hard-money contributions from individuals and "Account B" is made up of soft-money contributions from corporations, each constitutes a different bundle of constitutional interests. Just because government has greater authority to regulate "Account B" does not mean that organizations lose their bundle of constitutional interests formed in "Account A." *See Carey*, 791 F.Supp.2d at 130 ("A nonprofit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates"). Here, a PAC (and those affiliated with it) does not forfeit its First Amendment rights when it decides to lawfully accept soft-money funds and use hard-money funds for contributions to Texas candidates.[15]

Were the firm boundaries of close tailoring not observed in these sort of constitutional challenges, government could reach out and prosecute all kinds of conduct beyond its authority. But these proper lines of demarcation preserve key individual liberties and judges must guard them jealously. Thus, a narrowly or closely tailored regulation is one that that: "actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive) . . . and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)." *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th

[15] It is this point that repeatedly confounds the State of Texas in its prosecutorial theory. Throughout much of its 190 page brief, the State makes continued efforts to demonstrate the fungibility of the funds as a means to support its prosecution. *See, e.g.*, Br. for Appellee at 108–10, 133–45, 165–66.

Cir. 2005). In the matter at hand, the vague and smothering effect of Texas's odd comingling of its election and penal law provisions *in toto* run afoul of the careful tailoring demanded by the First Amendment.

CONCLUSION

This Court is left with a familiar problem: undefined and far-reaching laws trample the protected First Amendment freedoms of those who would speak and associate about politics. Until new life was breathed into it, the Texas Election Code sat dormant while political organizations and parties regularly engaged in money swaps. But upon a single prosecution, never before applied parts of penal and election law were commingled to criminalize otherwise ordinary conduct—actions that allowed citizens to associate and speak their minds. It must be remembered that the rigorous exposition of ideas through political channels is not a vice. It is a celebrated form of conduct deemed essential to the protection of our republic and guarded with the full vigor of the Constitution. These principles inform this Court that the peculiar prosecution of the Appellant based on hazy and undefined laws must be overturned so that the protection of every individual's First Amendment rights throughout Texas will be upheld.

PRAYER

For the reasons stated herein, *amici* request that this Court reverse the conviction of the Appellant in the 331st District Court of Travis County, Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 15th, 2011, a true and correct copy of this **Amici Curiae Brief of the Center for Competitive Politics and Wyoming Liberty Group** was served by U.S. mail or electronically on all appellate counsel of record in this proceeding as listed below.

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