No. 08-11-00367-CV

IN THE COURT OF APPEALS FOR THE
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOHN F. COOK,
Appellant,

v.

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

On Appeal from El Paso County Court at Law No. 3
2011-DCV-02792
The Honorable Javier Alvarez

APPELLEES' BRIEF IN RESPONSE TO BRIEF OF APPELLANT JOHN F. COOK

Joel L. Oster*
Kevin H. Theriot, SBN 00788908
Alliance Defense Fund
15192 Rosewood Street
Leawood, KS 66224
(913) 685-8000
(913) 685-8001 Facsimile

Theresa Caballero, SBN 03569625
Stuart Leeds, SBN 12151500
Attorneys at Law (Local Counsel)
300 E. Main Drive, Suite 1136
El Paso, TX 79901-1381
(915) 565-3550
(915) 562-5250 Facsimile

Attorneys for Appellees
Tom Brown, Salvador Gomez, Ben Mendoza, Elizabeth Branham, Tom Brown Ministries, Word of Life Church of El Paso, and El Pasoans for Traditional Family Values

* *Pro hac vice* status pending

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page No.**

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

This case is an attempt to censor political speech – which enjoys the most protection the First Amendment to the United States Constitution has to offer. Mayor John F. Cook ("Mayor") is seeking a mandatory preliminary injunction to stop the recall election involving himself, Representative Steve Ortega and Representative Susie Byrd. The Mayor filed this lawsuit against Tom Brown, Elizabeth Branham, Ben Mendoza, Salvador Gomez, Tom Brown Ministries, Word of Life Church of El Paso, and El Pasoans for Traditional Family Values (collectively, "Appellees"), as well as Richarda Momsen, as the City Clerk of El Paso.[1]

The Mayor claims that the Appellees violated Texas Election Code § 253.094(b) ("Election Code") by circulating and submitting petitions to hold a recall election. But circulating and submitting petitions are core First Amendment activities and cannot be prohibited, even if such speech comes from a corporate entity. The United States Supreme Court has already ruled on this issue in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), when it struck down a law that banned political expenditures by corporations. According to the Court, banning corporations from spending money on political causes was the same thing as banning corporate political speech, and was unconstitutional. The Texas Ethics Commission has already reviewed the Election Code in light of *Citizens United* and issued an opinion that is directly contrary to the Mayor's theory in this case.

[1] The Mayor did not sue the El Paso City Council.

While the trial court initially granted a temporary restraining order that enjoined the Appellees from submitting to the City Clerk any petitions in violation of the Election Code, the Court quickly dissolved the order and instead ordered that the Appellees could submit their petitions.

Following a five day evidentiary hearing on the Mayor's motion for preliminary injunction, the court denied the Mayor's request for a mandatory injunction to stop the election.

REQUEST FOR ORAL ARGUMENT

The Appellees request oral argument. This case involves actions by a government official to deny citizens their fundamental constitutional rights to speech and to petition their government for the redress of grievances, among other rights. Oral argument will assist the Court in safeguarding these important rights. *See* Tex. R. App. P. 39.

ISSUES PRESENTED

(1) It is well settled Texas law that courts are not to enjoin an election.[2] Here, the El Paso Clerk has already certified enough signatures for the recall election. All that is left is the ministerial act of the City Council to call the election, an act in which

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

it has no discretion.[3] No Texas court has ever stopped an election. Did the trial court err in refusing to issue a mandatory injunction that would have stopped the recall election?

(2) In *Citizens United*, 130 S.Ct. at 876, the Supreme Court ruled that the government cannot restrict political speech based on the corporate identity of the speaker. Here, the Mayor is seeking to enforce the Election Code in such a way that bans political speech based on the corporate identity of the speaker. Did the trial court err in refusing to issue a mandatory injunction that would have stopped the recall election?

(3) The Supreme Court ruled in *Citizens United* and *Buckley v. Valeo*, 424 U.S. 1 (1976), that the only possible interest in restricting (not banning) political contributions is the possibility of *quid pro quo* arrangements between the contributor and the candidate. The Mayor is enforcing a contribution ban on Appellees even though the alleged contributions did not go to a candidate or office holder. Did the trial court err in rejecting the Mayor's enforcement action because he provided no legitimate interest to violate the Appellees' constitutional rights?

RESPONSE TO STATEMENT OF FACTS

The Mayor spent over 17 pages trying to prove the following fact – that churches circulated and submitted petitions to hold a recall election for the Mayor, Representative Byrd and Representative Ortega. Even if all of the facts the Mayor alleged are true, this

[3] *Blanchard v. Fulbright*, 633 SW 2d 617 (Tex.App. 1982).

type of activity is core political speech, and is not a violation of any law.[4] The circulation of petitions is pure political speech, and "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347. And as the Supreme Court made abundantly clear in *Citizens United*, political speech, even from corporations, cannot be prohibited. *See Citizens United*, 130 S.Ct. at 876. The Mayor might as well have spent 17 pages alleging that the Appellees *voted* because what he claimed they did – circulate petitions – is core political speech and is not a crime in America.

But even so, the Mayor failed to allege or prove several essential facts that doom his case. The Mayor failed to allege or prove that a candidate or office holder approved or coordinated the alleged contributions. As the Texas Ethics Commission made clear in Advisory Opinion No. 489, issued April 21, 2010, after *Citizens United*, any restriction on political expenditures or contributions that are not done under the direction or control of a candidate or office holder is unconstitutional. (RR Vol. 7 p. 157). *See also Citizens United*, 130 S.Ct. at 908 ("The *Buckley* Court, nevertheless, sustained limits[5] on direct

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[4]Appellees are not admitting that the Mayor's recitation of the facts is correct. The trial court heard all of the live testimony, considered the evidence, and decided that the election should not be stopped.

[5] While the *Buckley* Court sustained *limits* on contributions to candidates, the Mayor here is trying to enforce a complete *ban* on contributions. The government has no valid interest, let alone a compelling interest, to completely ban contributions. Such a complete ban not only fails to be narrowly tailored to serve a valid interest, but the enforcement of such a ban would be unconstitutional. For example, here, the Mayor is alleging that the act of circulating petitions itself is an illegal contribution. He contends that the act of communicating on a website is illegal. According to the Mayor, the act of communicating within a building is even illegal because the use of a building has value. If this is truly what the Election Code prohibits, then it would be blatantly unconstitutional. *See Canyon Ferry Road Baptist Church v. Unsworth,* 556 F.3d 1021 (9th Cir. 2009); *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010).

contributions in order to ensure against the reality or appearance of corruption... The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.") So in order to prove a violation of the Election Code, the Mayor had to prove that the Appellees made a contribution ***under the direction of, or in coordination with, an office holder or candidate.*** This is an essential element of the Mayor's case. But the Mayor failed to present any evidence that any of the alleged contributions were made under the guise of a candidate or officer holder.

The Mayor has failed to present any evidence as to any *corporate* decision by the Word of Life Church, or any other church for that matter, to be involved in the recall effort. It is not illegal for a pastor or church leader to circulate or submit recall petitions. Even under the Mayor's erroneous interpretation of the Election Code, pastors and church officials have this right. But the Mayor failed to present any evidence that a church board voted on the matter. The Mayor failed to present any evidence that a corporate board considered the decision and voted to approve being involved. The Mayor's evidence points out that certain *individuals* circulated a petition. *See, e.g.,* Appellant's Brief, 4-6. Indeed, the Mayor includes a quote from Pastor Brown that shows his involvement was personal. "In a June posting entitled, 'A Message from Pastor Tom Brown,' ***Pastor Brown*** called for a recall petition campaign and stated that '[i]t was not an easy decision to recall the mayor ... ***I,*** along with El Pasoans for Traditional Family Values (EPTFV), have decided to join in the recall ....'" *See*

Appellant's Brief, 6 (emphasis added). But as the Mayor pointed out in his Motion to Show Authority before the trial court, a corporate entity acts through decisions of its board. And here, the Mayor failed to show any board decision by any of the churches he alleged participated in circulating recall petitions.

The minutes from the June 27, 2011 board meeting make this point clear. *See* Minutes, attached as Tab 3 to the Mayor's Brief.[6] These minutes reflect that Pastor Brown was informing his church that he personally intended to be involved in this effort. This document states, "So **Pastor Tom** in good conscious, will continue with the recall. **He** cannot abandon the people that stood and supported the issue. **He** will stand for the VOTERS CIVIL RIGHTS." *See id.* (emphasis added). Even under the Mayor's erroneous interpretation of the Election Code, a pastor can be personally involved in a recall effort. And it would only make sense that if a pastor was going to be involved in such a highly publicized matter, that he would inform his employer about his involvement. But the Church never voted to be involved. These minutes say just the opposite – that *Pastor Brown* was going to be involved.

In addition, the websites that the Mayor cites to as evidence that churches were circulating petitions do not support this conclusion. Rather, these websites show that

[6] The Mayor's argument that these minutes were not properly submitted during the hearing is baseless. When the pastor was served with a lawful subpoena, he filed a motion for a protective order on several different grounds, including the ground that the Mayor was seeking the names of members within the church and a church has a constitutional right not to turn over the names of its members. *See NAACP v. Alabama*, 357 U.S. 449, 460, 462 (1958). Under Texas Rules of Civil Procedure Rule 176.6, once a party files for a protective order, he does not have to comply with the subpoena until the court orders him to do so. If the issuing party wants a quicker compliance, then it can file a motion ordering immediate compliance under Rule 176.6. The Mayor never filed this motion. The trial court denied the motion for a protective order, ordered that the documents be turned over, and the pastor complied with the Order.

people were *encouraged* to be involved in the recall effort. *See, e.g.,* RR Vol. 15, PX 20 ("City Council and the Mayor disrespected the will of the people. They overturned the legitimate vote for the Traditional Family Ordinance. People who have complained that their votes do not count are justified .... If you are upset at this action and would like to sign and/or circulate a recall petition against Mayor John Cook and Representatives Susie Byrd and Steve Ortega come to one of the following locations.") But the websites themselves did not *circulate* the petitions. Thus the Mayor is not only trying to punish the Appellees for allegedly circulating and submitting recall petitions, but he is also seeking to punish them for their speech encouraging others to be involved.[7]

In addition, the websites do not prove that a significant number of petitions were signed in churches. Rather, the websites show that people were encouraged to sign the petitions outside the churches and "off church property". *See id.*

The Mayor's "star witness" was his lawyer's own paralegal Pamela Soto. RR Vol. 3, 109. Not only was she a biased witness and on the payroll for this case, but when the Mayor invoked the witness rule, she remained in the courtroom. RR Vol. 3, 92. The trial court had discretion to discount her testimony.

Finally, the number of signatures that the Mayor has called into question is statistically irrelevant. Thousands of signatures were collected. The clerk testified that she stopped counting at 9,556 "because those – that was several thousand over what was required." RR Vol. 2, p. 117.

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[7] The Mayor was crystal clear that he interprets the Election Code to prohibit pure political speech. *See* Appellant's Brief, 28 ("the "circulation and submission" of petitions, without more, constitutes a violation.")

In sum, the Mayor alleges that the Appellees engaged in core First Amendment activity – activity that the Supreme Court said receives the "zenith" level of protection. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999). Simply put, what the Mayor alleges the Appellees did is not a crime, but is democracy in action.

STANDARD OF REVIEW

The Mayor seeks an astounding remedy – a mandatory injunction to force the City Clerk to decertify signatures to stop an election.[8] Mandatory injunctions themselves are an extreme remedy. "[I]t has been said that such injunctions should be granted with great caution. Ordinarily a mandatory injunction will not be granted before final hearing, and not even then except under pressing necessity to prevent serious damage which would ensue from the withholding of the writ, or where necessary to effectuate the decree." *Thomas v. Hale County*, 531 S.W.2d 213, 214-15 (Tx. App. 1975).

But even more extreme would be the remedy of stopping an election. No court in the history of Texas has ever stopped an election, not to mention doing so via a mandatory injunction where the court orders a clerk to decertify signatures. And to get to this remedy, the Mayor is asking this Court to ignore a United States Supreme Court ruling (*Citizens United*) directly on point. To put it mildly, the Mayor has an extremely high burden in this case. The trial court did not abuse his discretion in denying the mandatory injunction that would have stopped an election.

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[8] The Court cannot enjoin the City Council from calling the election. First of all, this would be a direct violation of the separation of powers doctrine. *See* Section I below. But more to the point here, the City Council is not even a party to this action.

SUMMARY OF THE ARGUMENT

The Mayor is not entitled to a mandatory injunction as it would be improper for a court to stop or delay an election. The petitions have already been submitted to the City Clerk. She received them, verified the signatures, and has already submitted them to the City Council. All that remains is for the City Council to call the election, a ministerial act in which it has no discretion.

The Mayor's case is based on the premise that churches cannot circulate or submit petitions to hold a recall election. This is not the law. The Mayor might as well be trying to hold Defendants criminally liable for saying the pledge of allegiance. Circulating petitions is fundamental First Amendment activity, and receives the highest protection under our laws. Of this right, the Supreme Court said, "Petition circulation ... is 'core political speech,' because it involves 'interactive communication concerning political change.' ***First Amendment protection for such interaction ... is 'at its zenith.***'"[9]

The Mayor's case is premised on the flawed legal theory that the government can prohibit corporations from being involved in political causes. But the United States Supreme Court recently rejected this in *Citizens United*. There, the Court struck down a law that banned corporate expenditures relating to a candidate. The Court noted the vital importance of political speech in our democratic form of government. Any restriction on such speech would have to survive strict scrutiny analysis – the highest level of constitutional protection afforded any right. The Court then considered all of the

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[9] *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999) (emphasis added), quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)

government's interests in restricting corporate political speech, such as the anti-distortion doctrine, limiting the undue influence of corporate entities, discouraging *quid pro quo* arrangements, and that a restriction on money spent is not really a restriction on speech. The Court rejected these arguments, struck down the law prohibiting corporate political speech, and said, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech" and "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." 130 S.Ct. at 904 and 913.

Here, there is no question that if the Appellees were individuals, the Mayor would not have a case. The Mayor is bringing this case *based on the corporate identity* of the church. This type of speaker identity discrimination is directly prohibited by *Citizens United*, and is unconstitutional.

ARGUMENT AND AUTHORITIES

I. The Trial Court was correct to not stop or delay the election as doing so would violate the Separation of Powers Doctrine.

The people of El Paso have spoken, and they want an election to recall the Mayor and Representatives Byrd and Ortega. The signatures were collected. The City Clerk verified the signatures are authentic, and the petitions have already been submitted to the City Council. All that is left is for the City Council to call the election, a ministerial act in which the Council has no discretion. *See Blanchard v. Fulbright*, 633 SW 2d 617 (1982).

A. Stopping an election would violate the Separation of Powers Doctrine.

To enter any kind of injunction now would stop an election, and this would violate the Separation of Powers Doctrine. In *Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999), the Texas Supreme Court held, "We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process.... An injunction that delays the election would be improper...."[10]

The Mayor argues that the Texas Legislature created a special exemption to allow for recall elections to be enjoined. The Texas Legislature did no such thing. Texas Election Code § 273.081 states, "A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." There is no reference in this code section that this allows enjoining of a recall election. There is no inference that this code section is overturning the well settled law that courts are not to

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[10] The Court then cited several cases demonstrating this well founded principle: *City of Austin v. Thompson*, 147 Tex. 639, 219 S.W.2d 57, 59 (1949) (district court is without authority to enjoin even a void election); *Ex parte Barrett*, 120 Tex. 311, 37 S.W.2d 741, 742 (1931)(injunction against holding an election is outside the general scope of judicial power); *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 105 Tex. 337, 148 S.W. 292, 295 (1912)(declined to enjoin canvassing of votes on ground that election was illegal); *Leslie v. Griffin*, 25 S.W.2d 820, 821–22 (Tex. Comm'n App.1930, judgm't adopted)(same); *Winder v. King*, 1 S.W.2d 587, 587–88 (Tex. Comm'n App.1928, judgm't adopted)(refused to enjoin official from calling election); *City of McAllen v. Garza*, 869 S.W.2d 558, 561 (Tex.App.—Corpus Christi 1993, writ denied)(refused to enjoin allegedly void election); *Kolsti v. Guest*, 565 S.W.2d 556, 557 (Tex.Civ.App.—Austin 1978, no writ)(declined to enjoin official from placing referendum on ballot); *Ellis v. Vanderslice*, 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ)(declined to enjoin official from certifying petition for local option election); *Stroud v. Stiff*, 465 S.W.2d 407, 408 (Tex.Civ.App.—Amarillo 1971, no writ)(refused to enjoin city for proceeding under election resolution).

interfere with the holding of an election. In short, there is nothing about § 273.081 that suggests the Texas Legislature intended to treat recall elections differently than any other election, or to exempt such elections from the well settled law that the judiciary is not to stop the election process. The Texas Legislature only intended to allow injunctions against ongoing actions that violate the Election Code, such as making political contributions or expenditures in violation of the Code. But the Legislature said nothing about *stopping elections* by injunction.

The Texas courts that have reviewed § 273.081 are in agreement that it does not permit the judiciary to stop or delay an election. *See Ramirez v. Quintanilla*, 2010 WL 3307370 (Tex.App.-Corpus Christi) (in determining whether §273.081 permits a court to enjoin an election, stated, "[i]n short, if the matter is one that can be judicially resolved in time to correct deficiencies in the ballot without delaying the election, then injunctive relief may provide a remedy that cannot be adequately obtained through an election contest."); *Cahill v. Bertuzzi*, 2010 WL 2163136 (Tex.App.-Corpus Christi) (stating that § 273.081 of the election code gives the trial court jurisdiction to enjoin violations of the election code, but the relief requested must not seek to delay or cancel an election).

So while this section does permit the person being harmed to seek an injunction to stop certain and specified ongoing violations of the Election Code, it does not give the person a right to stop or delay the election. Here, the Mayor is seeking a mandatory injunction for the Clerk to decertify signatures to stop the election. But the signatures have already been obtained and verified. The City Clerk has submitted the petitions to the City Council. There is no ongoing or continuing violation of the Election Code to

enjoin. The trial court was correct in refusing to issue a mandatory injunction that would have stopped the election.

B. The Election Code provides sufficient remedies if the code is violated.

The Mayor argues that if he is not entitled to stop the election, then the Code is meaningless as it offers no disincentive from violating the Code. According to the Mayor, Wal-Mart would be free to violate the Code with no repercussions. The Mayor has misrepresented the Code on this matter. Several provisions of the Code deter people and corporations from violating the Election Code. Most stringent are the criminal sanctions. For example, violation of Election Code § 253.094 is a third degree felony, which carries with it possible jail time. The Code also allows a candidate to contest an election after it has occurred. The Code provides for monetary damages to the offended party if there is a violation. But the Code does not overturn the well settled principle that courts are not to interfere with the election process by stopping or delaying an election.

II. The Mayor's entire case is based on a gross misstatement of law. Churches have a fundamental right to circulate and submit petitions to hold a recall election.

The Mayor's case is directly contrary to the law. The Mayor alleges that a church circulated and submitted a petition to hold a recall election, and that this activity is illegal.[11] Even assuming that the Mayor is factually correct, the circulation and submission of recall petitions by churches or other corporations represents core First

[11] The Mayor, as stated above, has not proven that any Church circulated or submitted recall petitions. At most, the Mayor has proven that certain individuals circulated and submitted recall petitions. This activity is clearly lawful and is not proscribed by the Election Code.

Amendment activity. Far from being illegal under our laws, it deserves and receives the highest protection under the law.

A. The Mayor is targeting core political speech.

The Mayor is not challenging the expenditure of money. He is not complaining that someone made an improper donation. No, this case is about pure grassroots efforts of circulating and submitting petitions. This is pure political speech, and "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995).

In *Buckley v. American Constitutional Law Foundation*, the Supreme Court was confronted with a Colorado statute that placed restrictions on circulating petitions, such as name badge and reporting requirements for petition circulators. *See* 525 U.S. at 182. The Colorado law imposed far fewer restrictions on political speech than what is involved here. The Colorado statute did not prohibit political speech but only placed restrictions on the speech. Nevertheless, the Court struck down these restrictions. The Court concluded that the "restrictions in question significantly inhibit communication with voters about proposed political change" because the one-on-one communication involved in petition circulation requires circulators to "endeavor to persuade electors to sign the petition." *Id.* at 192, 199.

The Court noted, "[p]etition circulation ... is 'core political speech,' because it involves 'interactive communication concerning political change,'" and that First Amendment protection for such interaction is therefore "at its zenith." *Id.* at 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). *See also Mills v. Alabama*, 384

U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates...."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *see also Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Mayor claims that the text of the Election Code states that the actual circulation of petitions is an illegal contribution. *See* Appellant's Brief, 28 ("the "circulation and submission" of petitions, without more, constitutes a violation."). In order to reach this faulty conclusion, this Court would have to ignore standard rules of statutory and grammatical construction, and be willing to interpret the Code in a way that would render it blatantly unconstitutional. Under the last antecedent rule, a qualifying phrase in a statute applies to the *last antecedent* before it. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (describing doctrine of last antecedent, a canon of statutory construction instructing that "that a qualifying phrase ... must be confined to the words and phrases immediately preceding it to which it may, without impairing the meaning of the sentence, be applied.")

Applying this rule to the Election Code, the phrase "including the circulation and submission of a petition to call an election" modifies "recall election," not "political contribution." In other words, the code prohibits political contributions concerning recall elections, including political contributions concerning the process that lead to the recall election – the circulation and submission of the petition to call the election. But the Code does not prohibit the actual circulation and submission of the petitions. The Code does not equate the actual circulation of petitions as an illegal contribution. If it did so, it would be banning core political speech and would be a blatant violation of the United States Constitution. *See Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009); *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

While this interpretation of the Code is the most straight forward, and is consistent with standard grammatical and statutory construction rules, the Mayor argues that this cannot be the correct interpretation as there would never be a candidate or office holder involved in a recall election. This is not true. For example, Pastor Brown, or any other citizen, could have announced his candidacy for Mayor. But under *Citizens United*, the only remotely arguable interest in restricting political contributions is that by definition, such contributions are to candidates, and thus could result in *quid pro quo* deals.[12] *See* 130 S.Ct. at 908. But if there is no candidate, then this danger is nonexistent.

[12] Even so, the Supreme Court did not uphold such interests as valid in *Citizens United*. It left the issue of whether contributions to candidates could be restricted to another case. But in any event, a *complete ban* on contributions, as we have here, is unconstitutional and serves no valid governmental interest. *See Buckley*, 424 U.S. at 1, *Citizens United*, 130 S.Ct. at 900-08.

The Mayor bases his entire case on the assumption the circulation of petitions at a church is illegal. But the circulation of petitions is core political speech. It is "interactive communication concerning political change." It is entitled to the greatest protection under the First Amendment. It cannot be banned.

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre,* 514 U.S. at 347 (citing *Bellotti*, 435 U.S. at 786). Here, there is no valid government interest to prohibit churches, or corporations for that matter, from circulating petitions or submitting petitions to hold a recall election. Any interest the Mayor might assert, like the corporation having undue influence, or preventing *quid pro quo* exchanges, were specifically rejected by the Supreme Court in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).[13] And even if the Mayor could assert a compelling interest, *banning* speech is not narrowly tailored to achieve that interest. Limits could be set or disclosures required. But a ban serves no legitimate interest.

B. *Citizens United* protects Appellees' right to engage in corporate political speech.

In *Citizens United,* the Supreme Court was confronted with the issue of corporate political speech, and held that such speech is constitutionally protected and cannot be

[13] This issue is properly before this Court. Appellees have argued from the inception of this case, and at every proceeding along the way, that the Mayor's actions in enforcing the Code violate the Constitutional rights of the Appellees. It was raised as an affirmative defense. It was part of a motion to dismiss under the Texas Citizens Participation Act, V.T.C.A., Civil Practice & Remedies Code § 27.001, et. seq. It was part of every motion for protective order. It was raised in the Opposition Brief to Plaintiff's Motion for Injunctive Relief. The Mayor has the burden of proving he is likely to succeed on the merits. He will not succeed on the merits because his interpretation of the Code would render it blatantly unconstitutional. And it would violate the fundamental constitutional rights of every single citizen who signed the petitions.

banned simply because it is speech by a corporate entity. *Citizens United* involved a federal law that prohibited corporations from using their funds to pay for "electioneering communication" and for speech that expressly advocated the election or defeat of a candidate. *See id.* at 886; *see also* 2 U.S.C. § 441b. Citizens United was a nonprofit corporation that produced *Hillary: The Movie*, a ninety minute documentary about then Senator Hillary Clinton. Senator Clinton was a candidate in the Democratic Party's 2008 Presidential primary elections, and Citizens United wanted to air this movie during the campaign. But Citizens United feared that the law banning corporate-funded political expenditures would subject it to civil and criminal penalties if it did. So Citizens United sought declaratory and injunctive relief against the federal law, claiming it was unconstitutional.

The Court began by noting that the federal law, §441b, although a restriction on money, did indeed ban corporate political speech.

> Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

Id. at 898.

The Court then explained that political speech is vital to the proper functioning of a democracy.

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The

> First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."

Id. at 898, *quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). *See also Buckley v. Valeo*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential").

"For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.*, *citing Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (ROBERTS, C.J.).

The Court then stated that any restriction on political speech cannot be based on the identity of the speaker.

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.... Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id. at 899.

The Court recognized that First Amendment protection extends to corporations, and that this "protection has been extended by explicit holdings in the context of political speech." *Id.* (*citing NAACP v. Button*, 371 U.S. 415, 428-429 (1963)). The Court explained, "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Id.* (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). The Court has thus "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 900.

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

In *Citizens United*, the government argued that the restrictions were necessary to prevent the "distortion" that a corporation would have on the election process due to its amassed pool of wealth. *See id.* at 905. The Court rejected this rationale, stating,

> It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.

Id. (citations omitted).

Rather than restrict political speech by some, the Supreme Court said that it should be opened to all.

> By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, ***but the remedy of "destroying the liberty" of some factions is "worse than the disease."*** The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, *see ibid.*, and by entrusting the people to judge what is true and what is false.... "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Bellotti*, 435 U.S., at 792, n. 31, 98 S.Ct. 1407

Id. at 907 (emphasis added).

The government argued that such restrictions were necessary to avoid any *quid pro quo* deals between candidates and corporations, or the appearance of such dealings. *See id.* at 908. The Court rejected this as a valid interest to ban corporate political speech and explained:

> "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate...." For the reasons explained above, ***we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.***

Id. at 908 (emphasis added) (quoting *Buckley*, 424 U.S. at 47).

The Mayor has alleged that the Church is engaged in circulating and submitting a petition for a recall election. The Mayor has not even attempted to show factually that any candidate or officeholder was involved in the circulation or submission of petitions.

In fact, there is no candidate involved that could be a part of a *quid pro quo* dealing with the Church. No candidate has approved this effort. No candidate is coordinating with the Church in the recall.

The Mayor argues that the Election Code is different than the law struck down in *Citizens United* because here, the ban is on the circulation of petitions, and in *Citizens United*, the ban was on expenditures. But a ban on circulating petitions is worse! If government cannot restrict the spending of money on a campaign as it might interfere with speech, it most assuredly cannot restrict the speech itself. *See also Ex parte Ellis*, 309 S.W.3d 71 (Tex.Crim.App.2010) ("a corporation may contribute to a political committee devoted exclusively to measures....a corporation may make independent expenditures (e.g., buy its own issue ads), make press releases, and otherwise have its agents directly engage in communication with respect to a measure (or a candidate, for that matter).") (parentheticals in original).

The Mayor contends that the Election Code prohibits churches from circulating petitions to recall an elected official. This is a speech restriction based on the corporate identity of the speaker, and is unconstitutional. The Mayor does not have a compelling interest to enforce this law against the Appellees, and even if one existed, banning churches from circulating petitions to recall an elected official is not narrowly tailored.

C. The Texas Ethics Commission disagrees with the Mayor's interpretation of the Election Code.

The Mayor's interpretation of the Election Code is wrong. Not even the Texas Ethics Commission agrees with the Mayor's interpretation of the Election Code. It does

not prohibit a Church, or any of its members, from circulating a recall petition. If it did, as demonstrated above, such law would be in blatant violation of the United States Supreme Court holding in *Citizens United* that upheld the right of corporate entities to engage in political speech. *See* Tex. Government Code § 311.021 ("In enacting a statute, it is presumed that … compliance with the constitutions of this state and the United States in intended …."); *In re Brazen*, 251 S.W.3d 39 (Tex. 2008) ("we try to interpret statutes in a way that avoids constitutional conflicts").

The Election Code prohibits *political contributions* in connection with the circulation and submission of a petition to call an election. A political contribution is a political expenditure made with the prior consent or approval of the candidate or officeholder on whose behalf the expenditure was made. *See* 1 TX ADC § 20.15(5), and Texas Ethics Commission Advisory Opinion No. 489 (April 21, 2010).

After *Citizens United,* the Texas Ethics Commission issued an opinion that explains how the Election Code should be interpreted in light of the Supreme Court's ruling. The Commission began its opinion by stating,

> We believe the Texas Legislature intended the laws under our jurisdiction to prohibit political expenditures made by corporations to the full extent allowed by the United States Constitution, as interpreted by the United States Supreme Court. *See* Ethics Advisory Opinion No. 198 (1994). *See also*, Gov't Code § 311.021(1) (providing that, in enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended). It is clear that under *Citizens United*, sections 253.094 and 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by corporations or labor organizations. Furthermore, based on *Citizens United*, section 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by any other person. *See, e.g., Citizens United*, 558 U.S. at 39-45 (stating that limits on independent expenditures have a chilling effect on political speech

> and that restrictions based on anti-distortion or anti-corruption rationales are not justified). See also, id. at 26 (noting a previous Court decision that rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons"). Thus, for the reasons stated in *Citizens United*, and in accordance with the legislature's intent that statutes be enforced in compliance with the constitutions of this state and the United States, we cannot enforce sections 253.094 or 253.002 of the Election Code to prohibit a corporation or labor organization from making a direct campaign expenditure or enforce section 253.002 of the Election Code to prohibit any other person from making a direct campaign expenditure.

See Ethics Advisory Opinion No. 489 (April 21, 2010).

The Commission then noted the difference between expenditures and contributions.

> the term "direct campaign expenditure" is used in Texas law to describe a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. *Id.* § 251.001(8). In contrast, a campaign expenditure made with the prior consent or approval of the candidate benefitted is not a direct campaign expenditure, but is a contribution to the candidate. 1 T.A.C. § 20.1(5); Ethics Advisory Opinion No. 331 (1996).

The Commission then gave a practical example of an expenditure as compared to a contribution.

> For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent or approval from the candidate, would make a direct campaign expenditure. If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *See* Ethics Advisory Opinion No. 331 (1996).

Thus post *Citizens United,* a political contribution under Texas law is a political expenditure that is done with the prior consent or approval of the candidate benefitted.

But here, the Mayor does not allege that the Defendants made political contributions, as that term is defined in the Election Code. There are no allegations that money was given with the express approval or consent by a candidate or officeholder. The Mayor only alleges that the Appellees circulated the recall petition at church. But this is not a violation of the Election Code and is instead protected political speech under *Citizens United.*

III. The Mayor is barred from arguing that the SPAC status of El Pasoans for Traditional Family Values is a violation of the Election Code because he never raised this issue below. Additionally, the issue is a red herring as El Pasoans is in full compliance with all laws.

The Mayor argues that persons associated with the recall effort should have formed a PAC in order to support the recall of Cook, Byrd, and Ortega. *See* Appellant's Brief at xiii, 12-13, 31-33. This issue is barred from consideration because the Mayor never raised it in the trial court and cannot raise it for the first time on appeal. "A party cannot complain on appeal about a trial court's failure to award relief when the party never pled for that relief in the trial court." *Paul v. Merrill Lynch Trust Co.*, 183 S.W. 3d 805, 808 (Tex. App. 2005); *see also Adams v. First Nat'l Bank,* 154 S.W.3d 859, 871 (Tex. App. 2005) ("A claim that was not presented to the trial court cannot be considered on appeal."); *Carrizales v. Tex. Dep't Prot. & Reg. Servs.,* 5 S.W.3d 922, 925 (Tex. App 1999) ("As a rule, a party may not raise an issue, even a constitutional claim, for the first time on appeal."). The argument that certain persons should have formed a PAC in order to support the recall of Cook, Byrd, and Ortega never once appears in Plaintiff's Second Amended Petition and was never argued below in the trial court. Indeed, the sections of

the Election Code that the Mayor argues the proponents of the recall petition violated (sections 252.001, 253.003, 253.005, and 253.031(b)) never appeared anywhere in the Mayor's Petition below. This Court should not consider this issue that was never raised in the pleadings filed below, was never presented to the trial court, and formed no part of the proceedings below.

If this Court is inclined to address this issue even though it appears for the first time in this case in the Mayor's Brief on appeal, it should reject the argument in its entirety because the Election Code's requirement to create and form a political committee does not apply to city recall elections. The exact argument raised by the Mayor was considered and rejected in *Blanchard v. Fulbright*, 633 S.W. 2d 617 (Tex. App. 1982). In that case, proponents of a recall election filed a mandamus action to compel the city council to call a recall election. The mayor, who was the subject of the recall election, defended against the mandamus action on various grounds, including arguing that the proponents of the recall election had no standing to bring the mandamus action because they had not complied with the Election Code's requirement to form a political committee, designate a campaign treasurer, and file campaign expense reports. The mayor in *Blanchard* argued that there was no difference in the definition of election in the election code for a recall election and any other election held pursuant to city code.

The appellate court rejected these arguments: "We do not construe the Election Code to require the designation of a campaign treasurer or the filing of campaign contribution and expense reports on a recall petition made and filed by residents of a Home Rule municipality to recall members of the city council. We do not find such

election code provisions to be applicable in such a city recall election procedure." *Id.* at 624. The appellate court in *Blanchard* completely rejected the identical argument made by the Mayor in this case. The Mayor never even cited *Blanchard* in his brief to this Court even though it has direct application and completely forecloses his argument.

This Court should follow *Blanchard* and likewise reject the Mayor's argument to apply the Election Code provisions for political committees to a city recall election procedure. It also makes logical sense in light of the Election Code's definition section. *See* TEX. ELEC. CODE §1.005. There is no definition for "election" in the Election Code that encompasses the procedures for circulating and submitting a recall petition. Indeed, the only time the term "recall" is used at all in the Election Code is in §253.094(b) which only prohibits "political contributions" in connection with a recall election. There is no indication in any section of the Election Code, outside of §253.094's specific prohibition, that the Legislature intended its provisions to apply to the procedures to be followed for circulating and submitting recall petitions. And there is certainly no indication that the Legislature intended the requirements for political committees to apply to the procedures for recall elections. This Court, like the appellate court in *Blanchard*, should reject the Mayor's attempt to broaden the scope of the Election Code beyond its specific terms.[14]

[14] In any event, the SPAC that was formed to support the Family Values Ordinance would not be prohibited from expending funds or accepting contributions in support of the recall of Cook, Byrd, and Ortega because such contributions and expenditures relate to and are part of its purpose to support the Family Values Ordinance. The Mayor has not shown, nor can he show, that the support of an effort to recall him from office is unrelated to the purpose of the SPAC formed to support the Family Values Ordinance because the entire purpose for the recall effort was solely related to his action in overturning the Family Values Ordinance the SPAC was set up to support.

CONCLUSION

The Mayor's case is based on a fallacy. It is not illegal for a church to circulate a petition to hold a recall election. Circulating a petition is core First Amendment activity, and receives the highest of protections under the law. A law that bans it offends the constitution, and is unconstitutional.

In addition, the Mayor's application for a mandatory injunction should be denied as it seeks to stop an election. It well settled Texas law that it would violate the separation of powers doctrine for the judiciary to stop an election. The Election Code provides for remedies if it is violated, including criminal sanctions, damages, and an election contest. But it does not provide what the Mayor seeks – stopping the election from taking place.

This Court should not lose sight of the political ploy that this lawsuit is attempting. The mayor is the subject of the recall election. And it is he who seeks to stop it. Democracy should be allowed to play out here, and the people should have their election.

Respectfully submitted, this 11th day of January, 2012.

Joel L. Oster*
Kevin H. Theriot, SBN 00788908
Alliance Defense Fund
15192 Rosewood Street
Leawood, KS 66224
(913) 685-8000
(913) 685-8001 Facsimile

Theresa Caballero, SBN 03569625
Stuart Leeds, SBN 12151500
Attorneys at Law (Local Counsel)

300 E. Main Drive, Suite 1136
El Paso, TX 79901-1381
(915) 565-3550
(915) 562-5250 Facsimile

Attorneys for Appellees Tom Brown Ministries, Word of Life Church of El Paso, Tom Brown, El Pasoans for Traditional Family Values, Salvador Gomez, Ben Mendoza and Elizabeth Branham

* *Pro hac vice* status pending

CERTIFICATE OF SERVICE

I hereby certify that on January 11th, 2012, a true and correct copy of the foregoing was served by placing same in the U.S. Mail, postage prepaid, addressed to:

Mark C. Walker
David M. Mirazo
Cox Smith Matthews Incorporated
221 North Kansas Street, Suite 2000
El Paso, TX 79901

Attorneys for Appellant

Charlie McNabb, City Attorney
Kenneth A. Krohn, Asst. City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, TX 79901-1196

Attorneys for Appellee Richarda Momsen

Kevin H. Theriot