

IN THE SUPREME COURT OF TEXAS

**TOM BROWN MINISTRIES, TOM BROWN,** )  
**WORD OF LIFE CHURCH OF EL PASO,** )  
**EL PASOANS FOR TRADITIONAL FAMILY** )  
**VALUES, SALVADOR GOMEZ, BEN** )  
**MENDOZA and ELIZABETH BRANHAM,** )

**Petitioners,** )

**v.** )

**No.** \_\_\_\_\_

**John F. Cook,** )

**Respondent.** )

**MOTION TO STAY APPEALS COURT RULING**

Petitioners 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, hereby move this Court to stay the judgment of the Eighth District Court of Appeals that has stopped a recall election. In support of this motion, Petitioners state as follows:

1. Thousands of El Paso citizens signed a petition to hold a recall election for Mayor John Cook, State Representative Steve Ortega and State Representative Susan Byrd. The El Paso City Clerk certified that the signatures were valid, and the El Paso City Council then called for the election to be held on either April 14, 2012, or May 12, 2012.

2. But this election has now been stopped pursuant to an order from the Eighth District Court of Appeals of Texas.<sup>1</sup>

3. This suit originated in the County Court at Law Number Three of El Paso County, Texas. The Mayor sued the Petitioners and Richarda Momsen, solely in her official capacity as El Paso City Clerk, seeking to enjoin the use of petitions to call a recall election. The Mayor sought injunctive relief, declaratory relief, and damages. The Mayor alleged that the Defendants violated §253.094 of the Election Code by circulating and submitting petitions to hold a recall election. The Mayor alleged that one of the groups supporting the recall was a church (“Word of Life Church”), and thus the efforts of everyone associated with the Church to promote the recall were invalid because the Church was a corporate entity.

4. The Mayor alleged that the speech of the Church and the various individuals constituted a contribution, thus anyone who made such a contribution, or accepted such a contribution, violated the Texas Election Code as a proper committee had not been formed to accept such contributions.<sup>2</sup>

5. The Appeals Court ruling is in direct contradiction with the Texas Election Code and binding precedent, including the Supreme Court’s recent ruling in *Citizens United v. Federal Election Commission*, 558 U.S. \_\_\_\_, 130 S.Ct. 876 (2010).<sup>3</sup>

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<sup>1</sup> The order was signed by Chief Justice Ann Crawford McClure, Justice Guadalupe Rivera, and Justice Christopher Antcliff.

<sup>2</sup> Plaintiff did not allege this claim until his Third Amended Petition, which was filed on November 21, 2011, almost a month after the hearing began on October 24, 2011, and only one day before the hearing ended on November 22.

<sup>3</sup> For a more detailed explanation of how the Appeals Court’s ruling conflicts with Texas law and binding precedent, see Petitioners’ Expedited Petition for Review, filed contemporaneously with this motion.

6. First, the remedy the Court of Appeals issued, stopping an election, is not appropriate for the alleged deficiencies it found, nor is it permitted under the well established Texas doctrine of separation of powers. *See Blum v. Lanier*, 997 S.W.2d 259, 263 (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...”)

7. Second, Texas Election Code 251.001(2) and *Buckley v. Valeo*, 424 U.S. 1, 23 n.24 (1976), require that before a political spending can be considered a contribution, there must be a “transfer”. Here, the alleged “illegal” activities were the speech of the various defendants. There was no transfer in this case, so there was no contribution, much less an illegal contribution. What the Mayor is claiming is an illegal contribution is not a contribution at all.

8. Third, if it was a contribution, Texas may not ban or limit it.

9. Fourth, if it was not a contribution, it was independent spending for political speech, so Texas may not ban or limit it. Nor may Texas force Defendants to *form* a (separate) political committee and let only the political committee speak.

10. Fifth, the government has not asserted that the non-political-committee Defendants themselves must *be* a political committee to engage in their political speech. Texas may also not force the non-political-committee Defendants themselves to *be* a political committee to engage in their political speech. The Supreme Court specifically rejected this in *Citizens United*. *See* 130 S.Ct. 876, 896 (2010). The Supreme Court said,

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.... A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak-and it does not-the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.... PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign. Section 441b's prohibition on corporate independent expenditures is thus a ban on speech.

*Id.*

11. Sixth, the Texas Election Code bans the speech of corporations based on their identity as corporations. This contravenes Supreme Court case law.<sup>4</sup>

12. The Appeals Court ruling is already causing great fear among El Pasoans concerning possible criminal indictment for their speech. Since the Appellate Court ruling was issued, the District Attorney has already subpoenaed the petitions and has convened a grand jury. *See Exhibit A.* The public is fearful that they can be criminally prosecuted just for speaking out on political matters. Their ruling must be stayed to alleviate these fears and to undo the chilling effect the ruling will have on speech and participation in the democratic process.

WHEREFORE, Petitioners seek a stay of the Eighth Circuit Court of Appeals Ruling, a granting of the Petition for Review, and an expedited briefing schedule.

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<sup>4</sup> In addition, any award of attorneys' fees against Defendants is improper as the Appeals Court ruled that the recall matter is a measure, and not a matter in opposition to a candidate. *See Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011); Tex. Elec. Code Ann. 253.131.

Respectfully submitted, this 7<sup>th</sup> day of March, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2012, a true and correct copy of the foregoing was served by sending a copy of the same via email and facsimile to the following:

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*Attorney for Other Party,  
Richarda Momsen, Solely in her  
official capacity as El Paso City  
Clerk*

/s/ Kevin H. Theriot  
Kevin H. Theriot

GRAND JURY SUBPOENA  
THE STATE OF TEXAS

TO ANY PEACE OFFICER OF THE STATE OF TEXAS OR BAILIFF OF THE GRAND  
JURY OF ANY COUNTY IN THE THIRTY-FOURTH JUDICIAL DISTRICT GREETING:

YOU ARE COMMANDED TO SUMMON:

**RICHARDA MONSEN, CITY CLERK**  
CUSTODIAN OF RECORD

DUCES TECUM: RECALL PETITIONS AND ALL RELATED DOCUMENTS FOR THE RECALL  
OF JOHN F. COOK, SUSIE BYRD AND STEVE ORTEGA FILED ON OR ABOUT SEPTEMBER  
2011 AND ALL DOCUMENTS EVIDENCING PERSONS OR PERSONS WHO SUBMITTED THESE  
DOCUMENTS

IN LIEU OF PERSONAL APPEARANCE, please contact District Attorney's Office Investigator Cathy  
Hendon 546-2059 Ext. 3411 when the required documents are ready.

Reference (ADA J. DAVIS)

to appear before the GRAND JURY now in session at the 168<sup>TH</sup> District Court, El Paso  
County Court House, on the 29<sup>TH</sup> day of FEBRUARY, 2012 at 10:00 o'clock A. M. then and there  
to testify as witness      before said Grand Jury HEREIN FAIL NOT, but of the Writ make  
due return, showing how you have executed the same.



signed and issued this 22<sup>ND</sup> day of FEBRUARY, 2012

  
FOR JAIME E. ESPARZA, DISTRICT ATTORNEY

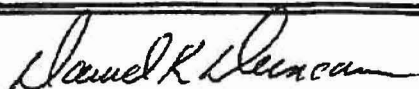
34<sup>TH</sup> JUDICIAL DISTRICT, EL PASO COUNTY, TEXAS

**ACCEPTANCE OF SERVICE**

The undersigned witness named in this subpoena acknowledge receipt of a copy thereof  
and hereby accepts and waives service of such subpoena.

\_\_\_\_\_  
Signature of Witness and Date

\_\_\_\_\_  
Investigator C. Hendon



2-22-2012