

No. 10-0487

IN THE SUPREME COURT OF TEXAS

In Re:
DEB SHAFTO, HERB GONZALES, JR., EDWARD LINDSAY,
ART BROWNING, CHRISTINE MORSHEDI,
AND THE GREEN PARTY OF TEXAS, Relators

ON PETITION FOR WRIT OF MANDAMUS

**RELATORS' RESPONSE TO
REAL PARTIES IN INTEREST'S
MOTION TO DISMISS FOR MOOTNESS**

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Art Browning,
Christine Morshedi, &
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Real Parties in Interest:

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STATEMENT OF THE CASE

This is a ballot access case.

On June 24, 2010, the district court (Honorable John Dietz, 250th District Court of Travis County, sitting for the 353rd District Court) issued a temporary injunction that enjoined the Green Party of Texas (and its co-chair Christine Morshedi) from “certifying its slate of candidates and forwarding same to the Secretary of State” and from “taking any measures to certify its slate of candidates or obtain access for them to the 2010 Texas General Election Ballot.”

On July 2, 2010, this Court stayed the district court’s temporary injunction order and thereafter Green Party of Texas co-chair Christine Morshedi timely delivered to the Secretary of State a certified list of the party’s 2010 statewide nominees.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this original proceeding pursuant to sections 22.001 and 22.002 of the Texas Government Code.

ISSUES PRESENTED

1. May a minor political party in Texas use corporate contributions to defray ballot access costs incurred by the party?
2. If the Green Party of Texas unlawfully accepted ballot access petitions from Take Initiative America, Inc., what is the appropriate remedy to address the violation?
3. Do the plaintiffs below lack standing?
4. Are the plaintiffs’ requests for declaratory and injunctive relief moot?

STATEMENT OF FACTS

In May 2010, the Green Party of Texas (GP) received an in-kind contribution consisting of a large number of ballot access petitions from Take Initiative America, Inc., an out-of-state nonprofit corporation. On May 24, 2010, the GP submitted all of its ballot access petitions (including those received from Take Initiative America, Inc.) to the Secretary of State, which subsequently determined that the party had submitted a sufficient number of valid petition signatures.

On June 10, 2010, the Texas Democratic Party, Boyd Richie, and John Warren (plaintiffs below) filed suit against the GP and numerous other named and unnamed defendants.

On June 12, 2010, the GP nominated its 2010 statewide nominees at its state convention. The GP's 2010 statewide nominees are Deb Shafto (governor), Herb Gonzales, Jr. (lieutenant governor), Ed Lindsay (comptroller), and Art Browning (railroad commissioner). In the district court, these four individuals were sued as "Defendants the 2010 Unknown Nominees of the Texas Green Party." They are relators in this Court.

On June 24, 2010, the plaintiffs filed Plaintiffs' First Amended Original Petition and Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, Writ of Mandamus, and Declaratory Judgment. In that pleading, the plaintiffs request a judicial declaration that "the Texas Green Party and its nominees are not entitled to placement on the 2010 General Election ballot because their application for same was procured through numerous violations of law as stated herein and hereinafter alleged." In

addition, the plaintiffs request temporary and permanent injunctions enjoining “the TGP and Chair Morshedi from certifying the TGP nominees to the SOS” and “Defendants from taking any steps to have nominees of the TGP placed on the 2010 General Election Ballot.” In the alternative, the plaintiffs seek “their damages as required by Texas Election Code §§ 253.131-132 Specifically, Plaintiffs pray for judgment against Defendants for two times the amount of the wrongful contributions and expenditures as well as attorneys fees as required by the aforementioned statutes.”

On June 24, 2010, the district court issued a temporary injunction that enjoined the GP (and its co-chair Christine Morshedi) from “certifying its slate of candidates and forwarding same to the Secretary of State” and from “taking any measures to certify its slate of candidates or obtain access for them to the 2010 Texas General Election Ballot.”

In the district court, no parties have been served with process. In fact, no citations have been issued (or even requested) for relators Shafto, Gonzales, Lindsay, and Browning. Relators GP and Christine Morshedi voluntarily appeared in the district court. No other defendants appeared below.

On July 2, 2010, this Court stayed the district court’s temporary injunction order and thereafter GP co-chair Christine Morshedi timely delivered to the Secretary of State a certified list of the party’s 2010 statewide nominees.

On July 7, 2010, in a motion to dismiss, the plaintiffs stated that they “seek no further injunctive relief concerning the appearance of the Texas Green Party’s nominees on the 2010 General Election ballot” and asserted that this original proceeding is “now moot.”

SUMMARY OF THE ARGUMENT

The plaintiffs' restrictive interpretation of Section 257.002(a) of the Texas Election Code ignores the provision's plain language, legislative history, and penal nature.

Section 257.002(a) provides: "A political party that accepts a contribution authorized by Section 253.104 may use the contribution only to: (1) defray normal overhead and administrative or operating costs incurred by the party; or (2) administer a primary election or convention held by the party." TEX. ELEC. CODE § 257.002(a).

The plaintiffs repeatedly assert that the expenses incurred by the defendants to obtain ballot access for the Green Party of Texas (GP) were made "in connection with a campaign for an elective office." However, those expenses are not unlawful corporate "campaign expenditures,"¹ but instead constitute "normal operating costs" of a minor political party in Texas. *Cf.* ELECTION LAW OPINION NO. MW-14 (1974) ("Funds expended by a political party solely to advertise the party and which do not directly support or oppose a candidate or measure in an election are not 'campaign expenditures' under HB 4. A political party which purchases such advertising does not become a 'political committee,' as defined by Article 14.01(n), by reason of such expenditures.").

The plaintiffs have no legal authority on point. They cite no statute, court opinion, administrative rule, legislative history, or ethics opinion that states that a minor political party in Texas may not use corporate contributions to defray its ballot access costs.

¹ "'Campaign expenditure' means an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure." TEX. ELEC. CODE § 251.001(7).

If the Court nonetheless determines that the GP unlawfully accepted ballot access petitions from Take Initiative America, Inc., the civil and criminal penalties specifically provided by the Texas Election Code for such violations are the appropriate remedies.

In any event, the plaintiffs lack standing and their requests for declaratory and injunctive relief are moot.

ARGUMENT

Applicable Law

In their live pleading, the plaintiffs below allege that the defendants violated the following sections of the Texas Election Code: 253.001, 253.002, 253.003, 253.004, 253.005, 253.032, 253.094, and 253.104. In addition, the plaintiffs' flawed interpretation of Section 257.002(a) relies heavily on Section 253.100. To assist the Court, the text of those provisions and several relevant definitions is set forth below.

Section 251.001 of the Texas Election Code, entitled "Definitions," provides:

(2) "Contribution" means a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. ...

(3) "**Campaign contribution**" means **a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure.** Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution.

(5) "**Political contribution**" means **a campaign contribution or an officeholder contribution.**

(6) "Expenditure" means a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment.

(7) “**Campaign expenditure**” means **an expenditure made by any person in connection with a campaign for an elective office or on a measure**. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.

(10) “**Political expenditure**” means **a campaign expenditure or an officeholder expenditure**.

(12) “Political committee” means a group of persons that has as a principal purpose accepting political contributions or making political expenditures.

(15) “**Out-of-state political committee**” means a political committee that: (A) makes **political expenditures** outside this state; and (B) in the 12 months immediately preceding the making of a **political expenditure** by the committee inside this state (other than an expenditure made in connection with a campaign for a federal office or made for a federal officeholder), makes 80 percent or more of the committee’s total **political expenditures** in any combination of elections outside this state and federal offices not voted on in this state.

TEX. ELEC. CODE § 251.001 (emphasis added).

Section 253.001 of the Texas Election Code, entitled “Contribution or Expenditure in Another’s Name Prohibited,” provides:

(a) A person may not knowingly make or authorize a **political contribution** in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution in order for the recipient to make the proper disclosure.

(b) A person may not knowingly make or authorize a **political expenditure** in the name of or on behalf of another unless the person discloses in writing to the person on whose behalf the expenditure is made the name and address of the person actually making the expenditure in order for the person on whose behalf the expenditure is made to make the proper disclosure.

(c) A person who violates this section commits an offense. An offense under this section is a **Class A misdemeanor**.

TEX. ELEC. CODE § 253.001 (emphasis added).

Section 253.002 of the Texas Election Code, entitled “Unlawful Direct Campaign

Expenditure,” provides:

(a) A person may not knowingly make or authorize a direct **campaign expenditure**.

(b) This section does not apply to: (1) an individual making an expenditure authorized by Subchapter C; (2) a corporation or labor organization making an expenditure authorized by Subchapter D; (3) a candidate making or authorizing an expenditure for the candidate’s own election; (4) a political committee; or (5) a campaign treasurer or assistant campaign treasurer acting in an official capacity.

(c) A person who violates this section commits an offense. An offense under this section is a **Class A misdemeanor**.

TEX. ELEC. CODE § 253.002 (emphasis added).

Section 253.003 of the Texas Election Code, entitled “Unlawfully Making or

Accepting Contribution,” provides:

(a) A person may not knowingly make a **political contribution** in violation of this chapter.

(b) A person may not knowingly accept a **political contribution** the person knows to have been made in violation of this chapter.

(c) This section does not apply to a political contribution made or accepted in violation of Subchapter F.

(d) Except as provided by Subsection (e), a person who violates this section commits an offense. An offense under this section is a **Class A misdemeanor**.

(e) A violation of Subsection (a) or (b) is a **felony of the third degree** if the contribution is made in violation of Subchapter D².

TEX. ELEC. CODE § 253.003 (emphasis added).

² Subchapter D governs corporate “political contributions” and consists of sections 253.091-253.104.

Section 253.004 of the Texas Election Code, entitled “Unlawfully Making Expenditure,” provides:

- (a) A person may not knowingly make or authorize a **political expenditure** in violation of this chapter.
- (b) This section does not apply to a political expenditure made or authorized in violation of Subchapter F.
- (c) A person who violates this section commits an offense. An offense under this section is a **Class A misdemeanor**.

TEX. ELEC. CODE § 253.004 (emphasis added).

Section 253.005 of the Texas Election Code, entitled “Expenditure from Unlawful Contribution,” provides:

- (a) A person may not knowingly make or authorize a **political expenditure** wholly or partly from a **political contribution** the person knows to have been made in violation of this chapter.
- (b) This section does not apply to a political expenditure that is: (1) prohibited by Section 253.101; or (2) made from a political contribution made in violation of Subchapter F.
- (c) A person who violates this section commits an offense. An offense under this section is a **Class A misdemeanor**.

TEX. ELEC. CODE § 253.005 (emphasis added).

Section 253.032 of the Texas Election Code, entitled “Limitation on Contribution by Out-of-State Committee,” provides:

- (a) In a reporting period, a candidate, officeholder, or political committee may not knowingly accept **political contributions** totaling more than \$500 from an **out-of-state political committee** unless, before accepting a contribution that would cause the total to exceed \$500, the candidate, officeholder, or political committee, as applicable, receives from the out-of-state committee: (1) a written statement, certified by an officer of the out-of-state committee, listing

the full name and address of each person who contributed more than \$100 to the out-of-state committee during the 12 months immediately preceding the date of the contribution; or (2) a copy of the out-of-state committee's statement of organization filed as required by law with the Federal Election Commission and certified by an officer of the out-of-state committee.

(b) This section does not apply to a contribution from an out-of-state political committee if the committee appointed a campaign treasurer under Chapter 252 before the contribution was made and is subject to the reporting requirements of Chapter 254.

(c) A person who violates Subsection (a) commits an offense. An offense under this section is a **Class A misdemeanor**.

(d) A candidate, officeholder, or political committee shall include the statement or copy required by Subsection (a) as a part of the report filed under Chapter 254 that covers the reporting period to which Subsection (a) applies.

(e) A candidate, officeholder, or political committee that accepts **political contributions** totaling \$500 or less from an **out-of-state political committee** shall include as part of the report filed under Chapter 254 that covers the reporting period in which the contribution is accepted: (1) the same information for the out-of-state political committee required for general-purpose committees by Sections 252.002 and 252.003; or (2) a copy of the out-of-state committee's statement of organization filed as required by law with the Federal Election Commission and certified by an officer of the out-of-state committee.

TEX. ELEC. CODE § 253.032 (emphasis added).

Section 253.094 of the Texas Election Code, entitled "Contributions and Expenditures

Prohibited," provides:

(a) A **corporation** or labor organization may not make a **political contribution** or **political expenditure** that is not authorized by this subchapter.

(b) A **corporation** or labor organization may not make a **political contribution** or **political expenditure** in connection with a recall election, **including the circulation and submission of a petition** to call an election.

(c) A person who violates this section commits an offense. An offense under this section is a **felony of the third degree**.

TEX. ELEC. CODE § 253.094 (emphasis added).

Section 253.100 of the Texas Election Code, entitled “Expenditures For General-Purpose Committee,” provides:

(a) A **corporation**, acting alone or with one or more other corporations, may make one or more **political expenditures** to finance the **establishment or administration** of a general-purpose committee. In addition to any other expenditure that is considered permissible under this section, a corporation may make an expenditure for the maintenance and operation of a general-purpose committee, including an expenditure for: (1) office space maintenance and repairs; (2) telephone and Internet services; (3) office equipment; (4) utilities; (5) general office and meeting supplies; (6) salaries for routine clerical, data entry, and administrative assistance necessary for the proper administrative operation of the committee; (7) legal and accounting fees for the committee’s compliance with this title; (8) routine administrative expenses incurred in establishing and administering a general-purpose political committee; (9) management and supervision of the committee, including expenses incurred in holding meetings of the committee’s governing body to interview candidates and make endorsements relating to the committee’s support; (10) the recording of committee decisions; (11) expenses incurred in hosting candidate forums in which all candidates for a particular office in an election are invited to participate on the same terms; or (12) expenses incurred in preparing and delivering committee contributions.

(b) A corporation may make political expenditures to finance the solicitation of political contributions to a general-purpose committee assisted under Subsection (a) from the stockholders, employees, or families of stockholders or employees of one or more corporations.

(c) A labor organization may engage in activity authorized for a corporation by this section. For purposes of this section, the members of a labor organization are considered to be corporate stockholders.

(d) A corporation or labor organization may not make expenditures under this section for: (1) political consulting to support or oppose a candidate; (2) telephoning or telephone banks to communicate with the public; (3) brochures and direct mail supporting or opposing a candidate; (4) partisan voter

registration and get-out-the-vote drives; (5) political fund-raising other than from its stockholders or members, as applicable, or the families of its stockholders or members; (6) voter identification efforts, voter lists, or voter databases that include persons other than its stockholders or members, as applicable, or the families of its stockholders or members; (7) polling designed to support or oppose a candidate other than of its stockholders or members, as applicable, or the families of its stockholders or members; or (8) recruiting candidates.

(e) Subsection (d) does not apply to a corporation or labor organization making an expenditure to communicate with its stockholders or members, as applicable, or with the families of its stockholders or members as provided by Section 253.098.

TEX. ELEC. CODE § 253.100 (emphasis added).

Section 253.104 of the Texas Election Code, entitled “Contribution to Political Party,” provides:

(a) A **corporation** or labor organization may make a **contribution** from its own property to a **political party** to be used as provided by Chapter 257.

(b) A corporation or labor organization may not knowingly make a contribution authorized by Subsection (a) during a period beginning on the 60th day before the date of a general election for state and county officers and continuing through the day of the election.

(c) A corporation or labor organization that knowingly makes a contribution in violation of this section commits an offense. An offense under this section is a **felony of the third degree**.

TEX. ELEC. CODE § 253.104 (emphasis added).

As reflected above, sections 253.001, 253.002, 253.003, 253.004, 253.005, 253.032, 253.094, and 253.100 of the Texas Election Code govern contributions made (either directly or indirectly through political committees) to campaigns and expenditures made on behalf of campaigns. Only section 253.104 addresses contributions to political parties.

Plain Language

Chapter 257 of the Texas Election Code, which is entitled “Political Parties,” was enacted by the 72nd Legislature in 1991. It was included in Senate Bill 1, the bill that created the Texas Ethics Commission. None of the sections set forth below have been substantively amended since they were originally enacted.

Section 257.002 of the Texas Election Code, entitled “Requirements Relating to Corporate or Labor Union Contributions,” provides:

(a) A **political party** that accepts a **contribution** authorized by Section 253.104 may use the contribution only to: (1) **defray normal overhead and administrative or operating costs incurred by the party**; or (2) administer a primary election or convention held by the party.

(b) A **political party** that accepts **contributions** authorized by Section 253.104 shall maintain the contributions in a separate account.

TEX. ELEC. CODE § 257.002 (emphasis added).

Section 257.003 of the Texas Election Code, entitled “Report Required,” provides:

(a) A **political party** that accepts **contributions** authorized by Section 253.104 shall report all contributions and expenditures made to and from the account required by Section 257.002.

(b) The report must be filed with the commission and must include the information required under Section 254.031 **as if the contributions or expenditures were political contributions or political expenditures.**

(c) Sections 254.001 and 254.032-254.037 apply to a report required by this section as if the party chair were a campaign treasurer of a political committee and **as if the contributions or expenditures were political contributions or political expenditures.**

(d) The commission shall prescribe by rule reporting schedules for each primary election held by the political party and for the general election for state and county officers.

TEX. ELEC. CODE § 257.003 (emphasis added).

Section 257.004 of the Texas Election Code, entitled “Restrictions on Contributions Before General Election,” provides:

(a) Beginning on the 60th day before the date of the general election for state and county officers and continuing through the day of the election, a **political party** may not knowingly accept a **contribution** authorized by Section 253.104 or make an **expenditure** from the account required by Section 257.002.

(b) A person who violates this section commits an offense. An offense under this section is a **felony of the third degree**.

TEX. ELEC. CODE § 257.004 (emphasis added).

Section 257.006 of the Texas Election Code, entitled “Criminal Penalty for Failure to Comply,” provides:

(a) Except as provided by Section 257.004, a person who knowingly uses a **contribution** in violation of Section 257.002 or who knowingly fails to otherwise comply with this chapter commits an offense.

(b) An offense under this section is a **Class A misdemeanor**.

TEX. ELEC. CODE § 257.006 (emphasis added).

Expenses incurred by a minor political party in Texas to obtain ballot access are a “normal operating cost.”³ Therefore, under the plain language of section 257.002(a), the Green Party of Texas may legally accept ballot access petitions from a corporation.

³ See, e.g., BLACK’S LAW DICTIONARY (9TH ED. 2009) (“operating expense” means “[a]n expense incurred in running a business and producing output”).

Legislative History

As stated above, chapter 257 of the Texas Election Code was enacted by the 72nd Legislature in 1991. Before the effective date of chapter 257, political parties were allowed, with one exception, to legally accept corporate contributions. Under longstanding administrative interpretation of the Secretary of State, political parties were allowed to accept corporate contributions as long as the contributions were “not directly or indirectly utilized for the purpose of supporting or opposing any Texas candidate or assisting an officeholder.”

LETTER FROM TEXAS SECRETARY OF STATE TO DALLAS COUNTY DEMOCRATIC CHAIRMAN
(DATED MARCH 17, 1989).

On March 9, 1989, during the 71st Legislature, House Bill 2568 was filed. The enacting clause read “relating to contributions to a political party by a corporation or labor organization; providing a criminal penalty.” The bill contained the same substantive provisions enacted in 1991, including the critical language “normal overhead and administrative or operating costs.” On May 10, 1989, the House Committee on Elections held a hearing on House Bill 2568. As reflected by the recording of the legislative hearing, the author of the bill, Representative Glossbrenner, testified that the bill would not change the current law regarding corporate contributions to political parties, but would simply mandate that the acceptance and disbursement of such contributions be reported. During the hearing, the bill’s author responded “right” to the following comment by fellow committee member Mowery: “they can use it for direct contact with voters and registration of voters.” The bill subsequently died in the House Committee on Calendars.

Penal Nature

The plaintiffs' restrictive interpretation of Section 257.002(a) of the Texas Election Code would criminalize the defendants' actions. As recognized by the Secretary of State, campaign finance laws that provide for civil and criminal penalties "must be construed in favor of one who is subject to the penal provisions. *See Beck v. State*, 583 S.W.2d 338 (Tex.Crim.App. 1979) and *Houston, E.&W.T. Ry. Co. v. Campbell*, 91 Tex. 551, 45 S.W. 2 (Tex. 1898)." ELECTION LAW OPINION NO. DAD-18 (1982).

Remedy

If the Green Party of Texas unlawfully accepted ballot access petitions from Take Initiative America, Inc., the severe civil⁴ and criminal penalties specifically provided by the Texas Election Code for such violations are the appropriate remedies.

Standing

In Texas, the standing doctrine has been interpreted to prohibit a political party from challenging another party's candidates. *See Colvin v. Ellis Co. Republican Executive Comm.*, 719 S.W.2d 265, 267 (Tex.App.—Waco 1986, no writ) ("the only plaintiffs who could bring this case would be the Democratic candidates for the offices involved, or the State in quo warranto"). Because none of the candidates opposing the 2010 statewide nominees of the Green Party of Texas are plaintiffs below, both this original proceeding and the underlying suit should be dismissed.

⁴ See Sections 253.131, 253.132, 253.133, and 253.134 of the Texas Election Code.

Mootness

In a motion to dismiss filed July 7, 2010, the plaintiffs stated that they “seek no further injunctive relief concerning the appearance of the Texas Green Party’s nominees on the 2010 General Election ballot” and asserted that this original proceeding is “now moot.”

The relators agree. The requests for declaratory and injunctive relief contained in the plaintiffs’ live pleading are “now moot” and none of the exceptions to the mootness doctrine recognized by this Court appear applicable. *See, e.g., F.D.I.C. v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994) (“We have recognized two exceptions to the mootness doctrine: (1) the ‘capable of repetition’ exception and (2) the ‘collateral consequences’ exception.”); *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) (same).

“When the appeal is from an order granting a temporary injunction, and that phase of the case becomes moot on appeal, the same rule applies. The proper order is to set aside all orders pertaining to the temporary injunction and dismiss that portion of the case, leaving the main case still pending.” *Tex. Foundries, Inc. v. Int’l Moulders & Foundry Workers’ Union*, 248 S.W.2d 460, 464 (Tex. 1952).

PRAYER

Based on the foregoing, Deb Shafto, Herb Gonzales, Jr., Edward Lindsay, Art Browning, Christine Morshedi, and the Green Party of Texas request that this Court direct the district court to: (1) vacate its temporary injunction order dated June 24, 2010; and (2) dismiss with prejudice the plaintiffs’ claims for declaratory and injunctive relief.

Relators seek such other and further relief to which they may be entitled.

Respectfully submitted,

_____/s/_____
Steven W. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this response was served on July 8, 2010 to the respondent (by first-class mail) and to the attorney-in-charge for real parties in interest (by e-mail & first-class mail).

_____/s/_____
Steven W. Smith