

IN THE SUPREME COURT OF TEXAS

No. 04-0953

IN RE NORMAN F. NEWTON, INDIVIDUALLY AND AS TREASURER OF ASSOCIATED
REPUBLICANS OF TEXAS POLITICAL ACTION COMMITTEE, AND ASSOCIATED
REPUBLICANS OF TEXAS POLITICAL ACTION COMMITTEE

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WAINWRIGHT, concurring.

Real parties Bobby Glaze and David Leibowitz filed suit on October 18, 2004 contending that the Associated Republicans of Texas Political Action Committee and Norman Newton, its treasurer, (collectively ART PAC) violated provisions of the Texas Election Code by illegally soliciting, accepting, and expending corporate funds for four years and in the 2004 election in detriment to plaintiffs' campaigns for election to the Texas Legislature and to the election process. The trial court issued a temporary restraining order restricting the political speech rights of ART PAC. It held that "Texas Election Code Section 253.100, in conjunction with Sections 253.003, 253.004, 253.005, and 253.094, prohibits corporations and unions from giving their treasury funds to any unconnected general purpose political action committee" and found that ART PAC violated these statutes. Its order further precluded ART PAC from soliciting, accepting, or expending any such funds. The trial court set the temporary injunction hearing on this dispute for November 3, 2004, the day after the election.

Relators seek mandamus relief from the restraining order and argue that the dispute involves issues of statewide importance and urgent time constraints in light of the pending election. Relators further contend that if not resolved immediately their rights under the United States and Texas Constitutions to free speech during this election cycle will be permanently denied.

It is fundamental to a free and democratic society that persons have the right to publicly express their opinions on candidates seeking election to public office and that the candidates have the right to express their opinions on issues of the day. *See Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (“It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them.”). For this reason, the United States Supreme Court vigorously protects speech. With relatively few exceptions, the United States Supreme Court strongly disfavors prior restraints on free speech. *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (“prior restraints are particularly disfavored”); *Avis Rent a Car Sys. v. Aguilar*, 529 U.S. 1138, 1142 (2000) (Thomas, J. dissenting) (injunctions that create prior restraints on speech raise “the strictest scrutiny known to our First Amendment jurisprudence”). A prior restraint, unlike a subsequent damages action or prosecution, if appropriate, has an immediate and irreversible sanction. *Davis*, 510 U.S. at 1317 (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). Accordingly, a prior restraint of expression bears “a heavy presumption against its constitutional validity.” *Carroll*, 393 U.S. at 181 (citing *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

Moreover, “even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit.” *Carroll*, 393 U.S. at 181. The absence

of appropriate evidence and argument from the adverse parties to inform judicial determinations may be “insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.” *Id.* at 183. Without such procedural safeguards for issuance of a prior restraint against speech, the value of the judicial determination and its validity may be diluted. *See id.* (prior restraint against political speech that was issued *ex parte* determined to be invalid).

Real parties filed this lawsuit on October 18 and obtained a temporary restraining order two days later based on real parties’ verified pleadings and argument of counsel for the parties. No evidence was taken and the parties had insufficient time to fully and carefully brief the issues. The parties present no record of the hearing in the trial court. An injunction hearing to allow consideration of evidence and further briefing to test the sufficiency of the restraining order was scheduled to occur after the election, when the ability to exercise the constitutional rights at issue would have been moot. The trial court decided the issue on the merits, finding that Relators “violated the Texas Election Code,” and did so with the barest of procedural protections for vital First Amendment rights. The circumstances of the issuance of the restraining order raise significant concerns in light of the precautions the Supreme Court warned are necessary under the Constitution.

I join the Court’s opinion for the reasons stated therein and for these additional reasons.

J. Dale Wainwright
Justice

OPINION ISSUED: October 26, 2004