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To: Betsy Keller
From: Erica Rosales, Assistant County Attorney
Date: July 9, 2019
Re: OP-19-644 Enforcement of Political Advertising Rules

Question:

Does El Paso County ("County") have the authority to enforce state or federal political campaign rules when an individual engages in political speech during the public comment portion of a Commissioners Court meeting?

Answer:

- (1) The County has the option to file a complaint with either the Texas Ethics Commission ("TEC") or the Federal Election Commission ("FEC"), depending on the type of political campaign that is being advertised. It is the function of the TEC and the FEC to enforce political campaign rules. If the campaign is for an office within Texas, the Texas Ethics Commission enforces Texas political campaign and advertising laws. If the campaign is for a federal office, the FEC enforces the federal campaign finance laws. The analysis below includes laws relevant to both commissions.
- (2) In connection with the specific factual summary below, it is my legal opinion that the County should not seek enforcement of political campaign laws in connection with a resident of El Paso County who is using the public comment portion of the Commissioner Court meetings to campaign for the United States presidential election. First, if the FEC found this resident in violation of federal campaign finance laws, his violation could be easily amended if he started his speech by saying his full name and a statement that he supports his own message. Second, denying this resident the opportunity to speak about his campaign during public comment is very likely in violation of his first amendment rights and puts the County at risk of a lawsuit.

Factual summary:

A resident of El Paso County has regularly been using the public comment portion of the County Commissioners Court meeting to speak about his campaign for President of the United States of America. During his time, he has asked for support for his campaign, discussed his political platform, and invited members of the public to attend his campaign events. The Commissioners Court meetings are broadcast via the internet on YouTube and on the El Paso County website. Additionally, the meetings are broadcast on a local television station.

A. A resident using the public comment portion of the Commissioner Court meetings to campaign for the United States presidential election is likely not in violation of federal campaign finance laws

The FEC has exclusive jurisdiction over the civil enforcement of the federal campaign finance laws, including enforcement of certain political advertisement laws.¹ The FEC specifically regulates all “public communications” which are defined as follows:

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

11 CFR 100.26.

All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate, solicit a contribution, or are “electioneering communications,” must include a disclaimer.² The content of the disclaimer depends on whether the communication is paid, unauthorized by the candidate, printed, or broadcast.³ If the content is not paid, authorized by a candidate, and broadcast, the specific requirements are generally include a requirement that the candidate (1) identify himself or herself, state that he or she has approved the communication and (2) convey this disclaimer via a full-screen view of himself or herself or record a voice-over of himself or herself with an accompanying photo.⁴ Below are two examples of acceptable disclaimers:

(A) "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."

(B) "My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message."

11 CFR 110.11

¹ See generally 11 CFR 100.1 *et al.*

² 11 CFR 110.11(a).

³ See 11 CFR 110.11.

⁴ 11 CFR 110.11(c)-(d).

Based on our facts, the content of the resident's communication regarding his candidacy is not paid, authorized by himself, and broadcast on a local television station. It is unlikely that the internet live streaming of the Commissioners Court meeting would be considered a "broadcast" and would likely be considered an unpaid "communication over the Internet," thus falling outside of the scope of FEC regulation. Although, even if the internet live streaming were considered by the FEC to be a "broadcast," the resident would be in compliance with FEC public communication regulation by stating his name and saying he approves of his own message. If the County found he was not in compliance, the County has the option to contact the FEC to enforce federal campaign finance law in connection with these communications.

Additionally, I spoke with a representative from the FEC and was informed that they are not aware of how the use of time during public comment for political speech is in violation of FEC rules. The representative expressed that, at most, a possible violation could be rectified if the speaker stated his name and approval of his own message. Even so, the FEC representative expressed that this is a determination for the FEC to make and, more than likely, the FEC would find no violation.

B. A resident using the public comment portion of the Commissioner Court meetings to campaign for the United States presidential election is not in violation of state campaign finance laws

A person who violates the Texas political advertising rules may be liable to the state for a civil penalty in an amount determined by the Texas Ethics Commission and not to exceed \$4,000.⁵ The process for enforcement begins by issuing a sworn complaint to the Texas Ethics Commission alleging a violation of political advertising laws.

Political advertising is defined for the purpose of Title 15 of the Texas Election Code ("Election Code"), in part, as a "communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer" that appears on an internet website.⁶

The Texas Elections Code provides that certain rules must be followed if something is considered political advertising. Specifically, a person "may not knowingly cause to be published, distributed, or broadcast political advertising containing express advocacy that does not indicate in the advertising: (1) that it is political advertising; and (2) the full name of the person who paid for the political advertising, the political committee authorizing the political advertising, or the candidate or specific-purpose committee supporting the candidate, if the political advertising is authorized by the candidate."⁷

⁵ Tex. Elec. Code § 255.001(e).

⁶ Tex. Elec. Code § 251.001(16).

⁷ Tex. Elec. Code § 255.001(a).

Based on our facts, the Texas political advertising rules do not apply to a resident that is campaigning for a federal office. Additionally, I spoke with legal counsel at the Texas Ethics Commission and was informed that they know of instances where candidates for state and local political office used the public comment portion of a government meeting to talk about their candidacy and criticize incumbent officials. Informally, the Texas Ethics Commission representative told me that this type of speech is within the candidate's first amendment rights and the representative did not recall any instances where the Texas Ethics Commission enforced any penalties against these candidates.

C. Restricting the speech of a resident using the public comment portion of the Commissioner Court meetings to campaign for the United States presidential is likely in violation of the resident's first amendment rights.

A local government body, such as the Commissioners Court, may enforce *reasonable* time, place, and manner restrictions on speech made during the public comment section, but generally cannot restrict speech based on content or viewpoint of the speaker.⁸ Below are some examples of restrictions that are allowed because they are tied to a compelling government interest, such as conducting an efficient meeting and maintaining peace and order.

Time – It is permissible to place a time limit on a public comment period and on the time each member of the public is allowed to speak.⁹

Place – It is permissible to allow public comment only during a portion of the meeting (e.g. beginning, middle, end) and prohibit people from trying to speak at any other time.

Manner – It is permissible to require members of the public to sign in prior to the meeting. It is also permissible limit speech to certain topics (e.g. agenda item topics).¹⁰

Additionally, the Texas Attorney General has provided that a court “may set some degree of limits on the number of persons who speak on a particular subject and how often they speak on a particular subject *but not limit the specific subject matter* as it relates to any constitutionally guaranteed right of freedom of speech.”¹¹

Considering the limitations set forth above, it is our opinion that a restriction on the subject matter of a person's candidacy for federal office may be considered a violation of a person's first amendment rights. Currently, the County's public comment policy aligns with the public comment policy for the City of El Paso, which includes a reasonable limitation of prohibiting “political advertising contrary to state law.”

D. Conclusion

⁸ See generally *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983).

⁹ *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

¹⁰ See *Steinburg v. Chesterfield Cty. Planning Comm'n*, 527 F.3d 377 (4th Cir. 2008).

¹¹ Tex. Att'y Gen Letter Op. No. 96-111 (1996).

Because this resident's speech is not governed by state political advertising law, it is likely not in violation of federal campaign finance law, and prohibiting him from making his speech may be in violation of his first amendment rights, we recommend that he be allowed to continue making his speech regarding his campaign for federal office.