

TEXAS ETHICS COMMISSION

IN THE MATTER OF	§	BEFORE THE
FRANK J. “JIMMY” SYLVIA,	§	TEXAS ETHICS COMMISSION
RESPONDENT	§	SC-32206264

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (Commission) met on June 27, 2023, to consider sworn complaint SC-32206264. A quorum of the Commission was present. The Commission determined that there is credible evidence of violations of Section 255.003(a) of the Election Code, a law administered and enforced by the Commission. To resolve and settle this complaint without further proceedings, the Commission adopted this resolution.

II. Allegation

The complaint alleged that the respondent, as an officer or employee of a political subdivision, knowingly spent or authorized the spending of public funds for political advertising, in violation of Section 255.003(a) of the Election Code.

III. Findings of Fact and Conclusions of Law

Credible evidence available to the Commission supports the following findings of fact and conclusions of law:

1. The respondent was re-elected as the Chambers County Judge in November 2018, and serves in the county seat of Anahuac, Texas. The respondent has held that position since 1997. The respondent ran for re-election and had one opponent on the ballot in the March 1, 2022 primary election. Further, the respondent was successfully re-elected in the November 8, 2022 general election.
2. The sworn complaint alleged that the respondent violated Section 255.003(a) of the Election Code by recording videos in his county office and in the county courtroom, and including the videos in political advertising posted to his campaign Facebook page in February 2022. The sworn complaint further alleged that the respondent violated Section 255.003(a) of the Election Code by taking photographs in the county courtroom and including the photographs in political advertising posted to his campaign Facebook page, also in February 2022.

3. One video discussed Judge Sylvia's duties as the county's emergency manager. In this video, the respondent welcomes the viewer into his personal office, saying: "come on in," while outside, a female county employee is working at her desk. In the video, the respondent describes his extensive experience with the county's hurricane recovery efforts, mentioning three major hurricanes by name and emphasizing the organizational complexity involved in coordinating the response. The respondent posted the video to his Facebook page with the subject line "EXPERIENCE MATTERS."
4. Another video, which was taken down from Facebook, was partly filmed in the respondent's office, as identified by a distinctive door displaying the respondent's name and title, and partly filmed in the courtroom. In the opening portion of the video, in the courtroom, the respondent begins by thanking viewers for their "support during this election season." The respondent continues by saying that he's "looking forward to seeing [viewers] at the poll[s]." The respondent moves to the video's principal subject by stating: "There have been some untruths that have been said about me. I want to let you know how I've handled those." After a brief jocular exchange with a man shown as filming the respondent, who says that similar untruths have been said of him, the video cuts to both the respondent and the other man, standing in the office doorway. The chorus of a major 2014 pop music hit begins playing in the background. The lyrics of the excerpted portion of the song are as follows: "Cuz the players gonna play, and the haters gonna hate, baby I'm just gonna shake it, shake it off." The respondent and the other man dance to the song and grin defiantly at the camera. The video cuts to a clip of children dancing in front of one of the respondent's large campaign signs, and then to a brief clip of the respondent dancing behind the bench in the courtroom, wearing judicial robes. At the end of the video, the screen displays a campaign graphic reading: "Keep Jimmy Judge[;] VOTE JIMMY SYLVIA[,] COUNTY JUDGE."
5. As noted above, the respondent also posted photographs to Facebook during February 2022. In one photograph, posted to Facebook on February 25, 2022, the respondent sits in a suit at the bench in the county courtroom. In his caption for the image, the respondent observes that "early voting is complete," thanks "all who came out and showed [their] support," notes that Election Day is March 1, and states that "he is looking forward to seeing the rest of you then." It appears that by "you," the respondent refers to Chambers County voters.
6. In another photograph posted to Facebook, the respondent sits at the bench in the county courtroom, while the same county employee seen in the video on the respondent's emergency management duties stands at the respondent's shoulder. This photograph was posted along with several paragraphs of text written by the employee, in which she praises the respondent effusively. The employee plainly states that she is "writing this to publicly express [her] support of the Judge in his bid for re-election," and finishes the statement with the following pronouncement: "This Primary my family and I will be voting to #KeepJimmyJudge. He is the right person for the job. I hope that you will do the same." "#KeepJimmyJudge" appears to be the respondent's campaign hashtag on the Twitter social media network. The county employee's statement includes a graphic of a waving American flag and the respondent's campaign logo, which reads "KEEP Jimmy JUDGE."

7. In response to Commission staff's written questions, the respondent confirmed that the videos at issue were filmed in his public office inside the courthouse, adjacent to the outer office where the female county employee was working, and in the courtroom for the county court and the commissioners' court. Concerning his office, the respondent indicated that "the offices" were unlocked during normal business hours; as to the courtroom, the respondent stated that it was not generally kept locked while the courthouse was open. The respondent did not differentiate between his personal office and the outer office in his responses, other than to acknowledge that both were seen in the videos. While the respondent admitted that he had a key to his offices, he denied having a key for the courtroom.
8. The respondent confirmed that the female employee seen in one video, and who endorsed him in the Facebook post with the photograph of the respondent and her behind the bench, was a county employee. However, the respondent averred that the photograph was taken during the respondent's afternoon break. The respondent confirmed that the man seen dancing with the respondent in one of the videos took the photographs and filmed the videos at issue, but denied that he was a county employee.
9. An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a).
10. In order to find a violation of Section 255.003(a) of the Election Code, the Commission must determine that:
 - 1) the respondent was an officer or employee of a political subdivision;
 - 2) the respondent knowingly spent or authorized the spending of public funds (or the use of public resources) for the video and/or pictures; and
 - 3) the video and/or pictures constituted or contained political advertising.

Tex. Elec. Code § 255.003(a).
11. The "spending" of public funds includes the use of a political subdivision employee's work time or a political subdivision's equipment or facilities. *See, e.g.*, Tex. Ethics Comm'n Op. No. 443 (2002) (placement of campaign flyers in a school district teachers' lounge would involve the spending of public funds where school district employees were required to transport the flyers to an area of the school that was not accessible to the public); Tex. Ethics Comm'n Op. No. 45 (1992) (distribution of political advertising using school district equipment or school district employees on school district time would be the spending of public funds where an already existing internal mail system was used); Attorney General Opinion No. KP-177 (2018) (statute prohibits the use of school district staff, facilities, or other resources where school districts electronically distributed links to Internet websites that were partisan in nature).
12. Ethics Advisory Opinion No. 550 concludes that a public officer's "use of a facility maintained by a political subdivision [for political advertising], in an area that was restricted to its employees, required government resources to operate while in that restricted area" and would therefore violate Section 255.003 of the Election Code. Tex.

- Ethics Comm’n Op. No. 550 (2019). Further, the Commission observed that it had “found violations of section 255.003(a) of the Election Code on numerous occasions since the statute was enacted where public officers controlled the access to certain government resources.” *Id.* Conversely, however, Section 255.003 does not prohibit a public officer “from using government resources that are equally accessible to the public for political advertising.” *Id.*
13. Ethics Advisory Opinion No. 561 specifically concerns a judicial officer’s use of his courtroom for political advertising. Tex. Ethics Comm’n Op. No. 561 (2021). Because the requestor of this opinion was a state district judge, who was not an “officer or employee” of a political subdivision but instead a state officer, Section 255.003 did not apply to the requestor and the Commission construed only Section 39.02(a)(2) of the Penal Code. However, in the opinion, the Commission made clear that “[c]ourtrooms are not ‘equally accessible’ to judges and the general public.” *Id.* (citing Tex. Ethics Comm’n Op. No. 550 (2019)). Reasoning that “a judge nearly always has more access to, and more rights within, his own courtroom than anyone else,” and observing that “the requestor’s opponent would need permission to take a photograph from behind the requestor’s bench, but the requestor himself would not need anyone’s permission,” the Commission held that “if a judge were to personally create—or coordinate with a third party to create—a photograph anywhere in his courtroom for use in a political advertisement,” then he or she would violate Section 39.02(a)(2) of the Penal Code. This reasoning is no less applicable to Section 255.003 of the Election Code.
 14. “Political advertising” means, in relevant part, a communication supporting or opposing a candidate for election to a public office, or a public officer, that appears in various forms of written communications or on an Internet website. Tex. Elec. Code § 251.001(16).
 15. Whether a particular communication supports or opposes a candidate or a public officer is a fact question. Tex. Ethics Comm’n Op. No. 476 (2007). “The critical issue in determining whether an advertisement is ‘political advertising’ is whether it is a communication supporting or opposing a candidate or a public officer.” *Id.* (citing Tex. Ethics Comm’n Op. No. 102 (1992)).
 16. Political advertising includes a communication that merely “supports or opposes” a candidate for election or a public officer, regardless of whether it contains express advocacy or its functional equivalent. *See, e.g., In re Smith Purcell*, SC-31804181 (2018). Unlike the requirement that “political advertising *containing express advocacy*” include a disclosure statement, Section 255.003 restricts the spending of public funds for “political advertising” without reference to express advocacy or its functional equivalent. *Compare* Tex. Elec. Code § 255.003 *with id.* § 255.001. Therefore, the Commission has rejected an “express advocacy” standard that would limit the definition of political advertising to communications that include certain words or phrases like “vote for,” “support,” “vote against,” “defeat,” “reject,” or “cast your ballot for.” *See* Tex. Ethics Comm’n Op. Nos. 559 (2021), 560 (2021).

17. This lower standard is constitutionally sound because under the First Amendment “government speech” is generally not afforded First Amendment protection. *See, e.g., Walker v. Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009); *see also Vargas v. City of Salinas*, 205 P.3d 207, 209 (Cal. 2009) (holding a communication can “support or oppose” a measure in an election even without express advocacy when the “style, tenor and timing” of communication demonstrates the communication constitutes traditional campaign activity); *cf. Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 160-162 (Conn. 1999); *Anderson v. Boston*, 380 N.E.2d 628 (Mass. 1978); *Smith v. Dorsey*, 599 So.2d 529, 540-544 (Miss. 1992); *Burt v. Blumenauer*, 699 P.2d 168, 171-181 (Ore. 1985); *Dollar v. Town of Cary*, 569 S.E.2d 731, 734 (N.C. App. 2002) (upholding restrictions on use of public funds for political advertising based on a lower standard than “express advocacy”).
18. Further, the U.S. Supreme Court has long recognized that mentioning a candidacy, election, a challenger, or taking a position on a candidate’s character, qualifications, or fitness for office are all indicia of express advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of C.J. Roberts & J. Alito).
19. It is undisputed that the respondent is an officer or employee of a political subdivision and that the respondent used his county office and the county courtroom to create the videos and photographs at issue.
20. The videos and photographs are clearly political advertising. In one video, the respondent positively describes his emergency management experience. While the video itself only implies that this extensive experience is a reason to vote for the respondent, the text of the Facebook post in which the respondent shared the video reads “EXPERIENCE MATTERS.” Considered in context, the video seeks to establish the respondent’s competence and thereby supports the respondent’s reelection.
21. The other video is political advertising, expressly advocating the respondent’s reelection efforts. The advertisement rebuts criticisms of, or allegations against, the respondent by displaying the respondent’s lighthearted disregard of the apparently trivial or unsubstantiated allegations. The video follows this with a shot of children dancing in front of the respondent’s campaign sign, and concludes by displaying the respondent’s campaign logo.
22. The Facebook posts in which the two photographs at issue appeared are also political advertising. In one post, the respondent posted the photograph of himself at the bench, thanked all those who came out for early voting and “showed [their] support [for his campaign],” and said that he “look[ed] forward to seeing the rest of [his supporters]” on Election Day. In the other, the woman appearing with the respondent in the photograph at the bench – his executive assistant and court coordinator – praised the respondent, stated that she and her family would vote for him, and urged others to vote for the respondent, too. Both of these Facebook posts plainly support the respondent’s campaign for reelection.

23. Facebook is an internet website. The Election Code's definition of political advertising includes any communication supporting or opposing a candidate for election or a public officer that appears on an Internet website. *See* Tex. Elec. Code § 251.001(16). Therefore, because the posts containing the videos and images supported the respondent for reelection and appeared on Facebook, they constitute political advertising under the Election Code.
24. Concerning the portions of the videos that were shot in the respondent's office, the respondent claims that the office is open to the public during normal business hours, when the videos were filmed. However, while the office might be open to members of the public who have business there, it is not plausible that the respondent's opponent could walk in and film a similar promotional video. The respondent, as the county judge and as the possessor of a key to the office, functionally controlled access to the office spaces, particularly to his personal office, in which portions of the videos were filmed. As noted above, an officer's use of his government office, which is restricted to the custody or possession of that officer, to produce political advertising constitutes a spending of public funds in violation of Section 255.003(a) of the Election Code. Therefore, by using his office in the videos, the respondent spent or authorized the spending of public funds for political advertising, in violation of Section 255.003(a) of the Election Code. *See* Tex. Ethics Comm'n Op No. 550 (2019).
25. The images and video footage taken in the courtroom are similarly problematic. In Ethics Advisory Opinion No. 561, the Commission made clear that any use by a judge of his courtroom to create political advertising violated the law, and suggested that images behind the bench are especially troublesome. *See* Tex. Ethics Comm'n Op. No. 561 (2021). The Commission premises this reasoning on the judge's "custody or possession" of the courtroom. *See id.* The county courtroom at issue in this complaint appears to be used by the county commissioners as well as the respondent. Further, the courtroom is kept unlocked and is accessible to the public during normal business hours. However, even if the respondent does not have "custody or possession" of the public areas of the courtroom, the photographs and video footage were of the respondent behind the bench. The public norm of unlocked courtrooms does not generally extend behind the bench to the judge's dais. The dais is an area to which the respondent and the county commissioners controlled access. It is therefore reasonable to conclude that the respondent also spent or authorized the spending of public funds by appearing behind the bench in the videos and images. *See id.*; Tex. Ethics Comm'n Op. No. 550 (2019).
26. The Facebook posts containing the videos and photographs constitute political advertising because they support the respondent as a candidate in a contested election. Further, the respondent used public funds to produce the videos and photographs, by filming or photographing in county-owned spaces that were restricted to his custody or possession. Therefore, there is credible evidence of violations of Section 255.003(a) of the Election Code regarding the respondent using county facilities for political advertising.

IV. Representations and Agreement by Respondent

By signing this order and agreed resolution and returning it to the Commission:

1. The respondent neither admits nor denies the findings of fact and conclusions of law described under Section III, and consents to the entry of this order and agreed resolution solely for the purpose of resolving this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds or use public resources for political advertising. The respondent agrees to comply with this requirement of the law.

V. Confidentiality

This order and agreed resolution describes a violation that the Commission has determined is neither technical nor *de minimis*. Accordingly, this order and agreed resolution is not confidential under Section 571.140 of the Government Code and may be disclosed by members and staff of the Commission.

VI. Sanction

After considering the nature, circumstances, and consequences of the violation described under Section III, and after considering the sanction necessary to deter future violations, the Commission imposes a \$500 civil penalty.

VII. Order

The Commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-32206264.

AGREED to by the respondent on this _____ day of _____, 2023.

Frank J. "Jimmy" Sylvia, Respondent

EXECUTED by the Commission on: _____.

Texas Ethics Commission

By: _____
J. R. Johnson, Executive Director