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A Well-Informed Electorate: Best Practices for Avoiding Electioneering Complaints

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Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.

Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976).

I. Introduction

This paper briefly discusses the ongoing dispute over the proper interpretation and application of the State's electioneering and political advertising statutes, in general, and the line between permissible speech and impermissible advocacy, in particular. Understanding the distinction is key to helping Texas public school districts develop best practices for educating voters on critical issues impacting public education—without running afoul of the law.

II. Background

Texas ranks 41st (or lower) in the Nation in per-pupil funding for K-12 public schools.[1] The baseline funding for Texas public schools has not changed since 2019, despite double-digit inflation rates, and despite the State going in to the 88th Legislative Session with a $33 billion surplus. Meanwhile, the Legislature has imposed numerous unfunded (or underfunded) mandates on school districts that significantly increase the cost of public education.[2] Faced with this unprecedented budget crisis, many school districts have had to make very difficult decisions, including decisions to reduce staff, eliminate programs, and even close schools.

Several school districts attempted to explain these difficult decisions to their communities by sharing factual information related to the events that unfolded during the 88th Legislative Session, including the political debate surrounding the *issue* of school vouchers, how that highly-politicized *issue* impacted the Legislature's efforts to pass new funding for public schools, and the various ways in which the political stalemate over the school voucher *issue* resulted in tangible consequences to school districts, their students, and their communities. Some school districts' communications generally encouraged individuals to support public education. Others specifically encouraged individuals to oppose school vouchers. And while most school districts crafted their communications about the school voucher debate in accordance with their understanding that the electioneering and political advertising statutes do not prohibit

[1]Hanson, Melanie, *U.S. Public Education Spending Statistics*, EDUCATIONDATA.ORG (Sept. 8, 2023), *available at* https://educationdata.org/public-education-spending-statistics#texas; EdWeek Research Center, *Quality Counts 2021: Educational Opportunities and Performance in Texas*, EDUCATION WEEK (updated Sept. 1, 2021), *available at* https://shorturl.at/CjLxN.

[2]TASA & TASB, *Report on School District Mandates: Cost Drivers in Public Education* (updated Dec. 2022), *available at* https://tasanet.org/wp-content/uploads/2023/07/2022-TASB-TASA-Report-on-School-District-Mandates.pdf.

communications about *issues* (an understanding gleaned from various Texas Ethics Commission decisions discussed below), the State sued several school district trustees and employees for allegedly engaging in electioneering and/or political advertising, and each lawsuit targeted communications opposing school vouchers—even though no *measures* relating to public education or school vouchers appeared on any ballots.[3]

III. Electioneering and Political Advertising Statutes

The electioneering litigation initiated by the State highlights certain legal questions surrounding the proper interpretation and application of the electioneering and political advertising statutes, and whether and to what extent these statutes limit school districts' ability to discuss important issues impacting the future of public education.

Any interpretation or analysis of the State's electioneering and political advertising statutes must begin with their plain language. *See City of Houston v. Bates*, 406 S.W.3d 539, 543 (Tex. 2013). A court's "primary objective when interpreting a statute is to give effect to the Legislature's intent." *Id.* When construing a statute, a court must "begin with the statute's text and the presumption that the Legislature intended what it enacted." *Id.* "Where text is clear, text is determinative of [the Legislature's] intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). "This general rule applies unless enforcing the plain language would produce absurd results." *Id.*

When statutory terms are not defined, courts look "to the plain and common meaning of the statute's words." *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484 (Tex. 1998); *see also Summers*, 282 S.W.3d at 437 ("Since the words contained in the definition are not themselves defined, we apply a meaning that is consistent with the common understanding of those terms."). But, as with everything else, context matters: "Undefined terms in a statute are typically given their ordinary meaning, but if a different or more precise definition is apparent from the term's use in the context of the statute, [courts] apply that meaning." *In re Fort Motor Co.*, 442 S.W.3d 265, 273 (Tex. 2014) (citations and quotations omitted).

Only when a statute's plain language is ambiguous will a court "resort to rules of construction or extrinsic aids." *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007); *see*

[3]In 2024, the State sued several school district trustees and employees for allegedly engaging in electioneering and/or political advertising. Each lawsuit targeted communications opposing school vouchers. *See* Cause No. 429-01216-2024, *State v. Davis et al.* (Frisco ISD), in the 429th Judicial District Court of Collin County, Texas; Cause No. 24-0437-C425, *State v. Logiudice et al.* (Hutto ISD), In the 425th Judicial District Court of Williamson County, Texas; Cause No. 017-350665-24, *State v. Taliaferro et al.* (Castleberry ISD), In the 17th Judicial District Court of Tarrant County, Texas; Cause No. 24-1663-431, *State v. Price et al.* (Denton ISD), In the 431st Judicial District Court of Denton County, Texas; Cause No. CV-24-1114, *State v. Rhoden et al.* (Denison ISD), In the 59th Judicial District Court of Grayson County, Texas; Cause No. CV24-0305, *State v. Collins et al.* (Aledo ISD), In the 415th Judicial District Court of Parker County, Texas; Cause No. 2024-13851, *State v. McGee et al.* (Huffman ISD), in the 269th Judicial District Court of Harris County, Texas.

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