

PRESENTED AT**38th Annual School Law Conference****February 9-10, 2023****Austin, Texas****Public Employee and Private Citizen****Moderator:****Skylar Gallop****Raise Your Hand Texas, Amarillo, Texas****Panelists:****Brandon Y. Brim****Brim, Robinett & Brim, P.C., Austin, Texas****Sarah S. Flournoy****Brackett & Ellis, P.C., Fort Worth, Texas****Authors' Contact Information:****Sarah S. Flournoy****sflournoy@belaw.com****817-339-2417****Brandon Y. Brim****brandon@teacher.legal****512-328-0048**

Speech by school district employees is a convergence. Is the government speaking through its agent? Is the employee speaking on a purely personal matter? Or is the employee offering a unique voice to the democratic discussion regarding a matter of public concern? For public employees the governing rules are different depending on the type of speech at issue.

Government Speech

The First Amendment “restricts government regulation of private speech; it does not regulate government speech.”¹ Government speech is speech that is communicated by the government or is in a context that would reasonably be understood to have been endorsed by the government.² It can include speech from a government agent in their official capacity³ or can be displays of speech in a public space such as government-endorsed monuments in public parks.⁴ “[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position.”⁵ “In doing so, it represents its citizens and it carries out its duties on their behalf.”⁶ “That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.”⁷

Texas law does regulate government speech.

- The board may not use state or local funds or other resources of the district to electioneer for or against any candidate, measure, or political party.⁸
- A political subdivision, like a school district, that receives state funds may not use the funds to pay lobbying expenses.⁹
- An officer or employee of a district may not knowingly spend or authorize the spending of public funds for the purpose of political advertising.¹⁰
- An officer or employee of a district may not spend or authorize the spending of public funds for communication describing a measure if the communication contains information the officer or employee knows is false and is sufficiently substantial and important as to be reasonably likely to influence a voter.¹¹

A factual description of a measure is allowed, but only if the communication does not advocate passage or defeat of the measure.¹² Individual communication made by email or text messages are similarly allowed provided they are not distributed in mass or utilize district resources beyond the

¹ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).

² *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598 (2022) (citing *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 294 (1984)).

³ *Id.*

⁴ *See Summum*, 555 U.S. at 472.

⁵ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

⁶ *Id.*

⁷ *Id.* at 207.

⁸ Tex. Educ. Code § 11.169.

⁹ Tex. Gov’t Code § 556.0055(a).

¹⁰ Tex. Elec. Code § 255.003.

¹¹ *Id.*

¹² *Id.*

basic cost of hardware, messaging software, and bandwidth.¹³ The Texas Attorney General in 2018 issued a Frequently Asked Question (FAQ) addressing the role of Texas school districts in politics and elections, sent educational materials to Texas school districts in 2020, and continues to be vigilant in monitoring the activity of school officials.



Figure 1.¹⁴

Government Speech or Citizen

“As a threshold inquiry, we must determine whether the employee spoke as a private citizen or pursuant to her public job before asking whether the subject matter of the speech is a topic of public concern.”¹⁵ Deciding if a statement is made as an employee or as a citizen is a question of law requiring a fact-intensive analysis.¹⁶ An employee’s speech is as an agent of the school district if the statements are made pursuant to their official duties.¹⁷ “Official duties are tasks that employees are required to perform as part of their job responsibilities.”¹⁸

In determining whether the speech at issue is pursuant to an employee’s job responsibilities or as a citizen, courts have held the following factors are informative, but not dispositive:

- Details of particular speech¹⁹
- Scope of the employee's job responsibilities as indicated in policies or job descriptions created by the employer²⁰

¹³ 1 TAC 20.1(11); Tex. Elec. Code § 251.001(16).

¹⁴ [School Electioneering | Office of the Attorney General \(texasattorneygeneral.gov\)](https://www.texasattorneygeneral.gov/school-electioneering) (last accessed January 6, 2023).

¹⁵ *Harrison v. Lilly*, 854 F. App'x 554, 556 (5th Cir.), cert. denied, 211 L. Ed. 2d 184, 142 S. Ct. 346 (2021).

¹⁶ *Graziosi v. City of Greenville*, 775 F.3d 731, 736 (5th Cir. 2015); *Foerster v. Bleess*, No. 20-20583, 2022 WL 38996, at *2 (5th Cir. Jan. 4, 2022).

¹⁷ *Kennedy v. Bremerton Sch. Dist.*, 213 L. Ed. 2d 755, 142 S. Ct. 2407, 2424 (2022).

¹⁸ *Harrison*, 854 F. App'x at 556.

¹⁹ *Van Deelen v. Cain*, 628 F. App'x 891, 895 (5th Cir. 2015).

²⁰ *Id.*; see also *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008).

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