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RQ-0542-KP

May 30, 2024

Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
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Re: Whether the First Amendment allows Texas state agencies to restrict the political activities of the consultants, advisors, and representatives of its contractors

Dear General Paxton:

A Texas state agency enters into contracts that include a provision restricting the political activities of the contractor's consultants, advisors, and representatives. I ask you to address whether a state agency has statutory authority to unilaterally impose a restriction of this scope and magnitude and, if so, whether this contractual provision comports with the First Amendment.

I. An Agency Must Identify A Source Of Statutory Authority For Restrictions That It Imposes On Its Contractors And Their Third-Party Representatives

A state or federal agency must always identify a source of statutory authority for the actions it undertakes. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[An] agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."). And a statute that empowers an agency to enter into contracts does not necessarily entail the authority to restrict the First Amendment activities of a contractor's agents, consultants, advisors, and representatives—especially when imposing a restriction of that scope and magnitude on anyone who does business with a state contractor will give rise to constitutional issues under the First Amendment. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (construing an agency's statutory authority narrowly and rejecting an agency's construction of a statute that "would raise serious constitutional problems").

The Texas Ethics Commission is statutorily empowered to adopt rules and policies that ensure integrity in the political process. *See* Tex. Gov't Code ch. 571. But nothing in state law gives each individual agency the prerogative to decide whether or to what extent the agents, consultants, advisors, and

representatives of its contractors should be allowed to engage in political activities—especially when those activities would normally be protected by the Speech Clause of the First Amendment. Absent a clear and explicit statutory source of authority for an individual agency to impose a condition of this sort on its contractors, a state agency should either await specific statutory authorization or leave these matters to the judgment of the Texas Ethics Commission.

II. Serious First Amendment Questions Arise When An Agency Attempts To Restrict The Political Activities Of Its Contractors And Their Third-Party Representatives

Federal law has long restricted the political activities of federal contractors while they negotiate or perform federal contracts. *See* 52 U.S.C. § 30119(a)(1). And courts have upheld the constitutionality of this longstanding federal prohibition as well as similarly worded state laws. *See Wagner v. Federal Election Commission*, 793 F.3d 1 (D.C. Cir. 2015) (upholding the constitutionality of section 30119(a)(1)); *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010). But the state agency's contract goes far beyond these laws by restricting political activities not only of the contractor itself but also of individuals and entities associated with the contractor—including its officers, directors, employees, agents, consultants, advisors, and representatives. It is far from clear that the First Amendment would allow a state agency to impose such a sweeping restriction on political activities.

Serious constitutional questions arise when a state restricts the political activities not only of the contractor itself but also of those *affiliated with* the contractor. A state agency that attempts to restrict the political activities of a contractor's third-party representatives—even when those people act in their personal capacities and without any coordination or instruction from the contractor—is likely to violate the First Amendment.

It is worth noting that more recent contracts between Texas state agencies and their contractors include more carefully calibrated restrictions. The restrictions that appear in these more recent contracts restrict the political activities of the contractor, as well as persons associated with the contractor who act on its behalf. But they stop short of restricting the political activities of *all* persons associated with the contractors, including when they act on their own initiative and their own behalf.

I urge your office to opine that state agencies lack the authority to restrict the political activities of their contractors' consultants, advisors, and third-party representatives, absent clear and explicit statutory authorization to do so.

Sincerely,

Bryan Hughes