

Garlo Ward, P.C.

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OF COUNSEL

Stephen Greenberg, J.D.

Judge Andy Brown
Travis County Commissioner's Court
700 Lavaca, Ste. 2.300
Austin, Texas 78767

February 9, 2021

VIA EMAIL

**Andy.Brown@traviscountytexas.gov &
Certified Mail Return Receipt:**

Re: Public Comment and First Amendment

Dear Judge Brown,

I and The Rutherford Institute¹ represent Jennifer Fleck, a resident of Travis County and your constituent, regarding a violation of her fundamental constitutional right to freedom of speech guaranteed by the Constitutions of the United States and the State of Texas, as well as Texas' Open Meetings Act. At a Travis County Commissioners Court public meeting last month, Ms. Fleck was unceremoniously and unjustifiably silenced during comments she was making regarding the subject of the meeting because the chair disapproved of the comments Ms. Fleck was making.

The actions of the chair, which cut off Ms. Fleck well before she had used the time allotted to all other speakers according to the rules of the meeting, constituted rank viewpoint discrimination that is clearly forbidden by the Constitutional guarantees to freedom of speech. Those acting under government authority may not censor citizens exercising their right to expression simply because the message is one the government

¹ The Rutherford Institute is a national, non-profit civil liberties organization that educates the public on policy issues of constitutional concern and provides legal representation at no charge to individuals whose civil rights are threatened or infringed.

disapproves of. Indeed, state law also clearly forbids a government body from prohibiting speech that is critical of the government.

On her behalf, we are asking that the Travis County Commissioners Court rectify this deprivation of constitutional and statutory rights by allowing Ms. Fleck the opportunity to speak that she was previously denied. Only if Ms. Fleck is allowed to speak for the full three minutes to which she was and is entitled will her fundamental right of expression and fair treatment be vindicated.

Facts

The circumstances surrounding the constitutional deprivation at issue are undisputed, having been captured and recorded on publicly-available video.² The Travis County Commissioners Court held a regularly-scheduled public meeting on January 12, 2021. Due to the current declaration of a public health emergency, the meeting was held without members of the public; only Commissioners and County staff were in attendance, and some of them participated remotely by video feed. However, the public was able to view a live-stream of the meeting and members of the public were allowed to call in and address the Commissioners and the public during a public comment period. Under the rules of the meeting, each person recognized were allotted three (3) minutes to speak during this public comment period.

A substantial topic of the meeting was the current public health situation and the County's response to it. Dr. Mark Escott, the County's Interim Health Authority, attended the meeting virtually and made numerous statements and answered questions from Commissioners.

At 12:16 p.m.,³ Ms. Fleck was recognized and allowed to address the Court via telephone. Ms. Fleck reminded the Court of its obligation to seek to further and promote the well-being of County residents and then questioned its commitment to that, stating that the Court had allowed Dr. Escott to convey information to the public about Covid-19 without supporting facts or science. Ms. Fleck asserted that Dr. Escott was inflaming the public on this issue by using conjecture and anecdotes to guide public

²https://www.youtube.com/watch?app=desktop&v=cskLdyH44hw&feature=youtu.be&fbclid=IwAR2p144MxZ7FusHumccCe95Oa_B7f5jWEHpufMOd8zvEy9TFJKB3JFKbeQ8

³ Ms. Fleck began speaking at the 3:50:30 mark of the video of the January 12, 2021 meeting.

policy. She questioned the need for the County to promote the use of untested vaccines when the survival rate of those infected with Covid-19 is 99% in all age brackets. She requested that Dr. Escott be required to also convey credible scientific reports on the need for mask use by non-vulnerable persons and disputing asymptomatic spread. Ms. Fleck also disputed whether the statistics on deaths from Covid-19 indicated a health pandemic.

At 12:18 p.m. and before she had been allowed to speak her allotted three minutes, you interrupted Ms. Fleck and directed that her call be terminated, stating “Okay, I’m not going to promote people who are saying false things about Covid. Sorry, I’m just not.”⁴

Cutting Off Ms. Fleck Violated Her First Amendment Rights

By opening the Commissioners Court meeting for comments from the public, that Court created a public forum for purposes of the First Amendment’s guarantee to freedom of speech.⁵ When a government body has either by its own decision or under statutory command determined to open its decision-making processes to public view and participation it has created a public forum dedicated to the expression of views by the general public.⁶

Once a public body creates a public forum at its meetings, it may not restrict expression by members of the public who speak on matters under consideration at the meeting on the basis of the viewpoint of the speaker.⁷ As the Supreme Court has written, “To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”⁸

Your decision to cut off Ms. Fleck at the January 12 meeting before she was allowed to speak for her allotted three minutes because of the views she expressed are in direct violation of this principle and controlling precedent. Thus, the U.S. Court of Appeals for the Fifth Circuit held in 2017 that if a citizen speaking at a city council

⁴ Ms. Fleck was silenced at the 3:52:45 mark of the video of the January 12, 2021 meeting.

⁵ *Wenthold v. City Farmers Branch Texas*, 2012 WL 467325, *16-17 (N.D.Tex. 2012).

⁶ *City of Madison, Joint School District No v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 178-79 (1976) (Brennan, J., concurring).

⁷ *Wenthold*, 2012 WL 467325, at *17.

⁸ *City of Madison*, 429 U.S. at 175-76.

meeting is cut off by the meeting chair before the citizen's allotted time to speak has expired because the chair disagrees with the opinions expressed by the citizen, the citizen's clearly established First Amendment rights are violated. The court ruled that it is beyond debate that the constitution forbids viewpoint discrimination in a limited public forum.⁹

This is precisely what happened to Ms. Fleck. She was cut off before being allowed to speak for her allotted time because of your disagreement with the views she was expressing. This is a clear violation of her rights under the First Amendment and the free speech provisions of the Constitution of the State of Texas,¹⁰ and she is entitled to have that deprivation rectified.

Violation of State Open Meetings Act

Moreover, you violated the Open Meetings Act of the State of Texas, specifically Section 551.007(e) of the Texas Government Code, specifically states:

A governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service. This subsection does not apply to public criticism that is otherwise prohibited by law.

A review of the video of Ms. Fleck's statements at the January 12 meeting make plain that the reason you cut her off before she was allowed her full opportunity to speak is that her statements contradicted and criticized the Court and Dr. Escott. This action is in direct contravention of § 551.007(e).

As a result of your actions, Ms. Fleck suffered a deprivation of her Constitutional and statutory rights for which she seeks vindication. To that end, Ms. Fleck is requesting that she be given the full three minutes to make her presentation to its

⁹ *Heaney v. Roberts*, 846 F.3d 795, 801-02 (5th Cir. 2017).

¹⁰ Tex. Const. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.")

conclusion. Should this request be refused, Ms. Fleck will pursue all available legal means to rectify the violations of her rights under the Constitutions of Texas and the United States, as well as the Government Code of Texas.

Very Truly Yours,

Jerri Lynn Ward, J.D.

Affiliate Attorney for The Rutherford Institute

cc. Jennifer Fleck
The Rutherford Institute

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