

## BILL ANALYSIS

Senate Research Center  
86R1430 ATP-D

H.B. 368  
By: Cain et al. (Hall)  
State Affairs  
5/15/2019  
Engrossed

### AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In November 2016, a Harris County state district judge entered a final judgment permanently enjoining Section 306.005, Government Code, wherein the court opined:

IT IS THEREFORE ORDERED AND ADJUDGED that Government Code Section 306.005 is violative of the provisions of the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution, and the [Texas Ethics Commission is] hereby permanently restrained and enjoined from administering or enforcing Texas Government Code section 306.005. [1]

Government Code Section 306.005, entitled "Use of Legislatively Produced Audio or Visual Materials in Political Advertising Prohibited" [2], was enacted during the 74th Legislature and took effect in September, 1995. [3] The bill, S.B. 1453, was originally a measure designed to authorize the Texas Legislative Council the ability to provide legislative information on the Internet. However, the bill was completely changed late in the process. [4]

In 2015, at the start of the 84th Legislature, the Texas Ethics Commission (TEC) made a recommendation to the legislature to change the law. Paul Hobby, then chairman of TEC, said the law "has very little policy legs to stand on" if it were challenged in court. [5]

On April 27, 2016, a lawsuit was filed in state district court in Harris County, Texas, challenging the constitutionality of the statute on the grounds that it is a content-based political speech regulation, and seeking injunctive and declaratory relief. [6] The Texas attorney general's office declined to represent TEC in the lawsuit, stating "the Office of the Attorney General has determined it is not appropriate to make an appearance on behalf of the Texas Ethics Commission in this matter." [7] The Defendant, Chase Untermeyer, then chairman of TEC, also agreed the law is unconstitutional, stating: "We agree with the attorney general that this law is unconstitutional," and "that this is public information paid for by taxpayers that should be available to the public. But the law as it currently reads says otherwise, and so we have no choice but to uphold what the law is." [8]

In 2016, after the filing of a lawsuit, then-TEC Chairman Chase Untermeyer said, "The legislature has put the agency in a tough spot by refusing to repeal or narrow the law, despite the commission raising red flags. " [9]

[1] Final Judgment, *Cain v. Untermeyer*, No. 2016-27417 (270th Dist. Ct., Harris Co., Tex. 2016).

[2] See Government Code Section 306.005 (flush language).

[3] N.b., Subsection (d) was added by an act of the 83rd R.S. (2013).

[4] Legal experts; and compare, Introduced version of S.B. 1453, 74th R.S. (1995) with Enrolled version of S.B. 1453, 74th R.S. (1995).

[5] David Saleh Rauf, *San Antonio Express-News*, Attorney General Ken Paxton's office declines to represent ethics commission in lawsuit (28 April 2016), available at:

[https://www.expressnews.com/news/politics/texas\\_legislature/article/Ken-Paxton-s-office-declines-to-represent-ethics-7382403.php](https://www.expressnews.com/news/politics/texas_legislature/article/Ken-Paxton-s-office-declines-to-represent-ethics-7382403.php)

[6] See Pl.'s Original Pet., *Cain v. Untermeyer*, No. 2016-27417 (270th Dist. Ct., Harris Co., Tex. 2016).

[7] See Supra note 5.

[8] Ibid.

[9] David Saleh Rauf, *San Antonio Express-News*, Legal experts: Texas law banning use of legislative footage in political ads likely to be struck down (6 May 2016), available at: [https://www.expressnews.com/news/politics/texas\\_legislature/article/Ethics-experts-Texas-law-banning-use-of-7406647.php](https://www.expressnews.com/news/politics/texas_legislature/article/Ethics-experts-Texas-law-banning-use-of-7406647.php)

H.B. 368 amends current law relating to the use of legislatively produced audio or visual materials in political advertising.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Repealer: Section 306.005 (Use of Legislatively Produced Audio or Visual Materials in Political Advertising Prohibited), Government Code.

SECTION 2. Amends Sections 306.006(a) and (g), Government Code, as follows:

(a) Prohibits a person from using audio or visual materials produced by or under the direction of the legislature or of a house, committee, or agency of the legislature for a commercial purpose unless the legislative entity that produced the audio or visual materials or under whose direction the audio or visual materials were produced gives its permission for the person's commercial use and:

(1) the person uses the audio or visual materials only for educational or public affairs programming, including news programming, rather than educational or public affairs programming, including news programming that does not also constitute a use prohibited under Section 306.005; or

(2) makes no changes to this subdivision.

(g) Redefines "visual materials."

SECTION 3. Effective date: upon passage or September 1, 2019.