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January 11, 2021

The Honorable Briscoe Cain
Chair, House Select Committee on Driver's
License Issuance & Renewal
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0347

Re: Public access to the Texas Capitol and whether members of the Legislature may vote on legislation from a location other than their respective chambers (RQ-0389-KP)

Dear Representative Cain:

You ask three questions regarding public access to the Texas Capitol during the legislative session and the authority for members of the Legislature to debate or vote on legislation from a location other than their respective chambers.¹ You first ask whether the U.S. Constitution, the Texas Constitution, or Texas state law requires “the Capitol be open to allow the citizens of Texas to petition their government, specifically in terms of public access to the Texas Capitol in order to testify during legislative committee hearings regarding the budget and proposed legislation.” Request Letter at 1.

The Texas Constitution provides: “The sessions of each House shall be open, except the Senate when in Executive session.” TEX. CONST. art. III, § 16. We find no Texas court decisions construing this provision.² In construing the plain language of the text, however, a court would consider the common meaning of the term “open,” which dictionaries define as “accessible” or “allowing access.” NEW OXFORD AM. DICTIONARY 1227 (3d ed. 2010); *see also Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (explaining that courts often look to dictionary definitions to determine a term’s common ordinary meaning). The common understanding of the term “session” is “a meeting of a deliberative or judicial body to conduct its business.” NEW OXFORD AM. DICTIONARY 1597 (3d ed. 2010). Construing these terms together, the Texas Constitution requires that the meetings of both Houses of the Legislature shall be accessible to the public, except when the Senate is in executive session. TEX. CONST. art. III, § 16; *see Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990) (“The executive and legislative decisions of our governmental officials as well as the underlying reasoning must be discussed openly before

¹See Letter from Honorable Briscoe Cain, Chair, House Select Comm. on Driver’s License Issuance & Renewal, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Dec. 14, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0389KP.pdf> (“Request Letter”).

²A district court referenced article 3, section 16 in the jury charge of a defamation case arising from statements made by legislators and then published in a newspaper. *See A.H. Belo & Co. v. Wren*, 63 Tex. 686, 714 (Tex. 1884). However, the Texas Supreme Court, in affirming that decision, did not construe or otherwise address the meaning of article 3, section 16. *See id.* at 720.

the public rather than secretly behind closed doors.”); G. Braden, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 129 (1977) (“Plenary sessions of the House and Senate have always been open to the public.”).

The Texas Constitution also creates a right for citizens to petition their government: “The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.” TEX. CONST. art. I, § 27 (“Petition Clause”). “Article I, section 27 assures citizens of an important substantive political right”—the right to petition the government for redress. *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 SW.2d 700, 704 (Tex. App.—Corpus Christi 1986, no writ). However, it does not create an affirmative duty for a government to provide a specific “grievance procedure for citizens to vent their complaints.” *Id.* at 704–05 (concluding that an open forum at the end of a school district board meeting satisfied the constitutional requirement). It is likely a court would construe this provision to require the Legislature to provide some method by which the public could address legislators in some format.

Closing the Capitol while the Legislature is in session also raises multiple concerns under the U.S. Constitution. The First Amendment prohibits laws that “abridge[e] the freedom of speech.” U.S. CONST. amend. I.³ However, “the government need not permit all forms of speech on property that it owns and controls.” *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Rather, the Supreme Court “has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). There are four broad categories of forums: (1) traditional public forums; (2) designated public forums; (3) limited public forums; and (4) nonpublic forums. *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 344–47 (5th Cir. 2001); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 214–18 (2015). Limited public forums are places a government opens for public expression of particular kinds or by particular groups. *Chiu*, 260 F.3d at 346. Under this forum analysis, the courts have considered the Texas Capitol a limited public forum in other contexts. *See, e.g., Freedom from Religion Found., Inc. v. Abbott*, 955 F.3d 417, 429 (5th Cir. 2020). The government may restrict, but not prohibit, access to limited public forums by reasonable content-neutral conditions for the time, place, and manner of access. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

Article III, section 11 of the Texas Constitution provides that “[e]ach House may determine the rules of its own proceedings[.]” TEX. CONST. art. III, § 11. Pursuant to this constitutional provision, House and Senate rules supersede any contradictory procedural requirements for the Legislature found in the Texas Open Meetings Act or other state law.⁴ House and Senate rules of

³The First Amendment also prohibits governments from enacting laws that abridge the right of the people to petition the government for a redress of grievances. U.S. CONST. amend. I. However, the Petition Clause “does not provide a right to response or official consideration.” *We the People Found. Inc. v. U.S.*, 485 F.3d 140, 143 (D.C. Cir. 2007).

⁴Section 551.003 of the Texas Open Meeting Act provides: “In this chapter, the legislature is exercising its powers to adopt rules to prohibit secret meetings of the legislature, committees of the legislature, and other bodies associated with the legislature, *except as specifically permitted in the constitution.*” TEX. GOV’T CODE § 551.003 (emphasis added).

procedure typically provide that meetings of a committee are generally open to the public. *See, e.g.,* Tex. H.R. Rule 4, § 12, Tex. H.R. 4, 86th Leg., R.S., 2019 H.J. of Tex. 50, 81, *reprinted in Rules of the House*, Texas Legislative Manual 51 (2019) (“All meetings of a committee or subcommittee . . . shall be open to other members, the press, and the public unless specifically provided otherwise by resolution adopted by the house.”).⁵ Pursuant to each chamber’s constitutional authority to determine the rules of its own proceedings, the House and Senate may determine procedures for providing public access and conducting public testimony during the legislative session in accordance with the Texas Constitution.

In your second question, you ask whether the Legislature, any other elected official, or any state agency has the power to close the Capitol to the public, and if so, under what circumstances. Request Letter at 2. The Texas Constitution authorizes the Legislature to suspend certain constitutional procedural rules that relate to the business of the Legislature “in periods of emergency resulting from disasters caused by enemy attack.” TEX. CONST. art. III, § 62(a). This provision also authorizes the Governor to “suspend the constitutional requirement that the Legislature hold its sessions in Austin.” *Id.* § 62(c). However, because the nature of the disaster, this section does not apply to the current COVID-19 emergency. *Id.* § 62(a).

Pursuant to his emergency powers under the Texas Disaster Act, the Governor “may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.” TEX. GOV’T CODE § 418.018(c). If a disaster area includes the Capitol, the Governor may possess authority to control the occupancy of the Capitol building. However, the constitutional mandate that the legislative session be “open” supersedes any statutory emergency authority that may otherwise apply to the Capitol. *See* TEX. CONST. art. III, § 16 (“The sessions of each House shall be open, except the Senate when in Executive session.”).

The State Preservation Board is responsible for the maintenance, operation, and improvements for the Capitol complex. TEX. GOV’T CODE § 443.007(a). The Legislature specifically authorized the Board to “adopt rules that regulate actions of visitors in the Capitol or on the grounds of the Capitol,” in order to “provide that members of the public must leave the Capitol when the building is closed to the public” and “prohibit actions that pose a risk to safety.” *Id.* § 443.018(a), (b)(5)–(6).⁶ However, the Legislature expressly provided that the State Preservation Board’s rules may not violate a person’s rights afforded by the First Amendment or the Texas Constitution. *Id.* § 443.018(e). Because the Texas Constitution requires that legislative

⁵Commentary to House Rule 4, section 12 provides:

Section 12 provides that every committee meeting shall be open to the public. Anyone may attend committee meetings. Committees, however, have control of their business, and *there is nothing in the rules which requires committees to hold “public hearings” in the accepted meaning of the term, i.e., where numbers of persons appear to argue both sides of a question.*

Rules of the House, Texas Legislative Manual 52 (2019) (emphasis added).

⁶Pursuant to this authority, the Board closed the Capitol to the public on March 18, 2020, “in an ongoing effort to reduce exposure to the COVID-19 contagion.” *See* https://tspb.texas.gov/plan/events/post/Press_Release_Capitol_Closing_due_to_COVID-19_3-17-2020.pdf.

sessions be open, the Board is constitutionally prohibited from closing the Capitol when the Legislature is meeting in session.⁷

In your final question, you ask whether the phrases “in a House” or “in either House” as used in article III, section 12(b) or article III, section 21 of the Texas Constitution require that voting and debate occur physically and in-person. Request Letter at 2.

The means to vote remotely have existed throughout the lifespan of the Texas Constitution, including by phone, mail, or messenger. Nonetheless, the Texas Constitution has never included language permitting the use of such tools for voting. The advent of electronic tools for voting offer new methods for conveying votes remotely, but these tools join a list of existing technology for which no provisions have been enacted to authorize their use. Just as the Texas Constitution provided no expectation that voting by phone would be permissible in 1918, so too does the Constitution provide no basis for remote voting by teleconference in 2021.

Provisions of the Texas Constitution that reference voting explicitly or implicitly contemplate the physical gathering of the Legislature with terms like “present,” “attendance,” “meet,” “assemble,” and “in a house.” Such terms are consistent with an understanding at the time of drafting of an actual gathering of a deliberative body.

Article III, section 12 governs the requirement of each House to keep a journal of proceedings and to record votes in certain circumstances. TEX. CONST. art. III, § 12 (“Journals of proceedings; entering yeas and nays”). It provides:

A vote taken by either house must be by record vote with the vote of each member entered in the journal of that house if the vote is on final passage of a bill, a resolution proposing or ratifying a constitutional amendment, or another resolution other than a resolution of a purely ceremonial or honorary nature. Either house by rule may provide for exceptions to this requirement for a bill that applies only to one district or political subdivision of this state. For purposes of this subsection, a vote on final passage includes a vote on third reading in a house, or on second reading if the house suspends the requirement for three readings, on whether to concur in the other house’s amendments, and on whether to adopt a conference committee report.

Id. § 12(b). The interpretive commentary to section 12 explains that by requiring each house to “keep a journal of its proceedings and publish the same, the people are assured of an official report of legislative proceedings and, thus, will be enabled to ascertain what each house is doing.” TEX. CONST. art III, § 12 interp. commentary. Section 12(b) establishes procedural requirements for recording votes by both the House and Senate; it does not address how those votes may be cast. When read in context, the phrase “in a house” appears to refer to the legislative body upon which the rule operates, not to the physical location where that body meets. *See id.* § 12(a) (“Each house of the legislature shall keep a journal of its proceedings, and publish the same.”); *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (explaining that courts refrain from

⁷However, the House and Senate may determine when and how to conduct their meetings consistent with the Texas Constitution. TEX. CONST. art. III, § 11 (“Each House may determine the rules of its own proceedings.”).

rewriting text that lawmakers chose); *In re Office of the Att’y Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015) (“The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive.”).

Article III, section 21 provides immunity to legislators for certain statements made in their legislative capacity in either House: “No member shall be questioned in any other place for words spoken in debate in either House.” TEX. CONST. art. III, § 21. The interpretive commentary to this provision emphasizes the location of actions that take place “on the floor of the House by members” or “from the floor of the house” and states:

This provision gives absolute immunity for any speech or debate made on the floor of the house by the members thereof, and the protection extends beyond to reports and resolutions which, though written, may be reproduced in speech. The privilege extends to things generally done in a session of either house by one of its members in relation to the business before it. *See Canfield v. Gresham*, 82 Tex. 10, 17 S.W. 390 (1891).

In a speech made from the floor or before committees *or other proceedings directly connected with the legislature*, a member may say what he pleases, even though his speech is abusive, and cannot be sued for slander or libel or otherwise questioned outside of the legislature.

For speech or writing made outside their respective houses, legislators remain subject to legal restraints as other persons.

TEX. CONST. art III, § 21 interp. commentary (emphasis added). Few cases have construed this provision, but its purpose is clear on its face—to provide immunity to legislators for certain statements made while performing their legislative function. No Texas cases directly address whether this immunity would extend to a legislator’s statements made outside the legislative chamber, outside of a committee meeting, or outside the Capitol building.⁸

Provisions throughout the Texas Constitution require that members be “present” to take certain legislative actions. *See, e.g.*, TEX. CONST. art. IV, § 12(b) (“An appointment of the Governor made during a session of the Senate shall be with the advice and consent of two-thirds of the Senate *present*.” (emphasis added)); *id.* art. III, 49-g(k) (“An appropriation from the economic stabilization fund must be approved by a three-fifths vote of the members *present* in each house of the legislature.” (emphasis added)). A common understanding of the term “present” in this context is being “in a particular place.” NEW OXFORD AM. DICTIONARY 1381 (3d ed. 2010). Thus, the Texas Constitution contemplates that legislators will be in a particular place when performing certain functions, and a court could construe such provisions to require legislators’ physical presence in the chamber to satisfy constitutional prerequisites to taking those actions.

⁸The Texas Legislature has specifically authorized committee meetings outside of Austin in certain circumstances. *See* TEX. GOV’T CODE § 301.015(b) (“Each committee shall meet in Austin, except that if authorized by rule or resolution of the house creating the committee, the committee may meet in any location in this state . . .”).

In addition, article III, section 10 establishes a quorum of two-thirds of each House to do business, but it allows a smaller number “to compel the attendance of absent members, in such manner and under such penalties as each House may provide.” TEX. CONST. art III, § 10. Thus, the Texas Constitution ties quorum to “attendance.” *Id.* The use of the term “attendance” connotes physical presence in the chamber to be counted for purposes of a quorum. Furthermore, the power to compel attendance could be deemed superfluous if members were not required to be actually present to be counted toward a quorum.

Neither the Texas Supreme Court nor the U.S. Supreme Court has confronted proxy voting in the U.S. Congress or the Texas Legislature, but the U.S. Supreme Court’s discussion of quorum requirements in *United States v. Ballin*, 144 U.S. 1 (1892), is instructive. There, interpreting similar language in the U.S. Constitution to the Texas Constitution, the Supreme Court observed that, although “[t]he constitution empowers each house to determine its rules of proceedings,” the House “may not by its rules ignore constitutional restraints or violate fundamental rights.” *Id.* One of those restraints, the Court said, was the quorum requirement: “All that the constitution requires is the presence of a majority, and when that majority are present the power of the house arises.” *Id.* at 6.

Finally, article III, section 58 mandates that “[t]he Legislature shall hold its sessions at the City of Austin, which is hereby declared to be the seat of government.” TEX. CONST. art III, § 58. The Legislature is therefore required to convene an “open” session, *see* TEX. CONST. art III, § 16, at a predetermined physical location—the City of Austin. A court could conclude that in-person attendance is implied where the constitution mandates a physical location for a legislative session.

Within this constitutional framework, the House and Senate may determine when and how to conduct their meetings. TEX. CONST. art. III, § 11 (“Each House may determine the rules of its own proceedings.”). The rules set by the House and Senate have historically conformed to constitutional restraints requiring voting and debate to occur in person. The House and Senate Rules of the Eighty-sixth Legislature required voting and debate to occur in person, and the longstanding precedent of the Legislature has been consistent with such rules.⁹

⁹Tex. H.R. Rule 5, § 45, Tex. H.R. 4, 86th Leg., R.S., 2019 H.J. of Tex. 50, 103, *reprinted in Rules of the House*, Texas Legislative Manual 94 (2019) (“Presence in House Required in Order to Vote — A member must be on the floor of the house or in an adjacent room or hallway on the same level as the house floor, in order to vote.”); Tex. S. Rule 6.15(d), S. Res. 5, 86th Leg., R.S. 2019 S.J. of Tex. 19, 19, *reprinted in Rules of the Senate*, Texas Legislative Manual 45 (2019) (“A member must be on the floor of the Senate or in an adjacent room or hallway on the same level as the Senate floor or gallery in order to vote; but a member who is out of the Senate when a record vote is taken and who wishes to be recorded shall be permitted to do so” under certain conditions).

S U M M A R Y

Article III, section 16 of the Texas Constitution requires that sessions of each House be open, except when the Senate is in executive session. Thus, when the Legislature meets for session in the Capitol, it must be open and accessible to the public.

The First Amendment of the U.S. Constitution prohibits laws that abridge the freedom of speech or the right of the people to petition the government for a redress of grievances. However, to the extent that the Capitol is a limited public forum, the Legislature may impose reasonable content-neutral conditions for the time, place, and manner of access.

Article III, section 10 establishes a quorum of two-thirds of each House to do business, and it ties quorum to “attendance.” A court could construe this term and others in the Texas Constitution to require physical presence in the chamber in order to attend and be counted for purposes of a quorum.

Article III, section 11 of the Texas Constitution provides that each “House may determine the rules of its own proceedings.” However, the House and Senate must determine procedures, consistent with the Texas and U.S. Constitutions, for providing public access, conducting public testimony, debate, and voting on legislation during the legislative session. The rules set by the House and Senate have historically conformed to constitutional restraints requiring voting and debate to occur in person.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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