



Texas

March 5, 2021

Edmund J. Zielinski
Cooke County Attorney
101 S. Dixon St.
Gainesville, Texas 76240

Re: Prosecution of Constitutionally Protected Speech

Dear County Attorney Zielinski,

We write to express serious concerns that the prosecution of Joel Luis Najera is unlawful and unconstitutional and ask that you immediately drop pending criminal charges against him.

In September 2020, Mr. Najera donated \$10 to a GoFundMe page for Progressive Rights Organizers of Gainesville (PRO Gainesville), a group of racial justice organizers whose members had recently been arrested by the police for protesting in Gainesville streets. Mr. Najera donated his own money to this fundraiser and provided his own credit card information to the site. But in an effort to criticize and parody Gainesville Police Chief Kevin Phillips for the police department's treatment of peaceful protesters, Mr. Najera chose to display his donation under the name "PC Kevin Phillips" and included the satirical comment, "I need attention, and these kids help me get it. Every villain needs a hero!"

For many people in the Gainesville community, including those most likely to view the Go Fund Me page for PRO Gainesville, Mr. Najera's comment was clearly a joke and obvious satire, parody, and criticism of a public official. But Chief Phillips was not amused, and he contacted the Texas Rangers to launch an investigation into who made these comments on the GoFundMe message board. Because Mr. Najera gave his actual identifying information to GoFundMe, his identity was easily found, and he spoke willingly to the Texas Rangers about his intended satire and parody.

On February 3, your office filed a criminal case against Mr. Najera and sought a warrant for his arrest for "online impersonation," a Class A Misdemeanor under Section 33.07 of the Texas Penal Code. We now urge you to revisit this decision because Mr. Najera's prosecution is unlawful and unconstitutional.

Under the Texas Penal Code, Mr. Najera's words cannot be considered "online impersonation" because he lacked the necessary intent to harm or defraud another person.¹ Even if the police chief felt personally aggrieved, Texas courts have found that prosecution under Section 33.07 does not extend to individuals who engage in political parody or satire, even in cases "where the satirist takes on the name or persona of a political figure with the specific intent to cause some harm to that person."² Instead, "such conduct may be constitutionally protected speech within the purview of the statute."³ The specific

¹ Under Texas Penal Code § 33.07(b), a person commits online impersonation if they send an electronic communication referencing another person's identifying information (1) without obtaining the other person's consent, (2) with the intent to cause recipient of the communication to reasonably believe that the other person authorized or transmitted the communication, and (3) with the intent to harm or defraud any person.

² *Ex parte Bradshaw*, 501 S.W.3d 665, 675 n.8 (Tex. App.—Dallas 2016, writ ref.).

³ *Id.* (citing *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

intent element of Section 33.07 cannot be met by engaging in political satire and parody, as Mr. Najera did with his post. *Id.* Instead, such criticism and parody of a public official is squarely protected by the First Amendment.

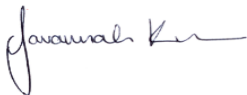
The Supreme Court has long established that one of the most sacred rights protected by the First Amendment is the right “to criticize officials and discuss public affairs with impunity.”⁴ Such criticism can take many forms, and political parody and satire is protected speech, even where public officials feel slandered or lampooned by the joke.⁵ This is what enables comedians to impersonate public officials on *Saturday Night Live* and what allows people to donate to a nonprofit or charity in the name of a politician that they disagree with. At the end of 2016, more than 82,000 people donated to Planned Parenthood under the name “Mike Pence.”⁶ But none of these people were jailed or imprisoned for their donation because such satire is clearly shielded by the First Amendment.

Police chiefs and their departments are not immune from public criticism under the First Amendment. In 2019, a federal appeals court found that a satirical Facebook page created to mimic an official police department’s account could be considered constitutionally protected speech.⁷ Even though many people in the community were confused by the account and called the police department to complain, the court explained that “[o]ur nation’s long-held First Amendment protection for parody does not rise and fall with whether a few people are confused. . . . Indeed, the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader’s mind before she realizes the joke.”⁸

While not everyone may have understood or appreciated Mr. Najera’s joke, that does not make his speech any less protected by the U.S. Constitution or give license to a wrongful and unnecessary prosecution. We urge you to respect the First Amendment rights of Cooke County residents and drop the charges against Mr. Najera immediately.

Sincerely,

/s/



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⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 296 (1964).

⁵ *See Hustler Mag.*, 485 U.S. at 51 (portraying a public figure as drunk, immoral, and sexually promiscuous was protected by the First Amendment).

⁶ Lisa Ryan, *Planned Parenthood Has Already Received 82,000 Donations From ‘Mike Pence’*, The Cut (Dec. 8, 2016), <https://www.thecut.com/2016/12/how-many-planned-parenthood-donations-came-from-mike-pence.html>.

⁷ *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019).

⁸ *Id.*