

# ALESHIRELAW

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March 8, 2018

**VIA EMAIL:** [spencer.cronk@austintexas.gov](mailto:spencer.cronk@austintexas.gov)

Spencer Cronk  
Austin City Manager

**VIA EMAIL:** [Roosevelt.Weeks@austintexas.gov](mailto:Roosevelt.Weeks@austintexas.gov)

Roosevelt Weeks  
Director of Austin Library

**VIA EMAIL:** [Anne.Morgan@austintexas.gov](mailto:Anne.Morgan@austintexas.gov)

Anne Morgan  
Austin City Attorney

RE: Request for Hearing – Lucas Burdick, Criminal Trespass Warning 3-7-18

Dear Mr. Cronk, Mr. Weeks, and Ms. Morgan,

I represent Lucas Burdick, who is working for my client IndyAustin SPAC (a political action committee) gathering signatures on a petition for initiative concerning CodeNEXT, a highly controversial issue of public concern.

## The Criminal Trespass Warning

Yesterday, Mr. Burdick was standing about 25 feet away from the entrance way to the Main Library. Exhibit P-1. A uniformed officer instructed Mr. Burdick to move off the library sidewalk used by pedestrians entering the library from the parking garage located to the left side of the entrance way. The officer gave Mr. Burdick the attached Criminal Trespass Warning (Exhibit P-2) merely because he was petitioning at that location. The officer required Mr. Burdick to move to the sidewalk by the street, so far away and with traffic noise that no patron of the library would notice the petitioner or even hear him if he called out to them. The warning cited Library Rules “chapter [sic] 13(A)(5), which makes it a violation to:

(5) distribute literature or otherwise solicit customers on library property.

Library Use Rules (eff. 2/1/2017), section 13(a)(5)

As you can see from the warning notice, Mr. Burdick was prohibited from “coming on the property or premises of the City of Austin located at ALL Austin Public Libraries [ ] For Any Reason at All.” The ban lasted until today, March 8, 2018. Section 2(B)(3) of the Library rules define “library” (as in “library property”) as meaning:

“... any building or facility of the Austin Public Library, including the entrance ways and adjacent lawns, landscaping, and parking areas.”

Mr. Burdick was not located inside the building, nor was he in the entrance way, adjacent lawns, landscaping or parking area of the library. Yet, he was cited and barred from *every* Austin library. Despite the more limited definition of the term “library,” apparently library staff is enforcing the petitioning ban everywhere within “library property boundaries”—a demarcation that is not visible by the public and extends to areas that are not included in the rule definition.

### Request for a Hearing

Since this incident (and others that have occurred and others that may occur in the next few days) will likely result in litigation against the city to challenge the City staff’s rules severely restricting petitioning, I am writing to request that Mr. Burdick be afforded whatever administrative appeals process the rules allow. As I read the Library Use Rules and the Rules for Public Use of City Properties, there is no hearing granted for someone unless and until they are denied access to city property for a year. However, out of an abundance of caution (against a later claim by the City that plaintiffs failed to exhaust administrative remedies), this is a request that Mr. Burdick be afforded a hearing, as well as any appeals allowed, so that he can have the Criminal Trespass Warning rescinded. We ask that the information in this letter be considered for such a hearing.

### Ultra Vires and Content-Based Violation of Free Speech

In addition to our contention, that Mr. Burdick’s location was not in or on the “library” as that term is defined in the staff’s Rules, we contend the staff lacks authority to interfere in such petitioning outside on the sidewalks leading to Austin public libraries. The Austin City Charter does not empower the City Manager, Library staff, or others to interfere in the reserved right of the people of Austin to petition for initiative, such as what IndyAustin and Mr. Burdick are doing. The Manager’s authority, and limitations on that authority, is derived from the City Charter, and Article IV, section 1 says:

§ 1. - POWER OF INITIATIVE.

**The people of the city reserve the power of direct legislation by initiative**, and in the exercise of such power may propose any ordinance, not in conflict with this Charter, the state constitution, or the state laws except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition signed by qualified voters of the city equal in number

to the number of signatures required by state law to initiate an amendment to this Charter.

In addition, the Texas Constitution, art. I section 8, in affirmative language, guarantees Texans' free speech ("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 section 19 substantively and procedurally protects our "liberty" and "privileges," not just our property. Exercising the petitioning rights recognized in the City Charter is a unique form of free speech, requiring a degree of physical proximity to potential petition-signers that is not necessary for other forms of speech, such as demonstrations and protests. The further the City staff tries to move petitioners away from potential petition-signers, the greater their interference is in the people's exercise of this "reserved right" of petitioning for initiatives.

There are relatively few locations of city property in Austin, especially when viewed by Council member districts, where people gather or congregate and provide a feasible and efficient opportunity for the exercise of the people's reserved power to petition. Austin, by mere staff rules which have not been endorsed by the City Council, apparently outright prohibits petitioning for initiative at the very locations where the most potential petition-signers can be found, *e.g.*, at Palmer Auditorium (even though it is located on parkland) and outside of every Austin library. Section 3 of the staff's Library Rules broadly proclaim "...the library is not a public forum." IndyAustin and its petitioners have never asserted any claim to be petitioning inside the library or in manner that interferes with library patron use of the facility. Staff apparently thinks that even sidewalks leading up to the library entrances are not forums for free-speech petitioning ... at least not for IndyAustin and their CodeNext petition.

We continue to gather evidence that the Library Rules are being enforced based on the content of the activity at issue. When library staff member Sharon Herfurth sent an email on Friday, February 16<sup>th</sup> to library staff, she did not just remind them about the Library Rules, she specifically targeted IndyAustin by name as planning to be "present on Saturday at your locations to collect signatures on a petition *to force an election on CodeNEXT*." Exhibit P-3. Ms. Herfurth even included, *unnecessarily*, unless to further emphasize what IndyAustin stands for, the IndyAustin website "<https://indyaustin.org/event/library-day-rain-date-march-3/>." Note also Ms. Herfurth broad ban on these petitioners being anywhere within "library property boundaries." ("IndyAUSTIN is welcome to be stationed *beyond* Library *property boundaries*, just not inside the Library or in the Library parking lot.").

On Saturday, March 3<sup>rd</sup> at Twin Oaks Library, not only was a foster-care group allowed to "distribute literature or otherwise solicit customers on library property," they were allowed to set up a table and chairs encroaching on the sidewalk within about 10 feet of the library door. Exhibit P-4. Not only is the City Manager's staff effectively barring the people from exercising their "reserved right" to petition, the staff is using a content-based enforcement strategy.

I would also note that some of the libraries have been used as election polling places, and even if the 100-foot electioneering distance marker is considered, in some cases political candidates have been allowed on the library "property boundaries" to campaign ("solicit"?) and distribute their literature.

No Staff Effort to Avoid Confrontation or Litigation

I think it's important to note how City staff have handled this serious matter. When my clients first told me about this library issue, on Saturday, February 17, 2018, I sent an email to City Attorney Anne Morgan to which she responded. Exhibit P-5. I have received no further communication from her about this. On Monday, February 19, 2018, co-counsel Bill Bunch, Fred Lewis, and I sent a request to you and Council specifically asking "that the City Manager and City Attorney take immediate steps to assure that no other petitioners are cited or threatened with citation" merely for petitioning near the libraries. Exhibit P-6. The only response we received to this letter was an interim response from Library Director Weeks, on that Monday, indicating he would "respond by the end of business on tomorrow [Feb. 20<sup>th</sup>]." Exhibit P-7. I am not aware of any other response to our letter of February 19<sup>th</sup>, but IndyAustin petitioners continue to be harassed at the libraries. I expect that if you want to give citations to more of IndyAustin's petitioners outside of libraries, IndyAustin will continue to give you that opportunity ... at least until we get into court for relief. However, the criminal trespass warnings issued so far are having the effect of chilling the exercise of free speech by some IndyAustin petitioners.

IndyAustin's and Mr. Burdick's position is that the City Manager and staff lack authority to interfere in their right to petition for the CodeNext initiative or any other initiative. Mr. Burdick asserts that he did not even violate the published rules by his location, yet was removed. And, even if the City staff has some rulemaking authority as to the place and manner in which petitioning can occur, the rules that have been adopted, and as they are being enforced, are unreasonable in their broad effect, in that they practically ban petitioning at the very locations *where the people are*.

Please let me know if Mr. Burdick will get a hearing. Be advised that I will be out of town from the afternoon of March 13<sup>th</sup> until March 28<sup>th</sup>, but I can be reached by phone (512 750-585) or email ([Bill@AleshireLaw.com](mailto:Bill@AleshireLaw.com)).

ALESHIRELAW, PC



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Bill Aleshire