

No. 03-21-00075-CV

**IN THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS**

***IN RE LINDA DURNIN, ERIC KROHN, AND MICHAEL LOVINS
RELATORS***

**RELATORS' REPLY TO CITY OF AUSTIN'S RESPONSE
TO RELATORS' ORIGINAL EMERGENCY PETITION
FOR WRIT OF MANDAMUS**

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IN THE INTEREST OF TIME, ORAL ARGUMENT IS NOT REQUESTED

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¹ This Reply will refer to Respondents collectively as “the City.”

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REPLY ISSUE PRESENTED

REPLY ISSUE: The City's² Argument (Response, Pages 11-16), provides no basis for ignoring Austin City Charter art. IV, § 5 that requires the ballot used in voting on a petition-initiated ordinance to "state the caption of the ordinance," and adoption of the City's argument would make Charter art. IV, § 5 a nullity.

STATEMENT OF FACTS - CORRECTION

The City's Statement of Facts misstates the fact of the plain language of the Petitioned Ordinance by saying:

Unaddressed anywhere in the initiated ordinance is that, in addition to *eliminating provisions for warnings and opportunities to correct the offending conduct*, Part 2 would also *eliminate existing provisions that require material endangerment as an element of the offense* and also eliminates heightened *mens rea* components.

Response at Pages 8-9 (emphasis added)

But the "warning first" provision and the "material endangerment" provision are retained in the Code and state:

(C) *Unless a law enforcement officer determines that there is an imminent health or safety threat*, a law enforcement officer must, *before*

² This Reply will refer to Respondents collectively as "the City."

citing a person for a violation of this section, make a reasonable effort to:

- (1) advise the person of a lawful alternative place to camp;*
- (2) advise the person, to the best of the law enforcement officer's knowledge, of available shelter or housing; and*
- (3) contact, if reasonable and appropriate, a city designee who has the authority to offer to transport the person or provide the person with services.*

(D) A person is *materially endangering* the health or safety of another person or of themselves, or is rendering impassable or impeding the reasonable use of a public area making usage of such area unreasonably inconvenient or hazardous if the person is camping on a sidewalk.

See Relators' Original Petition, Tab H (Redline of City Code showing effect of the Ordinance) (emphasis added).

Relators suggest the City's misstatement of fact may be to try to prop up the City's defense of its exaggerated emphasis in its ballot language—repeated 3 times—that the Ordinance “creates a criminal offense and a penalty for *anyone*” violating the prohibited activity.

REPLY ARGUMENT

REPLY ISSUE: The City's³ Argument (Response, Pages 11-16), provides no basis for ignoring Austin City Charter art. IV, § 5 that requires the ballot used in voting on a petition-initiated ordinance to "state the caption of the ordinance," and adoption of the City's argument would make Charter art. IV, § 5 a nullity.

The City's Response presents a tortured interpretation of the Austin City Charter art. IV, § 5 to not only avoid the requirement to use the Petitioned Ordinance Caption on the ballot, but to render that Charter provision a nullity. Section 5 says:

§ 5. - BALLOT FORM AND RESULTS OF ELECTION.

The ballot used in voting upon an initiated or referred ordinance shall state the caption of the ordinance and below the caption shall set forth on separate lines the words, "For the Ordinance" and "Against the Ordinance."

See Relators' Original Petition, Tab M (emphasis added).

Clearly, this section provides a required "ballot form," *i.e.*, the "caption of the ordinance" must be stated on the ballot. The Charter contains this provision to protect the power of the people to initiate ordinances from being thwarted by a City Council intent on ignoring the Charter and making up its own ballot language to discourage passage of citizen-initiated ordinances. The policy reasons for § 5 are obvious, sound, and protect an essential element of the democratic process that

³ This Reply will refer to Respondents collectively as "the City."

initiative petitioning represents. In Tex. Elec. Code § 52.072(a), the Legislature has adopted a policy consistent with the notion that a home-rule city charter can supplant the discretion otherwise given the city council to determine ballot language. The Austin City Council has no such discretion because, under these circumstances the City Charter provides the instructions for the ballot language.

Tex. Elec. Code section 52.072(a) says:

Except as otherwise provided by law, the authority ordering the election shall prescribe the wording of a proposition that is to appear on the ballot.

Tex. Elec. Code § 52.072(a) (emphasis added); *see also Bischoff v. City of Austin*, 656 S.W.2d 209, 211-12 (Tex. App. – Austin 1983, writ ref'd n.r.e.) (“In general, *the form of a ballot proposition* to be submitted to the voters of a city is prescribed by municipal authority *unless such form is governed by statute, city charter, or ordinance.*” (emphasis added)). Tex. Elec. Code § 1.005(10) defines “law” as “a constitution, statute, *city charter*, or city ordinance.”

Despite this plain language, the City argues that “nothing in [§ 5] establishes the caption *of the petition* for the initiated ordinance as the go-to source for the caption that the city council is assigned the duty under § 5 to provide.” City’s Response at Page 12. The City seems to suggest that the caption at issue is not the caption of the petitioned ordinance, but a caption of the petition itself. This is

nonsense. *See* Relators’ Original Petition, Tab B (the petitioned ordinance):

PETITION TO SAVE AUSTIN NOW BY RESTORING SAFETY AND SANITY TO OUR CITY STREETS

We, the undersigned registered voters of the City of Austin, petition the adoption of *the following citizen-initiated ordinance*:

A PETITIONED ORDINANCE AMENDING CITY CODE SECTION 9-4-11 RELATING TO PROHIBITING CAMPING IN PUBLIC AREAS, SECTION 9-4-13 RELATING TO PROHIBITING SOLICITATION, AND SECTION 9-4-14 RELATING TO PROHIBITING SITTING OR LYING DOWN ON PUBLIC SIDEWALKS OR SLEEPING OUTDOORS IN THE DOWNTOWN AUSTIN COMMUNITY COURT AREA; AND CREATING OFFENSES

The caption of *the ordinance* appears after the petition introductory phrase, “the following citizen-initiated ordinance” with Part 1 of the ordinance immediately following the caption. This caption must be stated on the ballot as required by City Charter art. IV, § 5.

The City argues that if the Council has to use the caption of the petitioned ordinance as the ballot language, “then the city council would be the captive of petition circulators, no matter how misleading or pernicious the language of the caption of their petition.” City’s Response at 14. The City is making an argument to ignore its own City Charter because the Council doesn’t like what it says. But the City’s list of examples of the horrible things that could happen are purely

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hypothetical and make no actual complaint about the wording of the Petitioned Ordinance's caption. Perhaps that is because the Petitioned Ordinance's caption is the same wording as the caption on the City Council's Ordinance No. 20190620-185 on the same topics. *Compare* Relators' Original Petition, Tab B (the petitioned ordinance) *with* Tab G (Ordinance No. 20190620-185).

Finally, if this Court were to accept the City's argument against application of Austin City Charter art. IV, § 5, it would make that section a nullity; it would be meaningless, mere surplusage, and would never be applicable to any ballot language. The City's argument would also erase the exception in Tex. Elec. Code § 52.072(a) ("Except as otherwise provided by law...") to the authority of the City Council to determine the ballot language. This Court should reject the City's invitation to just read away Charter art. IV, § 5 and to amend Tex. Elec. Code § 52.072(a) by judicial decision. *See TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) ("Our objective is to ascertain and give effect to the Legislature's intent as expressed in the statute's language. In doing so, we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage.")

CONCLUSION AND PRAYER

The Austin City Charter protects the power of the people of Austin to create ordinances through petition, as was done in this case. Part of that protection is

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Charter art. IV, § 5 that requires use of the petitioned-ordinance’s caption as the ballot language. The City has given no good reason for this Court to ignore § 5, and it is the “law” that controls this case. Because the City Council does not have, under these facts, any discretion to use different ballot language, the Court should grant Relators’ Original Emergency Petition for Writ of Mandamus and (a) order the City Council to use the petitioned-ordinance caption as the ballot language for the May 1, 2021 election; (b) grant Relators all costs of suit; and (c) grant Relators all other relief to which Relators may show themselves to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document was computer generated and the word count of the document, except for those items “excluded” by section T.R.A.P. 9.4(i)(1), is 1,341 based on the count of the computer program used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served electronically on the following counsel of record for Relator on February 24, 2021:

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