

No. 21-0170

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**IN THE SUPREME COURT OF TEXAS**

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*In re Linda Durin, Eric Krohn, and Michael Lovins,  
Relators,*

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Amicus Curiae in Original Proceeding

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**BRIEF OF AMICUS CURIAE NATIONAL HOMELESSNESS LAW  
CENTER IN RESPONSE TO RELATORS' EMERGENCY PETITION  
FOR WRIT OF MANDAMUS**

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## **I. Identity and Interests of Amicus Curiae**

The National Homelessness Law Center (the “Law Center”) submits this *amicus curiae* brief to the Court, in support of Texans who are experiencing homelessness and who will suffer hardship if criminalization of homelessness is reinstated in Austin, as Relators request. The National Homelessness Law Center is the only national legal organization dedicated to ending and preventing homelessness, with over thirty years<sup>1</sup> of experience in outreach and education, policy advocacy, and impact litigation.

The Law Center has previous direct experience with the City of Austin’s policies that would be affected by the passage of Save Austin Now’s (“SAN”) sponsored ballot initiative. In 2019, as the Austin City Council considered legislative action to modify the ordinance language that Relators wish now to reimpose, the Law Center submitted three letters to the Council, highlighting the fact that “the City does not need to take a step back toward the old, failed status quo of criminalization.”<sup>2</sup>

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<sup>1</sup> In 2020, the National Law Center on Homelessness & Poverty was renamed the National Homelessness Law Center.

<sup>2</sup> Nat’l Law Ctr. on Homelessness & Poverty Letter to City of Austin Mayor Steve Adler and City Councilmembers (Oct. 10, 2019), available at <http://nlchp.org/wp-content/uploads/2019/10/Austin-Repeal-Follow-Up-10-10-2019-Final.pdf>.

By attempting to change the clear ballot language that the City Council has put forth, Relators' mandamus petition is nothing more than a veiled attempt to mask what SAN's proposed ordinance really is: an effort to revert to "old, failed" policies the City Council moved *away* from in 2019.

## **II. Disclosure of Source Fee**

The National Homelessness Law Center is represented pro bono by the Law Office of Joseph M. Abraham, PLLC.

## **III. Statement of the Case**

This mandamus proceeding involves the language that voters will consider on the May 2021 ballot, in connection with SAN's proposed ordinance. The goal of SAN's proposed ordinance is and always has been to revert Austin's penal ordinances to their pre-June 2019 language that criminalized the acts of camping, sitting, and lying down by people experiencing homelessness. And while Relators suggest the City's proposition language describing SAN's proposed ordinance on the ballot is unacceptable because it uses the word "criminal," Petition at 9-10, that is the crux of SAN's proposed ordinance. Nonetheless, regardless of how the *ballot* describes the proposed ordinance, both the ultimate text of the proposed ordinance and its effect remain the same: to return to failed policies of criminalizing the status of being homeless.

#### **IV. Statement of Facts**

##### **A. The City Council's 2019 decriminalization of homelessness in Austin**

On June 20, 2019, the Austin City Council passed an ordinance decriminalizing the status of homelessness and limiting enforcement of the City's camping ban to instances when a person is materially endangering the health or safety of themselves or others, or when a person renders public areas impassable or hazardous. *See* Austin, Tex. Ordinance No. 20190620-185 (June 20, 2019), available at <https://www.austintexas.gov/edims/document.cfm?id=322655>. These June amendments prevented the prosecution of Austinites experiencing homelessness for simply existing in public spaces, and helped prevent them from seeking refuge in dangerous places. People experiencing homelessness were never allowed to camp on private property, neither then nor now. Moreover, all other laws respecting public spaces—e.g., littering ordinances—remained fully in effect. Nonetheless, against the backdrop of an increasingly expensive city, anti-homelessness campaigns such as SAN arose.

On October 17, 2019, the Austin City Council further amended City Code Sections 9-4-11 (Camping in Public Area Prohibited) and 9-4-14 (Obstruction in the Downtown Austin Community Court Area Prohibited), which reimposed certain limited restrictions, but also required that law enforcement apprise individuals of available permitted shelter locations before citations could be issued.

*See* Austin, Tex. Ordinance No. 20191017-029 (Oct. 17, 2019), available at <https://www.austintexas.gov/edims/document.cfm?id=330225>.

**B. Save Austin Now’s ballot initiatives**

Even after the Council’s October 2019 amendments, SAN began its drive to reinstate Austin’s criminalization of homelessness. SAN initiated its first ballot initiative drive on February 23, 2020.<sup>3</sup> SAN’s proposed ballot initiative sought, and still seeks, to repeal and replace the Austin City Council’s 2019 amendments by recriminalizing homelessness. SAN also adds additional restrictions on “panhandling.” These are all punitive bans under the penal title of the Austin City Code, Title 9, “Prohibited Activities.” Indeed, as SAN has said consistently, the goal of the ballot initiative has always been “to reinstate the camping ban”:

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<sup>3</sup> *See* @SaveAustinNow, Twitter (Feb. 24, 2020, 6:26 PM), <https://twitter.com/SaveAustinNow/status/1232099477558824966>.

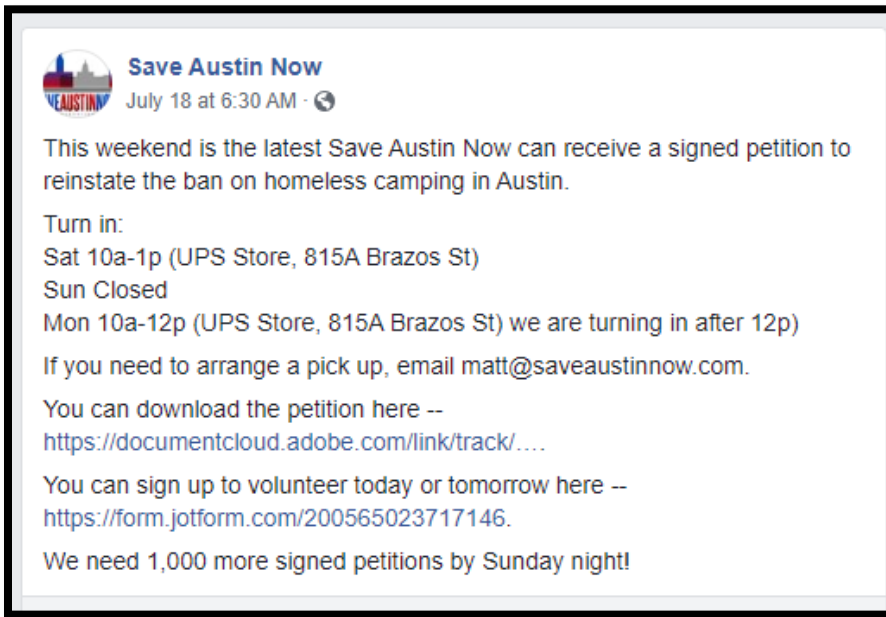


@SaveAustinNow, Twitter (Jul. 23, 2020, 1:35 PM),  
<https://twitter.com/SaveAustinNow/status/1275497691397664782>.



@SaveAustinNow, Twitter (Jul. 17, 2020, 2:20 PM),  
<https://twitter.com/SaveAustinNow/status/1284206412919386114>.





Save Austin Now, Facebook (Jul. 18, 2020, 6:30 AM),  
[https://www.facebook.com/SaveAustinNow/posts/159339569000821?\\_\\_tn\\_\\_=-R](https://www.facebook.com/SaveAustinNow/posts/159339569000821?__tn__=-R).

On July 20, 2020, SAN submitted nearly 20,000 signatures to the Austin City Clerk as part of its first ballot initiative. On August 5, 2020, the City Clerk ruled that SAN had failed to submit the required 20,000 signatures. *See Mark D. Wilson, Petition to put Austin's homeless camping ban on ballot fails, city clerk says, Austin American-Statesman (Aug. 5, 2020), <https://www.msn.com/en-us/news/us/petition-to-put-austins-homeless-camping-ban-on-ballot-fails-city-clerk-says/ar-BB17C3Bh>.*

On January 19, 2021, SAN submitted its second ballot petition, this time with over 26,000 signatures. *See Ryan Autullo, Austin voters might get chance to reinstate homeless camping ban, Austin American-Statesman (Jan. 19, 2021), <https://www.statesman.com/story/news/2021/01/19/austin-camping-ban-petition->*

could-put-issue-on-may-ballot/4213775001/. On February 3, 2021, the Austin City Clerk certified the second petition as satisfying the threshold of 20,000 signatures. *See Ryan Autullo, May ballot will give Austin voters the option to bring back homeless camping ban, Austin American-Statesman* (Feb. 4, 2021), <https://www.statesman.com/story/news/2021/02/04/austin-voters-get-chance-reinstate-homeless-camping-ban-may-1/4390452001/>. On February 9, the City Council called for an election to be held on May 1, 2021, to submit SAN's proposed ordinance to the city's voters. *See Austin, Tex. Ordinance No. 20210209-003* (Feb. 9, 2021), available at <https://www.austintexas.gov/edims/document.cfm?id=355345>.

Relators' injury and claim for relief in this mandamus petition center solely on the City's actions on February 9, 2021, in which the City executed its ministerial duty under the City Charter to ensure that "The ballot used in voting upon an initiated or referred ordinance shall state the caption of the ordinance." Austin, Tex. City Charter, Article IV § 5. Specifically, the Council called for a special election for the SAN initiative on May 1, 2021, and reproduced the full text of the SAN initiative for study by any voter. *See Austin, Tex. Ordinance No. 20210209-003* (Feb. 9, 2021), available at <https://www.austintexas.gov/edims/document.cfm?id=355345>. Relators excerpted this 12-page Ordinance in Tab D with just one page.

## **V. Summary of the Argument**

The criminalization of homelessness was an “old, failed” policy pre-June 2019, which is precisely why the Law Center advocated to prevent (or at worst, mitigate) the re adoption of criminalization in October 2019. While Relators’ Petition for Writ of Mandamus purports to be directed to preventing the City Council from “misleading” voters, the City’s description of the proposed ordinance is accurate—i.e., the effect of SAN’s proposed ordinance would simply be a return to the failed policies of criminalizing the status of being homeless.

## **VI. Argument**

The Austin City Council’s 2019 modifications to the City Code generated and continue to generate robust public discussion regarding the most beneficial and permanent solutions to serve Austin’s population of people experiencing homelessness. But to achieve these beneficial and permanent solutions, the City does not need to take a step back toward the old, failed status quo of criminalization, as Relators’ mandamus petition and SAN’s sponsored ballot initiative seek to do. Both the City of Austin and State of Texas already have pre-existing laws which address and promote safety and health standards. Notwithstanding recent obstacles presented by the COVID-19 pandemic (over the past year) and winter storm Uri (over the past weeks), Austin continues to implement positive policies intended to address and eventually solve the issue of

homelessness. In stark contrast, in taking out the word “criminal” from the ballot description, Relators do nothing more than attempt to mask the character and purpose of SAN’s proposed ordinance, which is a return to the “old, failed” policy of criminalization.

**A. Austin can achieve its law-enforcement goals via non-punitive measures other than the SAN ballot initiative**

Currently, the City has in place law enforcement tools available to address legitimate public safety and health concerns. The existing Austin City Code already allows for enforcement—either immediately in the case of “an imminent health or safety threat,” or otherwise after advising the person to be cited “of a lawful alternative place to camp” and “to the best of the law enforcement officer’s knowledge, of available shelter or housing”—if a person “camps in a public area that is not designated as a camping area by the City of Austin and the person is: (a) materially endangering the health or safety of another person or of themselves; or (b) intentionally, knowingly, or recklessly rendering impassable or impeding the reasonable use of a public area.” *See, e.g.*, Austin, Tex. Code § 9-4-11(B)-(C). *i.e.*, The existing law already permits enforcement when a person’s camping presence requires a member of the public, including those using a wheelchair or stroller, to step off a sidewalk to get around an individual or their property; or blocks business entryways or places that police have closed off for public safety purposes.

Enacting SAN’s ballot initiative would not only be a return to the pre-June 2019 version of the City’s camping ordinance but would also significantly broaden the range of potentially criminalized behavior, and remove the present requirement for law enforcement to inform a person to be cited “of a lawful alternative place to camp” and “of available shelter or housing” before issuing a citation. In other words, the SAN ballot initiative potentially would make criminals of many unfortunate people experiencing homeless simply for being present in public space, with no other available accommodations.

As another non-limiting example of the overbroad conduct that SAN’s ballot initiative would criminalize, Austin’s pre-June 2019 ordinance formerly defined “camping” to include “storing personal belongings.” *E.g.*, Austin, Tex. Code § 9-4-11(A)(1)(a) (May 8, 2019 archive available at [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances/340792?nodeId=TIT9PRAC\\_CH9-4PRAC\\_ART2OFREPRAC\\_S9-4-11CAPUARPR](https://library.municode.com/tx/austin/codes/code_of_ordinances/340792?nodeId=TIT9PRAC_CH9-4PRAC_ART2OFREPRAC_S9-4-11CAPUARPR)) (amended June 20, 2019). Thus, were SAN’s ballot initiative to pass, a person’s brief respite on a bench could be considered criminal if personal belongings were “stored” on or around the bench—raising legal concerns under the U.S. Constitution and Americans with Disabilities Act.

**B. Austin can achieve its public-health goals through non-punitive measures other than the SAN ballot initiative**

Austin can also address public health concerns without returning to misguided, punitive policies like SAN’s ballot initiative that punish people for living outside when they have nowhere else to go. Under Austin’s existing criminal and civil laws, conduct such as harassment, drug use, theft, violence, littering and public urination is strictly prohibited. Other problems can be addressed through civic and infrastructure investment, such as:

- To address reported public urination or defecation, increase toilet access to public restrooms.
- To alleviate concerns about communicable diseases, increase access to clean water.
- To reduce trash or hazardous property in public space, increase trash services and litter pick-up, such as Austin’s Violet Bag program, which “empowers people experiencing homelessness to maintain spaces around them by providing trash bags and disposal kiosks near known encampments.”<sup>4</sup>

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<sup>4</sup> See City of Austin, *Public Spaces Initiative*, available at <https://www.austintexas.gov/department/public-spaces-initiatives> (last visited Feb. 24, 2021).

- To restrict access and use of areas that are sensitive (e.g., adjacent to water sources) or dangerous (e.g., too close to roadways), give clear notice of where people can or cannot remain in advance of enforcement activity.
- To move people from where they are, when necessary, craft tailored solutions in cooperation with experts such as Austin’s newly-appointed Homeless Strategy Officer Dianna Grey,<sup>5</sup> as well as persons experiencing homelessness. If alternatives are truly adequate and accessible, people will use them. Best practices are available in the Law Center’s “Tent City, USA” and “Housing, Not Handcuffs” reports.<sup>6</sup>

None of these problems require reimposing the former class of criminal violations that would be the inherent result of SAN’s ballot initiative.

**C. Pursuing a positive response to Austin’s population of people experiencing homelessness is the most appropriate solution**

The City Council is appropriately entitled to disfavor a return to pre-June 2019’s punitive regime, and to instead prioritize positive solutions. For example, the City has in recent months purchased a series of hotels intended for use as

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<sup>5</sup> City of Austin, *City of Austin Announces New Homeless Strategy Officer*, available at <https://www.austintexas.gov/news/city-austin-announces-new-homeless-strategy-officer> (Dec. 28, 2020) (last visited Feb. 24, 2021).

<sup>6</sup> See Nat’l Law Ctr. on Homelessness & Poverty, *Tent City, USA: The Growth of America’s Homeless Encampments and How Communities are Responding* (Dec. 20, 2017), available at ; Nat’l Law Ctr. on Homelessness & Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (Dec. 2019), available at (hereinafter “*Housing Not Handcuffs* 2019”).

permanent supportive housing.<sup>7</sup> Permanent supportive housing is a proven model for sustainably and cost-effectively reducing street homelessness.<sup>8</sup> This is a favorable development that stands in contrast to the approach now advocated by SAN's ballot initiative and Relators' mandamus petition: No aspects of an effective action plan to end homelessness should be punitive. Indeed, the collateral consequences of criminal convictions make housing difficult to obtain, which undermines efforts to end homelessness.<sup>9</sup> Moreover, decriminalizing survival activities is better for public safety and public health, and criminalization laws fail to reduce homelessness all over the country because these laws fail to address the causes of homelessness.<sup>10</sup> This is why the Federal Plan to End Homelessness

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<sup>7</sup> See City of Austin, Memorandum: Staff Recommendation for Hotel Purchases (Jan. 20, 2021) (available at <https://www.austintexas.gov/edims/document.cfm?id=353821>).

<sup>8</sup> See Lavena Staten & Sara Rankin, *Penny Wise but Pound Foolish: How Permanent Supportive Housing Can Prevent a World of Hurt* (July 14, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3419187](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187).

<sup>9</sup> See *Housing Not Handcuffs* 2019.

<sup>10</sup> See, e.g., John Dixon and Eric Tars, *Police chiefs and advocates for the homeless agree: Housing, not handcuffs, is the right way to deal with poverty*, Sept. 12, 2019, <https://www.washingtonpost.com/opinions/2019/09/12/police-chiefs-advocates-homeless-agree-housing-not-handcuffs-is-right-way-deal-with-poverty/>; see also Jake Lilly, *Op-ed: As a Prosecutor, I Believe Denver Should Stop Criminalizing Homelessness*, May 5, 2019, <https://www.westword.com/news/prosecutor-jake-lilly-argues-in-favor-of-denvers-initiative-300-11332945>; *Housing Not Handcuffs* 2019.



explicitly calls for “Reduc[ing] Criminal Justice Involvement” in order to end homelessness itself.<sup>11</sup>

“The Texas Election Code grants discretion to ‘the authority ordering the election [to] prescribe the wording of a proposition’ unless otherwise provided by law.” *Dacus v. Parker*, 466 S.W.3d 820, 823 (Tex. 2015), citing Tex. Elec. Code § 52.072(a). The Council’s proposed language ensures that the ballot proposition informs voters of the chief features of the measure they will vote on with definiteness and certainty by calling the measure what it is:

[A]n ordinance . . . that would create a criminal offense and a penalty for anyone sitting or lying down on a public sidewalk or sleeping outdoors in and near the Downtown area and the area around the University of Texas campus; create a criminal offense and penalty for solicitation, defined as requesting money or another thing of value, at specific hours and locations or for solicitation in a public area that is deemed aggressive in manner; create a criminal offense and penalty for anyone camping in any public area not designated by the Parks and Recreation Department.

Austin, Tex. Ordinance No. 20210209-003 (Feb. 9, 2021), available at <https://www.austintexas.gov/edims/document.cfm?id=355345>.

In summary, a return to the City’s pre-June 2019 ordinances is unnecessary, and the City Council is properly entitled to make clear to the voters the consequence of Relators’ ballot initiative. Relators’ proposed readoption of the

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<sup>11</sup> U.S. Interagency Council on Homelessness, *Reduce Criminal Justice Involvement*, <https://www.usich.gov/solutions/criminal-justice/> (last updated Oct. 16, 2019).

pre-June 2019 ordinances would significantly expand the scope of criminal conduct that could subject Austin's homeless population to punitive sanctions, which would in turn worsen Austin's homeless crisis. Rather than returning Austin to a failed policy that has not worked anywhere, let alone in Austin, the City should continue to pursue the positive policies set out in its Homelessness Action Plan, and the Court should deny Relators' mandamus petition.

## **VII. Prayer**

For these reasons, the National Homelessness Law Center respectfully requests that this Court deny Relators' Emergency Petition for Writ of Mandamus.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that this brief contains 2,231 words, excluding the parts of the brief exempted by Rule 9.4(i)(1). In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

By: /s/ Joseph M. Abraham  
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**CERTIFICATE OF SERVICE**

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Brief of Amicus Curiae has been forwarded to all counsel and parties of record (listed below) via electronic service on this 25th day of February, 2021.

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