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SUPREME COURT OF TEXAS
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No. 21-0170

IN THE SUPREME COURT OF TEXAS

IN RE LINDA DURNIN, ERIC KROHN, AND MICHAEL LOVINS,
Relators.

ORIGINAL PROCEEDING

RESPONSE BY CITY OF AUSTIN AND AUSTIN CITY COUNCIL IN OPPOSITION TO FIRST AMENDED ORIGINAL EMERGENCY PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Nature of the case

Ms. Durnin, Mr. Krohn, and Mr. Lovins, the relators in this original mandamus proceeding and signers of an initiative petition, challenge ballot language adopted by the Austin city council for a May 1, 2021, election on the measure.

Respondents

The respondents are the City of Austin, a home rule city in Travis County, and the Austin City Council. The city council called a special election for May 1, 2021, on eight measures, seven of which, including the initiative measure supported and signed by the relators, originated with citizen-initiated petitions.

Challenged Action of Respondent

The relators challenge the legal sufficiency of ballot language that the city council adopted for a special election on the measure that will appear as Proposition B on the May 1, 2021, ballot. *See* App. Tab 1 (Ord. No. 20210209-003) (Feb. 9, 2021).

Appeals Court Decision

On February 24, 2021, in ruling by Justice Baker, joined by Chief Justice Byrne and Justice Smith, the Third Court of Appeals denied the relators' application for a writ of mandamus that made the same challenge and sought the same relief as they seek here. *See* Relator App. R (*In re Durnin*, 2021 WL 728179 (Tex.App.—Austin Feb. 24, 2021) (orig. proceeding).

ISSUE PRESENTED

Section 52.072(a) of the Election Code authorizes a city council to "prescribe the wording of a proposition" that is to appear on the ballot containing a "measure." Austin's council prescribed ballot language for Proposition B, which will appear on the ballot for a measure for the May 2021 election. The measure is an initiated ordinance that would revise three parts of Austin's city code by expanding the scope of criminal offenses for three categories of actions: camping in public areas; soliciting in specified locations, in a specified manner, or at specified times; and sitting or lying down on public sidewalks or sleeping in certain areas of town.

Is the council's prescribed ballot language for Proposition B consistent with Article IV, § 5, of the Austin City Charter and Texas common law?

STATEMENT OF FACTS

A. Austin's Initiative Process

Austin's City Charter allows the City's qualified voters to engage in direct legislation through the initiative process, as long as it is not in conflict with the charter, the state constitution, or state laws. Austin's initiative process is detailed in §§ 1 and 3-5 of Article IV of its city charter. *See* App. Tab 2.

The charter provides the ballot form for the council. *Id*. § 5. The ballot is to state "the caption of the ordinance," with lines below for voting for or against. *Id*. The task of "prescrib[ing] the wording" for the ballot caption for the proposition is specifically assigned to the city council. *See* Tex. Elec. Code § 52.072(a).

B. Context For The Initiated Ordinance

1. Constitutional Boundaries For Criminalization In The Sphere of Homelessness

Those who live on the streets present cities across the country with vexing public policy dilemmas. Cities have to confront complicated issues of constitutional law, including increasingly having to deal with constitutional line drawing to address the criminalization of aspects of the lives of those faced with homelessness.

The Supreme Court started drawing constitutional lines in this area in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), where the Court struck down as unconstitutionally vague a local ordinance establishing a criminal offense for "vagrancy." A federal district court invalidated as a violation of the federal constitutional prohibition on cruel and unusual punishments a Dallas city ordinance criminalizing sleeping in public by those experiencing homelessness. *Johnson v. City of Dallas*, 860 F.Supp. 344 (N.D. Tex. 1994).[1]

In 2019, in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S.Ct. 674 (2019), a federal appeals court struck down as cruel and unusual a municipal ordinance that criminalized sitting, sleeping, or lying outside on public properties by homeless people who could not obtain shelter. The opinion drives home the delicacy of the line drawing task facing local city councils by carefully identifying what it was *not* deciding, including questions about whether the act of sleeping outside or obstructing public rights of way can ever be criminalized. *Id.* at 617 n.8.

[1] The judgment was vacated on jurisdictional grounds. *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995).

2. The Council's Post-*Boise* Revisions To The City Code

After *Boise*, Austin's council revisited the existing city code provisions speaking most directly to criminalization of aspects of homelessness, amending three parts of the city code, §§ 9-4-11, 9-4-13, and 9-4-14. *See* Relator App. Tab I (text of provisions). Provisions establishing criminal offenses in three categories—generally speaking, public area-camping, aggressive confrontations, and obstruction in a designated area—were included, but with care to avoid criminalizing mere status as opposed to conduct and with provisions about the conditions attaching to citation for such conduct. They are necessarily intricately drawn because of *Papachristou*.

3. The Save Austin Now Initiative Petition And Council Action On It

An organization then launched a petition drive to initiate an ordinance that would criminalize conduct not criminalized in the council's revisions and add further restrictions on activities by those experiencing homelessness. *See* Relator App. Tab B. Its caption does not identify the stricter criminalization rules it would

impose, stating only at the 2-word tail-end of its four-part, 47-word caption that it "creat[es] offenses." *Id*.

After receiving the requisite number of signatures, *see* Relator App. Tab C, it was placed on the council agenda for February 9, 2021, along with a number of other items related to citizen-initiated petitions.

Austin's City Attorney provided two options for the ballot language. *See* Relator App. Tab E at 3. The council unanimously to adopted Option 2's ballot language:

> Shall an ordinance be adopted 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?

Ord. No. 20210209-003 Part 1, Prop. B. The language of the initiated ordinance is then set forth *verbatim* in Part 2 of the ordinance calling the election on the measure.

C. Summary Of Initiated Ordinance

Part 1 of the body of the initiated ordinance, headed "Purpose," recites that since the 2019 revisions the city "has been plagued by threats to public health and safety" due to various types of outdoor public activity. It makes no mention of the fact that the ordinance would create "offenses," criminal or civil, instead simply stating broadly that the initiated ordinance would "return to the effective system of management and control" before the 2019 council revisions.

Part 2 revises city code § 9-4-11, replacing the current subsection (B) (21 lines long, 225 words) with a new subsection (B) (2 lines long, 33 words). The initiated ordinance reveals what the new subsection (B) would provide in terms of a criminal offense. But it does not reveal the far-reaching changes that would be effected. Voters reading the ordinance at the polling station would not have the convenience of a redlined version of the proposed changes. *Compare* Relators App. Tab H (redlined comparison).

Under the initiated ordinance's one-sentence Part 2, it would become a criminal offense when a person camps in any public area

other than one designated by the City's Parks and Recreation Department.[2]

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.

Also unaddressed, and unexplained, is that the purported exception in the initiated provision's sub-part (B)—the one referencing sub-part (D)—makes no sense and does not really create the exception that, though stated, is not actually provided.

Part 3 adds a detailed list of types of solicitation, including locations and times of day, that are criminalized. It expressly eliminates a *mens rea* component for forbidden solicitations in certain spots.

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[2] The criminal offenses under the three affected city code sections would be Class C misdemeanors. *See* Austin City Code § 1-1-99. While the city code's default rule for the maximum amount of the fine is $500, *see id.* § 1-1-99((B)(1), the maximum fine rises to $2,000 if the violation involves a provision concerned with "public health and sanitation," *id.* § 1-1-99(B)(2).

Part 4 expands the parts of town where sleeping outdoors and sitting or lying down is a criminal offense, eliminates the opportunity to correct the offending conduct after a warning, and provides that there is no *mens rea* component for an offense under it.

D. Relators' Non-Compliance With Tex. R. App. 52.3(j)

The Relators affix a verification representing that they have complied with Rule 52.3(j) of the Texas Rules of Appellate Procedure. *See* Relator Am. Pet. 20. They have not. Specifically, as the footnote below shows, they have made factual assertions unsupported by the relators' appendix.[3]

ARGUMENT

The relators level two legal challenges to the Austin council's determination of the language for Proposition B. First, they argue that the council violated Article IV, § 5, of the city charter because it did not use *verbatim* the caption that was affixed to the petition for the initiated ordinance. Second, they argue that the language for Proposition B violates the common law duty established in

[3] Relator Am. Pet. 1 (2nd full para. after first sentence); 8 (1st full para. after first sentence); 11 (1st full para., 2nd sent. ("voters are alarmed . . .); and 12-13 (runover para. from 11).

such cases as *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). They are wrong on both counts.

I. AUSTIN'S CITY CHARTER DOES NOT COMPEL THE CITY COUNCIL TO ADOPT *VERBATIM* THE CAPTION USED TO CIRCULATE A PETITIONED ORDINANCE.

The relators provide no authority for their argument, Relators Am. Pet. 3-6, that the city council was compelled to use the caption of the Save Austin Now petition for the proposition language.

The Article IV provisions that govern the initiative process for Austin measures demonstrate the emptiness of relators' argument. Start with § 1. It gives Austin citizens the power to propose "any *ordinance*" and authorizes them to submit a petition containing "[a]ny initiated *ordinance*" to the city council. Then, assuming the requisite signature requirements are satisfied, under § 4(b) the council is to order an election and submit the "initiated *ordinance*" to a vote.

The form of the ballot is dictated by § 5 of Article IV. The ballot for voting on the "ordinance" has to "state the caption of the ordinance." Nothing in this provision 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. Had

the provision intended to establish such a requirement, it would, and easily could, have directed that the stated caption had to match the caption on the petition—but that is not what the charter provision says.

Rather, Article IV's structure and requirements are laid out in logical fashion. The council is obligated to submit the *ordinance* that has been initiated to the voters in unadulterated form. It is given no leeway to vary, modify, clarify, or rearrange its terms. The measure to be voted on must be the measure as stated in the initiated ordinance.

But the caption is not the ordinance, or even part of it. It "carries no weight" and does not limit or expand its meaning. *See, e.g.*, *Colorado County v. Staff*, 510 S.W.3d 435, 452 (Tex. 2017);[4] *see also* Austin City Code § 1-1-1(E). Nothing in Article IV, § 5, of the city charter modifies this principle or somehow transmogrifies something that the law says carries no weight into something that suddenly is decisive.

[4] Municipal codes are subject to the same rules of construction as state statutes. *Mills v. Brown*, 159 Tex. 110, 114, 316 S.W.2d 720, 723 (1958).

The caption in this part of Austin's charter is the *proposition* that briefly lays out the measure that itself is on the ballot for the voters. State law, Tex. Elec. Code § 52.072(a), places the duty for the "wording of a proposition" on the council, not the circulators of an initiative petition. That is why the charter provision at issue follows its reference to "caption" with the specification that "for" or "against" options are to be provided immediately below the caption.

It is correct that Section 52.072(a)'s imposition of the duty is "except as otherwise provided by law" and that a city charter may be "other law" within the meaning of that exception, *Bischoff v. City of Austin*, 656 S.W.2d 209, 211-12 (Tex.App.—Austin 1983, writ ref'd n.r.e.). But this contrary obligation has to be "provided" by that other law (in this case, Austin's charter). Nothing in Article IV's § 5 "provides" that the petitioners for an initiated ordinance are to determine the "wording of a proposition." It leaves that job where Section 52.072(a) squarely places it: on the city council.

The policy reason for this principle is readily discernable and buttresses the conclusion drawn from the charter provision's words. If the ballot language for the proposition had to be mindlessly cut and pasted from the caption of a petitioned initiative ordinance, 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. In the circumstance here, for example, the relators would have the charter be read to force the council to have the ballot language omit any reference whatever to criminal penalties if the petitioners do not mention them in *their* caption. Or the petitioners could have inserted blatantly insulting or derogatory language about the city council or those experiencing homelessness into *their* caption, and then forced it on the council to adopt as the *council's* description to the voters of what the initiated ordinance would do if passed. After all, the proposition language on the ballot is what the city itself, not the proponents of the initiative, is telling the voters the proposed measure would do.

The relators have yet to identify a single situation in which a city charter provision, much less Austin's, has been read to turn a city council into a ventriloquist's dummy for initiative proponents. There is no foothold in the terms of Article IV's § 5 that would allow or require such a reading. The relators' first argument, then, must be rejected as legally baseless. Their accusation that it would not have been wise to "empower the City Council to select its own descriptive language to appear on the ballot," Relator Pet. 5, demonstrates how far adrift they are in their reading of what is wise and what the law is. For one thing, it is direct attack on the wisdom of the legislative choice expressly made in Section 52.072(a), which did empower city councils to determine the descriptive language for measures. For another, it is bottomed on a forced reading of the charter provision untethered from the terms of the provision and would require the Court to add words to the provision and make it a total outlier in Texas law.

The relators argue that, under the city's reading, the Austin council would be left free to "thwart[]" the initiative proponents by "making up" their own ballot language. Relators Am. Pet. 16. But

city councils, not initiative petitioners, are charged with exercising their broad discretion to design ballot proposition language. The courts are supposed to give "due consideration" when councils interpret their charters. *In re Scott*, 2017 WL 1173829 (Tex.App.—Corpus Christi-Edinburg March 29, 2017) (orig. proceeding), at *7; *see also* Tex. Atty. Gen. Op. KP-0062 (2016) at 2 (deferring to councils' authority to construe their own charters).

II. THE LANGUAGE ADOPTED FOR PROPOSITION B SATISFIES THE REQUIREMENTS OF THE COMMON LAW.

The relators target three aspects of the Proposition B language adopted by the city council, claiming that they violate common law standards and warrant issuance of a writ of mandamus by the Court to force the council to modify the language more to their liking. *See* Relator Am. Pet. 9-11 (complaining about reference to penal elements of initiated ordinance); 11-13 (complaining that camping element was not listed first); and 13-15 (complaining about the word "anyone").

They are wrong on each point. *See* Parts II.B.1 (penal issue); II.B.2 (camping issue); and II.B.3 (the word "anyone"). But the over-arching common law standards for assessing and testing the

adopted language are addressed first to help guide the Court's analysis.

A. The Responsibility For Adopting Ballot Language For A Proposition Rests With The City Council, Subject Only To Common Law Restraints.

1. City Council Responsibility

The relators obviously prefer to dictate the language to be used to put their proposed measure to a vote. Who would not prefer that in what the relators perceive, and treat, as a political dispute? They, of course, are free to frame the political discourse and debate on their initiative as they see fit. But they are not free to dictate the ballot language that reflects the emphasis that they wish to give to their proffered measure. Texas law places that responsibility squarely in the laps of the City's elected representatives: the city council:

> The language of a ballot proposition is the responsibility of the authority ordering the election, *not* the responsibility of the party petitioning for an election to be called.

City of Galena Park v. Ponder, 503 S.W.3d 625, 635 (Tex.App.—Houston [14th Dist.] 2016, no pet. h.) (citing Tex. Elec. Code § 52.072) (emphasis added).

The leading case, *Dacus*, brings this key point home. There are "many ways" to identify a measure, but not all are suitable for the ballot. Special interest groups, for example, may talk about their proposition by focusing on "details that incidentally impact them" but that are not fairly characterized as "chief features." *Id.* at 825. Regardless of individual self-interest, the language must be "formal and sure." *Id.* And it falls not to private proponents of one position or another but to the city council—elected by the people of Austin—to "capture the measure's essence" and provide the necessary "threshold level of detail." *Id.*

The council's job is not to further petitioners' campaign strategy. Instead, it is to craft language that captures the initiated ordinance's actual operation and impact, not to helpfully overlook such important features in deference to proponents' campaign plans and objectives. The relators' endeavor here is to have the exact opposite principle adopted and enforced against the City. They want *their* framing of the issue to prevail, even if it omits key features of the proffered ordinance and even if the City's description is otherwise accurate.

2. Council-Adopted Ballot Language For A Measure That Outlines Its General Purpose, Does Not Mislead, and Identifies Key Features Meets Council's Discretionary Obligation Under The Common Law.

Section 52.072(a) of the Election Code squarely placed the job of crafting language for Proposition B in the hands of the Austin city council, directing that, as the body calling the election, it was charged with the duty of prescribing the proposition's wording. In performing this task, the council had "broad discretion" in its choice of how the ballot proposition should read. *Dacus*, 466 S.W.3d at 826; *see also Bryant v. Parker*, 580 S.W.3d 408, 412 (Tex.App.—Houston [1st Dist.] 2019, pet. denied).

This broad discretion is limited only by certain common law restraints. *Dacus*, 466 S.W.3d at 823. The chief features and the basic character and purpose of the measure need to be identified, telling the voters "what it is." *Id.* at 825. The council is to use language presenting a fair picture of the measure on the ballot. *See, e.g., In re Williams*, 470 S.W.3d 819, 822 (Tex. 2015) (per curiam). Common law standards do not allow an affirmative misrepresentation of a measure or the omission of its "chief features." *Dacus*, 466 S.W.3d at 826.

B. The Proposition B Language Meets Common Law Requirements On Each Challenged Ground.

1. The Language About Criminal Offenses And Penalties Is Accurate And Valid.

The city council language for Proposition B tells voters that the proposed ordinance would create a "criminal offense and penalty" for: sitting or lying down on a public sidewalk or sleeping outdoors in two areas of town; solicitation of a certain sort; and camping in undesignated public areas. The relators do not complain about the accuracy of the language. The expanded criminalization of homeless activities, whether characterized as criminalizing homelessness or more narrowly as criminalizing some activities closely associated with homelessness, was the very impetus and is the very objective of the initiative. They admit that restoration of the pre-2019 status quo on criminalization in this sphere is what they seek. Relators Am. Pet. 1. This would mean increasing the category of criminal offenses: "the effect of SAN's proposed ordinance would simply be a return to the failed policies of criminalizing the status of being homeless." NHLC Br. 8. The relators' problem with the council's language is not accuracy or omission. It is political

discomfort. They do not like the language adopted by the council for the very reason that it *is* accurate—an "inconvenient truth," to coin a phrase.

There is no doubt about what the ordinance would do. It would create criminal offenses and penalties in precisely the categories specified by the language. The complaint is that it emphasizes the down-side of the initiative, which is that new categories of crimes are established, with the consequence that new penalties will be imposed on those who transgress the ordinance's provisions. In short, according to the relators, it emphasizes what they do not think should be emphasized.

But the core purpose of the ordinance was to put more teeth into enforcement of the provisions directed at what the relators would characterize as conduct by those who are homeless. Without stronger enforcement, in their view, the "blight" they see as being created across the city would not be reversed.

State statutes that have failed to mention penalties imposed by a statute in their caption have been struck down. *See, e.g., Stein v. State*, 515 S.W.2d 104, 107 (Tex. Crim. App. 1974) (caption's omis-

sion of reference to penalty in statute was "fatal"). Even a city code provision highlighted by the relators singles out "penal ordinances" for special attention in directing publication of descriptive captions for them. *See* City Charter Art. II, § 15.

The relators claim that those opposing the ordinance will turn the *accurate* characterization in the ballot language to their advantage by campaigning on a theme that the ordinance criminalizes homelessness. Relator Am. Pet. 10-11. Whether such a characterization would be correct or not may be subject to debate but that is not a complaint that the language in the proposition is erroneous. It is a complaint about the way a campaign might be conducted, something on which the relators seem quite fixated.

2. The Language About The Ordinance's Camping Provisions Is Accurate And Valid.

The ordinance specifically identifies camping in undesignated public places as one of the activities specifically targeted by the proposed ordinance and the criminal penalties it would add to the code. The relators complaint? Because they listed it first, the city council should have, too, and its failure to do so violates its common law duties. Relators Am. Pet. 11. This is a baseless argu-

ment, unaccompanied by a single citation to supporting authority. There is nothing in the common law that directs a city council to care in the same way, and to the same degree, about the features of an initiated ordinance as its proponents care about it.

The relators do not argue that the language about camping is inaccurate or misleading. Their complaint is that its placement does not play to public sentiment against certain activities by those who are homeless in the way they want public sentiment played to. But there is nothing in this complaint that remotely constitutes a violation of the council's common law duties to fairly and accurately portray the effects of a measure that is on the ballot. The law imposes no duty on the city council to adopt the precise priorities of an initiative's proponents. The council's duty is to note the key features, and that is what the council did here. The camping provisions, say the relators, is a key feature. That key feature is explicitly identified in the ballot language. No plausible argument supports the relators' claim.

3. The Language About "Anyone" Being Exposed To Criminal Liability Is Accurate And Valid.

The third and final specific complaint by the relators is that Proposition B misuses the word "anyone" in two different spots. Relator Am. Pet. 13-15. The complaint does not demonstrate a common law violation by the city council of its discretion.

The first use of the word "anyone" in the Proposition B language is where it states that the ordinance would create a criminal offense and penalty for "anyone sitting or lying down on a public sidewalk or sleeping outdoors" in two specified areas.

The relators complain that use of the word this way is misleading in two ways. They posit that the criminal exposure does not occur until a law enforcement officer has warned of the improper conduct. Relator Am. Pet. 15 (citing proposed § 9-4-14(E). But that precondition does not lessen the universe of those exposed to penalty by the provision. "Anyone" who sits or lies down in the off-limits areas *is* legally exposed under the provision—just as the proposition language states.

The second way that they claim it is misleading is that there is a provision that carves out certain kinds of sitting and lying down.

Relator Am. Pet. 15 (citing proposed § 9-4-14(F)). Again, "anyone" that sits or lies down where it is not allowed remains criminally exposed. It would be up to those charged to invoke the exception in subsection (F). The chief feature of this provision is accurately identified. Under the relators' argument, the only way to satisfy the rules would be to reproduce every exception contained in a lengthy ordinance in the ballot language about it. That is self-defeating. It would eliminate shortened ballot language as a way to convey the essence of a proposed measure to voters in a readily graspable way. As *Dacus* explains, "short, general descriptions" and "technical errors" are acceptable as a corollary to giving brief description to sometimes complex proposals. 466 S.W.3d at 826, 828.

Finally, the relators complain that the use of "anyone" in the part of the proposition about camping is legally invalid. Relator Am. Pet. 13-14. They go so far as to claim the language is "blatantly false." *Id*. 13. They are wrong.

The language summarizes the ordinance's camping provisions as creating a criminal offense and penalty for "anyone camping in

a public area" not properly designated. Part 2 of the ordinance would repeal all of the present subsection (B) of § 9-4-11 and replace it with a simple prohibition. Except as provided in subsection (D) of that section of the code, "a person commits an offense if the person camps in a public area" not properly designated. There is no difference between "anyone" and "a person." So the city council's description is spot-on.

The relators argue that "anyone" goes too far because subsection (C), which would remain in place, requires a police officer under certain conditions to give certain admonitions or take other steps before citing for a violation. Relator Am. Pet. 14. There are two problems with this argument. First, it is not clear at all that the wording of the proposed new subsection (B) would remove a person from the offense category it describes if the subsection (C) provisions might otherwise be applicable. Subsection (B), by its terms, creates only one exception, the one found in Subsection (D). Second, the word "anyone" still accurately describes the category of exposure, even if subsection (C)'s provisions are applicable in any given situation.

The relators also argue against use of "anyone" in the camping language because, they say, subsections (G) and (H) would remain in place, and they contain exceptions. But much like the problem with subsection (D) being neutered by the repeal of the existing subsection (B)'s detailed provisions, subsections (G) and (H) also are neutered and made inapplicable by the repeal of the existing subsection (B). These provisions—that is, (G) and (H)—are only triggered in connection with the current subsection (B)(2), and the current subsection (B)(2) would be repealed if the ordinance were adopted.

CONCLUSION AND PRAYER

The Court should deny the petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)-(3), I certify that this response contains 4,494 words, excluding the portions of the response exempted by Tex. R. App. Proc. 9.4(i)(1). This is a computer-generated document created in Microsoft Word 2010 using 14-point Century Schoolbook (12-point for footnotes), with 14- and 15-point Calibri for headings. In making this certification, I relied on the word count provided by the software used to prepare the document.

*_/s/ Renea Hicks*_____
Renea Hicks

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2021, the foregoing Response by City of Austin and Austin City Council in Opposition to First Amended Original Emergency Petition for Writ of Mandamus was served electronically in accordance with the Texas Rules of Appellate Procedure on the following counsel of record:

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*_/s/ Renea Hicks*_____
Renea Hicks

INDEX TO APPENDIX

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

I, Jannette S. Goodall, City Clerk of the City of Austin, Texas, do hereby certify that the foregoing instrument is a true and correct copy of Ordinance No. 20210209-003, consisting of nine pages, an Exhibit A consisting of three pages, for a total of twelve pages as approved by the City Council of Austin, Texas, at a Special Called Meeting on the 9th day of February, 2021, as on file in the Office of the City Clerk.

WITNESS my hand and official seal of the City of Austin at Austin, Texas, this 23rd day of February, 2021.

JANNETTE S. GOODALL
CITY CLERK
CITY OF AUSTIN, TEXAS

ORDINANCE NO. 20210209-003

AN ORDINANCE ORDERING A SPECIAL MUNICIPAL ELECTION TO BE HELD IN THE CITY OF AUSTIN ON MAY 1, 2021, TO SUBMIT TO THE VOTERS A PROPOSED CITIZEN-INITIATED ORDINANCE REGARDING A CRIMINAL OFFENSE AND A PENALTY FOR CAMPING IN PUBLIC AREAS WITHOUT A PERMIT, CERTAIN TYPES OF SOLICITATION, AND SITTING, LYING, OR SLEEPING OUTDOORS IN CERTAIN PUBLIC AREAS; PROVIDING FOR THE CONDUCT OF THE SPECIAL ELECTION; AUTHORIZING THE CITY CLERK TO ENTER INTO JOINT ELECTION AGREEMENTS WITH OTHER LOCAL POLITICAL SUBDIVISIONS AS MAY BE NECESSARY FOR THE ORDERLY CONDUCT OF THE ELECTION; AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. A special municipal election shall be held in the City on May 1, 2021, to submit to the voters of the city a proposed citizen-initiated ordinance regarding a criminal offense and a penalty for camping in public areas without a permit, certain types of solicitation, and sitting, lying, or sleeping outdoors in certain public areas. The ballot shall be prepared to permit voting "Yes" or "No" on the Proposition:

Proposition B: Shall an ordinance be adopted 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?

PART 2. If the proposition provided in Part 1 is approved by a majority of voters voting at the election, the City Code is amended as indicated below, with the Purpose appearing before Section 9-4-11 of the City Code, and the Effectiveness and Severability appearing after Section 9-4-14 of the City Code:

Part 1. Purpose

On June 20, 2019, the Austin City Council amended provisions of the Austin City Code relating to camping and solicitation in public areas of Austin and to sitting

or lying down on public sidewalks or sleeping outdoors in certain downtown areas of the city. These provisions had long been effective in maintaining safety and order throughout the city. Since and as a result of the adoption of the amended provisions, and the adoption of further amendments by the City Council, Austin has been plagued by threats to public health and safety, as camping and sleeping outdoors, sitting or lying down on public sidewalks, and solicitation during the evening and nighttime hours have expanded dramatically, notwithstanding the fact that Austin has shelters and other facilities that do not reach maximum capacity and that are available to individuals as an alternative to such actions. The purpose of this ordinance is to restore generally the provisions of the Austin City Code that were in effect on June 19, 2019 prior to the City Council's action, expand the area in which solicitation is prohibited during the evening and nighttime hours, and modify the boundaries of the geographic area to which the ordinance applies to encompass the area that contains the campus of The University of Texas at Austin and areas where many students at the university and through which they must move to travel to and from the campus. This will return to the effective system of management and control of the city which these provisions promoted and secured.

Part 2. Subsection (B) of Section 9-4-11 of the Austin City Code is hereby repealed and replaced with the following:

§ 9-4-11 CAMPING IN PUBLIC AREA PROHIBITED

(B) Except as provided in Subsection (D), a person commits an offense if the person camps in a public area that is not designated as a camping area by the Parks and Recreation Department.

Part 3. Section 9-4-13 of the Austin City Code is hereby repealed and replaced with the following:

§ 9-4-13 SOLICITATION

(A) The council finds that:

(1) Aggressive solicitation is disturbing and disruptive to residents and businesses and contributes to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.

(2) Aggressive solicitation includes approaching or following

pedestrians, repetitive soliciting despite refusals, the use of abusive or profane language to cause fear and intimidation, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic.

(3) The presence of individuals who solicit money from persons at or near banks, automated teller machines, public transportation facilities, and crosswalks is especially troublesome because of the enhanced fear of crime in a place that is confined, difficult to avoid, or where a person might find it necessary to wait.

(4) This section is intended to protect citizens from the fear and intimidation accompanying certain kinds of solicitation, and not to limit a constitutionally protected activity.

(B) In this section:

(1) AGGRESSIVE MANNER means:

a. intentionally or recklessly making any physical contact with or touching another person in the course of the solicitation without the person's consent;

b. following the person being solicited, if that conduct is:

i. intended to or likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or

ii. intended to or reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation;

c. continuing to solicit a person within five feet of the person being solicited after the person has made a negative response;

d. intentionally or recklessly blocking the safe or free passage of the person being solicited or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person making the solicitation;

e. using obscene or abusive language or gestures toward the person being solicited;

f. approaching the person being solicited in a manner that:

i. is intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal

act upon property in the person's possession; or

ii. is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation.

(2) AUTOMATED TELLER MACHINE means a device, linked to a bank's account records, which is able to carry out banking transactions.

(3) AUTOMATED TELLER FACILITY means the area comprised of one or more automatic teller machines, and any adjacent space that is made available to banking customers.

(4) BANK includes a bank, savings bank, savings and loan association, credit union, trust company, or similar financial institution.

(5) BUS means a vehicle operated by a transit authority for public transportation.

(6) CHECK CASHING BUSINESS means a person in the business of cashing checks, drafts, or money orders for consideration.

(7) PUBLIC AREA means an outdoor area to which the public has access and includes, but is not limited to, a sidewalk, street, highway, park, parking lot, alleyway, pedestrian way, or the common area of a school, hospital, apartment house, office building, transport facility, or shop.

(8) SOLICIT means to request, by the spoken, written, or printed word, or by other means of communication an immediate donation or transfer of money or another thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value, and regardless of whether consideration is offered.

(C) A person commits an offense if the person solicits:

(1) in an aggressive manner in a public area;

(2) in a bus, at a bus station or stop, or at a facility operated by a transportation authority for passengers;

(3) within 25 feet of

a. an automated teller facility;

b. the entrance or exit of a bank; or

c. the entrance or exit of a check cashing business;

(4) at a marked crosswalk;

(5) on either side of the street on a block where a school attended by minors or a child care facility has an entrance or exit;

(6) at a sidewalk café authorized under Chapter 14-4 (*Sidewalk Cafes*) or the patio area of a bar or restaurant; or

(7) within the boundaries of the City of Austin between 7:00 p.m. and 7:00 a.m.

(D) A culpable mental state is not required, and need not be proved, for an offense under this Chapter Subsection (C)(2), (3), or (4).

(E) This section is not intended to proscribe a demand for payment for services rendered or goods delivered.

Part 4. Section 9-4-14 of the Austin City Code is hereby repealed and replaced with the following:

§ 9-4-14. SITTING OR LYING DOWN ON PUBLIC SIDEWALKS OR SLEEPING OUTDOORS IN THE DOWNTOWN AUSTIN COMMUNITY COURT AREA PROHIBITED

(A) DISABILITY means having a physical or mental impairment which substantially limits one of more major life activities.

(1) PHYSICAL OR MENTAL IMPAIRMENT means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) MAJOR LIFE ACTIVITIES means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, learning, breathing and working.

(B) The council finds that the City has a compelling interest in:

(1) encouraging and preserving a vital, pedestrian-friendly urban core;

(2) assuring that the urban core remains accessible to individuals

with disabilities and compliant with the provisions of the Americans with Disabilities Act;

(3) promoting tourism and business in the central business district;

(4) preserving the quality of urban life and in protecting its citizens from intimidating behavior; and

(5) encouraging businesses and neighborhoods in the central city where walking is a realistic alternative to vehicles that use fossil fuels.

(C) The council finds that in areas with high pedestrian traffic and a high incidence of petty crime related to public disorder, individuals sitting or lying in the pedestrian right-of-way:

(1) contribute to a sense of fear, intimidation, and disorder;

(2) are disruptive to residents, businesses, and customers;

(3) discourage, block, or inhibit the free passage of pedestrians; and

(4) contribute to the loss of access to and enjoyment of public places.

(D) This section applies in the following area, including the streets and pedestrian rights-of-way that bound the area, but does not apply on the campus of the University of Texas:

(1) beginning at the intersection of 30th Street (West) and Lamar Boulevard (North);

(2) south on Lamar Boulevard (North) to the north shore of Lady Bird Lake;

(3) east along the north shore of Lady Bird Lake to the point directly south of the curve at the intersection of Jesse E. Segovia Street and Robert Martinez, Jr. Street;

(4) north to the curve at the intersection of Jesse E. Segovia Street and Robert Martinez, Jr. Street;

(5) west along Jesse E. Segovia Street to the intersection of Chicon Street;

(6) north on Chicon Street to the intersection of Seventh Street (East);

(7) west on Seventh Street (East) to the IH-35 East Frontage Road;

(8) north on the IH-35 East Frontage Road to the intersection of 14th

Street (East);

(9) east on 14th Street (East) to the boundary of Oakwood Cemetery;

(10) south and east along the boundary of Oakwood Cemetery to Leona Street;

(11) north on Leona Street to the intersection of Manor Road;

(12) east on Manor Road to the intersection of Dean Keeton Street (East);

(13) west on Dean Keaton Street (East) to the intersection of Red River Street;

(14) north on Red River Street to the intersection of 38th Street (East);

(15) west on 38th Street (East and West) to the intersection of Guadalupe Street;

(16) south on Guadalupe Street to the intersection of 30th Street (West); and

(17) west on 30th Street (West) to the intersection of Lamar Boulevard (North), the place of beginning.

(E) A person commits an offense if, after having been notified by a law enforcement officer that the conduct violates this section:

(1) the person is asleep outdoors; or

(2) the person sits or lies down in the right-of-way between the roadway and the abutting property line or structure, or an object placed in that area.

(F) This section does not apply to a person who:

(1) sits or lies down because of a medical emergency;

(2) operates or patronizes a commercial establishment that conducts business on the sidewalk under Title 14 (*Use of Streets and Public Property*) of the Code;

(3) participates in or views a parade, festival, performance, rally, demonstration, or similar event;

(4) sits on a chair or bench that is supplied by a public agency or by the abutting private property owner;

(5) sits within a bus stop zone while waiting for public or private transportation; or

(6) is waiting in a line for goods, services, or a public event.

(G) It is an affirmative defense to prosecution if a person sits or lies down as the result of a physical manifestation of a disability, not limited to visual observation.

(H) A culpable mental state is not required, and need not be proven, for an offense under this section.

Part 5. Effectiveness and Severability.

(A) The effective date of this ordinance shall be the earlier of (i) ten (10) days after the date of its final passage by the Austin City Council, as prescribed under Article IV, Section 4(a) of the Austin City Charter or (ii) the date upon which the results of an election required under Article IV, Section 4(b) are canvassed.

(B) If any section, paragraph, clause, or provision of this ordinance is for any reason held to be invalid or unenforceable, the invalidity or unenforceability of that section, paragraph, clause, or provision shall not affect any of the remaining provisions of this ordinance, and to this end, the provisions of this ordinance are declared to be severable. This ordinance shall supersede the Austin City Code to the extent there are any conflicts.

PART 3. The election shall be conducted between the hours of 7:00 a.m. and 7:00 p.m. The location of the main early voting polling place, the dates and hours for early voting, and the early voting clerk's official mailing address are provided in Exhibit A, attached and incorporated as a part of this ordinance.

PART 4. A direct electronic recording voting system, as the term is defined in Title 8 of the Texas Election Code, shall be used for early voting and for voting conducted on election day. The central counting station is established at the Travis County Elections Division, 5501 Airport Boulevard, Austin, Texas.

PART 5. Notice of this election shall be posted and published in accordance with state law. The notice shall be posted, in both English and Spanish, in the office of the City Clerk and at the City Hall notice kiosk not later than the 21st day before election day. Notice of this election shall be published one time, in English and Spanish, not earlier than the 30th day before the date of the election or later than the 10th day before the date of the election, in a newspaper of general circulation in the City of Austin.

PART 6. In accordance with Chapter 271 of the Texas Election Code, the May 1, 2021 special municipal election may be held jointly with the various political

subdivisions that share territory with the City of Austin and that are holding elections on that day. The City Clerk may enter and sign joint election agreements with other political subdivisions for this purpose, and their terms as stated in the agreements are hereby adopted.

PART 7. The Council finds that the need to immediately begin required preparations for this election constitutes an emergency. Because of this emergency, this ordinance takes effect immediately on its passage for the immediate preservation of the public peace, health, and safety.

PASSED AND APPROVED

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February 9 , 2021 §

Steve Adler
Mayor

APPROVED: Anne L. Morgan by NJ
Anne L. Morgan
City Attorney

ATTEST: Jannette S. Goodall
Jannette S. Goodall
City Clerk

EXHIBIT A

Main Early Voting Locations

EXHIBIT A

Main Early Voting Locations, Early Voting Dates, and Early Voting Clerk Mailing Address
May 1, 2021

Main Early Voting Locations:

Travis County: City of Austin Planning and Development Center, 6310 Wilhelmina Dr., Austin TX

Hays County: Government Center Conference Room, 712 S. Stagecoach Trail, San Marcos, TX

Williamson County: Williamson County Inner Loop Annex, 301 SE Inner Loop, Suite 104, Georgetown, TX

Early Voting Dates:
Monday, April 19, 2021 – Tuesday, April 27, 2021; times vary

Designated 12-Hour Days of Early Voting:
Travis County – every Early Voting Day except Sunday, April 25, 2021
Hays County – Monday, April 19, 2021 and Monday, April 26, 2021
Williamson County – Monday, April 26, 2021 and Tuesday, April 27, 2021

Early Voting Clerk Mailing Addresses:

Ballots by Mail – Travis County
By Mail voters: P.O. 149325, Austin, Texas 78714-9325
By Contract Carriers/ Fedex: 5501 Airport Blvd., Austin, Texas 78751

Ballots by Mail - Hays County
By Mail Voters: P.O. Box 907, San Marcos, TX 78666

Ballots by Mail – Williamson County
By Mail voters: P.O Box 209, Georgetown, TX 78627

ADJUNTO A

Sitios Principales de la Votación Adelantada, Fechas de la Votación Adelantada, y Dirección Postal de la Secretaria de la Votación Adelantada
1 de Mayo, 2021

Sitios Principales de la Votacion Adelantada:

Condado de Travis: City of Austin Planning and Development Center, 6310 Wilhelmina Dr., Austin, TX

Condado de Hays: Government Center Conference Room, 712 S. Stagecoach Trail, San Marcos, TX

Condado de Williamson: Williamson County Inner Loop Annex, 301 SE Inner Loop, Suite 104, Georgetown, TX

Fechas de la votación Adelantada:

Martes, 19 de abril, 2021 – Viernes, 27 de abril, 2021; las horas varían

Días designados de 12 horas de votación anticipada:

Condado de Travis: todos los días de votación anticipada excepto el domingo 25 de abril de 2021

Condado de Hays: Lunes 19 de abril de 2021 y lunes 26 de abril de 2021

Condado de Williamson: Lunes 26 de abril de 2021 y martes 27 de abril de 2021

Direcciones Postales de la Secretaria de la Votación Adelantada

Para Boletas por Correo-Condado de Travis
Enviadas por correo por los votantes: P.O. 149325, Austin, Texas 78714-9325
Enviadas usando transportista contratado/ Fedex: 5501 Airport Blvd., Austin, Texas 78751

Para Boletas por Correo – Condado de Hays
Enviadas por correo por los votantes: P.O. Box 907, San Marcos, TX 78666

Para Boletas por Correo – Condado de Williamson
Enviadas por correo por los votantes: P.O Box 209, Georgetown, TX 78627

CHARTER

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ARTICLE IV. - INITIATIVE, REFERENDUM, AND RECALL.

§ 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.

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§ 3. - FORM AND VALIDATION OF A PETITION.

A petition under section 1 or section 2 of this article is subject to the requirements prescribed by state law for a petition to initiate an amendment to this Charter, and shall be in the form and validated in the manner prescribed by state law for a petition to initiate an amendment to this Charter.

§ 4. - COUNCIL CONSIDERATION AND SUBMISSION TO VOTERS.

When the council receives an authorized initiative petition certified by the city clerk to be sufficient, the council shall either:

(a) Pass the initiated ordinance without amendment within 10 days after the date of the certification to the council; or

(b) Order an election and submit said initiated ordinance without amendment to a vote of the qualified voters of the city at a regular or special election to be held on the next allowable election date authorized by state law after the certification to the council.

When the council receives an authorized referendum petition certified by the city clerk to be sufficient, the council shall reconsider the referred ordinance, and if upon such reconsideration such ordinance is not repealed, it shall be submitted to the voters at a regular or special election to be held on the next allowable election date authorized by state law after the date of the certification to the council. Special elections on initiated or referred ordinances shall not be held more frequently than once each six months, and no ordinance on the same subject as an initiated ordinance which has been defeated at any election may be initiated by the voters within two years from the date of such election.

§ 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."

Any number of ordinances may be voted on at the same election in accordance with the provisions of this article. If a majority of the votes cast is in favor of a submitted ordinance, it shall thereupon be effective as an ordinance of the city. An ordinance so adopted may be repealed or amended at any time after the expiration of two years by favorable vote of at least three-fourths of the council. A referred ordinance which is not approved by a majority of the votes cast shall be deemed thereupon repealed.

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Renea Hicks on behalf of Renea Hicks
Bar No. 09580400
rhicks@renea-hicks.com
Envelope ID: 51063305
Status as of 3/2/2021 10:58 AM CST

Associated Case Party: Linda Durnin

Name	BarNumber	Email	TimestampSubmitted	Status
Bill Aleshire		Bill@AleshireLaw.com	3/2/2021 10:56:02 AM	NOT SENT

Associated Case Party: Eric Krohn

Name	BarNumber	Email	TimestampSubmitted	Status
Donna Garcia Davidson	783931	donna@dgdlawfirm.com	3/2/2021 10:56:02 AM	NOT SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Renea Hicks		RHICKS@RENEA-HICKS.COM	3/2/2021 10:56:02 AM	NOT SENT
Joseph MichaelAbraham		joe@abrahamlaw.com	3/2/2021 10:56:02 AM	NOT SENT

Associated Case Party: Michael Lovins

Name	BarNumber	Email	TimestampSubmitted	Status
Donna Davidson		Donna@DGDLAWFIRM.COM	3/2/2021 10:56:02 AM	NOT SENT

Associated Case Party: City of Ausitn, Austin City Council

Name	BarNumber	Email	TimestampSubmitted	Status
Anne Morgan		anne.morgan@austintexas.gov	3/2/2021 10:56:02 AM	SENT