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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

1ST AMENDED
ORIGINAL EMERGENCY PETITION FOR WRIT OF MANDAMUS

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IN THE INTEREST OF TIME, ORAL ARGUMENT IS NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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LINDA DURNIN is a registered voter in Austin, Texas who signed the petition at issue in this case. She can be contacted through her Counsel of record.

ERIC KROHN is a registered voter in Austin, Texas who signed the petition at issue in this case. He can be contacted through his Counsel of record.

MICHAEL LOVINS is a registered voter in Austin, Texas who signed the petition at issue in this case. He can be contacted through his Counsel of record.

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STATEMENT ON ORAL ARGUMENT

Due to the imminent deadline of March 3, 2021, by which the language for the ballot in the City of Austin's May 1, 2021 election must be set, Relators have not requested oral argument. App. Tab A (Travis County Clerk email on election deadlines, showing February 27, 2021 deadline); App. Tab S (City of Austin Response, at Page 28, FN 9, showing March 3, 2021 deadline).. However, if oral argument is deemed appropriate, Relators ask to be included.

STATEMENT OF THE CASE

PROCEEDINGS IN COURT

On February 16, 2021, Relators filed petitions for writ of mandamus in both the Third Court of Appeals (Case No. 03-21-00075-CV) and this Court (Case No. 21-170). On February 17, 2021, the Court of Appeals requested that the Respondent, City of Austin, file a response, which the City did on February 23, 2021. App. Tab S. Relators filed a Reply on February 24, 2021.

On February 24, 2021 a panel of the Court of Appeals (Bryne, CJ; Baker, J; Smith, J) issued its Memorandum Opinion denying Relators' petition. App. Tab R. Relators now ask the Supreme Court to act on this amended petition.

PROCEEDINGS BEFORE THE AUSTIN CITY COUNCIL

Over 26,000 registered voters of the City of Austin, including Relators,

signed a petition for an ordinance regarding camping, lying on public sidewalks, and aggressive solicitation of money and filed it with the Austin City Clerk. App. Tab B (the petitioned Ordinance). On February 3, 2021, the City Clerk of the City of Austin certified the petition to be voted on at the City's May 1, 2021 election. App. Tab C (City Clerk's certification of the petitioned Ordinance). The petitioned Ordinance contains a caption for the proposed ordinance which seeks to restore and expand provisions contained in the Austin City Code that were in effect prior to June 19, 2019 relating to camping in public areas without a City-issued permit, aggressive solicitation in public areas of Austin during certain defined hours, and sitting or lying down on public sidewalks or sleeping outdoors in certain areas of the City.

On February 9, 2021, the Austin City Council exercised discretion it does not legally have and prescribed ballot language for the ordinance proposition. App. Tab D (Council-approved ballot language). In doing so, the Council chose from two options for ballot language submitted to the Council by the City Attorney. App. Tab E (City Attorney memo 2/8/2021, see Page 3).

Relators bring this action in because the Austin City Charter does not give the Council discretion to create its own ballot language when presented with a petition-initiated ordinance containing a caption, nor can the Council's language violate the

common law test set forth by the Texas Supreme Court in *Dacus v. Parker,* 466 S.W.3d 820 (Tex. 2015).

Relators ask for an emergency mandamus directing the City and City Council to fulfill its ministerial duty under the Austin City Charter or, in the alternative, to comply with the requirements set forth in *Dacus*.

STATEMENT ON JURISDICTION

THE SUPREME COURT HAS JURISDICTION

A compelling reason—the lack of time for review in the Court of Appeals and the Supreme Court—exists for filing directly with the Supreme Court. Tex. R. App. P. 52.3(e). There is insufficient for review in both the Court of Appeals and the Supreme Court, and the Supreme Court has concurrent jurisdiction with the Court of Appeals to issue writs of mandamus "to compel the performance of any duty imposed by law in connection with the holding of an election...." Tex. Elec. Code § 273.061; Tex. Gov't Code § 22.221(a) (authorizing a court of appeals to issue writs of mandamus necessary to enforce the court's jurisdiction); *see also,* Tex. Const. art. 5, § 6 (providing original jurisdiction as may be prescribed by law). [1]

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[1] All laws and principal cases cited in this Petition can be found in the Appendix. For an original proceeding, such as this, the proceeding is subject to Tex. R. App. P. 52.

A city charter provision imposing a duty regarding an election is a "law" in the context of Tex. Elec. Code § 273.061. Tex. Elec. Code § 1.005(10) defines "law" as "a constitution, statute, *city charter*, or city ordinance." *See In re Williams*, 470 S.W.3d 819, 821–22 (Tex. 2015) (applying requirements of the City of Houston city charter in a mandamus proceeding regarding an election). In this present case, the Austin City Charter imposes a ministerial duty on the City Council to "state the caption of the ordinance" on the ballot used in voting for such a petition-initiated ordinance. Austin City Charter art. IV, § 5. Thus, mandamus by the court of appeals is appropriate in this case.

> Mandamus may issue to compel public officials to perform ministerial acts, as well as "to correct a clear abuse of discretion by a public official." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). "An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Id*.

In re Williams, 470 S.W.3d 819, 821 (Tex. 2015).

While cities generally have broad discretion in wording election propositions, local laws, such as a city charter, may limit this discretion. *Id.* at 821-22. This Court has jurisdiction to compel the Austin City Council to perform its ministerial duty to state the petitioned ordinance's caption on the ballot.

THERE IS NOT TIME TO PRESENT THE CASE IN DISTRICT COURT FIRST

According to the Travis County Clerk, final corrections to the ballot wording

must be made and ballot programming completed by February 25, 2021. App. Tab A. *See In re Palomo,* 366 S.W.3d 193, 194 (Tex. 2012) (per curiam) (Court granted mandamus relief "so as not to delay printing of the ballots."). Relators ask this Court to grant the mandamus without oral argument "lest the actions of city officials 'thwart the will of the public.'" *See In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015).

Mandamus is generally appropriate only when the relator has no adequate remedy on appeal. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135-40 (Tex. 2004) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). The "adequacy" of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). In evaluating the benefits and detriments, this Court should consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *Id*. In the present case, with appropriate speed in the Court and corrective action by the Austin City Council, the defective wording of the ballot can be corrected prior to the deadline to approve and print the ballots. Under these circumstances, a post-election contest is not available as an adequate remedy. *See In re Williams,* 470 S.W.3d at 823 (Tex. 2015) (citing *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999).

ISSUES PRESENTED

ISSUE ONE: The City Council's ballot language violates 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."

ISSUE Two: In the alternative, the City Council's ballot language fails the common-law test from *Dacus v. Parker* as it will mislead voters about the purpose, character, and chief features of the petitioned ordinance.

STATEMENT OF FACTS

Relators Linda Durnin, Eric Krohn and Michael Lovins were among over 26,000 eligible voters of Austin who signed the initiative petition in question, and their signatures were on copies of the Petition submitted to the City of Austin. App. Tab F (Affidavit of Brian Ruddle). The Petition seeks to place before the voters an ordinance that restores prior provisions of the Austin City Code, relating to unpermitted camping, aggressive solicitation, and sitting, lying down and sleeping on sidewalks and outdoors, and that expands the times and areas in which such activity is regulated.

On June 20, 2019, the Austin City Council amended provisions of the Austin City Code dealing with this activity. App. Tab G (Ordinance No. 20190620-185). Prior provisions of the City Code had long been effective in regulating this activity and maintaining safety and order throughout the City. Since the action of the City Council in amending these effective provisions, Austin has seen an explosion of camping throughout all parts of the City, as well as a dramatic increase in aggressive solicitation, particularly during evening and nighttime hours. Crime has increased as well, along with concerns about public health and traffic safety.

The certified petitioned Ordinance contained the following caption for the ordinance that would be presented to the voters:

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

In certifying the Petition, the City Clerk cited this language from the caption of the proposed ordinance. App. Tab C (City Clerk's certification of the petitioned Ordinance).

On Tuesday, February 9, 2021, the City Council considered its agenda item 3 that would submit to the voters the citizen-initiated ordinance in a special municipal election to be held on May 1, 2021, as required by law. The Council was presented two options by the City Attorney for the ballot language.

Option 1 was as follows:

> "Shall an ordinance be adopted that creates a criminal offense and a penalty to camp in public areas without a permit; solicit aggressively, or solicit in specified areas, or solicit during certain times in all public areas; or to sit, lie, or sleep outdoors in certain public areas even if not obstructing the right-of-way?"

Option 2, which was adopted by the City Council, is as follows:

> "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?"

App. Tab E (City Attorney memo 2/8/2021, see Page 3), The Council designated the petitioned Ordinance as "Proposition B" for the May 1, 2021 election and adopted ballot language of "Option 2" shown above.

ARGUMENT

ISSUE ONE: The City Council's ballot language violates 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."

Under the Austin City Charter, "the people of the city reserve the power of direct legislation by initiative, and in the exercise of such power may propose any ordinance …." Austin Charter, art. IV, § 1. To protect this power from improper interference by the City Council, the City Charter also prescribed the form of the ballot when an election is called to vote on an initiated ordinance, such as in this case.

Texas Election 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). This exception, found in both the current Election Code and its predecessor, has been interpreted to encompass provisions of a city charter: "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." *Bischoff v. City of Austin*, 656 S.W.2d 209, 211-12 (Tex. App. – Austin 1983, writ ref'd n.r.e.) (citing Tex. Elec. Code Ann. Art. 6.07 (Supp.1982), the predecessor of Tex. Elec. Code § 52.072).

In this case, the Austin City Charter does prescribe the form of a ballot proposition where the initiative petition contains a caption for the proposed ordinance:

> 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." (emphasis added)

Austin Charter, art. IV § 5.

The petitioned ordinance contains the following caption:

> 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.

App. Tab B (the petitioned Ordinance).

The petition seeks to reverse some of the actions the City Council took on June 20, 2019 in adopting Ordinance No. 20190620-185 which contains a nearly identical caption as the petitioned ordinance:

> AN ORDINANCE AMENDING CITY CODE SECTIONS 9-4-11 RELATING TO PROHIBITING CAMPING IN PUBLIC AREAS, 9-4-13 RELATING TO PROHIBITING SOLICITATION, AND 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.

App. Tab G (June 20, 2019 Council ordinance).

Rather than comply with the clear and unambiguous provisions of the City Charter, the City Council exercised discretion it does not have by law to politically manipulate the ballot language. In protecting their right of initiative in the City Charter, the people of Austin wisely did not empower the City Council to select its own descriptive language to appear on the ballot. The caption of an ordinance describes and summarizes the purpose of the ordinance and is used to inform voters of the ordinance. For example, the Austin City Charter, art. II, § 15 ("Publication of Ordinance") requires the caption of all penal ordinances to be published:

> Except as otherwise provided by law or this Charter, the city clerk shall give notice of the enactment of every penal ordinance and of every other ordinance required by law or this Charter to be published, by causing *the descriptive title or caption of the same to be published* at least one time after final passage thereof in some newspaper of general

circulation in the city before the ordinance is effective....

Austin City Charter, art. II, § 15 (emphasis added).

In adopting their City Charter, the voters of Austin did not entrust the City Council with discretion in setting the ballot language for a petition-initiated ordinance with a caption. Instead, Article IV, § 5 requires ("shall") the Council to use the petitioned-ordinance's caption as the ballot description. In creating its own ballot language, the Council acted in violation of its ministerial duty, and mandamus from this Court compelling the Council to state the caption of the petition-initiated ordinance on the ballot is appropriate and necessary.

ISSUE TWO: In the alternative, the City Council's ballot language fails the common-law test from *Dacus v. Parker* as it will mislead voters about the purpose, character, and chief features of the petitioned ordinance.

THE COUNCIL CANNOT ADOPT BALLOT LANGUAGE THAT WILL MISLEAD VOTERS.

If this Court does not find that the ballot language chosen by the City Council violates the Austin City Charter, then, in the alternative, the Court should find that the ballot language violates the common law test set forth in *Dacus v. Parker*. This common law test "protects the integrity of the election with a minimum standard for the ballot language." *Dacus v. Parker*, 466 S.W.3d 820, 823 (Tex. 2015). The sufficiency of the ballot language is a question of law. *Bryant v. Parker*, 580 S.W.3d 408, 412 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

The Texas Election Code grants discretion to "the authority ordering the election [to] prescribe the wording of a proposition" *unless* otherwise provided by law. Tex. Elec. Code § 52.072(a). However, a municipal authority does not have unfettered discretion in deciding the language in which propositions are submitted to voters. "Though our past decisions demonstrate that municipalities generally have broad discretion in wording propositions, they do not suggest that this discretion is unlimited." *Dacus,* 466 S.W.3d at 826. The Court said, "... the ballot must identify the measure by its chief features, showing its character and purpose." *Id.* at 825. The Court looks to whether the ballot "substantially submits the question ...with such definiteness and certainty that voters are not misled." *Id.* at 826. The Court went on to explain how the standard would fail to be satisfied:

> An inadequate description may fail to do that in either of two ways. First, it may affirmatively misrepresent the measure's character and purpose or its chief features. Second, it may mislead the voters by omitting certain chief features that reflect its character and purpose. The common law standard thus requires that the ballot identify the measure for what it is, and a description that does either of the foregoing fails to comply with the standard.

Id. at 826.

The ballot language approved by the City Council fails to meet either of the elements of the applicable common-law standard under *Dacus*.

THE COUNCIL'S BALLOT LANGUAGE MISLEADS VOTERS AS TO THE PETITIONED-ORDINANCE'S CHIEF FEATURES, CHARACTER, AND PURPOSE

The primary character, principal purpose, and chief feature of the Petition, signed by more than 26,000 voters in Austin, is clear: "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." App. Tab B (the petitioned Ordinance).One has only to drive around Austin and compare conditions in the City of Austin today to those seen before June 20, 2019 to understand the motivation behind the Petition and the voters' desire to reinstate the thrust of the past ordinances. By its changes to the City Code regarding camping, the Austin City Council may have desired political points from "decriminalizing homelessness"—although homelessness was never, is not, and is not proposed to be a criminal offense. But what the Council did was to set on a course that is neither safe nor compassionate for people experiencing homelessness *or* for those with homes or businesses in Austin.

THE COUNCIL'S BALLOT LANGUAGE POLITICALLY EXAGGERATES THE PENAL ASPECTS OF THE PETITIONED ORDINANCE.

In the caption of its own ordinances, explaining their purpose, the Council does not adopt language *emphasizing* or suggesting that the *purpose* of the ordinance is to "create a criminal offense and penalty." Instead, the real substance of the ordinance—such as regulating camping in public areas, aggressive solicitation of money, or prohibiting sleeping or lying down in certain areas—is what leads in the

caption, with the phrase "and creating offenses," stated once only in the concluding phrase. For example, see the caption to Ordinance No. 20190620-185 which concerned the same subjects as the petitioned ordinance said:

> AN ORDINANCE AMENDING CITY CODE SECTIONS 9-4-11 RELATING TO PROHIBITING CAMPING IN PUBLIC AREAS, 9-4-13 RELATING TO PROHIBITING SOLICITATION, AND 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*.

App. Tab G (June 20, 2019 Council ordinance) (emphasis added)

But, when choosing ballot language for the petitioned Ordinance, the Council chose wording that intentionally emphasizes—by mentioning 3 times—that the ordinance creates a criminal offense and penalty (instead of only once in Option 1). This improper ballot wording is proposed so the City Council opponents of the voter-initiated ordinance can campaign against the Ordinance claiming it "criminalizes homelessness" which it does not. The Council's ballot language is designed to be inflammatory, misleading, and prejudicial.

As explained above, the Austin Council should have adopted the caption of the petitioned ordinance as the ballot language:

> 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.

Instead of doing so, the Council was presented two options by the City Attorney for the ballot language. Option 1 was:

> "Shall an ordinance be adopted that *creates a criminal offense and a penalty* to camp in public areas without a permit; solicit aggressively, or solicit in specified areas, or solicit during certain times in all public areas; or to sit, lie, or sleep outdoors in certain public areas even if not obstructing the right-of-way?" (emphasis added)

Option 2, which was adopted by the City Council, says:

> "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?"

App. Tab E (City Attorney memo 2/8/2021, see Page 3).

Creating criminal offenses or penalties is not the purpose, character, or chief feature of the petitioned ordinance, but you certainly would not know that by reading the Council's ballot language. The ballot language approved by the Council seeks to *emphasize* that failure to comply with the limitations and restrictions on the activities

and behavior that are to be regulated, *e.g.* camping, could, under certain conditions, constitute criminal offenses. Relators concede that the ordinance, as amended, would sometimes, but not always result in a criminal penalty. Relators assert, however, that this reference in the Council's ballot language to criminal offenses and penalties—appearing as it does in the first dozen words that would be on the ballot—is inflammatory and misleading. It would present an unduly emotional appeal and distraction to voters in a way that would be prejudicial to objective consideration of the measure.

THE COUNCIL'S BALLOT LANGUAGE EVEN CHANGED THE ORDER OF THE ORDINANCE TOPICS TO DE-EMPHASIZE "CAMPING"—THE FIRST TOPIC OF THE ORDINANCE.

Instead of following the order in which the 3 main areas of regulation (camping, solicitation, and lying/sleeping in public areas) appear in the petitioned ordinance, the Council ballot language reverses them. This is because the Council opponents of the ordinance know that the voters are alarmed that the Council has chosen to allow camping anywhere and everywhere in Austin, so they did not want "camping" to appear early in the ballot language even though it is the first topic of the Ordinance.

The City Council's choice of the language reflects its intent to mislead the voters about the purpose of the Ordinance. That same drive through the City of

Austin would show in vivid and dramatic detail the principal change throughout our community, specifically the explosion of camping all across Austin. These encampments are found throughout the City in numerous and the most public of locations. They often create health and safety concerns due to the accompanying proliferation of altercations and other violent interchanges; risks posed to the more vulnerable occupants of the camps, including women and those with disabilities; the frequent presence of open fires; the quantity of trash and other refuse, including human waste, scattered in and near the camps; and their proximity to roadways, many heavily trafficked at high speeds.

The logical option, in the City Attorney's Option 1–of addressing the regulated activity in the ballot language by the same priority and order of the proposed Ordinance was rejected by the Council. Option 1 identified camping as the first issue addressed by the citizen-initiated Proposed Ordinance; in so doing, it also adheres to the structure of the Austin City Code, in which the section relating to camping appears first in Section 9-4-11, followed by Section 9-4-13 on solicitation and then Section 9-4-14 on sitting, lying down and sleeping. Instead, the City Council consciously and deliberately sought to mislead voters by de-emphasizing the most glaring and pressing challenge caused by its June 2019 decisions when it opted for Option 2. The ballot language in this option seeks to downplay, if not

"bury," the camping provision at the end of a lengthy paragraph, at the same time reversing the order of the portions of the City Code.

THE COUNCIL'S BALLOT LANGUAGE FALSELY TELLS VOTERS THAT THE ORDINANCE CREATES A CRIMINAL OFFENSE AND A PENALTY FOR "***ANYONE***" CAMPING OR SITTING ON A SIDEWALK OR SLEEPING OUTDOORS.

Note that the City Attorney's "Option 1" for ballot language did not use the word "anyone" at all. The use of that word prejudicially exaggerates who is subject to a criminal offense or to a penalty.

When the Council's ballot language is compared to what the law would be upon adoption of the petitioned Ordinance, the fraudulent nature of the ballot language chosen by the Council becomes obvious. *See* App. Tab H (redline of the City Code showing the effect from the Ordinance); App. Tab I (current City Code sections 9-4-11; 9-4-13; 9-4-14). The Council's ballot language says the Ordinance would create a criminal offense and a penalty for:

> "*anyone* camping in a public area not designated by the Parks and Recreation Department."

App. Tab D (Council-approved ballot language).

This is blatantly false. Existing law in Code section 9-4-11(C)—which is not amended by the Ordinance—prohibits citing someone for violation of the camping prohibition unless certain conditions are met:

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

App. Tab H (redline of the City Code showing the effect from the Ordinance).

In addition, existing Code sections 9-4-11(G) and (H)—which are not disturbed by the Ordinance—has a host of exceptions to which the no-camping ban would not even apply to someone, *e.g.*, because of a medical emergency, viewing a parade, or physical manifestation of a disability. *Id.* Thus, the ballot language is false when it says the petitioned Ordinance creates a criminal offense and a penalty for "anyone" who is camping.

Likewise, the Council's ballot language says the Ordinance creates a criminal offense and a penalty for:

> "***anyone*** sitting or lying down on a public sidewalk or sleeping outdoors [in certain areas of the City]."

App. Tab D (Council-approved ballot language).

While the petitioned Ordinance replaces Code section 9-4-14 (regarding sitting, lying down, sleeping) in its entirety, it still contains significant exceptions to

the prohibitions so that "anyone" would first be notified by a law enforcement officer (Section 9-4-14(E)) and could not be charged (Section 9-4-1(F), (G)) for sitting or lying down because of a medical emergency, a physical manifestation of a disability, viewing a parade, is waiting in line for goods, services, or a public event. So, it is a blatantly false and prejudicial statement to say that the petitioned Ordinance makes a criminal offense/penalty for "anyone" who sits, lies down, or sleeps in areas as described by the Council's ballot language.

We cannot "protect the integrity of the election" if the Council does not show integrity by adopting ballot language that does not mislead the voters. The Council's ballot language will grossly mislead voters and is obviously intended to encourage voters to oppose the proposition. Due to the abuse by the City Council in the exercise of its discretion and the failure on the part of the Council to fulfill its solemn responsibility to safeguard integrity in the election, the Court should apply the safeguards of the common law and mandate that the City Council adopt different ballot language, preferably the caption of the petitioned Ordinance.

RELATORS REPLY ARGUMENTS TO CITY OF AUSTIN'S RESPONSE

The City's[2] Argument (App. Tab S, Response, Pages 11-16), provides no

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

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 (App. Tab S) 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 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 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.")

PRAYER

Because the City Council does not have, under these facts, any discretion to use different ballot language, Relators ask the Court to 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,

/s/ Donna Davidson
DONNA GARCÍA DAVIDSON
BAR NO. 00783931
CAPITOL STATION, P.O. BOX 12131
AUSTIN, TEXAS 78711
TELEPHONE: (512) 775-7625
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/s/ Bill Aleshire
BILL ALESHIRE
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3605 SHADY VALLEY DR.
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TELEPHONE: (512) 320-9155
CELL: (512) 750-5854
FACSIMILE: (512) 320-9156
BILL@ALESHIRELAW.COM

ATTORNEYS FOR RELATORS

TEX. R. APP. P. 52.3(J) CERTIFICATION

Pursuant to TRAP 52.3(j), the undersigned certifies that she has reviewed the above Emergency Petition for Writ of Mandamus and concluded that every factual statement in the petition is supported by competent evidence included in the appendix.

/s/ Donna Davidson
Donna Davidson

CERTIFICATE OF COMPLIANCE

The undersigned herby 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 4,464 based on the count of the computer program used to prepare the document.

/s/ Donna Davidson
Donna Davidson

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 25, 2021:

COUNSEL FOR RESPONDENTS:

ANNE L. MORGAN
AUSTIN CITY ATTORNEY
STATE BAR NO. 14432400
CITY OF AUSTIN-LAW DEPARTMENT
P. O. BOX 1546
AUSTIN, TEXAS 78767-1546
TELEPHONE: (512) 974-2507
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ANNE.MORGAN@AUSTINTEXAS.GOV

RENEA HICKS
LAW OFFICE OF RENEA HICKS
STATE BAR NO. 09580400
P.O. BOX 303187
AUSTIN, TEXAS 78703-0504
(512) 480-8231
RHICKS@RENEA-HICKS.COM

/s/ Donna Davidson
Donna Davidson

APPENDIX
TABLE OF CONTENTS

EXHIBITS

STATUTES & CASES CITED

Tab P – *Dacus v. Parker,* 466 S.W. 3d 820 (Tex. 2015)

Tab Q – *In re Williams*, 470 S.W.3d 819 (Tex. 2015)

Tab R – Memorandum Opinion, Case No. 03-21-00075-CV, 2/24/2021

Tab S – City of Austin Response, Case No. 03-21-00075-CV

Tab A – Travis County Clerk email on election deadlines

---------- Forwarded message ---------
From: Charlie Johnson <Charlton.Johnson@traviscountytx.gov>
Date: Wed, Feb 10, 2021 at 10:58 AM
Subject: Key Dates
To: brianruddle1@gmail.com <brianruddle1@gmail.com>
CC: Bridgette Escobedo <Bridgette.Escobedo@traviscountytx.gov>, Daniel Hayes <Daniel.Hayes@traviscountytx.gov>

Hey Brian,

Thanks for checking in.

Here are some of the key dates related to ballot proofing and mail out. Be advised some dates are tentative.

02-12-21 – Candidate Filing Deadline / Ballot programming begins
02-15-21 – Deadline to turn in preliminary ballot content
02-19-21 – Cancellation Deadline
02-25-21 (Tentative) – Entity Proofing (Final corrections due) – Ballot programming is typically complete by this time
03-03-21 (Tentative) – Logic & Accuracy Testing
Week of March 8 (tentative) – Ballot Printing
03-17-21 – Deadline to send FPCAs (military voters)

Let me know if you need anything else,

Charlie Johnson
Travis County Clerk
Elections Division
512-854-3939

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

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:

[Section sign] 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:

[Section sign] 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:

[Section sign] 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.

PRINT, HAND SIGN & MAIL TO: Save Austin Now 815A Brazos Street, Box 455 Austin, TX 78701

Date: ___/___/20	**Full Name** (print clearly)	**Residential Street Address** (must be registered Austin voter):	**Date of Birth** (DOB):
County:	___	___	___/___/___
___ Travis	**Email address:**	___	or **Voter Registration Number:**
___ Williamson	___	Austin, TX ___ (zip code)	___
___ Hays	**Signature:** ___	**** Please fill in every box legibly.**	**Learn more: SaveAustinNow.com**
Date: ___/___/20	**Full Name** (print clearly)	**Residential Street Address** (must be registered Austin voter):	**Date of Birth** (DOB):
County:	___	___	___/___/___
___ Travis	**Email address:**	___	or **Voter Registration Number:**
___ Williamson	___	Austin, TX ___ (zip code)	___
___ Hays	**Signature:** ___	**** Please fill in every box legibly.**	**Learn more: SaveAustinNow.com**
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County:	___	___	___/___/___
___ Travis	**Email address:**	___	or **Voter Registration Number:**
___ Williamson	___	Austin, TX ___ (zip code)	___
___ Hays	**Signature:** ___	**** Please fill in every box legibly.**	**Learn more: SaveAustinNow.com**
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County:	___	___	___/___/___
___ Travis	**Email address:**	___	or **Voter Registration Number:**
___ Williamson	___	Austin, TX ___ (zip code)	___
___ Hays	**Signature:** ___	**** Please fill in every box legibly.**	**Learn more: SaveAustinNow.com**
Date: ___/___/20	**Full Name** (print clearly)	**Residential Street Address** (must be registered Austin voter):	**Date of Birth** (DOB):
County:	___	___	___/___/___
___ Travis	**Email address:**	___	or **Voter Registration Number:**
___ Williamson	___	Austin, TX ___ (zip code)	___
___ Hays	**Signature:** ___	**** Please fill in every box legibly.**	**Learn more: SaveAustinNow.com**

Tab C – City Clerk's certification of the petitioned Ordinance

CERTIFICATE OF SUFFICIENCY OF INITIATIVE PETITION

I, Jannette Goodall, City Clerk of the City of Austin, Texas, hereby certify that:

An initiative petition proposing an ordinance seeking to "amend 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" was filed with the City Clerk on January 19, 2021.

At the time of filing, the petition was comprised of 12,757 pages containing 27,879 signatures. In accordance with the City of Austin Charter and state law, the number of signatures required for a sufficient initiative petition is 5% of the qualified voters of the city or 20,000, whichever number is the smaller.

Based on verification against the voter registration rolls obtained from Travis County, Hays County, and Williamson County, I have determined the following facts regarding this petition:

The raw-count number of signatures filed with the petition was 27,879. The required number of signatures is 20,000. The Texas Election Code authorizes the use of random sampling to verify petitions of large size, and the City has used the same random sampling method since 2002. Under that method, and in accordance with law, 25% of the total number of submitted signatures on this petition were verified, which equates to a sample size of 6,970.

Based on the analysis of the random sample results, it has been determined that the petition meets the requirement for the minimum number of signatures of valid voters, based on the required minimum of 20,000. Of the 6,970 sample lines checked under the sampling method, 345 of the sample lines were disqualified on account of bearing signatures of persons not on the voter list (312), or of being duplicate signatures of registered voters who signed more than once (33). The remaining 6,625 sample lines were validated as bearing signatures of qualified voters.

Based on the above, the petition is determined to be sufficient. Please see attached report on the statistical analysis.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of Austin on this the 3rd day of February 2021.

CITY OF AUSTIN TEXAS TRAVIS COUNTY

Jannette Goodall, City Clerk
City of Austin, Texas

Report on Analysis of Save Austin Now Petition

We estimate that there are 26,103 valid signatures on the Save Austin Now petition. Using a random sample of a size required by law, the City is 95% confident that the true number of valid signatures on the entire petition exceeds 25,919 and is 95% confident that the true number of valid signatures on the entire petition is less than 26,287. Furthermore, the City is virtually certain that the true number exceeds 20,000.

A total of 27,879 lines of names were submitted on the petition. A random sample of 6,970 of these lines was checked. 345 of the sample lines were disqualified on account of being duplicate signatures of registered voters who signed more than once (33), or for other reasons (312). The remaining 6,625 sample lines were validated as bearing signatures of qualified voters.

Using these figures, we estimate that there are 26,103 valid signatures on the Save Austin Now petition. The method used for calculating this estimate is based on Goodman's method (*The Annals of Mathematical Statistics*, 1949, pp. 572-579), supplemented with variance estimate based on Haas and Stokes (*Journal of the American Statistical Association*, 1998, pp. 1475-1487.) The estimate of 26,103 valid signatures adjusts properly for the effect of multiple signatures. In principle, it is incorrect to extrapolate the 6,625 valid signatures that were found in the sample by simply multiplying 6,625 by the petition-to-sample-size ratio $27{,}879 \div 6{,}970 = 4$ (approximately). Also, the presence of multiple signatures in the sample substantially increases the margin of error for the estimate even when the multiplicities are relatively few, as in this petition. The method used correctly calculates both the estimate and the margin of error; the simple extrapolation does not. The effect of increased margin of error is to reduce confidence that a required minimum number of signatures was submitted. However, the correct margin of error is still small relative to the difference between the estimate of 26,103 and the benchmark minimum figure of 20,000. Therefore, the confidence is nearly 100% that the petition contains at least 20,000 valid signatures. Details on proper ways to adjust for multiple signatures are given in the cited references.

Random number generation for the sample and all programming were done with SAS® (Statistical Analysis System) software.

Number of Valid Signatures on Save Austin Now Petition is Estimated to be 26,103

The City of Austin has determined that the Save Austin Now petition meets the requirement for the minimum number of signatures of valid voters if the required minimum is 20,000. 27,879 lines of names were submitted on the petition. A random sample of 6,970 of the submitted lines was checked. 345 of the sample lines were disqualified on account of being duplicate signatures of registered voters who signed more than once (33), or for other reasons (312). The remaining 6,625 sample lines were validated as bearing signatures of qualified voters.

Furthermore, using the random sample, the City estimates that there are 26,103 valid signatures on the Save Austin Now petition. The City is 95% confident that the true number of valid signatures on the entire petition exceeds 25,918 and is also 95% confident that the true number is less than 26,287. Furthermore, the City is virtually certain that the true number of valid signatures exceeds 20,000.

Tab D – Council-approved ballot language

From: "Goodall, Jannette" <Jannette.Goodall@austintexas.gov>
Subject: RE: Ballot language
Date: February 11, 2021 at 4:39:11 PM CST
To: Matt Mackowiak <matt@potomacstrategygroup.com>
Cc: Donna Davidson <donna@dgdlawfirm.com>

I haven't received the final ordinance from Law yet to execute but this is the language.

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:

Sent from Mail for Windows 10

From: Matt Mackowiak
Sent: Thursday, February 11, 2021 4:33 PM
To: Goodall, Jannette
Cc: Donna Davidson
Subject: Ballot language

Do we have final language yet?

Matt Mackowiak
President
Potomac Strategy Group, LLC

Tab E – City Attorney memo 2/8/2021, see Page 3

LAW DEPARTMENT
MEMORANDUM

To: Mayor and Council

From: Anne L. Morgan, City Attorney

Date: February 8, 2021

Subject: Ballot Language for Citizen-Initiated Charter Amendments and Ordinances

---

This memo serves as back up to the ordinances ordering special elections for special called meetings scheduled for tomorrow. The Council asked us to provide proposed ballot language with potential alternative options for consideration. This memo provides those options.

It is the responsibility of Council to determine the ballot language. TEX. ELEC. CODE § 52.072(a). In regards to the charter amendments, Council must place amendments on the ballot in such a manner that the amendment does not contain more than one subject. TEX. LOC. GOV'T CODE § 9.004(d). Finally, Council must determine the order in which the propositions appear on the ballot. TEX. ELEC. CODE § 52.095(a). This memo provides ballot language options for each petition based on the order in which they were filed with the City Clerk's Office.

Austinites for Progressive Reform Petition – Charter Amendments

The petition submitted by Austinites for Progressive Reform includes amendments to the charter on these topics: 1) moving mayoral elections to coincide with presidential elections, 2) adopting ranked choice voting for city elections, if allowed by state law, 3) changing to a "mayor-council" form of government and adding a geographic council district, and 4) creating a "Democracy Dollars" voluntary public campaign finance program.

Potential ballot language for amendment to change date of mayoral elections:

Option 1

"Shall the City Charter be amended to elect the mayor at the general election in presidential election years?"

Option 2

"Shall the City Charter be amended to transition the election for mayor from gubernatorial election years to presidential election years, providing that the mayor elected in 2022 will serve a 2-year term and then mayoral elections will occur on the same date as presidential elections starting in 2024?"

Potential ballot language for amendment to create ranked choice voting for city elections:

"Shall the City Charter be amended to provide for the use of ranked choice voting in city elections, if such voting is permitted by state law?"

Potential ballot language for amendment to change from a council-manager form of government and adding a geographic council district:

"Shall the City Charter be amended to change the form of city government from 'council-manager' to 'mayor-council,' which will eliminate the position of city manager and designate an elected mayor as the chief administrative and executive officer of the city, with veto power over all legislation; and create an additional single-member district to maintain an 11-member city council?"

As noted above, it is the responsibility of Council to place the items on the ballot such that each question relates to a single subject. The addition of a council district could be considered a separate subject from the role and authority of the mayor. The following proposed ballot language provides for two questions:

"Shall the City Charter be amended to change the form of city government from 'council-manager' to 'mayor-council,' which will eliminate the position of city manager and designate an elected mayor as the chief administrative and executive officer of the city with veto power over all legislation?"

And:

"Shall the City Charter be amended to provide for an additional geographic council district which will result in 11 council members elected from single member districts?"

Potential ballot language for amendment to voluntary public campaign finance program:

Option 1

"Shall the City Charter be amended to adopt a public campaign finance program, which requires the city clerk to provide up to two $25 vouchers to every registered voter who may contribute them to candidates for city office who meet the program requirements?"

Option 2

"Shall the City Charter be amended to repeal and replace the current public campaign finance program that provides limitations on campaign expenditures to adopt an alternative public campaign finance program that does not have expenditure limitations and that requires the city clerk to provide up to two $25 vouchers to every registered voter who may contribute them to candidates for city office who meet the program requirements?"

Austin Firefighters Association Petition – Charter Amendment

Potential ballot language for amendment regarding binding arbitration:

"Shall the City Charter be amended to give the Austin Firefighters Association, Local 975 of the International Association of Fire Fighters, unilateral authority to require the City to participate in binding arbitration of all issues in dispute with the Association if the City and the Association reach impasse in collective bargaining negotiations?"

Save Austin Now Petition – City Code Amendment

Potential ballot language for amendment to prohibit certain activities:

Option 1

"Shall an ordinance be adopted that creates a criminal offense and a penalty to camp in public areas without a permit; solicit aggressively, or solicit in specified areas, or solicit during certain times in all public areas; or to sit, lie, or sleep outdoors in certain public areas even if not obstructing the right-of-way?"

Option 2

"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?"

Please feel free to contact me with any questions or concerns you might have.

CC: Spencer Cronk, City Manager

Tab F – Affidavit of Brian Ruddle

AFFIDAVIT OF BRIAN RUDDLE

STATE OF TEXAS	§
	§
	§
COUNTY OF TRAVIS	§

BEFORE ME, the undersigned notary, on this day personally appeared Brian Ruddle, a person known to me or identified to me by his Texas driver license, who upon his oath stated:

"My name is Brian Ruddle. I am over the age of 18, have never been convicted of a felony or a crime involving moral turpitude, and am otherwise fully competent to make this Affidavit.

I have personal knowledge that Michael Lovins, Linda Durnin, and Eric Krohn, all signed the petition to reinstate the ordinance that is the subject of this lawsujt. In fact, Mr. Lovins personally handed me his signed petition. Additionally, Ms. Durnin and Mr. Krohn actually not only signed the petition, but helped to validate petition signatures. I know all three of their signatures were submitted to the City of Austin.

As I supervised the process, I can describe the steps for validating signatures for the Petition included in this lawsuit as follows:

1) The full voting participant voter file for the City of Austin was downloaded from the Travis County Elections Department.

2) Petitions were then examined by volunteers who searched for name matches on the file of full participant voters for the City of Austin.

3) If the information on a petition matched the voter file, a note was made in a separate column, which indicated that the petition had been reviewed by volunteers and had sufficient information as required to be certified by the City of Austin. All validated signed petitions were then placed into the boxes that were submitted to the City.

4) The list of marked voters was downloaded daily and added to the Internally Validated Signature list.

5) If any signed petition signatures could not be independently validated, those names were blacked out.

6) If any validated signatures were on the same page with signatures that could not be validated, the petition page was included in the boxes for submission to the City.

7) Upon completion of the process, Matt Mackowiak and I took the boxes of signed petitions to the City and submitted them all.

To be absolutely clear, I have personal knowledge that the petition submitted to the City Clerk included the signatures from Michael Lovins, Linda Durnin, and Eric Krohn.

Further Affiant sayeth not."

Brian Ruddle

SWORN TO AND SUBSCRIBED BEFORE ME this 12 day of February, 2021 to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

NOTARY PUBLIC STATE OF TEXAS
TIMOTHY SCOTT BROOKINS
Notary ID #132840531
My Commission Expires
December 24, 2024

ORDINANCE NO. 20190620-185

AN ORDINANCE AMENDING CITY CODE SECTIONS 9-4-11 RELATING TO PROHIBITING CAMPING IN PUBLIC AREAS, 9-4-13 RELATING TO PROHIBITING SOLICITATION, AND 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

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

PART 1. Subsection (B) of City Code Section 9-4-11 (*Camping in Public Area Prohibited*) is amended and the remaining subsections are numbered accordingly, as follows:

§ 9-4-11 CAMPING IN PUBLIC AREA PROHIBITED

(B) Except as provided in Subsection (D), a person commits an offense if, after having been notified by a law enforcement officer that the conduct violates this section and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct, the person camps in a public area that is not designated as a camping area by the City of Austin [~~Parks and Recreation Department~~] and the person is:

(1) materially endangering the health or safety of another person or of themselves; or

(2) intentionally, knowingly, or recklessly rendering impassable or impeding the reasonable use of a public area making usage of such area unreasonably inconvenient or hazardous.

PART 2. The Caption and City Code Section 9-4-13 (*Solicitation Prohibited*) are amended to read:

§ 9-4-13 AGGRESSIVE CONFRONTATION [~~SOLICITATION~~] PROHIBITED

(A) The council finds that:

(1) Aggressive confrontations in public areas are [~~solicitation is~~] disturbing and disruptive to residents and businesses and contribute[s]to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.

(2) Aggressive confrontation [~~solicitation~~] includes people approaching or following pedestrians, repetitive attempts to confront another person [~~soliciting~~] despite refusals, the use of abusive or profane language with the intent 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 aggressive confrontations [~~solicitation~~], and not to limit a constitutionally protected activity.

(B) In this section:

(1) AGGRESSIVE MANNER means intending to cause a person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession by:

(a) [~~intentionally or recklessly~~] making any physical contact with or touching another person in the course of the confrontation [~~solicitation~~] without the other person's consent when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative;

(b) following the person being confronted [~~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 confronted [~~solicited~~] into engaging in acts or behaviors the person would not otherwise do or perform [~~responding affirmatively to the solicitation~~];

(c) continuing to confront [~~solicit~~] a person within five feet of the person being confronted [~~solicited~~] after the person has

demanded that the confrontation cease [~~made a negative response~~];

(d) [~~intentionally or recklessly~~] blocking the safe or free passage of the person being confronted [~~solicited~~] or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person initiating or continuing the confrontation [~~making the solicitation~~]; or

(e) using obscene or abusive language or gestures toward the person being confronted [~~solicited~~] in a manner that tends to incite an immediate breach of the peace.[~~;~~

~~(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.~~]

(2) CONFRONT means to approach and threaten or intimidate another person by words or actions in a manner reasonably calculated to detain, hinder, or delay the person.

(3[~~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 confronts another person in an aggressive manner in a public area. [~~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; or~~

~~(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 Cafés*) or the patio area of a bar or restaurant; or~~

~~(7) in the downtown business area described in Section 9-4-14 (*Sitting or Lying Down on Public Sidewalks in the Downtown Business Area Prohibited*) 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.

(E) This section does not apply to a person who participates in or views a parade, festival, performance, rally, demonstration, or similar event.

(F) This section does not apply to a peace officer or other person making a lawful detention or arrest.

PART 3. The Caption and City Code Section 9-4-14 (*Sitting or Lying Down on Public Sidewalks or Sleeping Outdoors in the Downtown Austin Community Court Area Prohibited*) are amended to read:

§ 9-4-14 OBSTRUCTION [~~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 or 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) promoting tourism and business in the central business district;

(3) preserving the quality of urban life [~~and in protecting its citizens from intimidating behavior~~]; and

(4) 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 obstructing [~~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;

(2[~~3~~]) discourage, block, or inhibit the free passage of pedestrians; and

(3[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 29th 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 Martin Luther King, Jr. Boulevard;

(9) west on Martin Luther King, Jr. Boulevard to the intersection of Guadalupe Street;

(10) north on Guadalupe Street to the intersection of 29th Street (West); and

(11) northwest on 29th 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 and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct:

(1) [~~the person is asleep outdoors; or~~

~~(2)~~]the person is obstructing [~~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; and

(2[~~3~~]) the person is:

(i) materially endangering the health or safety of another person or of themselves; or

(ii) intentionally, knowingly, or recklessly rendering impassable or impeding the reasonable use of a public area making usage of such area unreasonably inconvenient or hazardous.

(G[~~F~~]) This section does not apply to a person who:

(1) is obstructing the right-of-way [~~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 (*Streets and Use of 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.

(H[~~G~~]) It is an affirmative defense to prosecution if a person is obstructing the right-of-way [~~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 proved, for an offense under this section.~~]

PART 4. This ordinance takes effect on July 1, 2019.

PASSED AND APPROVED

June 20, 2019

§
§
§

Steve Adler
Mayor

APPROVED:

Anne L. Morgan
City Attorney

ATTEST:

Jannette S. Goodall
City Clerk

Tab H – Redline of the City Code showing the effect from the 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

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

~~§ 9-4-11 - CAMPING AND OBSTRUCTION IN CERTAIN PUBLIC AREAS PROHIBITED.~~

(A) In this section:

(1) PUBLIC AREA means an outdoor area accessible to the public including a street, highway, park, parking lot, alleyway, pedestrian way, and the common areas of a school, hospital, apartment building, office building, transport facility, or business.

(2) CAMP means the use of a public area for living accommodation purposes including:

(a) storing personal belongings for an extended period of time;

(b) making a camp fire;

(c) using a tent or shelter or other structure for a living accommodation;

(d) carrying on cooking activities; or

(e) digging or earth breaking activities.

(3) HOMELESS SHELTER means a supervised publicly or privately operated facility that is designed to provide temporary living accommodations for individuals who lack a fixed, regular, and adequate residence while providing them with social services and other assistance to find a home and that is designated by the city as a shelter.

(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.

~~(B) Except as provided in Subsection (F), a person commits an offense if, after having been notified by a law enforcement officer that the conduct violates this section and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct, the person:~~

~~(1) 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 making usage of such area unreasonably inconvenient or hazardous.~~

~~(2) camps, sits or lies down in a public area and the person is located:~~

~~(a) within the area of the Austin Resource Center for Homelessness (ARCH) and Salvation Army Downtown Shelter, so long as either is an operating homeless shelter, bordered by East Fourth Street (South), South Bound I-35 Frontage Road (East), East 11th Street (North), and Brazos Street (West); or~~

~~(b) within approximately one-quarter mile, with boundaries set by the City Manager and posted with signage, of an operating homeless shelter located outside of the Central Business District; or~~

~~(c) within 15 feet of a door jamb of a residence or a business during the business' operating hours.~~

~~(3) camps in an area that the city designates as a high wildfire risk area.~~

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

(E) A person is camping if the person engages in any of the activities listed in Subsection (A)(2) if it reasonably appears, based on the totality of the circumstances, that the person conducting the activity is using a public area for living accommodation purposes, regardless of the person's intent or engagement in other activities.

(F) This section does not apply to permitted camping or cooking in a park in compliance with park regulations.

(G) Subsection (B)(2) does not apply to a person who is sitting or lying if the person is:

(1) in the right-of-way because of a medical emergency;

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

(3) participating in or viewing a parade, festival, performance, rally, demonstration, or similar event;

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

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

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

(H) It is an affirmative defense to prosecution for a violation of Subsection (B)(2) for sitting or lying if a person is sitting or lying and is obstructing the right-of-way, but is seated or lying down as the result of a physical manifestation of a disability, not limited to visual observation.

(I) It is an affirmative defense to prosecution that a person owns the property or has secured the permission of the property owner to camp in a public area.

Source: Ord. No. 20191017-029, Pt. 1, 10-28-19.

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; or

(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.

~~§ 9-4-13 - AGGRESSIVE CONFRONTATION PROHIBITED.~~

~~(A) The council finds that:~~

~~(1) Aggressive confrontations in public areas are disturbing and disruptive to residents and businesses and contribute to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.~~

~~(2) Aggressive confrontation includes people approaching or following pedestrians, repetitive attempts to confront another person despite refusals, the use of abusive or profane language with the intent to cause fear and intimidation, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic.~~

~~(3) This section is intended to protect citizens from the fear and intimidation accompanying certain kinds of aggressive confrontations, and not to limit a constitutionally protected activity.~~

~~(B) In this section:~~

~~(1) AGGRESSIVE MANNER means intending to cause a person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession by:~~

~~(a) making any physical contact with or touching another person in the course of the confrontation without the other person's consent when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative;~~

~~(b) following the person being confronted, if that conduct is:~~

~~(i) intended to cause a person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or~~

~~(ii) intended to intimidate the person being confronted into engaging in acts or behaviors the person would not otherwise do or perform;~~

~~(c) continuing to confront a person within five feet of the person being confronted after the person has demanded that the confrontation cease;~~

~~(d) blocking the safe or free passage of the person being confronted or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person initiating or continuing the confrontation; or~~

~~(e) using obscene or abusive language or gestures toward the person being confronted in a manner that tends to incite an immediate breach of the peace.~~

~~(2) CONFRONT means to approach and threaten or intimidate another person by words or actions in a manner reasonably calculated to detain, hinder, or delay the person.~~

~~(3) 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.~~

~~(C) A person commits an offense if the person confronts another person in an aggressive manner in a public area.~~

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

~~(E) This section does not apply to a person who participates in or views a parade, festival, performance, rally, demonstration, or similar event.~~

~~(F) This section does not apply to a peace officer or other person making a lawful detention or arrest.~~

Source: 1992 Code Section 10-1-15; Ord. 031023-13; Ord. 031211-11; Ord. 20051215-017; Ord. No. 20190620-185, Pt. 2, 7-1-19.

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 or 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 Keeton 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.

~~§ 9-4-14 - OBSTRUCTION IN THE DOWNTOWN AUSTIN COMMUNITY COURT AREA PROHIBITED.~~

~~(A) DISABILITY means having a physical or mental impairment which substantially limits one or 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) promoting tourism and business in the central business district;

(3) preserving the quality of urban life; and

(4) 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 obstructing the pedestrian right-of-way:

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

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

(3) 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 29th 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 Martin Luther King, Jr. Boulevard;

(9) west on Martin Luther King, Jr. Boulevard to the intersection of Guadalupe Street;

(10) north on Guadalupe Street to the intersection of 29th Street (West); and

(11) northwest on 29th 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 and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct:

~~(1) the person is obstructing the right-of-way between the roadway and the abutting property line or structure, or on an object placed in that area; and~~

~~(2) the person is:~~

~~(i) materially endangering the health or safety of another person or of themselves; or~~

~~(ii) intentionally, knowingly, or recklessly rendering impassable or impeding the reasonable use of a public area making usage of such area unreasonably inconvenient or hazardous.~~

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

~~(1) is obstructing the right-of-way because of a medical emergency;~~

~~(2) operates or patronizes a commercial establishment that conducts business on the sidewalk under Title 14 (*Streets and Use of 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 is obstructing the right-of-way as the result of a physical manifestation of a disability, not limited to visual observation.~~

Source: 1992 Code Section 10-1-26; Ord. 031023-13; Ord. 031211-11; Ord. 20051215-017; 20110303-029; Ord. No.20190620-185, Pt. 3, 7-1-19.

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.

Tab I - Current City Code sections 9-4-11; 9-4-13; 9-4-14

City Code of the City of Austin (Current) Sections 9-4-11, 9-4-13, and 9-4-14

§ 9-4-11 - CAMPING AND OBSTRUCTION IN CERTAIN PUBLIC AREAS PROHIBITED.

(A) In this section:

(1) PUBLIC AREA means an outdoor area accessible to the public including a street, highway, park, parking lot, alleyway, pedestrian way, and the common areas of a school, hospital, apartment building, office building, transport facility, or business.

(2) CAMP means the use of a public area for living accommodation purposes including:

(a) storing personal belongings for an extended period of time;

(b) making a camp fire;

(c) using a tent or shelter or other structure for a living accommodation;

(d) carrying on cooking activities; or

(e) digging or earth breaking activities.

(3) HOMELESS SHELTER means a supervised publicly or privately operated facility that is designed to provide temporary living accommodations for individuals who lack a fixed, regular, and adequate residence while providing them with social services and other assistance to find a home and that is designated by the city as a shelter.

(B) Except as provided in Subsection (F), a person commits an offense if, after having been notified by a law enforcement officer that the conduct violates this section and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct, the person:

(1) 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 making usage of such area unreasonably inconvenient or hazardous.

(2) camps, sits or lies down in a public area and the person is located:

(a) within the area of the Austin Resource Center for Homelessness (ARCH) and Salvation Army Downtown Shelter, so long as either is an operating homeless shelter, bordered by East Fourth Street (South), South Bound I-35 Frontage Road (East), East 11th Street (North), and Brazos Street (West); or

(b) within approximately one-quarter mile, with boundaries set by the City Manager and posted with signage, of an operating homeless shelter located outside of the Central Business District; or

(c) within 15 feet of a door jamb of a residence or a business during the business' operating hours.

(3) camps in an area that the city designates as a high wildfire risk area.

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

(E) A person is camping if the person engages in any of the activities listed in Subsection (A)(2) if it reasonably appears, based on the totality of the circumstances, that the person conducting the activity is using a public area for living accommodation purposes, regardless of the person's intent or engagement in other activities.

(F) This section does not apply to permitted camping or cooking in a park in compliance with park regulations.

(G) Subsection (B)(2) does not apply to a person who is sitting or lying if the person is:

(1) in the right-of-way because of a medical emergency;

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

(3) participating in or viewing a parade, festival, performance, rally, demonstration, or similar event;

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

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

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

(H) It is an affirmative defense to prosecution for a violation of Subsection (B)(2) for sitting or lying if a person is sitting or lying and is obstructing the right-of-way, but is seated or lying down as the result of a physical manifestation of a disability, not limited to visual observation.

(I) It is an affirmative defense to prosecution that a person owns the property or has secured the permission of the property owner to camp in a public area.

Source: Ord. No. 20191017-029, Pt. 1, 10-28-19.

§ 9-4-13 - AGGRESSIVE CONFRONTATION PROHIBITED.

(A) The council finds that:

(1) Aggressive confrontations in public areas are disturbing and disruptive to residents and businesses and contribute to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.

(2) Aggressive confrontation includes people approaching or following pedestrians, repetitive attempts to confront another person despite refusals, the use of abusive or profane language with the intent to cause fear and intimidation, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic.

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

(B) In this section:

(1) AGGRESSIVE MANNER means intending to cause a person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession by:

(a) making any physical contact with or touching another person in the course of the confrontation without the other person's consent when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative;

(b) following the person being confronted, if that conduct is:

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

(ii) intended to intimidate the person being confronted into engaging in acts or behaviors the person would not otherwise do or perform;

(c) continuing to confront a person within five feet of the person being confronted after the person has demanded that the confrontation cease;

(d) blocking the safe or free passage of the person being confronted or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person initiating or continuing the confrontation; or

(e) using obscene or abusive language or gestures toward the person being confronted in a manner that tends to incite an immediate breach of the peace.

(2) CONFRONT means to approach and threaten or intimidate another person by words or actions in a manner reasonably calculated to detain, hinder, or delay the person.

(3) 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.

(C) A person commits an offense if the person confronts another person in an aggressive manner in a public area.

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

(E) This section does not apply to a person who participates in or views a parade, festival, performance, rally, demonstration, or similar event.

(F) This section does not apply to a peace officer or other person making a lawful detention or arrest.

Source: 1992 Code Section 10-1-15; Ord. 031023-13; Ord. 031211-11; Ord. 20051215-017; Ord. No.20190620-185, Pt. 2, 7-1-19.

§ 9-4-14 - OBSTRUCTION IN THE DOWNTOWN AUSTIN COMMUNITY COURT AREA PROHIBITED.

(A) DISABILITY means having a physical or mental impairment which substantially limits one or 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) promoting tourism and business in the central business district;

(3) preserving the quality of urban life; and

(4) 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 obstructing the pedestrian right-of-way:

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

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

(3) 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 29th 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 Martin Luther King, Jr. Boulevard;

(9) west on Martin Luther King, Jr. Boulevard to the intersection of Guadalupe Street;

(10) north on Guadalupe Street to the intersection of 29th Street (West); and

(11) northwest on 29th 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 and having been given a reasonable opportunity by a law enforcement officer to correct the violating conduct:

(1) the person is obstructing the right-of-way between the roadway and the abutting property line or structure, or on an object placed in that area; and

(2) the person is:

(i) materially endangering the health or safety of another person or of themselves; or

(ii) intentionally, knowingly, or recklessly rendering impassable or impeding the reasonable use of a public area making usage of such area unreasonably inconvenient or hazardous.

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

(1) is obstructing the right-of-way because of a medical emergency;

(2) operates or patronizes a commercial establishment that conducts business on the sidewalk under Title 14 (*Streets and Use of 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 is obstructing the right-of-way as the result of a physical manifestation of a disability, not limited to visual observation.

Source: 1992 Code Section 10-1-26; Ord. 031023-13; Ord. 031211-11; Ord. 20051215-017; 20110303-029; Ord. No.20190620-185, Pt. 3, 7-1-19.

Tab J – Tex. Elec. Code § 52.072(a)

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 5. Election Supplies
Chapter 52. Ballot Form, Content, and Preparation (Refs & Annos)
Subchapter C. Form of Ballot

V.T.C.A., Election Code § 52.072

§ 52.072. Propositions

Effective: September 1, 2019

Currentness

(a) 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.

(b) A proposition shall be printed on the ballot in the form of a single statement and may appear on the ballot only once.

(c) Except as provided by Subsection (d), in an election in which an office and a measure are to be voted on, each proposition stating a measure shall appear on the ballot after the listing of offices.

(d) If an election of officers is contingent on the adoption of a proposition appearing on the same ballot, the proposition shall appear on the ballot before the listing of offices.

(e) In addition to any other requirement imposed by law for a proposition, including a provision prescribing the proposition language, a proposition submitted to the voters for approval of the imposition, increase, or reduction of a tax shall specifically state, as applicable:

(1) with respect to a proposition that only seeks voter approval of the imposition or increase of a tax, the amount of or maximum tax rate of the tax or tax increase for which approval is sought; or

(2) with respect to a proposition that only seeks voter approval of the reduction of a tax, the amount of tax rate reduction or the tax rate for which approval is sought.

(f) A political subdivision that submits to the voters a proposition for the approval of the issuance of debt obligations shall prescribe the wording of the proposition that is to appear on the ballot in accordance with the requirements of Subchapter B, Chapter 1251, Government Code.[1] In this subsection, "debt obligation" and "political subdivision" have the meanings assigned by Section 1251.051, Government Code.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 2011, 82nd Leg., ch. 692 (H.B. 360), § 1, eff. Sept. 1, 2011; Acts 2019, 86th Leg., ch. 505 (S.B. 30), § 2, eff. Sept. 1, 2019; Acts 2019, 86th Leg., ch. 728 (H.B. 477), § 2, eff. Sept. 1, 2019.

Notes of Decisions (24)

Footnotes

1 V.T.C.A., Government Code § 1251.051 et seq.

V. T. C. A., Election Code § 52.072, TX ELECTION § 52.072
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab K – Tex. Elec. Code § 273.061

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 16. Miscellaneous Provisions
Chapter 273. Criminal Investigation and Other Enforcement Proceedings
Subchapter D. Mandamus by Appellate Court (Refs & Annos)

V.T.C.A., Election Code § 273.061

§ 273.061. Jurisdiction

Currentness

The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Notes of Decisions (128)

V. T. C. A., Election Code § 273.061, TX ELECTION § 273.061
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab L – Tex. Gov't Code § 22.221(a)

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter C. Courts of Appeals (Refs & Annos)

V.T.C.A., Government Code § 22.221

§ 22.221. Writ Power

Effective: September 1, 2017

Currentness

(a) Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.

(b) Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against:

(1) a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district;

(2) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or

(3) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge.

(c) Repealed by Acts 1987, 70th Leg., ch. 148, § 2.03, eff. Sept. 1, 1987.

(d) Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 69, § 1, eff. May 6, 1987; Acts 1987, 70th Leg., ch. 148, §§ 1.35, 2.03, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 58, § 1, eff. May 2, 1991; Acts 1995, 74th Leg., ch. 839, § 1, eff. Sept. 1, 1995; Acts 2017, 85th Leg., ch. 740 (S.B. 1233), § 1, eff. Sept. 1, 2017; Acts 2017, 85th Leg., ch. 1013 (H.B. 1480), § 1, eff. Sept. 1, 2017.

Editors' Notes

REVISOR'S NOTE

2004 Main Volume

The revised law in Subsection (b) omits "or any Justice thereof, in vacation," from the source law in V.A.C.S. Article 1824 because amendments to V.A.C.S. Article 1816 have changed the original term of the courts of appeals from the first Monday in October until the first Monday in July to a term beginning and ending with each calendar year.

Notes of Decisions (390)

V. T. C. A., Government Code § 22.221, TX GOVT § 22.221
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab M – Austin City Charter, art. II, § 15; art. IV §§ 1, 4, and 5.

Available at:
https://library.municode.com/TX/Austin/codes/code_of_ordinances?nodeId=CH_ARTIVINRERE

AUSTIN CITY CHARTER

Art. II

§ 15. - PUBLICATION OF ORDINANCE.

Except as otherwise provided by law or this Charter, the city clerk shall give notice of the enactment of every penal ordinance and of every other ordinance required by law or this Charter to be published, by causing the descriptive title or caption of the same to be published at least one time after final passage thereof in some newspaper of general circulation in the city before the ordinance is effective. The city clerk shall note on every ordinance and on the record thereof the dates and medium of its publication, and such notation shall be prima facie evidence of compliance with the requirements of this section.

Art. IV

§ 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.

.....

§ 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 ten (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 (6) 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 (2) 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 (2) 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.

656 S.W.2d 209
Court of Appeals of Texas,
Austin.

Neil E. BISCHOFF, et al., Appellants,
v.
CITY OF AUSTIN, Appellee.

No. 13983.
|
July 13, 1983.
|
Rehearing Denied Sept. 7, 1983.

Synopsis
Action was brought to set aside city revenue bond election. The 126th District Court, Travis County, Pete Lowry, J., entered judgment declaring the election valid, and appeal was taken. The Court of Appeals, Shannon, J., held that ballot submitted proposition to be voted on with sufficient definiteness and certainty that voters would not be misled and thus selection of language to be placed on ballot did not constitute abuse of discretion by municipal officials.

Affirmed.

West Headnotes (8)

[1] **Municipal Corporations** Referendum procedure

In general, form of ballot proposition to be submitted to voters of city is prescribed by municipal authority unless such form is governed by statute, city charter, or ordinance. V.A.T.S. Election Code, art. 6.07.

1 Cases that cite this headnote

[2] **Municipal Corporations** Referendum procedure

In absence of any statute, charter provision, or ordinance setting out form for ballot proposition to be submitted to voters of city, framing of statement of proposition on the ballot is properly left to discretion of municipal authorities, such discretion being limited only to common-law requirement that statement describe proposition with such definiteness and certainty that voters will not be misled. V.A.T.S. Election Code, art. 6.07.

3 Cases that cite this headnote

[3] **Electricity** Establishment or acquisition of plant by public authorities

Parenthetical language appearing in proposition on ballot submitted to city voters was not tantamount to argument to voters to vote in favor of revenue bonds for electric light and power system extensions and improvements where parenthetical language, that bonds were being issued to avoid legal complications and to protect city's financial interest, was explanation of extensions and improvements for which bonds were being issued.

[4] **Election Law** Evidence

It is presumed that voters will familiarize themselves with contents of and statements in propositions before casting their ballots; that being so, ballot which directs attention of voter to particular amendment or proposition with which he is presumed to be familiar is sufficient.

[5] **Electricity** Establishment or acquisition of plant by public authorities

Proposition on ballot to be submitted to city voters for issuance of revenue bonds for electric

light and power system extensions and improvements described proposition with sufficient definiteness and certainty that voters would not be misled and thus selection of language did not constitute abuse of discretion by municipal officials.

1 Cases that cite this headnote

[6] **Electricity**Establishment or acquisition of plant by public authorities

Proposition on ballot to be submitted to voters for issuance of revenue bonds for electric light and power system extensions and improvements to avoid legal complications and to protect city's financial interest did not purport to authorize issuance of bonds for unauthorized purposes where avoiding legal complications and preserving city's interest were only ancillary to main purpose of constructing nuclear power plant. Vernon's Ann.Texas Civ.St. art. 1111.

[7] **Appeal and Error**Nature or Subject-Matter of Issues or Questions

Contention that language of proposition on ballot to be submitted to voters constituted violation of voters' rights could not be raised for first time on appeal where it was not raised in trial pleading.

1 Cases that cite this headnote

[8] **Municipal Corporations**Referendum procedure

Proposition on ballot to be submitted to city voters did not violate voters' constitutional rights where ballot submitted proposition with sufficient definiteness and certainty so that voters could not have been misled. Vernon's Ann.Texas Const. Art. 4, § 1 et seq.; U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

Attorneys and Law Firms

***210** Jonathon H. Smith, Austin, for appellants.

Albert DeLaRosa, City Atty., Jonathan Davis, First Asst. City Atty., Austin, for appellee.

Before SHANNON, SMITH and BRADY, JJ.

Opinion

SHANNON, Justice.

Neil Bischoff and others, appellants, seek to set aside a judgment of the district court of Travis County declaring the validity of a City of Austin bond election. This Court will affirm the judgment.

The parties stipulated the facts. The City of Austin is one of four participants in a project to construct a nuclear power plant known as the "South Texas Project." The Austin City Council passed an ordinance calling for an election to be held for the ***211** authorization to issue combined utility systems revenue bonds relating to financing the City's participation in the South Texas Project. Pursuant to that ordinance a bond election was set for January 15, 1983, for the purpose of submitting to the electorate the following proposition:

PROPOSITION NUMBER 1

"SHALL the City Council of the City of Austin, Texas, be authorized to issue revenue bonds of said City in the amount of NINETY–SEVEN MILLION DOLLARS ($97,000,000) maturing serially in such installments as may be fixed by the City Council, the maximum maturity being not more than FORTY (40) years from their date, to be issued and sold at any price or prices

and to bear interest at any rate or rates as shall be determined within the discretion of the City Council at the time of issuance, for the purpose of extending and improving the City's Electric Light and Power System (continued financing through March, 1984, of the City's participation in the South Texas Project to avoid legal complications and to protect the City's financial interest, including the right to sell its interest therein); to be issued in accordance with and in the manner provided in Article 1111 et seq., V.A.T.C.S., and secured by a pledge of the net revenues from the operation of the City's Electric Light and Power System and Waterworks and Sewer System, each bond to be conditioned that the holder thereof shall never have the right to demand payment of said obligation out of funds raised or to be raised by taxation?"

On January 15, 1983, the City conducted the election at which the electors were asked to vote "FOR" or "AGAINST" the single proposition which appeared on the official ballot in the following terms:

PROPOSITION NUMBER 1

THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS CONTINUED FINANCING THROUGH MARCH, 1984, OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN).

Appellants' basic complaint on appeal concerns the manner in which the proposition was described on the official ballot. By three points of error, appellants assert the district court erred in declaring the bond election valid because, as a matter of law, the language on the ballot did not submit the proposition in a fair and impartial manner; because such language was ambiguous, unclear, and misleading; and because such language failed to state a specific question to be answered by the voters. Specifically, appellants argue that the language, "to avoid legal complications and to protect the city's financial interest including the right to sell its interest therein," should have been omitted. Appellants contend that the statement of the proposition on the ballot amounted to an argument to the voters to vote for the bonds by informing them that if they wanted to avoid legal complications and protect the city's interest, they should vote for the bonds. There were various other alternatives to a bond referendum, urge appellants, about which the voters were not informed. Accordingly, appellants contend the language on the ballot was inaccurate and misleading in that it made it appear that the bond vote was the only way to avoid legal complications. This Court will overrule the points of error.

In passing, it should be observed that this is not a case where appellants pleaded or attempted to prove that the alleged irregularity in the wording of the ballot proposition affected or changed the results of the election; or where appellants pleaded or attempted to prove fraudulent conduct by city officials in the choice of language for the ballot.

[1] [2] In general, the form of a ballot proposition to be submitted to the voters of a city is prescribed by municipal authority ***212** unless such form is governed by statute, city charter, or ordinance. Tex.Elec.Code Ann. art. 6.07 (Supp.1982). The parties to this appeal agree that no statute, charter provision, or ordinance sets out a form for such a ballot proposition. Under these circumstances, as this Court understands, the framing of the statement of the proposition on the ballot was properly left to the discretion of the municipal authorities. Tex.Elec.Code Ann. Art. 6.07 (Supp.1982), such discretion being limited only by the common law requirement that the statement describe the proposition with such definiteness and certainty that the voters will not be misled. *See* *Moore v. City of Corpus Christi,* 542 S.W.2d 720 (Tex.Civ.App.1976, writ ref'd n.r.e.); *Turner v. Lewie,* 201 S.W.2d 86 (Tex.Civ.App.1947, writ dism'd).

Appellants have not directed our attention, nor have we been able to discover, any Texas authority holding invalid a ballot because it contains *too much* language describing the proposition. The usual case involves contentions that the ballot contains *too little* descriptive language. *See* *Hill v. Evans,* 414 S.W.2d 684 (Tex.Civ.App.1967, writ ref'd n.r.e.); *Turner v. Lewie, supra.*

[3] The parenthetical language appearing on the ballot served to explain the phrase "electric light and power system extensions and improvements," and was not tanamount to an argument to voters to vote in favor of the bonds. Although the parenthetical language perhaps could have been omitted, the law encourages, rather than frowns upon, a full and definite statement of the purpose of a proposition. *Moore v. Coffman,* 109 Tex. 93, 200 S.W. 374 (1918).

[4] It is presumed that voters will familiarize themselves

with the contents of, and the statements in, the propositions before casting their ballots; otherwise, the legislature would have required a verbatim copy of the proposition on the ballot. *Moore v. City of Corpus Christi, supra; Hill v. Evans, supra.* That being so, a ballot which directs the attention of the voter to a particular amendment or proposition with which he is presumed to be familiar is sufficient. *Hill v. Evans, supra.*

[5] The statement of the proposition appearing on the ballot mirrors the language of the full proposition. This Court has concluded that the ballot submitted the proposition to be voted on with sufficient definiteness and certainty that the voters would not be misled. *Moore v. City of Corpus Christi, supra.* Accordingly, it cannot be said that, as a matter of law, the selection of the language to be placed on the ballot constituted an abuse of discretion by the municipal officials.

[6] Appellants' fourth point of error is that the district court erred in upholding the validity of the election because the proposition purports to authorize the issuance of revenue bonds for purposes not authorized by statute or the city charter. Texas Rev.Civ.Stat.Ann. art. 1111 (1963) provides that cities shall have power to issue bonds to build, purchase, improve, extend, and repair certain public facilities, including an electric plant. Appellants argue that the purpose of these bonds was to avoid legal problems and to preserve the city's interest in the South Texas Project. The point of error is without merit because avoiding legal complications and preserving the city's interest in the project, if indeed purposes of the bonds, are only ancillary to the main purpose of constructing a power plant.

[7] Appellants' fifth point is that the language on the ballot was misleading to the extent that it constitutes a violation of the rights of the voters protected by Article IV and the Fourteenth Amendment to the Constitution of the United States. This contention was not raised in appellants' trial pleading.[1] Contentions raised for the first time on appeal are not properly before the appellate court. *Gray-Taylor, Inc. v. Tennessee,* 587 S.W.2d 668 (Tex.1979).

***213** [8] Should the claimed error not be considered waived, this Court holds that there was no constitutional violation because the ballot submitted the proposition with sufficient definiteness and certainty so that the voters could not have been misled.

The judgment is affirmed.

All Citations

656 S.W.2d 209

Footnotes

1 In a supplemental transcript filed after submission and oral argument in this Court, it is seen that this contention was urged only after entry of judgment by an instrument denominated "Motion to Vacate Judgment."

History (3)

Direct History (3)

1. Bischoff v. City of Austin
656 S.W.2d 209 , Tex.App.-Austin , July 13, 1983 , writ refused n.r.e. (Oct 19, 1983)

Motion Granted by

2. Bischoff v. City of Austin
662 S.W.2d 156 , Tex.App.-Austin , Dec. 07, 1983

AND Appeal Dismissed, Certiorari Denied by

3. Bischoff v. City of Austin
466 U.S. 919 , U.S.Tex. , Apr. 02, 1984

Tab O

997 S.W.2d 259
Supreme Court of Texas.

Edward J. BLUM, Petitioner,
v.
Bob LANIER, Mayor of the City of Houston, and the City of Houston, Respondents.

No. 98–0256.
|
Argued April 8, 1999.
|
Decided July 1, 1999.

Synopsis
Voter who signed petition to initiate election to amend city charter sought mandamus and injunctive relief to prevent city from using allegedly misleading language on the ballot to describe proposed amendment. The trial court concluded it lacked subject matter jurisdiction to issue injunction and denied mandamus relief. Appeal was taken. The Houston Court of Appeals, Fourteenth District, —— S.W.2d ——, affirmed, concluding that voter lacked standing to seek injunctive relief against city. Voter sought review. The Supreme Court, Phillips, C.J., held that: (1) voter has standing to seek, and trial court has jurisdiction to issue, injunction forbidding city's use of misleading ballot proposition so long as injunction does not operate to delay or cancel called election, and (2) exception to mootness doctrine for issues capable of repetition yet evading review applied to allow review of standing and jurisdictional issues.

Reversed and remanded.

West Headnotes (7)

[1] **Municipal Corporations** Amendment of charter or special act

Qualified voters who sign a petition to initiate an election to change a city charter have a justiciable interest in the valid execution of the charter amendment election, and as such have an interest in that election distinct from that of the general public so as to support standing to seek injunctive relief concerning ballot language.

16 Cases that cite this headnote

[2] **Municipal Corporations** Amendment of charter or special act

Citizens who exercise their rights under voter initiative provisions for elections to amend city charters act as and become in fact the legislative branch of the municipal government.

5 Cases that cite this headnote

[3] **Election Law** Nature and form of remedy

Election contest is a special proceeding created by the Legislature to provide a remedy for elections tainted by fraud, illegality or other irregularity. V.T.C.A., Election Code § 233.002.

8 Cases that cite this headnote

[4] **Municipal Corporations** Amendment of charter or special act

Under separation of powers principles and judicial deference to legislative branch, voter had no right to invoke judicial power to enjoin election at which proposed amendment of city charter would be put to popular vote.

5 Cases that cite this headnote

[5] **Municipal Corporations** Amendment of charter or special act

Qualified voter who signs an initiative petition for an election to amend a city charter has standing to seek, and the trial court has jurisdiction to issue, an injunction forbidding the city's use of a misleading ballot proposition so long as the injunction does not operate to delay or cancel the called election.

22 Cases that cite this headnote

[6] **Appeal and Error** Want of Actual Controversy
Municipal Corporations Amendment of charter or special act

Exception to mootness doctrine for issues capable of repetition yet evading review applied to allow review of whether voter who signed initiative petition for election to amend city charter had standing to seek, and trial court had jurisdiction to issue, injunction forbidding use of misleading ballot proposition, where proposed charter amendment had already been defeated at polls but trial court indicated that it would sustain election contest and order new election.

38 Cases that cite this headnote

[7] **Appeal and Error** Want of Actual Controversy

Exception to the mootness doctrine for issues capable of repetition yet evading review applies when the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot, and there must also be a reasonable expectation that the same action will occur again if the issue is not considered.

30 Cases that cite this headnote

Attorneys and Law Firms

***260** J. Preston Wrotenbery, Kimaberly R. Stamp, Alan N. Magenheim, Kevin D. Jewell, Houston, for Petitioner.

Patrick Zummo, Anthony W. Hall, Jr., Gene L. Locke, Bertrand L. Pourteau, II, Helen M. Gros, Houston, for Respondents.

Opinion

Chief Justice PHILLIPS delivered the opinion for a unanimous Court.

In an election to amend a city charter, the plaintiff attempted to enjoin the city from using allegedly misleading language on the ballot to describe the proposed amendment. While we do not address the merits of plaintiff's claim at this time, we must resolve two jurisdictional questions: (1) whether a district court has jurisdiction to enjoin a city from using allegedly vague and misleading language on the ballot describing the proposed amendment to the city charter initiated by petition, and (2) whether a qualified voter who signs the petition that initiates the election has standing to seek the injunction against the ballot proposition the city drafted.

The trial court, concluding that it lacked subject matter jurisdiction over this aspect of the election, declined to consider the plaintiff's request for injunctive relief. The court of appeals affirmed the dismissal on slightly different grounds, concluding that a voter who signed the petition lacked standing to seek injunctive relief against the city.[1] —— S.W.2d ——. We disagree with both lower courts and answer the two questions "yes." We therefore reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings.

The Local Government Code authorizes qualified voters of a municipality to propose amendments to the city's charter. *See* TEX. LOC. GOV'T CODEE § 9.004(a). Under this authority, Edward J. Blum and over 20,500 other registered voters in the City of Houston signed a petition that proposed to amend the City's charter to "end preferential treatment" in the City's public employment and contracting. In full, the proposed charter amendment provided:

> (a) The City of Houston shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment and public contracting.
>
> (b) This section shall apply only to action taken after

the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide occupational based on gender qualifications which are reasonably necessary to the normal operations of a particular government activity.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the city.

(f) For the purposes of this section, "city" shall include, but not necessarily be limited to, the city itself, and any other political subdivision or governmental instrumentality of or within the city.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex color, ethnicity, or national origin, as are otherwise available for violations of then existing Texas anti-discrimination law.

***261** (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with state law, the Texas Constitution, federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portion of this section.

On October 1, 1997, the Houston City Council adopted an ordinance under state law calling a special election on the proposed charter amendment for November 4, 1997, the same day as the City's general election. This ordinance recited the entire proposed charter amendment and provided the following description of the amendment for use on the ballot:

> Shall the Charter of the City of Houston be amended to end the use of Affirmative Action for women and minorities in the operation of City of Houston employment and contracting, including ending the current program and any similar programs in the future?

Blum objected to this description and immediately sought mandamus and injunctive relief in district court against the Honorable Bob Lanier, Mayor,[2] and the City of Houston. In his lawsuit, Blum asked the court to direct the City to submit the proposed charter amendment to the voters using paragraph (a) of the proposed amendment as the ballot description. Alternatively, he sought to enjoin the City from using "vague, indefinite language, which fails to give voters fair notice of the nature and substance of the proposed charter amendment." The City responded with a plea to the jurisdiction, alleging that the trial court lacked jurisdiction to enjoin any part of the election process. Furthermore, the City argued that mandamus was inappropriate because Blum had an adequate remedy at law through an election contest. The trial court agreed that it lacked jurisdiction to issue a temporary injunction, but concluded that it had jurisdiction to consider Blum's petition for writ of mandamus. The court thereafter denied mandamus relief, signing its order on October 8, 1997.

Blum filed an accelerated appeal, complaining only about the trial court's order denying injunctive relief for lack of subject matter jurisdiction. The City moved to dismiss the appeal on October 20, 1997, urging that Blum's petition for injunctive relief was moot because the election had begun. *See, e.g.,* *Skelton v. Yates,* 131 Tex. 620, 119 S.W.2d 91, 91–2 (1938)(election challenge moot once absentee voting has begun). The court of appeals denied this motion, concluding that the appeal was not moot under the "capable of repetition yet evading review" exception to the mootness doctrine. The court of appeals on its own motion, however, determined that Blum lacked standing to enjoin the City and affirmed the trial court's judgment for this reason. *See generally* *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 443–45 (Tex.1993)(standing is an essential, unwaivable component of subject matter jurisdiction which court should consider on its own motion).

[1] To establish standing in this case, Blum must demonstrate that he possesses an interest distinct from the general public such that the City's actions have caused him some special injury. *See* *Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984). In his trial court pleadings, Blum alleged that he was co-chair of the Houston Civil Rights Initiative, a private, nonprofit organization that spearheaded the petition drive. Although Blum did not allege in the trial court that he actually signed the petition himself, the City concedes in its brief to this Court that he was a signatory. The City argues, however, that the initiative petition does not otherwise distinguish ***262** Blum from any other petition signer and that signing the petition alone is not sufficient to give him a justiciable

interest in the controversy. We disagree.

[2] Citizens who exercise their rights under initiative provisions act as and "become in fact the legislative branch of the municipal government." *Glass v. Smith,* 150 Tex. 632, 244 S.W.2d 645, 649 (1951). In this context, we have recognized that the signers, as sponsors of the initiative, have a justiciable interest in seeing that their legislation is submitted to the people for a vote. *See id.* at 648, 653–54. We have issued and affirmed writs of mandamus to compel municipal authorities to perform their ministerial duties with respect to initiatory elections. *See Coalson v. City Council of Victoria,* 610 S.W.2d 744, 745–46 (Tex.1980); *Glass,* 244 S.W.2d at 648, 653–54. We thus conclude that those qualified voters who sign the petition have a justiciable interest in the valid execution of the charter amendment election, *see Glass,* 244 S.W.2d at 648, and as such have an interest in that election distinct from that of the general public. *See Hunt,* 664 S.W.2d at 324.

The initiative in this case was conducted under section 9.004 of the Local Government Code. That section grants the qualified voters of a municipality the right to petition their governing body to amend its charter. When the requisite number of qualified citizens sign such a petition, the municipal authority must put the measure[3] to a popular vote. *See* TEX. LOC. GOV'T CODEE § 9.004(a). Although the petitioners draft the charter amendment, the municipal authority generally retains discretion to select the form of the ballot proposition[4] that describes the proposed amendment. In this regard, section 52.072(a) of the Election Code provides:

> 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.

Blum concedes in this Court that the City had the right to choose the ballot language under this section, but not the right to mislead the public about the nature of the proposed charter amendment. Although no statute or ordinance prescribes the proposition's form in this instance, Blum argues that the City's choice of language is nonetheless limited by the common law, which requires that the proposition identify the measure "with such definiteness and certainty that the voters are not misled." *Reynolds Land & Cattle Co. v. McCabe,* 72 Tex. 57, 12 S.W. 165, 165–66 (1888); *see also Bischoff v. City of Austin,* 656 S.W.2d 209, 212 (Tex.App.—Austin 1983, writ ref'd n.r.e.), *cert. denied* 466 U.S. 919, 104 S.Ct. 1699, 80 L.Ed.2d 172 (1984)(same); *Wright v. Board of Trustees of Tatum Indep. Sch. Dist.,* 520 S.W.2d 787, 792 (Tex.Civ.App.—Tyler 1975, writ dism'd)(proposition should constitute a fair portrayal of the chief features of the measure in words of plain meaning so that it can be understood). The City responds that even assuming for the sake of argument that its proposition was insufficient, Blum still was not entitled to a mandamus or an injunction in the trial court because he had an adequate remedy at law in the form of an election contest under Chapter 233 of the Election Code.

[3] An election contest is a special proceeding created by the Legislature to provide a remedy for elections tainted by fraud, illegality or other irregularity. *De Shazo v. Webb,* 131 Tex. 108, 113 S.W.2d 519, 524 (1938). A party cannot file such a suit until after the election. *See* TEX. ELEC.CODE § 233.006(a). Because Blum or any qualified voter in the City of Houston could have challenged the City's allegedly misleading proposition through an election ***263** contest, *see* TEX. ELEC.CODE § 233.002; *see also, e.g., Wright,* 520 S.W.2d at 792, the City concludes that this was Blum's only remedy.

Blum disagrees, responding that this Court has approved the use of mandamus, for example, to compel public officials to comply with their ministerial duties in election matters. Thus, when public officials have refused to call an election required by law, this Court has compelled them to act. *See, e.g., Anderson v. City of Seven Points,* 806 S.W.2d 791, 793 (Tex.1991); *Coalson,* 610 S.W.2d at 747; *Glass,* 244 S.W.2d at 648. Although mandamus is not available to control discretionary acts such as the City's choice of language here, Blum argues that injunctive relief is appropriate in this case because the City has violated the law and effectively subverted the election by drafting a proposition that misled, rather than informed, the voters. Blum concludes that an injunction against the City's misleading proposition was his only means of preserving an informed submission of the proposed charter amendment at the called election.[5]

The City responds that the trial court correctly dismissed Blum's request for injunctive relief because a district court cannot enjoin an election. The City submits that Blum's injunction would necessarily have prevented the election from taking place as scheduled because the proposed charter amendment could not be submitted to the voters without the ballot proposition.

[4] We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of

powers and the judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process.[6]

[5] Blum, however, did not seek to enjoin the election itself, but only to prevent the City from using what he alleged to be a vague and misleading ballot proposition to describe the proposed charter amendment. The City is correct that a possible consequence of an injunction against some aspect of the ordinance calling the election could be postponing the election. But what is possible is not necessarily inevitable. An injunction that delays the election would be improper, but an injunction that facilitates the elective process may be appropriate. *Cf. Ellis v. Vanderslice,* 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ)(courts may act to facilitate election process but injunctions typically interfere with that process). In short, if the matter is one that can be judicially resolved in time to correct deficiencies in the ballot without delaying the election, ***264** then injunctive relief may provide a remedy that cannot be adequately obtained through an election contest.

A misleading ballot proposition that requires an election contest and a second election delays the timely resolution of the proposed charter amendment no less than, and perhaps even more than, an improper injunction. Election results are often influenced by unique and complex factors existing at a particular point in time, and those who petition for an election may have strong reasons for desiring a particular election date. The Local Government Code implicitly recognizes this interest by requiring charter amendment elections to be set promptly. TEX. LOC. GOV'T CODEE § 9.004(b).[7] If defective wording can be corrected through injunctive relief, a remedy will be provided that is not available through a subsequent election contest. We accordingly hold that a qualified voter who signs an initiative petition has standing to seek, and the trial court has jurisdiction to issue, an injunction forbidding the City's use of a misleading ballot proposition so long as the injunction does not operate to delay or cancel the called election.

[6] By cross-point, the City argues that the court of appeals erred in applying the "capable of repetition yet evading review" exception to the mootness doctrine because starting the election mooted this appeal. The City submits that election schedules will often moot election injunctions but that this reality does not constitute an exception to the mootness doctrine. We disagree.

[7] The "capable of repetition yet evading review" exception to the mootness doctrine applies when "the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *General Land Office v. OXY U.S.A., Inc.,* 789 S.W.2d 569, 571 (Tex.1990). There must also be a reasonable expectation that the same action will occur again if the issue is not considered. *Weinstein v. Bradford,* 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Contrary to the City's position, the doctrine has been applied to pending election matters. *See, e.g., Bejarano v. Hunter,* 899 S.W.2d 346, 351 (Tex.App.—El Paso 1995, orig. proceeding).

Before granting the petition in this case, we asked the parties to report on the status of the case that remained in the trial court. The parties reported that the proposed charter amendment was defeated at the polls and that Blum thereafter amended his pleadings to include a contest of that election. We are further advised that the trial court has indicated by letter that it will sustain the contest and order a new election on the initiative. Because the City controls the proposition language and to some extent may also dictate the amount of time the initiative sponsors will have to seek judicial relief prior to the election, a repetition of the events in this case is possible. Accordingly, we agree with the court of appeals that the "capable of repetition yet evading review" doctrine applies here. If the trial court orders a new charter amendment election, as it has indicated it will, Blum or any other signatory to the petition may seek to enjoin the City from proceeding with a ballot proposition that allegedly misleads the electorate about this proposed amendment.

Again, we express no opinion on the merits of the underlying dispute. Our decision today is limited to the jurisdictional issues. Because the court of appeals erred in this regard, we reverse its judgment and remand the cause to the trial court for ***265** further proceedings consistent with this opinion.

All Citations

997 S.W.2d 259, 42 Tex. Sup. Ct. J. 955

Footnotes

[1] The court of appeals' opinion was originally designated not for publication, but we have ordered it to be published. *See* TEX.R.APP. P. 47.3(d).

[2] During this appeal, Mayor Lanier's term expired, and he was succeeded by the Honorable Lee P. Brown.

[3] The Election Code defines a "measure" as "a question or proposal submitted in an election for an expression of the voters' will." TEX. ELEC.CODE § 1.005(12).

[4] The Election Code defines a "proposition" as "the wording appearing on a ballot to identify a measure." TEX. ELEC.CODE § 1.005(15).

[5] Blum also contends that he is entitled to injunctive relief under section 273.081 of the Election Code, which provides:

> A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.

TEX. ELEC.CODE § 273.081. Blum, however, has not identified any provision of the Election Code violated by the City's actions here.

[6] *See* *City of Austin v. Thompson,* 147 Tex. 639, 219 S.W.2d 57, 59 (1949)(district court is without authority to enjoin even a void election); *Ex parte Barrett,* 120 Tex. 311, 37 S.W.2d 741, 742 (1931)(injunction against holding an election is outside the general scope of judicial power); *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.,* 105 Tex. 337, 148 S.W. 292, 295 (1912)(declined to enjoin canvassing of votes on ground that election was illegal); *Leslie v. Griffin,* 25 S.W.2d 820, 821–22 (Tex. Comm'n App.1930, judgm't adopted)(same); *Winder v. King,* 1 S.W.2d 587, 587–88 (Tex. Comm'n App.1928, judgm't adopted)(refused to enjoin official from calling election); *City of McAllen v. Garza,* 869 S.W.2d 558, 561 (Tex.App.—Corpus Christi 1993, writ denied)(refused to enjoin allegedly void election); *Kolsti v. Guest,* 565 S.W.2d 556, 557 (Tex.Civ.App.—Austin 1978, no writ)(declined to enjoin official from placing referendum on ballot); *Ellis v. Vanderslice,* 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ)(declined to enjoin official from certifying petition for local option election); *Stroud v. Stiff,* 465 S.W.2d 407, 408 (Tex.Civ.App.—Amarillo 1971, no writ)(refused to enjoin city for proceeding under election resolution).

[7] Section 9.004(b) provides:

> The ordinance ordering the election shall provide for the election to be held on the first authorized uniform election date prescribed by the Election Code or on the earlier of the date of the next municipal general election or the presidential general election. The election date must allow sufficient time to comply with other requirements of law and must occur on or after the 30th day after the date the ordinance is adopted.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Bertrand v. Holland, Tex.App.-Hous. (1 Dist.), April 10, 2018

466 S.W.3d 820
Supreme Court of Texas.

Allen Mark DACUS, Elizabeth C. Perez, and Rev. Robert Jefferson, Petitioners,
v.
Annise D. PARKER and City of Houston, Respondents

No. 13–0047
|
Argued February 24, 2015
|
Opinion Delivered: June 12, 2015
|
Rehearing Denied September 11, 2015

Synopsis
Background: Voters filed election contest against City, seeking declaration that a drainage systems and streets funding measure was invalid due to use of a misleading proposition on the ballot. The 234th District Court, Harris County, Reese Rondon, J., entered summary judgment in favor of City. The Houston Court of Appeals affirmed, 383 S.W.3d 557. Voters' petition for review was granted.

Holdings: The Supreme Court, Devine, J., held that:

[1] Supreme Court had jurisdiction to review decision of Court of Appeals with respect to election contest in order to resolve conflict among courts of appeal, and

[2] ballot proposition's failure to mention drainage charges to be imposed on most real property owners rendered funding measure invalid.

Reversed and remanded.

Guzman, J., issued concurring opinion in which Willett, J., joined.

West Headnotes (10)

[1] **Election Law**
Right of review and decisions reviewable

The Court of Appeals' decision in an election contest is generally final.

Cases that cite this headnote

[2] **Election Law**
Right of review and decisions reviewable

Supreme Court had jurisdiction to review decision of Court of Appeals with respect to election contest in which voters challenged validity of drainage systems and streets funding measure based on an alleged misleading proposition on the ballot, as decisions of state's appellate courts conflicted regarding the common law standard for describing a measure on the ballot. Tex. Gov't Code Ann. § 22.225(e).

Cases that cite this headnote

[3] **Municipal Corporations**
Amendment of charter or special act

Failure of ballot proposition for a proposed city charter amendment to mention drainage charges to be imposed on most real property owners across the city rendered drainage systems and streets funding measure invalid; by omitting the drainage charges, the proposition failed to substantially submit the measure with such definiteness and certainty that voters would not be misled. Tex. Loc. Gov't Code Ann. § 9.004.

4 Cases that cite this headnote

[4] **Evidence**
Particular facts

Voters are presumed to be familiar with every measure on the ballot. Tex. Loc. Gov't Code Ann. § 9.004(c)(1).

Cases that cite this headnote

[5] **Municipal Corporations**
Amendment of charter or special act

Given voters' presumed familiarity with every measure on the ballot, city charter amendments need not be printed in full on the ballot; not all details must be there. Tex. Loc. Gov't Code Ann. § 9.004(c)(1).

1 Cases that cite this headnote

[6] **Election Law**
Ballots in general

On the ballot, the identification of a measure must be formal and sure; it must capture the measure's essence.

Cases that cite this headnote

[7] **Election Law**
Ballots in general

Though neither the entire measure nor its every detail need be on the ballot, the importance and formality of an election still demand a threshold level of detail.

Cases that cite this headnote

[8] **Election Law**
Ballots in general

Though voters are presumed to be already familiar with ballot measures before reaching the voting booth, they can still be misled by an incomplete ballot description.

Cases that cite this headnote

[9] **Election Law**
Ballots in general

In an election contest challenging the sufficiency of the ballot description, the issue is whether the ballot substantially submits the question with such definiteness and certainty that the voters are not misled.

3 Cases that cite this headnote

[10] **Election Law**
Ballots in general

An inadequate ballot description may fail to provide definiteness and certainty, thereby misleading voters. in either of two ways: first, it may affirmatively misrepresent the measure's character and purpose or its chief features, or, second, it may mislead the voters by omitting certain chief features that reflect its character and purpose.

3 Cases that cite this headnote

***821** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

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Opinion

JUSTICE DEVINE delivered the opinion of the Court.

In this election contest, we consider whether a ballot proposition for a proposed city charter amendment meets the common law standard preserving the integrity of the ballot. The court of appeals upheld the proposition in this case. 383 S.W.3d 557, 571 (Tex.App.–Houston [14th Dist.] 2012). Even though the ballot did not make clear that the amendment imposed charges directly on many voters, the court concluded it still described the amendment's character and purpose and enabled voters to distinguish it from other propositions on the ballot. *See id.* at 566. In so doing, the court departed from the applicable standard, which requires that proposed amendments be submitted with such definiteness and certainty that voters are not misled. Though the ballot need not reproduce the text of the amendment or mention every detail, it must substantially identify the amendment's purpose, character, and chief features. Widespread charges are such a chief feature. Accordingly, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

I. Background and Procedural History

A narrow majority of voters in the City of Houston adopted an amendment to their City Charter creating a "Dedicated Pay–As–You–Go Fund for Drainage and Streets." The amendment—approved in the November 2, 2010 election—required the City to obtain funding from several sources. One source was drainage charges to be imposed on properties benefitting from the drainage system.[1] Prior to the election, the text of the proposed amendment (and the text of two others), a fiscal impact summary, and the text of the proposition to be placed on the ballot were published in the *Houston Chronicle*. The fiscal impact summary and the text of the amendment indicated that drainage charges would be imposed. The language on the ballot, however, merely stated the amendment was "Relating to the Creation of a Dedicated Funding Source to Enhance, Improve and Renew Drainage Systems and Streets." It asked, "Shall the City Charter of the City of Houston be amended to provide for the enhancement, improvement and ongoing renewal of Houston's drainage and streets by creating a Dedicated Pay–As–You–Go Fund for Drainage and Streets?" It did not mention the drainage charges.

Shortly after the election, several voters (the "Contestants")[2] filed an election contest. They sought a declaration that the proposition was "illegal and invalid as a matter of law," and a determination that the adoption of the amendment was invalid. The Contestants named the City of Houston and the Mayor, Annise Parker, as ***823** the contestees.[3] The City filed a motion for summary judgment, which the trial court granted, denying the Contestants all relief. The Contestants thereafter filed a motion to modify the judgment or enter judgment nunc pro tunc, as well as a motion for a new trial. The trial court denied the Contestants' motions, and the court of appeals affirmed. Here, the Contestants argue that the court of appeals erred in affirming the trial court's summary judgment in favor of the City and denying their motion for new trial.

II. Jurisdiction

[1] [2]This is an election contest with special jurisdictional considerations. The court of appeals' decision in an election contest is generally final. TEX. GOV'T CODE § 22.225(b)(2). There are exceptions, however, such as when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court." *Id.* §§ 22.001(a)(2); 22.225(c). Courts hold differently from each other "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.225(e). As discussed in more detail below, the decisions of the courts of appeals conflict regarding the common law standard for describing a measure on the ballot. This inconsistency should be clarified, and we have jurisdiction.

III. Sufficiency of Ballot Language

[3]The parties dispute whether the ballot sufficiently described the charter amendment when it did not mention that drainage charges would be imposed.[4] The Texas Election Code grants discretion to "the authority ordering the election [to] prescribe the wording of a proposition" unless otherwise provided by law. TEX. ELEC. CODE § 52.072(a). The "proposition" is "the wording appearing on a ballot to identify a measure," and the "measure" is "a question or proposal submitted in an election for an expression of the voters' will"—in this case, the proposed Charter amendment. *See id.* § 1.005(12), (15). The proposition must be printed "in the form of a single statement." *Id.* § 52.072(b).

The common law protects the integrity of the election with a minimum standard for the ballot language, but the parties disagree over what the standard requires. In 1888, we held that the proposition must "substantially submit [ ] the question ... with such definiteness and certainty that the voters are not misled." *Reynolds Land & Cattle Co. v. McCabe,* 72 Tex. 57,12 S.W. 165, 165 (1888).[5] Beyond summarizing ***824** parties' arguments about the standard in 1999, *Blum v. Lanier,* 997 S.W.2d 259, 262 (Tex.1999), and commenting on the standard for ballot descriptions of state constitutional amendments in 1949, *R.R. Comm'n v. Sterling Oil & Ref. Co.,* 147 Tex. 547, 218 S.W.2d 415, 418 (1949), we have not elaborated on the standard since then. In the meantime, the courts of appeals have articulated several additional rules. Some have said that the proposition should "constitute a fair portrayal of the chief features of the proposed law ... in words of plain meaning, so that it can be understood by persons entitled to vote."[6] Under this standard, the ballot language "is sufficient if enough is printed on the ballot to identify the matter and show its character and purpose."[7] Some have said that the test of a description's sufficiency is not the level of detail, but "whether from the ballot wording a voter of average intelligence can distinguish one proposition from another on the ballot."[8]And, at least in cases involving state constitutional amendments, some have said that the ballot should disclose the amendment's "intent, import, subject matter, or theme."[9]

The Contestants assert that the ballot must do more than merely enable voters to identify and distinguish the different propositions from each other, as the court below, 383 S.W.3d at 566, and some other courts of appeals have held, *see, e.g., Hardy,* 849 S.W.2d at 358; *Hill,* 414 S.W.2d at 692. Instead, it must "substantially submit" the amendment with "definiteness and certainty." *See Reynolds Land & Cattle Co.,* 12 S.W. at 165. The ballot in this case should have mentioned the drainage charges required by the amendment; by ignoring the charges, the ballot obscured the amendment's "chief features" and its "character and purpose."

The City responds that because of election notices and publication requirements, voters are presumed to be familiar with the measure before the election. *See Sterling Oil & Ref. Co.,* 218 S.W.2d at 418. The ballot need not educate voters about what they are already familiar with; it need only identify and distinguish which proposition refers to which measure so ***825** that voters know which is which on the ballot. *See Hardy,* 849 S.W.2d at 358. According to the City, requiring the ballot to identify a measure's "chief features" is just another way of saying that the proposition must sufficiently identify the measure so that the different propositions can be distinguished on the ballot.

[4] [5]It is true that voters are presumed to be familiar with every measure on the ballot.[10] Election notices for city charter amendments must be published in the newspaper before the election, and the notice must "include a substantial copy of the proposed amendment." TEX. LOC. GOV'T CODE § 9.004(c)(1). Accordingly, the amendment need not be printed in full on the ballot–not all details must be there. *See Sterling Oil & Ref. Co.,* 218 S.W.2d at 418. The proposition on the ballot, according to the Election Code, serves to "identify a measure." TEX. ELEC. CODE § 1.005(15).

But *how* must the ballot identify the measure? Does anything go as long as the voters will manage to

distinguish the different propositions on the ballot and which measures they refer to? Our jurisprudence indicates otherwise. Many cases have stated that the proposition must substantially submit the measure, name its chief features, or describe its character and purpose, without even mentioning whether the election involved other propositions needing to be distinguished.[11] Simply put, the proposition must "substantially submit[ ] the question" with "definiteness and certainty." *See Reynolds Land & Cattle Co.,* 12 S.W. at 165. In other words, the ballot must identify the measure *by* its chief features, showing its character and purpose. *See Wright,* 520 S.W.2d at 792; *Turner,* 201 S.W.2d at 91. Even the Election Code suggests that propositions "describe" measures. *See* TEX. ELEC. CODE § 274.001(a), (b) (requiring the secretary of state at times to word propositions "describ[ing]" proposed state constitutional amendments).

[6] [7] [8]A measure may be identified in many ways, but not all suit the ballot. News commentary might identify it by popular title. Local officials could refer to it by a number. Special interest groups may discuss it by reference to details that incidentally impact them but nonetheless fall short of being "chief features." Citizens may discuss it in any number of ways. But, on the ballot, the identification must be formal and sure; it must capture the measure's essence. Implicit in the common law standard is that though neither the entire measure nor its every detail need be on the ballot, the importance and formality of an election still demand a threshold level of detail. The common law standard prevents confusion at the ballot box over measures voters are already familiar with by ensuring that propositions identify measures for what they are. In other words, though voters are presumed to be already familiar with measures before reaching the voting booth, they can still be misled by an incomplete ballot description. Given the importance of the ***826** ballot, the common law relies on more than just a presumption; it ensures that the ballot informs voters of the chief features of the measures they vote on.

[9] [10]In an election contest challenging the sufficiency of the ballot description, the issue is whether the ballot "substantially submits the question ... with such definiteness and certainty that the voters are not misled." *Reynolds Land & Cattle Co.,* 12 S.W. at 165. An inadequate description may fail to do that in either of two ways. First, it may affirmatively misrepresent the measure's character and purpose or its chief features. Second, it may mislead the voters by omitting certain chief features that reflect its character and purpose. The common law standard thus requires that the ballot identify the measure for what it is, and a description that does either of the foregoing fails to comply with the standard. The common law safeguards the election, preventing voters from being misled and ensuring that the ballot substantially submits the measure.

Accordingly, we disapprove of language suggesting that the ballot need *only* "direct[ ] [the voter] to the amendment so that he can discern its identity and distinguish it from other propositions on the ballot."[12] True, the ballot should allow voters to identify and distinguish the different propositions, but in the process, it must also substantially submit the measure with definiteness and certainty.

Here, the ballot stated that the amendment would create a pay-as-you-go fund for drainage and streets. But the ballot did not identify a central aspect of the amendment: the drainage charges to be imposed on benefitting real property owners across the city. Such charges imposed directly on most residents of Houston are a chief feature of the amendment, part of the amendment's character and purpose. Merely stating that a fund is being established provides little definiteness or certainty about something important to the people—will they directly pay for it? Because the ballot did not mention the charges, it fell short of identifying the measure for what it is—a funding mechanism and fiscal burden on benefitting property owners. Failing to identify something for what it is can be misleading, even for those presumed to be familiar with it. Again, not every detail need be on the ballot, and short, general descriptions are often acceptable. But when the citizens must fund the measure out of their own pockets, this is a chief feature that should be on the ballot, and its omission was misleading.

Though our past decisions demonstrate that municipalities generally have broad discretion in wording propositions, they do not suggest that this discretion is unlimited. For example, in *Reynolds Land & Cattle Co.,* voters adopted a tax to fund new school buildings and supplement the state school fund. 12 S.W. at 165–66. The official order of election merely queried whether taxes "shall be levied for school purposes" without mentioning the specific purposes of building schools and supplementing the state fund. *Id.* at 165. Nonetheless, the order still "substantially submit[ted] the question ... with such definiteness and certainty that the voters [were] not misled." *Id.* at 165–66. Similarly, in *City of Austin v. Austin Gas–Light & Coal Co.,* the electorate approved "a special additional annual tax" to help fund Austin public schools. 69 Tex. 180, 7 S.W. 200, 204 (1887). We rejected arguments ***827** that voters were confused about the details of the tax and its relationship to preexisting taxes; the "proposition [was not] likely to mislead." *See id.* at 205. In both cases, the proposition identified the general purpose of the measure

(school purposes) and the tax to accomplish it. The governing authorities in these cases substantially submitted the measure by making clear all chief features. Accordingly, the ballot was not misleading.

Our 1949 decision in *Sterling Oil & Refining Co.* likewise demonstrates that some details may be omitted from the ballot description, but it does not suggest that the proposition may fail to substantially submit the measure. Texas voters amended the constitution, empowering the Legislature to authorize direct appeals to this Court in certain cases. 218 S.W.2d at 416; *see also* TEX. CONST. Art. V, § 3–b. The ballot had disclosed that direct appeals could be allowed in cases involving the constitutionality of laws and regulatory orders, but it had not mentioned that direct appeals could also be authorized in cases regarding the validity of a regulatory order on grounds other than the constitution. *Id.* at 416–17. Nonetheless, the description was sufficient. *Id.* at 418. The pre-election notices ensured the voters were "familiar with the amendment and its purposes when they cast their ballots." *Id.* Thus, the ballot omitted technical information about some types of direct appeals that could be authorized, but it still described the chief features of the amendment. In contrast, in this case, the ballot withheld a central component of the charter amendment—the drainage charges—essential to the character of the amendment.

The City notes that only twice have courts of appeals sided against the governing authority in disputes over ballot language. *See McAllen Police Officers Union,* 221 S.W.3d at 895; *Turner,* 201 S.W.2d at 91. Yet, importantly, almost none of the cases upholding an election involved a proposition that did not mention widespread charges against the citizenry.[13] Indeed, in several early cases, we refused the writ where the lower court correctly upheld the election because the proposition disclosed the purpose of the measure and the costs the citizens would directly bear. In *Beeman v. Mays,* the ballot allowed voting "For School Tax" and "Against School Tax," whereas it should have said, "For *increase* of school tax" and "Against *increase* of school tax." 163 S.W. at 359. The election was valid, *id.* at 359–60, for the ballot still described the character and purpose of the measure. *See also Moerschell,* 236 S.W. at 998, 1000 (upholding proposition about "continu[ing] or discontin[uing]" a tax even though the election arguably concerned a new tax). And in *Texsan Service Co. v. City of Nixon,* the ***828** propositions in a bond election stated they concerned "funds to aid in the construction, purchase, extension *and* improvement" of waterworks and sewer systems, without expressly mentioning that the city could choose between constructing *or* purchasing the systems. 158 S.W.2d 88, 90 (Tex.Civ.App.–San Antonio 1941, writ ref'd) (emphasis added). Voters would understand that the city could choose to construct or purchase the systems, and the ballot was not "misleading and confusing." *Id.* at 91. These cases involved, at most, technical errors, and contrast sharply with the City's failure to disclose on the ballot that many voters would face new drainage charges.

The City emphasizes that one court of civil appeals once upheld a six-word proposition submitting an entire city charter to a vote, *see England,* 269 S.W.2d at 816, and that another held that the two words "maintenance tax" sufficiently described a school-tax measure, *see Wright,* 520 S.W.2d at 790, 792. Texas law, however, now prevents the entire charter from being submitted to voters as a whole; instead, the charter shall be prepared "so that to the extent practicable each subject may be voted on separately." TEX. LOC. GOV'T CODE § 9.003(c). This statutory requirement reflects what the common law has always been—that the measure should be substantially submitted with definiteness and certainty to the voters. And, though mere use of the two words "maintenance tax" is suspect, at least it acknowledged the direct fiscal impact to citizens—something that the ballot in the present case failed to do. In neither of these cases did the governing authority omit such a central feature as in this case. In neither case did the governing authority so clearly fail to substantially submit the measure with such definiteness and certainty that voters would not be misled.

Thus, both we and the courts of appeals have generally upheld ballot descriptions identifying the character and purpose of the proposition. Schools and taxes. Direct appeals. Waterworks and bonds. But the proposition in this case contrasts sharply with the others—it did not mention the drainage charges to be imposed on most real property owners across the city. Because the proposition omitted a chief feature—part of the character and purpose—of the measure, it did not substantially submit the measure with such definiteness and certainty that voters would not be misled. Accordingly, the proposition was inadequate, and summary judgment should not have been granted in the City's favor.

In reaching this conclusion, we do not consider the Contestant's evidence that some voters were subjectively confused about the nature of the measure. Those who oppose election results will always be able to find voters who claim to have been misled. Admittedly, some court of appeals decisions have suggested that such evidence may be considered.[14] Nonetheless, we base our decision solely on the failure ***829** of the proposition to present the measure's chief features and its character and purpose. Because the ballot omitted a chief feature of the measure,

it did not substantially submit the measure with such definiteness and certainty that voters would not be misled.

In an amicus brief, the Texas Municipal League and Texas City Attorneys Association urge that home rule cities should look first to their charter, not the common law, for the standard governing ballot language. Notably, although the Houston charter provides no means for amending the charter, the Texas Local Government Code does. *See* TEX. LOC. GOV'T CODE § 9.004(a). Moreover, the Texas Election Code, not the City's charter, authorizes election contests. *See* TEX. ELEC. CODE § 233.001. Accordingly, state statutes and common law govern this dispute. Our common law prohibits the City from submitting such an amendment to the voters without disclosing on the ballot that many of them will pay for it out of their own pockets.

IV. Conclusion

The City did not adequately describe the chief features—the character and purpose—of the charter amendment on the ballot. By omitting the drainage charges, it failed to substantially submit the measure with such definiteness and certainty that voters would not be misled. Accordingly, summary judgment should not have been granted in the City's favor. We reverse the judgment of the court of appeals, and, because only the City moved for summary judgment, remand to the trial court for further proceedings consistent with this opinion.

Justice Guzman filed a concurring opinion, in which Justice Willett joined.

Justice Brown did not participate in the decision.

JUSTICE GUZMAN, joined by JUSTICE WILLETT, concurring.

I agree with the Court that the language of the ballot proposition was sufficiently uncertain and indefinite as to be potentially misleading. I further agree that by not describing the nature of the drainage charges, the ballot language omitted a chief feature of the proposition, thereby violating the common-law standard governing ballot clarity. I write separately to indicate my confidence in the continued viability of the common-law standard as it applies to ballot questions and to underscore its particular utility in the context of revenue-raising ballot propositions.

Texas has long required a baseline degree of precision in ballot language. In 1888, we held that a ballot question must be submitted "with such definiteness and certainty that the voters are not misled." *Reynolds Land & Cattle Co. v. McCabe,* 72 Tex. 57, 12 S.W. 165, 165 (1888). Decades later, a Texas appellate court held that a ballot proposition had to state the measure's "chief features" so as to indicate its "character and purpose." *See Turner v. Lewie,* 201 S.W.2d 86, 91 (Tex. Civ. App.–Fort Worth 1947, writ dism'd) (citing 18 AM. JUR. § 180 at 298 (1939), collecting cases, and deriving "chief features" language from *In re Opinion of the Justices,* 271 Mass. 582, 171 N.E. 294, 297 (1930)). Though not the sole articulation of the law in this context, these standards form the essential contours of our ballot-language jurisprudence involving questions of this nature.

In the City's accommodating view, the chief-features test essentially means ballot language must be specific enough to permit a voter to distinguish one proposition from another on the ballot. This concept is frequently traced back to *Hill v. Evans,* ***830** which suggested that the ballot need only "direct" the voter to the amendment so it can be identified and distinguished from other propositions on the ballot. 414 S.W.2d 684, 692 (Tex.Civ.App.–Austin 1967, writ ref'd n.r.e.). Today, the Court disapproves of this language. I wholeheartedly concur and wish to further reiterate the infeasibility of the City's construction.

Take, for example, a ballot featuring multiple questions on dramatically different topics. With very little thematic overlap, even a cursory description of the varying questions could serve to differentiate one from another and would thus serve to identify each as distinct. But identification hardly guarantees that the same cursory definition would accurately describe the chief features of the ballot question. Better yet, put aside the theoretical and simply take the present case. In addition to the drainage-fund proposition at issue here, the November 2010 ballot also contained propositions addressing the terms of residency for Houston's elected officials and the use of red-light cameras in the city. Even a substantially less thorough description of the drainage-fund proposition than the inadequate one the City provided would nonetheless identify the drainage-fund question as distinct from the red-light-camera or residency questions. But again, such a pithy description would hardly ensure that the measure's chief features are described or meet the

standard we have required for more than a century: A ballot proposition must be written with such definiteness and certainty that the voters are not misled. *Reynolds,* 12 S.W. at 165. Providing only enough information on a ballot to allow propositions to be distinguished from one another is necessary, but not necessarily sufficient. To satisfy the chief-features requirement, more than mere identification is required. Therefore, I agree with the Court that the City's argument to the contrary is unpersuasive, and I would overrule decisions from the courts of appeals to the extent they suggest the ballot need only enable voters to identify and distinguish the different propositions from one another. *See, e.g., Dacus v. Parker,* 383 S.W.3d 557, 566 (Tex.App.–Houston [14th Dist.] 2012); *Hardy v. Hannah,* 849 S.W.2d 355, 358 (Tex.App.–Austin 1992, writ denied); *Hill,* 414 S.W.2d at 692.

The City's semantic obfuscation is particularly egregious here, considering that the ballot proposition at issue concerned a revenue-raising measure. The City refers to this—perhaps euphemistically—as a drainage "charge" to be paid into a "dedicated pay-as-you-go fund." Before this Court, the parties disputed whether this charge was in fact tantamount to a "fee" or a "tax." If the drainage charges involved here are not a tax, they at least bear some of its hallmarks. *See TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns,* 397 S.W.3d 173, 175 n. 3 (Tex.2013) ("A charge is a fee rather than a tax when the primary purpose of the fee is to support a regulatory regime governing those who pay the fee."); *Hurt v. Cooper,* 130 Tex. 433, 110 S.W.2d 896, 899 (1937) (noting that where a fee's "primary purpose ... is the raising of revenue, then such fees are in fact ... taxes ... regardless of the name by which they are designated"). But whatever the true nature of the "charge" here, I find it difficult to conceive of a scenario in which a revenue-raising measure would be an element of a proposition and yet not constitute one of its chief features. To be sure, voters are presumed to have knowledge of the features and issues contained on a ballot. But that presumption does not absolve the City of the responsibility to fairly and fully portray a revenue-raising measure on the ballot, and the fact that the complete text is published in a newspaper before the ***831** election does not relieve the City of this responsibility, as it suggests.[1] If the common-law standard is to maintain currency, it must at least mean that revenue-raising elements of a proposition are a chief feature, and the ballot language should reflect as much.

Direct democracy is of paramount importance to the citizens of this State. In perhaps no other area of self-government is the citizen brought closer to the legislative process. A fact issue exists as to whether the City's ballot language omitted a chief feature of a measure and thereby deprived voters of the opportunity to make a fully informed decision. Accordingly, I respectfully concur in the Court's decision to remand to the trial court for further proceedings.

All Citations

466 S.W.3d 820, 58 Tex. Sup. Ct. J. 1076

Footnotes

1 The amendment described this source of funding as follows:
> [a]ll proceeds of drainage charges, which beginning in fiscal year 2012, and continuing thereafter shall be imposed in an equitable manner as provided by law to recover allocable costs of providing drainage to benefitting properties, with drainage charges initially set at levels designed to generate at least $125 million for fiscal year 2012.

2 We refer to the petitioners, Allen Mark Dacus, Elizabeth C. Perez, and Rev. Robert Jefferson, as the "Contestants." It is not disputed in this summary judgment proceeding that they have standing as registered qualified voters in Harris County, Texas. *See* TEX. ELEC. CODE § 233.002.

3 We refer to the City and Mayor collectively as "the City."

4 The Contestants' briefing focuses on the drainage charges, mentioning another funding source imposed by the amendment—developer-impact fees—only in passing. The Contestants did not mention the developer-impact fees in the court of appeals. Accordingly, we decide this case on the basis of the drainage charges without considering whether the ballot should have mentioned the developer-impact fees.

5 The statement in *Reynolds Land & Cattle Co.* may have referred to the order calling the election rather than the text of the ballot. *See* 12 S.W. at 166. Since then, this standard has frequently been applied to the ballot language, and we do so today. *See Blum v.*

Lanier, 997 S.W.2d 259, 262 (Tex.1999); *City of McAllen v. McAllen Police Officers Union,* 221 S.W.3d 885, 895 (Tex.App.–Corpus Christi 2007, pet. denied); *Brown v. Blum,* 9 S.W.3d 840, 847 (Tex.App.–Houston [14th Dist.] 1999, pet. dism'd w.o.j.); *Bischoff v. City of Austin,* 656 S.W.2d 209, 212 (Tex.App.–Austin 1983, writ ref'd n.r.e.); *Moore v. City of Corpus Christi,* 542 S.W.2d 720, 723 (Tex.Civ.App.–Corpus Christi 1976, writ ref'd n.r.e.); *Wright v. Bd. of Trs. of Tatum Indep. Sch. Dist.,* 520 S.W.2d 787, 792 (Tex.Civ.App.–Tyler 1975, writ dism'd); *England v. McCoy,* 269 S.W.2d 813, 815 (Tex.Civ.App.–Texarkana 1954, writ dism'd); *Turner v. Lewie,* 201 S.W.2d 86, 91 (Tex.Civ.App.–Fort Worth 1947, writ dism'd).

6 *Turner,* 201 S.W.2d at 91; *see McAllen Police Officers Union,* 221 S.W.3d at 895; *Brown v. Blum,* 9 S.W.3d at 848; *Wright,* 520 S.W.2d at 792.

7 *Turner,* 201 S.W.2d at 91; *see In re Roof,* No. 14–12–00258–CV, 2012 WL 1072038, at *1 (Tex.App.–Houston [14th Dist.] Mar. 28, 2012) (per curiam) (mem. op.); *McAllen Police Officers Union,* 221 S.W.3d at 895; *Brown v. Blum,* 9 S.W.3d at 848; *Hardy v. Hannah,* 849 S.W.2d 355, 358 (Tex.App.–Austin 1992, writ denied); *Winger v. Pianka,* 831 S.W.2d 853, 856 (Tex.App.–Austin 1992, writ denied); *Moore,* 542 S.W.2d at 723; *Wright,* 520 S.W.2d at 792; *Hill v. Evans,* 414 S.W.2d 684, 692 (Tex.Civ.App.–Austin 1967, writ ref'd n.r.e.); *England,* 269 S.W.2d at 815; *Whiteside v. Brown,* 214 S.W.2d 844, 851 (Tex.Civ.App.–Austin 1948, writ dism'd).

8 *Hardy,* 849 S.W.2d at 358; *see In re Roof,* 2012 WL 1072038, at *1; *McAllen Police Officers Union,* 221 S.W.3d at 895; *Brown v. Blum,* 9 S.W.3d at 848; *Rooms With a View, Inc. v. Private Nat'l Mortg. Ass'n, Inc.,* 7 S.W.3d 840, 850 (Tex.App.–Austin 1999, pet. denied); *Evans,* 414 S.W.2d at 692.

9 *Rooms With a View, Inc.,* 7 S.W.3d at 850; *see Whiteside,* 214 S.W.2d at 851. Texas law is more specific about propositions describing state constitutional amendments than those describing charter amendments. If the legislature does not word the proposition submitting a constitutional amendment, then the secretary of state must "describe the proposed amendment in terms that clearly express its scope and character." TEX. ELEC. CODE § 274.001(a), (b).

10 *See Sterling Oil & Ref. Co.,* 218 S.W.2d at 418; *In re Roof,* 2012 WL 1072038, at *1; *Brown v. Blum,* 9 S.W.3d at 847–48; *Rooms With a View, Inc.,* 7 S.W.3d at 850; *Hardy,* 849 S.W.2d at 358; *Winger,* 831 S.W.2d at 856; *Bischoff,* 656 S.W.2d at 212; *Moore,* 542 S.W.2d at 723; *Hill,* 414 S.W.2d at 692; *England,* 269 S.W.2d at 815; *Whiteside,* 214 S.W.2d at 851.

11 *See, e.g., Reynolds Land & Cattle Co.,* 12 S.W. at 165–66; *Moore,* 542 S.W.2d at 724; *England,* 269 S.W.2d at 817–18; *Whiteside,* 214 S.W.2d at 850–51; *Flowers v. Shearer,* 107 S.W.2d 1049, 1054 (Tex.Civ.App.–Amarillo 1937, writ dism'd).

12 *See, e.g., In re Roof,* 2012 WL 1072038, at *1; *McAllen Police Officers Union,* 221 S.W.3d at 895; *Brown v. Blum,* 9 S.W.3d at 848; *Rooms With a View, Inc.,* 7 S.W.3d at 850; *Hardy,* 849 S.W.2d at 358; *Hill,* 414 S.W.2d at 692.

13 Many appellate cases regarding the sufficiency of ballot descriptions have related, to some extent, to widespread taxes. In almost all of these, the ballot disclosed that the tax would be imposed. *See, e.g., Wright,* 520 S.W.2d at 789; *Whiteside,* 214 S.W.2d at 849; *Texsan Serv. Co. v. City of Nixon,* 158 S.W.2d 88, 90 (Tex.Civ.App.–San Antonio 1941, writ ref'd); *Moerschell v. City of Eagle Lake,* 236 S.W. 996, 998 (Tex.Civ.App.–Galveston 1921, writ ref'd); *Beeman v. Mays,* 163 S.W. 358, 359 (Tex.Civ.App.–Dallas 1914, writ ref'd); *cf. Wiederkehr v. Luna,* 297 S.W.2d 243, 245 (Tex.Civ.App.–Waco 1956, no writ) (upholding election where three related propositions were voted on, two of which mentioned the tax that would be imposed). *But see Cameron v. City of Waco,* 8 S.W.2d 249, 255 (Tex.Civ.App.–Waco 1928, no writ) (holding that bond election was valid although election order did not mention the levy of taxes to pay the interest on the bonds). Here, although the Contestants conceded at oral argument that the drainage charges are not a tax (at least insofar as the charges were not used to improve streets), a question we need not reach, the point is the same: the ballot must substantially submit the measure.

14 *See, e.g., Hardy,* 849 S.W.2d at 358 ("These voters did not, however, state that they were unable to distinguish this particular proposition from the other twelve propositions on the ballot, nor does Podesta assert that any voters had this difficulty."); *Hill,* 414 S.W.2d at 693 ("No voter is shown to have been deceived or misled by the proposition as stated on the ballot."); *Wiederkehr,* 297 S.W.2d at 247 ("[T]here is no evidence in the case at bar that any elector was misled or deceived by the ballot proposition employed."); *Whiteside,* 214 S.W.2d at 851 ("It is not shown that any voter was misled or deceived by the form of submission of this amendment."); *Moerschell,* 236 S.W. at 1000 ("[T]here is neither contention that they did not understand what they were voting on nor that a different result would have followed if the proposition had been for or against the levy of such a tax as appellant suggests it should have been.").

1 The dissent in *Hill v. Evans* rightly noted that newspaper publication is simply a statutory requirement, not a panacea that

insulates the actual proposition language from review:

> The majority seems to imply that compliance with publication requirements relating to proposed constitutional amendments cures all. This is patently erroneous. The law requires certain publication of the proposed amendment. It also requires a ballot which describes the scope and character of the proposed amendment. These requirements complement each other. Substantial compliance with both requirements is prerequisite to a fair or lawful election.

Hill v. Evans, 414 S.W.2d 684, 696 (Tex.Civ.App.–Austin 1967, writ ref'd n.r.e.) (Hughes, J., dissenting).

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470 S.W.3d 819
Supreme Court of Texas.

IN RE F.N. WILLIAMS, Sr., and Jared Woodfill, Relators

NO. 15–0581
|
Opinion Delivered: August 19, 2015

Synopsis

Background: Referendum proponents petitioned for writ of mandate challenging wording of ballot question.

Holdings: The Supreme Court held that:

[1] ballot question on referendum for repeal of ordinance had to be phrased so a "No" vote meant to repeal the ordinance, but

[2] referring to ordinance as city's "Equal Rights Ordinance" was not improperly politically slanted.

Petition granted.

West Headnotes (8)

[1] **Election Law**
Further review

Referendum proponents' petition for writ of mandate challenging wording of ballot question was within the narrow class of cases in which resort to the court of appeals was excused, where the election was imminent. Tex. Elec. Code Ann. § 273.061; Tex. R. App. P. 52.3(e).

Cases that cite this headnote

[2] **Mandamus**
Nature of acts to be commanded

Mandamus may issue to compel public officials to perform ministerial acts, as well as to correct a clear abuse of discretion by a public official.

5 Cases that cite this headnote

[3] **Mandamus**
Nature of acts to be commanded

An act is "ministerial," as would support mandamus relief, when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.

4 Cases that cite this headnote

[4] **Municipal Corporations**
Referendum procedure

Cities generally have broad discretion in wording propositions on the ballot, but state or local laws may limit this discretion.

Cases that cite this headnote

[5] **Municipal Corporations**
Referendum procedure

The common law limits a city's discretion in wording propositions, demanding that the ballot substantially submit the measure with definiteness and certainty by identifying the measure's chief features and character and purpose.

Cases that cite this headnote

[6] **Municipal Corporations**
Referendum procedure

Upon a referendum for the repeal of a city ordinance, a city charter provision stating that ballots used when voting upon proposed and referred ordinances shall set forth upon separate lines the words "For the Ordinance" and "Against the Ordinance" imposed a ministerial duty for the city to phrase the ballot question so that a "NO" or "AGAINST" vote meant to repeal the ordinance and a "YES" or "FOR" vote meant to maintain the ordinance, even though the city charter was preempted to the extent that it purported to require the specific words "For the Ordinance" and "Against the Ordinance." Tex. Elec. Code Ann. § 52.073(a).

Cases that cite this headnote

[7] **Municipal Corporations**
Referendum procedure

The heading of the ballot question on a referendum for the repeal of a city ordinance was not improperly politically slanted in referring to the ordinance as the city's "Equal Rights Ordinance," where the ordinance itself contained the words "Equal Rights" in a heading, and the subject of the ordinance was discrimination in city employment, city services, city contracts, public accommodations, private employment, and housing.

Cases that cite this headnote

[8] **Mandamus**
Acts of officers, boards, or private corporations

No adequate remedy by appeal existed, and thus mandamus relief was proper, for city's violation of its charter in phrasing a ballot question on a referendum for the repeal of a city ordinance so that a "YES" vote meant to repeal the ordinance.

Cases that cite this headnote

***820** ON PETITION FOR WRIT OF MANDAMUS

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Opinion

PER CURIAM

This case involves yet another mandamus proceeding concerning the City of Houston's equal rights ordinance, the referendum petition calling for its repeal, and the City Council's duties in response. *See In re Woodfill,* 470 S.W.3d 473, 481, 2015 WL 4498229, at *7 (Tex.2015) (per curiam) (directing the City Council to comply with its ministerial duties and either repeal the ordinance or submit it to popular vote). Though the ordinance is controversial, the law governing the City Council's duties is clear. Our decision rests not on our views on the ordinance—a political issue the citizens of Houston must decide—but on the clear dictates of the City Charter. The City Council must comply with its own laws regarding the handling of a referendum petition and any resulting election. When the law imposes a ministerial duty on the City Council and the City Council does not comply, and there is no adequate remedy by appeal, mandamus may issue. *Id.* at 475–476, 2015 WL 4498229, at *1.

Pursuant to a citizen-initiated referendum petition, the Houston City Council ordered that the ordinance be submitted to voters in the upcoming November 2015 election. The City Council chose to describe the issue on the ballot as follows:

PROPOSITION NO. 1

[Relating to the Houston Equal Rights Ordinance.]

Shall the City of Houston repeal the Houston Equal Rights Ordinance, Ord. No.2014–530, which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?

The ballot will allow voters to choose between "Yes" and "No" when voting on this proposition.

The Relators—two signers of the referendum petition—contest this wording. They urge that the City Charter requires an up or down vote on the ordinance itself rather than a vote on its "repeal." They also assert that the phrase "Houston Equal Rights Ordinance" should not be on the ballot. The City responds that this Court lacks jurisdiction to grant mandamus relief and interfere with the ongoing election process or to enjoin the City from ***821** using the phrase "Houston Equal Rights Ordinance" on the ballot. The City argues the Charter gives it discretion to submit the repeal of the ordinance—rather than the ordinance itself—to the voters, and the City may identify the ordinance as the "Houston Equal Rights Ordinance."

The Texas Election Code confers jurisdiction on this Court to "issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election." TEX. ELEC. CODE § 273.061. In *Blum v. Lanier,* we held that signers of a petition may seek injunctive relief to correct deficiencies in the ballot language "if the matter is one that can be judicially resolved ... without delaying the election." 997 S.W.2d 259, 263–64 (Tex. 1999). Although that case involved injunctive relief, the reasoning also applies to mandamus proceedings. *See id.* at 262 (relying on cases granting mandamus relief when holding the petition signers had standing to seek injunctive relief).

[1]Although the Relators did not seek mandamus first in the court of appeals, we note "the imminence of the election places this case within the narrow class of cases in which resort to the court of appeals is excused." *Bird v. Rothstein,* 930 S.W.2d 586, 587 (Tex. 1996) (orig. proceeding); *see also* TEX. R. APP. P. 52.3(e). Indeed, for the same compelling reason that we exercise jurisdiction even though mandamus relief was not first sought in the court of appeals, we also immediately grant relief without requesting additional briefs on the merits. *See* TEX. R. APP. P. 52.8(b).

The City Council adopted the current ballot language on August 5, 2015. Two days later, the Relators petitioned for emergency and mandamus relief, averring that the Houston Voter Registrar requires final ballot language for printing no later than August 31, 2015, for the election on November 3, 2015, and that if this Court grants relief, the City Council should have time to meet and adopt revised language. The City Council filed a response but did not contest the deadlines identified by the Relators. In the past, we have granted relief without requesting additional briefing—especially in election cases—when time is critical, the issues are clear, and all parties have had a chance to respond. *See, e.g., In re Palomo*, 366 S.W.3d 193, 194 (Tex. 2012) (per curiam) (noting that the Court granted mandamus relief "without opinion so as not to delay printing of the ballots"); *In re Francis,* 186 S.W.3d 534, 538, 543 (Tex. 2006) (conditionally granting mandamus relief fourteen days after petition was filed); *In re Fitzgerald,* 140 S.W.3d 380, 381 (Tex. 2004) (per curiam) (conditionally granting mandamus relief three days after petition was filed); *In re Sanchez,* 81 S.W.3d 794, 795 (Tex. 2002) (per curiam) (noting that mandamus relief was conditionally granted with opinion to follow). Such situations are infrequent, but when prompt action is required, we may act accordingly.

[2] [3]Mandamus may issue to compel public officials to perform ministerial acts, as well as "to correct a clear abuse of discretion by a public official." *Anderson v. City of Seven Points,* 806 S.W.2d 791, 793 (Tex. 1991). "An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Id.*

[4] [5]Cities "generally have broad discretion in wording propositions" on the ballot. *Dacus v. Parker,* 466 S.W.3d 820, 826 (Tex. 2015). State or local laws, however, ***822** may limit this discretion. *See id.* at 823. The common law also limits it, demanding that the ballot "substantially submit the measure with definiteness and certainty" by identifying the measure's chief features and character and purpose. *Id.* at 826.

In this case, the Houston Charter outlines the City Council's duties. Once a referendum petition and certification properly invoke the City Council's duties, then the City Council

> shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election, or the Council may, in its discretion, call a special election for that purpose; and such ordinance or resolution shall not take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.

Houston, Tex., Charter, art. VII-b, § 3. Of its own accord, the City Council may also submit proposed ordinances to popular vote for adoption or repeal:

> The Council, on its own motion, may submit to popular vote for adoption or rejection or repeal at any election any proposed ordinance or resolution or measure, in the same manner and with the same force and effect as provided in this Article for submission on petition.

Id. art. VII-b, § 4.

Because the Charter requires a majority vote "in favor" of the ordinance for it to take effect, the Relators argue that the City Council must submit the ordinance such that voters may vote directly "in favor" of the ordinance or against it. The City Council responds that the Charter allows it to ask voters whether they would "repeal" the ordinance. According to the City, a vote against repeal is the same as a vote in favor of the ordinance. The Charter authorizes the Council to "submit to popular vote for adoption or rejection or *repeal* at any election any proposed ordinance." *Id.* (emphasis added).

[6]Although the parties argue about the meaning of a vote "in favor" of the ordinance, Section 5 of the Charter clearly requires the vote to be on the ordinance itself rather than its repeal:

> The ballots used when voting upon such proposed and referred ordinances, resolutions or measures shall set forth their nature sufficiently to identify them, and shall also set forth upon separate lines the words "For the Ordinance" and "Against the Ordinance", or "For the Resolution" or "Against the Resolution."

Id. art. VII-b, § 5. Admittedly, the Texas Election Code preempts part of this mandate, allowing only the choice between "FOR" and "AGAINST," or else "YES" and "NO," to appear on the ballot. TEX. ELEC. CODE § 52.073(a), (e). Nonetheless, the mandate that the vote be on the ordinance itself remains.

Here, the City Council determined that voters should choose between "Yes" and "No" regarding the repeal of the ordinance. The Charter, however, when read in conjunction with the Election Code, requires a choice of "Yes" or "No" (or "For" or "Against") as to the ordinance itself. Because the Charter clearly defines the City Council's obligation to submit the ordinance—rather than its repeal—to the voters and gives the City Council no discretion not to, we hold that this is a ministerial duty.

[7]The Relators also argue that the words "Houston Equal Rights Ordinance" ***823** should not appear on the ballot because they are not in the ordinance and are politically slanted. Yet this is a *Houston ordinance,* and the ordinance itself contains the words "*Equal Rights* " in a heading. Even the referendum petition referred to "Ordinance No.2014–530, otherwise known as the 'Equal Rights Ordinance.' " The City Council did not abuse its discretion by placing these words on the ballot.

[8]In summary, the City Council has a ministerial duty to submit the ordinance to an affirmative vote by the people of Houston. As discussed above, the deadline for revising the ballot language is rapidly approaching. The City Council asserts that despite the short deadlines, a post-election election contest provides an adequate remedy by appeal. We have previously rejected this argument, holding that if "defective wording can be corrected" prior to the election, then "a remedy will be provided that is not available through a subsequent election contest." *Blum,* 997 S.W.2d at 264. No adequate remedy by appeal exists.

Accordingly, without hearing oral argument, we conditionally grant mandamus relief. TEX. R. APP. P. 52.8(c). The City Council is directed to word the proposition such that voters will vote directly for or against the ordinance. The writ will issue only if the City Council does not comply.

All Citations

470 S.W.3d 819, 58 Tex. Sup. Ct. J. 1564

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Tab R - Memorandum Opinion

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00075-CV

In re Linda Durnin, Eric Krohn, & Michael Lovins

ORIGINAL PROCEEDING FROM TRAVIS COUNTY

M E M O R A N D U M O P I N I O N

The petition for writ of mandamus is denied. *See* Tex. R. App. P. 52.8(a).

Thomas J. Baker, Justice

Before Chief Justice Byrne, Justices Baker and Smith

Filed: February 24, 2021

Tab S - City of Austin Response

No. 03-21-00075-CV

IN THE
THIRD COURT OF APPEALS
AUSTIN, TEXAS

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

ORIGINAL PROCEEDING

CITY OF AUSTIN'S RESPONSE IN OPPOSITION TO 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).

ISSUE PRESENTED

Section 52.072(a) of the Election Code authorizes the governing body of a city council to "prescribe the wording of a proposition" that is to appear on the ballot containing a "measure." Austin's city 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 establishing 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

As authorized by Section 9.004(a) of the Local Government Code, Austin's City Charter allows the City's qualified voters—defined in Tex. Elec. Code § 11.002(a)—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.[1]

Citizens may propose ordinances by collecting the requisite number of signatures from "qualified [city] voters" on a petition, then submitting the petition and the "initiated ordinance" to Austin's city clerk for verification of whether the signature requirements are met. *Id*. Art. IV, §§ 1, 4. If they are, the city clerk certifies the petition and initiated ordinance to the city council. *Id*. § 4.

Once presented with the verified petition and initiated ordinance, the council has two options. It may pass the ordinance, as presented, within ten days of the city clerk's certification. *Id*. §

[1] Under Tex. R. Evid. 504, the Court may judicially notice Austin's charter. *See* https://www.municode.com/library/tx/austin/codes/code_of_ordinances.

4(a). Or it may order an up-or-down election on the ordinance, as presented, on the next "allowable election date." *Id.* § 4(b).

If the council chooses the latter option—putting the proposed ordinance to a popular vote—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).

In this regard, it is important to keep in mind the distinction between a "measure" and a "proposition." The "measure" is the proposal being put up for a vote. Tex. Elec. Code § 1.005(12). The "proposition" is the wording appearing on the ballot to identify the measure being put up for vote. *Id.* § 1.005(15). The issue in this case is about the language of the proposition, not the language of the measure.

B. Context For The Initiated Ordinance

1. Constitutional Boundaries For Criminalization In The Sphere of Homelessness

Those who live on the streets instead of in dwellings present cities across the country with heart-rending and vexing public policy dilemmas. Those cities, Austin included, also have to confront complicated issues of constitutional law. In particular, the courts have increasingly had to deal with constitutional line drawing to address the criminalization of aspects of the life of those faced with homelessness.

The Supreme Court started drawing constitutional lines in this area at least as early as 1972 in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In that case, the Court struck down as unconstitutionally vague a local ordinance establishing a criminal offense for "vagrancy." Closer to home and a couple of decades later, 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 ex-

periencing homelessness. *Johnson v. City of Dallas*, 860 F.Supp. 344 (N.D. Tex. 1994).[2]

Still later, in the spring of 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.[3] The opinion drives home the delicacy of the line drawing task facing local city councils by carefully identifying what it was *not* deciding, either way, including questions about whether the act of sleeping outside or obstructing public rights of way can ever be criminalized. *Id*. at 617 n.8 (noting that such issues are dependent on whether such ordinances punishes persons who lack the means to live out the "universal and unavoidable consequences of being human").

[2] The Fifth Circuit vacated the judgment, not on the merits, but on jurisdictional grounds. *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995).

[3] The actual panel opinion is found at pages 603-18 of the reported decision.

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

In the summer and early fall after the *Boise* decision, Austin's city council revisited its existing city code provisions that spoke most directly to criminalization of aspects of homelessness. It amended three parts of the city code, §§ 9-4-11, 9-4-13, and 9-4-14. *See* Relator App. Tab I (containing texts of these code 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, in part to comport with the due process vagueness issues delineated in *Papachristou*.

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

Soon after, an organization was formed to launch a petition drive to initiate an ordinance that would criminalize conduct not directly criminalized in the council's revisions and add further restrictions on activities by those experiencing homelessness. The

circulated petition was entitled "Petition To Save Austin Now By Restoring Safety and Sanity To Our City Streets." *See* Relator App. Tab B. It had a caption that 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*.

The petition received the requisite number of signatures to be certified to the city council for consideration under Section 4 of Article IV of the city charter, *see* Relator App. Tab C, and 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 the council with a memorandum on ballot language options for this particular proposition—called the "Save Austin Now Petition"—offering two options. *See* Relator App. Tab E at 3. After receiving public comment on this and other matters, the council voted unanimously to adopt Option 2's ballot language.[4] The adopted language for Proposition B is:

[4] The unofficial transcript of the session is available at https://www.austintexas.gov/edims/document.cfm?id=354870. The council action adopting the language is at lines 3-6 on page 72 of the link.

> 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

The body of the initiated ordinance begins with Part 1, headed "Purpose." It is largely composed of editorial comment critical of the council's actions in the summer and fall of 2019 revising §§ 9-4-11, 9-4-13, and 9-4-14 of the city code. It recites that since then the city "has been plagued by threats to public health and safety" due to various types of outdoor public activity. It gives a general characterization of its version of what the initiated ordinance would accomplish. 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. The ordinance reveals what subsection (B) of the provision would provide for in terms of a criminal offense if adopted. What it does not reveal is how far-reaching the change is that would be effected. Under the initiated ordinance's Part 2, it would be a criminal offense if a person camps in any public area other than one designated by the City's Parks and Recreation Department.[5]

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

[5] 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 1 of the initiated ordinance describes what it is trying to outlaw as "threats to public health and safety." This suggests that the proponents of the ordinance envisioned not only eliminating *mens rea* requirements for the reconfigured criminal offenses they were creating but also potentially increasing the penalties under the initiated ordinance up to four-fold. But Section 6.01 of the Penal Code appears to foreclose that possibility because of the initiated ordinance's elimination of *mens rea* requirements.

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 is stated (but not provided). Other examples of nonsensical provisions left intact but neutered are the would-be-repealed sub-parts (G) and (H), which apply only if there is a sub-part (B)(2)—which would not exist under Part 2 of the initiated ordinance. These provisions, respectively, carve-out from the offense category such things as participating in a parade or festival and provide an affirmative defense for sitting or lying in the forbidden place because of a disability.

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.

Part 4 expands the parts of town where sleeping outdoors and sitting or lying down is a criminal offense, eliminates the oppor-

tunity to correct the offending conduct after a warning, and provides that there is no *mens rea* component for an offense under it.[6]

ARGUMENT

It bears repeating that the issue in this case is not about a choice between the policies that would be adopted through the initiated ordinance and the policies currently in effect in the three affected city code provisions. Rather, it is about whether the language that Austin's city council adopted to describe the proposed initiated measure on the ballot is legally sufficient. As further explained below, it plainly is.

It also must be noted, at least as a precaution, that the relators' brief contains numerous statements of fact that are not supported by the record that they have provided and that, therefore, can play no role in the Court's disposition of their petition. A court cannot resolve mandamus issues involving disputed facts, particularly in election-related suits. *In re Woodfill*, 470 S.W.3d 473, 478 (Tex. 2015). Listed in the footnote below are some of the factual

[6] The foregoing discussion of the changes to, and expansion of, criminal liability in Parts 2, 3, and 4 of the initiated ordinance are not intended to be comprehensive. Time and weather constraints have limited the opportunity for a thoroughgoing analysis.

assertions in the petition that, even assuming they are material, are unsupported and thus inappropriate for consideration in connection with this case.[7]

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 such cases as *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). The relators are wrong on both counts, which are addressed in turn below.

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 whatever for their argument that the city council was compelled to use the caption of the Save Austin Now petition, and *only* that caption, for the language for

[7] Relator Pet. 1 (2nd full para. after first sentence); *id.* 8 (2nd full para. after first sentence); and *id.* 12 (first full para.).

the proposition language for the initiated ordinance propounded by their petition.

The provisions of Article IV of the city charter that govern the initiative process for Austin measures demonstrate the emptiness of relators' argument. Start with § 1. With exceptions and qualifications not relevant to this point (and with emphases added), 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 (and the council does not itself adopt the initiated ordinance), 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. In the situation here, 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. It is not part of it. The caption is the *proposition* that briefly lays out the measure (or initiated ordinance) that itself is on the ballot for the voters to read when they vote. State law—specifically 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.

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) firmly 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 failed 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) of the Election Code, which did empower city councils to determine the descriptive language for measures. For another, it is bottomed on a forced reading of the relevant charter provision that is untethered from the terms of the provision and would re-

quire the Court to add words to the provision so that it would be a total outlier in Texas law.

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

The relators specifically 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 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, each of which is specifically addressed, and refuted, in turn below. *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 the 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 on these matters, *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015), 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. When all is said and done, 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 v. Parker*, 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.

3. Mandamus Is Only Available To Compel The Council To Perform A Clear, Non-Discretionary Duty.

The mandamus relief authorized under Section 273.061 of the Election Code to enforce a "duty imposed by law in connection with the holding of an election" is not a matter of right. Courts must exercise discretion, bringing equitable considerations to bear, in deciding whether to award such extraordinary and discretionary relief. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993); *see also City of Houston v. Houston Municipal Employees Pension System*, 549 S.W.3d 566, 580 (Tex. 2018).

Only a tightly circumscribed set of "ministerial acts" are to be compelled by mandamus relief. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). Such ministerial acts are those for which "the law clearly spells out the duty to be performed with sufficient certainty that *nothing* is left to the exercise of discretion." *Id*. (emphasis added); *see also In re Woodfill*, *supra* at 475. This Court has explained that "the framing of the proposition on the ballot" is "left to the discretion of municipal authorities." *Bischoff v. City of Austin*, *supra* at 212.

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 really complain about the accuracy of the language; it is just that they wish it had not been pointed out so clearly.

There is no doubt, and no dispute 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 whole 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" being created across the city would not be reversed.

To stress the obvious point yet again, the city council's job is not to further the political objectives of the ordinance's proponents by framing the ordinance's provisions in a way that they wish them framed. The council's job is to provide a fair picture of the chief features of the ordinance. And the criminal offenses it creates are among the chief features. In fact, they are *the* chief features.

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 omission 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 Pet. 9-10. Whether such a characterization would be correct or not may be subject to debate—especially in light of constitutional rulings in cases such as Boise—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.

The short of it is that there is nothing to the relators' complaint about the proposition's description of the penal implications of the ordinance. The language is well within the protective circle laid out by the common law rules governing ballot language.

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 com-

mon law duties. There is really no fair and accurate way to describe this other than as legal whining.

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 that the order in which the features are listed must be the one that they divined (from which set of facts is unclear) is the one of most concern to the public.

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 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 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 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 and non-misleading 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 a self-defeating proposal. It would effectively eliminate shortened ballot language as a way to convey the essence of a proposed measure to voters in a readily graspable way.

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

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 subsec-

tion (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 (even though their proposition uses the equivalent phrase "a person") 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 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).[8] Second, the word "anyone" still accurately describes the category of exposure, even if subsection (C)'s provisions are applicable in any given situation.

[8] Moreover, the subsection (D) exception has been rendered meaningless by the proposed ordinance. The proposed ordinance repeals the current subsection (B)(1)(A), which is the cross-reference point for (D). With (B)(1)(A) repealed, (D) would have no referent at all.

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.

To sum up, there is nothing to the "anyone" argument.

CONCLUSION AND PRAYER

The ballot language adopted by Austin's city council for Proposition B is within its legal discretion and consistent with Austin's city charter and applicable common law requirements. The Court should deny the emergency petition for writ of mandamus.[9]

[9] For reasons provided in this response, the Relators' arguments for mandamus relief are not valid, but assuming they were, the city council may have to change the ballot language for Proposition B. Austin's boundaries reach into three counties, Travis, Williamson, and Hays, which will be administering the May election for the city. Officials conducting the election for these counties have informed Austin of the latest date by which they need to be provid-

Respectfully submitted,

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ATTORNEYS FOR CITY OF AUSTIN AND AUSTIN CITY COUNCIL

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ed final ballot language to enable the ballots' timely printing. The earliest of these deadlines is Travis County's, which is March 3. The relators have assumed that February 25 is the deadline for any such final changes to ballot language. Relator Pet. ix (referencing Relator App. Tab A). The weather-related circumstances have made it difficult to clearly reconcile the different dates, and determine which is correct, within the current timeframe.

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)-(3), I certify that this response contains 5,511 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 February 23, 2021, the foregoing City of Austin's Response in Opposition to 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:

Donna García Davidson
Capitol Station, P.O. Box 12131
Austin, Texas 78711; and

Bill Aleshire
ALESHIRELAW, P.C.
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Austin, Texas 78739

*_/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

§
§
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

. . . .

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.

. . . .

§ 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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Associated Case Party: Linda Durnin

Name	BarNumber	Email	TimestampSubmitted	Status
Bill Aleshire		Bill@AleshireLaw.com	2/25/2021 7:37:39 AM	SENT

Associated Case Party: Eric Krohn

Name	BarNumber	Email	TimestampSubmitted	Status
Donna Garcia Davidson	783931	donna@dgdlawfirm.com	2/25/2021 7:37:39 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Renea Hicks		RHICKS@RENEA-HICKS.COM	2/25/2021 7:37:39 AM	SENT

Associated Case Party: Michael Lovins

Name	BarNumber	Email	TimestampSubmitted	Status
Donna Davidson		Donna@DGDLAWFIRM.COM	2/25/2021 7:37:39 AM	SENT

Associated Case Party: City of Ausitn, Austin City Council

Name	BarNumber	Email	TimestampSubmitted	Status
Anne Morgan		anne.morgan@austintexas.gov	2/25/2021 7:37:39 AM	SENT