ORAL ARGUMENT — 4/8/99
98-0256
BLUM V. BOB LANIER

JEWELL: Mr. Blum was the co-chair of a nonprofit, private citizen's organization, Houston Civil Rights Initiative. His story began in early 1997 when he drafted a proposed charter amendment to the City of Houston charter, which sought to eliminate discrimination against or preferential treatment to any individual or group on the basis of race, gender, color or national origin, operation of public employment or public contracting.

Mr. Blum spearheaded the circulation of this petition containing the language with the purpose of obtaining enough signatures to cause an election to be held, to put the charter amendment to the vote of the entire city of Houston.

Having successfully obtained the 20,000 necessary votes to place the issue on the ballot, the matter was placed on the ballot for the Nov. 4, 1997 general election. However, the description of the charter amendment to be printed on the ballot as drafted by the respondents was significantly altered and was substantially different from the language adopted by the petitioners.

GONZALES: Does the city of Houston have the authority or discretion to decide the language on the ballot?

JEWELL: The statute says that the authority prescribes the language on the ballot. Certainly they do have authority to do that.

GONZALES: Are there any limitations?

JEWELL: There are common law limitations as we have outlined in our brief, such that the language on the ballot must fairly portray the substance and content of the charter amendment without misleading the voters.

PHILLIPS: Before we get too far into the substance let's talk about the procedure. This isn't the only courtroom that this case is in.

JEWELL: I certainly agree with that. Even though the election was held here and the proposition failed, and even though Judge Wood has invalidated that election in the contest proceeding currently pending in Harris county, the real tragedy here was that Mr. Blum was not entitled to do something about this before the election occurred. Hence our presence here.

PHILLIPS: What relief are you seeking? You have a temporary injunction and a mandamus on an election that's already over. What relief would you ask this court to give?

JEWELL: We want this court to hold that a TC has jurisdiction to entertain an injunction _____ relief proceeding before an election occurs.

PHILLIPS: And what will that do for your client that the election contest proceeding won't do?

JEWELL: In this particular case when the election contest has been sustained, as it has been here, there is going to be another election. And it is our belief based on past conduct that the respondents will likely attempt to do the same thing that happened here: submit their own version of the proposed ballot language, perhaps modify it, and then we will be in the exact same position that we are right now. And the City will be able to continually manipulate language according to their desires, force us to file election contests after each election, and then we go on in that cycle. In our view it's more efficient to allow a TC to grant injunctive relief in the first instance to prevent this type of cycle from occurring.

OWEN: Why wouldn't an opinion like that be an advisory opinion from this court?

JEWELL: Well it's certainly not advisory for this particular case because the election is going to occur again.

OWEN: But we don't know what will happen, what will be proposed to be on the ballot or anything like that. Why isn't this moot?

JEWELL: Our circumstance is not only going to happen here, but it will happen in other cities as well. As the CA concluded, the issue was not moot because our circumstance falls into the exception of the capable repetition, yet evading review - exception to the mootness doctrine. That certainly applies here because of the short time that exist between a charter amendment and then the election which is held _____.

As in this particular case as noted by the CA the time period had already passed for any sort of change to occur by the time that the court's order had issued.

ENOCH: After the petition is presented the statute requires an election be held within 30 days or 60 days depending on _____?

JEWELL: That's right.

ENOCH: And so your argument is that capable of _____ repetition really hinges on the fact by the governing law there just isn't sufficient time for a TC to be presented the issues on a temporary injunction and that sort of thing within the time frame before the election has to be held?

JEWELL: And that's true. And in fact in this particular case, as I understand it, the

respondents would not waive a 45-day notice requirement for a trial. And so that's an additional problem.

ABBOTT: Isn't there a separate case concerning this subject matter pending in the 127th?

JEWELL: Yes, there is an election contest proceeding pending in Judge Sharolyn Wood's court. She has ruled that the city's manipulation of the language here was not consistent with the election code of the local government code.

ABBOTT: But it's not a final judgment?

JEWELL: It's not a final judgment.

ABBOTT: Why?

JEWELL: Well she has drafted correspondence and sent it to counsel. To date, to my knowledge, she has not signed an order.

ABBOTT: But she made that ruling 9 months ago?

JEWELL: That's correct.

ABBOTT: Has she explained why she hasn't ruled or signed a final judgment?

JEWELL: Not to my knowledge. We submitted a proposed partial summary judgment to her several months ago.

ABBOTT: Once that judgment is entered, to what extent would that be dispositive of the case that we are arguing today?

JEWELL: That judgment could be appealed as well. As I understand it the City would intend to appeal that.

ABBOTT: And if they do would that dispose of the matter that we are currently considering today also?

JEWELL: If they win the appeal, I don't think it disposes of the matter. Because we are continuing in the same process. But the point is the burden is on us to file an election contest after an election contest since we can't do anything to stop the city's proposed language on a ballot according to the City's point of view. So the problem is sort of self perpetuating.

PHILLIPS: Couldn't there be a possibility of contempt or wouldn't the TC have some

other powers if the city continually frustrated - a view that the TC had held accountable under the election code?

JEWELL: I would hope so. But I still don't think that moots the issue in front of this court.

PHILLIPS: Well let's talk about Mr. Blum's standing. He's no longer a resident of the City of Houston, correct?

JEWELL: That's correct.

PHILLIPS: So if I decide I can be a big help to New York in some of the problems they are having and I get active in New York's internal political matters, do I have standing to go and challenge a SC ruling there?

JEWELL: Not necessarily. Of course, he was a resident at the time that the relevant events occurred here. And of course, he can always move back. The fact that he signed this petition in and of itself confers and argues sufficient standing for him to seek the relief that he is seeking. The CA's opinion we believe errs on this topic by misconstruing the *Deleon* case as stated by the CA states that a person has standing if he has one of four options: 1) has sustained or is immediately in danger of sustaining some direct injury as a result of the wrongful act; 2) has a personal stake in the controversy; 3) has suffered some special injury particularly to himself; or, 4) has a legal right to sustain from the general public.

Certainly I don't understand how his actions in his time and effort and money spent in spearheading this initiative and drafting the language himself does not vest him with sufficient personal stake in the controversy.

HECHT: But he doesn't need that. All he needs to have done is sign it.

JEWELL: Yes.

HECHT: So of all _____565 people were standing to challenge this?

JEWELL: Well of course everyone who signed the petition is distinguished from just a general voter. That's for sure. Because there are only 20,000 plus who signed it in the first place. But certainly while the respondents argue to this court that Mr. Blum does not have standing, what they don't tell you is who does have standing if he doesn't. Mr. Blum was the top of the organization. If he doesn't have standing it's difficult to understand who would be able to bring this suit.

ABBOTT: Where did he live at the time of the vote?

JEWELL: At the time he lived in Houston.

ABBOTT: Not the time he signed the petition but the time of the vote?

JEWELL: I believe at the time of the vote he lived in the city of Houston.

ABBOTT: And at the time the language was changed he lived in the City of Houston.

JEWELL: Yes, he did reside in the city as of Nov. 4, 1997. And of course, Judge Wood has found in her order or her ruling that he did have standing and does have standing to win the election contest proceeding.

I would also add that the standing issue was not raised or made an issue by the respondents at the TC level.

HECHT: Does that matter?

JEWELL: This court has stated that to have standing is part and parcel to the jurisdictional issue. However, the facts in this case do not we believe give rise to any sort of reasonable dispute about Mr. Blum's standing considering his stature and what happened and his very public debates with the mayor on this issue, which were heavily recorded _____ particularly during the month of Sept, 1997.

So quite simply the standing issue is a surprise to us, or was a surprise to us and certainly we believe the CA erroneously sustained his argument on that point.

PHILLIPS: Under the capable of evasion doctrine, you want us to hold that in the future if someone signs a petition for a ballot proposition, that they are entitled to go in to DC and get an injunction against the city if they do not word the proposition in a way that you believe fairly summarizes...

JEWELL: In a way consistent with the statutory obligation and common law obligation. Yes. But as an alternative position, as I've stated, to the extent the court is not willing to do that, Mr. Blum certainly in this case would have sufficient standing with his individual participation and importance to the project.

HECHT: This proceeding rose out of the election contest proceeding?

JEWELL: This proceeding came first.

HECHT: Was it a separate action in the TC?

JEWELL: Yes.

PHILLIPS: Is there a problem with the record that your client brought to the CA for them to review the actions of the TC? Is the record fully brought up or was there part of the record that was not brought up, not cited to - the CA was entitled to make certain assumptions about correctness of the TC ruling and in the absence of a full record we're here?

JEWELL: I believe that the CA had the record that we gave them and I believe that was everything that was _____. In the injunction proceeding there really weren't any pleadings other than the petitions and the _____ petitions and the respondent's plea of jurisdiction and of course the court's order.

ABBOTT: Where did Blum live at the time that this lawsuit was filed?

JEWELL: I have to get back to you on that.

HECHT: These are not hard questions.

JEWELL: I will have to check on that as to where he resided at the time this suit was filed.

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RESPONDENT

LAWYER: This is a case about the discretion of a governing body to prescribe the language on the ballot describing a measure to be voted on by the voters.

PHILLIPS: Do you have any problem with us reaching the full merits of this case?

LAWYER: My problem is that when the petitioner filed the brief in the manner that they did, we felt we had to respond to their arguments on the merits just so the court would have the - if the court chose to consider those, the court could do so. I would love to have the court reach the merits if the court had the full record, but that won't be here until the court has a chance to review the proceedings in Judge Wood's court.

ABBOTT: You're saying that when she completes the proceedings currently pending in her court, we will have the full record in the case before our court now?

LAWYER: If the court were to go to the merits of Mr. Blum's complaints about the ballot language. But there is additional material in the TC record before Judge Wood on both sides that we think means that Mr. Blum cannot make the argument that he's making here that the language on the ballot is misleading.

ABBOTT: Do you have any knowledge about why she is taking so long to sign a judgment in that currently pending matter in her court?

LAWYER: I have to answer that in two parts. First, the Judge Wood's letter indicating her intent to rule ordered us to confer on the form of an order. I was never able to speak directly to Mr. Helphen, the attorney for Mr. Blum. He submitted a proposed order to me that I felt violated the election code because it was not a final judgment but still ordered an election by a date certain. I wrote him back and pointed out those problems. I got no response. Several months later Mr. Helfen without conferring with me sent another proposed order to Judge Wood. I didn't know why that order had not been acted on, but Judge Wood's clerk has informed me that when the order is not agreed by both parties it is Judge Wood's procedure to require a hearing and that no hearing had yet been requested by the plaintiff offering an order. I have spoken to them about that and there has been no movement to either have an order entered or have a hearing set on that. The second part to answer your question fully, even the ruling that Judge Wood indicated in her letter would not be a final judgment. There are additional parties and additional claims involved that she has not ruled on or indicated to intend to rule on. So we still will have to have a trial to the court and again Judge Wood told us at a hearing in August, 1998, that we would have to get with her on some pre-trial conference to discuss the issues and discuss how long the case would need to try and again no action has been taken...

ABBOTT: So the bottom line is, there is no end in sight?

LAWYER: I think that we could have a trial to the court on about two weeks notice to both parties and resolve it al without the need for an actual order on the summary judgment.

O'NEILL: As a practical matter, is everyone waiting to see what happens with this case before they move on the _____?

LAWYER: I have not been, but I was told by a reporter that the reason that the plaintiff had not acted was they were waiting for this court to rule on the injunction issue because Judge Wood did indicate in her letter that she did not believe that she had jurisdiction to give them the injunctive relief that they request. And so at least as expressed to a reporter and relayed to me, that was the reason that no trial setting had been requested and no action taken to have an order entered.

ABBOTT: Going back to the substance that you raised, would it be okay if 20,000 citizens sign a petition to put something on the ballot that said, A, B, C; and the City said, Fine, we're not going to put A, B, C on there, we are going to put X, Y, Z? It seems under your argument you're saying the City can totally ignore what 20,000 citizens put on the ballot and totally change it with no limitations.

LAWYER: That is not our argument.

ABBOTT: Then what are the parameters of the limitations?

LAWYER: The parameters are, that the ballot description must provide fair notice to the voters of the measure that they are being asked to vote on.

ABBOTT: But the measure they are being asked to vote on could be changed as the City did here to say something totally different.

LAWYER: We disagree that the City changed anything.

ABBOTT: The wording that the petitioners came up with is different than the wording the City came up with.

LAWYER: The petitioners after submitting the petition have argued that they wanted the ballot to read a particular way. If the court will review the actual petition, this is not like a constitutional amendment passed by the legislature where the legislature generally says, This will be the wording of the proposition stated on the ballot. Here there is no ballot language proposed. All we have here is a proposed charter amendment. And had the voters approved it, this entire charter amendment would have become part of the City of Houston charter word for word as printed on their petition. There was no ballot language to change and there was no change made in the charter amendment.

GONZALES: So we're arguing about the language on the ballot not a change to the charter amendment?

LAWYER: Precisely. To get back to Justice Abbott's question: What are the parameters? The election code is very clear, the governing body shall prescribe the description of the measure on the ballot. It's mandatory. We shall do that.

BAKER: But it also says except as otherwise provided by law. And so what is your position on what the City Charter imposes upon the council and why does that not have an effect on what you do or don't do when an initiative is presented?

LAWYER: The confusion raised by Mr. Blum on this point is in directing the courts to the charter initiative provisions which only provide for the enactment of ordinances, not charter amendments. And we have cited the authority to the court in our brief where CAs have explained the difference between a charter initiative provision for the enactment of legislation in the form of ordinances, and a charter amendment which by law can only be done under procedures established by the legislature through the local government code.

HANKINSON: The question of fair notice of the ballot language, is that a question of law from the court or a fact question?

LAWYER: It is a fact question. And to get back to the basic question that I think would apply on the merits and it's the one that Justice Abbott asked a few minutes ago, the fair notice is part of the information that the voters are going to receive. But just like a constitutional amendment, a proposed charter amendment must be published in a newspaper of general circulation, and it must be publically posted. We agree with Mr. Jewell that there was substantial public debate for the month preceding this election. This is as we expect things to be when there are contentious issues. The voters are educated. And all the courts that have ever addressed this have held that the voters are presumed to be educated about the measure that they are voting on when they vote. There are limits.

HECHT: Why change the language then?

LAWYER: There's no language to change.

HECHT: The proposal was the first part of the proposed ordinance and the city changed that. Why do it if the electorate is presumed to be informed?

LAWYER: If you look at the, again this is evidence that will be presented at a trial on the merits if we ever get one, the use of the words "preferential treatment" we felt were misleading because by many, many social science studies and polls, it has been well established that people who support current affirmative action programs may still vote for a proposition for a measure that says there will be no preferential treatment because they don't know that that it's the intention of that proposition to end affirmative action programs. The city knew that.

GONZALES: Twenty thousand voters, and twenty thousand citizens who signed a petition, you argue may have been misinformed because it does include a term "preferential treatment?"

LAWYER: What those same studies show and what we will present in a trial on the merits, is that those who oppose current affirmative action programs will vote yes for a proposition or approve a statement whether it uses the description "affirmative action" or "preferential treatment."

ENOCH: So you admit what's implied in all of this, which is that the city council knows it can affect the outcome of an election by the buzz words it chooses to put in the ballot?

LAWYER: We did not want the voters to be misled about the intention of this proposed charter amendment. And the studies that we knew about and that we will present evidence on in a trial on the merits showed that for opponents of current affirmative action programs the language makes no difference. But for people who support the current programs, the language does make a difference.

HECHT: More to the question here. Why shouldn't we take this up before the election rather than after and incur the expense of the election and perhaps a new one?

LAWYER: At bottom, we are asking the court to approve jurisdiction for courts to interfere in and direct the actual performance of the elected official's duties during the election process.

HECHT: You are going to do it in the election contest, what's the difference? It just saves money.

LAWYER: It's very important and this is in part a response to Justice Owen's question about advisory opinions. The voters are presumed to understand the impact of the measure by the time they go and vote. The ballot language is not their only source of information. What you're asking a trial judge to do if you allow jurisdiction for trial judges to enjoin language like this or mandamus officials to use particular language, is you're asking the trial judge to make a prediction about is the language misleading and will voters be actually misled? In an election contest after the election, we can know as much as we will ever know about whether there was first a violation, but second whether that violation of the election laws materially affected the result? You can't predict. Certainly our trial judges can't predict the results of elections.

PHILLIPS: Yours is absolute. The city for a charter amendment has the complete discretion to word the language like they want it, and if that is flagrantly in disregard of the intent of the signers of the petition, then they can challenge it through an election contest which fully protects their rights?

LAWYER: That is correct.

PHILLIPS: But there's no circumstance heinous enough that can be thought out of a misrepresentation of intent of a citizen initiative that would allow a preelection interference by the courts?

LAWYER: As long as there is an election, the courts cannot further interfere. As long as the measure is placed before the voters as required by law which is the ministerial act required by the election code.

PHILLIPS: So this could have been worded "should there be a $100,000 levy on every citizen in Houston" and you have that election, that wasn't a fair representation of this petition then we would sort that out in the court in the coming years.

LAWYER: Obviously the court is taking this to the extreme because the city council would not have done that. What this court held in the *City of Austin v. Thompson*, that even when the court knows that the election is going to be an invalid election once the election process starts, the courts do not have power to interfere. And that's a decision from the 1940's, it is as far as I know never been questioned, and it was reaffirmed by Justice Shannon in his opinion in _____ *v. City of Austin*.

HANKINSON: Assuming that the courts can interfere, who would have standing to make a challenge like this?

LAWYER: If we are talking about a mandamus any voter would have standing.

HANKINSON: Any voter, not just the petition signers? Anybody in the City of Houston?

LAWYER: If it is a mandamus. The mandamus has been abandoned here on appeal. So _____ injunction the only grant of authority to the courts by the legislature to grant injunctions in election matters comes under §273.081 of the Election Code. The definition there is a person harmed. And that's the question I think that the precise issue here about whether there should have been an injunction centers on: Is Mr. Blum and is someone like him a person harmed?

HANKINSON: And what's the answer?

LAWYER: The answer under the court's decision in *Allen v. Fisher* is that someone who is a voter has no interest different from the general public at large, there must be a special injury to have standing.

PHILLIPS: How does this square with the *Deleon* case?

LAWYER: *DeLeon* was a mandamus case. It was not an injunction case. So in *DeLeon* I believe there was a petition signer in that case, and that petition signer had standing which the law of mandamus has been petition signers does have standing.

HECHT: Returning to Judge Hankinson's questions as you view the statute and *Allen v. Fisher* nobody would have standing?

LAWYER: That's correct. And is that something that's a problem? Is that something that's so bad?

BAKER: Well who has standing in the election suit after the fact that you say is the only way you can attack this problem?

LAWYER: Any eligible voter.

BAKER: Why isn't the same standard available before because the courts can't interfere?

LAWYER: Because the courts can't interfere because the legislature hasn't given authority as interpreted by the courts to interfere. And the question then comes who speaks for these petition signers?

BAKER: So the real basis of your position is because the courts can't interfere no one has standing before an election and only after the election can there be litigation and then anybody that's a voter can file the suit?

LAWYER: When it deals with an election on a measure such as this.

BAKER: So then would I take it that there is no standing issue in the pending litigation before Judge Woods?

LAWYER: There is a different standing issue there because we did argue that Mr. Blum does not have standing having moved out of the city of Houston.

ABBOTT: Didn't he vote in the election?

LAWYER: We don't know that for sure. I think he has told people he has. We don't question that he did.

PHILLIPS: Isn't that easy to resolve one way or the other?

LAWYER: We haven't deposed Mr. Blum and there hasn't been - there's been no discovery.

PHILLIPS: I thought the city kept records of the voters.

LAWYER: I don't know how to find out if a particular person has voted. We haven't looked at whether Mr. Blum voted. We have assumed that he did.

HECHT: If there is an election contest after an election like this and the city loses and the court says that the ballot language was misleading and it should have been different, in the next election, and there should be another election, is the City bound to follow that or can courts interfere if it doesn't?

LAWYER: I can tell the court the City would not use the same language.

ABBOTT: But you're saying that's what they would do. Answer his question about would could happen.

LAWYER: The city would still be under the common law, the city can't do: check yes or no. And the city also is not supposed to print the entire measure on the ballot. So the city must have the discretion to draft a description of the measure on the ballot.

ABBOTT: So you're saying it is unequivocally capable of repetition and evading review?

LAWYER: I want to address that in two parts. There is the requirement in the election code that the city council do this. So the city council is required. It's a mandatory statement, ballot prescribed the wording on the ballot. We do not believe that the capable of repetition standard should be extended to cases like this. When that standard was adopted in *General Land Office v.* _____, in 1995, it was limited to actions challenging government activity based on constitutional grounds. And there is no constitutional challenge here. If the court extends that standard, there is no deadline that won't be subject to interference by injunction or mandamus actions will never be able to be certain that actions that are required to be done in a specific period of time won't be interfered with by injunction or mandamus actions.

HECHT: So the city's view then is that even if it loses the election contest if it wants to keep spending the money for elections that are going to get set aside, it can do it?

LAWYER: The city is not trying to frustrate any instructions from any court. But the city is limited by the law in that it is not supposed to put the whole measure on the ballot and it's not supposed to say: Check yes or no like George Strait. What we are required to do is give a brief description that gives the voters fair notice of the measure they are voting on.

PHILLIPS: And the citizens don't have the right to get an adjudication from the court after the election as to what that fair language...

LAWYER: After the election.

PHILLIPS: But in the underlying contest in Judge Wood's court in part of her judgment (b), your language should have been this?

LAWYER: No. That would be directing the officials in the performance of their duties which is a mandamus in which this court and the lower courts have said: The court can only say hold the election, or in an individual race either put the candidates name on the ballot or take the candidates name off the ballot. And that has been the law and we don't believe that the circumstances here provide any justification for changing that law.

GONZALES: Did I hear you earlier say that art. 7b, §1 of the City Charter was not applicable here?

LAWYER: That's correct. By its own terms, and the record that was provided to the court does say ordinances or regulations.

BAKER: Did I understand you earlier to say that Mr. Blum was insisting that parts A-H all be included on the ballot, and that's your main objection? Frankly, I got from the briefing that the dispute was over §A only, and nothing never arose about the other parts.

LAWYER: Mr. Blum's statements after the petitions were filed were that he wanted a description on the ballot based on his section A. He has both in the lowers courts and the CA sometimes argued that we were required to never deviate from that language. And we take that to mean to a verbatim inclusion of all parts. And the courts have always said you do not have to use a verbatim description of the measure.

PHILLIPS: Let me test you a little further on what the trial judge can do in an election contest. If the trial judge said: Alright, the city council can set this ballot language but they cannot use the term (any term you can use), would you be guided by that or is even that partial instruction in your opinion illegal, _____ on the rights of the city leaders?

LAWYER: I guess I can turn the question back to the court because this court is the body that can decide what's a mandamus and what's an injunction. Injunctions historically have been "you shall not." And if the court says you shall not use this language - if this court gives Judge Wood the authority to enter an injunction, which right now we believe Mr. Blum doesn't have standing to seek, Judge Would could say: You shall not use X language for the ballot, or this particular term. But we don't think that she right now has that jurisdiction because Mr. Blum doesn't have standing.

ABBOTT: How many signatures are required to get this measure on the ballot?

LAWYER: Twenty thousand for the city of Houston. And under the local government code there is also a percentage requirement for the particular body but that percentage is higher and it's the lesser of 20,000 or that percentage. For an initiative under the charter, which we've discussed the requirement is different, it is 15% of the eligible voters.

GONZALES: Did the city negotiate with Mr. Blum about when the election should occur?

LAWYER: Mr. Blum had discussions with Mayor Lanier and with some other members of council. There is no record of those before the court and we believe that under the well established law that a governing body can only act through its statutes or its ordinances. It was not within Mayor Lanier's power even if he chose to do so to waive any rights or create standing for Mr. Blum that didn't already exist.

BAKER: But doesn't he appear and argue before the council as an entity based on a waiver the council gave him?

LAWYER: He spoke and other people had also spoke in previous council meetings and at the public comment practice of the city council about this issue. To allow citizens to address their representatives is required in the city council deliberation process.

BAKER: But they can't sue?

LAWYER: Under *Allen v. Fisher*, if they have a special injury they can. Here, we don't have any evidence of a special injury or any evidence that Mr. Blum is anything other than another petition signer. To claim that he should have standing because he is a representative of the people who signed the petitions goes contrary to the whole petition philosophy because the petition philosophy is that we want the citizens to be able to do this as a group and not have to act through their elective representatives. So far, the government code, the election code, and the common law have never created some in-between status for someone who is more than a voter, more than a petition signer, but less than an elected representative of the people. And that in essence is what Mr. Blum is claiming to be is some sort of unelected representative of the people who sign the petitions and the people who supported the charter amendment.

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REBUTTAL

JEWELL: This case is about the integrity of a system that allows these voters to place a proposition like this on a ballot and have it subjected to the vote of the people. Now, what we wanted to do was to prevent the city and the mayor from transmogrifying this clear expression of voter power that is embodied in this amendment.

HANKINSON: Would you respond to the argument that under the applicable statute no one has standing to seek an injunction before the election?

JEWELL: Well the injunction provision must mean something.

HANKINSON: Well your opponent says it means that nobody can challenge it before the election.

JEWELL: Well then it's meaningless. If Mr. Blum doesn't have standing, if the petitioners don't have standing, then there's no point to having the injunction provision there. And thus, we end up in the position that we're in.

OWEN: Well why does he have a special injury?

JEWELL: He has a special injury because of his individual time and effort into this issue at a minimum.

ENOCH: Does a special injury requirement work in the context of an initiative referendum? It seems to me special injury is in the context of a representative form of democracy where the representative act on behalf of the whole and so there ought to be a special injury before any part of that whole should be allowed to begin a process of court litigation over what the representatives have done. But in the initiative this is a direct democracy not a representative democracy. This is where the citizens circumvent the representative form of city government forcing

the government to go directly to the people on a particular vote. Does the notion that people participating in that event really indicate that they still have to have special harm?

JEWELL: The way you phrase your question leads me to say no that there would not have to be such a requirement there. I'm not sure the court is going to get to that issue in this case or will ever be faced with that issue in this case.

ENOCH: Well it raises the question of who has standing doesn't it?

JEWELL: Yes, but the issue of whether this is an initiative verses a charter amendment is really something that need not necessarily be resolved because it was our position - assuming the city charter does not apply at all, which is as I understand it the respondent's position, the city's power to manipulate language like this is constrained by common law requirements and the spirit of the statute.

GONZALES: If that charter provision doesn't apply do you know what obligation does a city have after receiving the petitions on August 28, 1997 to hold the election? Is there another provision do you know of?

JEWELL: I don't know off-hand. I think it's relatively quickly.

GONZALES: Did Mr. Blum negotiate with the city of when that election might occur?

JEWELL: He did. He negotiated. He had meetings with the mayor, meetings at which the city attorney was present.

GONZALES: Is it your position the city - could the city have held the election any time it wanted?

JEWELL: Initially the proposition was supposed to be a special election, which was supposed to occur in August of 1997. As I understand it, Mr. Blum agreed to forego the expense of a special election and place this issue on the general election ballot in exchange for a representation that the language would not be altered. And of course, the city argues that their hands are tied, that they can't put proposition verbatim on a ballot, but there certainly isn't anything that prevents them from doing that. And I can certainly understand where in cases where a proposition is lengthy or convoluted, something of that nature where a certain amount of a condensed version would be appropriate. But here, we've got a proposition that's only 37 words long. It's certainly not a burden to just paste it right on the ballot. What they did was a clear intent to _____ an expression of political power, which I might add is one of the reasons why we believe the *City of Austin v. Thompson* case is not so strong an authority for them. An underlying concern in that case was a case which involved a proceeding to enjoin the occurrence of an election. The underlying concern in that case was the political power of the people to have an election, and an expression of that political power. And

here, what we have is a squelching of it. And had Judge Harbach granted the injunction like he should have done, he would have not been squelching political power. He would have been giving it meaning and life.

HECHT: I still have a confusion about where we are procedurally. The order that you are petitioning for review of bares the same case number in the TC as the pending election contest proceeding. And I had asked you earlier if there were separate proceedings under separate numbers and I thought your answer was, yes.

JEWELL: If I said that, then I must have been mistaken.

HECHT: So this is an interlocutory order out of the proceeding. That proceeding remains pending and it isn't final, the same case number 97-49872?

JEWELL: The election contest right is not final.