NO. 11-20068

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE CITY OF HOUSTON, Plaintiff - Appellee

vs.

AMERICAN TRAFFIC SOLUTIONS, INC., Defendant - Appellee

vs.

FRANCIS M. KUBOSH and RANDALL KUBOSH,
Appellants

ON APPEAL FROM CAUSE H-10-4545 IN THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

FRANCIS M. AND RANDALL KUBOSH'S APPELLANTS' (INTERVENORS') REPLY BRIEF

E-Filed on June 27, 2011

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ABBREVIATIONS AND RECORD REFERENCES

Francis Kubosh. Intervenor/Defendant, now Appellant, Francis M. Kubosh is "Francis."

Randall Kubosh. Intervenor/Defendant, now Appellant, Randall Kubosh is "Randall."

Felix Michael Kubosh. Felix Michael Kubosh, Francis' oldest son and Randall's oldest brother, is "Mike."

Paul Kubosh. Paul Kubosh, Francis' youngest son and Randall's youngest brother, is "Paul."

The Kubosh Appellants. Together, Appellants Francis and Randall Kubosh are the "Kubosh Appellants."

The Kubosh Family. Together, Francis, Randall, Paul, and Mike Kubosh are the "Kubosh Family."

Citizens against Red Light Cameras Political Action Committee. Citizens Against Red Light Cameras Political Action Committee, a PAC that Appellant Randall Kubosh served as Treasurer, is "CAR PAC."

The City. Appellee The City of Houston is "the City."

ATS. Appellee Automated Traffic Solutions is "ATS."

RLC. "RLC" is the abbreviation for Red Light Camera.

Charter. "Charter" is the abbreviation for the City of Houston Charter.

The Charter-Amendment Petition. The "Charter Amendment Petition" refers to the Kubosh Family petition requesting the City of Houston to call a charter-amendment election to ban further use of Red Light Camera systems as presented to City Secretary Anna Russell on August 9, 2010 and certified by City Secretary Russell on August 24, 2010.

Proposition 3. "Proposition 3" is the abbreviation for City of Houston Proposition No. 3, which requested voters to amend the Charter of the City of Houston to permit the continued use of the City's Red Light Camera system, on the general election ballot in the City of Houston on November 2, 2010.

The Election. The "Election" refers to the Proposition 3 special measure election that occurred on November 2, 2010.

The Ordinance Scheduling Election. The "Ordinance Scheduling Election" refers to City of Houston Ordinance No. 2011-678 (August 24, 2010), in which the Mayor and City Council of Houston approved submission of the Proposition 3 ballot issue to voters of the City of Houston on November 2, 2010.

The Ordinance Amending Charter. The "Ordinance Amending Charter" refers to City of Houston Ordinance No. 2010-881 (November 15, 2010) amending the City Charter because of the result of the Proposition 3 election.

The Ordinances. The "Ordinances" is a collective abbreviation for (1) City of Houston Ordinances Nos. 2011-678 (August 24, 2010) and 2010-881 (November 15, 2010), respectively.

The First Hearing. The first hearing the District Court conducted in this case, on November 26, 2010, is abbreviated as the "First Hearing."

The Intervention Motion. The Kubosh Appellants' November 30, 2010 motion to intervene is the "Intervention Motion."

The Intervention Hearing. The hearing the District Court conducted on December 9, 2010 to hear the Kubosh Appellants' motion to intervene is the "Intervention Hearing."

The Final Judgment. The January 15, 2011 "Order Denying Rehearing" of the Kubosh Appellants' January 7, 2011 motion for new trial and rehearing, Docket No. 53, USCA5 2416, is the "Final Judgment."

The Order. The December 12, 2010 "Order Denying Intervention," Docket No. 36, USCA5 1630, denying the Kubosh Appellants' motion to intervene, Docket No. 11, is the "Order."

Memo. Op. The "Opinion Regarding Intervention," Docket No. 35, USCA5 1625-29, is the "Memo. Op."

The Summary Judgment. U.S. District Judge Lynn Hughes June 17, 2011 Interlocutory Summary Judgment, Supplemental Electronic Record ("SER")

Docket 79, and his June 17, 2011 Opinion on Summary Judgment, SER Docket 78, are collectively referenced as the "Summary Judgment."

Appendices. "APP." refers to one of the Record Appendices.

R. "R" is short for Record. References to the Record page numbers are referenced by Docket Number and USCA5 page, *e.g.*, R. 1, at 101.

SER. "SER" is short for the Supplemental Electronic Record filed in this Court on June 20, 2011.

SUMMARY OF ARGUMENT

This case concerns the constitutionally guaranteed and statutorily defined right of all Texans in home rule cities to govern themselves by petitioning charter amendment elections under Article I, Section 2 and Article XI, Section 5 of the Texas Constitution and Chapter 9 of the Texas Local Government Code. The Texas Constitution and that statute grant citizens the right to amend a home rule city's "constitution," *i.e.*, its charter. If municipal government by the people, of the people, and for the people is to continue in Houston, this Court should (1) reverse and render Judge Hughes' denial of Appellants' intervention motion; (2) void the June 17, 2011 summary judgment for ATS; and (3) remand the case.

Appellants seek to appeal an abridgment of their constitutional and statutory right to campaign for municipal reform by petitioning for charter amendment elections. Appellants (1) timely intervened, (2) proved a concrete and legally cognizable "interest" in defending the Proposition 3 election they petitioned for, funded, and won, (3) demonstrated that their interest in petitioning for, winning, and defending charter-amendment elections is impaired, and (4) showed that the City's collusive defense of the election and two related ordinances is utterly inadequate. Judge Hughes' June 17, 2011 interlocutory summary judgment shows the importance of permitting the Kubosh Appellants to intervene on behalf of themselves and 181,000 other City voters who oppose ATS/City cameras.

In his June 17, 2011 memorandum opinion, the district court declared that, "The Founders' definition of tyranny was arbitrary government. Timid or over-enthusiastic city officials can destroy regular government as easily as a king." But a far greater danger has arisen because government contractor ATS demands that federal courts disregard a state constitution, judicially restrict the scope of a legislature's state-wide election laws, overturn the will of the people expressed in a lawful election, abridge the First and Fourteenth Amendment rights of citizens to petition entrenched municipal elites to amend or supersede oppressive and outdate ordinances, and exercise jurisdiction over state law issues without certifying those issues to a state supreme court already examining the same state law issues.

Here, the City has lost a case it purports, falsely, to "zealously defend," enabling it to continue pocketing $10 million in annual Red Light Camera revenues its Mayor does not want to lose. Because the City waived the statutory and constitutional defenses Appellants preserved, no one but Appellants can defend the Proposition 3 election they petitioned for, organized, funded with $200,000 of their family's money, and won at the polls. Only Appellants can protect their and their fellow citizens' constitutional and statutory right to reform City government through charter amendment elections. And only the Kubosh Appellants can effectively preserve their right, and their fellow citizens' right, to appeal an erroneous June 17, 2011 summary judgment in favor of ATS.

ARGUMENT AND AUTHORITIES

I. Appellants have special standing as ballot-organizers, petition-gatherers, and qualified voters to defend the Election and Ordinances that resulted from their statutorily-authorized petition-organizer handiwork under Article XI, Section 5 of the Texas Constitution.

A. ATS's and the City's statements of fact consist of legal conclusions and legal argument, not undisputed facts.

1. Contrary to ATS' argument, the Kubosh Appellants' status as qualified voters is undisputed and well-supported by competent evidence.

ATS' statement of facts on pages 2-3 of its brief consists of conclusory arguments, not undisputed facts, while the City's statement on 1-2 of its brief repeats undisputed facts Appellants presented. Contrary to ATS' argument on page 6, Francis and Randall Kubosh's status as qualified City voters is undisputed and well-supported in the Record. USCA5 335-341; 668; 673-74; 682-83.

2. Contrary to ATS' argument, the City conducted a charter-amendment election on November 2, 2010, not an untimely referendum, as the City's Secretary, Mayor, and City Council all recognized, based on decades of City precedent.

The City conducted a statutorily authorized charter-amendment election on November 2, 2010, not a "referendum." Charter amendment elections arise under Article XI, Section 5 and Article 1, Section 2 of the Texas Constitution and Chapter 9 of the Texas Local Government Code, while referenda and initiatives arise under a charter. USCA5 at 1726-27. They are not the same thing, as a matter of federal and state constitutional, statutory, common, and municipal law. The

City Secretary, Mayor, and City Council recognized, based on decades of handling similar charter amendment petitions, that Appellants satisfied Local Government Code § 9.004. *See* USCA5 134, 263-68, 320, 322, 341, 366, 412, 1027-1035.

3. Candor requires Appellants to disclose that Judge Hughes ruled that the Proposition 3 election was an invalid referendum in a June 17, 2011 interlocutory summary judgment.

In response to the City's unsuccessful defense of the Proposition 3 election that cost it $10 million annually in Red Light Camera ("RLC") revenue, Judge Hughes signed a June 17, 2011 interlocutory summary judgment. Candor to the tribunal requires disclosure of Judge Hughes' ruling that Proposition 3 was an untimely "referendum" election. Appellants request Federal Rule of Evidence 201(d) judicial notice of that order (the "Summary Judgment"), Docket Nos. 78 and 79 in the June 20, 2011 Supplemental Electronic Record ("SER").

Appellants also request judicial notice of SER Docket entries 74-77. On the day the Legislature's Regular Session ended, Judge Hughes ordered the City to file information about referenda. SER 74. The City filed its answers on June 2, 2011. SER 76. But ATS responded to the City's as-yet, then-unmade filing on June 2, 2011. SER 75. The City never responded to ATS' Supplemental Brief. After a week of waiting in vain for the City to "zealously defend" the election, Appellants filed the supplemental response to ATS the City should have filed. SER 76.

ATS won an interlocutory summary judgment. Appellants seek to participate in that case and to vindicate their right to appeal (1) the denial of intervention *and* (2) June 17, 2011 summary judgment. The Kubosh Appellants' prosecution of an appeal in defense of the election serves the dignitary, participation, effectuation, and behavior-influencing values of the law. *See, e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights-Part I*, 1973 DUKE L.J. 1153, 1172-77 (1973). An appeal provides a tried and true safeguard against arbitrary decision-making, corrects error, maintains justice, and enhances the legitimacy of the judicial system.

4. "Say it ain't so, Joe": the City's eagerness to return ATS' cameras after Judge Hughes' June 17, 2011 interlocutory summary judgment demonstrates the hypocrisy of the City's "zealous defense" assertions.

After the entry of an interlocutory summary judgment on June 17, 2011, the Mayor showed that the City's "zealous defense" was a zealous ruse. In a June 17, 2011 Press Release (a party admission), the Mayor stated that,

> Judge Hughes' ruling means that we have several options to consider I will consult with City Attorney Dave Feldman and City Council members as we deliberate the future of the red light camera program in Houston. Right now the cameras continue to monitor intersections, but no tickets are being issued.

Mayor Parker's Statement on Red Light Camera Ruling, http://www.facebook.com/note.php?note_id=10150215366590965&comments (last checked June 24, 2011). Mayor Parker said nothing about appealing, but said

she could return the cameras. Ken Fountain, *Parker considers reactivating Houston red light cameras after judge invalidates election*, EXAMINER: YOURMEMORIALNEWS.COM (June 17, 2011, last checked June 24, 2011).

The City devotes more pages to challenging Appellants' standing than to challenging ATS' claims. The City's Appellee's Brief is 41 pages long, while its summary judgment motion against ATS was a mere 14 pages. USCA5 1721-34.

In 1920, Baseball Commissioner, U.S. Judge Kenesaw Mountain Landis, banned eight Chicago White Sox players from baseball after concluding that they threw the 1919 World Series. Like the Black Sox players, the City seeks to overcome a lack of funding. It has $10 million to gain, annually, by losing. The City lost the case in a June 17, 2011 interlocutory ruling. The City's failure to argue the defenses set forth on pages 24-30 below and its hesitation to appeal refute the City's "zealous defense" assertions and present issues for post-remand discovery.

5. The City/ATS contract does not stop Appellants from defending the ordinances and election ATS sued to nullify.

On pages 7-8 of its brief, ATS argues that the City's decision to structure its Red Light Camera program under a contract with ATS denies Appellants standing to defend two ordinances and an election. ATS' argument is nonsense.

Municipalities (and other state actors) *always* retain power to regulate the businesses that contract with them and to revise those regulations as circumstances require. A state actor lacks power to shackle its inherent right to exercise its police power in the future. *U.S. Trust Co. v. N.J.*, 431 U.S. 1, 23 n.20 (1977). Otherwise, governmental contractors like ATS could immunize themselves from regulation by signing contracts with cities. As Justice Oliver Wendell Holmes declared, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908), as cited in *U.S. Trust Co.*, 431 U.S. at 22. *See also Interstate Marina Dev. Co. v. Cty. of Los Angeles,* 155 Cal. App. 3d 435, 448, 202 Cal. Rptr. 377 (1984).

Citizens use ballot initiatives to challenge private contractors who convince city councils to disregard the financial, environmental, and safety needs of their citizens. In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 103 Cal. Rptr.2d 447 (Cal. App. Dist., Div. 3, 2001, *rhg. denied, rev. denied*), the court recognized that ballot-organizers could challenge the City of

Hermosa Beach's approval of drilling contracts. USCA5 1489-1500. *See also Indep. Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006).

6. The City's and ATS' arguments about permissive intervention are irrelevant.

ATS devotes pages 11-12 of its brief and the City dedicates pages 4 and 14-15 of its briefs to flogging the deadest of dead equines – Appellants' trial court request for permissive intervention. Appellants do not raise that issue on appeal, so this Court can disregard ATS' and the City's pointless briefing.

B. If government by the people, of the people, and for the people is to have meaning in Houston, this Court must permit Appellants to appeal the manifestly erroneous, June 17, 2011 summary judgment granted in ATS' favor.

If permitted to intervene, the Kubosh Appellants will appeal Judge Hughes' June 17, 2011 interlocutory summary judgment because it:

(1) overrides the Article I, Section 2 and Article XI, Section 5 guarantee of Texas voters' right to govern themselves through charter-amendment elections "subject to such limitations as may be prescribed by the Legislature," where "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State….";

(2) guts Local Government Code § 9.004, a "general law of the State of Texas" under Article XI, Section 5, which declares that charter amendment elections

remain "subject to such limitations as may be prescribed by the Legislature" and that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State….";

(3) elevates inconsistent and out-dated charters above a state statute, Local Government Code Chapter 9, the uniform, codified system the Legislature crafted to protect the rights of home rule citizens, in an unprecedented decision;

(4) strips more than 181,000 Houston voters of the vote they cast in a charter-amendment election they had every reason to believe meaningful;

(5) repeals a charter amendment that precludes this Mayor and City Council and any future mayor and city council from enacting an RLC ordinance, whether it involved civil, criminal, or administrative enforcement mechanisms, and without regard to whether the Legislature subsequently permits cities to enforce criminal, administrative, or civil schemes not yet conceived in the boardrooms of ATS, USCA5 2009-2011;

(6) disregards evidence of other charter-amendment elections used to annul or amend other City ordinances, USCA5 at 2009-2086;

(7) restricts the right of City voters to decide issues of public finance, traffic safety, jury trials, and contracts with the City, thus abridging ballot-access rights and the self-government protected by the First and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 27, and 29 of the Texas Constitution;

(8) ignores Appellants' arguments that a federal court should not decide this case under the *Younger*, *Burford*, and *Pullman* abstention doctrines[1]; and

(9) refuses to permit the Texas Supreme Court to decide issues of Texas standing consistent with certification of state law issues to state supreme courts in cases such as *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*).

These serious issues deserve to be developed through intervention.

C. Appellants satisfied the *Edwards v. City of Houston,* 78 F.3d 983 (5th Cir. 1996) (*en banc*) standard governing federal interventions as a matter of right.

A 1996 *en banc* decision, *Edwards v. City of Houston*, governs denial of intervention as a matter of right under, not the ATS-cited case (Appellee ATS'

[1] Under *Younger v. Harris*, 401 U.S. 37 (1971), abstention is appropriate when a federal exercise of jurisdiction would unduly interfere with state court processes. Under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), a court should abstain if federal action would involve unsettled issues of state law and interfere with state efforts to develop a coherent administrative policy about matters of public concern. USCA5 at 329 ¶ 47 and at 540 (the 2010 State Republican Party Platform opposing Red Light Cameras). Under *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498-500 (1941), abstention is appropriate when a complaint touches a sensitive area of social policy federal courts should not address unless there is no alternative, a definitive state court ruling on the state law issue could eliminate federal adjudication; and the proper resolution of a state law issue is uncertain. *See also Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976); *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959).

brief, at 5) *Edwards* superseded: *U.S. v. Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978). Appellants met that standard when they:

(1) **filed an indisputably timely application** six days after ATS filed its counterclaim to void the Proposition 3 election,

(2) **showed a direct and substantial "interest**" in defending their own votes against Red Light Cameras, including vast amounts of time, energy, and $200,000 in family money, USCA5 668, ¶ 3;

(3) **demonstrated that their "interest" would be impaired by the disposition of the action**, namely, that their time, money, and efforts would be wasted if ATS invalidated the election; and

(4) **showed that their "interest" was inadequately protected by a fiscally-irresponsible, budget-strapped City** whose Mayor colludes with City business partner ATS to retain $10 million annually in RLC revenues and whose City Attorney presented an emaciated and utterly unsuccessful defense of the Proposition 3 RLC election.

An investment of $200,000 in Kubosh family funds to win a ballot-measure campaign is no mere "general economic interest," as ATS asserts. That investment sets the Kubosh Appellants as far apart from ordinary voters who merely show up to vote on election day as David set himself apart when he strode out from the ranks of the Israelite army, in the Valley of Elah, to challenge Goliath.

1. The U.S. Supreme Court recognizes the standing of those who create legislation to defend that legislation.

Proponents of a ballot-proposition have standing to defend its constitutionality and validity. In *Karcher v. May,* 484 U.S. 72, 86 (1987) ("*Karcher*"), the Supreme Court held that legislators have standing and "authority under state law" to defend the legislation they sponsored. In *Karcher,* the President of the New Jersey Senate had standing to defend the constitutionality of a state statute when "neither the Attorney General nor the named defendants would defend the statute." *Id.*, 484 U.S. at 75 and 82. The City claims that *Karcher* is distinguishable on page 9 of its brief. But the City cannot deny that its voters are legislators when ballot-organizers collect 30,000 signatures in a petition under Local Government Code § 9.004. *Karcher* supports Appellants.

2. In *LULAC II,* 999 F.2d 831 (5th Cir. 1993), this Court recognized the standing of specially-interested *voters* to defend the legality of elections.

The City argues that *League of United Latin American Citizens v. Clements,* 923 F.2d 365, 367 (5th Cir. 1991), *later procs.*, 999 F.2d 831 (5th Cir 1993), *cert. denied*, 510 U.S. 1071 (1994) ("*LULAC II*") is distinguishable because the intervenors, Judges Sharolyn Wood and F. Harold Entz, were judges defending their elections. But this Court's ruling was not that narrow. *LULAC II* recognized those judges' standing to appeal as *Texas voters* whose votes were threatened by former Attorney General Dan Morales', fall-on-his-sword defense of Texas

elections and eagerness to settle: "Wood and Entz also have standing as voters," this Court ruled. "The settlement agreement would deprive voters of their right to vote for judges with general jurisdiction over their county." *Id.*, 999 F.2d at 845. USCA5 1519-21, USCA5 2123-25, 2241-53. *See also Wild Earth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 1998) ("The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy the minimal burden.").

ATS argues on page 6 that "[c]ourts have recognized referendum petition organizers' interests may support intervention in uniquely particular situations, such as where the procedural requirement of the petition process is challenged…[such as] a challenge to the validity of petition signatures." *LULAC II* defeats that argument, for Judges Wood and Entz did *not* dispute voter signatures.

In *LULAC II*, this Court cited with approval a then-recent Eleventh Circuit case: *Meek v. Metropolitan Dade Cty.*, 985 F.2d 1471 (11th Cir. 1993), which examined an at-large system of electing county commissioners when several individuals sought to uphold the existing at-large election. The court identified the voters/intervenors' interest as "maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered." *Id.* at 1480. "As here," Fifth Circuit Judge Higginbotham observed, "*individual voters* challenged a liability finding that

elected officials would not contest on appeal." *LULAC*, 999 F.2d at 845 (emphasis supplied). Those *individual voters'* interest in defending the legality of elections and the status quo election process conferred federal standing on them to intervene. *LULAC II*, 999 F.2d at 846, *citing Whitcomb v. Chavis,* 403 U.S. 124, 29 L. Ed. 2d 363, 91 S. Ct. 1858 (1971); *Baker v. Carr,* 369 U.S. 186 (1962).

3. Other courts' reasonable recognition of the standing of ballot-organizers to defend elections, election processes, and challenged laws supports Appellants' argument.

In their opening brief, Appellants cited well-reasoned cases from other courts around the country concluding that ballot organizers and other activists who dedicated their time, energy, and money the way the Kubosh Appellants did had standing to sue or intervene in federal court.

Those cases included Eleventh Circuit decisions reaffirming the standing of individual voters to defend challenged elections in *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) and *Dillard v. Baldwin County Commissioners*, 225 F.3d 1271 (11th Cir. 2000); the Sixth Circuit's recognition of the Michigan Chamber of Commerce's right to intervene in defense of a labor law it had supported in the analogous federal case of *Michigan State v. Miller,* 103 F.3d 1240, 1243-44, 1247 (6th Cir.), *rhg. en banc denied,* 1997 U.S. App. LEXIS 6347 (6th Cir. March 19, 1997); Ninth Circuit cases which upheld the standing of public-interest groups and ballot organizers to intervene in suits such as *Idaho Farm Bureau Fed'n v. Babbitt*,

58 F.3d 1392, 1397 (9th Cir. 1995), and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983); the Alaska Supreme Court's protection of a ballot-organizer's right to intervene in defense of a challenged proposition it had sponsored in *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 911, 2000 Alas. LEXIS 61 (Al. 2000); and numerous California cases, *e.g.*, *Hermosa Beach*. *See* USCA5 USCA5 340-421, 629-58, 1545-47, 2127-28.

Those rulings demonstrate that petition-signers, ballot-organizers, and other specially interested voters can show a concrete, legally-protectable interest to intervene as a matter of right. Most arose under Federal Rule 24(a) or state rules involving a similar test. *See, e.g., Kritz*, 3 P.3d at 911. In their briefs, ATS and the City fled from the power of that precedent the way dust clouds fly before an advancing storm. But ATS' and the City's flight from the force of law cannot obscure the fact that Appellants have an interest sufficiently direct and specific to prove their right to intervene. The intervenor's burden of proof is minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972).

D. In *Blum v. Lanier*, 997 S.W.2d 259 (Tex. 1999), Texas' highest court held that "qualified voters who sign [a charter-amendment] petition 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."

1. Article XI, Section 5 and Article I, Section 2 of the Texas Constitution protect home-rule voters' right to govern their cities through charter-amendment elections.

Independently and in addition to federal law governing standing, the Kubosh Appellants have standing to defend the Proposition 3 election under Texas law. Any doubts about *Blum* must be decided in favor of the Kubosh Appellants' petition-signer standing. On November 5, 1912, a super-majority of Texas voters (73.6%) voted to amend Texas' Constitution to preserve and protect their right as home-rule citizens to amend their municipal charters *under state law* pursuant to Article XI, Section 5 of the Texas Constitution. *See* Texas Legislative Council, AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876 (Austin, May 2010), at 87. *See also* H.J.R. 10, 32nd Leg., R.S., 1911 (session laws, p. 284).

By voting to amend the Constitution, a majority of Texas voters granted those "qualified voters" who organize home-rule charter-amendments campaigns a special interest in proposing direct legislation to the people of this State, thus giving those "qualified voters" who organize ballot elections and submit charter-amendment petitions "special interest" standing to defend the constitutionality and validity of the measure elections they sponsor, support, and fund with their blood,

sweat, tears, and wallets. As amended, Article XI, Section 5 reads as follows:

> § 5. Cities of More Than 5,000 Population; Adoption or Amendment of Charters; Taxes; Debt Restrictions.
>
> Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, **the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State**….

That amendment enshrined the right of all home rule citizens, including Appellants, to participate in self-government – a right put at risk by ATS' attack on the Texas Constitution, statutory law, federalism, the First Amendment right and liberty interest of citizens to petition peaceably, and the Fourteenth Amendment right to reasonable ballot access and associational freedoms.

ATS' counterclaim to nullify the Proposition 3 election unreasonably limits liberty and freedom of speech, for "[an] election campaign is a means of disseminating ideas as well as attaining political office….Overbroad restrictions on ballot access jeopardize this form of political expression." *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). In his SECOND TREATISE OF GOVERNMENT, John Locke stated that "[t]he Freedom then of Man and Liberty of

acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far his is left to the freedom of his own will." *Id.*, Pt. II, ch. 6, § 63 at 327 (London 1690; Cambridge Univ. Press 1960).

2. The Texas Supreme Court has long recognized a ballot-organizer's justiciable interest in the valid execution of a charter amendment election.

This case involves an important clash of ideas about the duration of standing extended to petition organizers in *Blum v. Lanier,* 997 S.W.2d 259 (Tex. 1999). In *Blum,* the court recognized that petition-signers in Texas have a justiciable interest in the valid ***execution*** of a charter-amendment election:

> 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 (Tex. 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…..*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.**

Blum, 997 S.W.2d at 261-62 (bold, italics, and underlining supplied).

Blum's recognition of a petition-signer's justiciable interest demonstrates that Appellants had Rule 24(a)(2) standing and determines the outcome of this appeal. The word "execution" in *Blum* plainly refers to a post-election result.

Bryan Garner, editor of BLACK'S LAW DICTIONARY, defines execution as "1. The act of carrying out or putting into effect (as a court order or a securities transaction) <execution of the court's decree> <execution of the stop-loss order>…" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY similarly defines "execution" as "1. The act or process of executing: PERFORMANCE, ACCOMPLISHMENT…"

To ***execute***, *i.e.*, to ***carry out or put into effect*** a charter-amendment election, means ***amending a home-rule city's charter***. Thus, the *execution* of an election occurs *post*-election and the amendment overrides inconsistent ordinances. When a government contractor such as ATS sues to invalidate a charter-amendment election or the ordinances scheduling it and memorializing it, as here, that contractor seeks to keep a city from ***executing*** the electorate's will, the contractor thwarts the will of the electorate expressed on election day.

Ballot-organizers and petition-gatherers execute the electorate's constitutional and statutory right to conduct charter amendment elections by defending, post-election, the validity and constitutionality of the electorate's decision. *See Glass*, 244 S.W.2d at 649 (recognizing petition-signers' "justiciable interest in the valid execution of [a] charter amendment election…distinct from that of the general public…"). *See* USCA5 at 1729-1730.

In its Brief at 9, the City argues that no Texas court has recognized a petition-organizer's standing under *Blum* to defend his "justiciable interest in the

valid execution of the charter amendment election" after election day. The City's argument demonstrates only that the duration of ballot-organizer standing is an issue of first impression in the Texas Supreme Court. The absence of a ruling does not support affirmation of the district court's intervention-denial.

The City cites *Brown v. Todd*, 53 S.W.3d 297, 299 (Tex. 2001), to argue that Appellants had no standing to complain of ATS' efforts to invalidate the election Appellants funded with $200,000 of Kubosh family money. *See* USCA5 668, ¶ 3. But in *Brown*, petitioners' counsel waived the ballot-organizer standing argument these Appellants preserved. Petitioner Richard Hotze argued *only* that he had voter standing, *not* ballot-organizer, petition-signer and campaign fundraiser standing. In footnote 2, Chief Justice Phillips emphasized that:

> Hotze did not base his assertion of standing on the fact that he was a petition organizer and signer. *See Blum*, 997 S.W.2d at 261-62 (rejecting similar argument [that a voter who signed a petition was just like any other voter]). At oral argument, he clarified that he asserted standing more broadly, based on the fact that he "voted and was a winner."

Brown, 53 S.W.3d at 302 n.2. This Court can decide the issue.

E. ATS' challenge to the Proposition 3 election and related ordinances was a retroactive election contest Randall Kubosh was entitled to defend under Texas Election Code § 233.004(b).

The City's declaratory judgment suit has enabled ATS to file a counterclaim that is in substance if not in form a retroactive election-contest. An election contest includes "any type of a suit in which the validity of an election or any part

of the elective process is made the subject matter of litigation." *See, e.g., Rossano v. Townsend*, 9 S.W.3d 357, 362 (Tex. App.—Houston [14th Dist.] 1999, no writ). An election contest thus includes a government contractor's suit seeking to void an election. ATS characterized the Proposition 3 election as void and Judge Hughes agreed on June 17, 2011. *See* SER, Docket 78 and 79.

Courts do not permit form to govern over substance when the Constitution is at stake. *See Escobedo v. Ill.*, 378 U.S. 478, 486 (1964) (declining to "exalt form over substance" when determining the temporal scope of the Sixth Amendment); *Terry v. Adams*, 345 U.S. 461, 465 n.1 (1953) (refusing to accept a legal argument that "is not one of substance but of form" in a case about African-American voters in a primary); *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (1997) ("We decline to elevate form over substance, as the dissenters would."); *Bexar Cty. v. Hatley*, 136 Tex. 354, 363, 150 S.W.2d 980, 985 (1941) ("It would be a sacrifice of substance to form to hold the above quoted language set out in preamble and decreeing clause of the order legally insufficient to adopt voting machines for use in elections in the county…"); *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1328-31 (Fed. Cir.), *cert. denied*, 546 U.S. 873 (2005) (defining "non-partisan election" by reference to local laws improperly elevated form over substance).

There is no valid reason a petition-signer can have standing to defend a ballot-measure *before* an election but lose it *afterward*. Unlike Cinderella's

pumpkin-carriage, a petition-organizer's rights under Section 9.004 do not disappear at the stroke of election day's midnight. The interest in changing the status quo does not end until a new law replaces a bad law.

The Texas Election Code demonstrates that petition-voters and ballot-organizers have standing to defend ballot measure elections. In its brief at 19, the City denies that *Grizzaffi v. Lee,* 517 S.W.2d 885 (Tex. Civ. App.—Fort Worth 1974, dism'd w.o.j.), USCA5 2116-17, applies. But *Grizzaffi*, Election Code § 233.004(b), and § 233.004(b)'s predecessor statute (Article 9.30, REV. CIV. STAT.) show that standing does *not* end on election day. Mayor Grizzaffi intervened *after* the election as a "representative of the proponents of the election." *Id*. at 888. Denial of Mr. Grizzaffi's right to intervene would have violated the Fourteenth Amendment's guarantee of "equal protection under the Constitution." *Id.* at 891.

F. Appellants seek to appeal Judge Hughes' June 17, 2011 summary judgment entered in response to the City's collusive, utterly unsuccessful, fall-on-its-sword "defense."

1. ATS mis-states this Court's standard for determining the adequacy of governmental representation.

On page 9 of its brief, ATS cites *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 757 (5th Cir. 1995) to aver that an intervenor must show a "very compelling showing of inadequacy of representation" amounting to "gross negligence or bad faith" to show a defense is inadequate. But that was *not* the holding in *Franklin Parish.* Instead, this Court held that "when the party seeking

to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene ***unless that party demonstrates adversity of interest, collusion, or nonfeasance."*** (Emphasis added).

Franklin Parish involved school desegregation, *id.* at 757, where there was "no evidence offered at the hearing that FPSB was operating in bad faith or was in any way not representative of the majority of its constituency." *Id.* at 757-58. In contrast, the Kubosh Appellants presented arguments and evidence regarding the City's $10 million adverse interest, long collusion with ATS, and nonfeasance, *i.e.*, failure to present important affirmative defenses.

Appellants showed, *first*, that ATS' contractual partner, the City, was colluding with ATS by making ATS' case for it, namely, by pleading that "[t]he only process for non-elected citizens to propose the repeal of an existing ordinance, the referendum process, is set forth in Article VII-b. § 3 of Houston's Charter," USCA5 at 15, and, further, by referring to civil suit evidence that the City colluded to conceal embarrassing ATS e-mails with Houston Police Department officers under a claim of privilege rejected as bogus by former Harris County District Court Judge (now Fourteenth Court of Appeals Justice) Tracy Christopher. *See* USCA5 634-38, ¶¶ 16-26 (briefing) and 644-58 (examples).

Appellants proved, *second*, that the City had a $10 million annual interest that incentivized it to lose the Proposition 3 charter-amendment lawsuit it purported, falsely, to "zealously defend" before losing its case on June 17, 2011.

Appellants established, *third*, that the City failed to fulfill its duty to defend the Proposition 3 election its leaders always opposed and now seek to abandon, including, *inter alia*, the defenses analyzed below.

2. In an appeal of Judge Hughes' June 17, 2011 summary judgment, the Kubosh Appellants can present meritorious defenses the City refused to make and thus waived summary judgment.

The June 17, 2011 summary judgment demonstrates the falsity of ATS' argument, at 13 of its brief, that Appellants "dumped" thousands of pages of irrelevant documents into the record. "Absent some basis for determining that the intent of the electorate was in conflict with the intent of the drafters," the *Hermosa Beach* court declared, "evidence of the drafters' intent is an important tool in interpreting the scope of an initiative." *Id.*, 86 Cal. App. 4th at 551. All evidence about the scope and intent of the Kubosh charter-amendment is relevant because the summary judgment rejected as too narrow the City's argument "that the [charter-amendment] is broader than the ordinance…" SER Docket 78 at 4.

The evidence Appellants presented showed that their intent was consistent with that of 53% of the voters who said No to the City's Proposition 3. The Kubosh Appellants proposed a charter-amendment election, an amendment to the

City's constitution, to prevent ATS and the City from conspiring, denying Houstonians their procedural and jury trial rights, endangering their safety, and hypocritically disguising a tax as a safety measure. Appellants sought to block this Mayor and future mayors from using cameras in administrative proceedings, in future criminal prosecutions, or in any future debt collection cases. *See* USCA5 335 (Francis Kubosh's affidavit, USCA5 335, ¶¶ 3-4 stating that, "I signed one of the petitions calling for an election to ban the City of Houston's use of Red Light Cameras for civil, administrative, or criminal purposes.").

An appeal by the Kubosh Appellants will focus on Judge Hughes' erroneous reliance on ATS' arguments to limit the scope of a state charter-amendment to the terms of a single referendum (and its four amendments). The record will demonstrate error in the district court's conclusion that "[t]he nature of the [Proposition 3] was to repeal a single ordinance about techniques for enforcing traffic laws." SER, Docket 78, at 1. Appellants' record includes history of past charter amendment elections in Houston and more than a century of similar constitutional amendment elections in Texas. *See* USCA5 2139, ¶ 7; 2239-40.

Contrary to ATS' argument at 17-18, ATS' counsel is advancing opposing sides of the same ballot-organizer standing issues in this Court and in two pending *Hotze* cases in the Texas Supreme Court. It is difficult to conceive of a clearer conflict of interest between one attorney and two sets of clients.

This Record contains ample evidence of the inadequacy of the City's defense under the *Edwards* standard. On pages 54-59 of their opening brief, Appellants presented meritorious defenses the City never argued in its utterly unsuccessful defense of the Proposition 3 election, two related ordinances, and the statutory and constitutional right of its citizens, including Appellants, to use charter amendment elections to amend its code of ordinances.

First, the City gave ATS a forum in the federal court where ATS Vice President George Hittner's father serves as a U.S. District Court Judge. The City could have forced ATS to sue first in state court, or, alternatively, it could have truthfully pled in its complaint, that 53% of its voters had exercised their constitutional and statutory rights under Article XI, Section 5 of the Texas Constitution and Texas Local Government Code § 9.004 to use a charter-amendment election to keep any future Mayor and City Council from ever enacting another such ordinance in the future, whether such ordinance involved civil, criminal, or administrative enforcement mechanisms.

Second, during the day-after-Thanksgiving T.R.O. hearing, City Attorney David Feldman failed to defend the Proposition 3 election after Judge Hughes declared, erroneously we submit, that "the essence of the popular revolt was people in Houston want to run red lights" despite knowing the many reasons Houstonians rejected the City/ATS cameras. *See* Appellants' Brief at 9-11, USCA5 2309. Mr.

Feldman admitted that "we have got some very fundamental issues with respect to the interpretation of statute, vis-à-vis the initiative and referendum process of the ordinance; but those issues have been there from the very beginning." *See* Appellants' Brief at 54, USCA5 2306-2340. No one but ATS and the City know what else was said there because they went off the record and returned again as ATS Vice President George Hittner apologized ("Sorry") for some error or misstatement that went unrecorded. RR, Nov. 26, 2011, at 32, ll. 2-4.

Third, City Attorney David Feldman failed to present in this case the very same election-contest arguments the City was then making in its pending *City v. Hotze* case in the Texas Supreme Court. *See* Appellants' Brief at 47-49, citing USCA5 1628, 2162-76, 1998-2090, etc. Why did the City pull its punches?

Fourth, City Attorney David Feldman refused to present authoritative arguments and authorities about Texas' voters' traditional right to decide public safety and civil/criminal issues despite receiving e-mailed, PDF copies of those arguments and authorities. *See* Appellants' Brief at 49, citing USCA5 2139, ¶ 7 and 2239-40. When given weapons to wield, the City sat on its hands.

Fifth, in a clear dereliction of duty the City utterly failed to respond to supplemental briefing ATS filed on June 2, 2011. *See* SER Docket 75-79.

Sixth, the City did not present meritorious arguments about Texas voters' long history of deciding complex issues of civil and criminal law in elections not

involving referenda. As reflected on page 55 of Appellants' opening brief, the City never responded to ATS' summary judgment motion by showing that Texas and Houston voters had addressed many issues of civil and criminal law in constitutional-amendment elections during the previous century. USCA5 1504-10 and 2131-32. The City ignored that defense on pages 23-24 of its Appellee's brief. The City cannot deny that it *never* presented those authorities, despite Appellants' counsel's e-mailing of those arguments and an authoritative summary of all Texas constitutional amendments to City Attorney David Feldman at 8:50 a.m. on December 15, 2010. USCA5 2139, 2239-40. The City Attorney did not present arguments and authorities he received on a silver (well, e-mail) platter. USCA5 1721-27 and 1992-93. The City intentionally waived those arguments and authorities, leaving no one but the Kubosh Appellants to present them on appeal.

Seventh, the City waived First Amendment ballot-access and petitioning arguments. In their opening brief at 56, Appellants argued that an ATS victory would impair their First Amendment and Texas constitutional right to organize charter-amendment elections of the kind they organized and won here. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), the Supreme Court recognized that ballot access restrictions may burden both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes

effectively." On June 17, 2011 Judge Hughes held, without reference to any statute or other legal authority but only Abraham Lincoln's reference to Edward J. Stearns' NOTES ON UNCLE TOM'S CABIN (1853), at 53 (*see* SER, Docket 78, at 4 n.8), to rule that a City municipal referendum is the same thing as a statutorily authorized charter amendment. *See* SER, Docket 78, at 6; USCA5 313-329. ATS' summary judgment victory narrows the scope of Chapter 9 of the Local Government Code and Article XI, Section 5 of the Texas Constitution, limiting charter-amendment rights and restricting ballot-access throughout Texas.

Eighth, the City waived *Younger*, *Pullman*, or *Burford* abstention arguments about federal/state comity. On their opening brief at 55, Appellants argued that the City never presented three federal abstention defenses they thoroughly brief in Judge Hughes' court: *Younger, Pullman,* and *Burford* abstention. Appellants developed those meritorious defenses in their December 3, 2010 "Briefing in Opposition to ATS' Counterclaim to Nullify the November 2, 2010 Election Defeat of Houston's Charter Amendment Proposition 3." *See* USCA5 1477 and 1510-1514 (argument and authorities); and USCA5 2351. The City chose not to respond to Appellants' argument on pages 23-24 of its brief, just as it chose not to raise any abstention defenses.

The June 17, 2011 summary judgment shows how this case involves the interaction of Texas constitutional, statutory, and municipality law and political issues of profound importance to voters. *See* SER, Docket 78, at 3-6.

The City *chose* not to make abstention arguments despite (1) its own litigation of the same issues in the pending *City of Houston v. Hotze* appeal in the Texas Supreme Court, No. 10-048 (Tex. filed July 6, 2010) and (2) ATS' litigation of the same legal issues in its pending, September 2, 2011 lawsuit against the City of Baytown in the 11th Judicial District Court of Harris County. *See* USCA5 1768-1870 at 1823-28 and 1225-1316 (ATS and City of Baytown pleadings).

Because the City waived these defenses, only Appellants can raise them on appeal to defend the constitutional, statutory, and common law right of Texas citizens to participate in self-government by presenting home rule cities with charter amendment petitions lawful under Local Government Code § 9.004.

II. The District Court abused its discretion in denying Appellants' motion for new trial.

The Kubosh Appellants respect Judge Hughes but disagree with his decisions in this case. Appellants pointed out an erroneous legal conclusion at the heart of Judge Hughes' order denying intervention. *See* Appellants' Brief at 60. The City makes pointless attacks on the Furlow Affidavit's sworn statements about only discovering the Texas Supreme Court *City v. Hotze* appellate briefs *after* the December 9, 2010 rush-to-judgment intervention hearing to avoid admitting that it

never disclosed its inconsistent positions in the *Hotze* case and never objected to the undisputed Furlow affidavit in the district court. Judge Hughes erred as a matter of law by denying Appellants' motion for new trial.

PRAYER FOR RELIEF

Appellants respectfully pray that this Court will (1) reverse and render the December 12, 2010 order denying intervention and recognize Appellants' right to appear as an intervenor as qualified-voters, petition-organizers, and ballot-organizers under Article I, Section 2 and Article XI, Section 5 of the Texas Constitution, § 9.004 of the Texas Local Government Code, and Texas Election Code § 233.004(b); (2) vacate the June 17, 2011 interlocutory summary judgment in the district court; (3) certify any appropriate state law standing issues to the Texas Supreme Court; (4) remand this case for further proceedings.

Dated: June 27, 2011.

Respectfully Submitted,

E-Filed on June 27, 2011

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CERTIFICATE OF SERVICE

I certify that I am serving electronically, via Pacer CM/ECF, Randall and Francis Kubosh's Appellants' Reply Brief, and that I will serve via hand delivery two paper copies and a CD to any counsel of record who requests it, serving same as follows in accordance with FED. R. CIV. P. 5(b), on June 27, 2011:

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CERTIFICATE OF BRIEFING COMPLIANCE

The undersigned counsel of record certifies, pursuant to 5th Cir. R. 32.3, that this Appellants' Reply Brief complies with the type-volume limitations of 5th Cir. R. 32.2.1. Exclusive of the exempted portions in **Fed. R. App. P. 32(a)(7)(B)(2)** and **5th Cir. R. 32.2**, this Brief contains 7**,333 words**, that is, **less than the 7,500 word limit for an Appellants' Reply Brief**. This Brief is in Microsoft Word format using Times New Roman 14.

2. The undersigned counsel has provided this Court with an electronic version of the brief in a single Portable Document Format (PDF) filed on CD.

3. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limitations in 5th Cir. R. 32.3, may result in the Court striking the brief and imposing sanctions against the person signing the brief.

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