

Cause Number

12-2938-A

LOIS ROGER
DISTRICT CLERK

2012 NOV - 5
SMITH COUNTY, TEXAS

IN THE DISTRICT COURT

OF SMITH COUNTY, TEXAS

7TH JUDICIAL COURT

____ JUDICIAL DISTRICT

DELORES RADFORD, AND RICHARD LANHAM §
Plaintiffs, §
v. §
CASSANDRA BRAGER, City of Tyler City Secretary, §
BARBARA BASS, JASON WRIGHT, RALPH CARAWAY, SAM MEZAYEK, MARTIN HEINES, MARK WHATLEY, AND DARYL BOWDRE, as Tyler City Council Members, KAREN NELSON, Election Coordinator, KAREN SMITH, as County Clerk for Smith County, JO ANN FLEMING, as Commissioner Precinct 1, WILLIAM A. MCGINNIS, as Commissioner Precinct 2, BOBBY VAN NESS, as Commissioner Precinct 3, JO ANN HAMPTON, as Commissioner Precinct 4, JOEL P. BAKER, as County Judge §
Defendants. §

PLAINTIFF'S ORIGINAL PETITION & APPLICATION FOR TEMPORARY RESTRAINING ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, DELORES RADFORD AND RICHARD LANHAM, (hereinafter collectively referred to as "PLAINTIFFS"), complaining of CASSANDRA BRAGER, City of Tyler City Secretary, BARBARA BASS, JASON WRIGHT, RALPH CARAWAY, SAM MEZAYEK, MARTIN HEINES, MARK WHATLEY, AND DARYL BOWDRE, as Tyler City Council Members, hereinafter referred to collectively as "CITY OF TYLER", and KAREN NELSON, Election Coordinator, KAREN SMITH, as County Clerk for Smith County, JO ANN FLEMING, as Commissioner Precinct 1, WILLIAM A. MCGINNIS, as Commissioner Precinct 2, BOBBY VAN

NESS, as Commissioner Precinct 3, JO ANN HAMPTON, as Commissioner Precinct 4, JOEL P. BAKER, as County Judge, hereinafter referred to collectively as "SMITH COUNTY"), files this his Original Petition and Application for Temporary Restraining Order, and for cause of action would respectfully show unto the Court as follows:

I. DISCOVERY LEVEL

1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3.

II. PARTIES

2. Plaintiff DELORES RADFORD, is an individual living in Smith County, with her residence being located within the area commonly known for election purposes as JP 2. *See Exhibit "A", Affidavit of Delores PLAINTIFFS.*
3. Plaintiff RICHARD LANHAM, is an individual living in Tyler, Texas, Smith County. *See Exhibit "B", Affidavit of Richard Lanham.*
4. Defendant, CASSANDRA BRAGER, is the City Secretary, City of Tyler City, Texas and may be served with process by serving her at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever she may be found. Defendant CASSANDRA BRAGER, was and is the City Secretary of the City of Tyler at the time of the verification of the signatures related to the petition in question, and was responsible for certifying to the Tyler City Counsel the number of qualified voters signing the petition.
5. Defendant, BARBARA BASS, is the Mayor and City Council Member of the City of Tyler City, Texas and may be served with process by serving her at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever she may be found. Defendant BARBARA BASS, was

and is the Mayor of the City of Tyler and the final canvassing authority for the contested matter, the presiding officer of the authority that ordered the election in question.

6. Defendant, JASON WRIGHT, is a Tyler City Council Member and may be served with process by serving him at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever he may be found. Defendant JASON WRIGHT, is part of the final canvassing authority for the contested petition process.
7. Defendant, SAM MEZAYEK, is a Tyler City Council Member and may be served with process by serving him at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever he may be found. Defendant SAM MEZAYEK, is part of the final canvassing authority for the contested petition process.
8. Defendant, MARTIN HEINES, is a Tyler City Council Member and may be served with process by serving him at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever he may be found. Defendant MARTIN HEINES, is part of the final canvassing authority for the contested petition process.
9. Defendant, MARK WHATLEY, is a Tyler City Council Member and may be served with process by serving him at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever he may be found. Defendant MARK WHATLEY, is part of the final canvassing authority for the contested petition process.
10. Defendant, DARYL BOWDRE, is a Tyler City Council Member and may be served with process by serving him at City of Tyler, 212 N. Bonner, Ave., Tyler, Texas 75702, or wherever he may be found. Defendant DARYL BOWDRE, is part of the final canvassing authority for the contested petition process.

11. Defendant, KAREN NELSON, is the Election Representative for Smith County, Texas and may be served with process by serving her at City of Tyler, 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever she may be found. Defendant KAREN NELSON, was and is the Election Representative for Smith County, Texas at the time of the verification of the signatures related to the petition in question, and was responsible for certifying to the Smith County Commissioner's Court the number of qualified voters signing the petition.¹
12. Defendant, KAREN SMITH, is the County Clerk for Smith County, Texas and may be served with process by serving her at City of Tyler, 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever she may be found. Defendant KAREN SMITH, was and is the County Clerk for Smith County, Texas at the time of the verification of the signatures related to the petition in question, and is responsible for certifying to the Texas Secretary of State the results of the election.
13. Defendant, JO ANN FLEMING, is a Smith Council Commissioners' Court Member and may be served with process by serving her at 200 E. Ferguson, Suite 300, Tyler, Texas 75702 or wherever she may be found. Defendant JO ANN FLEMING, is part of the final canvassing authority for the contested petition process.
14. Defendant, WILLIAM A. MCGINNIS, is a Smith Council Commissioners' Court Member and may be served with process by serving him at 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever he may be found. Defendant WILLIAM A. MCGINNIS, is part of the final canvassing authority for the contested petition process.
15. Defendant, BOBBY VAN NESS, is a Smith Council Commissioners' Court Member and

¹ On Friday, November 2, 2012, Shannon Dacus, retained counsel for SMITH COUNTY, stated she would accept service on behalf of SMITH COUNTY defendants. Accordingly, service is being performed via facsimile and hand delivery to her office.

may be served with process by serving him at 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever he may be found. Defendant BOBBY VAN NESS, is part of the final canvassing authority for the contested petition process.

16. Defendant, JO ANN HAMPTON, is a Smith Council Commissioners' Court Member and may be served with process by serving her at 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever she may be found. Defendant JO ANN HAMPTON, is part of the final canvassing authority for the contested petition process.

17. Defendant, JOEL P. BAKER, is a Smith Council Commissioners' Court Member, serving as County Judge, and may be served with process by serving him at 200 E. Ferguson, Suite 300, Tyler, Texas 75702, or wherever he may be found. Defendant JOEL P. BAKER, is part of the final canvassing authority for the contested petition process.

III. JURISDICTION

18. The District Court of Smith County has exclusive Jurisdiction and venue of this cause of action pursuant to Texas Election Code Section 221.002 et seq., and Section 232.006 (c).

IV. STATEMENT OF FACTS

19. BUY LOCAL FIRST, a grass-roots organization requested an application for a local option liquor petition to TYLER and SMITH COUNTY. Subsequently, the petitions were issued pursuant to the Texas Local Opinion Election Code, mandating that each signature petition bear a serial number, date of issuance, (April 24, 2012), and bear the seal of the County or City.

20. The propositions in question are as follows:

-
- A. SMITH COUNTY: *To Legalize: "The legal sale of beer and wine for off-premises consumption only"*
- B. TYLER: *To Legalize: "The legal sale of beer and wine for off-premises consumption only"*
21. The signature pages were timely submitted to TYLER and SMITH COUNTY authorities. Following the submission, numerous individuals filed Public Information Requests seeking copies of these signature pages in order to perform an individual analysis of the signature pages to ensure they were proper pursuant to Texas law.
22. While authorized to conduct a scientific sampling, both TYLER and SMITH COUNTY bypassed this methodology, and elected to perform a signature by signature analysis of the petitions submitted. Through this method, faulty or improper signatures should have been detected by the authorities undertaking this task.
23. Despite complaints and notice from concerned citizens that the signatures tabulated had substantial errors, the County Clerk and/or Electoral Representative of SMITH COUNTY submitted what was deemed to be sufficient signatures to place this matter on the November ballot. As such, SMITH COUNTY'S Commissioners' Court ordered the propositions be placed on the ballot, as required by law.
24. In similar fashion, TYLER's City Secretary informed the City Council for TYLER that their office had found what was alleged to be sufficient signature to place the proposition on the ballot. Accordingly, the City Council for TYLER followed the lead of SMITH COUNTY.
25. On October 22, 2012, early voting began in Smith County, JP District 2, with ballots containing the local opinion liquor propositions for TYLER and SMITH COUNTY. These

ballots have not been tabulated or certified at this time.

26. The general election on these propositions is November 6, 2012.

V. CAUSES OF ACTION

A.) VIOLATION OF TEXAS ELECTION CODE TITLE 17, CHAPTER 501 §501.031

27. TYLER and SMITH COUNTY have allowed propositions as to off-premises sale of beer and wine to be placed on the November 6, 2012 ballot during the general election. Independent review of the signature pages submitted clearly show that placement of these propositions on the ballots is improper because the signature pages do not contain the requisite amount of valid signatures of qualified voters.

28. Pursuant to §501.031(a), the following mandate is imposed on the voter registrar:

The voter registrar of the county shall check the names of the signers of petitions and the voting precincts in which the signers reside to determine whether the signers were qualified voters of the county, justice precinct, or municipality at the time the petition was issued. The political subdivision may use a statistical sampling method to verify the signatures, except that on written request from a citizen of the political subdivision for which an election is sought, the political subdivision shall verify each signature on the petition. The citizen making the request shall pay the reasonable cost of the verification. The registrar shall certify to the commissioner's court the number of qualified voters signing the petition.

29. Furthermore, §501.031(b), provides that a petition signature may not be counted unless the signature is the actual signature of the purported signer and the petition:
- A. contains in addition to the signature:
 - B. the signer's printed name;
 - C. the signer's date of birth;
 - D. if the territory from which signatures must be obtained is situated in more than one county, the county of registration;
 - E. the signer's residence address; and
 - F. the date of signing.
30. Despite the fact that the SMITH COUNTY has failed and refused to comply with previous Public Information Requests, resulting in approximately 319 missing pages of the petitions that purportedly contain 12,566 signatures, the following disallowed signatures have been identified by PLAINTIFFS:
- A. 5,402 signatures that failed to provide registration numbers on the Petition;
 - B. 121 signatures for "voters" that did not reside in JP2 as of April 30, 2012;
 - C. 1 signature from a gentleman that was deceased when the Petition was allegedly signed;
 - D. 215 duplicate signatures; *See Exhibit "C", Data Compilation of Duplicative Names.*
 - E. 124 signatures on the suspended list as of April 25, 2012;
 - F. 5 signatures from individuals that registered to vote after April 25, 2012;
 - G. 149 signatures for individuals that were registered in JP2, but moved out of JP2; *See Exhibit "D", Data Compilation of Signers that Moved from JP 2.*
 - H. 138 signatures whose birthrate is missing or incorrect from the Petition; *See Exhibit "E", Data Compilation of Signers failed to provide proper birthdate.*

- I. § signatures for individuals who failed to include their city address.
31. In total, 6,242 signatures [49.6% of the total submitted] that were "certified" by SMITH COUNTY. As to TYLER, it is believed that the same issues are presented, but the marked versions of the signature pages relied upon by TYLER have not been obtained as of this date.
32. While these invalidations might appear to be technical, the Texas Attorney General, in Opinion JP-501, stated that the registrar has no discretion to waive the requirements of §501.031. (See Exhibit "F", Opinion JM-501). [*Emphasis Added*]
33. When the 319 pages that were omitted in SMITH COUNTY'S production are located, it is highly likely that additional invalid signatures will be discovered and brought to the attention of SMITH COUNTY and TYLER. However, these documents will not be obtained without the necessity of litigation.

B) VIOLATION OF TEXAS ELECTION CODE TITLE 17, CHAPTER 501 §501.026

34. Pursuant to Texas law, any petition submitted for verification on a local opinion liquor election must contain the date of issuance from the County Clerk, and be serially numbered.
35. Specifically, "A petition must show the date the petition is issued by the county clerk and be serially numbered. Each page of a petition must bear the same date and serial number and the actual seal of the county clerk rather than a facsimile of that seal." See *Texas Election Code Title 17, Chapter 501 §501.026*.
36. Of the Petitions submitted and tabulated by SMITH COUNTY, the following sets are missing the requisite date of issuance:

- A. 1301-1400: 252 votes deemed valid by SMITH COUNTY.
 - B. 1401-1500: 363 votes deemed valid by SMITH COUNTY.
 - C. 1501-1600: 769 votes deemed valid by SMITH COUNTY.
 - D. 1601-1700: 784 votes deemed valid by SMITH COUNTY.
 - E. 1701-1800: 450 votes deemed valid by SMITH COUNTY.
 - F. 1801-1900: 373 votes deemed valid by SMITH COUNTY.
 - G. 1901-2000: 742 votes deemed valid by SMITH COUNTY.
37. Therefore, SMITH COUNTY has counted, tabulated, and verified 3,733 signatures that are on petition forms that are strictly prohibited by §501.026. Accordingly, these signatures cannot be used to aggregate the requisite signatures.
38. Furthermore, the signature pages provided to PLAINTIFFS and other concerned citizens by SMITH COUNTY do not contain any evidence that the seal of the County was affixed as required by law.

C) VIOLATION OF TEXAS GOVERNMENT CODE § 552.221

39. On various occasions, members of STAND STRONG FOR TYLER, requested Smith County and alternatively City of Tyler to provide a complete copy of the Petition filed by BUY TYLER FIRST. As of this date, the complete petition has never been provided to any party seeking same.
- A. An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.
 - B. An officer for public information complies with Subsection (a) by:

1. *providing the public information for inspection or duplication in the offices of the governmental body; or*
 2. *sending copies of the public information by first class United States mail if the person requesting the information requests that copies be provided and pays the postage and any other applicable charges that the requestor has accrued under Subchapter F.*
- C. *If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.*
- D. *If an officer for public information cannot produce public information for inspection or duplication within 10 business days after the date the information is requested under Subsection (a), the officer shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.*

40. SMITH COUNTY and TYLER'S actions in response to numerous Public Information

Request regarding the local opinion election petitions conclusively show the following:

- A. neither entity timely provided the requested documents to the individuals that requested them, citing the "verification process" as the reason for the delay;
- B. neither entity provided the requested documents in sufficient time to allow the concerned citizens the ability to discuss irregularities in front of the County Commissioner's Court or City Council when this matter was approved for the ballot; and
- C. SMITH COUNTY refused to produce any documents unless litigation was filed.

41. In particular, On July 5, 2012, Steve Kean, Deputy City Attorney for Tyler, Texas, sent correspondence to Deon Williams, a member of STAND STRONG FOR TYLER, in which he acknowledged receipt of a Public Information Request on June 21, 2012. In this email, attached hereto as Exhibit "G", Mr. Kean stated that TYLER could not provide said records until August 13, 2012, because of the "ongoing verification process".

42. As to SMITH COUNTY, Stan Springerley, Civil Assistant District Attorney, sent correspondence to Mr. Bill Aleshire (then counsel for STAND STRONG FOR TYLER), regarding an identical Public Information Request. See Exhibit "H". In this letter, dated August 19, 2012, Smith County representatives stated the Public Information Request was not properly submitted, and was repetitious or redundant.
43. The letter claims copies were sent to Mike Daniels, a member of STAND STRONG FOR TYLER on July 2, 2012, with additional documents being sent July 3, 2012. Finally, it alleges that on August 1, 2012, "marked pages" were provided to Mr. Daniels. However, a complete copy of the petition was never provided, despite Mr. Springerley's assertion that they were piecemealed together. See Exhibit "I", Affidavit of Mike Daniels, see also Exhibit "J", Data Compilation of Missing Pages from Smith County JP 2 data.
44. Finally, Mr. Springerley's letter summed up Smith County's feelings towards STAND STRONG FOR TYLER, and PLAINTIFFS'S desire to have transparency by stating:
- "that based on your or your client's numerous threats of litigation, Smith County will not disclose any information relevant to so-called Public Information Request, unless such a request is properly submitted under a Request for Production of Documents or a subpoena in the context of litigation."*
45. By failing to timely or completely provide the requested documents that were the subject of "repetitious or redundant" Public Information Requests, thus denying PLAINTIFFS or other concerned citizens from ensuring the proper signatures were being counted by the authorities, SMITH COUNTY violated Texas Government Code § 552.221.

VI. REQUEST FOR INJUNCTIVE RELIEF

46. SMITH COUNTY and TYLER'S conduct has deprived PLAINTIFFS, and other citizens in JP 2 from having the opportunity to ensure that a matter presented on the ballot was properly, lawfully, and constitutionally executed. In particular, of the 12, 566 signatures relied upon by SMITH COUNTY and TYLER, 49.6% are statutorily invalid based solely on the missing information on as to the individual signer, with another 3,733 "verified signatures" being invalid due to failure to comply with the requirements of the signature pages. The quantity of invalid signatures will increase once PLAINTIFFS is able to obtain the 319 pages missing from SMITH COUNTY'S production.
47. If DEFENDANTS are not enjoined from allowing the liquor proposition to be on the ballot, issuing a result via Commissioner's Court Order and/or certifying the result to the Secretary of State before it is determined that the petition and subsequent ballot proposition were legal and constitutional, the rights of affected citizens will be immediately and permanently harmed.
48. IRREPARABLE HARM: While PLAINTIFFS could elect to bring this matter as an election contest, such method has irreparable harm associated with the statutory law regarding the results of the election itself. Specifically, Texas Election Code 501.155(a) states that "the enforcement of local opinion laws in the political subdivisions in which an election is being contested is not suspended during an election contest."

49. In other words, if approved by the electorate, beer and wine sales will begin while this matter is litigated in court, possibly resulting in months or years of activity while the initial portion was invalid. As such, PLAINTIFFS, a private citizen, would be priced out of pursuing her claim.
51. Such losses, injuries and damages that PLAINTIFFS and other concerned citizens will suffer as a result of DEFENDANT'S wrongful conduct is within the jurisdictional limits of the Court, but is not susceptible of measurement by any definite, certain or usual pecuniary standards.
52. Further, DEFENDANTS' failure to comply with the applicable statutes or to verify the disqualified signatures before placing on the ballot constitutes a breach of PLAINTIFFS'S rights.
53. Even if PLAINTIFFS'S damage from DEFENDANTS' wrongful actions could be measured with sufficient accuracy, and it cannot, unless DEFENDANTS are restrained and enjoined as hereinafter prayed, PLAINTIFFS and concerned citizens will, in order to protect their rights, be compelled to bring additional suits in the future with respect to DEFENDANTS' actions and/or omissions. As a consequence, PLAINTIFFS and concerned citizens have no adequate remedy at law and are entitled to the injunctive relief sought hereunder.
54. PLAINTIFFS would show additionally that he has a probable right to recovery at trial on the merits because of the reasons stated herein, and continues to suffer injury as a result of DEFENDANTS' actions and/or omissions. A writ of injunction may be granted when a party performs or is about to perform, or is procuring or allowing the performance of, an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the

act would tend to render the judgment in that litigation ineffectual. See CPRC §65.011.

55. For the reasons stated herein, PLAINTIFFS asks this honorable Court to set its application for temporary injunction for a hearing and, after the hearing, issue a permanent injunction against the defendant.

**VII. APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY
INJUNCTIVE RELIEF & PERMANENT INJUNCTIVE RELIEF**

56. PLAINTIFFS seeks the following immediate injunctive relief and ask this Court to ORDER the following:

- A. Immediately orders that the election regarding the electoral propositions made the basis of this petition, shall be removed, repealed, and/or delayed until such time as the Court is provided an opportunity to determine if the procedural requirements were complied with before this matter was presented to the County Commissioner's Court and/or the Tyler City Council;
- B. The County Commissioner's Court is immediately ordered to cease and desist from canvassing the election results as to the proposition related to SMITH COUNTY, including specifically those results from the early election process and the general election;
- C. The County Commissioner's Court is immediately ordered to cease and desist from making any order declaring the result of the election related to the proposition made the basis of this petition;
- D. The County Clerk for SMITH COUNTY is immediately ordered to cease and desist from certifying the result of the election solely as to the proposition in question;
- E. The Tyler City Council is immediately ordered to cease and desist from canvassing the election results as to the proposition related to TYLER, including specifically those results from the early election process and the general election; and
- F. The Tyler City Council is immediately ordered to cease and desist from making any order declaring the result of the election related to the proposition made the basis of this petition;

57. If PLAINTIFFS'S application is not granted, harm is imminent because the illegal and invalid

proposition will be presented on the November 6, 2012 ballot. If sufficient votes are made in favor of same, and the COUNTY CLERK certifies such election result, the proposition becomes effective despite the subsequent election contest. It should be noted that until that time, SMITH COUNTY representatives have stated they will not provide any more documents regarding the petition until discovery is initiated during litigation. Therefore, PLAINTIFFS has no adequate remedy at law, and the harm that will result if the temporary restraining order is not issued will be irreparable.

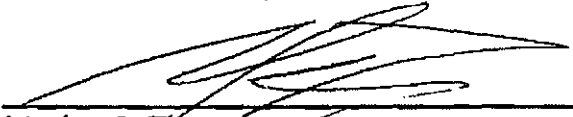
58. PLAINTIFFS is willing to post bond, but request such bond be nominal as he is merely a concerned citizen seeking to ensure SMITH COUNTY and TYLER comply with their statutory duties as elected officials. Any substantial bond imposed against PLAINTIFFS will be against the interest of justice.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear and to answer herein, that the Court grant Plaintiff a temporary restraining order, that the Court fix the amount of the bond required to be posted by Plaintiff, if any, and that upon a hearing hereof, Plaintiff be granted a temporary injunction as plead for herein, and that, upon a final hearing hereof, the Court grant a permanent injunction as plead for herein and enter a judgment against Defendants and in favor of Plaintiff for its damages and alleged herein and in excess of the minimum jurisdictional limits of this Court, with prejudgment interests thereon at the legal rate, post-judgment interest at the legal rate, attorneys fees and expenses, punitive damages, court costs, and for such other and further relief, both at law and in equity, as they show themselves to be entitled to receive.

Respectfully submitted,

LADD & THIGPEN, P.C.



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