

**NO. 18-0749**

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IN THE SUPREME COURT OF TEXAS

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IN RE ED ENGLISH,

*Relator.*

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**BRIEF OF TEXAS PUBLIC POLICY FOUNDATION  
AS AMICUS CURIAE**

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## **STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Texas Public Policy Foundation (the “Foundation”) is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Historically, the Foundation has worked on policymaking through its Center for Local Governance related to the constitutional limitation on local government ordinances by requiring such laws to be in conformity with the state statute or rule on the same subject.

It is with this background and experience that the Foundation submits this Brief in support of the Relator Ed English (the “Relator”). The Foundation’s Brief supplements Relator’s legal arguments to expand upon the larger policy framework. The Foundation requests this Court grant Relator’s emergency petition for mandamus.

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

## SUMMARY OF ARGUMENT

The Texas Supreme Court should grant Relator's petition for mandamus because common law requires cities to adopt ballot language for a proposed ordinance that accurately identifies the measure's chief features, character, and purpose. The municipal efficiency study is modeled on Ronald Reagan's California Commission and Grace Commission, which sought to improve state government and federal government by conducting a thorough analysis of government operations and making specific efficiency and enhancement recommendations. By referring to the existing city and external auditors, and by including a speculative cost estimate, Austin affirmatively misrepresents the more comprehensive features, character, and purpose of the efficiency study. Accordingly, the Court should grant Relator's petition for mandamus, and require Austin to adopt ballot language that complies with the common law standard.

## ARGUMENT

**A. The Efficiency Study Is a Comprehensive Budget Analysis With Features Modeled on Ronald Reagan's California Commission and Grace Commission, Not Routine Auditing.**

Austin's proposed efficiency study ordinance relays its purpose in the Mission section as follows:

The City's Efficiency Study will provide an impartial, objective review of the city's operational and fiscal performance, including development of a Government Efficiency Blueprint which includes a comprehensive budget

analysis, efficiency and enhancement recommendations, and a targeted list of opportunities for operating savings.

Relator's Original Emergency Petition for Writ of Mandamus, App. Tab A., § 2-3-12(A).

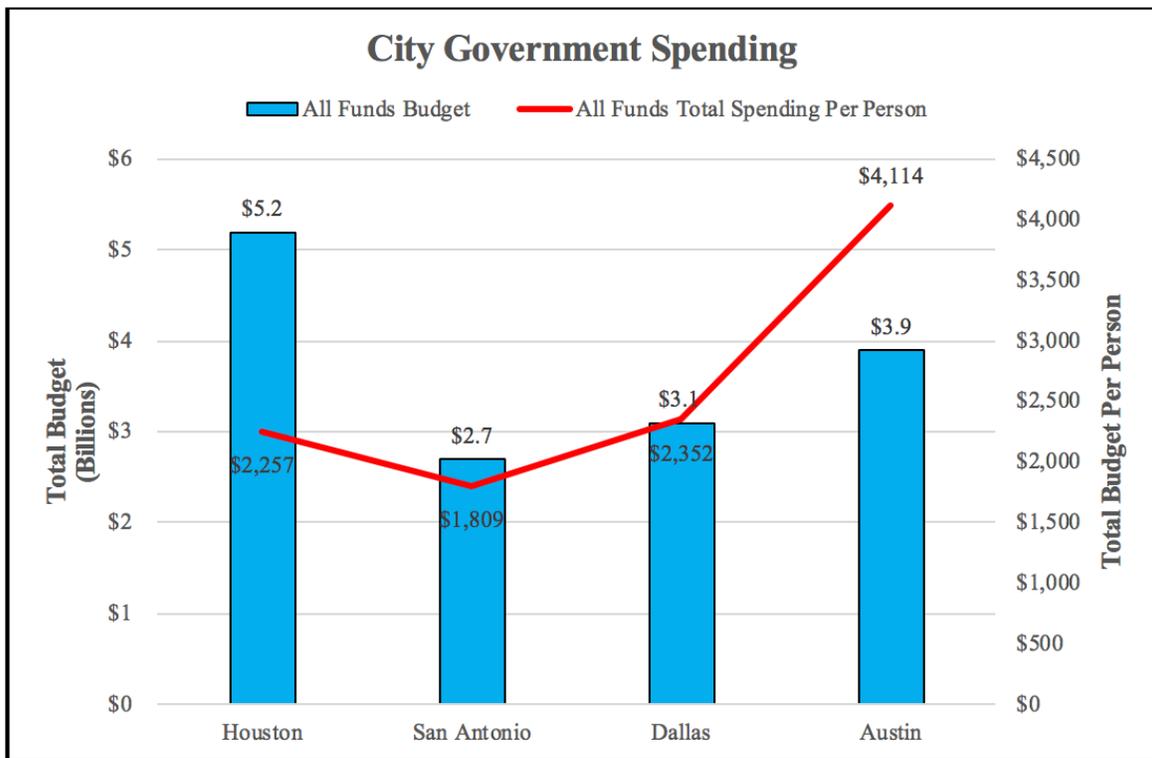
An examination of the ordinance shows that the efficiency study has two key features: Impartiality of the entity conducting the study, and a comprehensive review of all city functions in order to identify opportunities to reduce taxes and improve the quality of services.

First, in order to achieve impartiality and objectivity, the ordinance specifically lists out qualifications for the independent third party entity conducting the study. In particular, the ordinance disqualifies entities or individuals that had a direct contract with Austin in the last five years; who served as Mayor, City Council Member, City Auditor, or City Manager in the last five years; or who are related to the Mayor, City Council Members, City Auditor, or City Manager. Relator's Original Emergency Petition for Writ of Mandamus, App. Tab A., § 2-3-12(B).

Second, in order to emphasize the broad scope of the study, the ordinance specifies that the third party entity will review all City Departments, including General Fund Departments and all publicly owned utilities, in order to "identify specific targets for program efficiencies, cost savings, revenue enhancements, private/public partnership initiatives, and monetization of unused or underutilized

city assets.” Relator’s Original Emergency Petition for Writ of Mandamus, App. Tab A., § 2-3-12(C).

Recent reports from the Center for Local Governance at the Texas Public Policy Foundation demonstrate the need for an impartial, comprehensive review of Austin’s finances and operations. For fiscal 2018, the city’s budget totaled \$3.9 billion, the second-highest among cities in aggregate following Houston. However, Austin’s population is far less than Houston’s. On a per capita basis, Austin spends more than \$4,000 per resident—the highest among Texas cities.



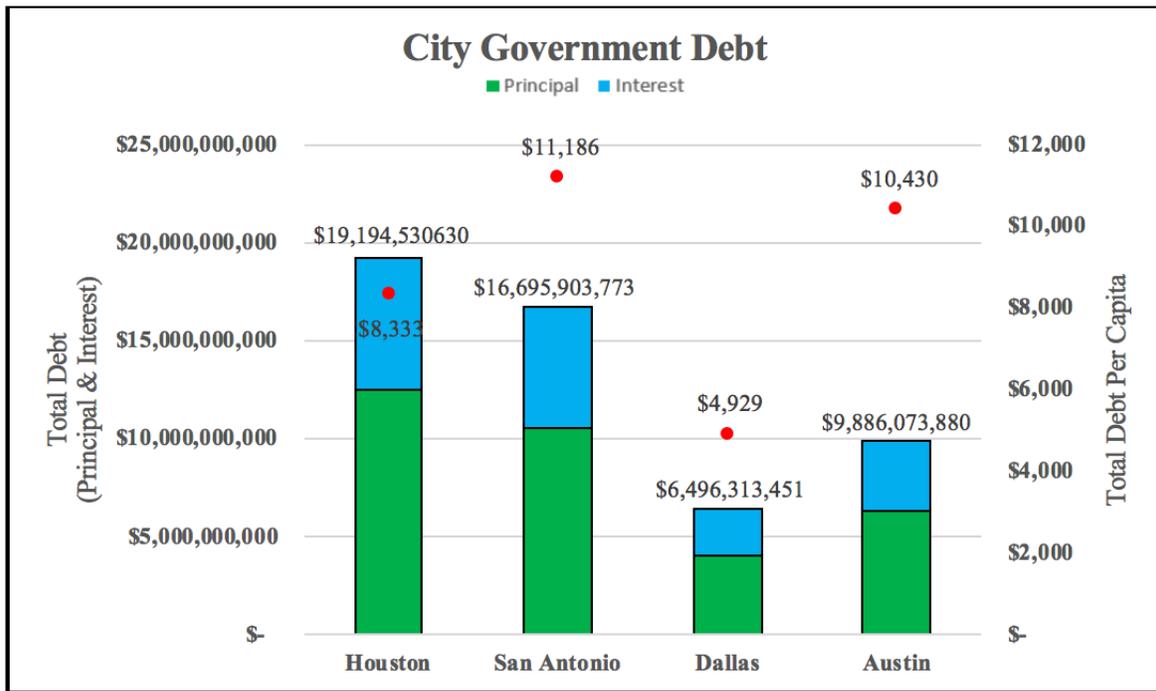
Source: Respective city budgets

James Quintero, “Does the City of Austin need a 3<sup>rd</sup> party efficiency audit?,” TEXAS

PUBLIC POLICY FOUNDATION (2018), available at

<https://www.texaspolicy.com/blog/detail/does-the-city-of-austin-need-a-3rd-party-efficiency-audit>.

Austin also fares poorly on comparisons of city debt. The city’s total debt of \$9.9 billion ranks as the third-highest amount among Texas cities in the aggregate, and as the second-highest amount per capita. Only San Antonio has more debt.



Source: Texas Bond Review Board, U.S. Census Bureau

*Id.*

Austin’s high spending and high debt load has led to a disproportionately heavy property tax burden on Austin’s property owners. As James Quintero wrote in the Austin American-Statesmen:

In 2007-08, the average Austin-area home was valued at \$175,000 — and the city portion of the tax bill due was \$705. Today, the average home value stands at more than \$305,000, and the city tax bill due for it is \$1,251. That

means the council has grown the property tax by almost 80 percent over the last 10 years. During the same period, the number of people calling Austin home only grew by 29 percent.”

James Quintero, “Austin policies are making affordability crisis worse,” *AUSTIN AMERICAN-STATESMEN* (2018), *available at* <https://www.mystatesman.com/news/opinion/two-views-austin-policies-are-making-affordability-crisis-worse/XBdZd3MIJ8smI1SIOG4Z7L/>.

Moreover, recent news reports and the city’s own audits raise serious doubts as to whether Austin’s high taxes, high spending, and high debt provide a good return in quality services for residents. For example:

- Austin’s new central library was built \$35 million over budget and close to a year behind schedule. Calily Bien, “Austin’s new Central Library has a grand opening date,” August, 8, 2017, *KXAN* (2018), *available at* [https://www.kxan.com/news/local/austin/austins-new-central-library-has-a-grand-opening-date\\_20180227103559692/994650897](https://www.kxan.com/news/local/austin/austins-new-central-library-has-a-grand-opening-date_20180227103559692/994650897).
- In addition to a \$325,000 base salary, \$7,200 annual executive allowance, and health and retirement benefits, Austin gives its city manager a \$4,500 per month housing allowance. Michael Galyen and James Quintero, “Austinites are struggling with affordability, but the Austin city manager is not,” June 8, 2018, *TEXAS PUBLIC POLICY FOUNDATION* (2018), *available at* <https://www.texaspolicy.com/blog/detail/austinites-are-struggling-with-affordability-but-the-austin-city-manager-is-not>.
- A 2017 audit revealed that during renovations at City Hall a previous city manager submitted a Purchase Order for a \$28,000 custom pecan wood table. James Quintero, “Audit finds Austin has nicer stuff than you,” October 12, 2017, *TEXAS PUBLIC POLICY FOUNDATION* (2018), *available at* <https://www.texaspolicy.com/blog/detail/speaking-freely-audit-finds-austin-has-nicer-stuff-than-you>.
- The Texas Public Foundation and the Reason Foundation found that the City of Austin’s Employees’ Retirement System has unfunded liabilities of \$1.3 billion as of 2016, an increase of \$875 million over ten years. Leonard Gilroy, Anthony Randazzo, James Quintero, and Daniel Takash, *Evaluating*

*Solutions for Austin's Billion Dollar Pension Crisis*, TEXAS PUBLIC POLICY FOUNDATION, REASON FOUNDATION (2018), available at <https://www.texaspolicy.com/library/doclib/2018-04-RR-Evaluating-Solutions-for-Austin-s-Billion-Dollar-Pension-Crisis-CLG-Quintero-et-al-1.pdf>.

- An internal audit in 2017 revealed problems with Austin's Public Works Department that have led to actual construction costs ballooning far beyond original estimates. The most dramatic example is the Shoal Creek Storm Drain Ridgelea Improvement Project which was initially projected to cost around \$1 million but ended up costing 700 percent more than originally thought. James Quintero, "City of Austin stinks at estimating project costs," October 12, 2017, TEXAS PUBLIC POLICY FOUNDATION (2018), available at <https://www.texaspolicy.com/blog/detail/speaking-freely-audit-city-of-austin-stinks-at-estimating-project-costs>.

The proposed ordinance must be understood as a response to Austin's high taxes, high spending, and high debt load in return for questionable quality in city services. This measure is an effort to initiate an impartial, comprehensive efficiency study of the city's finances and operations that will result in specific recommendations to root out waste and inefficiency, improve service quality, and ensure that Austin's taxpayer dollars are being spent wisely.

1. The efficiency study concepts originates from President Ronald Reagan.

The efficiency study's two features of impartiality and comprehensive review of government functions are modeled on Ronald Reagan's in-depth, private-sector led reforms of California state government and the federal government. In the late 1960s, then-Gov. Ronald Reagan established the Governor's Survey on Efficiency

and Cost Control, a private sector led commission that thoroughly evaluated California's state government finances and operations.

This California Commission developed about 2,000 specific recommendations. According to their report, implementing these recommendations could have yielded \$22 million in one-time savings, \$233 million in long-term reductions, \$153 million in cost avoidance, and \$118 million spared through deferrals. *The Grace Commission*, CONSERVATIVEPLATFORM.ORG (2018), available at <https://conservativeplatform.org/issue/grace-commission/>.

Drawing from his experience with the California Commission, then-President Ronald Reagan initiated a similar effort and established the private-sector led Grace Commission to identify excessive federal expenditures and improve managerial accountability. *Id.* At an early meeting with the Commission, President Reagan instructed the members, "Be bold. We want your team to work like tireless bloodhounds. Don't leave any stone unturned in your search to root out inefficiency." Ronald Reagan, "Remarks at a White House Luncheon for the Chairman and Executive Committee of the Private Sector Survey on Cost Control in the Federal Government," March 10, 1982, The AMERICAN PRESIDENCY PROJECT (2018), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=42250>.

The Grace Commission's final report contained 2,478 separate and distinct recommendations. *Grace Commission Information Packet*, January 31, 1985,

CONGRESSIONAL RESEARCH SERVICE (2018), *available at* [https://digital.library.unt.edu/ark:/67531/metacrs9044/m1/1/high\\_res\\_d/IP0281G.](https://digital.library.unt.edu/ark:/67531/metacrs9044/m1/1/high_res_d/IP0281G.pdf)

[pdf](#). According to the commission’s findings, the full implementation of their recommendations could save an estimated \$424.4 billion over a three-year period plus achieve cash accelerations of \$66 billion. *Id.* Crucially, all of these proposals were achievable “without raising taxes, without weakening the United States’ needed defense build-up and without in any way harming necessary social welfare programs.” *Id.*

Austin’s proposed efficiency study ordinance is in the same spirit as Reagan’s California Commission and Grace Commission. A variety of factors—like heightened population growth, near-term budgetary excesses, and long-term structural imbalances—are putting pressure on Austin’s finances. In order to preserve the Texas Model of low taxes, light regulation, and strong property rights, a significant portion of Austin’s citizenry has sent this measure to impartially and comprehensively root out waste and inefficiency in city government to City Hall, to transcribe this measure into faithful ballot language.

This overarching purpose of the efficiency study distinguishes it from Austin’s normal external and internal auditing processes. Austin’s external audit, in keeping with Austin’s Charter, is simply a financial audit requiring “an independent audit to be made of all accounts of the city by a certified public accountant,” not a

thorough search to root out waste and improve performance. Austin City Charter, art. VII, § 16. Similarly, Austin’s internal audit is narrower in scope than the proposed efficiency study. As Austin’s City Auditor stated in an email to Council Member Ellen Troxclair:

[W]e do not typically conduct large scope projects like the proposed efficiency study. Specifically, we select more narrowly focused topics and then focus on risks within each selected topic to identify opportunities to improve effectiveness and efficiency. Focusing on those high risks helps us cover more topics than we would otherwise be able to audit.

Relator’s Original Emergency Petition for Writ of Mandamus, App. Tab H.

**B. Austin’s Ballot Language Affirmatively Misrepresents the Nature of the Efficiency Study.**

Instead of faithfully transcribing the measure into appropriate ballot language, Austin adopted language that affirmatively misrepresents the efficiency study by suggesting that it would be a costly undertaking that simply duplicates Austin’s existing auditing processes. The adopted language for Proposition K reads:

Without using the existing internal City Auditor or existing independent external auditor, shall the City Code be amended to require an efficiency audit of the City’s operational and fiscal performance performed by a third-party audit consultant, at an estimated cost of \$1-\$5 million?

Relator’s Original Emergency Petition for Writ of Mandamus, App. Tab L.

This language obscures the efficiency study’s chief features, purpose, and character, and thereby fails to meet the common law standard of definiteness and

certainty to preserve ballot integrity. *See Dacus v. Parker*, 466 S.W.3d 820, 826 (Tex. 2015).

First, the reference to the existing internal and external auditors is superfluous and misleading because it suggests that the efficiency study duplicates Austin's routine auditing procedures. As discussed above, the efficiency study is an all-encompassing, independent review of municipal functions undertaken in response to Austin's high taxes, high spending, high debt in return for questionable quality in services. The purpose of the study is to identify opportunities to reduce taxes and improve services, modeled on Reagan's California Commission and Grace Commission.

Austin's existing external and internal auditors have narrower functions: The existing external audit is an audit of the city's financial accounts, not a study to identify waste and ways to improve performance. The existing internal audit husband's limited resources by focusing on specific, narrower topics rather than a systematic review of all city departments. By misleadingly connecting the measure with existing auditing processes, this language affirmatively misrepresents the more comprehensive scope of the efficiency study.

Second, the estimated cost of \$1-\$5 million is prejudicial and unsubstantiated. There is no way to know what the final net cost or savings of the proposed efficiency study would be, but the point of the study is to produce net savings to the city. By

putting a speculative price tag on the study, the current ballot language misleads voters into conceiving of the efficiency study as a net cost to Austin, rather than in keeping with its purpose to produce net savings for Austin.

## CONCLUSION

For the foregoing reasons, the Foundation respectfully requests the Court grant Relator's petition for mandamus, and, in doing so, recognize the importance of the efficiency study's chief features, character, and purpose.

Respectfully submitted,

*/s/Robert Henneke*

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this document complies with the typeface requirements of Tex. R. App. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 2,208 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

*/s/Robert Henneke*

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