CAUSE NO. D-1-GN-16-002031

MARTIN A. HARRY, Contestant, and DONALD S. ZIMMERMAN, Contestant, v. CITY OF AUSTIN, et al., Contestees.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 98TH JUDICIAL DISTRICT

CONTESTANT HARRY'S RESPONSE TO THE CITY OF AUSTIN'S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Martin A. Harry ("Harry") files this Response to the No-Evidence Motion for Summary Judgment ("Motion") filed by the City of Austin, Mayor Steve Adler, and Council Members Ora Houston, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Don Zimmerman, Leslie Pool, Ellen Troxclair, Kathie Tovo, and Sheri Gallo (together, "City") and this Cross-Motion for Summary Judgment:

I. SUMMARY

1. The City's motion for summary judgment is based on the assertion that an essential element of an election contest is clear and convincing evidence that a violation of the Texas Election Code ("Election Code") materially affected the outcome of the election. Motion ¶¶ 1, 12. Further, it is claimed that the outcome of the election is "materially affected" only when a different and correct result would have been achieved in the absence of the violation. *Id*. The City concludes that Contestants cannot prevail on their claims because there is no evidence that

the outcome of the election would have been different but for alleged violations of the Election Code. *Id.* ¶ 13.

2. The City's conclusion is based on two false premises, however. First, not all of Harry's allegations concern violations of the Election Code. Second, even for election contests based on violations of the Election Code, clear and convincing evidence that a violation of the Election Code materially affected the outcome of the election is not always required to successfully challenge the validity of an election. Because Harry alleges violations of mandatory requirements only and a true outcome cannot be ascertained but for those violations, he has no burden to show a violation of the Election Code materially affected the outcome of the election.

3. There is substantial evidence, however, that mandatory requirements were violated. Without evidence that the election outcome is a true outcome notwithstanding those violations, Harry is entitled to summary judgment.

II. STANDARD OF PROOF

4. Although courts discuss a "clear and convincing" standard of proof in connection with certain types of election contests, this standard relates to establishing the erroneous *effect* of irregularities proven, not proving irregularities themselves. *Willet v. Cole*, 249 S.W.3d 585, 589 (Tex.App.—Waco 2008, no pet.) ("[T]he declared results of an election will be upheld in all cases except where there is clear and convincing evidence of an *erroneous result*." (emphasis added)). The *Willet* court notes that this requirement has no basis in the Election Code and appears to be a judge-made rule. *Id*. at 589 n.2. As such, it appears to have been applied in the context of violations for which an effect on the election is ascertainable. *See, e.g.*, *Honts v. Shaw*, 975 S.W.2d 816, 823 (Tex.App.—Austin 1998, no pet.). Because a material effect is not an element in the present contest, the clear and convincing standard of proof does not apply.

III. ELEMENTS OF AN ELECTION CONTEST

5. An election contest is a special statutory proceeding that "includes any type of suit in which the validity of an election or any part of the elective process is made the subject matter of the litigation." *Rosanno v. Townsend*, 9 S.W.3d 357, 362 (Tex.App.—Houston [14th Dist.] 1999, no pet.). Elections have been contested for a variety of alleged violations: improper notice before an election, (*id.*); improper voter petition, (*City of Sherman v. Hudman*, 996 S.W.2d 904 (Tex.App.—Dallas 1999)); improper wording of the ballot proposition, (*Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015)); improper ballot format, (*Wright v. Graves*, 671 S.W.2d 586 (Tex.App.—Beaumont 1984, no pet.)); improper conduct by election officials, (*Guerra v. Garza*, 865 S.W.2d 573 (Tex.App.—Corpus Christi 1993)) and improper conduct by voters, (*Willet v. Cole*, 249 S.W.3d 585 (Tex.App.—Waco 2008, no pet.)). In all contests, the purpose is to determine if the outcome is not a true outcome. TEX. ELEC. CODE § 221.003(a).

6. The City does not claim a lack of evidence regarding Contestants' alleged irregularities. The City asserts, however, that there is no more than a scintilla of evidence as proof that those irregularities materially affected the election outcome. This argument is a reiteration of its argument in support of its plea to the jurisdiction. Orig. Ans. ¶ 3. The City argued that an essential element was omitted from Harry's pleading: that the outcome would have been different but for the irregularities alleged. Harry responded that there can be no pleading requirement for a fact that cannot be ascertained based on the nature of the violations alleged. First Sup. Pet. ¶¶ 11-12. The City's plea to the jurisdiction was denied.

7. The present iteration of the argument is no more applicable to this contest. All irregularities alleged by Harry, individually and collectively, render the election on Proposition 1 unlawful and void as a matter of law. For the irregularities alleged, there is no legal authority to

require proof of a material effect on the election or a different outcome as a true outcome where the election is unlawful *ab initio*. *See, e.g., Brown v Blum,* 9 S.W.3d 840 n.9 (Tex.App.—Houston [14 Dist.] 1999) ("None of the cases addressing the sufficiency of ballot language specifically require the contestant to show that the language materially affected the outcome of the election. Whether the outcome of an election was 'materially affected' is an issue only when there is a complaint that the election was tainted by fraud or illegality under section 221.003 of the Election Code.").

8. Contests are not all the same. Regarding violations, courts distinguish between violations of mandatory and directory requirements. *See, e.g., Prado v. Johnson,* 625 S.W.2d 368, 369 (Tex.Civ.App.—San Antonio 1981) ("The general rule is that the performance of duties placed upon the election officials are directory, unless made mandatory by statute, while those placed upon the voters are mandatory."). This distinction is legally significant in terms of the burden of proof. "The rule is that statutes regulating the manner of holding an election are merely directory and a departure from their provisions will not ordinarily invalidate an election, unless such departure or such irregularities have affected or changed the results of the election." *Id*. Conversely, a violation of a mandatory provision invalidates an election unless it can be ascertained that the election outcome was a true result. In *Rosanno,* for example, the court affirmed the district court's finding that a failure to comply with city charter requirements for publishing notice of an election and holding hearings were per se violations of the city charter. The election was declared void without a showing that the violations materially affected the election outcome.

9. Ignoring the distinction between directory and mandatory requirements, the City has failed to produce any evidence that alleged violations relate only to directory requirements.

In fact, Harry alleges violations relating to requirements for properly calling an election which are analogous to requirements for candidates to get on the ballot. *See City of Sherman v. Hudman*, 996 S.W.2d at 918 ("[I]n the instant case, the provisions at issue do not relate to the mechanics of voting or the right of an individual citizen to cast a ballot; rather, these provisions set out the requirements for properly calling an election. As such, these provisions are more analogous to requirements for candidates to get on the ballot, which repeatedly have been held mandatory and therefore require strict compliance." (footnotes omitted)).

IV. A DIFFERENT RESULT IS NOT REQUIRED TO BE PROVEN

10. Not only does the City erroneously claim that all irregularities must be shown to materially affect an election for it to be declared void, it goes further and claims that there can be no material effect unless it is proved that the result would have been different but for the irregularity. In other words, the City believes that a material effect on an election necessarily requires showing the result would be different but for the irregularities.

11. Actually, an election can be found to have been materially affected by certain irregularities and declared void whether or not a true result can be ascertained. TEX. ELEC. CODE § 221.012(b) ("The tribunal shall declare the election void if it cannot ascertain the true outcome of the election."). If a true outcome cannot be ascertained it is factually impossible to prove the outcome would be the same or different. Clearly, the law does not require proof that a different result would have occurred but for irregularities in such contests. *See Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex. App.—Corpus Christi-Edinburg 2008) ("A contestant may allege and prove that 'irregularities rendered impossible a determination of the majority of the voters' true will.'" (quoting *Guerra v. Garza*, 865 S.W.2d at 576)).

V. VIOLATIONS ALLEGED BY HARRY

12. Harry alleges violations of mandatory requirements for which he is not required to prove a material effect. Accordingly, unless the Court can ascertain that the outcome was true notwithstanding each and every violation, the election must be declared void.

A. The City Failed to Perform Mandatory Ministerial Functions Relating to the Voters' Petition for a Referendum.

13. The powers of referendum and initiative are powers reserved to the voters and protected by the Texas Constitution. Any infringement or usurpation of these fundamental political powers by the City must be considered to be violations of mandatory, not directory, requirements.

14. The City does not dispute that it did not act on the voters' petition to repeal or replace a city ordinance (not then in effect) as a referendum. There is no legal precedent in Texas establishing a right for voters to exercise the power to repeal a city ordinance, either before or after it becomes effective, through the power of initiative. Because the voters filed their petition before the ordinance became effective, it qualified as a referendum. AUSTIN CITY CHARTER, art. IV, § 2. Evidence shows voters signed a petition "in favor of requiring the Austin City Council to either preserve the current municipal TNC regulations or allow the public to vote on an ordinance, the entire text of which is attached." (Exhibit JE 5) The petition to preserve regulations, regulations adopted in 2014 (Exhibit PE 1), is a petition to repeal Ordinance No. 20151217-075 that amended them. (Exhibit JE 2) A petition to repeal an ordinance adopted but not yet in effect is a referendum.

15. By definition, a referendum election is different from an initiative election. A referendum is a vote to preserve the status quo which is maintained until voters express themselves. An initiative is a vote to change the status quo. By treating a petition that qualified

as a referendum as an initiative, the City changed the political dynamics to the disadvantage of voters opposed to Ordinance No. 20151217-075. The burden of persuading voters that the status quo should change shifted from the supporters of the new ordinance to voters opposed to it. Because the City allowed the amendatory ordinance to go into effect *after* receipt of the petition, opponents were no longer defending the status quo but advocating against it.

16. Furthermore, by ignoring the explicit terms of the petition and classifying the petition solely as an initiative, the City affected the election and the consequences of its outcome. The ordinance voters were asked to approve or disapprove was no longer the City's newly passed Ordinance No. 20151217-075 but an entirely new set of regulations proposed by voters. Ordinance No. 20151217-075, if approved by referendum, could not have been amended or repealed by the city council or voters for two years. AUSTIN CITY CHARTER, art. IV, § 5. If, however, Ordinance No. 20151217-075 was effectively approved by the disapproval of the voters' proposed ordinance, the city council retained authority to amend or repeal it at will.

17. Through the power of referendum and initiative, voters exercise the same legislative power as the city council and have equivalent authority. Harry testified that the election the City ordered required him to approve one of the two ordinances when he opposed both. The city council, however, had legislative authority to reject both. *See Wright v. Graves*, 671 S.W.2d at 590 ("The basic fault of this ballot is that the voter must vote for one of the propositions to vote against the other. Therefore, obviously the submitted ballot did not give the voters all the alternatives to which they were legally entitled. We hold that the form of ballot prescribed by Article 6.05(8) of the Texas Election Code is mandatory." (The requirements of this section are now in section 52.073.) Instead of ordering a referendum on an ordinance not yet in effect and/or an initiative election that permitted approving or disapproving single ordinances,

the City forced voters to approve one and disapprove the other simultaneously, a manifest usurpation of legislative power reserved by the voters.

18. Although the City claims it properly acted on the petition solely as an initiative (City Reply ¶ 3), the City's actions were not proper for an initiative either. Initiated ordinances are required to be submitted to voters without amendment. AUSTIN CITY CHARTER, art. IV, § 4(b). The City did not submit the full ordinance to voters, however.

19. A comparison between the proposed ordinance attached to the petition (Exhibit JE 6) and the ordinance incorporated in Ordinance No. 20160217-001 ("election order" or "election ordinance") (Exhibit JE 8) patently shows Part 1 of the ordinance, arguably the most important provision, was omitted by the City. Without Part 1, the only means by which all or part of Ordinance 20151217-075 could be repealed would be by a referendum or implicitly by inconsistent terms initiated by voters. Without Part 1, however, terms of the proposed ordinance neither explicitly nor implicitly repeal the entire ordinance or the specific provisions mentioned in the proposition (requiring fingerprinting, displaying emblems and prohibiting stops in traffic lanes). Therefore, the only logical conclusion a voter could make when comparing the ballot proposition with the ballot measure is that the voters must have petitioned for a *referendum* to repeal Ordinance 20151217-075.

20. Based on legal and political differences that distinguish the powers of referendum and initiative, the City's decision to act on the voters' petition solely as an initiative and not as a referendum unlawfully usurped the political power of the voters. The election ordered and the election held effectuated this usurpation and must be considered void as a result.

B. The election *ordered* by the City on Proposition 1 was unlawful.

21. There can be no true result in an invalid election. *Hutson v. Smith,* 191 S.W.2d 779, 785 (Tex.App.—Galveston 1945) ("The issue which was submitted in the election was submitted in statutory form. There is no hint in the record that the defective order had any effect upon the result of the election. But we are constrained to hold that the order did not comply with the statute, that the statute was mandatory, that consequently the order was void, and that the election held in response to a void order was itself void.") *See also Jones v. Threet*, 117 S.W.2d 560, 561 (Tex.App.—Fort Worth [2nd Dist.] 1938) ("We are reluctant to hold invalid such an election as this, and thus set aside the will of a majority of the qualified voters who participated in the election, but under the authorities, it is our manifest duty to do so, even though we are convinced that the results of the election would not have been different had the proper ballot been used."). Similarly, Ordinance No. 20160217-001 (Exhibit JE 8) was defective for the election on Proposition 1 because it did not comply with the Election Code or the city charter.

22. Whether the petition is for a referendum, initiative or both, the City did not order a lawful election. The Election Code provides that a writ of mandamus may compel the performance of any duty imposed by law in connection with the holding of an election. Election Code § 273.061. According to the Texas Supreme Court, the Election Code and city charter requirement that a referendum or initiative vote be on the *ordinance* is mandatory, not directory. *See In re Williams*, 470 S.W.3d 819 (Tex. 2015) (per curiam). The Texas Supreme Court has held that an election authority that fails to perform its ministerial duty to order a vote on the *ordinance*, a duty imposed by law, may be ordered to do so.

23. Thus, ordering an election on the ordinance, whether as a referendum or initiative, is a duty imposed by law enforceable by a court before the election by a writ of mandamus.

Although courts are without jurisdiction to interfere with an election while an election process is in progress, even if void, the duty is no less mandatory and may be enforced post-election by a court enquiring into the validity of the election through an election contest. *See City of McAllen v. Garza*, 869 S.W.2d 558, 560 (Tex. App.—Corpus Christi 1993, writ denied). Accordingly, Harry's allegation that the City unlawfully ordered an election on a *proposition* and not on an *ordinance* (either Ordinance No. 20151217-075 or the voters' proposed ordinance) concerns a violation of a mandatory, not directory, election requirement.

24. There is ample evidence that the City ordered an election on a proposition instead of an ordinance. First, the election ordinance states "[t]he ballot shall be prepared to permit voting 'for' or 'against' the following *proposition*…." (emphasis added) (Exhibit JE 8). Second, the proposition that follows poses the question "Shall the City Code be amended to repeal?" and references two different ordinances. Undeniably, the question is on the proposition not on one of the two ordinances involved. Third, in Part 2 of the election order the City states "[i]f the *proposition* provided in Part 1 is approved" Article 4 of the city code (not Ordinance 20151217-075) is repealed. By its plain and unambiguous wording, the City did not order a vote on an *ordinance*. Without legal authority, the City ordered an election on a proposition.

25. The error of the City's order is even more egregious than the one found unlawful by the Texas Supreme Court in *In re Williams*. There, the City of Houston's election order was at least consistent with the referendum power asserted by voters, the ballot proposition and ballot form. Voters had petitioned for a referendum and Houston ordered an election on the following question: "Shall the City of Houston repeal the Houston Equal Rights Ordinance, Ord. No. 2014-530,…" and the choices were "yes" and "no." Although the City of Houston argued its charter gave it discretion to submit the repeal of the ordinance—rather than the ordinance

itself—to the voters, the Court disagreed, holding that "[t]he City Council must comply with its own laws regarding the handling of a referendum petition and any resulting election." *Id.* at 820.

26. Furthermore, the Court held compliance was mandatory:

> [T]he Texas Election Code preempts part of this mandate, allowing only the choice between "FOR" and "AGAINST," or else "YES" and "NO," to appear on the ballot. Tex. Elec. Code § 52.073(a), (e). Nonetheless, the mandate that the vote be on the ordinance itself remains….Because the Charter clearly defines the City Council's obligation to submit the ordinance—rather than its repeal—to the voters and gives the City Council no discretion not to, we hold that this is a ministerial duty.

Id. at 822.

27. The Austin City Charter, consistent with the Election Code, mandates that the vote be on the ordinance itself in referendum and initiative elections. AUSTIN CITY CHARTER, art. IV, § 5. It requires the ballot to offer voters a choice between "For the Ordinance" and "Against the Ordinance." *Id.* The same provision requires the caption of the ordinance on the ballot. Article IV, § 5, states, "[i]f a majority of the votes cast is in favor of a submitted ordinance, it shall thereupon be effective as an ordinance of the city."

28. The very nature of referendum and initiative elections involves the approval or disapproval of a specific change to the code or charter and the Election Code separately limits ballot propositions to a single statement. TEX. ELEC. CODE § 52.072(b). For charter amendments, a ballot shall be prepared so that a voter may approve or disapprove any one or more amendments without having to approve or disapprove all of the amendments. TEX. LOCAL GOV. CODE § 9.004.

29. Arguably, a question whether one ordinance should be approved is a different question from whether a second ordinance should be approved. In this sense, the proposition involved two separate legislative acts and more than one subject. *Cf. In re Proposed Initiative*

1996-4, 916 P.2d 528 (Colo. 1996) (Justice Mullarkey, concurring, agreed the voters' initiative violated the state's single subject requirement "because this initiative would repeal a constitutional provision and also enact another provision in its place.").

30. The law is unambiguous: it is the ordinance that is to be submitted to voters to vote "for" or "against" and not a proposition to repeal or proposition to amend the code. The facts are equally clear: the City ordered an election on a proposition and not on a single ordinance. Because the City abused its power and ordered an unlawful election, the election is void without showing it was materially affected and without showing a different outcome resulted (which would be impossible).

C. The election *held* by the City was not authorized.

31. The City's response that the ballot included the wording "For the Ordinance" and "Against the Ordinance" as the city charter prescribes ignores the real issue and, indirectly, corroborates Harry's argument. The record contains no evidence that the City authorized the words "For the Ordinance" and "Against the Ordinance" which appear on the ballot. In fact, those words are inherently contradictory to the election ordered on the proposition.

32. It appears a city official directed the words to appear as an afterthought. Nevertheless, it contravened the order of the election authority (the ballot *shall* be prepared to permit voting 'for' or 'against' the following *proposition*) and it rendered the ballot incoherent. Where the proposition discusses two separate ordinances, voters were asked to elect "for" or "against" one unspecified ordinance. Although the City presented evidence regarding voter education efforts by third parties (Exhibit D 2) ("Demystifying Prop 1: What a Yes and No Vote Mean"), itself evidence of uncertainty and confusion, there is no evidence the City or its agents declared for which ordinance a vote "for the ordinance" would be counted. From the face of the

ballot, it could have been either Ordinance 20151217-075 or the proposed ordinance. The ballot measure which voters are presumed to know provided no assistance as it describes the effect of voting for or against a proposition instead.

33. Harry's pre-election letter to the mayor and council members (Exhibit P 6) evidences the confusion these inconsistencies caused. Significantly, these problems could have affected votes cast for either choice depending on individual interpretation. Therefore, this irregularity makes it impossible to ascertain a true vote.

D. Proposition 1 misled voters because it did not substantially submit the measure with definiteness and certainty.

34. The Texas Election Code grants discretion to "the authority ordering the election [to] prescribe the wording of a proposition" unless otherwise provided by law. TEX. ELEC. CODE § 52.072(a). The election on Proposition 1 is invalid because the wording of the proposition was factually inaccurate. It materially misrepresents the measure. Contrary to the City's claim that there must be evidence of a material effect on the election, the Texas Supreme Court has held that a ballot that does not substantially submit the measure with such definiteness and certainty so that voters will not be misled is unlawful without a showing of actual confusion on behalf of voters. *Dacus v. Parker*, 466 S.W.3d at 828-29.

35. As discussed, the City deleted Part 1 of the voters' proposed ordinance that expressly repealed Ordinance No. 20151217-075 in its election order. Voters unfamiliar with the petition, including Harry, who consulted the election ordinance before voting, had no knowledge that the voters' proposed ordinance explicitly repealed the entire city ordinance. Because the city charter requires the City to submit the entire initiated ordinance without amendment to voters, the measure approved by the City would reasonably be presumed to be an accurate

representation of the ordinance initiated by the voters' petition. Because it was not, the measure was misleading.

36. Without Part 1, nothing in the proposed ordinance explicitly or implicitly repeals required fingerprinting, the trade emblem requirement, or the prohibition on stopping in a travel lane. Therefore, the proposition, which states the word "repeal" four times and asserts that the entire city ordinance would be repealed, did not fairly summarize the ballot measure as approved by the City. (Exhibits JE 8, 9)

37. First, Proposition 1 misrepresents the initiated ordinance because it states that the replacement ordinance prohibits required fingerprinting (Exhibit JE 8) but the proposed ordinance recited in the election ordinance (Exhibit JE 8 at 7, § 13-2-513(F)) does not prohibit fingerprinting from being required. A repeal of a provision requiring fingerprinting can only *prohibit* required fingerprinting as an operation of law if the proposed provision implicitly repeals the fingerprinting requirement and, if approved, prohibits the City and voters from enacting an inconsistent provision for two years. Such an effect, however, is not the same as stating the proposed ordinance itself prohibits indefinitely required fingerprinting.

38. Second, Proposition 1 implies that Ordinance 20151217-075 requires fingerprinting ("[the proposed ordinance] would repeal and prohibit required fingerprinting") (Exhibit JE 8). At best, there was disagreement by council members whether Ordinance 20151217-075 required fingerprinting. Although TNCs were required to include fingerprinting as part of driver background checks, there were no penalties for noncompliance by TNCs and nothing revealed by the fingerprint checks was disqualifying for drivers. (Exhibit JE 2 at 8, § 13-2-527(D)). Contrary to what the proposition implies, the mayor, who inexplicably voted for the wording of the proposition, claimed that Ordinance 20151217-075 did not require fingerprinting.

(Exhibit PE 2 at 9:08:52 PM ("[I]f we were to pass a requirement for [fingerprinting]—and that's not what we're doing here."); PE 3 at 10:27:13 PM ("And within the safety conversation the focus turned to whether or not we would have fingerprinting of drivers. We took a vote in December that, I think, was incomplete. It was kind of ambiguous. Used the word mandatory but still allowed drivers to drive without fingerprinting and there were any measure of enforceability was taken out." (sic))).

39. Third, the City told voters that if the "proposition" was approved, then Article 4 of the Transportation chapter would be repealed and replaced by the proposed ordinance (as amended, without Part 1). Article 4 of the Transportation chapter, however, is *not* Ordinance 20151217-075. If only Article 4 of the Transportation chapter would have been repealed by the proposed ordinance then repeal of the entire city ordinance could only have been possible by referendum. To the extent that the City now claims that the proposed ordinance would have repealed the entire ordinance, it shows further how the election ordinance is inconsistent with the wording of the proposition and inconsistent with the voters' petition.

40. Finally, the inconsistency between the election ordinance that ordered a vote for or against the proposition, with which voters are presumed to be familiar, and the ballot by which voters were to vote for or against an ordinance, itself created indefiniteness and uncertainty. The campaign was waged as one for or against the proposition (Exhibit PE 4) but at the voting booth voters were confronted with choices for or against an ordinance. Neither the measure nor the proposition provided voters an official interpretation for what a vote for or against the ordinance would mean. Under the circumstances, reasonable voters could have interpreted Proposition 1 as a referendum, initiative or combination proposition because it did not substantially submit the measure with definiteness and certainty.

PRAYER

The City's motion for summary judgment should be denied because there is more than a scintilla of evidence for all required elements for this election contest. Furthermore, Harry's cross-motion should be granted because Harry has established violations of mandatory election requirements and a true outcome but for those violations cannot be ascertained. Harry requests that the Court declare the election on Proposition 1 void and enter final judgment for Harry.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of the foregoing on all parties or their attorneys of record in compliance with the Texas Rules of Civil Procedure this 22nd day of March 2017 via e-service:

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