

COMMENTS

The Death of a HERO: How Equality Opponents Repealed the Houston Equal Rights Ordinance by Fueling Trans-Panic with Tested Tactics

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I. THE HERO’S SHORT LIFE

In May 2014, nearly twenty years after Houston first rejected an ordinance to protect gays and lesbians in city employment, the Houston City Council passed the Houston Equal Rights Ordinance, also known as HERO.¹ Like its failed predecessor, the law passed city council approval by a large margin only to be later overturned by a subsequent ballot

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1. *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, BALLOTPEdia, [https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum,_Proposition_1_\(November_2015\)](https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum,_Proposition_1_(November_2015)) (last visited May 11, 2017).

measure.² But HERO was also different. It promised to protect not only the LGBT³ community, but also numerous other classes of individuals not already protected under Texas or federal law, including veterans and pregnant women.⁴ Unfortunately, HERO was short lived. Almost immediately after the ordinance passed, a group of right-wing opponents to the law, calling themselves the Campaign for Houston, organized a petition to mount a referendum.⁵ The city refused to accept the petition because of allegations that many of the signatures were fraudulent, so members of the Campaign filed suit.⁶ While the case was pending, Mayor Annise Parker delayed implementation of the ordinance.⁷

The Campaign waged a two-tiered war against HERO, both in the courts of law and of public opinion. After the Campaign lost at trial, upon a jury's finding that the petitions were rife with fraud and other defects, it still persisted in its efforts to overturn HERO.⁸ Although the Campaign filed an appeal, it essentially sidestepped the appellate process by aggressively seeking a writ of mandamus directly from the Supreme Court of Texas to compel the Houston City Council to repeal HERO or hold a referendum for a popular vote on the law.⁹ Despite the unprecedented nature of this writ, the Republican-dominated Supreme Court of Texas¹⁰ sided with the plaintiffs and ordered the Houston City Council to overturn HERO, or place it on the next ballot.¹¹

After the Supreme Court granted the writ, the Campaign mounted an uncannily familiar public relations campaign, focusing solely on one issue: public access to bathrooms by transgender persons.¹² Without offering statistics or evidence, the Campaign's ads asserted that HERO would endanger women in public restrooms by exposing them to "gender

2. *Id.*

3. "LGBT" stands for lesbian, gay, bisexual, and transgender. For readability, this Comment uses that term interchangeably with "gay community" and sometimes "gay and lesbian community," though this is in no way meant to diminish the importance of bisexual, transgender, and queer identities. Likewise, while there are other widely used acronyms for the larger Community, such as "LGBTQ," this Comment only uses "LGBT" for simplicity's sake.

4. *Facts*, HOUS. UNITES, <http://houstonunites.org/facts/> (last visited May 11, 2017).

5. *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, *supra* note 1.

6. *Id.*

7. *Id.*

8. *See* Jared Woodfill et al. v. Annise Parker et al., No. 2014-44974, in the 152nd Judicial District Court of Harris County, Texas.

9. *In re* Woodfill, 470 S.W.3d 473 (Tex. 2015).

10. All nine of the Justices are Republican.

11. *Id.*

12. CAMPAIGN FOR HOUS., <https://www.campaignforhouston.com> (last visited Mar. 31, 2016).

confused men” who might be sexual predators.¹³ While dishonest, this rhetoric was extremely effective: HERO lost the electoral battle by a margin of more than 20%.¹⁴

This attack on HERO is but one example of the many challenges that local equal rights ordinances are facing around the country.¹⁵ This Comment explains the reasons for HERO’s failure such that it may serve as a warning and example, to prevent further rollbacks in hard won, critical protections for the LGBT community. Part II reviews the history of the gay rights movement in Houston and the legacy of gay rights defeats suffered at ballot boxes nationwide. Part III explores the series of aggressive legal challenges mounted by HERO’s opponents, the smear campaign mounted by those same individuals, and the ultimate referendum that repealed the ordinance. Part IV discusses reasons for the failure of HERO and describes how it might be revived.

II. THE HERO’S OBSTACLES

A. *Houston’s Inconsistent Gay Rights Record*

Until the Supreme Court struck down the applicable laws, in *Lawrence*,¹⁶ Texas criminalized sodomy for most of the state’s history.¹⁷ As in many other states, the Texas law originally applied to all instances of non-procreative sexual activity, whether between homosexuals or heterosexuals.¹⁸ Also like other anti-sodomy laws, the authorities rarely, if ever, enforced the statute against people acting in the privacy of their homes.¹⁹ Rather, the law was likely intended to scorn homosexuals, as

13. *Id.*

14. *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, *supra* note 1.

15. Arkansas, Tennessee, and Oklahoma have recently passed statewide laws to gut locally enacted protections for LGBT persons and other minorities. Texas attempted to pass a similar law in 2015. Meanwhile, numerous other states are exploring the so-called “religious freedom” path to legalizing discrimination.

16. *Lawrence v. Texas*, 539 U.S. 558 (2003). The events that gave rise to this landmark case transpired in Houston.

17. *The History of Sodomy Laws in the United States—Texas*, GAY & LESBIAN ARCHIVES PAC. NW. (Aug. 10, 2004), <https://www.glapn.org/sodomylaws/sensibilities/texas.htm>.

18. *Id.*

19. *Id.* As a practical matter, the original statute was simply unenforceable because it codified the common law prohibition of “crimes against nature,” which Texas courts would not recognize because of a separate law requiring that crimes be “expressly defined.” *E.g.*, *Frazier v. State*, 39 Tex. 390 (1873); *Fennell v. State*, 32 Tex. 378 (1869); *State v. Campbell*, 29 Tex. 44 (1867). The legislature removed that separate requirement in 1879. Nevertheless, no reported decisions through *Lawrence* indicate the enforcement of Texas sodomy laws against adults acting consensually and in private, though the facts in many reported decisions are unclear. CARPENTER, *infra* note 20, at 13.

they were the people most commonly believed to practice sodomy.²⁰ By the 1960s, a movement took hold in many states to modernize the criminal law by removing antiquated prohibitions concerning sex.²¹

Even the conservative Texas legislature eventually decriminalized adultery, fornication, seduction, and bestiality.²² It also passed a law in 1973 regarding “deviate sexual intercourse,” likely as a response to the burgeoning gay rights movement.²³ The new law modified the prior sodomy statute by prohibiting “any contact between any part of the genitals of one person and the mouth or anus of another person” if such acts were performed “with another individual of the same sex.”²⁴ Thus, the legislature effectively legalized sodomy between heterosexual couples and singled out the LGBT community for disparate treatment.

While the politicians in Austin crafted laws to suppress the gay and lesbian community, the Houston Police Department carried out the task on a personal level. Raids of local gay bars and even of private homes were commonplace as late as the 1980s.²⁵ The police generally used violent tactics.²⁶ And while most people that were arrested spent little time in jail, the long-term consequences of an arrest could be devastating.²⁷ The Houston newspapers published the names of arrestees, and this exposure often led to ridicule by friends and family and termination from employment.²⁸ A climate of fear blanketed the community.

Nevertheless, the gay rights movement grew in Houston just as it did in many large, American cities after the Stonewall Riots in 1969.²⁹ Various LGBT interest groups formed throughout the city and pursued activities as diverse as religious study, STD testing, and political activism.³⁰ A group called the Houston Gay Liberation Front worked to elect friends of the gay community to city offices.³¹ In 1975, another group, called the Gay Political Caucus, organized a small pride parade,

20. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 8 (2012).

21. *Id.* at 11.

22. *Baker v. Wade*, 553 F. Supp. 1121, 1150 (N.D. Tex. 1982).

23. CARPENTER, *supra* note 20, at 11.

24. TEX. PENAL CODE ANN. § 21.01 *et. seq.* (West).

25. CARPENTER, *supra* note 20, at 20.

26. *Id.*

27. *Id.* at 21.

28. *Id.*

29. *Id.* at 22-28.

30. *Id.* at 23.

31. *Id.* at 23.

following the annual tradition of New York and other large cities.³² What started as a small gathering swelled to a march of over 10,000 protestors by 1977, when it rallied outside Anita Bryant's performance at the Texas Bar Association convention.³³ The Gay Political Caucus also campaigned on behalf of progressive candidates—helping elect liberals to city council in 1979 and the mayor's office in 1981—such that by the election of 1983, local politicians actively sought their endorsement.³⁴ Thus, the status of Houston's gay community rose quickly, from that of an ostracized fringe to a politically powerful group of citizens.

However, events soon unfolded that gave rise to “one of the most viciously antigay political campaigns ever conducted in the nation.”³⁵ In mid-1984, Houston's city council passed two ordinances that would forbid discrimination against gays in city employment.³⁶ The mayor voted “yes” along with the majority of the council members.³⁷ Moreover, polls demonstrated that Houston residents supported these ordinances by nine points.³⁸ The Religious Right, on the other hand, was outraged. Conservatives mounted a repeal effort by collecting signatures for a referendum petition.³⁹ Within a few weeks, they obtained the more than 60,000 signatures they would need to hold a special election in January 1985.⁴⁰ The events of the following six months would prove prescient in terms of the development of an effective, long-term strategy for manipulating the electorate against the LGBT community.

Multiple groups formed to promote overturning the antidiscrimination ordinances. The most visible called itself the Campaign for Houston. It held meetings, sponsored advertisements, distributed brochures, and operated a phone bank.⁴¹ The Campaign's messaging was consistent: homosexuals are dangerous, especially to children. In a letter promoting a documentary film screening, the Campaign wrote of San Francisco—the recent host city for the

32. *Id.* at 24.

33. *Id.* at 25.

34. *Id.* at 27.

35. *Id.* at 29.

36. *Id.* at 28.

37. *Id.*

38. *Id.*

39. *Id.* at 29.

40. *Id.*

41. *Id.* at 31-35.

Democratic National Convention and a favorite target of conservative scapegoating—that

children may not safely play in the parks without being exposed [to] men who are meeting men for “anonymous” sex in full public view; sado-masochistic parlors have proliferated; the city’s mayor is a pawn of the radical homosexuals; the public schools are mandated to teach homosexuality as an acceptable lifestyle to the children; and more.⁴²

Leveraging the AIDS crisis, it recruited doctors to voice their opinions that gay people were a public health hazard.⁴³ The Campaign also sought to split the progressive voting block by encouraging black leaders to argue that the ordinances endangered that community’s hard won civil rights gains.⁴⁴ Most offensive of all, the Campaign issued a brochure that concluded

Homosexuals are not merely parasites—they are more apt to be predatory. They run their lives closer to the ragged edge and they endanger everyone as a consequence In these and countless other ways homosexuals increase the collective risk of living. And to what advantage? What do homosexuals do for us that makes up for the damage that they do to us? Nothing, nothing at all. There are no benefits associated with homosexuality, only liabilities—for them and for us Do we need this grief? Do our children need to play in a more dangerous world to satisfy the quirks of those given to kinky sex? No. Enough. Homosexuality ought to be suppressed with all deliberate speed, [let’s] get on with it.⁴⁵

On January 19, 1985, Houstonians voted to overturn the city’s new anti-discrimination ordinances—that a majority of voters said they favored—by a devastating margin of 60%.⁴⁶ The political gains of the prior decade had been largely illusory, and what progress had been made was surely set back by the Campaign’s widespread message. One month after the election, a majority of poll respondents said that they opposed gay rights.⁴⁷ Despite a growing progressive movement in Houston, it turned out the gay community could not depend on the support of their heterosexual neighbors—a legacy that persists today.

The state of Texas still does not prohibit discrimination in employment based on sexual orientation or gender identity.⁴⁸ Neither does state law protect LGBT persons from discrimination in housing or

42. *Id.* at 31.

43. *Id.* at 32.

44. *Id.* at 33.

45. *Id.* at 35.

46. *Id.*

47. *Id.* at 36.

48. TEX. LAB. CODE § 21.051.

public accommodations.⁴⁹ However, many large cities in Texas do protect LGBT individuals from discrimination in employment, housing, public accommodations, and more.⁵⁰ But while Houston is the largest city in Texas, it was the last to add such protections with the passage of HERO in 2014, and now remains the largest city in the country where discrimination against the gay community is legal.⁵¹

B. A Tested, Effective Strategy for the Religious Right

Since the 1970s, the Religious Right has used direct democracy as one of their primary tools to fight legislative gains by the gay rights movement.⁵² Direct democracy refers to the system provided by some states and municipalities to their citizens whereby they are permitted to enact or repeal legislation, or even to amend the state constitution, by collecting enough signatures to petition to put a law on the ballot in the next election.⁵³ The Colorado constitutional amendment at issue in the landmark case, *Romer v. Evans*, grew from such a referendum,⁵⁴ as did the now-infamous Proposition 8 in California.⁵⁵ The state of Texas does not permit citizen-driven initiatives or referenda in statewide elections, however Houston and Austin provide such a process for local ordinances.⁵⁶

Conservative groups have had tremendous success using ballot measure campaigns in the gay rights arena, with voters rejecting LGBT rights in as many as 70% of elections.⁵⁷ By using the ballot box, equality opponents can sidestep nuanced policy discussion with elected lawmakers, avoid the intricacies of litigation, and instead rely on grassroots messaging to inject homophobia into public opinion, which pays dividends on election day.⁵⁸ The rapid growth of social media in recent years makes these tactics even more efficient and virulent.

49. TEX. PROP. CODE § 301.021(a)-(b).

50. Carlos Maza & Rachel Percelay, *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, MEDIA MATTERS (Oct. 15, 2015), <http://media.matters.org/research/2015/10/15/texas-experts-debunk-the-transgender-bathroom-p/206178>. These include San Antonio, Dallas, Fort Worth, and El Paso.

51. *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, *supra* note 1.

52. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* xv (2012).

53. *Id.* at xvi.

54. *Id.* at 30.

55. *Id.* at xiii.

56. *Id.* at 2.

57. *Id.* at 4.

58. *Id.* at 5.

The Religious Right has employed remarkably consistent rhetoric to win elections over the last forty-plus years. The most common themes are “danger” and “special rights.” In the 1980s, conservative groups seized upon widespread panic surrounding the AIDS crisis to increase fear of gay people, establishing them as enemies in the public consciousness. The Reverend Jerry Falwell, for example, sent a fundraising letter to supporters of his Moral Majority organization, stating that HIV-positive gay men seek to donate blood because “they know they are going to die—and they are going to take as many people with them as they can.”⁵⁹

Almost paradoxically, at the same time that they paint LGBT people as a decaying group trying to destroy society, some conservatives also characterize gays as a powerful political class that does not need protection but that nevertheless seeks “special rights.” This argument relies on precedent from the Supreme Court of the United States that suggests protected class status depends on “a history of political powerlessness and invidious discrimination, along with immutability or inability to change.”⁶⁰ Thus, equality opponents frequently present data supposedly proving that gays are on average more educated, employed in more professional positions, and possessed of more disposable income.⁶¹ Then they juxtapose these statistics with the plight of other minorities—African Americans, for example—who they say deserve protective laws as a remedy for a long history of discrimination, which does not apply to the LGBT community.⁶² Much of the public has readily accepted these arguments as true. Indeed, even Justice Antonin Scalia, in his dissent to *Romer*, characterized gays as a “politically powerful minority” that was trying to unfairly “revise” the laws in its favor.⁶³

Ultimately, anti-gay ballot measures succeed because they are supported by public relations campaigns that can transmit a powerful message via “sound bite.”⁶⁴ Moreover, equality opponents choose to phrase their vitriol in an easily repeatable way that seems like a reasonable proposition any fair-minded person would agree with. They have therefore characterized the pursuit of equal rights by the LGBT community as a grab for special rights that comes at the detriment to everyone else. Activists have noted that while it takes only seconds to

59. *Id.* at 16.

60. *Id.* at 26.

61. *Id.*

62. *Id.*

63. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

64. ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS* 152 (2009).

deliver the “special rights” argument, “[i]t takes fifteen minutes of real discussion to undo the damage that phrase does.”⁶⁵ Proponents of LGBT equality continue to struggle to develop methods to counteract this strategy.

C. *Models for Resistance*

Notwithstanding the difficulty of countering the rhetoric used by the Religious Right in connection with ballot measures, activists have developed certain model campaign tactics that, if deployed correctly, can serve as effective countermeasures. Whatever the tactics, all model campaigns operate with a singular goal: winning at least 50% of the vote.⁶⁶ The most important tactics in service of this objective are voter identification and focused messaging.⁶⁷

The voter identification strategy involves finding and targeting only those voters that are likely to vote favorably on the measure in question.⁶⁸ Campaign managers prepare lists of regular voters sorted by demographics or by precincts known to lean liberal.⁶⁹ With this information in hand, staff or volunteers contact the target voters directly, either by telephone or door-to-door canvassing, to determine which voters evidence strong support, or at least persuadability.⁷⁰ The campaign staff remove from their lists any voters demonstrating opposition to LGBT rights and avoid expending further resources on converting them.⁷¹ Later, staff contact the likely supporters again by telephone or direct mail to remind them to vote on election day.

Upon contacting likely voters, campaign staff must deliver a focused message that will motivate turnout on election day.⁷² Successful campaigns often employ professional pollsters and media consultants to assist in developing a winning message.⁷³ The most effective messages “focus[] on unintended consequences of legal-restrictive initiatives . . . , fear of government intervention, and disdain for [the extremism of] the Religious Right” rather than on LGBT visibility.⁷⁴ This avoidance of a specific “gay rights” message is controversial among many activists;

65. *Id.* at 159.

66. STONE, *supra* note 52, at 68.

67. *Id.* at 69.

68. *Id.*

69. *Id.*

70. *Id.* at 70.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 71.

nevertheless, this strategy has also proven effective and makes sense in light of the known difficulty of directly countering the anti-gay “sound bites” of the Right.⁷⁵

Successful implementation of voter identification and messaging tactics requires a substantial increase in both campaign staff and fundraising.⁷⁶ But when properly implemented, these methods have proven decisive in pro-LGBT victories across the United States; likewise, mismanagement of voter identification and messaging is “a recurring explanation for failed campaigns.”⁷⁷ Like many pro-LGBT laws before it, HERO lost at the ballot box, its supporters unable to overcome the Campaign’s successful usage of one of the most effective tools in the Religious Right’s arsenal.

III. THE HERO’S BATTLE

With the failures of Houston’s first anti-discrimination ordinances a distant memory, Mayor Annise Parker introduced HERO to Houston’s city council in early 2014.⁷⁸ After much discussion and debate, the council passed the ordinance by a margin of 11-6.⁷⁹ HERO banned discrimination based on sexual orientation and gender identity “in city employment, city services, city contracting practices, housing, public accommodations, and private employment.”⁸⁰ The ordinance also made discrimination based on sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, genetic information, and pregnancy explicitly forbidden by the city’s code.⁸¹ HERO was designed to exempt religious institutions and organizations from compliance,⁸² but it ultimately sought to make discrimination against every single Houstonian illegal.⁸³ Nevertheless, conservative

75. *Id.* at 72.

76. *Id.* at 73.

77. *Id.* at 73, 91-100.

78. Mike Morris, *Council Passes Equal Rights Ordinance*, HOUS. CHRON. (MAY 29, 2014), <http://www.chron.com/news/politics/houston/article/Council-passes-equal-rights-ordinance-5510672.php>.

79. *Id.*

80. *City of Houston, Texas, Ordinance No. 2014-530*, http://www.houstontx.gov/equal_rights_ordinance.pdf (last visited May 11, 2017).

81. *Id.* Discrimination based on these characteristics was already prohibited by federal law.

82. *Id.*

83. Laila Khalili, *Five Things You Need To Know About the Houston Equal Rights Ordinance*, FREE PRESS HOUS. (Oct. 27, 2015), <http://www.freepresshouston.com/5-things-you-need-to-know-about-the-houston-equal-rights-ordinance/>.

activists sought to repeal the law believing it an unnecessary and even dangerous expansion of rights for the LGBT community.

A. *Courtroom Maneuvers*

After the passage of HERO in May 2014, its opponents moved quickly to attempt to overturn it. A group of local pastors began a petition for a repeal referendum to appear on a city-wide ballot the following November.⁸⁴ According to the Houston city charter, such a petition would require 17,269 signatures to succeed.⁸⁵ Additionally, to be valid, the petitions were required to contain the printed names, addresses, voter ID numbers, dates of birth, and dates signed for each of the signatories.⁸⁶ Signature collectors, called circulators, were also required to sign the petitions and acknowledge before a notary that the signatures were taken in their presence.⁸⁷

After collection of nearly 55,000 signatures,⁸⁸ the opponents filed their petition for review by the city of Houston.⁸⁹ The city secretary initially accepted the petitions as valid.⁹⁰ However, upon review by the city attorney, the number of valid signatures fell short by approximately 2000 names, based on his finding that not all of the signatures pages had been properly notarized.⁹¹ Additionally, the city attorney alleged that many of the signatures were fraudulent because they appeared to be written in the same handwriting.⁹² With these signatures excluded, Mayor Parker reversed the acceptance of the petition by the city secretary and declared the petition insufficient to support a referendum on the November 2015 ballot.⁹³ Not to be dissuaded, the HERO opponents filed suit.

84. Hannah Smothers, *Houston's Equal Rights Ordinance, Explained*, TEX. MONTHLY (Jan. 21, 2015), <http://www.texasmonthly.com/the-daily-post/houstons-equal-rights-ordinance-explained/> (last visited May 11, 2017).

85. *Id.*

86. *Id.*

87. *Id.*

88. Jeremy Heallen, *Houston Sued Over Benefits Offer to Gay Workers' Spouses*, LAW360 (Aug. 6, 2014), www.law360.com/articles/564690/houston-sued-over-benefits-offer-to-gay-workers-spouses.

89. Smothers, *supra* note 84.

90. *Id.*

91. *Id.*

92. Katherine Driessen, *In HERO Case, 8,500 Signatures Will Decide Trial*, HOUS. CHRON. (Mar. 26, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/In-HERO-case-8-500-signatures-will-decide-trial-6161983.php>.

93. Smothers, *supra* note 84.

1. District Court Proceeding

A group of four plaintiffs brought an action in Texas state court against the city of Houston, Mayor Parker, and the city secretary, on the theory that the city attorney acted without authority in invalidating the petition, and that the city secretary's original acceptance of the signatures was the official count for the purposes of bringing the referendum.⁹⁴ The judge asked the jury to determine whether ninety-seven circulators who gathered signatures for the petition had "signed and subscribed the circulator's oath" as required by the city charter.⁹⁵ The jury decided that only thirty-three circulators submitted valid signature pages, resulting in a tally of just over 2000 intact signatures.⁹⁶ Furthermore, the court asked the jury to determine whether any of the submitted pages contained forgery.⁹⁷ The jury found that twelve out of thirteen "high volume" circulators submitted pages with forgeries, oaths that were not true and correct, and other non-accidental defects.⁹⁸

Despite having argued for a jury trial,⁹⁹ the plaintiffs asked the presiding judge to set aside the jury's findings. In his final order, the judge did disregard several of the findings.¹⁰⁰ Ultimately, the court accepted all those signatures that had either a legible signature or a printed name.¹⁰¹ Nevertheless, the plaintiffs still had less than 15,500 signatures in support of their referendum.¹⁰² They appealed.¹⁰³ However,

94. The case is *Jared Woodfill et al. v. Annise Parker et al.*, No. 2014-44974, in the 152nd Judicial District Court of Harris County, Texas.

95. *Driessen*, *supra* note 92.

96. *Id.*

97. *Id.*

98. *Id.*

99. The plaintiffs opposed the defendants' motion for a bench trial. *See Woodfill v. Parker*, 2015 Tex. Dist. LEXIS 2194, at *1.

100. *See Woodfill v. Parker*, 2015 Tex. Dist. LEXIS 2191, at *1.

101. *Driessen*, *supra* note 92.

102. *Id.*

103. Incidentally, during the pendency of the District Court case, the plaintiffs also filed a writ of mandamus in the 14th Court of Appeals. *In re Woodfill*, No. 14-14-00648-CV, 2014 WL 4088704, at *1 (Tex. App. Aug. 15, 2014), subsequent mandamus proceeding, 470 S.W.3d 473 (Tex. 2015). The plaintiffs asked the court to compel the respondents to (1) suspend the enforcement of the Houston Equal Rights Ordinance (HERO); (2) notify the public of such suspension and of the consequence that no action taken under HERO may be legal or valid; (3) reconsider whether HERO should be repealed in its entirety; and (4) if the city council does not repeal HERO, then submit HERO to popular vote. *Id.* The court denied the writ, concluding the plaintiffs would have adequate remedy in appealing a judgment from the district court case. *Id.*

the appeal was obviated by subsequent writs of mandamus to the Supreme Court of Texas.¹⁰⁴

2. First Writ of Mandamus

After losing at trial, but prior to the adjudication of their appeal, the plaintiffs pursued a writ of mandamus from the Supreme Court of Texas to compel the Houston City Council to reconsider HERO or to submit it to a popular vote.¹⁰⁵ For mandamus to issue, the plaintiffs were required to demonstrate that they had no adequate remedy by appeal.¹⁰⁶ Despite the Fourteenth Court of Appeals of Texas having previously determined that the plaintiffs did have an adequate remedy,¹⁰⁷ the Supreme Court of Texas disagreed.¹⁰⁸

In Texas, a plaintiff may seek mandamus to compel a public official to perform a ministerial act.¹⁰⁹ “An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.”¹¹⁰ However, where facts are in dispute, the Supreme Court of Texas may not resolve issues in a mandamus proceeding.¹¹¹

The plaintiffs argued that the Houston City Charter required the city council to act upon the original certification by the city secretary of their petition’s sufficiency.¹¹² The city of Houston argued that the city council had no duty to act where the city secretary’s certification was based upon an insufficient number of signatures.¹¹³ Furthermore, the city argued that mandamus was precluded because of disputes of fact concerning forged signatures and defective affidavits.¹¹⁴

The Supreme Court held that the city secretary’s actions triggered a ministerial duty of the Houston City Council to either repeal HERO or submit it to a popular vote.¹¹⁵ The Court reasoned that “[t]he City

104. This appeal was ultimately dismissed by unopposed motion of the plaintiffs, after they obtained relief through their writ of mandamus to the Supreme Court of Texas. *Woodfill v. Parker*, No. 14-15-00396-CV, 2016 WL 749955, at *1 (Tex. App. Feb. 25, 2016).

105. *In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015).

106. *See In re Union Carbide Corp.*, 273 S.W.3d 152, 156 (Tex. 2008) (orig. proceeding) (per curiam) (“[A] relator must show that it has no adequate remedy by appeal.”)

107. *In re Woodfill*, No. 14-14-00648-CV, 2014 WL 4088704, at *1 (Tex. App. Aug. 15, 2014), subsequent mandamus proceeding, 470 S.W.3d 473 (Tex. 2015).

108. *In re Woodfill*, 470 S.W.3d at 475.

109. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 (Tex. 1991).

110. *Id.*

111. *In re Angelini*, 186 S.W.3d 558, 560 (Tex.2006) (orig. proceeding).

112. *In re Woodfill*, 470 S.W.3d at 478.

113. *Id.*

114. *Id.*

115. *Id.*

Secretary unequivocally stated that ‘I am able to certify that . . . [t]he number of signatures verified on the petition submitted on July 3, 2014 is 17,846,’ and that only 17,269 were required.’¹¹⁶ That the city attorney found otherwise was of no consequence because

[t]he City Attorney may, no doubt, give legal advice to the City Secretary, but he cannot assume her duties. Though the City Secretary’s report mentions the City Attorney’s findings, the City Secretary did not adopt the City Attorney’s findings as her own, review the substance of his findings herself, or certify the inadequacies to the City Council.¹¹⁷

After certification by the city secretary, “the Council shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election.”¹¹⁸ Thus, the Court held that the Houston City Charter grants only the city secretary, and not the city attorney or the city council, the power to evaluate the sufficiency of a referendum opinion.¹¹⁹

Furthermore, the Court noted that allegations of forgery and defects were never cited by the city secretary herself.¹²⁰ Rather, the city council made this finding despite being required by the city charter to act immediately pursuant to a certification by the city secretary.¹²¹ The Court held that, “to give authority to the council to make the ultimate determination of sufficiency of the petition would commit the decision to a body that could not be considered impartial.”¹²²

All of these issues were raised in the plaintiffs’ pending appeal; nevertheless, the Court held that because the appellate process would likely not conclude in time for the referendum to make it on the coming November ballot, the plaintiffs did not have an adequate remedy by appeal.¹²³ The Supreme Court of Texas ordered the city of Houston to suspend enforcement of HERO and the city council to reconsider or repeal it by August 2015, or to put it to a vote in the November 2015 election.¹²⁴

116. *Id.*

117. *Id.* at 479.

118. Houston, Tex., Charter, art. VII-b, § 3.

119. *In re Woodfill*, 470 S.W.3d at 479.

120. *Id.*

121. Houston, Tex., Charter, art. VII-b, § 3.

122. *In re Woodfill*, 470 S.W.3d at 479 (citing *Howard v. Clack*, 589 S.W.2d at 750 (Tex. Civ. App. 1979)).

123. *Id.* at 480.

124. *Id.* at 481.

3. Second Writ of Mandamus

Not satisfied with the mere opportunity to repeal HERO by popular vote, its opponents further prevailed upon the Supreme Court of Texas to craft ballot language that would make that objective easier.¹²⁵ Pursuant to the directive issued by the Court in the plaintiffs' first writ of mandamus action, the Houston City Council decided to put the ordinance on the November 2015 ballot for consideration by the citizens of Houston.¹²⁶ The council proposed the following language:

PROPOSITION NO. 1

[Relating to the Houston Equal Rights Ordinance.]

Shall the City of Houston repeal the Houston Equal Rights Ordinance, Ord. No.2014-530, which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?

The ballot will allow voters to choose between "Yes" and "No" when voting on this proposition.¹²⁷

The plaintiffs took exception to this language for two reasons,¹²⁸ calling it "deceitful" and "designed to confuse the voters."¹²⁹ First, they argued that the city charter required an affirmative or negative vote on the ordinance itself, rather than on its repeal.¹³⁰ Second, they argued that the phrase "Houston Equal Rights Ordinance" should not appear on the ballot.¹³¹ The city argued that the court lacked jurisdiction to grant mandamus relief in interference with its election process, and that the city charter granted it discretion in the wording of ballot language.¹³² Disagreeing with the city, the Court held that the circumstances of the case justified its consideration of the matter.¹³³

125. *In re Williams*, 470 S.W.3d 819, 820 (Tex. 2015).

126. *Id.*

127. *Id.*

128. *Id.*

129. *About—Campaign for Houston*, CAMPAIGN FOR HOUS., <https://www.campaignforhouston.com/about> (last visited May 11, 2017).

130. *In re Williams*, 470 S.W.3d at 820.

131. *Id.*

132. *Id.*

133. *Id.* Texas law grants the Supreme Court of Texas jurisdiction to "issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election." TEX. ELEC. CODE § 273.061. Signatories to a petition may seek an injunction to correct deficiencies in the ballot language "if the matter is one that can be judicially resolved . . . without delaying the election." *Blum v. Lanier*, 997 S.W.2d 259, 263-64 (Tex. 1999). This Court held that, even though the plaintiffs did not first seek relief in this matter in the

The Court further held that the city charter, by its explicit language, requires the vote to be for or against the ordinance itself rather than repeal.¹³⁴ The charter states:

The ballots used when voting upon such proposed and referred ordinances, resolutions or measures shall set forth their nature sufficiently to identify them, and shall also set forth upon separate lines the words “For the *Ordinance*” and “Against the *Ordinance*”, or “For the Resolution” or “Against the Resolution.”¹³⁵

The Court thus accepted the plaintiffs’ argument that “because the Charter requires a majority vote ‘in favor’ of the ordinance for it to take effect . . . the City Council must submit the ordinance such that voters may vote directly ‘in favor’ of the ordinance or against it.”¹³⁶

However, the plaintiffs did not completely succeed in their attack on the city’s ballot language.¹³⁷ The Court upheld the city’s usage of the phrase “Houston Equal Rights Ordinance” on the ballot.¹³⁸ The Court reasoned that such language was not politically slanted, because the ordinance in question was a Houston ordinance, and the title of the ordinance contains the wording in question.¹³⁹ Thus, the court held that the Houston City Council did not abuse its discretion.¹⁴⁰

B. *A Familiar Campaign*

Having secured a referendum, the opponents of HERO set about crafting a public relations campaign to smear its supporters and obfuscate its purpose. Despite the multitude of protections provided by HERO, its opponents designed rhetoric to reduce focus on transgender women and the supposed dangers of protecting that group. The Campaign for Houston re-emerged. This time, it stated, “Campaign for Houston is made up of parents and family members who do not want their daughters, sisters or mothers forced to share restrooms in public facilities with gender-confused men, who—under this ordinance—can call themselves ‘women’ on a whim and use women’s restrooms

Texas Court of Appeals, “the imminence of the election places this case within the narrow class of cases in which resort to the court of appeals is excused.” *In re Williams*, 470 S.W.3d at 821 (citing *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996) (orig. proceeding)); *see also* Tex. R. App. P. Ann. § 52.3(e) (West 2017).

134. *In re Williams*, 470 S.W.3d at 822.

135. Houston, Tex., Charter, art. VII-b, § 5 (emphasis added).

136. *In re Williams*, 470 S.W.3d at 822.

137. *Id.*

138. *Id.* at 823.

139. *Id.*

140. *Id.*

whenever they wish.”¹⁴¹ Its website further implored citizens of Houston to “care enough for the women in your life, your mothers, wives, daughters, sisters, and others who deserve the right to only be seen by others of their same gender, in the privacy and sanctuary of restrooms, in moments when they may be most vulnerable.”¹⁴²

Despite these claims, officials and other experts in Austin, Dallas, and El Paso—each city with its own equal rights ordinance—went on the record debunking the Campaign’s claims.¹⁴³ *Media Matters* conducted a survey in each city, asking the following question of city officials, law enforcement, and advocates for sexual assault victims: “Have gender identity/transgender public accommodations protections resulted in increased sexual assault or rape in women’s restrooms? Has [CITY] encountered any other problems as a result of such protections?”¹⁴⁴ The responses from each of these groups were telling.

In Austin, where gender identity has been protected since 2004,¹⁴⁵ a representative from SAFE¹⁴⁶ stated that she “[could not] recall a single incident” of sexual assault in connection with restroom access by transgender individuals.¹⁴⁷ Members of city council and the Austin Police Department made the same representations.¹⁴⁸ Likewise, officials in Dallas, where gender identity has been protected since 2002, and in El Paso, where gender identity has been protected since 2003, responded that they had no evidence of negative outcomes of their equal rights ordinances.¹⁴⁹ In a particularly salient statement, April Mitchell, CEO of the Dallas Area Rape Crisis Center, wrote:

These protections are passed with the intention to protect those that are vulnerable to harm in their communities. In our experience, sexual predators will perpetrate under ANY circumstance that presents itself. These types of ordinances or laws do not increase the sexual assaults or rapes for the community. Further, for communities to refuse these basic protections for all citizens will give power to those that would harm others.

141. *How Will the November Election in Houston Affect You?*, CAMPAIGN FOR HOUS., <https://www.campaignforhouston.com/news/how-will-the-november-election-in-houston-affect-you> (last visited May 11, 2017).

142. *Id.*

143. Maza & Percelay, *supra* note 50.

144. *Id.*

145. *Id.*

146. SAFE stands for “stop abuse for everyone.” This group is a “partnership of Austin Children’s Shelter and SafePlace dedicated to ending child abuse, sexual assault, and domestic violence.” *See Home—Safè*, www.safeaustin.org (last visited Mar. 31, 2016).

147. Maza & Percelay, *supra* note 50.

148. *Id.*

149. *Id.*

Last, those that cite this proposition as an “opportunity” to victimize someone are simply doing so in ignorance; not understanding the mentality of perpetrators.¹⁵⁰

As if this is not enough, *Media Matters* reported that experts in fifteen other states have also debunked the “transgender bathroom myth.”¹⁵¹ On its website, the Campaign for Houston cited no statistics, interviews with law enforcement, or other evidence in support of its claim that HERO would endanger Houston’s “wives, daughters, and sisters.”¹⁵²

C. *Houston Unites*

On the other side of the fray was a group called Houston Unites, a coalition made up of civil rights organizations, local businesses, and Fortune 500 companies.¹⁵³ The group attempted to inform the public about the true scope of HERO: that it protected many more people than just the LGBT community, that it was good for business, and that it did not change any law affecting public safety.¹⁵⁴ Houston Unites published statistics indicating that during the short period HERO was effective, 56% of the claims filed under the law were related to racial discrimination, and 16% were related to gender (as distinguished from gender identity) or pregnancy discrimination.¹⁵⁵ The group also pointed out the support for the ordinance by major stakeholders such as the Superbowl Committee, who might decide to move their events to more inclusive cities in the wake of a repeal of HERO.¹⁵⁶ However, some critics say that Houston Unites was disorganized and slow to circulate its message, presumably because it believed that a city of over two million residents, that has been noted for its diversity and inclusiveness, would naturally support a broad equal rights ordinance.¹⁵⁷

For example, while the Houston Unites website bears a robust design—especially as compared to the relatively rudimentary site for the Campaign—one must carefully scour its contents to discern the essential message. The site contains several sub-pages, with links to news and

150. *Id.*

151. *Id.*

152. CAMPAIGN FOR HOUS., *supra* note 12.

153. *Endorsements*, HOUS. UNITES, <http://houstonunites.org/endorsements/#> (last visited May 11, 2017).

154. *Facts*, HOUS. UNITES, <http://houstonunites.org/facts/> (last visited May 11, 2017).

155. *Id.*

156. *Id.*

157. Mimi Swartz, *What Houston’s Reaction to the Equal Rights Ordinance Says About My City*, TEX. MONTHLY (Oct. 22, 2015), <http://www.texasmonthly.com/articles/what-houstons-reaction-to-the-equal-rights-ordinance-says-about-my-city/>.

facts about HERO, clips of television and radio commercials, and a long list of endorsers, including testimonials from faith leaders, business owners, and advocates for various minority groups.¹⁵⁸ But missing from the site is the sort of clear messaging that would have countered the Campaign's reductive talking point, "No men in women's bathrooms." Indeed, on the "Facts" page, a reader must scroll all the way to the bottom to find any discussion about bathroom access that refutes the Campaign's claims.¹⁵⁹ The "News" page has links to dozens of stories about various celebrities, politicians, and community leaders announcing their support for HERO, but relatively little information to serve as a call to action for individual voters.¹⁶⁰ Thus, it is not clear that Houston Unites ever held any "get out the vote" or other similar community events; if they did, they did not advertise those events clearly on their website.

What is clear is that Houston Unites did a terrific job at raising funds that would allow it to land high profile endorsements and create a first rate media presence. However, these efforts were apparently lost on individual voters, having not been focused enough to drive the turnout of supporters needed for a win.

D. The Vote and Its Aftermath

On November 3, 2015, the repeal of HERO appeared on a ballot along with candidates for mayor, city council, and a few other local officials.¹⁶¹ To the shock and outrage of many, the ordinance was overwhelmingly defeated by a margin of 60.97% to 39.03%.¹⁶² Ironically, Houston Unites outspent the Campaign by a factor of nearly three.¹⁶³ Yet voter turnout was very low, with fewer than 260,000 votes cast amongst a large electorate, especially in the precincts including Montrose, Meyerland, and other areas of the city where HERO enjoyed strong support.¹⁶⁴

The new mayoral administration in Houston committed to reviving HERO, but appears to have taken no steps toward that goal in the intervening eighteen months. Likewise, Houston Unites has updated its website with a banner vowing to fight on, though there's no other

158. HOUS. UNITES, <http://houstonunites.org> (last visited May 11, 2017).

159. *Facts*, *supra* note 154.

160. *News*, HOUS. UNITES, <http://houstonunites.org/category/facts/> (last visited May 11, 2017).

161. *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, *supra* note 1.

162. *Id.*

163. *Id.*

164. *Id.*

mention of steps actually being taken to reinstate the law.¹⁶⁵ Meanwhile, the Texas House and Senate have each introduced their own new bills that would repeal all local non-discrimination ordinances that do not comply with the “state’s standards,” which means that any laws containing protections for the LGBT community face the same fate as HERO.¹⁶⁶ With these new challenges looming, proponents of equality must learn quickly from past mistakes and must develop a strategy that can overcome even the most persuasive sound bites from the right.

IV. THE HERO REVIVED?

The Houston Equal Rights Ordinance was overturned because of a small but vocal and well-organized group of opponents who were willing to stop at nothing to prevent the progress of equality for the LGBT community. The Campaign for Houston was despicable and dishonest. However, the supporters of HERO must examine their own actions in response to its attacks. It is incredible that Houston Unites could spend nearly three times as much money, defending a purportedly popular law, and yet be defeated by such a wide margin due to lack of organization and low voter turnout. This result underscores the necessity of motivating both members of the LGBT community and allies alike to take action in the face of discrimination and to not become complacent despite recent victories like marriage equality. The opposition is dedicated to overturning this progress and setting the LGBT community back by decades.

The parallels between the old and new Campaigns for Houston are startling. The strategy that was so effective in 1985 was re-used virtually in its entirety, save one small change: instead of casting all gay people as a danger to society, its focus narrowed on the trans community. The sound bite became, “No Men in Women’s Bathrooms.”¹⁶⁷ Much like “No Special Rights,” this proposition sounds reasonable. Of course, understanding the underlying issues requires an in-depth and sensitive discussion about gender identity that is simply impossible to have on a hand-bill, let alone a Twitter post.

Hopefully, HERO’s allies will actually mount an effort to resurrect the law. Next time, they should be prepared to face a similar challenge by the Religious Right, which will almost surely deploy the same

165. HOUS. UNITES, *supra* note 158.

166. Bobby Cervantes & Andrea Zelinski, *Texas House Offers a Replacement for Senate “Bathroom Bill,”* HOUS. CHRON. (Apr. 14, 2017), <http://www.chron.com/news/politics/texas/article/Proposal-in-Austin-would-rescind-several-local-11072506.php> (last visited May 11, 2017).

167. CAMPAIGN FOR HOUS., *supra* note 12.

methods it has used to thwart gay rights in Houston successfully since it defeated the first equal rights ordinances over thirty years ago. In response, Houston Unites must adapt the model campaign strategies that activists have used to win at the ballot box in other cities. While high profile endorsements and glossy media certainly do not hurt, it is clear that they do not necessarily drive turnout of favorable voters. “Signs don’t vote. Mailings don’t vote. Even people don’t vote. Voters vote.”¹⁶⁸ Thus, Houston Unites should focus its efforts on building a sophisticated voter identification system to motivate the supporters that simply did not show up the first time. In service of this system, Houston Unites should also spend the time and money necessary to develop a more straightforward message that speaks directly to the voters it needs to win.

Activists nationwide should take note of these events. Even in a post-*Obergefell* world, the LGBT community can suffer grave defeats in legislatures and especially at the ballot box. The transgender community is particularly susceptible both to laws curtailing its freedoms and to the stigma that results from the messaging strategy of the Religious Right. Equality opponents are still winning major victories against the gay community and they are doing it by using familiar methods, methods which can be countered. In the meantime, vulnerable citizens are holding out for a HERO.

168. STONE, *supra* note 52, at 69.