

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

H. WARREN HOYT and JESUS CHAPEL,)

Plaintiffs,)

v.)

Case No. 3:11-cv-00485

THE CITY OF EL PASO, TEXAS and)

GREG ABBOTT, in his official capacity as)

Attorney General of Texas,)

Defendants.)

VERIFIED COMPLAINT

I. INTRODUCTION

1. This is a federal civil rights action under 42 U.S.C. § 1983 to protect the rights of a church and its pastor to freely and publicly exercise their Christian faith and to speak out on matters vitally important to the community. Here, the City of El Paso, Texas, by and through its mayor, is enforcing Texas Election Code § 253.094 to prohibit churches from circulating petitions to hold a recall election. This law, if violated, is punishable as a third degree felony. The Plaintiffs here want to be able to fully participate as citizens within the community, including circulating petitions to hold recall elections, without fear of punishment arising from the enforcement of an unconstitutional state election law against them.

2. The Mayor is using the color of law to suppress the Plaintiffs’ constitutional rights, including their rights to petition the government for the redress of grievances, free speech, free association, free exercise of religion, equal protection, due process, as well as their rights under the establishment clause. These constitutional rights are rooted in both the United States Constitution and the Texas Constitution.

3. In addition, Texas Election Code § 253.094(b) (the “Election Code”) is unconstitutional. It is being enforced to ban political speech by a church, specifically, “the circulation and submission of a petition to call an election.”

4. Due to the Mayor’s actions and the Election Code, the Plaintiffs’ speech has been chilled, and will continue to be chilled in the future, unless the Court enters the relief requested.

5. Plaintiffs are seeking injunctive relief, enjoining the Mayor, in his official capacity, from violating Plaintiffs’ constitutional rights and from further interfering with the Plaintiffs’ rights to circulate petitions seeking recall elections. Plaintiffs seek a declaratory judgment that the Election Code is unconstitutional on its face and as applied to churches. Finally, Plaintiffs seek nominal damages caused by the actions and their loss of constitutional freedoms.

II. JURISDICTION AND VENUE

6. This action arises under the First and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act (42 U.S.C. §§ 1983 and 1985).

7. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343, because this is a suit in equity authorized by law to redress the deprivation, under color of State law, statute, regulation, or custom and usage of the State of Texas of rights, privileges, and immunities secured by the laws and Constitution of the United States; particularly the First and Fourteenth Amendments to the Constitution of the United States.

8. Venue is proper in the Western District of Texas under 28 U.S.C. § 1391(b), because a substantial part of the actions or omissions giving rise to this case occurred within this District.

9. This Court is authorized to grant the declaratory relief requested under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 for the purpose of deciding an actual controversy and declaring the rights and other legal relations of the interested parties, and the injunctive relief requested under 28 U.S.C. § 1343(3).

10. This Court is authorized to grant Plaintiffs' prayer for relief regarding costs, including a reasonable attorney fee, pursuant to 42 U.S.C. § 1988.

III. IDENTIFICATION OF THE PARTIES

11. Plaintiff H. Warren Hoyt is the pastor of Jesus Chapel, and lives in El Paso, Texas.

12. Plaintiff Jesus Chapel (hereinafter, "Church") is a Texas non-profit corporation, located in El Paso, Texas.

13. Defendant El Paso, Texas, is a civil body politic and can sue and be sued in federal court.

14. Defendant Greg Abbott is the Attorney General of Texas, and is sued only in his official capacity. The Attorney General enforces the state election law.

IV. STATEMENT OF FACTS

15. The Election Code states, "A corporation or labor organization may not make a political contribution in connection with a recall election, including the circulation and submission of a petition to call an election."

16. The Mayor is enforcing the Election Code to prohibit churches and their members from circulating petitions to hold recall elections.

17. The District Attorney is interpreting the Election Code to prohibit churches and their members from circulating petitions to hold recall elections, and conducting ongoing investigations of churches and their members who are suspected of violating the Election Code.

18. Plaintiffs desire to seek the recall of the Mayor, as well as Representative Steve Ortega and Representative Susie Byrd.

19. Plaintiffs desire to seek the recall of future elected officials.

20. Plaintiffs' desire to seek the recall of future elected officials stems from their desire to freely practice their faith.

21. Due to the Mayor's actions and the Election Code, Plaintiffs are fearful that if they do circulate a petition for the recall of elected officials in the future, they will face criminal sanctions.

22. Due to the Mayor's actions and the Election Code, Plaintiffs are fearful that if they do circulate a petition for the recall of elected officials in the future, they will face civil lawsuits.

23. Plaintiffs have been damaged due to the Mayor's unconstitutional actions and the Election Code.

24. Plaintiffs' constitutional rights, including their right to petition their government for the redress of grievances, free speech, free association, and free exercise of religion have been chilled due to the Mayor's actions and the Election Code.

V. ALLEGATIONS OF LAW

25. Each and all of the acts herein alleged regarding the Defendants, were done and/or are continuing to be done under the color of state law, including the statutes, regulations, customs, policies and usages of the City of El Paso, Texas.

26. The Mayor is a final policy maker for the City.

27. The Plaintiffs' speech and expressive activities are fully protected by the First Amendment to the United States Constitution and the Texas Constitution.

28. The loss of constitutional freedoms, even for a moment, constitutes irreparable harm sufficient to support issuance of a preliminary injunction.

FIRST CAUSE OF ACTION:
VIOLATION OF THE FREE SPEECH CLAUSES OF THE FIRST
AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 8 OF
THE TEXAS CONSTITUTION

29. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

30. The Mayor's actions and the Election Code, on its face and as applied, restrict more speech than is necessary to achieve any legitimate state interest.

31. The Mayor's actions and the Election Code, on its face and as applied, are an unconstitutional prior restraint on speech.

32. The Mayor's actions and the Election Code, on its face and as applied, are an unconstitutional content based speech restriction.

33. The Mayor's actions and the Election Code, on its face and as applied, unconstitutionally target corporate political speech.

34. The Mayor's actions and the Election Code, on its face and as applied, are overbroad, chilling not only the Plaintiffs' expression, but that of other non-profits, pastors, churches, and church-goers within Texas.

35. The Mayor's actions and the Election Code, on its face and as applied, grant Defendants unbridled discretion to investigate and penalize churches because of their speech.

36. Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

37. Defendants have therefore violated the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

SECOND CAUSE OF ACTION:
VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST
AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 6 OF
THE TEXAS CONSTITUTION

38. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

39. The Mayor's actions and the Election Code, on its face and as applied, chill Plaintiffs' exercise of religion.

40. The Mayor's actions and the Election Code, on its face and as applied, have placed a substantial burden on Plaintiffs' religious beliefs and practices.

41. The Mayor's actions and the Election Code, on its face and as applied, are not neutral or generally applicable.

42. The Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

43. The Defendants have therefore violated the First Amendment to the United States Constitution and Article I, § 6 of the Texas Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

THIRD CAUSE OF ACTION:
VIOLATION OF THE RIGHT TO FREEDOM OF ASSOCIATION
GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES
CONSTITUTION AND ARTICLE I, § 8 OF THE TEXAS CONSTITUTION

44. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

45. The Mayor's actions and the Election Code, on its face and as applied, restrict the right of Plaintiffs to associate with each other to engage in constitutionally protected activity.

46. The Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

47. The Defendants have therefore violated the right to free association guaranteed by the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

FOURTH CAUSE OF ACTION:
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE
TEXAS CONSTITUTION

48. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

49. The Election Code, on its face and as applied, requires persons of common intelligence to guess at the meaning, scope, and application of the law.

50. The Election Code, on its face and as applied, grants the Defendants unfettered discretion to investigate and potentially penalize Plaintiffs.

51. The Election Code, on its face and as applied, lacks unambiguous, objective standards to guide the Defendants in deciding which groups are within the scope of the law.

52. The Election Code, on its face and as applied, allows the Defendants to enforce those laws in an *ad hoc* and arbitrary manner.

53. The Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

54. The Defendants have therefore violated the Fourteenth Amendment to the United States Constitution and the Due Process clauses of the Texas Constitution, Article I.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

FIFTH CAUSE OF ACTION:
VIOLATION OF THE RIGHT TO PETITION THE GOVERNMENT FOR THE
REDRESS OF GRIEVANCES GUARANTEED BY THE FIRST AMENDMENT TO THE
UNITED STATES CONSTITUTION AND ARTICLE I OF THE TEXAS
CONSTITUTION

55. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

56. The Mayor's actions and the Election Code, on its face and as applied, restrict the right of Plaintiffs to petition the government for the redress of grievances.

57. The Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

58. The Defendants have therefore violated the right to petition the government for the redress of grievances guaranteed by the First Amendment to the United States Constitution and Article I of the Texas Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

SIXTH CAUSE OF ACTION:
VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE
FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND
ARTICLE I OF THE TEXAS CONSTITUTION

59. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

60. The Mayor's actions and the Election Code, on its face and as applied, treat similarly situated persons differently concerning their ability to engage in protected constitutional activity – speech.

61. The Defendants have no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Plaintiffs.

62. The Defendants have therefore violated the equal protection clauses of the First Amendment to the United States Constitution and Article I of the Texas Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

A. That this Court enter a declaratory judgment stating that the Mayor's actions in enforcing the Election Code, and the Election Code, on its face are unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and the Texas Constitution;

B. That this Court enter preliminary and permanent injunctive relief, enjoining the Defendants from enforcing the Election Code and from otherwise unconstitutionally restricting the Plaintiffs, and any other church, from circulating petitions to call an election;

C. That this Court award nominal damages to Plaintiffs for violations of their rights under the First and Fourteenth Amendments to the United States Constitution, and the Texas Constitution;

D. That this Court award Plaintiffs' costs and expenses of this action, including a reasonable attorney's fee award, in accordance with 42 U.S.C. § 1988 and other applicable law;

E. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment;

F. That this Court grant such other and further relief as the Court deems equitable, just, and proper; and

G. That this Court retain jurisdiction of this matter for the purpose of enforcing the Court's order.

Respectfully submitted, this 17th day of November, 2011.

/s Kevin Theriot

Joel L. Oster*

Kevin Theriot

SBN 00788908

Alliance Defense Fund

15192 Rosewood Dr.

Leawood, KS 66224

(913) 685-8000

Fax (913) 685-8001

Troy C. Brown

(Local Counsel)

SBN 00783735

Troy C. Brown P.C.

5400 Suncrest Drive, Bldg. C, Ste. 5

El Paso, TX 79912

(915) 543-9669

Fax (915) 543-5230

Attorneys for Plaintiffs

*Pro hac vice motion to be submitted

DECLARATION UNDER PENALTY OF PERJURY

Pursuant to 28 U.S.C. § 1746, I hereby declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

/s H. Warren Hoyt
H. Warren Hoyt

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS</p> <p>(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number)</p>	<p>DEFENDANTS</p> <p>County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%;"> <tr> <td style="width:30%;"></td> <td style="width:10%;">PTF</td> <td style="width:10%;">DEF</td> <td style="width:40%;"></td> <td style="width:10%;">PTF</td> <td style="width:10%;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated <i>or</i> Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated <i>and</i> Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated <i>or</i> Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated <i>and</i> Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align:center;">PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p style="text-align:center;">LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p style="text-align:center;">IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<p>REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p>CIVIL RIGHTS</p> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input checked="" type="checkbox"/> 440 Other Civil Rights	<p>PRISONER PETITIONS</p> <input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<p style="text-align:center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p style="text-align:center;">FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): _____

Brief description of cause: _____

VII. REQUESTED IN COMPLAINT:
 CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$ _____
 CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
 JUDGE _____
 DOCKET NUMBER _____

DATE: 11/17/2011
 SIGNATURE OF ATTORNEY OF RECORD: /s Kevin H. Theriot

FOR OFFICE USE ONLY

RECEIPT # _____
 AMOUNT _____
 APPLYING IFP _____
 JUDGE _____
 MAG. JUDGE _____