



Mayor Annise D. Parker
City of Houston
P.O. Box 1562
Houston, TX 77251

October 22, 2014

Dear Mayor Parker:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.¹ I write to express my concern regarding subpoenas requesting extensive information from pastors who are involved in the Equal Rights Ordinance Referendum. These discovery requests threaten to have a chilling effect on religious and political speech that is protected by the First Amendment.

Although non-parties to a lawsuit can be required to provide information that is reasonably likely to be relevant and admissible, these subpoenas are plainly overbroad. They require that the pastors turn over “All documents or communications to, from, CCing, BCCing, or forwarded to you, or otherwise in your possession, relating or referring to any of the following in connection in any way with HERO, the Petition,” followed by a lengthy list that includes public officials, “restroom access,” and “the topics of equal rights, civil rights, homosexuality, or gender identity”.²

A subpoena that requires a pastor to turn over an e-mail to his neighbor about the details of the Equal Rights Ordinance, or a draft book chapter on the Bible and homosexuality that discusses the Equal Rights Ordinance, is clearly overbroad. Yet both of these documents come within the ambit of the discovery request in the subpoena. Both the e-mail and the draft come within the definition of “documents,”³ and the subject matter would come within at least one item on the lengthy list.⁴

¹ The U.S. Commission on Civil Rights was established, among other things, to “make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.” 42 U.S.C. § 1975(a).

² Exhibit A to Subpoena on Pastor Steve Riggie, *Woodfill v. Parker*, Cause No. 2014-44974 (152nd J. Dist. Ct. Harris County, Tex.) (2014).

³ *Id.* at 7.

“Document” and “documents,” mean all documents and tangible things, in the broadest sense allowed by Rule 192.3(b) and comment 2 of the Texas Rules of Civil Procedure, and include, but are not limited to, any writings, drawings, graphs, charts, photographs, phonograph records, tape recordings, notes, diaries, calendars, checkbooks, books, papers, accounts, electronic or videotape recordings, and any computer-generated, computer-stored, or electronically-stored matter that constitute or contain matters relevant to the subject matter of this lawsuit. The terms include, but are not limited to, emails,



No government entity should be in the business of requiring private citizens to turn over private communications about the issues of the day. Obviously this discovery request would tend to have a chilling effect on political speech, which is the speech subject to the greatest First Amendment protection.⁵ When he is out of the pulpit, a pastor has the same free speech rights as any other person. “[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”⁶ Still more must political speech prevail against discovery requests designed to discourage pastors from publicly opposing the City’s preferred policies.

Furthermore, in this instance it is impossible to disentangle the religious aspects of much of the speech from the political aspects. Discovery request 1.m. requests any documents related to the Equal Rights Ordinance and “the topics of equal rights, civil rights, homosexuality, or gender identity”. Given that the recipients of these subpoenas are pastors, it is almost inevitable that their views on homosexuality and gender identity are informed by their faith, if not almost entirely rooted in their faith. Indeed, the views of many people on homosexuality and gender identity are rooted in their ultimate commitments. A person’s religious views on civil rights, equal rights, homosexuality, and gender identity have nothing to do with whether there are enough valid signatures to place a referendum on the ballot. Neither does the pastors’ understanding of the ordinance or petition have anything to do with the number of valid signatures. This discovery request impermissibly probes the religious beliefs of private citizens simply because they supported a political effort.

instant messages, text messages, or other responsive data that exists in electronic or magnetic form

⁴ *Id.* at 9-10.

- a. Plaintiffs,
- b. Annise Parker or the Mayor’s office,
- c. Anna Russell or the City Secretary’s office,
- d. David Feldman or the City Attorney’s office,
- e. HERO or any drafts of HERO,
- f. the Petition, or any drafts of the Petition, including any discussions relating to the language included at the top of the Petition,
- g. the legal requirements for petitions under Texas, Houston municipal, or any other law,
- h. Petition signers,
- i. Petition Circulators,
- j. affidavits filled out by Petition Circulators, including the notarization of the affidavits,
- k. the payment of Petition Circulators,
- l. funding of the Petition or petition drives,
- m. the topics of equal rights, civil rights, homosexuality, or gender identity,
- n. language relating to restroom access,
- o. language related to restroom access being or having been removed from a version of HERO, including any communications related to the removal of that language,
- p. any discussion about whether or how HERO does or does not impact restroom access.

⁵ *Citizens United v. FEC*, 558 U.S. 310, 339-340 (2010).

⁶ *Id.* at 340.



The pastors' understanding of the ordinance and the petition is irrelevant to the litigation. The truthfulness of political statements is often in the eye of the beholder, and the government cannot rule on the truthfulness of those statements. "We do not want the government ... deciding what is political truth – for fear that the Government might persecute those who criticize it. Instead, in a democracy, the voters should decide."⁷ It would be inappropriate for the court to rule whether or not the pastors' views were an accurate reflection of the ordinance. Therefore, this discovery request is inappropriate and irrelevant. If the City had allowed the referendum to proceed, it could have argued that the language of the petition was inaccurate and made the case for the ordinance. Instead, it said that there were insufficient signatures to allow the referendum to proceed. As a result, the validity of the signatures is the only legitimate issue. If the City wants to argue the merits of the ordinance, let the referendum proceed and let both sides make their case.

Thus, the discovery request appears instead to be a blatant attempt to punish these pastors for expressing their religiously-based political views. It punishes them by subjecting them to the stress of a subpoena (though they are not parties to the litigation), impairing their right to petition the government, forcing them to comply with a patently overbroad discovery request, and singling them out for opprobrium – thus chilling future religiously-informed speech. This is an abuse of government power, and it is unavailing to claim that there is some distinction between the City and its attorneys in this instance. Additionally, my concerns are in no way allayed by the revision of Request No. 12 to remove the reference to sermons.⁸ It is troubling that, given the number of lawyers involved, someone did not raise the First Amendment implications of this discovery request.

I hope that you will reconsider these ill-advised discovery requests and instruct your attorneys to withdraw them. If you have any questions you may contact me at pkirsanow@beneschlaw.com.

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner

⁷ List v. Ohio Elec. Comm'n, 2014 WL 4472634, *1 (S.D. Ohio 2014).

⁸ Preliminary Response to Amended Motion of Nonparties Pastor Hernan Castano, Ms. Magda Hermida, Pastor Khan Huynh, Pastor Steve Riggle, and Pastor David Welch to Quash Subpoenas to Produce Documents or Tangible Evidence, Woodfill v. Parker, Cause No. 2014-44974 (152nd J. Dist. Ct. Harris County, Tex.) (2014).