

IN THE COUNTY COURT AT LAW NUMBER THREE
OF EL PASO COUNTY, TEXAS

JOHN F. COOK,)
)
 Plaintiff,)
)
 v.)
)
 TOM BROWN MINISTRIES, WORD)
 OF LIFE CHURCH OF EL PASO, EL)
 PASOANS FOR TRADITIONAL FAMILY)
 VALUES, SALVADOR GOMEZ, BEN)
 MENDOZA, ELIZABETH BRANHAM)
 and RICHARDA MOMSEN, solely in)
 her official capacity as EL PASO CITY)
 CLERK,)
)
 Defendants.)

No. 2011-DCV-02792

**DEFENDANTS TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO,
EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN
MENDOZA, AND ELIZABETH BRANHAM'S MOTION FOR A PROTECTIVE
ORDER AND TO QUASH SUBPOENAS ISSUED BY PLAINTIFF FOR THE HEARING
ON PLAINTIFF'S APPLICATION FOR INJUNCTIVE RELIEF**

Defendants TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO,
EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN
MENDOZA, and ELIZABETH BRANHAM ("Defendants") hereby move, pursuant to Texas
Rules of Civil Procedure 176.6, 176.7, and 192.6(b), for a protective order and to quash the
subpoenas issued by the Plaintiff for the hearing on Plaintiff's Application for Injunctive Relief.

In support, Defendants state the following:

1. Plaintiff's Application for Injunctive Relief is set for Monday, October 24, 2011.
2. Plaintiff has issued several subpoenas requiring various witnesses to appear in court to testify, including Pastor Tom Brown, individually and as President of Word of Life

Church of El Paso, and for Tom Brown Ministries, Salvador Gomez and Pastor Harry Warren Hoyt.¹

3. Neither Tom Brown, nor any of the other witnesses have personal knowledge over any relevant matter before this court. These subpoenas are only meant to harass the witnesses and chill constitutionally protected speech.

4. Defendants have reason to believe that Plaintiff is issuing many more subpoenas as well, including Ben Mendoza and Elizabeth Branham.

5. Plaintiff has been very up front and open about his theory of the case. He is seeking evidence that petitions to recall Mayor Cook, Representative Byrd and Representative Ortega were circulated by a church. *See, e.g.*, First Amended Petition, 7-14, Transcript of Hearing on Motion to Modify/Dissolve Temporary Restraining Order, 21.

6. But circulating a petition is core First Amendment activity. Of this right, the Supreme Court said, “Petition circulation ... is ‘core political speech,’ because it involves ‘interactive communication concerning political change.’ *First Amendment protection for such interaction ... is ‘at its zenith.’*”²

7. In *Buckley*, the Supreme Court was confronted with a Colorado statute that placed restrictions on circulating petitions, such as name badge and reporting requirements for petition circulators. *See* 525 U.S. at 182. This law imposed far less restrictions on political speech than what is involved here, as the Colorado statute did not actually prohibit political speech, just placed restrictions on the speech. Nevertheless, the Court struck down these restrictions. The Court concluded that the “restrictions in question significantly inhibit communication with voters

¹ Tom Brown’s subpoena is attached as exhibit A. Harry Hoyt’s subpoena is attached as exhibit B. Defendants’ counsel has yet to receive a copy of the other subpoenas.

² *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999), quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

about proposed political change” because the one-on-one communication involved in petition circulation requires circulators to “endeavor to persuade electors to sign the petition.” *Id.* at 192, 199.

8. It would be a blatant violation of fundamental constitutional rights to prohibit a church, or any corporation for that matter, from circulating a petition. In *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), the Court emphatically rejected the notion that the government can restrict corporate political speech. The Court succinctly said, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech” and that “the Government may not suppress political speech on the basis of the *speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.*” *Id.* at 904 and 913 (emphasis added).

9. The only corporate speech restriction that is even arguably permissible after *Citizens United* would be restrictions on political contributions. But political contributions are limited to money expenditures done in coordination with the candidate. *See id.* at 908. The reason why this type of restriction might arguably remain is that it might lead to quid pro quo arrangements, i.e., a candidate once elected in office could return the favor of the contribution. But here, there is no hint that a political contribution was made. It was not alleged in the Petition. In fact, there is no candidate with which a quid pro quo arrangement could even be made here. ***Plaintiff is not attacking any contribution that was made in coordination with a candidate. No, he is attacking core political speech – the circulation and submission of a petition.***

10. But what is even worse here is that the law that the Mayor is basing his Petition on does not even prohibit churches from circulating petitions on its face. Texas Election Code §

253.094(b) (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.” This only bans political contributions in connection with the circulation and submission of a petition to call an election. It does not prohibit the actual act of circulating and submitting a petition to call an election. If it did, it would be blatantly unconstitutional as it would be prohibiting core political speech, a fundamental right under our constitution, a right that is so important that the Supreme Court said its protection is at its “zenith”. See *Buckley*, 525 U.S. at 186-87 (1999).

11. Calling witnesses here would be a waste of the Court’s time, and would chill the citizenry from engaging in this vitally important part of the democratic process. It would be a waste time because what the Plaintiff seeks here it cannot obtain – an injunction enjoining the election. The people of El Paso have spoken, and they want an election to recall the mayor and Representatives Byrd and Ortega. The signatures were collected. The City Clerk verified the signatures are authentic, and the petitions have already been submitted to the City Council. Plaintiff’s counsel even admitted,

[T]he general rule against the Court enjoining the election would apply in the event that the City Clerk then says here are the petitions to the City Council. I would agree that at that point in time I don’t think we can enjoin the City Council – in fact, I’m pretty darn sure that we – that we cannot enjoin the City Council from calling a recall election.

Transcript, 36:13-20.

12. To enter any kind of injunction now would be to stop an election, and this would violate the Separation of Powers Doctrine. In *Blum v. Lanier*, 997 S.W.2d 259, 263 (1999), the Texas Supreme Court held, “We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the judiciary’s deference to the legislative branch

require that judicial power not be invoked to interfere with the elective process.... An injunction that delays the election would be improper....”³

13. In addition, requiring witnesses to testify in this matter would be a huge disservice to the democratic process and would chill constitutionally protected speech. Citizens will be discouraged from signing petitions in the future for fear of being drug into court. ***Before a citizen is drug into court to testify, the Plaintiff should at least be forced to present a potential case.*** But he hasn't. He has not alleged any violations of law. Circulating a petition at church, or by a church, is constitutionally protected speech, deserves the highest amount of protection under our laws, and isn't even prohibited by the Texas Election Code.

14. The subpoena against Tom Brown seeks significant documents, including governing documents, bylaws, board minutes, notes, speeches, sermons, brochures, pamphlets, list of officers and directors, lists of members, including address and phone numbers, and much, much more. See exhibit A. This subpoena is extremely burdensome, seeks information protected from discovery under the First Amendment, and was served very late in the day.

15. Plaintiff seeks communications between Tom Brown Ministries, The Word of Life Church, and its members. The Supreme Court long ago held that “[e]ffective advocacy of


³ The Court then cited several cases demonstrating this well founded principle: *City of Austin v. Thompson*, 147 Tex. 639, 219 S.W.2d 57, 59 (1949)(district court is without authority to enjoin even a void election); *Ex parte Barrett*, 120 Tex. 311, 37 S.W.2d 741, 742 (1931)(injunction against holding an election is outside the general scope of judicial power); *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 105 Tex. 337, 148 S.W. 292, 295 (1912)(declined to enjoin canvassing of votes on ground that election was illegal); *Leslie v. Griffin*, 25 S.W.2d 820, 821–22 (Tex. Comm'n App.1930, judgm't adopted)(same); *Winder v. King*, 1 S.W.2d 587, 587–88 (Tex. Comm'n App.1928, judgm't adopted)(refused to enjoin official from calling election); *City of McAllen v. Garza*, 869 S.W.2d 558, 561 (Tex.App.—Corpus Christi 1993, writ denied)(refused to enjoin allegedly void election); *Kolsti v. Guest*, 565 S.W.2d 556, 557 (Tex.Civ.App.—Austin 1978, no writ)(declined to enjoin official from placing referendum on ballot); *Ellis v. Vanderslice*, 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ)(declined to enjoin official from certifying petition for local option election); *Stroud v. Stiff*, 465 S.W.2d 407, 408 (Tex.Civ.App.—Amarillo 1971, no writ)(refused to enjoin city for proceeding under election resolution).

both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” and that there exists a “vital relationship between freedom to associate and privacy in one’s associations.” *NAACP v. Alabama*, 357 U.S. 449, 460, 462 (1958). “Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Thus, the Court has repeatedly held that compelled disclosure of an advocacy association’s membership lists would “affect adversely the ability of [the association] and its members to pursue their collective effort to foster beliefs which they ... have a right to advocate, in that it may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.” *NAACP*, 357 U.S. at 462-63. *See also Bates*, 361 U.S. at 523; *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963).

16. This hearing has been set for several weeks, and the Plaintiff only served the subpoenas days before the hearing. These documents cannot be produced within the limited time frame Plaintiff demands.

WHEREFOR, Defendants hereby move that the Court issue a protective order and quash the subpoenas issued by the Plaintiff against Tom Brown, individually and as president of Word of Life Church of El Paso, and for Tom Brown Ministries, Harry Warren Hoyt, and any other witness Plaintiff serves with a subpoena for the purpose of eliciting testimony about the circulation of petitions at a church or by a church.

Respectfully submitted, this 20th day of October, 2011.



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*Attorneys for Defendants Tom Brown
Ministries, Word of Life Church of El
Paso, El Pasoans for Traditional Family
Values, Salvador Gomez, Ben Mendoza
and Elizabeth Branham*

CERTIFICATE OF SERVICE

I hereby certify that on October 20th, 2011, a true and correct copy of the foregoing was served via facsimile and by placing same in the U.S. Mail, postage prepaid, addressed to:

Mark C. Walker
David M. Mirazo
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Attorneys for Defendant Richarda Momsen



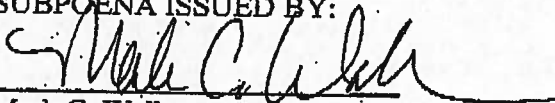
Joel L. Oster

COURT. TEXAS RULE OF CIVIL PROCEDURE 176.8(a) PROVIDES AS FOLLOWS:
Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

This subpoena is issued at the request of John F. Cook, Plaintiff, whose attorney of record is Mark C. Walker, Cox Smith Matthews Incorporated, 221 N. Kansas, Suite 2000, El Paso, Texas 79901.

Date of Issuance: October 19, 2011.

SUBPOENA ISSUED BY:



Mark C. Walker

Attorney in the State of Texas

State Bar No. 20717320

MEMORANDUM OF ACCEPTANCE

I accepted service of a copy of this subpoena on _____, 2011.

Mr. Tom Brown

RETURN OF SUBPOENA

I certify that I served the attached subpoena by delivering a copy and the required fee of \$ _____ to Mr. Tom Brown in person, at _____ on _____, 2011 at _____ a.m./p.m. My fee for this service is \$ _____.

By: _____
Title: _____

EXHIBIT "A"

You are commanded to bring with you to the temporary injunction hearing on October 24, 2001, the following documents:

1. True and correct copies of the governing documents for the World of Life Church of El Paso, including, without limitation, articles of incorporation, certificate of formation, certificate of filing, any assumed name registrations, bylaws, rules, regulations, organizational consent, and any other resolution adopting any rules governing the Word of Life Church of El Paso.
2. True and correct copies of the governing documents of Tom Brown Ministries, if different from the Word of Life Church of El Paso, including, without limitation, articles of incorporation, certificate of formation, certificate of filing, any assumed name registrations, bylaws, rules, regulations, organizational consent, and any other resolution adopting any rules governing Tom Brown Ministries.
3. True and correct copies of any applications for federal or state tax exempt status for the World of Life Church of El Paso, as well as any documents by any state or federal agency confirming such exempt status.
4. True and correct copies of any applications for federal or state tax exempt status for Tom Brown Ministries, if different from the Word of Life Church of El Paso, as well as any documents by any state or federal agency confirming such exempt status.
5. True and correct copies of any board resolutions, corporate resolutions, minutes, statements, recordings, transcripts, notes, sermons, speeches, brochures, pamphlets, materials, or other publications where the Word of Life Church or Tom Brown Ministries discussed the recall election, from June 15, 2011, to date.
6. A list of the officers and directors of the Word of Life Church, including their name address, and telephone number.
7. A list of any officers and directors of Tom Brown Ministries, if different from the Word of Life Church of El Paso, including their name address, and telephone number.
8. Any roster or list of the members or congregation of the Word of Life Church of El Paso, including their name address, and telephone number, from June 1, 2011 to date.
9. Any roster or list of the members of Tom Brown Ministries, if different from the Word of Life Church of El Paso, including their name address, and telephone number, from June 1, 2011 to date.
10. True and correct copies of all documents provided, used, or reviewed by the circulators of the recall petitions, including any instructions, scripts, advertisement, publicity, or other materials used in connection with the recall petitions.

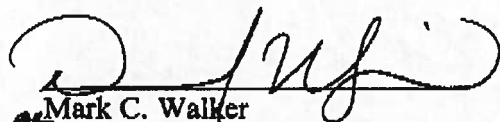
11. True and correct copies of all documents reflecting the ownership of the website found at www.tbm.org, including without limitations, contracts or invoices for web hosting or web design, payment receipts, copies of checks, credit card transactions, or other documents reflecting payments for the website.
12. All emails, letters, messages, memoranda, or other communications with any houses of worship of any denomination in El Paso, Texas, regarding the efforts to recall John Cook, Susie Byrd, or Steve Ortega.
13. All communications, instructions, emails, letters, pamphlets, facsimiles, with Word of Life Church, Tom Brown, Sonia Brown, Harry Hoyt, Jesus Chapel, LifeGate Church, Centro Vida Life Center, regarding the efforts to recall John Cook, Susie Byrd, and/or Steve Ortega, including campaigns, communications, and efforts to circulate and submit petitions for recall elections, since June 15, 2011, to date.
14. All communications, instructions, emails, letters, pamphlets, flyers, facsimiles, with any other churches, businesses, companies, for-profit and nonprofit corporations, regarding the efforts to recall John Cook, Susie Byrd, and/or Steve Ortega, including campaigns, communications, and efforts to circulate and submit petitions for recall elections, since June 15, 2011, to date.
15. All website, Facebook, Twitter, MySpace, or other social media communications since July 1, 2011, by or for you or Tom Brown Ministries and/or Word of Life Church of El Paso, regarding the recall petitions to call elections to recall John Cook, Susie Byrd, and Steve Ortega.
16. All records of recall petitions, including petitions still in your possession, where and when, how, by whom copied, produced, or obtained, and any instructions regarding such petitions.
17. All records and receipts regarding petitions to recall John Cook, Susie Byrd, and/or Steve Ortega, including copying, printing, distribution, or other records related to the circulation, distribution, and submission of such petitions.
18. Any board and/or corporate resolutions, findings, minutes, or other record of Word of Life Church and/or Tom Brown Ministries authorization to hire counsel in this litigation.
19. All instructions, communications, and directions between you, Word of Life Church, and/or Tom Brown Ministries, and circulators of petitions, regarding the petitions to recall John Cook, Susie Byrd, and/or Steve Ortega.

person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

This subpoena is issued at the request of John F. Cook, Plaintiff, whose attorney of record is Mark C. Walker, Cox Smith Matthews Incorporated, 221 N. Kansas, Suite 2000, El Paso, Texas 79901.

Date of Issuance: October 18, 2011.

SUBPOENA ISSUED BY:



Mark C. Walker
Attorney in the State of Texas
State Bar No. 20717320

MEMORANDUM OF ACCEPTANCE

I accepted service of a copy of this subpoena on _____, 2011.

Mr. Harry Warren Hoyt

RETURN OF SUBPOENA

I certify that I served the attached subpoena by delivering a copy and the required fee of \$ _____ to Mr. Harry Warren Hoyt in person, at _____ on _____, 2011 at _____ a.m./p.m. My fee for this service is \$ _____.

By: _____
Title: _____

EXHIBIT "A"

You are commanded to bring with you to the temporary injunction hearing on October 24, 2011, the following documents:

1. All communications, instructions, emails, letters, pamphlets, facsimiles, with Word of Life Church, Tom Brown, Sonia Brown, Jesus Chapel, LifeGate Church, Centro Vida Life Center, regarding the efforts to recall John Cook, Susie Byrd, and/or Steve Ortega, including campaigns, communications, and efforts to circulate and submit petitions for recall elections, since June 15, 2011, to date.
2. All communications, instructions, emails, letters, pamphlets, facsimiles, with any other churches, businesses, companies, for-profit and nonprofit corporations, regarding the efforts to recall John Cook, Susie Byrd, and/or Steve Ortega, including campaigns, communications, and efforts to circulate and submit petitions for recall elections, since June 15, 2011, to date.
3. All website, Facebook, Twitter, MySpace, or other social media communications since July 1, 2011, by or for you or Jesus Chapel, regarding the elections to recall John Cook, Susie Byrd, and Steve Ortega.
4. All records of recall petitions, including petitions still in your possession, where and when obtained, from whom, how obtained, and any instructions regarding such petitions.
5. All records and receipts regarding petitions to recall John Cook, Susie Byrd, and/or Steve Ortega, including copying, printing, distribution, or other records related to the circulation, distribution, and submission of such petitions.

**IN THE COUNTY COURT AT LAW NO. 3
EL PASO COUNTY, TEXAS**

JOHN F. COOK, Mayor,

Plaintiff,

v.

No. 2011-DCV-2792

TOM BROWN MINISTRIES,
WORD OF LIFE CHURCH OF EL
PASO, EL PASOANS FOR
TRADITIONAL FAMILY
VALUES, SALVADOR GOMEZ,
BEN MENDOZA, ELIZABETH
BRANHAM, and RICHARDA
MOMSEN, solely in her official
capacity as EL PASO CITY CLERK

Defendants.

ORDER

AND NOW, the Court, having considered Defendants Tom Brown Ministries, Word of Life Church of El Paso, El Pasoans for Traditional Family Values, Salvador Gomez, Ben Mendoza and Elizabeth Branham's Motion For A Protective Order and To Quash Subpoenas Issued by Plaintiff For the Hearing on Plaintiff's Application For Injunctive Relief,

IT IS HEREBY ORDERED that defendants' Motion is approved and granted.

This ____ day of October, 2011.

Javier Alvarez, Judge

IN THE COUNTY COURT AT LAW NUMBER THREE
OF EL PASO COUNTY, TEXAS

JOHN F. COOK,

Plaintiff,

v.

TOM BROWN MINISTRIES, WORD
OF LIFE CHURCH OF EL PASO, EL
PASOANS FOR TRADITIONAL FAMILY
VALUES, SALVADOR GOMEZ, BEN
MENDOZA, ELIZABETH BRANHAM
and RICHARDA MOMSEN, solely in
her official capacity as EL PASO CITY
CLERK,

Defendants.

No. 2011-DCV-02792

**DEFENDANTS TOM BROWN MINISTRIES, WORD OF LIFE CHURCH OF EL PASO,
EL PASOANS FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN
MENDOZA, AND ELIZABETH BRANHAM'S BRIEF IN OPPOSITION TO
APPLICATION FOR INJUNCTIVE RELIEF**

Plaintiff's application for injunctive relief must be denied as it seeks to trample on the fundamental constitutional rights of Defendants to engage in core political speech and as it seeks to stop an election.

Plaintiff's entire case is based on the premise that churches cannot circulate or submit petitions to hold a recall election. This is not the law! Plaintiff might as well be trying to hold Defendants criminally liable for voting. Circulating petitions is core First Amendment activity, and receives the highest protection under our laws. Of this right, the Supreme Court said, "Petition circulation ... is 'core political speech,' because it involves 'interactive communication

concerning political change.’ *First Amendment protection for such interaction ... is ‘at its zenith.’*”¹

The Supreme Court has repeatedly, and most recently in 2010, declared that even corporations have a First Amendment right to engage in political speech. Circulating a petition should be celebrated as democracy in action. It most assuredly should not result in threatening those who exercise this core fundamental right with criminal sanctions.

This case has received significant media attention. And through this case, Plaintiff is arguing that it is illegal for a church to circulate a petition to hold a recall election. The longer this lie is allowed to go on, the more damage is done to the public. There is absolutely nothing illegal about citizens of the United State of America engaging in core First Amendment activity. Yet allowing Plaintiff to continue this case based on a gross misstatement of the law gives the public the impression that there must be something illegal about a church circulating a petition to recall a candidate. This is absolutely an incorrect view of the law. The public is being harmed by the fact that this case is even allowed to continue.

In addition, Plaintiff is not entitled to injunctive relief as it would be improper for a court to stop or delay an election. The petitions have already been submitted to the City Clerk. She received them, verified the signatures, and has already submitted them to the City Council. Plaintiff’s counsel even admitted that there is nothing left to enjoin:

[T]he general rule against the Court enjoining the election would apply in the event that the City Clerk then says here are the petitions to the City Council. I would agree that at that point in time I don’t think we can enjoin the City Council – in fact, I’m pretty darn sure that we – that we cannot enjoin the City Council from calling a recall election.

¹ *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999), quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

Transcript on Hearing on Motion to Modify/Dissolve Temporary Restraining Order (“Transcript”), 36:13-20.

It is well established Texas law that courts are not to interfere with the holding of an election. There is no authority under Texas law for this Court to enjoin the recall election. If any illegal activity occurred, the proper remedy is to do an election contest after the election. But the separation of powers doctrine prevents courts from enjoining an election.

Finally, injunctive relief is not appropriate where there is an adequate remedy at law. If the election code was violated, the remedy provided for under the Code is (1) criminal punishment, (2) money damages, and (3) an election contest. But enjoining the election is not a proper remedy.

I. PLAINTIFF’S ENTIRE CASE IS BASED ON A GROSS MISSTATEMENT OF LAW. CHURCHES HAVE A FUNDAMENTAL RIGHT TO CIRCULATE AND SUBMIT PETITIONS TO HOLD A RECALL ELECTION.

Plaintiff’s case is based on a misstatement of law. Plaintiff alleges that a church circulated and submitted a petition to hold a recall election, and that this activity is illegal. But this activity represents core First Amendment activity. Far from being illegal under our laws, it deserves and receives the highest protection under the law.

A. Plaintiff is targeting core political speech.

Plaintiff is not challenging the expenditure of money. Plaintiff is not complaining that someone made an improper donation. No, this case is about pure grassroots efforts of circulating and submitting a petition. This is core political speech, and “occupies the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-347.

In *Buckley v. American Constitutional Law Foundation*, the Supreme Court was confronted with a Colorado statute that placed restrictions on circulating petitions, such as name

badge and reporting requirements for petition circulators. *See* 525 U.S. at 182. This law imposed far less restrictions on political speech than what is involved here, as the Colorado statute did not prohibit political speech, just placed restrictions on the speech. Nevertheless, the Court struck down these restrictions. The Court concluded that the “restrictions in question significantly inhibit communication with voters about proposed political change” because the one-on-one communication involved in petition circulation requires circulators to “endeavor to persuade electors to sign the petition.” *Id.* at 192, 199.

The Court noted, “[p]etition circulation ... is ‘core political speech,’ because it involves ‘interactive communication concerning political change,’” and that First Amendment protection for such interaction is therefore “at its zenith.” *Id.* at 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). *See also* *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates....”); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (“it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”); *see also* *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Plaintiff bases his entire case on the alleged circulation of a petition at a church. But the circulation of petitions is core political speech. It is “interactive communication concerning political change.” It is entitled to the greatest protection under the First Amendment.

“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre*, 514 U.S. at 347, citing *Bellotti*, 435 U.S., at 786. Here, there is no valid government interest to prohibit churches, or corporations for that matter, from circulating petitions or submitting petitions to hold a recall election. Any interest Plaintiff might assert, like the corporation having undue influence, or preventing quid pro quo exchanges, were specifically addressed by the Supreme Court in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), and rejected.

B. *Citizens United* protects Defendants’ right to engage in corporate political speech.

In *Citizens United*, the Supreme Court was confronted with the issue of corporate political speech, and held that such speech is constitutionally protected and cannot be banned simply because it is speech by a corporate entity. *Citizens United* involved a federal law that prohibited corporations from using their funds to pay for speech defined as “electioneering communication” or for speech that expressly advocated the election or defeat of a candidate. *See id.* at 886; *see also* 2 U.S.C. § 441b. *Citizens United* was a nonprofit corporation that produced *Hillary: The Movie*, a ninety minute documentary about then Senator Hillary Clinton. Senator Clinton was a candidate in the Democratic Party’s 2008 Presidential primary elections, and *Citizens United* wanted to air this movie during the campaign. But *Citizens United* feared that the law banning corporate-funded political expenditures would subject them to civil and criminal

penalties if it did. So Citizens United sought declaratory and injunctive relief against the federal law, claiming it was unconstitutional.

The Court began by noting that the federal law, §441b, although a restriction on money, did indeed ban corporate political speech.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

Id. at 898.

The Court then explained that political speech is essential to the proper functioning of a democracy.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."

Id. at 898, quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). See also *Buckley v. Valeo*, 424 U.S. 1, 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential").

"For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.*, citing *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 464, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.).

The Court then stated that any restriction on political speech cannot be based on the identity of the speaker.

Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.... Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id. at 899.

The Court recognized that First Amendment protection extends to corporations, and that this “protection has been extended by explicit holdings to the context of political speech.” *Id.*, citing *National Association for Advancement of Colored People v. Button*, 371 U.S. 415, 428-429 (1963). The Court explained, “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” *Id.*, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The Court has thus “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Id.* at 900.

For our purpose, the Court succinctly said, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech” and that “the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.” *Id.* at 904 and 913.

The government argued that the restrictions were necessary to prevent the “distortion” that a corporation would have on the election process due to its amassed pool of wealth. *See id.* at 905. The Court rejected this rationale, stating,

It is irrelevant for purposes of the First Amendment that corporate funds may “have little or no correlation to the public's support for the corporation’s political ideas.” All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.

Id. (citations omitted).

Rather than restrict political speech by some, the Supreme Court said that it should be opened to all.

By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, ***but the remedy of “destroying the liberty” of some factions is “worse than the disease.”*** The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, *see ibid.*, and by entrusting the people to judge what is true and what is false.... “[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.” *Bellotti*, 435 U.S., at 792, n. 31, 98 S.Ct. 1407

Id. at 907.

The government argued that such restrictions were necessary to avoid any quid pro quo deals between candidates and corporations, or the appearance of such dealings. *See id.* at 908.

The Court rejected this as a valid interest to ban corporate political speech. The Court explained,

“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate....” For the reasons explained above, ***we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.***

Id. at 908, quoting *Buckley*, 424 U.S. at 47 (emphasis added).

Here, Plaintiff has alleged that the Church is engaged in circulating and submitting a petition for a recall election. There is no candidate involved that could be a part of a quid pro quo dealing with the Church. No candidate has approved this effort. No candidate is coordinating with the Church in the recall.

Here, Plaintiff is arguing that the Election Code prohibits churches from circulating petitions to recall an elected official. This is a speech restriction based on the corporate identity of the speaker, and is unconstitutional. Plaintiff does not have a compelling interest to enforce this law against the Defendants, and even if one existed, banning churches from circulating petitions to recall an elected official is not narrowly tailored.

C. The Election Code Does Not Prohibit A Church From Circulating A Recall Petition.

Plaintiff's interpretation of the Election Code is wrong. It does not prohibit a Church, or any of its members, from circulating a recall petition at church. If it did, such law would be in blatant violation of the United States Supreme Court holding in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), that upheld the right of corporate entities to engage in political speech. *See* Tex. Government Code § 311.021 ("In enacting a statute, it is presumed that ... compliance with the constitutions of this state and the United States is intended ..."); *In re Brazen*, 251 S.W.3d 39 (Tex. 2008) ("we try to interpret statutes in a way that avoids constitutional conflicts").

The Election Code prohibits *political contributions* in connection with the circulation and submission of a petition to call an election. A political contribution is a political expenditure made with the prior consent or approval of the candidate or officeholder on whose behalf the

expenditure was made. See 1 TX ADC § 20.15(5), and Texas Ethics Commission Advisory Opinion No. 489 (April 21, 2010).

Plaintiff does not allege that the Defendants made political contributions, as that term is defined in the Texas Election Code. There are no allegations that money was given with the express approval or consent by a candidate or officeholder. Plaintiff only alleges that the Defendants circulated the recall petition at church. But this is not a violation of the Election Code.

II. INJUNCTIVE RELIEF SHOULD BE DENIED AS COURTS SHOULD NOT STOP OR DELAY AN ELECTION.

The people of El Paso have spoken, and they want an election to recall the mayor and Representatives Byrd and Ortega. The signatures were collected. The City Clerk verified the signatures are authentic, and the petitions have already been submitted to the City Council. Plaintiff's counsel even admitted,

[T]he general rule against the Court enjoining the election would apply in the event that the City Clerk then says here are the petitions to the City Council. I would agree that at that point in time I don't think we can enjoin the City Council – in fact, I'm pretty darn sure that we – that we cannot enjoin the City Council from calling a recall election.

Transcript, 36:13-20.

A. Stopping An Election Would Violate The Separation of Powers Doctrine.

To enter any kind of injunction now would be to stop an election, and this would violate the Separation of Powers Doctrine. In *Blum v. Lanier*, 997 S.W.2d 259, 263 (1999), the Texas Supreme Court held, “We agree that Blum had no right to enjoin the scheduled election. It is well settled that separation of powers and the judiciary's deference to the legislative branch

require that judicial power not be invoked to interfere with the elective process.... An injunction that delays the election would be improper....”²

Plaintiff argues that the Texas Legislature created a special exemption to allow for recall elections to be enjoined. *See* Transcript, 39:8-10. The Texas Legislature did no such thing. Texas Election Code § 273.081 states, “A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.” There is no reference in this code section that this allows enjoining of a recall election. There is no inference that this code section is overturning the well settled law that courts are not to interfere with the holding of an election. In short, there is nothing about § 273.081 that suggests the Texas Legislature intended to treat recall elections differently than any other election.

The Texas courts that have reviewed § 273.081 are in agreement that it does not permit the judiciary to stop or delay an election. *See Ramirez v. Quintanilla*, 2010 WL 3307370 (Tex.App.-Corpus Christi) (in determining whether §273.081 permits a court to enjoin an election, stated, “[i]n short, if the matter is one that can be judicially resolved in time to correct

² The Court then cited several cases demonstrating this well founded principle: *City of Austin v. Thompson*, 147 Tex. 639, 219 S.W.2d 57, 59 (1949)(district court is without authority to enjoin even a void election); *Ex parte Barrett*, 120 Tex. 311, 37 S.W.2d 741, 742 (1931)(injunction against holding an election is outside the general scope of judicial power); *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 105 Tex. 337, 148 S.W. 292, 295 (1912)(declined to enjoin canvassing of votes on ground that election was illegal); *Leslie v. Griffin*, 25 S.W.2d 820, 821–22 (Tex. Comm'n App.1930, judgm't adopted)(same); *Winder v. King*, 1 S.W.2d 587, 587–88 (Tex. Comm'n App.1928, judgm't adopted)(refused to enjoin official from calling election); *City of McAllen v. Garza*, 869 S.W.2d 558, 561 (Tex.App.—Corpus Christi 1993, writ denied)(refused to enjoin allegedly void election); *Kolsti v. Guest*, 565 S.W.2d 556, 557 (Tex.Civ.App.—Austin 1978, no writ)(declined to enjoin official from placing referendum on ballot); *Ellis v. Vanderslice*, 486 S.W.2d 155, 159–60 (Tex.Civ.App.—Dallas 1972, no writ)(declined to enjoin official from certifying petition for local option election); *Stroud v. Stiff*, 465 S.W.2d 407, 408 (Tex.Civ.App.—Amarillo 1971, no writ)(refused to enjoin city for proceeding under election resolution).

deficiencies in the ballot without delaying the election, then injunctive relief may provide a remedy that cannot be adequately obtained through an election contest.”); *Cahill v. Bertuzzi*, 2010 WL 2163136 (Tex.App.-Corpus Christi) (stating that § 273.081 of the election code gives the trial court jurisdiction to enjoin violations of the election code, but the relief requested must not seek to delay or cancel an election).

So while this section does permit the person being harmed to seek an injunction, it does not give the person a right to stop or delay the election. Here, Plaintiff is seeking to stop the election. But the signatures have been obtained and verified. The City Clerk has submitted the petitions to the City Council. It would be improper for a court to enjoin this election.

B. The Election Code Provides Remedies If The Code Is Violated.

Plaintiff argues that if he is not entitled to stop the election, then the Code is meaningless as it offers no disincentive to a person from violating the Code. According to the Plaintiff, Walmart would be free to violate the Code with no repercussions. Plaintiff has misrepresented the Code on this matter. Several provisions of the Code provides deter people and corporations from violating the Election Code. Most stringent is the criminal sanctions for violation of the Code. For example, violation of Election Code 253.094 is a third degree felony, which carries with it possible jail time. The Code also allows a candidate to contest an election after it has occurred. The Code provides for monetary damages to the offended party if there is a violation. But the Code does not overturn the well settled principle that courts are not to interfere with the election process by stopping or delaying an election.

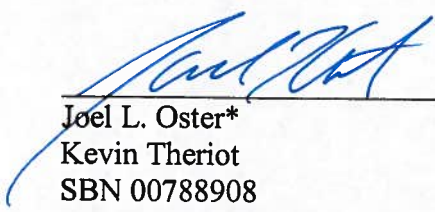
CONCLUSION

Plaintiff's case is based on a fallacy. It is not illegal for a church to circulate a petition to hold a recall election. Circulating a petition is core First Amendment activity, and receives the highest of protections under the law. A law that bans it offends the constitution, and is unconstitutional.

In addition, Plaintiff's application for an injunction should be denied as it seeks to stop an election. It well settled Texas law that it would violate the separation of powers doctrine for the judiciary to stop an election. The Election Code provides for remedies if it is violated, including criminal sanctions, damages, and an election contest. But it does not provide what the Plaintiff seeks – to stop the election from taking place.

This Court should not lose sight of the political ploy that this lawsuit is attempting. The mayor is the subject of the recall election. And it is he who seeks to stop it. Democracy should play out here, and the people should have their election.

Respectfully submitted, this 20th day of October, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on October 20th, 2011, a true and correct copy of the foregoing was served via facsimile and by placing same in the U.S. Mail, postage prepaid, addressed to:

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