

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

JOHN F. COOK, in his individual and)
official capacity as Mayor of El Paso,)
Texas,)
)
Plaintiff and Counter Defendant,)

v.)

No. 2011-DCV-02792

TOM BROWN MINISTRIES, TOM)
BROWN, WORD OF LIFE CHURCH OF)
EL PASO, ELPASOANS FOR)
TRADITIONAL FAMILYVALUES,)
SALVADOR GOMEZ, BEN MENDOZA,)
ELIZABETH BRANHAM,)

Defendants and Counter-Plaintiffs,)

and RICHARDA MOMSEN, solely in her)
official capacity as EL PASO CITY)
CLERK,)

Defendant.)

**FIRST AMENDED COUNTERCLAIM OF DEFENDANTS TOM BROWN
MINISTRIES, TOM BROWN, WORD OF LIFE CHURCH OF EL PASO, EL PASOANS
FOR TRADITIONAL FAMILY VALUES, SALVADOR GOMEZ, BEN MENDOZA AND
ELIZABETH BRANHAM AGAINST MAYOR JOHN COOK, BOTH IN HIS
INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR OF EL PASO, TEXAS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants TOM BROWN MINISTRIES, TOM BROWN, WORD OF
LIFE CHURCH OF EL PASO, EL PASOANS FOR TRADITIONAL FAMILY VALUES,
SALVADOR GOMEZ, BEN MENDOZA and ELIZABETH BRANHAM (“Defendants”), and
file this First Amended Counterclaim against Mayor John Cook, both in his individual and
official capacity as Mayor of El Paso, Texas (“Plaintiff”).

I. INTRODUCTION

1. Plaintiff is using the color of law to suppress the Defendants' 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.

2. In addition, Texas Election Code § 253.094(b) (the "Election Code") is unconstitutional as it is being enforced against the Defendants. It is being enforced to ban political speech by a church, specifically, "the circulation and submission of a petition to call an election." *See id.* A violation of the Election Code is punishable as a third degree felony. *See id.* at (c).

3. This counterclaim is against the Mayor both in his individual and official capacity as Mayor of El Paso, Texas.

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

5. Defendants are seeking preliminary and permanent injunctive relief, enjoining the Plaintiff, both in his individual and official capacities, from violating Defendants' constitutional rights and from further interfering with the Defendants' rights to circulate petitions seeking recall elections. Defendants seek a declaratory judgment that the Election Code is unconstitutional on its face and as applied to the Defendants. Finally, Defendants seek damages caused by the Plaintiffs' actions and their loss of constitutional freedoms.

II. STATEMENT OF FACTS

6. On or about October 21, 2011, Plaintiff Cook filed his Second Amended Petition against the Defendants.

7. In the Petition, the Plaintiff used the color of law to suppress the Defendants' constitutional rights.

8. For example, in paragraph 4 of the Petition, Plaintiff states, "The Mayor and Council members are charged with the duty to ensure that the City's election and voting processes, including any recall elections, are validly conducted, and that they are not tainted by fraud, illegality, or any other irregularity. The Mayor and members of Council are also charged with the duty to ensure that the hard-earned tax dollars of El Pasoans are wisely spent, and that the taxpayer funds are not spent on improper purposes, including elections obtained by fraud, illegality, or any other irregularity.... The Mayor and City Representatives are charged with the duty to ensure that the laws and ordinances of El Paso are followed, including ensuring that there is strict compliance with applicable election procedures and laws."

9. The Plaintiff is using his position as mayor to enforce the Texas Election Code against the Defendants.

10. According to the Plaintiff, the Texas Election Code prohibits a church from circulating a petition for a recall election.

11. Indeed, 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."

12. According to the Plaintiff, neither the church, nor its members acting on behalf of the church, can circulate a petition for a recall election.

13. Defendants desire to seek the recall of the Mayor, as well as Representative Steve

Ortega and Representative Susie Byrd.

14. Defendants desire to seek the recall of future elected officials.

15. Defendants desire to seek the recall of future elected officials stems from their desire to freely practice their faith.

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

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

18. Defendants have been damaged due to Plaintiffs' unconstitutional actions and the Election Code.

19. Defendants' 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 Plaintiff's actions and the Election Code.

III. ALLEGATIONS OF LAW

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

21. Each and all of the acts herein alleged regarding the Plaintiff, were done and 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.

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

23. 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

24. Defendants re-allege and incorporate herein by reference all preceding paragraphs.

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

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

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

28. Plaintiff's actions and the Election Code, on its face and as applied, unconstitutionally target corporate political speech.

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

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

31. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

32. Plaintiff has therefore violated the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution.

WHEREFORE, Defendants 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

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

34. Plaintiff's actions and the Election Code, on its face and as applied, chill Defendants' exercise of religion.

35. Plaintiff's actions and the Election Code, on its face and as applied, have placed a substantial burden on Defendants' religious beliefs and practices.

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

37. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

38. Plaintiff has therefore violated the First Amendment to the United States Constitution and Article I, § 6 of the Texas Constitution.

WHEREFORE, Defendants 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

39. Defendants re-allege and incorporate by reference all preceding paragraphs.

40. Plaintiff's actions and the Election Code, on its face and as applied, restrict the

right of Defendants to associate with each other to engage in constitutionally protected activity.

41. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

42. Plaintiff has 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, Defendants 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

43. Defendants re-allege and incorporate by reference all preceding paragraphs.

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

45. The Election Code, on its face and as applied, grant the Plaintiff unfettered discretion to investigate and potentially penalize Defendants.

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

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

48. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

49. Plaintiff has therefore violated the Fourteenth Amendment to the United States Constitution and the Due Process clauses of the Texas Constitution, Article I.

WHEREFORE, Defendants 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

50. Defendants re-allege and incorporate by reference all preceding paragraphs.

51. Plaintiff's actions and the Election Code, on its face and as applied, restrict the right of Defendants to petition the government for the redress of grievances.

52. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

53. Plaintiff has 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, Defendants 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

54. Defendants re-allege and incorporate by reference all preceding paragraphs.

55. Plaintiff'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.

56. Plaintiff has no government interest sufficient to justify the laws challenged herein, nor to justify the application of those laws to the Defendants.

57. Plaintiff has therefore violated the equal protection clauses of the First Amendment to the United States Constitution and Article I of the Texas Constitution.

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

PRAYER FOR RELIEF

WHEREFORE, Defendants request the following relief:

A. That this Court enter a declaratory judgment stating that the Plaintiffs' 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 Plaintiff from enforcing the Election Code and from otherwise unconstitutionally restricting the Defendants, and any other church, from circulating petitions to call an election;

C. That this Court award actual and nominal damages to Defendants 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 Defendants' 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;

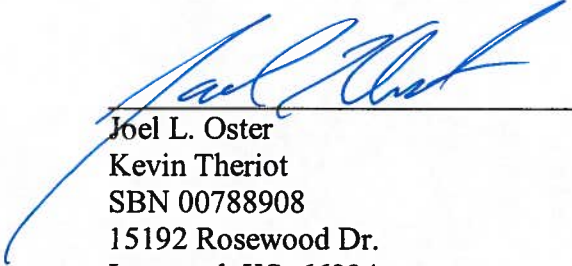
E. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment;

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 2nd day of November, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on November 2nd, 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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