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Houston Hustle



Claim: The city of Houston, Texas, subpoenaed several pastors' sermons as part of a crackdown on preaching against homosexuality.

MIXTURE

Examples: [Collected via e-mail, October 2014]

A Facebook friend recently shared a link stating that the city of Houston is cracking down on anti-homosexual preaching and has asked all pastors to turn over their sermon contents on Homosexuality, gender identity, and lesbian mayor Annise Parker, and that all who do so may be held in contempt of court. Is this true?

Origins: On 28 May 2014, Houston Mayor Annise Parker signed the controversial Houston Equal Rights Ordinance (HERO) into law. The *Houston Chronicle* described the ordinance thusly:

The measure bans discrimination based not just on sexual orientation and gender identity but also, as federal laws do, sex, race, color, ethnicity, national origin, age, religion, disability, pregnancy and genetic information, as well as family, marital or military status.

The ordinance applies to businesses that serve the public, private employers, housing, city employment and city contracting. Religious institutions would be exempt. Violators could be fined up to \$5,000.

After the passage of HERO, opponents of the ordinance began to collect signatures to put a repeal measure on the ballot. On 3 July 2014 HERO opponents delivered more than 50,000 signatures to the city of Houston, but a month later the city announced proponents of the repeal were "2,000 valid signatures short of the 17,269-signature threshold" and that "most of the pages contained

mistakes that invalidated the entire page of signatures."

On 7 August 2014, HERO was placed on hold after opponents of the ordinance filed suit against the city with the help of the Alliance Defending Freedom, a conservative Christian legal advocacy group focused largely on opposing same-sex marriage and abortion. The following month city attorneys subpoenaed sermons given by local pastors who oppose the law and are tied to the conservative Christian activists who have sued the city.

As Eugene Volokh, a professor at the UCLA School of Law, wrote in his "Volokh Conspiracy" blog of the underlying issue:

Opponents of the equal rights ordinance are hoping to force a repeal referendum when they get their day in court in January, claiming City Attorney David Feldman wrongly determined they had not gathered enough valid signatures to qualify for the ballot. City attorneys issued subpoenas during the case's discovery phase, seeking, among other communications, "all speeches, presentations, or sermons related to HERO, the Petition, Mayor Annise Parker, homosexuality, or gender identity prepared by, delivered by, revised by, or approved by you or in your possession."

Critics have contended that the subpoenas are an infringement on religious liberties, that they are intended to "punish and intimidate those who dared to step-up and oppose the city council," and that the specific and seemingly unrelated nature of the subpoenaed material suggests the discovery investigation is really about a crackdown on political or anti-homosexual preaching in city churches. Houston city officials maintain the subpoenas are about determining the validity of the petitions seeking the recall of HERO and the manner in which signatures for them were gathered:

The issue centers around a subpoena sent to some pastors actively involved in collecting petition signatures against Houston's non-discrimination ordinance. The subpoena asked the religious leaders to turn over "all speeches, presentations, or sermons related to HERO, the Petition, Mayor Annise Parker, homosexuality, or gender identity prepared by, delivered by, revised by, or approved by you or in your possession."

Pastors claim it's an overly broad fishing expedition. "The city council and its attorneys are engaging in an inquisition designed to stifle any critique of its actions," said a rep for the Alliance Defending Freedom, a conservative legal firm. "Political and social commentary is not a crime; it is protected by the First Amendment."

But their complaints make it sound like the pastors are about to be tried for hate speech using the new law, which is far from the case.

[City attorneys] were looking into what instructions pastors gave out to those collecting signatures for a referendum on the non-discrimination law. (What exactly the pastors said, and what the collectors knew about the rules, is one of the key issues in pending litigation around whether opponents of the law gathered enough signatures for a referendum.)

Feldman said the pastors made their sermons relevant to the case by using the pulpit to do political organizing. That included encouraging congregation members to sign petitions and help gather signatures for equal rights ordinance foes, who largely take issue with the rights extended to gay and transgender residents.

"There's no question, the wording was overly broad. But I also think there was some deliberate misinterpretation on the other side," [Houston mayor Annise] Parker said at a press conference. "The goal is to find out if there were specific instructions given on how the petitions should be accurately filled out. It's not about, 'What did you preach on last Sunday?'"

To reiterate: The mayor's office is not interested in what they preached, or how the pastors feel about Parker or her sexual orientation. (Those things are all well protected under the First Amendment, as they should be.) All officials want to know is what kinds of instructions the pastors gave out with respect to collecting petition signatures, and whether what they said agrees with what they're arguing in court while appealing the referendum.

Eugene Volokh argued that although the content of sermons may be protected by the First Amendment, they could nonetheless be legitimate (and legal) targets of subpoenas. But, he observed in this case, he did not feel that the material targeted by the Houston subpoenas was relevant to the matter being investigated:

All this presupposes that the information in the subpoenaed sermons really is substantially relevant to a case or an investigation. I don't quite see how "all speeches, presentations, or sermons related to HERO, the Petition, Mayor Annise Parker, homosexuality, or gender identity prepared by, delivered by, revised by, or approved by you or in your possession" would

be relevant to the litigation about the validity of the referendum petitions. At the very least, the subpoena seems vastly overbroad. And the fact that it seeks the contents of religious speeches does counsel in favor of making the subpoena as narrow as possible (which would likewise be the case if it sought the contents of political speeches). I'm not sure what sort of legally relevant information might be contained in the subpoenaed sermons. But the subpoena ought to be narrowed to that legally relevant information, not to all things about homosexuality, gender identity, the mayor, or even the petition or the ordinance.

City Attorney Feldman later maintained that the city's intent was not to challenge the churches' tax-exempt status for engaging in political activities, but rather to prove that pastors involved in the repeal referendum "knew the city's rigorous charter rules but failed to follow them":

For the churches, the issue of whether those subpoenaed documents could call their tax-exempt status into question also is at stake. Legal and political science experts said it is a politically fraught issue that governments generally have tread carefully, or avoided altogether.

Tax-exempt churches cannot use the pulpit to promote a specific candidate, but can use it as forum to discuss policy, such as the city's equal rights ordinance, Southern Methodist University political science Professor Matthew Wilson said.

"The city was counting on the fact that the distinction would be muddled in the court of public opinion," Wilson said. "It wasn't."

Feldman said the intent behind the subpoena was never to prove the churches were violating the terms of their tax-exempt status, but to produce proof that pastors who organized a petition drive to put a repeal referendum on the ballot knew the city's rigorous charter rules but failed to follow them.

At the crux of opponents' lawsuit is whether Feldman incorrectly invalidated their petitions to force a referendum.

"The fact that you happen to be a pastor and you happen to be at a church doesn't provide you with protection," Feldman said.

The city may have a point, University of Houston law professor Peter Linzer said. While the churches are correct that the original subpoena was too broad, the city likely has a legitimate right to seek communications about what specific petition instructions may have been given out, he said.

The original subpoena requests much more than that, seeking "all speeches, presentations, or sermons related to HERO, the Petition, Mayor Annise Parker, homosexuality, or gender identity prepared by, delivered by, revised by, or approved by you or in your possession."

Much of that request likely would be difficult to obtain, Linzer said, but instructions germane to the case should not be protected.

"When it comes to whether the ballot petition was correctly done, I see no constitutional problem with that," Linzer said. "I do see most of the current subpoena as overly broad."

Houston Mayor Annise Parker subsequently maintained, through a city spokeswoman, that the subpoenas had been issued by pro bono attorneys working with the city, that neither she nor the City Attorney was aware the subpoenas had been issued until after the fact, and that the city would be narrowing the scope of those subpoenas:

Mayor Parker agrees with those who are concerned about the city legal department's subpoenas for pastor's sermons. The subpoenas were issued by pro bono attorneys helping the city prepare for the trial regarding the petition to repeal the new Houston Equal Rights Ordinance (HERO) in January. Neither the mayor nor City Attorney David Feldman were aware the subpoenas had been issued. Both agree the original documents were overly broad. The city will move to narrow the scope during an upcoming court hearing. Feldman says the focus should be only on communications related to the HERO petition process.

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