NO. 2014-44974

JARED WOODFIL; STEVEN F. HOTZE; F.N. WILLIAMS, SR.; and MAX MILLER **Plaintiffs,** **vs.** ANNISE D. PARKER, MAYOR; ANNA RUSSELL, CITY SECRETARY; and CITY OF HOUSTON, **Defendants.**	§ § § § § § § § § §	**IN THE DISTRICT COURT** **HARRIS COUNTY, TEXAS** **152nd JUDICIAL DISTRICT**

Memorandum in Support of Nonparty Pastors' Amended Motion To Quash Subpoenas to Produce Documents or Tangible Evidence Or Otherwise Issue a Protective Order

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TABLE OF CONTENTS

I. Introduction 4

II. Statement of Facts 6

III. Argument 9

A. Requests for Production Must Be Reasonably Calculated to Lead to the Discovery of Admissible, Relevant Evidence. 10

1. Discovery Requests Must Support *Relevant* Claims or Defenses Not Barred by Controlling Law. 11

B. Discovery Requests Must Not be Overly Broad, Unduly Burdensome, or Harassing. 13

C. Discovery Requests Must Not Seek Materials Protected by the First Amendment Privilege. 13

D. Discovery Requests Must Not Seek Materials Protected by the Attorney-Client or Work Product Privilege. 15

E. The City of Houston's Discovery Requests Should be Quashed. 16

1. The FIRST Request – Communications with Certain People and About Certain Subjects – Should be Quashed. 16

2. The SECOND Request – Communications with the Plaintiffs – Should be Quashed. 19

3. The THIRD Request – All Communications with the City Regarding ERO or the ERO Petition – Should be Quashed. 20

4. The FOURTH Request – All Communications with Members of the Pastors' Congregations Regarding ERO or the ERO Petition – Should be Quashed. 20

5. The FIFTH Request – All Communications with Anyone at Alliance Defending Freedom – Should be Quashed. 23

6. The SIXTH Request – All Drafts of the ERO Petition – Should be Quashed. 24

7. The SEVENTH Request – All Lists of Petition Circulators – Should be Quashed. 25

8. The EIGHTH Request – All Communications With Petition Circulators – Should be Quashed. 25

9. The NINTH Request – Any Documents Relating to the Payment of Petition Circulators – Should be Quashed. 27

10. The TENTH Request – Documents Relating to the Funding Sources for the ERO Petition – Should be Quashed. 28

11. The ELEVENTH Request – All Training Materials Prepared for Those Collecting Signatures for the ERO Petition – Should be Quashed. 30

12. The TWELFTH Request – All Sermons and Speeches Related to ERO and Other Topics – Should be Quashed. 31

13. The THIRTEENTH Request – All Material Relied Upon to Check or Ensure the Truthfulness and Accuracy of Statements Made in the ERO Petition – Should be Quashed. 33

14. The FOURTEENTH Request – Material Demonstrating the Truthfulness or Accuracy of Statements Made in the Petition – Should be Quashed. 35

15. The FIFTEENTH Request – All Communications with Anyone Associated with the Houston Area Pastor Council – Should be Quashed. 37

16. The SIXTEENTH Request – All Communications Reflecting or Relating to the Validity of Signatures on the ERO Petition – Should be Quashed. 39

17. The SEVENTEENTH Request – Updated Resume – Should be Quashed. 40

IV. Conclusion 41

I. Introduction

The Houston City Charter (the "Charter") gives to the People of Houston the power of direct legislation by the initiative and referendum. This allows the People the opportunity to vote to enact laws the City Council has not. It also allows the People the ability to vote to repeal laws the City Council has enacted.

The Plaintiffs in this matter are part of a coalition that seeks to repeal a law enacted by the City Council. They presented to the City Secretary a referendum petition, known as the ERO Referendum Petition. The City Secretary certified the ERO Referendum Petition as valid, having the requisite number of registered voters' signatures, who signed the Petition in the manner the Charter requires. But the Mayor and City Attorney announced that the Petition was invalid, and this litigation ensued.

This is not a difficult case. The question before the Court is whether the Plaintiffs met the requirements of the Charter regarding referendum petitions. Everything the Court needs to decide this question is found in the text of the Charter. It specifies the procedure proponents of referendum petitions must follow to qualify their referendum for the ballot. The Charter also specifies how many signatures are required and what makes them valid. It further specifies which City official has power to certify the signatures as valid, and what must happen once she does so. The Charter specifies everything necessary to qualify a referendum for the ballot. Conversely, anything not specified in the Charter is not required to qualify a referendum.

Ms. Magda Hermida and Pastors Hernan Castano, Khan Huynh, Steve Riggle, and David Welch (together, the "Nonparty Pastors") are not parties to this litigation. The Defendant City of Houston and the City Official Defendants (together, the "City of Houston"), however, served the Nonparty Pastors with discovery requests. But these discovery requests are not reasonably calculated to lead to admissible evidence. That is, they have nothing to do with the requirements

specified in the Charter for referendum petitions, nor are they reasonably calculated to lead to any admissible evidence that does. Instead, the subpoenas seek information and documentation concerning things such as who paid the petition circulators, what sermons the pastors preached concerning certain topics, and what conversations they had with their attorneys. The responses to these and the other discovery requests will not lead to admissible evidence. The Charter does not specify who must pay petition circulators (or in any fashion address the issue of payment of circulators). Nor does it specify that certain subjects be addressed (or not addressed) by pastors from their pulpits. It certainly does not specify what conversations those opposing the city government may have with their legal counsel.

Moreover, the discovery requests are overbroad, unduly burdensome, harassing, and vexatious. They are so much so, in fact, that it appears they were designed to punish the Nonparty Pastors for being part of the coalition that invoked the City Charter's referendum provision, and discourage them and other citizens from ever doing so again. The message is clear: oppose the decisions of city government, and drown in unwarranted, burdensome discovery requests.

These requests, if allowed, will have a chilling effect on future citizens who might consider circulating referendum petitions because they are dissatisfied with ordinances passed by the City Council. Not only will the Nonparty Pastors be harmed if these discovery requests are allowed, but the People will suffer as well. The referendum process will become toxic and the People will be deprived of an important check on city government provided them by the Charter.

For the reasons explained in this memorandum this Court should grant the Nonparty Pastors' *Motion to Quash or Otherwise Issue a Protective Order*.

II. Statement of Facts

The Nonparty Pastors adopt the Plaintiffs' statement of facts, as presented in their *Original Petition and Request for Declaratory Judgment and Immediate Injunctive Relief*, August 5, 2014 (the "Petition" or "Pet."), and incorporate them by reference as if fully restated here. For the ease of the Court, however, the Nonparty Pastors state the most pertinent facts necessary to the disposition of this motion as follows:

Houston Mayor Annise Parker championed a so-called Equal Rights Ordinance ("ERO"), which was officially published on June 3, 2014. (Pet. at ¶ 8.) A coalition of pastors and others (the "Coalition") organized a referendum petition drive to demand that the City Council either repeal ERO or place it on the ballot for the People of Houston to decide its fate. (*Id*. at ¶ 9.) The referendum petition process is regulated by Article VII-b of the Charter. (*Id*. at ¶ 10.) Section 3 of Article VII-b explicitly sets forth the process whereby a referendum petition becomes legally binding on the City Council. First, it is specific regarding how many must sign a referendum petition for the petition to have force.[1] (*Id*.) For the instant referendum petition, 17,269 signatures were required. (*Id*. at ¶ 13.)

[1] The pertinent language is as follows:

> If prior to the date when an ordinance or resolution shall take effect, or within thirty days after the publication of same, whichever is later, a petition signed and verified, as required in section 2(a) hereof, by the qualified voters equal in number to ten percent of the total vote cast as calculated in accordance with Article V, Section 10 of this Charter, shall be filed with the City Secretary, protesting against the enactment or enforcement of such ordinance or resolution, it shall be suspended from taking effect and no action theretofore taken under such ordinance or resolution shall be legal and valid. Immediately upon the filing of such petition the City Secretary shall do all things required by section 2(b) of this Article. Thereupon the Council shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election, or the Council may, in its discretion, call a special election for that purpose; and such ordinance or

The Charter is specific, too, about who has power to certify referendum petitions. (*Id*. at ¶¶ 10, 13, 15.) It states that referendum petitions "shall be filed with the City Secretary," and that "the City Secretary shall do all the things required by section 2(b) of this Article." Charter, art. VII-b, § 3.[2] Those actions are as follows: by a certain date, she "shall certify to the City Council" the number of valid signatures necessary for a legally binding petition, and also—and significantly for this litigation—"the number of valid signatures on said petition." *Id*., § 2(b). The City Secretary is the only one the Charter authorizes to certify the petition; no one else—including the Mayor and City Attorney—is authorized to do so.

Not only does the Charter specify the number of valid signatures necessary for a legally binding petition and who has power to certify the signatures as valid, it also specifies what is required for a signature to be valid. (Pet. at ¶ 15.) Valid signatures are those of registered voters within the City of Houston. Charter, art. VII-b, § 2(a).[3] Additionally, valid signatures must

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> resolution shall not take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.

Charter, art. VII-b, § 3.

[2] The full text of section 2(b) is as follows:

> On or before the thirtieth day after the date of filing of the petition the City Secretary shall certify to the City Council (a) the greatest total vote cast for Mayor at any city general election held within three years next preceding the date of the filing of such petition, and (b) the number of valid signatures on said petition, and shall present such petition and certificate to the Council.

Charter, art VII-b, § 2(b).

[3] The pertinent language is as follows:

> Petition. A petition signed and verified in the manner and form required for recall petition in Article VII-a by qualified voters equal to fifteen per cent of the total vote cast as calculated in accordance with Article V, Section 10 of this Charter, next preceding the filing of said petition, accompanied by the proposed legislation or measure in the form of a proposed ordinance or resolution, and requesting that such ordinance or resolution be submitted to a vote of the people, if not passed by the Council, shall be filed with the City Secretary.

comply with the requirements of Article VII-a, which are that the signers must list their address and the date on which they signed the petition.[4] Those are the *only* requirements the Charter provides for signatures to be valid: they must be of registered voters, and they must include their addresses and dates upon which they signed.

The Coalition presented the City Secretary approximately 55,000 signatures (the "ERO Petition"). (Pet. at ¶ 12.) To be a legally binding petition, at least 17,269 of those signatures had to meet the requirements specified in the Charter. (*Id*. at ¶ 13.) The City Secretary examined the signatures as the Charter requires and certified that the number of valid and verified signatures meeting the requirements of the Charter exceeded the required 17,269. (*Id*.) Only slightly more than thirty percent of the signatures were examined. (*Id*.) Having surpassed the required 17,269 verified signatures, the City Secretary did not examine the remaining signatures. (*Id*.)

Under the clear terms of the Charter, the City Secretary's certification that the ERO Petition contained sufficient verified signatures necessitates certain actions by the City Council. (Pet at ¶ 13.) The Charter commands that, once the City Secretary certifies a referendum

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Charter, art. VII-b, § 2(a).

[4] The pertinent language is as follows:

> All petitions for recall of any officer of the City of Houston, shall be instituted by filing with the City Secretary a verified written petition requesting the removal of such officer, which said petition shall be signed by qualified voters of the City of Houston, in number not less than twenty-five per cent of the total votes cast calculated in accordance with Article V, Section 10 of this Charter, based on the votes cast city-wide if the officer sought to be recalled was elected city-wide, or if the officer sought to be recalled was elected by district, based on the votes cast in the district which the officer sought to be recalled currently serves. The signers of said petition shall also set opposite their respective names, the number of his residence, naming the street, and shall also state the day of the month and the year when such signature was affixed.

Charter, art. VII-a, § 2.

petition, "the Council shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election, or the Council may, in its discretion, call a special election for that purpose[.]" Charter, art. VII-b, § 3. The Mayor and City Attorney, however, refused to allow that to happen. (Pet at § 13.) Instead, they announced that they had invalidated many of the signatures the City Secretary accepted as valid, and the ERO Petition would be rejected. (*Id*. at ¶ 14.)

This litigation then ensued. The Defendant City of Houston and Defendant City Officials (together, the "City of Houston") answered the Plaintiffs' petition for declaratory and injunctive relief. A true and correct copy of the answer, *The City's Answer to Plaintiffs' Original and Supplemental Petitions*, filed on August 22, 2014, is attached as Exhibit 1 to the Pastors' Motion to Quash. Within the answer, the City of Houston offered a number of affirmative defenses. Two of those accuse the Plaintiffs of impropriety. The seventh affirmative defense states that "Plaintiffs' 'unclean hands' and noncompliance with the City Charter bars them from obtaining relief under any of their claims and legal or equitable theories." (Ex. 1, ¶ 7.) The eighth affirmative defense states that "Plaintiffs' fraud in connection with the referendum petition bars them from obtaining relief under any of their claims and legal or equitable theories." (Ex. 2, ¶ 8.)

The City of Houston has also served request for production subpoenas on the Nonparty Pastors. True and correct copies of these subpoenas are attached as Exhibits 2 – 6 to the Pastors' Motion to Quash.

III. Argument

The City of Houston's requests for production should be quashed. None are reasonably calculated to lead to the discovery of admissible, relevant evidence. Because they seek irrelevant information, all the requests for production are overly broad and cause undue burden or

harassment. Additionally, some of the requests for production are barred by attorney-client or work product privilege. And some are barred by various First Amendment privileges. As a result, all the discovery requests served on the Nonparty Pastors are improper. This Court should therefore grant the Motion to Quash.

A. Requests for Production Must Be Reasonably Calculated to Lead to the Discovery of Admissible, Relevant Evidence.

Texas law is clear: "discovery may not be used as a fishing expedition." *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998). Rather, "requests must be reasonably tailored to include only matters relevant to the case." *Id*.; *see also In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) ("discovery requests must be reasonably tailored to include only relevant matters") (internal quotation and citation omitted); *In re Brewer Leasing, Inc.*, 255 S.W.3d 708, 711 (Tex. App.—Houston [1st Dist.] 2008) ("Discovery requests, however, must be reasonably tailored to include only matters relevant to the case."). As a result, courts must quash discovery when it is not reasonably calculated to lead to the discovery of admissible, relevant evidence. *See In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007) ("Overbroad requests for *irrelevant* information are improper") (emphasis added). Whether the request is "reasonably calculated" is "the initial question that must be answered before any discovery may take place." *Id*. The party seeking discovery bears the burden to show that it is relevant. "Without that initial showing of relevance, discovery is improper." *Id*. Courts abuse their discretion by allowing "discovery into patently irrelevant matters." *In re ReadyOne Indus., Inc.*, 420 S.W.3d 179, 183 (Tex. App.—El Paso 2012).

None of the requests for production served on the Nonparty Pastors are reasonably calculated to lead to the discovery of admissible, relevant evidence. The City Secretary, who is the only officer authorized by the Charter to certify referendum petitions, certified the ERO

Petition as containing the requisite number of verified, valid signatures. The Mayor and City Attorney, however, invalidated many of those signatures for failing to meet "requirements" that the Plaintiffs contend are not authorized by the Charter. The only question before this Court, therefore, is whether the Charter authorizes the additional requirements the Mayor and City Attorney imposed. But the City of Houston served subpoenas on the Nonparty Pastors seeking production of documents that have nothing to do with the question before this Court. Nor are the subpoenas reasonably calculated to lead to admissible evidence relating to any of the City of Houston's relevant defenses.

1. Discovery Requests Must Support *Relevant* Claims or Defenses Not Barred by Controlling Law.

Only matters that are relevant to the pending matter may be discovered. The information sought must be sufficient to allow parties seeking the discovery to prevail on the merits or, at least, lessen their liability. *See, e.g., Doe v. Roman Catholic Archdiocese of Galveston-Houston ex rel. Dinardo*, 362 S.W.3d 803, 812 (Tex. App.—Houston [14th Dist] 2012) (party was not entitled to discovery when he did not explain how it would enable him to raise or defeat fact issues necessary to his theory of the case); *Kastner v. Texas Bd. of Law Examiners*, 03-08-00678-CV, 2010 WL 2977589 (Tex. App.—Austin July 29, 2010) (party was not entitled to discovery that would not have cured jurisdictional defects to his action). So naturally, discovery should not be permitted on facts going to claims or defenses that are barred by the controlling law.

In *Kubosh v. State*, Michael Kubosh was a bail bondsman who was surety on a bail bond for a criminal defendant who failed to appear in court. 177 S.W.3d 156, 158 (Tex. App.—Houston [1st Dist.] 2005). The State petitioned for forfeiture of the full amount of the bond, which was $75,000. *Id*. Kubosh filed an answer that included affirmative defenses that he asserted would relieve him of liability from responsibility for the bond. *Id*. He sought discovery

in support of those defenses, which the State resisted. *Id*. The trial court ruled in favor of the State, without allowing Kubosh's discovery, and he appealed. *Id*. at 157-58. The Court of Appeals noted that the controlling law governing criminal bonds, Chapter 22 of the Texas Code of Criminal Procedure, provides only four conditions in which a bail bondsman may be exonerated upon forfeiture of a bond. *Id*. at 158-59. Kubosh's affirmative defenses, however, even if proved, did not meet any of those four conditions. *Id*. at 160. As a result, even if he proved his affirmative defenses, he could not prevail. *Id*. The Court of Appeals held that "any discovery related to equitable affirmative defenses not recognized under [the controlling law] is irrelevant" and was properly excluded by the trial court. *Id*.

The instant matter before this Court is just like *Kubosh*. The Charter is the controlling law: it specifies what makes a referendum petition binding. The affirmative defenses of fraud and unclean hands asserted by the City of Houston are not recognized under the law that controls this case. Even if the City of Houston could somehow show that the Plaintiffs misstated the effect of ERO in their summary of the law on the ERO Petition, such a showing would not be sufficient for the City of Houston to prevail. It can only prevail if it shows that the ERO Petition failed to meet the requirements set forth by the Charter such that the Mayor and City Attorney were justified in demanding it be rejected and refusing to allow it to be forwarded to the City Council for action. The Charter sets forth those requirements with specificity, and they have nothing to do with whether the Plaintiffs spoke fraudulently or otherwise have unclean hands.[5] Consequently, "any discovery related to equitable defenses not recognized under [the controlling

[5] As explained *supra*, the only requirements for valid referendum petitions are that they be signed by the requisite number of registered voters within the City of Houston, Charter, art. VII-b, § 2(a), and that the signers must list their address and the date on which they signed the petition, Charter, art. VII-a, § 2. *See supra*, Part I.

law]," in this case, the Charter, "is irrelevant" and should be quashed. *Id*. This case is just like *Kubosh*, and this Court should reach the same decision as the Court of Appeals in that case.

B. Discovery Requests Must Not be Overly Broad, Unduly Burdensome, or Harassing.

Not only must discovery requests be reasonably calculated to lead to the discovery of admissible, relevant evidence, they cannot be overly broad, unduly burdensome, or harassing. *See Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 143 (Tex. App.—Dallas 2011) (noting that the trial court quashed a subpoena duces tecum because it was overly broad, unduly burdensome, and harassing); *see also Lunsmann v. Spector*, 761 S.W.2d 112, 113 (Tex. App.—San Antonio 1988) ("trial court may protect a party from unduly burdensome … discovery or from harassment").

C. Discovery Requests Must Not Seek Materials Protected by the First Amendment Privilege.

"[P]olitical speech" lies at the core of and "is central to the meaning and purpose of the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010). Political association—that is, the "freedom to associate with others for the common advancement of political beliefs and ideas"—is likewise protected by the First Amendment. *See Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). "[A]bridgement of [these] rights, even though unintended, may inevitably follow from varied forms of governmental action," *NAACP v. Alabama*, 357 U.S. 449, 461 (1958), including government-mandated "disclosure requirements," *Citizens United*, 558 U.S. at 366-67. That is why "[d]isclosures of political affiliations and activities"—including discovery-related disclosures in the context of litigation—"that have a deterrent effect on the exercise of First Amendment rights are . . . subject to . . . exacting scrutiny." *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010) (quotation marks omitted); *see also Britt v. Superior Court*, 574

P.2d 766, 774 (Cal. 1978) ("This chilling effect on First Amendment rights is not diminished simply because disclosure is compelled pursuant to a litigation-oriented discovery order.").

"Although there are relatively few cases applying a First Amendment privilege to discovery disputes, it is settled that such a privilege exists." *Wilkinson v. F.B.I.*, 111 F.R.D. 432, 436 (C.D. Cal. 1986) (*citing NAACP v. Alabama*, 357 U.S. 449). Determining whether the First Amendment privilege applies to a discovery demand is a two-step process. The person or entity invoking the privilege first must make the requisite prima-facie showing—by demonstrating a reasonable probability that "enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences [that] objectively suggest an impact on, or 'chilling' of, [First Amendment] rights." *Perry*, 591 F.3d at 1160 (alterations omitted); *Citizens United*, 558 U.S. at 370 (acknowledging the "reasonable probability" standard). The probability that these harms will occur need only be a "reasonable" one. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). One notable chill of a group's expressive associational rights is a diminished "effective[ness]" in its "advocacy of both public and private points of view." *NAACP*, 357 U.S. at 460.

Following the prima-facie showing, the burden shifts to the party requesting the discovery to "demonstrate[] an interest in obtaining the disclosures it seeks [that] is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association." *Perry*, 591 F.3d at 1161 (quoting *NAACP*, 357 U.S. at 463) (alterations omitted). *Accord Ex parte Lowe*, 887 S.W.2d 1, 3 (Tex. 1994) ("Once the privilege is raised, the party seeking the list has the burden to establish the constitutionally permissible basis justifying disclosure."). This involves a balancing inquiry. *See id.*; *see also Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 4 (D.D.C. 2002). The party seeking the discovery, to succeed in this

balancing analysis, "must show that the information sought is *highly relevant* to the claims or defenses in the litigation—a more demanding standard of relevance than that under [Rule 26]"—that "the information [is] otherwise unavailable," and that "[t]he request [is] carefully tailored to avoid unnecessary interference with protected activities." *Perry*, 591 F.3d at 1161 (emphasis added); *see also Int'l Action Ctr.*, 207 F.R.D. at 4. In close cases where First Amendment rights are implicated, "the tie goes to the speaker," *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 474 (2007), because "[i]nfringement of First Amendment interests must be kept to a minimum," *Int'l Action Ctr.*, 207 F.R.D. at 4.

D. Discovery Requests Must Not Seek Materials Protected by the Attorney-Client or Work Product Privilege.

Texas recognizes the attorney-client and work product privilege. Tex. R. Evid. 503; Tex. R. Civ. P. 192.5. "Core work product—the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories—is not discoverable." *Id.* Clients have "a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (A) between the client … and the client's lawyer." Tex. R. Evid. 503.

The Texas Supreme Court stated that "[t]he attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney" that are made in furtherance of "professional legal services to the client." *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996). Such discussions are not discoverable.

E. The City of Houston's Discovery Requests Should be Quashed.

Each of the City of Houston's discovery requests fails to be reasonably calculated to lead to the discovery of admissible, relevant evidence. Rather, they are overly broad, unduly burdensome, and harassing. As a result, each should be quashed.[6]

1. The FIRST Request – Communications with Certain People and About Certain Subjects – Should be Quashed.

The First Request for Production asks for all communications relating to ERO the Nonparty Pastors had with a broad group of people, including the Plaintiffs, the Mayor or her office, the City Secretary or her office, the City Attorney or his office, those who circulated the ERO Petition, and—incredibly—all 55,000 people who signed the ERO Petition.

It also asks for any communications about a broad range of subjects. These include ERO or any of its drafts, the ERO Petition or any of its drafts, the language summarizing ERO on the ERO Petition, the legal requirements for petitions under "Texas, Houston municipal, or any other law," and affidavits filed by the petition circulators. The first request also asks for any communications concerning the payment of the petition circulators and the funding of the ERO Petition. It seeks any communications about the topics of equal rights, civil rights, homosexuality, or gender identity. It wants all communications "relating to restroom access," as well as "language related to restroom access being or having been removed from a version of" ERO, "including any communications related to the removal of that language," and also "about whether" ERO "does or does not impact restroom access."

[6] The City of Houston's discovery requests are included as Exhibits 2 – 6. The requests are identical, with the exception of a very slight difference in Request for Production Number 15 for one of the Nonparty Pastors. That difference will be explained when that Request for Production is discussed. *See infra*, Part III.E.15.

None of these communications has anything to do with whether the requisite number of qualified voters properly signed the ERO Petition, such that it was properly certified by the City Secretary. What conversations might have been had, about whatever topics, has no bearing on whether the City Secretary's certification of the ERO Petition was proper, and whether it could be overruled by the Mayor and City Attorney. The case before this Court is like the *Kubosh* case—there is controlling law that decides the issue, and discovery about matters that are not relevant defenses under that law should not be allowed.[7] The controlling law, the Charter, dictates the criteria for certifying referendum petitions. What type of conversations those who support the petition had, and about what subjects, is not part of the criteria.

This request is also overly broad, unduly burdensome and harassing. It asks for communications that were had with some 55,000 people (i.e., with the "Petition signers"). It asks the Nonparty Pastors to provide financial information about irrelevant subjects—how the petition circulators were paid and how the ERO Petition was funded. But the First Amendment guarantees the right of proponents of initiatives to pay petition circulators, *see Meyer v. Grant*, 486 U.S. 414 (1988), and prohibits government requiring proponents of initiatives to report the names and addresses of petition circulators and the amounts paid to each, *see Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) ("*Buckley II*"). Because the City of Houston—i.e., *the government*—seeks information regarding the payment of petition circulators, the request itself violates the First Amendment.

The First Request for Production also seeks communications about "the topics of equal rights, civil rights, homosexuality, or gender identity." The Nonparty Pastors are *pastors*, and their communications on each of these topics might fill weighty tomes.

[7] For the analysis of *Kubosh*, 177 S.W.3d 156, *see supra* at 11-13.

Additionally, requests for communications between the Nonparty Pastors and the Plaintiffs are barred by the First Amendment Privilege. The United States Supreme Court has emphasized that the First Amendment protects not only the confidentiality of political associates' identities, but the *content* of political speech that they choose not to reveal. *See DeGregory v. Attorney Gen. of N.H*, 383 U.S. 825, 828-30 (1966) (preventing the disclosure of "information relating to . . . the meetings . . . and the views expressed and ideas advocated at any such gatherings"). Courts have thus regularly "recognized that the freedom of association protects . . . an organization's internal interactions and communications." *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 268 (Minn. 2007).

The Nonparty Pastors and the Plaintiffs were part of the same Coalition striving for political change in Houston. Any communications they had relating to ERO, or to the ERO Petition, if any occurred, are protected by the First Amendment Privilege. The Nonparty Pastors easily satisfy their prima-facie showing for protecting these internal documents. Compelled disclosure of these documents would chill First Amendment activity in at least two "self-evident" ways. *Perry*, 591 F.3d at 1163. First, "[c]ompelled disclosure of internal campaign information can deter [political] participation"; and second, disclosure of those materials "can have a deterrent effect on the free flow of information within [political] campaigns." *Id.* at 1162.

The City of Houston thus faces the burden of showing that the Nonparty Pastors' internal documents and communications with the Plaintiffs, as part of the Coalition, are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make communications among proponents of referendum petitions a criteria for determining whether the petitions are valid. These

communications are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

No part of this First Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it in part is barred by the First Amendment Privilege. It should be quashed.

2. The SECOND Request – Communications with the Plaintiffs – Should be Quashed.

The Second Request for Production asks for "[a]ll communications to or from Plaintiffs." This is not reasonably calculated to lead to the discovery of admissible evidence because the subject matter and texts of any communications the Nonparty Pastors had with the Plaintiffs is not one of the criteria the Charter specifies for certifying referendum petitions.

Additionally, the Second Request for Production is overly broad. It seeks "all" communications "to or from Plaintiffs." It does not, however, provide any limit to the scope of those communications. Nor does it limit in any way the time parameter in which the communications occurred. Rather, it asks for all communications about anything and everything the Nonparty Pastors have ever had with the Plaintiffs, from the beginning of the world until now. And it is not only communications with the named Plaintiffs that are sought, but also those with "any of their affiliates, parents, subsidiaries, employees, agents or representatives, and each person acting or authorized to act on their behalf." (Exs. 2 - 6, Definitions and Instructions: "Plaintiffs," at 8.) As such, it is unduly burdensome as well.

The Second Request for Production is also barred by the First Amendment Privilege, because it seeks nonpublic political speech documents and communications. *See supra*, Part II.E.1 (discussing how the First Amendment Privilege bars requests for production of documents

relating to communications between the Nonparty Pastors and the Plaintiffs). Significantly, as the Ninth Circuit Court of Appeals explained, opponents of ballot propositions are not entitled to the internal communications of proposition proponents. *Perry*, 591 F.3d 1126.

Because the Second Request for Production is not reasonably calculated to lead to the discovery of admissible evidence, but is overly broad and unduly burdensome, as well as privileged under the First Amendment, it should be quashed.

3. The THIRD Request – All Communications with the City Regarding ERO or the ERO Petition – Should be Quashed.

The Third Request for Production asks for "[a]ll communications with the City regarding" ERO "or the [ERO] Petition." This is not reasonably calculated to lead to admissible evidence, because the subject matter and texts of any communications the Nonparty Pastors had with the City is not one of the criteria the Charter specifies for certifying referendum petitions. Additionally, the City already has all communications between itself and the Nonparty Pastors. As such, it should not be allowed, because it is "obtainable from some other source that is more convenient, less burdensome, or less expensive[.]" Tex. R. Civ. P. 192.4(a). This request should be quashed. *Id*.

4. The FOURTH Request – All Communications with Members of the Pastors' Congregations Regarding ERO or the ERO Petition – Should be Quashed.

The Fourth Request for Production asks for "[a]ll communications with members of your congregation regarding" ERO "or the [ERO] Petition." This is not reasonably calculated to lead to admissible evidence, because the subject matter and texts of any communications the Nonparty Pastors had with their congregations is not one of the criteria the Charter specifies for certifying referendum petitions.

Further, these communications are protected by the First Amendment Privilege. The First Amendment's freedom to associate is vitally concerned with allowing groups and persons to retain "privacy in [their] associations." *NAACP*, 357 U.S. at 462. The City of Houston's Fourth Request for Production, however, seeks the communications that the Nonparty Pastors had with members of their churches. This would compel disclosure of the Nonparty Pastors' anonymous political associates. This discovery request directly implicates the constitutional right of association. They involve "information relating to . . . the meetings . . . and the [political] views expressed and ideas advocated at any such gatherings" *DeGregory*, 383 U.S. at 829.

The United States Supreme Court long ago held that compelled disclosure of materials revealing an advocacy group's political associates would "affect adversely" protected speech and association by "induc[ing] members to withdraw from the [a]ssociation and dissuad[ing] 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. "There can be little doubt that . . . public identification of individuals who never intended their participation in First Amendment activity to thrust them into the harsh glare of the limelight [will] chill future political [activity]," and thus "discovery requests . . . that seek such information will not be allowed." *Int'l Action Ctr.*, 207 F.R.D. at 3-4. "Privacy is particularly important where the group's cause is unpopular" in certain circles; "once the participants lose their anonymity, intimidation and suppression" are likely to follow. *Id.* at 3.

Additionally, the Nonparty Pastors and the members of their congregations share the same religious beliefs. The Texas Supreme Court has expressed grave concern when discovery requests will force religious leaders to reveal the identities of those who share their faith

convictions. *See Tilton v. Moye*, 869 S.W.2d 955 (Tex. 1994). The *Tilton* case involved a lawsuit against a prominent televangelist, Robert Tilton, and his church. *Id*. at 955. The plaintiff and her husband had contributed money to the church, believing that the husband would be healed of a disease as a result. *Id*. at 955-56. The husband, however, was not healed, but died. *Id*. at 956. The plaintiff sued and served a subpoena duces tecum seeking identifying information for those who had claimed to be healed as a result of Tilton's ministry. *Id*. The Supreme Court ruled that such discovery requests "violate[] the First Amendment right to association," because they are "specifically aimed at persons sharing particular beliefs: namely, it seeks the identities of those individuals who subscribe to the religious beliefs that Tilton espouses." *Id*. *See also Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 967 (5th Cir. 1993) (discovery requests seeking church membership or contributor information is "an obvious infringement of the First Amendment associational right").

The discovery requests served on the Nonparty Pastors seek identifying information about church members who share their faith. And it seeks communications discussing elements of their shared faith, since the Nonparty Pastors' and church members' political convictions are informed by their faith. But as the Texas Supreme Court said, pastors and church members do not "waive[] their constitutional rights merely by espousing their religious beliefs." *Id*. at 957. Burdensome discovery such as has been served on the Nonparty Pastors—requiring them to turn over confidential communications they had with the church members about the government's preferred law, thereby identifying their church members and their members' political convictions and beliefs—could cause people to become hesitant to join, or remain in, politically-active pastors' churches. And it could chill pastors' speech, causing them to refrain from discussing anything political with members of their churches. The Nonparty Pastors easily satisfy their

prima-facie showing for protecting these internal documents. The City of Houston thus faces the burden of showing that the Nonparty Pastors' communications with the members of their congregations are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make communications between proponents of referendum petitions and members of their churches a criteria for determining whether the petitions are valid. These communications are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

Additionally, even *if* this were a proper subject for discovery, and were not barred by the First Amendment Privilege, communications between the Nonparty Pastors and members of their congregations who declined to sign the ERO Petition would be overly broad.

No part of this Fourth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

5. The FIFTH Request – All Communications with Anyone at Alliance Defending Freedom – Should be Quashed.

The Fifth Request for Production seeks communications between the Nonparty Pastors and their attorneys. Specifically, this request asks for "[a]ll communications with Joe La Rue or anyone else at the 'Alliance Defending Freedom' regarding" ERO "or the [ERO] Petition." But because Alliance Defending Freedom and its attorneys represented the Coalition, including the Nonparty Pastors, at all times relevant to this discovery request, all of these communications are protected by the attorney-client privilege and the work product privilege. Such discussions are not discoverable. Tex. R. Civ. P. 192.5; Tex. R. Evid. 503; *Huie*, 922 S.W.2d at 922.

Additionally, the subject matter and texts of communications the Nonparty Pastors had with their attorneys is not one of the criteria the Charter specifies for certifying referendum petitions. Therefore this request is irrelevant. The Fifth Request for Production should be quashed.

6. The SIXTH Request – All Drafts of the ERO Petition – Should be Quashed.

The Sixth Request for Production seeks "[a]ll drafts of the [ERO] Petition." But the content of non-circulated, draft petitions is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine such uncirculated drafts before certifying the signatures on referendum petitions and declaring the petitions valid and legally binding.

Further, to the extent that drafts of the ERO Petition were the work product of the Coalition's legal counsel, they are not discoverable. Tex. R. Civ. P. 192.5; Tex. R. Evid. 503. Additionally, nonpublic documents revealing political strategy are protected by the First Amendment Privilege. *See Perry*, 591 F.3d at 1161-62 (ruling that compelled disclosure of internal campaign communications and documents can "chill protected activities" and so are subject to the First Amendment Privilege). "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, *and to do so in private*." *Id*. at 1162 (emphasis added). Allowing disclosure of private, internal documents—including drafts of political speech proposals—may well "discourag[e] political association and inhibit[] internal campaign communications that are essential to effective association and expression." *Id.* at 1163.

The Nonparty Pastors easily satisfy their prima-facie showing for protecting these internal documents. The City of Houston thus faces the burden of showing that the Nonparty

Pastors' internal documents and communications with the Plaintiffs, as part of the Coalition, are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make the content of drafts of referendum a criteria for determining whether the petitions are valid. These draft documents are not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

No part of this Sixth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

7. The SEVENTH Request – All Lists of Petition Circulators – Should be Quashed.

The Seventh Request for Production seeks "[a]ll lists of Petition Circulators." But the identity of those who circulate referendum petitions is not one of the criteria the Charter specifies for certifying referendum petitions. Further, the government violates the First Amendment when it requires the proponents of petitions to submit lists of their petition circulators to the government. *Buckley II*, 525 U.S. 182. Because the City of Houston—i.e., *the government*—seeks to force the Nonparty Pastors to submit lists of the Coalition's petition circulators, the request for production violates the First Amendment.

This request is not reasonably calculated to lead to the discovery of admissible evidence. It also violates the First Amendment. It should be quashed.

8. The EIGHTH Request – All Communications With Petition Circulators – Should be Quashed.

The Eighth Request for Production seeks "[a]ll communications to or from Petition Circulators." But the subject matter and text of communications between the Nonparty Pastors

and petition circulators is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine communications between the proponents of referendum petitions and those who circulate the petitions before certifying the signatures on referendum petitions and declaring the petitions valid and legally binding. This request is not reasonably calculated to lead to the discovery of admissible evidence.

Additionally, the Eighth Request for Production is overly broad and vague. It seeks "all" "communications" with "Petition Circulators," with no limitation on the scope of the request. It thus does not ask only for communications regarding the ERO Petition, but about any other subject as well. This request is thus overly broad and contemplates unduly burdensome discovery.

The Eighth Request for Production is also barred by the First Amendment Privilege. It seeks the private, internal communications of an association that exists to effect political change. "[T]he right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). This right enjoys First Amendment protection. *Id.* Allowing disclosure of private, political conversations designed to create strategy for political change may well "discourage[e] political association and inhibit[] internal campaign communications that are essential to effective association and expression." *Perry*, 591 F.3d at 1163. This is especially true when the content of those conversations is completely irrelevant to the litigation.

The Nonparty Pastors easily satisfy their prima-facie showing for protecting these private communications about political matters. The City of Houston thus faces the burden of showing that the Nonparty Pastors' internal documents and communications with the petition circulators

are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make the content of communications between proponents of petitions and petition circulators a criteria for determining whether petitions are valid. These communications are therefore not relevant to any claims or defenses. The Court should therefore conclude that such communications are privileged under the First Amendment.

No part of this Eighth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

9. The NINTH Request – Any Documents Relating to the Payment of Petition Circulators – Should be Quashed.

The Ninth Request for Production seeks "[a]ny documents relating to the payment of Petition Circulators, including but not limited to:" "budgets," "check stubs," "copies of checks," "tax forms," "documents explaining calculation of payment to Petition Circulators," and "documents referencing incentives given to Petition Circulators for obtaining certain numbers of signatures or completing a certain number of pages." None of these documents are reasonably calculated to the discovery of admissible evidence, because how much petition circulators are paid is not one of the criteria the Charter specifies for certifying referendum petitions. Indeed, the amount petition circulators are paid *cannot* be a criteria for evaluating petitions. The First Amendment guarantees the right of proponents of initiatives to pay petition circulators. *See Meyer*, 486 U.S. 414. And it prohibits the government from requiring proponents of initiatives to report the names and addresses of petition circulators and the amounts paid to each. *See Buckley II*, 525 U.S. 182. The City of Houston's Ninth Request for Production, which seeks

information about how much petition circulators were paid, thus violates the First Amendment. Further, it is not reasonably calculated to lead to the discovery of admissible evidence.

The Ninth Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment. It should be quashed.

10. The TENTH Request – Documents Relating to the Funding Sources for the ERO Petition – Should be Quashed.

The Tenth Request for Production seeks "[a]ny documents relating to funding and funding sources of the [ERO] Petition and [ERO] Petition-related activities." But the funding and funding sources of referendum petitions is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to determine the amount of funding and funding sources of referendum petitions before certifying the signatures on referendum petitions and declaring the petitions valid and legally binding. It is irrelevant as a matter of law who funded the ERO Petition; all that matters is whether the ERO Petition was signed by the requisite number of qualified voters in the proper way as designated by the Charter.

Also, this request is barred by the First Amendment Privilege, which is applied when discovery requests seek disclosure of a group's financial contributors. *See Wilkinson*, 111 F.R.D. at 437; *see also T.S. v. Boy Scouts of Am.*, 138 P.3d 1053, 1058 (Wash. 2006) (explaining that the First Amendment associational privilege is applied where the discovery request specifically required disclosure of the names of a group's financial contributors); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 208-10 (N.D. Cal. 1983) (associational First Amendment Privilege precluded discovery of the sources of the private association's financial support); *Pollard v.*

Roberts, 283 F. Supp. 248, 257 (E.D. Ark. 1968) *aff'd*, 393 U.S. 14 (1968) (identity of association's contributors and the amounts they contributed are protected by the First Amendment Privilege). An association may raise the First Amendment Privilege on behalf of its members and financial contributors. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., & its Locals 1093, 558 & 25 v. Nat'l Right to Work Legal Def. & Ed. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978) ("Without doubt, the association itself may assert the [First Amendment] right[s] of its members and contributors….").

Allowing discovery of the funding sources for the ERO Petition has a reasonable probability of chilling future associational participation. The Supreme Court recognized that disclosure of campaign contributions chills political activity and so places significant burdens on First Amendment rights. *Buckley*, 424 U.S. at 65-66. Contributors may think twice before they agree to fund measures that challenge the government's authority, and perhaps decide the risk is too great. Such a result will lead to less political power and participation for the People of Houston. The Nonparty Pastors easily satisfy their prima-facie showing for protecting these internal documents. The City of Houston thus faces the burden of showing that the Nonparty Pastors' internal documents and communications relating to the funding sources of the ERO Petition are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make the sources of funding for referendum petitions a criteria for determining whether the petitions are valid. These draft documents are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

No part of this Tenth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any

relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

11. The ELEVENTH Request – All Training Materials Prepared for Those Collecting Signatures for the ERO Petition – Should be Quashed.

The Eleventh Request for Production seeks "[a]ll training materials prepared for Petition Circulators or anyone else involved in the collection of any signatures for the Petition." But the content of the training materials, if any, used to train signature gatherers is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine training materials used with signature gatherers before certifying the signatures on referendum petitions and declaring the petitions valid and legally binding. This request is thus not reasonably calculated to lead to the discovery of admissible evidence.

Additionally, this request is barred by the First Amendment Privilege because it seeks internal, private documents having to do with campaign strategy. The D.C. Circuit Court of Appeals has held that the compelled disclosure of descriptions of "training programs," such as is sought by the City of Houston, "intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interferes with internal group operations and effectiveness." *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Fed. Election Comm'n*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (*quoting Buckley*, 424 U.S. at 64). That court accepted as reasonable the association's assertion that disclosure of training materials would "directly frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents activities, strategies, and tactics" that they had previously pursued and might pursue again in the future. *Id*. at 177. Political opponents should not be able to use discovery processes to uncover their adversaries' playbook without a showing of extreme need. *See id*. at 178

(explaining that the appellant had persuasively argued that disclosure of its training materials to its political opponent would be inappropriate, because it would allow its opponent to learn its political strategy so as to exploit it to the opponent's advantage). Allowing such to occur creates a reasonable probability that First Amendment freedoms will be chilled. The members of associations opposed to the current government will become discouraged as they are required to turn over their playbook to the City. And dissident political voices, becoming discouraged, may well drop out of the political process altogether, thereby reducing citizen participation.

The Nonparty Pastors thus easily satisfy their prima-facie showing for protecting these training materials (if any, in fact, exist). The City of Houston thus faces the burden of showing that the Nonparty Pastors' internal documents and communications relating to any training materials used with the ERO Petition circulators are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened showing. As already explained, the Charter does not make the training provided to petition circulators a criteria for determining whether the petitions are valid. These training materials, if any exist, are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

No part of this Eleventh Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

12. The TWELFTH Request – All Sermons and Speeches Related to ERO and Other Topics – Should be Quashed.

The Twelfth Request for Production seeks "[a]ll speeches, presentations, or sermons related to" ERO, "the [ERO] Petition, Mayor Annise Parker, homosexuality, or gender identity

prepared by, delivered by, revised by, or approved by you or in your possession." But the content of sermons, presentations, and speeches proponents of referendum petitions make or give, if any, is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine referendum petition proponents' "speeches, presentations, or sermons" before certifying the signatures on referendum petitions and declaring the petitions valid and legally binding. This request is thus not reasonably calculated to lead to the discovery of admissible evidence. It should be quashed.

Additionally, an evaluation of the content of pastors' sermons and other religious presentations could not be a criteria for the acceptance of a referendum petition without violating the First Amendment. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Significantly, the "[g]overnment may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities[.]" *Id*. (citations and quotations omitted). Rather, the government—including the courts—is not allowed by the Constitution "to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Fowler v. State of R.I.*, 345 U.S. 67, 70 (1953). The City of Houston is thus constitutionally forbidden from creating a religious test to determine who may submit a referendum petition, or from making the contents of a pastor's sermons a criteria for whether his or her petition is capable of being certified as legally binding.

Because the Twelfth Request for Production is not reasonably calculated to lead to the discovery of admissible evidence, but violates the First Amendment, it should be quashed.

13. The THIRTEENTH Request – All Material Relied Upon to Check or Ensure the Truthfulness and Accuracy of Statements Made in the ERO Petition – Should be Quashed.

The Thirteenth Request for Production seeks "[a]ll documents, studies, information, communications, or other data relied on in connection with the Petition to check, confirm, or ensure the truthfulness and accuracy of the statements made in the Petition, including but not limited to the statements in the Petition (or in any training materials prepared for Petition Circulators or anyone else involved in the collection of any signatures for the Petition) that 'Biological males ARE IN FACT allowed to enter women's restrooms in Houston under Mayor Annise Parker's 'Equal Rights Ordinance', thereby threatening the physical and emotional safety of our women and children!' and that 'Her ERO creates UNequal Rights for a tiny group of people by taking away rights of safety and privacy for the vast majority of our women and children!') (emphasis in original)." But the content of material relied upon, if any, to verify the accuracy of statements made in referendum petitions is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine whether referendum petitions contain only truthful or completely accurate statements. Nor is the City Secretary or any other official directed by the Charter to examine the content of material relied upon by petition proponents to ensure that any statements made in referendum petitions are accurate. This request is thus not reasonably calculated to lead to the discovery of admissible evidence.

Also, to the extent that the Nonparty Pastors relied on the legal analysis provided by their legal counsel, this request is barred by the attorney-client privilege. Tex. R. Evid. 503.

This request also violates the First Amendment Privilege, because it seeks internal, non-public documents relied upon by the Coalition to reach its political conclusions. This has a potentially chilling effect on the Coalition, its members, and their future speech. Members of

associations must be free to discuss and debate political ideas internally, without those private, internal dialogues being made public. Failure to provide such guarantees chills associational rights. One federal court has explained that "if the compelled disclosure is likely to adversely affect the ability of an organization and its members to collectively advocate for the organization's beliefs by inducing members to withdraw from the organization or dissuading others from joining the organization because fear of exposure of their beliefs will lead to threats, harassment, or reprisal, it runs afoul of the First Amendment." *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007) (*citing NAACP v. Alabama*, 357 U.S. at 462-63). *Accord Anderson v. Hale*, 49 Fed. R. Serv. 3d 364 (N.D. Ill. 2001) ("Infringement [of the First Amendment Privilege] occurs if disclosure would adversely affect the members' ability to pursue their collective effort to foster beliefs by either inducing them to withdraw from the organization or dissuading others from joining it."); *Tree of Life Christian Sch. v. City of Upper Arlington*, 2:11-CV-00009, 2012 WL 831918 (S.D. Ohio Mar. 12, 2012) (collecting cases).

Forcing a group to hand over to the City its internal documents upon which it relied to form its political opinions, so the City may expound on its opinion of the accuracy of those documents, will have a chilling effect on First Amendment associational and speech rights. Those who allowed themselves to be named in such documents, or those who authored such documents, may well think twice before doing so ever again. The Nonparty Pastors thus easily satisfy their prima-facie showing for protecting the internal documents (if any, in fact, exist) upon which they relied to form their political opinions regarding ERO. The City of Houston thus faces the burden of showing that the Nonparty Pastors' internal documents are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. They cannot come close to such a heightened

showing. As already explained, the Charter does not make the truthfulness or accuracy of descriptive phrases on referendum petitions a criteria for determining whether the petitions are valid. These internal documents that would be responsive to the Thirteenth Request for Production, if any exist, are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents are privileged under the First Amendment.

No part of this Thirteenth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. And to the extent it seeks documents or documents prepared by the Nonparty Pastors' legal counsel, it is barred by the attorney-client privilege. It should be quashed.

14. The FOURTEENTH Request – Material Demonstrating the Truthfulness or Accuracy of Statements Made in the Petition – Should be Quashed.

The Fourteenth Request for Production seeks "[a]ll documents, studies, information, communications, or other data that you believe support or demonstrate the truthfulness and accuracy of the statements made in the [ERO] Petition[.]" But the "truthfulness and accuracy" of statements made in referendum petitions is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine whether referendum petitions contain only truthful or completely accurate statements. Nor are they directed by the Charter to examine the content of material relied upon by petition proponents to ensure that any statements made in referendum petitions are accurate. This request is thus not reasonably calculated to lead to the discovery of admissible evidence.

There is another reason, having to do with First Amendment protections, to quash this request. Placing a petition before the voters "involves 'interactive communication concerning

political change.'" *Buckley-II*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422). It is "'both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Id*. at 199 (*quoting Meyer*, 486 U.S. at 421). Petition circulation is thus "core political speech" for which the First Amendment's protection is "at its zenith." *Id*. 525 at 186-87 (*quoting Meyer*, 486 U.S. at 422, 425). And truth-tests for political speech are constitutionally forbidden. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537 (2012) (holding that the federal Stolen Valor Act, which criminalized false claims of having received certain military medals, violated the First Amendment). The *Alvarez* Court colorfully stated that "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty–Four (1949) (Centennial ed.2003)." *Id*. at 2547. Or, as the Supreme Court famously said in *New York Times v. Sullivan*, "The erroneous statement is inevitable in free debate." 376 U.S. 254, 271 (1964).

A federal district court recently had opportunity to explain why this is so. It stated:

> The problem is that, at times, there is no clear way to determine whether a political statement is a lie or the truth. What is certain, however, is that we do not want the Government … deciding what is political truth—for fear that the Government might persecute those who criticize it.

Susan B. Anthony List v. Ohio Elections Comm'n, 1:10-CV-720, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014). As the Supreme Court put it, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." *Alvarez*, 132 S. Ct. at 2547-48. Government cannot be allowed such "censorial power;" for, "[t]he mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id*.

So even if the Charter had a requirement that the truthfulness and accuracy of statements in referendum petitions must be verified before the petition could be accepted and certified, that requirement would violate the First Amendment. But the Charter has no such requirement. Consequently, the Fourteenth Request for Production is not reasonably calculated to lead to the discovery of admissible evidence.

It is also barred by the traditional First Amendment Privilege, for all the reasons discussed regarding the Thirteenth Request for Production.

No part of this Fourteenth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

15. The FIFTEENTH Request – All Communications with Anyone Associated with the Houston Area Pastor Council – Should be Quashed.

The Fifteenth Request for Production seeks "[a]ll communications with Pastor Dave Welch or anyone else at or associated with the Houston Area Pastor Council referring or relating to HERO, restroom access in connection with HERO, the Petition, or this litigation."[8] But the content of communications between those interested in qualifying a referendum petition and others is not one of the criteria the Charter specifies for certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine the content of conversations petition proponents have with the Houston Area Pastor Council or anyone else. This request is thus not reasonably calculated to lead to the discovery of admissible evidence.

[8] The Request for Production served on Nonparty Pastor Dave Welch is substantially similar, seeking "[a]ll communications with anyone at or associated with the Houston Area Pastor Council referring or relating to HERO, restroom access in connection with HERO, the Petition, or this litigation."

It is also barred by the First Amendment Privilege. "The First Amendment's protection extends not only to the organization itself, but also to its staff, members, contributors, and *others who affiliate with it*." *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002) (quotation marks omitted) (emphasis added). Courts have therefore "recognized that the freedom of association protects organizational interaction . . . with other organizations[.]" *In re GlaxoSmithKline*, 732 N.W.2d at 268; *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (finding that compelled disclosure of "communications among various groups" bound by a common political purpose "carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment"). And "courts have long . . . ruled" that documents disclosing the "past political activities of [political-advocacy organizations] and *of those persons with whom they have been affiliated*" are "protected by the First Amendment," and thus "discovery requests . . . that seek such information will not be allowed." *Int'l Action Ctr.*, 207 F.R.D. at 3 (emphasis added) (collecting cases).

This means that the communications between the Coalition and the Houston Area Pastor Council—to the extent they are not the same group—are protected by the First Amendment Privilege because they are associated with each other.[9] Notwithstanding this legal authority, the City of Houston seeks documents and communications between the Nonparty Pastors and their nongovernmental political associates. As before, the Nonparty Pastors easily present a prima-facie showing for protecting the nonpublic documents and communications among their political

[9] If the Coalition and the Houston Area Pastor Council *are* the same group, then the Nonparty Pastors' communications with the Houston Area Pastor Council are protected by the First Amendment Privilege for the same reasons that the Nonparty Pastors' communications with the Plaintiffs are protected. *See supra*, Part II.E.1, 2 (discussing the privilege as it relates to theh Nonparty Pastors' communications with the Plaintiffs).

associates. Forcing them to disclose these nonpublic documents may reasonably deter them from associating with other organizations or political associates to pursue a common political goal (such as advocating for legislation). With fewer of (or, worse yet, in the absence of) these political alliances and associations, the Nonparty Pastors will be less effective in accomplishing their political goals. Compelled disclosure will also likely discourage the Nonparty Pastors from speaking forthrightly about political strategies with their political associates, and it will deter their political associates from communicating openly with them. This too demonstrates the chilling of the Nonparty Pastors' associational and speech rights. Hence, the Nonparty Pastors have once again made their prima-facie showing.

And once again, the City of Houston cannot demonstrate that the nonpublic documents and communications circulated between the Nonparty Pastors and its nongovernmental political associates are "highly relevant to the[ir] claims." *See Perry*, 591 F.3d at 1161. As already explained, the Charter does not make the content of communications between political allies a criteria for determining whether the petitions are valid. Consequently, any such communications are therefore not relevant to any claims or defenses. The Court should therefore conclude that such documents and communications are privileged under the First Amendment.

No part of this Fifteenth Request for Production is reasonably calculated to lead to admissible, relevant evidence. It rather explores subjects and themes that will not further any relevant defense. It is overly broad, unduly burdensome, and harassing. And it is barred by the First Amendment Privilege. It should be quashed.

16. The SIXTEENTH Request – All Communications Reflecting or Relating to the Validity of Signatures on the ERO Petition – Should be Quashed.

The Sixteenth Request for production seeks "[a]ll documents or communications reflecting or relating to the validity of signatures on the Petition or the validity of any Petition

Pages, including but not limited to correspondence, notes, spreadsheets, or other documents regarding: (a) the validity of signatures, (b) the registered-voter status of any signatories, (c) the number of valid signatures, (d) the validity of Petition pages, (e) the validity of Circulator Oaths."

The problem for the City of Houston is that the Charter does not require the proponents of referendum petitions to validate and verify their own petitions. Rather, it gives that authority to the City Secretary. As a result, the preliminary count that the Coalition made, if any, of petition signatures is not one of the criteria the Charter specifies for certifying referendum petitions. Nor is the preliminary count the Coalition made, if any, of how many registered voters signed the ERO Petition, or which pages or circulator oaths were valid. Such preliminary judgments by the proponents of the ERO Petition are only preliminary speculations based on their unofficial counts. The proponents of petitions are not authorized to determine these things; only the City Secretary is.

Further, the request for production of information relating to the registered voter status of those who signed the petition is barred by Civil Procedure Rule 192.4(a), which provides that discovery should not be allowed when it is "obtainable from some other source that is more convenient, less burdensome, or less expensive[.]" Tex. R. Civ. P. 192.4(a). The City of Houston maintains the official list of registered voters. It already has the information it seeks.

Because this request is thus not reasonably calculated to lead to the discovery of admissible evidence and should be quashed.

17. The SEVENTEENTH Request – Updated Resume – Should be Quashed.

The Seventeenth Request for Production seeks "[y]our updated résumé or curriculum vitae." But the Nonparty Pastors' resumes are not one of the criteria the Charter specifies for

certifying referendum petitions. Neither the City Secretary nor any other official is directed by the Charter to examine the resumes of petition proponents. This request is thus not reasonably calculated to lead to the discovery of admissible evidence and should be quashed.

IV. Conclusion

For the foregoing reasons, this Court should grant the Nonparty Pastors' Motion to Quash. If, however, the Court determines that the City of Houston's discovery requests should not be quashed in their entirety, the Court should grant a modification of the discovery requests that clarifies that they do not include (or a protective order declaring that the Nonparty Pastors need not produce) the requested documents that are not reasonably calculated to lead to the discovery of admissible evidence and the requested documents protected by the First Amendment privilege, the deliberative-process privilege, the attorney-client privilege, and the work-product doctrine.

Respectfully submitted this the 9th day of October, 2014.

By:/s/ Kevin Theriot

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached document was served via email on the 13th day of October, 2014 to the following attorneys.

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