



Houston told pastors to hand over their sermons for an investigation. Is that legal?

By [Brandon Ambrosino](#)

October 16, 2014

Five pastors from Houston recently had their sermons subpoenaed for an investigation by the city. Many religious conservatives are angry at this move; a headline on Breitbart [proclaimed](#): "Religious liberty under attack."

What actually happened, and why does it matter?

1) So what's going on in Houston?

[Earlier this year](#), Houston's City Council passed the [Houston Equal Rights Ordinance](#) (HERO), which granted equal rights protections to LGBT people. The law actually provides protection against many forms of discrimination, including on the basis of sex or race, but the majority of media attention has focused on HERO's protections of LGBT people — which might have something to do with the fact that it was signed by Annise Parker, Houston's first openly gay mayor.

Religious leaders who opposed the ordinance wanted to include a ballot measure for HERO's repeal in November. In order for that to happen, HERO's opponents needed to collect over 17,000 signatures.

According to the [Chronicle](#) (paywall), they collected "well more than the minimum number of signatures." In fact, they collected over 50,000.

These signatures were then taken to the city, but ultimately, "the Houston City Attorney — appointed by the Mayor — deemed many of the 50,000 signatures invalid," according to Josh Blackman, [Assistant Professor of Law](#) at the South Texas College of Law specializing in constitutional law.

The groups who collected the signatures then [sued the city](#), which is when things got messy. As [Media Matters for America](#) explains it, "the lawsuit claims that the City Attorney 'wrongly determined that they had not gathered enough valid signatures' to qualify for a vote to repeal HERO."

In response to the lawsuit, the city issued subpoenas against five pastors in the Houston area, requiring that they 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." Officials want to find out if and how pastors might have instructed opponents to collect signatures. As *New York Magazine's* [Kate Zavadski](#) says, "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."

But the subpoena looks, to some, like an effort to intimidate religious groups as reprisal for their opposition to the HERO ordinance. At Fox News, Todd Starnes [wrote](#), "I predicted that the government would one day try to silence American pastors. I warned that under the guise of 'tolerance and diversity' elected officials would attempt to deconstruct religious liberty. Sadly, that day arrived sooner than even I expected."

2) Was the subpoena legal?

City attorney David Feltman argued that city officials were "entitled" to being privy to church conversations that had to do with HERO. "It's relevant to know what representations and instructions were given regarding these petitions," he told [KTRH News](#), a local Houston radio station.

At the [Washington Post](#), UCLA law professor Eugene Volokh said he didn't think "there's a First Amendment bar to subpoenaing the text (or video or audio recordings) of sermons, if they are sufficiently relevant to a case or an investigation." The question, though, is whether or not the subpoenaed sermons *were* in fact sufficiently relevant to this investigation. Says Volokh, "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."

In other words, it's hard to imagine that every word that these five pastors have written or prepared about the aforementioned subjects have direct bearing on the question of the validity of the 50,000 collected signatures.

But that doesn't necessarily mean the subpoena was illegal, says Volokh, who also notes it's legal for courts to subpoena private newsroom conversations between journalists. Volokh does, however, think the subpoenas seem "vastly overbroad." He also thinks special care should have been taken in making the language as precise as possible, particularly because the texts being sought were religious in nature.

3) What has the mayor said about the subpoena?

Before we get into Parker's response, it's important to note that she says the subpoenas weren't her doing. In fact, reports [New York Magazine](#), Parker says she didn't even hear about them until October 14, which is when basically the entire country heard about them. This is an important

point, notes New York, because it pushes against the "lesbians are coming to get your religious freedom!" narrative.

At first, Parker seemed to agree with the subpoena and took to Twitter to justify it.

However, she said she agreed the language of the subpoena was "overly broad," and during a press conference, appeared to distance herself from it, as the Chronicle reports. She also made it clear that she thinks her opponents were deliberately misinterpreting the subpoena.

According to Parker, "The goal [of the subpoenas was] 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?'"

4) What has the response been like to the subpoena?

Steve Riggle, the senior pastor of Grace Community Church, [told](#) Fox News, "This is an attempt to chill pastors from speaking to the cultural issues of the day. The mayor would like to silence our voice. She's a bully."

On October 13, Alliance Defending Freedom filed a [motion](#) to quash the subpoenas.

Greg Abbott, Attorney General of Texas, released a [statement](#) calling the subpoena "a direct assault on the religious liberty guaranteed by the First Amendment. The people of Houston and their religious leaders must be absolutely secure in the knowledge that their religious affairs are beyond the reach of the government."

Over at [PJ Tatler](#), Bryan Preston points out that many of the sermons the city is subpoenaing are readily available online. ([Here](#) is one such archive.) With this in mind, then, Preston concludes that there's something else going on:

These subpoenas appear to have several purposes outside the court case, then - to call out and intimidate the pastors, and to fish for information from within and among the church staffs. Complying with the subpoenas may also cost money and tie up church staff who will be tasked with gathering up the materials demanded, rather than attend to their churches' ministries.

Walter Olson, in a [blog](#) published by the Cato Institute, called the subpoenas a "fishing expedition," saying that he hoped the city would be "shamed" into calling the entire thing off. However, he said he finds it "fascinating that so much of the coverage in the conservative press downplays or omits the fact of the ongoing litigation ...thus leaving many readers with the impression that the city is using police or administrative powers to demand the information, which would pose an entirely different set of challenges for public liberty."

5) So what happens now?

Parker has already made it clear that the subpoenas are too broad, so we have to wait and see if and how they are reworded or rescinded.

Ed Whelan, president of the Ethics and Public Policy Center, a conservative think tank, told me in an email that he believes "the subpoenas should be rescinded in their entirety," adding that "it's farfetched that they have any bearing on any genuine legal issue in dispute in the case."

As of this writing, attempts to reach either Parker or Feldman have been unsuccessful.