

CAUSE NO. 23DCV343036

GROUND GAME TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	DISTRICT COURT
	§	146th
DAVID MITCHELL, in his official	§	JUDICIAL DISTRICT
capacity as City Manager of the	§	
City of Harker Heights; and JULIE	§	BELL COUNTY, TEXAS
HELSHAM, in her official capacity	§	
as City Secretary of the City of	§	
Harker Heights,	§	
	§	
Defendants,	§	
	§	

ORIGINAL PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

TO THE HONORABLE DISTRICT COURT OF BELL COUNTY:

Ground Game Texas hereby files this Original Petition for Declaratory and Injunctive Relief against defendants David Mitchell, in his official capacity as City Manager of the City of Harker Heights, and Julie Helsham, in her official capacity as City Secretary of Harker Heights (together, “Defendants”), based on their refusal to add a voter-initiated policy to the City’s Code of Ordinances.

I. INTRODUCTION

1. This case concerns the refusal by Harker Heights officials to recognize the right of Harker Heights voters to adopt policy via initiative and referendum. On two separate occasions, city voters took action to implement a policy to reform marijuana enforcement practices: first, via initiative election in November 2022, and second, via a successful referendum after the City Council voted to repeal the initiated policy. On both occasions, despite clear, mandatory provisions of the Harker Heights City Charter, the City Secretary refused to add the marijuana reform policy to the City’s Code of Ordinances. Plaintiff Ground Game Texas, a nonprofit advocacy organization that led the initiative and referendum efforts, seeks declaratory and injunctive relief to implement the will of the voters.

II. JURISDICTION AND VENUE

2. Texas courts have jurisdiction to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” TEX. CIV. PRAC. & REM. CODE § 37.003(a). Lawsuits against governmental entities are permitted in Texas courts when a pleading alleges an *ultra vires* claim against state officials who fail to perform a purely ministerial act. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 & n.6 (Tex. 2009). When governmental officers are sued for allegedly *ultra vires* acts (i.e., acts that exceed the bounds of their granted authority or that conflict with the law), governmental immunity does not apply from the outset of the lawsuit. *Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154, 158 n.1 (Tex. 2016).

3. This court has jurisdiction to resolve the subject matter of this controversy pursuant to Texas Civil Practice and Remedies Code § 37.003.

4. Venue is proper in this Court pursuant to Texas Civil Practice and Remedies Code Sections 15.002(a) and 65.023(a).

III. PARTIES

5. Plaintiff GROUND GAME TEXAS is a nonprofit advocacy organization headquartered in Austin, Texas. Its mission is to advance democracy and social justice through local issue advocacy campaigns. In pursuit of this mission, Ground Game drafted a policy to reform marijuana enforcement practices in the City of Harker Heights and led two successful campaigns to win voter approval of the policy — first via an initiative election in November 2022 and second via a referendum following the City Council’s attempt to repeal the policy.

6. Defendant DAVID MITCHELL is the City Manager of the City of Harker Heights. At all times relevant to this controversy, in his official capacity, Mr. Mitchell has served as the chief administrative officer of the City of Harker Heights, with authority over all departments and personnel, including the City Secretary.

7. Defendant JULIE HELSHAM is the City Secretary of the City of Harker Heights. At all times relevant to this controversy, in her official capacity, Ms. Helsham has served as the City Secretary of the City of Harker Heights, with the responsibility for maintaining the City's Code of Ordinances.

IV. DISCOVERY CONTROL PLAN

8. Plaintiff intends to conduct discovery under Level 3 pursuant to Texas Rule of Civil Procedure 190.4.

V. STATEMENT OF FACTS

A. Harker Heights Voters Adopted Proposition A on November 8, 2022

9. The City of Harker Heights maintains a home rule city charter pursuant to the Texas Constitution. *See* TEX. CONST., Art. 11, § 5 (authorizing adoption of home rule charters). Under Harker Heights' charter, city voters may directly legislate via the initiative process. CITY CHARTER OF HARKER HEIGHTS, TEXAS, § 8.01. Under the City's rules, to qualify a proposed ordinance for the ballot, a petition campaign must collect and deliver petition signatures equal in number to at least 25% of the number of votes cast at the last regular municipal election. *Id.*

10. Between March and June 2022, Ground Game Texas led a petition campaign to qualify a marijuana enforcement policy for the municipal ballot. The policy sought to conserve scarce public resources by encouraging city police to conduct marijuana possession arrests in cases involving violent crime or felony drug possession while reducing enforcement of nonviolent, misdemeanor offenses. In support of the petition, Ground Game hired staff and supervised a team of paid and volunteer organizers to collect the signatures needed. The campaign collected over 800 signatures from local residents and the City Secretary certified the measure to be placed on the November 8, 2022 general election ballot as "Proposition A."

11. On November 8, 2022, the voters of Harker Heights adopted Proposition A by a margin of 64% to 36%. 5,225 city residents voted in favor of the marijuana enforcement policy, and 2,937 voted against.

12. The results of the election were canvassed by the Bell County Commissioners Court on November 18, 2022. Thus, under the terms of the City Charter, the proposed marijuana enforcement policy, Proposition A, became the law of Harker Heights. CHARTER, § 8.10. As the Charter reads, “If a majority of the electors voting on a proposed initiative ordinance shall vote in favor thereof, it shall thereupon be an ordinance of the City.” *Id.*

B. Although as of November 18, 2022, Proposition A was the Law of Harker Heights, the City Secretary Did Not Update the City’s Code of Ordinances

13. By the terms of Proposition A, the voters amended Title XIII of the City Code to add a new Chapter 133, entitled “Marijuana Enforcement” and containing subsections 133.01 through 133.07. *See* Ex. A (text of initiated ordinance). The provisions of Chapter 133 initiated a reformed approach to city enforcement of misdemeanor marijuana possession offenses, encouraging the use of citations and arrests only when an officer is investigating a felony drug crime or violent offense.

14. The entire Code of Ordinances of the City of Harker Heights is published online, through a platform maintained by American Legal Publishing.¹

15. The Harker Heights City Code identifies the City Secretary as the official responsible for the management of City records, including City policies. City of HARKER HEIGHTS CODE OF ORDINANCES, §§ 34.04, 34.05. The City Manager maintains ultimate authority over the office of the City Secretary, including hiring and budgetary authority. CHARTER, § 4.02.

¹ Available at https://codelibrary.amlegal.com/codes/harkerhts/latest/harker_tx/0-0-0-28458 (last accessed Nov. 27, 2023).

16. At no time on November 18, 2022, or thereafter, did the City Secretary or her designee update the City Code of Harker Heights to incorporate the new Chapter 133 (“Marijuana Enforcement”).

C. On November 22, 2022, the Harker Heights City Council Adopted an Ordinance to Repeal Chapter 133 from City Code

17. On November 22, 2022, the City Council voted to adopt an ordinance to repeal Chapter 133 of the Harker Heights City Code.

D. Harker Heights Voters Submitted a Successful Referendum Petition to Restore Chapter 133 to the City Code, and the Referendum Was Upheld at the May 6, 2023 Special Election

18. Under Harker Heights’ charter, city voters may overrule a vote of the City Council via the referendum process. CHARTER, § 8.02. Under the City’s rules, to qualify a referendum petition, a campaign must collect and deliver petition signatures equal in number to at least 25% of the number of votes cast at the last regular municipal election. *Id.* The requisite number of referendum petition signatures must be filed with the City Secretary within 20 days of the challenged Council action. *Id.*

19. Following the November 22, 2022, vote by the City Council to repeal Chapter 133, Ground Game Texas led a petition campaign to qualify a referendum. Ground Game hired staff and supervised a team of paid and volunteer organizers to collect the signatures needed. The campaign filed over 400 signatures from area residents with the City Secretary on December 12, 2022, and on December 21, 2022, the City Secretary certified the referendum petition as sufficient.

20. Pursuant to the City Charter, once the City Secretary certified the referendum petition, the City Council’s action to repeal Chapter 133 was no longer effective. CHARTER, § 8.06. As the Charter reads:

When a referendum petition ... has been certified as sufficient by the City Clerk, the ordinance specified in the petition shall not go into effect, or further action thereunder shall be suspended if it shall have gone into effect, until and unless approved by the electors, as hereinafter provided. CHARTER, § 8.06.

21. At no time on December 21, 2022, or thereafter, did the City Secretary update the City’s Code of Ordinances to restore Chapter 133.

22. After the Clerk’s certification, the City Council ordered the referendum to be placed on the May 6, 2023 special election ballot.

23. On May 6, 2023, the voters of Harker Heights affirmed the referendum. 1135 Harker Heights citizens voted against the City Council’s action, and 1134 voted in favor.

24. On May 16, 2023, the Harker Heights City Council canvassed the May 6, 2023 election results.

E. Despite the Referendum Results, the City Secretary Failed to Add Chapter 133 to the Harker Heights Code of Ordinances

25. At no time on May 16, 2023, or thereafter, did the City Secretary update the City Code of Harker Heights to restore Chapter 133 (“Marijuana Enforcement”).

26. On October 2, 2023, the general counsel of Ground Game Texas wrote to City Manager Mitchell and City Secretary Helsham, advising them of the City’s ministerial duty to update the City’s Code of Ordinances in accord with the successful referendum. Ground Game Texas asked the City to provide proof of its action to update the Code of Ordinances no later than October 27, 2023. Neither the City Manager nor the City Secretary responded to Ground Game’s letter.

VI. CAUSE OF ACTION

A. First Cause of Action — Declaratory Judgment: The City Secretary Violated Section 8.10 of the Harker Heights City Charter by Failing to Add Chapter 133 to the Harker Heights Code of Ordinances after the November 2022 General Election.

27. Ground Game Texas seeks a declaratory judgment that the City Secretary failed to perform her mandatory duty to add Chapter 133 to the Harker Heights Code of Ordinances following the November 2022 election by Harker Heights voters to adopt Proposition A.

28. Pursuant to the Harker Heights City Charter, Section 8.10, “If a majority of the electors voting on a proposed initiative ordinance shall vote in favor thereof, it shall thereupon be an ordinance of the City.” CHARTER, § 8.10. The results of the election were canvassed and became legally operative on November 18, 2022. By failing to update the City Code to reflect the successful initiative election, the City Secretary failed to perform a ministerial duty, in violation of the City Charter.

B. Second Cause of Action — Declaratory Judgment: The City Secretary Violated Section 8.06 of the Harker Heights City Charter by Failing to Restore Chapter 133 to the Harker Heights Code of Ordinances after the Certification of the Referendum Petition.

29. Ground Game Texas seeks a declaratory judgment that the City Secretary failed to perform her mandatory duty to restore Chapter 133 to the Harker Heights Code of Ordinances following the December 12, 2022, certification of the referendum petition.

30. Pursuant to the Harker Heights City Charter, Section 8.06, once the City Secretary certified the referendum petition on December 12, 2022, the City Council’s action to repeal Chapter 133 was no longer effective. CHARTER, § 8.06. As the Charter reads:

When a referendum petition ... has been certified as sufficient by the City Clerk, the ordinance specified in the petition shall not go into effect, or further action thereunder shall be suspended if it shall have gone into effect, until and unless approved by the electors, as hereinafter provided. CHARTER, § 8.06.

As of December 12, 2022, Chapter 133 again became the law of Harker Heights. By failing to add Chapter 133 to the City Code, the City Secretary failed to perform a ministerial duty, in violation of the City Charter.

VII. REQUEST FOR TEMPORARY INJUNCTIVE RELIEF

31. Ground Game Texas requests that the Court enter temporary injunctive relief to mandate that the City Manager and City Secretary perform the ministerial duty of adding the initiated ordinance, voted on by Harker Heights citizens as “Proposition A” and composed of a policy labeled as “Chapter 133 (Marijuana Enforcement),” to the City of Harker Heights Code of Ordinances.

32. To obtain temporary injunctive relief, a plaintiff must have a cause of action, show a probable right to relief, and demonstrate that it is faced with imminent irreparable harm. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A plaintiff has a probable right to relief if they have a cause of action for which relief may be granted. See *Universal Health Services, Inc. v. Thompson*, 24 S.W.3d 570, 577–78 (Tex. App.—Austin 2008, no pet.). A plaintiff alleging *ultra vires* conduct satisfies the irreparable-injury requirement by showing likely success on the merits. *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020).

33. In a similar case involving a city’s failure to respect the referendum process, the Texas Supreme Court declared that “the power of referendum is the exercise by the people of a power reserved to them, and this power should be protected.” *In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015). As the Court declared, “city officials must perform their ministerial duties.” *Id.* “[W]hen officials refuse to do so, and when there is no adequate remedy by appeal, mandamus may issue.” *Id.*

34. Here, Ground Game Texas will probably prevail on the merits because the City Charter imposed on the City Secretary a ministerial duty to add Chapter 133 to the City’s Code of Ordinances on two separate occasions: first, following the canvass of the original Proposition A initiative election results on November 18, 2022, and second following the certification of the referendum petition on December 12, 2022.

35. A showing of likely success on the merits is sufficient to satisfy the irreparable injury requirement for a temporary injunction when the merits involve *ultra vires* conduct of a state official. Additionally, Ground Game Texas will continue to suffer irreparable injury for each day that Defendants refuse to honor the results of the initiative election and subsequent referendum.

36. Granting Ground Game Texas’s requested injunctive relief will not result in any harm to the public welfare or to the City of Harker Heights.

37. Ground Game Texas agrees to post security in the amount and by the means to be determined by the Court. Because temporary injunctive relief will not present any injury to Defendant or the public, Ground Game requests the Court set the bond for a nominal amount not to exceed \$200.

VIII. PERMANENT INJUNCTION

38. After a full trial on the permits, Ground Game Texas requests the Court enter a permanent injunction mandating that City Manager Mitchell and City Secretary Helsham perform the ministerial duty of adding the initiated ordinance, voted on by Harker Heights citizens as “Proposition A” and composed of a policy labeled as “Chapter 133 (Marijuana Enforcement),” to the City of Harker Heights Code of Ordinances.

IX. CONCLUSION AND REQUESTS FOR RELIEF

For the foregoing reasons, Ground Game Texas respectfully requests that Defendants be cited to appear and answer and that the Court take the following actions and grant the following relief:

- A. After notice and hearing on Ground Game Texas’s Request for Temporary Injunction, issue a temporary injunction pursuant to Rule 681 of the Texas Rules of Civil Procedure, temporarily requiring Defendants to perform the above-described ministerial actions;
- B. After a trial on the merits:
 1. Enter a declaratory judgment as described above;
 2. Grant a permanent injunction requiring Defendants to perform the above-described ministerial actions;
 3. Award Ground Game Texas court costs and an amount that reflects the reasonable and necessary attorneys’ fees incurred by Ground Game Texas in an amount the Court finds to be equitable and just to be paid by Defendants to Ground Game Texas; and

4. Any other or further relief, in law or equity, that the Court determines that Ground Game Texas is entitled to receive.

Respectfully submitted,

By: /s/ Michael Siegel

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GROUND GAME TEXAS

EXHIBIT A — Ordinance Text

BE IT ORDAINED BY THE VOTERS OF THE CITY OF HARKER HEIGHTS:

Title XIII, Chapter 133 of the City Code is hereby created, to be titled “Marijuana Enforcement” and to read as follows:

Chapter 133. - MARIJUANA ENFORCEMENT

Section 133.01. - Ending citations and arrests for misdemeanor possession of marijuana.

(a) Harker Heights police officers shall not issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana offenses, except in the limited circumstances described in (b).

(b) The only circumstances in which Harker Heights police officers are permitted to issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana are when such citations or arrests are part of (1) the investigation of a felony level narcotics case that has been designated as a high priority investigation by a Harker Heights police commander, assistant chief of police, or chief of police; and/or (2) the investigation of a violent felony.

(c) In every instance other than those described in (b), if a Harker Heights police officer has probable cause to believe that a substance is marijuana, an officer may seize the marijuana. If the officer seizes the marijuana, they must write a detailed report and release the individual if possession of marijuana is the sole charge.

(d) Harker Heights police officers shall not issue any charge for possession of marijuana unless it meets at least one of the factors described in (b).

Section 133.02. - Citations for possession of drug residue or drug paraphernalia shall not be issued in lieu of a possession of marijuana charge.

(a) A class C misdemeanor citation for possession of drug residue or drug paraphernalia shall not be issued in lieu of a possession of marijuana charge.

Section 133.03. - Prohibition against using City funds or personnel to conduct THC concentration testing.

(a) No City funds or personnel shall be used to request, conduct, or obtain tetrahydrocannabinol (THC) testing of any cannabis-related substance to determine whether the substance meets the legal definition of marijuana under state law, except in the limited circumstances of a police investigation pursuant to Section 133.01(b).

(b) This prohibition shall not limit the ability of Harker Heights police to conduct toxicology testing to ensure public safety, nor shall it limit THC testing for the purpose of any violent felony charge.

Section 133.04. - Prohibition against City police using the odor of marijuana or hemp as probable cause for search or seizure.

(a) Harker Heights police shall not consider the odor of marijuana or hemp to constitute probable cause for any search or seizure, except in the limited circumstances of a police investigation pursuant to Section 133.01(b).

Section 133.05. - Training and policy updates; community involvement.

(a) The City Manager and Chief of Police shall ensure that Harker Heights police officers receive adequate training concerning each of the provisions of this ordinance.

(b) The City Manager shall work with the Harker Heights Police Chief and other relevant stakeholders identified in (c) to update City policies and internal operating procedures in accordance with this ordinance. Actions that may be necessary include but are not limited to: updating the Harker Heights Police Department General Manual; updating the training bulletin; training officers; and updating internal databases and systems.

(c) The City Manager shall arrange regular meetings to discuss the development of policies, procedures, and practices related to this ordinance, which shall include community stakeholders including: the Police Chief's Advisory Panel; other interested stakeholders and community organizations; individuals directly impacted by arrests within the City; immigrant communities; and communities of color. These meetings shall be open to public participation, have minutes and agendas publicly accessible, and have audio and video recordings uploaded to the City's website, if feasible.

Section 133.06. - Discipline.

(a) Any violation of this chapter may subject a Harker Heights police officer to discipline as provided by the Texas Local Government Code or as provided in City policy.

Section 133.07. – Reporting.

(a) Within three months of the adoption of this ordinance, and annually thereafter, the City Manager or their designee shall present to the City Council, at a public meeting subject to the Texas Open Meetings Act, a report concerning the City's implementation of this ordinance.