

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

HILDA GONZALEZ GARZA and
ROSBELL BARRERA

Plaintiffs,

v.

STARR COUNTY, *et al.*,

Defendants.

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CIVIL ACTION NO. 7:18-cv-00046

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY
APPLICATION FOR TEMPORARY RESTRAINING ORDER**

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY
APPLICATION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Plaintiffs Hilda Gonzalez Garza and Rosbell “Ross” Barrera respectfully move for a temporary restraining order enjoining Defendants from implementing and enforcing the order adopted by the Starr County Commissioners’ Court on January 8, 2018 banning electioneering on all Starr County property (“Order” or “electioneering ban”).

Plaintiffs are politically-active members of the Republican and Democratic parties in Starr County and plan to engage in electioneering activities now banned by the County. The Order has been implemented by Defendants and governs all voting periods in the current election cycle, including early voting for the March 6, 2018 primaries which began on February 20, 2018.

Plaintiffs make this application on the ground that the Order violates the First Amendment to the U.S. Constitution and the Texas Election Code. Temporary injunctive relief is warranted because Plaintiffs are likely to prevail on the merits of their constitutional and state law claims:

- First Amendment Claim: The Starr County electioneering ban is an unconstitutional content-based restriction on protected political speech. It applies to all county property, including numerous public fora not used as polling places. The ban is unconstitutional because it is overbroad, not narrowly tailored to serve a compelling interest, and because a substantial number of its applications are unconstitutional judged in relation to the Order’s legitimate sweep.
- Texas Election Code Claim: The ban violates Section 61.003 of the Texas Election Code, which prohibits electioneering within 100 feet of the door of a polling place and requires jurisdictions like Starr County to permit electioneering beyond the 100 foot zone subject to

reasonable time, place and manner regulations. Starr County's electioneering ban also conflicts with Section 61.003 of the Texas Election Code by imposing different criminal penalties for electioneering within the 100-foot zone.

- Ultra Vires Claim: The ban constitutes an ultra vires activity in violation of the Texas Election Code. Defendants acted without legal authority by adopting and enforcing the electioneering ban.

There is no serious dispute regarding the merits of the case. The Texas Secretary of State's Office stated publicly that the Starr County electioneering ban is a violation of state law. Not only are Plaintiffs likely to prevail on the merits of these claims, but they also have no adequate remedy at law and suffer the immediate threat of irreparable harm, including criminal prosecution under Starr County's electioneering Order, if Defendants are not enjoined from enforcing the ban. Despite the Secretary of State's warnings regarding their illegal conduct, Defendants have implemented and enforced their electioneering ban and stated that they will only stop if ordered by a court. It is well-established that a constitutional violation constitutes irreparable injury sufficient to support injunctive relief. The electioneering ban on its face, as well as its current enforcement, as demonstrated by the attached declarations and exhibits, evidence the likelihood of irreparable injury.

Plaintiffs' injuries outweigh any purported injury Defendants might claim, because Plaintiffs simply ask the Court to maintain the status quo pending resolution of this case. Defendants cannot reasonably claim any injury, because they have no right to enforce an unconstitutional law.

Finally, granting Plaintiffs' request for a preliminary injunction would serve the public interest. Enjoining the violation of constitutional rights is always in the public interest, as is enjoining enforcement of a local order that violates state law.

For all these reasons, Plaintiffs respectfully request that the Court grant their emergency application for a temporary restraining order and schedule a preliminary injunction hearing as soon as practicable.

FACTUAL BACKGROUND

I. Defendants Adopted an Unlawful Order

On January 8, 2018, the Starr County Commissioners Court adopted an Order banning electioneering on *all* county property during any voting period. *See* Exh. A. Specifically, the Order states that the County “desires to regulate the time, place and manner of electioneering by prohibiting electioneering during any ‘voting period’ . . . in or on property owned or under the care, custody and control of the County of Starr.” *Id.* at 2. A violation of the ban constitutes criminal trespass, a Class B misdemeanor punishable by a fine of up to \$2,000.00 and up to six months of jail time. *Id.* at 3.

The Order references and attaches, as “further” information, maps of several county properties and surrounding areas: El Cenizo [Starr County Precinct Office on FM 1430]; Starr County Courthouse; La Rosita Commissioner Precinct #1; Starr County Courthouse Annex; and La Victoria Community Center near Zarate Park. *Id.* at 2, 4-13. The maps include red markings around the county properties. *Id.* at 4-13. The Order indicates that the maps “further show[]” the County’s intent to “keep sidewalks, driveways, roads and similar areas clear for the egress and ingress of emergency and law enforcement vehicles, pedestrians and motor vehicle traffic in and around county properties” *Id.* at 2, 4-13.

The Order's ban on electioneering on all county property encompasses property that is not used for polling places. For example, the Order references and includes a map of the Starr County Courthouse Annex, which is not a polling place in the upcoming Primary Election. *See* Exh. C at 13, Attach. 1. Similarly, La Victoria Community Center-Zarate Park, which the Order references, is a designated polling place on Primary Election Day, but not during early voting. *Id.*

Even where the County's electioneering ban applies to a polling place, the Order's electioneering ban varies in geographic scope from one polling place to another. *See* Exh. A at 4-13. For example, the distance from the outside door of the polling place to the edge of county property is approximately 153 feet at the County Courthouse, 468 feet at La Victoria Community Center-Zarate Park, 155 feet at La Rosita Commissioner Precinct #1, and 232 feet at the El Cenizo polling place. *See* Exh. C at 12.

The Order specifies that the ban applies “during any ‘voting period’ as defined by the Texas Election Code.” Exh. A at 1. The Code defines “voting period” as “the period beginning when the polls open for voting and ending when the polls close or the last voter has voted, whichever is later.” TEX. ELEC. CODE ANN. § 61.003(b)(2) (West 2017). Although the Order does not define “electioneering,” the Code defines “electioneering” as “the posting, use, or distribution of political signs or literature.” *Id.* at § 61.003(b)(1). Texas courts have interpreted “electioneering” also to include verbal advocacy for a particular candidate or measure. *See Tafolla v. State*, 161 S.W. 1091, 1093 (1913); *Garvey v. Cain*, 197 S.W. 765, 770 (Tex. Civ. App. 1917).

The Order directs Defendant Sheriff Fuentes to enforce the ban and orders the Starr County Judge's Office to “place proper notice of no Electioneering on County Property to inform

the general public of the restriction or prohibition.” Exh. A at 3. Starr County has posted the ban on its official website.¹ The ban is in effect and will govern the upcoming election cycle, including early voting for the 2018 primaries, from February 20, 2018 to March 2, 2018, and Election Day on March 6, 2018.

II. Plaintiffs Have a Long History of Electioneering and Civic Engagement in Starr County

Plaintiff Hilda Gonzalez Garza is a former Starr County assistant district attorney currently running for Starr County Precinct Chair, Precinct No. 10, in the Democratic Party in the upcoming Texas primaries, which began on February 20, 2018. Exh. C at 2, 4. Plaintiff Rosbell Barrera is the chair of the Starr County Republican Party. Exh. D at 2. For years, Plaintiffs have electioneered and advocated for issues, political parties, and candidates of their choice in areas surrounding county-owned or operated polling places, including parking lots and sidewalks, during the voting period. *See* Exh. C at 3; Exh. D at 4-5. For example, Plaintiffs regularly wear t-shirts supporting their candidates of choice, put bumper stickers on their cars, hold up political signs, distribute campaign brochures, provide information to voters about candidates, and answer any questions from voters and neighbors about those candidates. *See* Exh. C at 4-5, 11; Exh. D at 4-5, 12. They have peacefully engaged in these electioneering activities for years and regard electioneering as part of their civic duties. *See* Exh. C at 3-6, 25; Exh. D at 12-14.

In the many years Plaintiffs have engaged in these kinds of political activities on county property and near the polls, Plaintiffs have never observed or been made aware that

¹ *See* ORDER OF COMMISSIONERS COURT OF STARR COUNTY, TEXAS SETTING POLICY FOR PROHIBITION ON ELECTIONEERING IN OR ON PROPERTY OWNED OR UNDER THE CARE, CUSTODY OR CONTROL OF THE COUNTY OF STARR, <http://tools.cira.state.tx.us/users/0144/docs/OrderProhibitionElectioneering.pdf> (last visited Feb. 19, 2018).

electioneering has caused disruptions to governmental operations occurring on county property, there have been any health or safety issues of residents and pedestrians, or there have been blockage of emergency and law enforcement vehicles, pedestrians, or motor vehicle traffic. *See* Exh. C at 25; Exh. D at 13-14. Similarly, Plaintiffs have never observed or been made aware of intimidation or harassment of voters on county property during the voting period. *Id.*

Quite the opposite, Plaintiffs have observed that electioneering activities can help voters, including Plaintiffs, make informed decisions on how to cast a vote and provide opportunities for voters to have face-to-face conversations with political candidates and their campaigns. *See* Exh. C at 25; Exh. D at 5.

As they have done for many years, Plaintiffs intend to electioneer in the upcoming March primary election on county-owned property, including near polling places as permitted by Texas law. *See* Exh. C at 7; Exh. D at 7-8. Early voting for the primary elections in Texas began on February 20, 2018 and ends on March 2, 2018. *See Important 2018 Election Dates*, ELECTIONS AND VOTER INFORMATION, TEXAS SECRETARY OF STATE OFFICIAL WEBSITE, <https://www.sos.state.tx.us/elections/voter/2018-important-election-dates.shtml> (last visited Feb. 19, 2018). The election cycle continues through the general election ending on November 6, 2018. *Id.*

III. Texas Electioneering Law Prohibits Defendants' Conduct

The Texas Election Code bans electioneering within 100 feet of an outside door of a polling place during the voting period, and *prohibits* Starr County from banning electioneering beyond the 100-foot marker. TEX. ELEC. CODE ANN. § 61.003(a)-(a-1). Specifically, the Code provides that a local entity “that owns or controls a public building being used as a polling place *may not, at any time during the voting period, prohibit electioneering on the building’s premises*

outside of the area [within 100 feet of an outside door of a polling place], but may enact reasonable regulations concerning the time, place, and manner of electioneering.” *Id.* § 61.003(a-1) (emphasis added).²

IV. Defendants Ignored Citizen Concerns and Failed to Revise the Policy

Plaintiffs fear that the Order could reach their regular electioneering activities. *See* Exh. C at 7-9; Exh. D at 6-7. At the January 8, 2018 Commissioners’ Court meeting, Plaintiff Hilda Gonzalez Garza spoke up to raise a concern to Defendants that the Order violated the Texas Election Code, but Defendant County Judge Vera refused to recognize her for public comment. *See* Exh. C at 11.

Fearing that her regular electioneering activities are covered by the ban, on January 26, 2018, Plaintiff Hilda Gonzalez Garza sent a letter to Defendant District Attorney Escobar, and copied all Defendants who sit on the Commissioners Court, stating her intent to engage in

² On October 6, 2017, the Texas Secretary of State issued an election advisory that discussed Section 61.003(a-1) of the Texas Election Code. *See* Texas Secretary of State Election Advisory No. 2017-14, *available at* <https://www.sos.state.tx.us/elections/laws/advisory2017-14.shtml> (last visited Feb. 19, 2018). The advisory states in relevant part:

An entity that owns or controls a public building being used as a polling place may not prohibit electioneering outside of the 100-foot distance marker. However, the entity may enact reasonable regulations in regards to the time, place, and manner of electioneering. Tex. Elec. Code § 61.003(a-1). Only a court of law can determine what is reasonable in terms of time, place and manner. However, an example of a reasonable regulation may include prohibiting electioneering on sidewalks or driveways to keep them clear for pedestrians and traffic. Finally, we recommend that all regulations be content neutral. If you have questions, we suggest that you contact your attorney.

Defendants cited to this advisory opinion as a basis for the Order’s flat prohibition on electioneering, noting that the Order is a “time, place and manner” restriction. *See* Exh. A at 1. In addition, Defendant District Attorney Omar Escobar has publicly stated that the Order comports with the advisory’s example of a reasonable regulation on sidewalks and driveways. *See* Exh. D, Attach. 2. However, as more fully set forth in this brief, and as confirmed by the Legal Director of the Texas Secretary of State’s Elections Division, the Order is not a reasonable time, place and manner regulation.

electioneering beyond the 100-foot marker and seeking clarification on the scope of the ban. *See* Exh. C at 14, Attach. 2. Ms. Garza never received a response from Defendants. *Id.*

On February 1, 2018, Plaintiff Rosbell Barrera similarly sent a letter to Defendant District Attorney Escobar, copying all Defendants who sit on the Commissioners Court, stating he intends to electioneer on behalf of Republican candidates on county property covered by the ban beyond the 100-foot marker and seeking clarification on whether his intended electioneering efforts are permissible under the Order. Exh. D. at 8, Attach. 1. Defendants likewise did not respond to Plaintiff Rosbell Barrera's letter. *Id.* at 9.

At a February 12, 2018 meeting, the Commissioners' Court revisited the electioneering ban. *See* Videotape: February 12, 2018 Starr County Commissioners' Court Meeting (on file with author) at 1:14:00-19:30, *available at* <https://www.youtube.com/watch?v=C1eE5ITQeaQt> (last visited Feb. 19, 2018). At the meeting, Defendant Commissioner Garza asked Defendant County Attorney Canales to clarify the scope of the ban. *Id.* Defendant Canales responded: "There cannot be electioneering. There cannot be loitering. There cannot be essentially 'pressing the flesh' on county property. There cannot be intimidation of voters. You cannot have barbeque pits in parking lots. Signage can't be on vehicles in the parking areas." *Id.* at 1:15:00-15:38. Defendant Canales also reiterated at that meeting that the Sheriff's office will enforce the ban. *Id.* at 1:16:08-16:18.

The Commissioners' Court did not allow for public comment at this meeting either. Plaintiff Hilda Gonzalez Garza was ready to express her concerns and get answers to the questions in her letter, but Defendant County Judge Vera, once again, refused to allow her to speak. Exh. C at 16. Defendants adjourned the meeting without taking formal action to revise or rescind the Order. *See* Videotape: February 12, 2018 Starr County Commissioners' Court

Meeting (on file with author) at 1:19:28-19:30, <https://www.youtube.com/watch?v=C1eE5ITQeaQ> (last visited Feb. 19, 2018). Instead, at the same meeting, the Commissioners' Court adopted a Building Property Use Policy that incorporated the electioneering ban. *See* Exh. B at 6.

V. The Texas Secretary of State's Attorneys Warned Defendants of the Ban's Illegality

Because Defendants failed to provide Plaintiffs with any answers, on February 14, 2018, Ms. Garza called the Legal Director of the Texas Secretary of State's Elections Division, Christina Adkins, to inquire about the legality of the ban.³ Exh. C at 17. Ms. Adkins was unavailable, but Tim Juro, another attorney in that office, told Ms. Garza that the Texas Secretary of State's Office had already informed Starr County Elections Administrator John Lee Rodriguez that the electioneering ban conflicts with the Texas Election Code. *Id.* On February 15, 2018, Ms. Adkins emailed Ms. Garza, stating that the "Code specifically states that any entity that owns or controls a public building that is used as a polling place cannot prohibit electioneering on the premises," and "[t]he resolution from Starr County appears to prohibit electioneering entirely, not just provide regulations as to time, place, and manner of electioneering." *Id.* at 18, Attach. 3. Therefore, Ms. Adkins concluded, "[i]t appears as though [the ban] would be in conflict with 61.003 (a-1) of the code." *Id.*

Similarly, on February 15, 2018, Sam Taylor, the Communications Director at the Texas Secretary of State's Office, was quoted in a local newspaper saying that Starr County's electioneering ban is unlawful under the Texas Election Code. *See* Exh. D at 10, Attach. 2. He stated: "The election code is very clear that they may not ban or prohibit at any time electioneering on the building's premises outside of that 100-foot mark . . . banning

³ The Elections Division of the Texas Secretary of State's Office is responsible for administering the Texas Election Code. *See* Texas Secretary of State: Constitutional Duties, <https://www.sos.state.tx.us/about/duties.shtml> (last visited Feb. 19, 2018).

electioneering outside of that 100-foot [mark] is not in accordance with the [E]lection [C]ode.” *Id.*

In response to these warnings by the Secretary of State’s Office, on February 15, 2018, Defendant District Attorney Escobar maintained that Starr County acted lawfully in passing the ban, explaining that the ban was a reasonable regulation. *See id.* Defendant Escobar also stated: “I really don’t see that anybody’s rights are being violated.” *Id.*

Starr County has enforced its electioneering ban. On February 20, 2018, the first day of early voting for the March 6, 2018 primary election, Starr County Elections Director John Lee Rodriguez directed at least one Starr County employee and at least one Starr County official who had political displays on their vehicles to remove their vehicles from the courthouse parking lot or cover their political displays. Exh. C at 21-22. The vehicles were parked beyond the 100-foot marker. *Id.* Plaintiff Hilda Gonzalez Garza was electioneering in the Starr County Courthouse parking lot at the same time and helped the Starr County official cover up the political displays on his truck pursuant to the order of the Starr County Elections Director. *Id.* at 22.

Plaintiff Hilda Gonzalez Garza has political bumper stickers on her car. *Id.* at 23. After she helped the Starr County official cover up the political displays on his truck, Plaintiff Hilda Gonzalez Garza left the courthouse parking lot because she feared arrest under the electioneering ban as a result of her electioneering activities and having political bumper stickers on her car. *Id.*

LEGAL STANDARD

A court may grant preliminary injunctive relief if the plaintiff shows “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the

public interest.” *Speaks v. Kruse*, 445 F.3d 396, 399–400 (5th Cir. 2006). The elements for relief are the same whether the plaintiff seeks a preliminary injunction or a temporary restraining order. *See Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 707 (S.D. Tex. 2002).

“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Therefore, “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Id.* Plaintiffs do not need to prove their case in full or show entitlement to summary judgement; all that is required is that Plaintiffs present a prima facie case based on the standards provided by the substantive law. *See Janvey v. Alguire*, 647 F.3d 585, 595-96 (5th Cir. 2011).

ARGUMENT

Plaintiffs establish below that: (1) they are likely to prevail on the merits of their claims that the electioneering ban violates the First Amendment to the U.S. Constitution and the Texas Election Code and that Defendants acted ultra vires; (2) they will suffer irreparable harm if an injunction is not granted; (3) their threatened injuries outweigh any alleged injuries to the County; and (4) a preliminary injunction would serve the public interest. For these reasons, Plaintiffs respectfully request that the Court enjoin Defendants from enforcing and implementing the Order.

I. Plaintiffs Have Established a Substantial Likelihood of Success on the Merits

Plaintiffs are likely to prevail on their claims that (1) the Order is unconstitutional because it violates the First Amendment to the U.S. Constitution, (2) the Order violates the Texas Election Code, and (3) Defendants acted ultra vires.

A. The electioneering ban violates the First Amendment to the U.S. Constitution

The electioneering ban violates Plaintiffs' First Amendment rights because the ban is a content-based restriction on protected speech that is not narrowly tailored to serve a compelling government interest. In addition, the ban is unconstitutionally overbroad and therefore facially invalid because a substantial number of its applications are unconstitutional, judged in relation to the policy's legitimate sweep.

Plaintiffs bring their First Amendment claims pursuant to Section 1983. 42 U.S.C. § 1983 (West 2017). To succeed on this claim, Plaintiffs must show (1) a violation of the Constitution or of federal law, and (2) that Defendants committed the violation when acting under color of state law. *Turner v. Lieutenant Driver*, 848 F.3d 678, 685 (5th Cir. 2017). It is well-established that local governing bodies such as Starr County and its officials can be sued under Section 1983 for declaratory and injunctive relief. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). Defendants cannot dispute that the electioneering ban is an official policy of Starr County. Defendants acted and continue to act under color of state law by enacting and enforcing the unconstitutional ban. Therefore, Plaintiffs' claims are proper under Section 1983.

1. The ban is a content-based restriction of speech

Defendants' electioneering ban is a content-based restriction of speech and, therefore, is presumptively unconstitutional. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The Order prohibits "electioneering," *i.e.*, only political speech, in property owned or operated by the County. *See* Exh. A at 1-2. The Texas Election Code defines "electioneering" as "the posting, use, or distribution of political signs or literature." TEX. ELEC. CODE ANN. § 61.003(b)(1). Texas courts have interpreted electioneering to include verbal advocacy for a

particular candidate or measure. *See Tafolla*, 161 S.W. at 1093 (in case where the defendant was visiting polling places and loudly supporting his preferred candidate, court explained: “Every citizen has a right to electioneer for his side of the question or for any candidate he sees proper to indorse or desires to see elected[.]”); *Garvey*, 197 S.W. at 770 (“[W]e know of no rule of law that would prevent women and children, or any other citizens, as to that matter, when they maintain themselves at a legal distance from the polls, comporting themselves in a lawful manner, to electioneer and insist that the voter cast his vote in accordance with their wishes.”). Because the electioneering ban applies only to political speech, it is a content-based restriction speech. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *see also Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality) (electioneering law is a content-based restriction where it “does not reach other categories of speech, such as commercial solicitation, distribution, and display.”). Indeed, “[p]olitical speech regarding a public election lies at the core of matters of public concern protected by the First Amendment.” *Wiggins v. Lowndes Cty., Miss.*, 363 F.3d 387, 390 (5th Cir. 2004).

2. The ban applies to public spaces

In public fora, such as parks, sidewalks, and other public property that the state “has opened for use by the public as a place for expressive activity,” content-based restrictions of speech are constitutional only if they survive strict scrutiny—*i.e.*, they serve a compelling government interest and are narrowly tailored. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (internal quotation marks omitted). The County can also enforce time, place, and manner regulations in public fora, but those regulations must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.* at 45.

In nonpublic fora, on the other hand, a restriction on speech is permissible so long as it is viewpoint neutral and “reasonable in light of the purpose which the forum at issue serves.” *Id.* at 46, 49. A public forum does not become a nonpublic forum simply because the two are adjacent. *See United States v. Grace*, 461 U.S. 171, 179, 183-84 (1983) (holding that speech restriction applicable to sidewalk adjacent to the Supreme Court was unconstitutional).

Defendants’ electioneering ban is not limited to polling places. The electioneering ban extends to *all* county property, including courthouses, tax offices, election offices, libraries, parks, and the seating areas, walkways, parking lots and open areas adjacent to these buildings. *See* Exh. A at 2 (regulating electioneering “in or on property owned or under the care, custody and control of the County of Starr”). Because it regulates public fora, the County’s electioneering ban is presumptively unconstitutional and it can survive only if it withstands strict scrutiny.⁴

3. The ban does not serve a compelling state interest

The County cannot show a compelling interest justifying its sweeping regulation. In the Order, the Commissioners’ Court offers as its rationale the need to “prevent or minimize disruptions” to governmental operations occurring on county property, “to further protect the health and safety of residents and pedestrians,” and “to keep sidewalks, driveways, roads and similar areas clear for the egress and ingress of emergency and law enforcement vehicles, pedestrians and motor vehicle traffic in and around county properties.” *Id.* at 2.

As an initial matter, the Order mentions no concern for either voters or polling places. Thus, the Order provides no basis to single out political speech for a ban and to permit other

⁴ To the extent Defendants can argue that some of these properties are not public fora, the Order nonetheless fails because the ban is (1) facially unconstitutional under the overbreadth doctrine, as discussed below, and (2) unconstitutional as applied to these fora because it is not a reasonable time, place and manner regulation.

types of speech such as commercial solicitation or outdoor artistic performances on county property. *See F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 365 (1984) (holding that the statute’s “overinclusiveness and underinclusiveness . . . undermines the likelihood of a genuine governmental interest”); *Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n*, 760 F.3d 427, 440 (5th Cir. 2014) (“Such obvious underinclusiveness undermines any argument that [the government] is truly interested in regulating [for that purpose]”).

Second, although the Order prohibits political speech “during any ‘voting period,’” the Order provides no basis to regulate activity on county property that is not connected to voting, such as libraries, the County Courthouse Annex (which houses the Starr County Appraisal District, the Tax Assessor and other county offices) and parks. *See* Exh. C at 13, Attach. 1.

Third, the Order offers no information suggesting that political activities on county property have: caused disruptions to county governmental operations; threatened the health or safety of residents or pedestrians; or blocked emergency and law enforcement vehicles, pedestrians, or motor vehicle traffic. *See* Exh. C at 25; Exh. D at 13-14.

Defendants made cursory allegations of voter intimidation to support the electioneering ban. *See* Videotape: February 12, 2018 Starr County Commissioners’ Court Meeting (on file with author) at 1:15:24-15:27, <https://www.youtube.com/watch?v=C1eE5ITQeaQ> (last visited Feb. 19, 2018). However, in the many years Plaintiffs have engaged in electioneering, they have never observed or been made aware of intimidation or harassment of voters near the polling places in Starr County. *See* Exh. C at 24; Exh. D at 13. To the contrary, electioneering serves the interests of voters, including Plaintiffs, by providing an opportunity to share political views,

interact with and exchange information about candidates, and make informed decisions when casting the ballot. *See* Exh. C at 3-6, 25; Exh. D at 5.

4. The ban is not narrowly tailored

Even assuming that any of the above-mentioned justifications are compelling state interests, the electioneering ban is nevertheless not narrowly tailored to serve those interests. With respect to the geographic scope of the ban, the Order extends to all county property, regardless of whether the property is near the entrance of a polling place or even a hosts a polling place. *See* Exh. A at 2, 4-13. A complete ban on electioneering in all these fora is not reasonably necessary to protect the County's purported interests. *See Grace*, 461 U.S. 171, 182 (holding that statute prohibiting political speech at Supreme Court and adjacent sidewalk was unconstitutional as applied to sidewalk because even though state may have an interest in maintaining "order and decorum" within Supreme Court grounds, a total ban on political speech on the public sidewalks, which were indistinguishable from other public sidewalks, did not substantially serve that interest, and there was no evidence that the activities obstructed the sidewalks or access to the building); *Reeves v. McConn*, 631 F.2d 377, 388 (5th Cir. 1980) ("the city may not broadly prohibit reasonably amplified speech merely because of an undifferentiated fear that disruption might sometimes result. When First Amendment freedoms are involved, the city may protect its legitimate interests only with precision.").

Furthermore, the ban is not narrowly tailored because it extends well beyond the 100 feet recognized by Texas law, and the limits of the boundaries at the various properties are arbitrary and inconsistent; the area in which electioneering is banned by the County depends on the shape of the county property at which the polling place is located. *See* Exh. C at 12. For example, the distance from the door of the polling site near Zarate Park to the edge of county property is

approximately 468 feet. *Id.* At the same time, the distance at La Rosita Commissioner Precinct #1 is approximately 155 feet, the distance at El Cenizo is approximately 232 feet and the distance at the County Courthouse is approximately 153 feet. *Id.* There is no indication that a ban on electioneering at the outer boundaries of county property substantially serves the County's asserted interests. *Cf. Schirmer v. Edwards*, 2 F.3d 117, 120 (5th Cir. 1993) (electioneering restriction of 600-feet was narrowly tailored to serve government's interest in protecting citizens' right to vote freely but only where government had tried less restrictive alternative that was unsuccessful).

Last, the Order is both underinclusive and overinclusive. As discussed above, the Order is underinclusive by failing to restrict other, non-political forms of speech, *e.g.*, commercial speech. At the same time, the Order is overinclusive because it applies to properties where voting does not occur and because it regulates not only "active" speech but also "passive" speech such as wearing campaign t-shirts or displaying political bumper stickers. Indeed, Starr County has already prohibited individuals from parking for work in the County Courthouse parking lot when their cars display political bumper stickers. Exh. C at 21-22. Voters face up to six months of jail time for wearing campaign t-shirts or having bumper stickers during the voting period in all county property including parks, libraries, and the county tax office. Plaintiff Gonzalez Garza, for example, has political bumper stickers on her car and fears arrest if she parks her car at the County Courthouse, even when conducting regular business as an attorney, or if she parks at other county properties not adjacent to polling places during the voting period. *Id.* at 23-24.

These restrictions bear no relationship whatsoever to any of the County's purported interests and are not reasonable in light of the articulated purpose of the electioneering ban. As explained by the U.S. Supreme Court:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21 (1971) (invalidating ban on political gear inside a courthouse); *see also Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (prohibition of political speech was unconstitutional regardless of whether airport constitutes public forum, holding that “nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message . . . is still protected speech even in a nonpublic forum”).

5. The ban is unconstitutionally overbroad and therefore facially invalid

“Under the First Amendment, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016) (internal quotation marks and citations omitted). The overbreadth doctrine responds to “the threat [that] enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Here, as explained above, the ban prohibits political speech in a far broader manner than what is reasonably necessary to protect the County’s purported interests. *See* Sections I.A.1-4. As a result, it is unconstitutionally overbroad and facially invalid.

B. The electioneering ban violates the Texas Election Code

Texas prohibits electioneering within 100 feet of an outside door of a polling place during the voting period. TEX. ELEC. CODE ANN. § 61.003(a). The Texas Election Code also provides that a local entity “that owns or controls a public building being used as a polling place *may not*,

at any time during the voting period, prohibit electioneering on the building's premises outside of the area [within 100 feet of an outside door of a polling place], but may enact reasonable regulations concerning the time, place, and manner of electioneering.” *Id.* § 61.003(a-1). (emphasis added).

Defendants' electioneering ban, on its face, violates Section 61.003, because it is a complete prohibition of electioneering at Starr County polling sites, including beyond the 100-foot zone created by the Election Code. Indeed, the Legal Director of the Texas Secretary of State's Elections Division opined that the Starr County Order “appears to prohibit electioneering entirely, not just provide regulations as to the time, place, and manner of electioneering” and therefore “[i]t appears as though this would be in conflict with 61.003 (a-1) of the [C]ode” *See* Exh. C at 18, Attach. 3. Most recently, on February 15, 2018, the Secretary of State's Office stated on behalf of the agency that the ban is unlawful under the Texas Election Code: “The election code is very clear that they may not ban or prohibit at any time electioneering on the building's premises outside of that 100-foot mark . . . banning electioneering outside of that 100-foot [sic] is not in accordance with the [E]lection [C]ode.” *See* Exh. D at 10, Attach. 2.

The electioneering ban further violates § 61.003 because it is not a reasonable regulation concerning the time, place, and manner of electioneering; it prohibits political speech at inconsistent distances from the polling place entrance and even bans electioneering where no polling place is located on the property.

C. Defendants acted *ultra vires*

Defendants acted *ultra vires* and in violation of state law when they enacted and enforced the Order. In Texas, *ultra vires* claims may be brought against government actors in their official capacities if “the officer acted without legal authority or failed to perform a purely

ministerial act.” *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 370–73 (Tex. 2009). Defendants are county officials who are responsible for policymaking and the administration of elections in Starr County, Texas. The Texas Election Code constrains their authority and prescribes specific, ministerial acts regarding elections administration that Defendants must perform. By passing an electioneering ban expressly prohibited by the Texas Election Code, Defendants acted *ultra vires*.

Defendants also acted unlawfully by adopting penalties for electioneering that conflict with the penalties mandated by the Texas Election Code. The Texas Constitution provides: “The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled ‘The Legislature of the State of Texas.’” TEX. CONST. art. III, § 1. The Texas Legislature adopted an electioneering regulation that governs the space extending 100 feet from the entrance of the polling place. *See* TEX. ELEC. CODE ANN § 61.003(a). A violation of the Code for electioneering within that 100 foot zone is a Class C misdemeanor, punishable by a fine not to exceed \$500. *Id.* at § 61.003(c); TEX. PENAL CODE ANN. § 12.23. By contrast, Defendants adopted an electioneering ban that provides a conflicting penalty of a Class B misdemeanor, punishable by a fine of up to \$2,000 or six months of jail time, for electioneering within that same 100 foot zone. *See* Exh. A at 3.

II. Plaintiffs Will Suffer Irreparable Harm if Injunctive Relief is Not Granted

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted)) (internal quotation marks omitted). “To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable.

The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (citations omitted).

Here, Starr County’s electioneering ban threatens Plaintiffs with irreparable harm, because it abridges their First Amendment free speech rights and restricts the content of their speech. Plaintiffs have lost the freedom to electioneer on county property and will continue to suffer that loss unless Defendants are enjoined from enforcing the Order.

Plaintiffs are under a credible threat of prosecution by county law enforcement officials for a violation of the Order. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted). The County Elections Director has already enforced the electioneering ban by instructing individuals who work at the County Courthouse that they must remove their cars from the Courthouse parking lot or cover the political displays on their cars. *See* Exh. C at 21-22. The looming threat of prosecution is a substantial threat of irreparable injury if injunctive relief is not issued. *See Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (finding a likelihood of irreparable injury where plaintiffs demonstrated “a credible threat of prosecution”). Plaintiffs also face irreparable injury in the form of chilled speech. Plaintiff Hilda Gonzalez Garza left the Starr County parking lot on the first day on early voting after witnessing enforcement of the electioneering ban and because she feared that she would be subject to prosecution under the ban. *See* Exh. C at 23.

Furthermore, enforcement of a county Order at odds with the Texas Election Code “is neither benign nor equitable.” *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Circ. 2012) (finding irreparable harm when state statute conflicts with federal law). Plaintiffs are confronted with the choice between attempting to exercise long-held free

speech rights and facing jail time—or relinquishing those precious rights and complying with the County’s unlawful electioneering ban. Starr County forces Plaintiffs and other residents to make this unreasonable choice.

The ban hinders the culture of civic participation to which electioneering contributes. Cultivating a tradition of civic participation takes time and the electioneering ban threatens to roll back a years-long tradition of political engagement.

Therefore, Plaintiffs will suffer an irreparable injury to their constitutional rights that no later judicial resolution or monetary relief can remedy.

III. Plaintiffs’ Injury Outweighs Any Harm from the Injunction Being Granted

The equities tip heavily in favor of granting Plaintiff’s application for a temporary restraining order that halts the enforcement of the Starr County electioneering ban. Plaintiffs simply seek to maintain the status quo by enjoining Defendants from enforcing an unconstitutional electioneering ban. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (party seeking a preliminary injunction must “establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest”). Indeed, the primary purpose of a preliminary injunction is to preserve the status quo pending a resolution of the merits. *Camenisch*, 451 U.S. at 395 (1981).

There is no harm to Defendants because there is no injury to Defendants who have no authority to enforce the law. *See United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) (“[W]e discern no harm from the state’s enforcement of invalid legislation.”); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (holding that the government has no interest in enforcing an unconstitutional law).

IV. The Injunction Will Not Disserve the Public Interest

It is “always” in the public’s interest to prevent a violation of the U.S. Constitution and of an individual’s constitutional rights. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338-39 (5th Cir. 1981); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) (“injunctions protecting First Amendment freedoms are always in the public interest”). Any interests Defendants have do not extend to permitting the County to interfere with the exercise of fundamental rights. *Deerfield Med. Ctr.*, 661 F.2d at 338-39. In addition, allowing counties across Texas to implement their own local policies that violate the Texas Election Code invites chaos and harms the public interest.

CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court grant their application for a temporary restraining order and preliminarily enjoin Defendants and their agents, servants, employees and all persons acting under, and in concert with, or for them from: (1) implementing and enforcing the Starr County electioneering ban, adopted by Defendants on January 8, 2018 and incorporated into the County’s Building Policy on February 12, 2018, (2) taking action or encouraging others to take action regarding the conduct restrained under (1); and (3) otherwise harming Plaintiffs by abridging their First Amendment rights to electioneer beyond the 100-foot radius permitted by the Texas Election Code. Plaintiffs are willing to post an appropriate bond.

Dated: February 22, 2018

Respectfully submitted,

**MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND**

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 22nd day of February 2018. The undersigned counsel further certifies that she sent electronic mail correspondence to all defendants at the electronic mail addresses provided by their business offices. That electronic correspondence notified Defendants that Plaintiffs would file an Emergency Application for a Temporary Restraining Order on this date and requested that they respond with their availability for an immediate hearing. That electronic correspondence also included a copy of the Complaint.

/s/ Nina Perales

Nina Perales

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that she sent electronic mail correspondence to all Defendants at the electronic mail addresses provided by their business offices. That electronic correspondence notified Defendants that Plaintiffs would file an Emergency Application for a Temporary Restraining Order on this date and requested that they respond with their availability for an immediate hearing. That electronic correspondence also included a copy of the Complaint.

The undersigned counsel further certifies that she telephoned the business office of Defendant Victor Canales, Starr County Attorney at 11:08am on this date and asked to conference with Mr. Canales on the above and foregoing Application for TRO. The individual who answered the phone at the Starr County Attorney's Office informed undersigned counsel that the County Attorney was in the office but unavailable for a telephone call. The undersigned counsel spoke to an administrative assistant named Elsa Garza and informed Ms. Garza that counsel sought to confer with Mr. Canales regarding the Application for TRO. Following that conversation, and based on Ms. Garza's representation that she would print out and hand the email correspondence regarding the Application for TRO and attached complaint to Mr. Canales, the undersigned counsel emailed a message requesting to conference on the Application for TRO, as well as the Complaint to Ms. Garza. As of the filing of this Application, the undersigned counsel has not received a response to her emails or phone call.

/s/ Nina Perales

Nina Perales