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

HILDA GONZALEZ GARZA AND ROSBELL BARRERA,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 7:18-cv-00046
STARR COUNTY, TEXAS *et al.*,	§	
Defendants.	§	

REPLY IN SUPPORT OF PLAINTIFFS' EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiffs Hilda Gonzalez Garza and Rosbell Barrera respectfully submit this reply in support of their Emergency Application for Temporary Restraining Order.

At the February 26, 2018 hearing on Plaintiffs' application for emergency relief, the Court ruled that the electioneering ban adopted by Defendants on January 8, 2018 (the "Order") is unconstitutionally vague, invalid and without effect. The Court further held that Section 12 of the Starr County Building Property Use Policy (the "Policy"), which was adopted on February 12, 2018 and incorporated the Order into the Policy, is surplusage and similarly invalid and unenforceable.

In light of these rulings, the remaining issues are straightforward. First, Plaintiffs are likely to succeed on the merits of their legal claims because Defendants' Policy (which now restricts electioneering as well as additional activities on County property) is overbroad in violation of the First Amendment and the Texas Election Code. Although the County argues that

its Policy is content neutral, the Policy still restricts speech in public fora and is not narrowly tailored to serve the County's interests. It is thus unconstitutional and illegal. Second, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Plaintiffs have demonstrated that they will suffer irreparable harm if injunctive relief is not granted. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012). Finally, the equities tip heavily in favor of Plaintiffs and an injunction would serve the public interest because the County has no interest in enforcing invalid legislation, and 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).

ARGUMENT

1. Factual background

In their response brief, Defendants ("the County") claim the Policy is an innocuous, reasonable parking-zone regulation. *See, e.g.*, Dkt. 14 at ¶ 20 ("The Use Policy restricts the use of these properties outside the 100-foot buffer zone *by prohibiting the use of parking lots at these locations, nothing more*.") (emphasis added). The County's position is belied by the facts.

On its face, the Policy makes clear that its geographic reach is much broader, including all county property designated as common areas, such parks, lawns, picnic areas, and sidewalks. *See, e.g.*, Pl. TRO Hrg. Ex. 2 at 6, 12-16.

The Policy distinguishes between and imposes separate rules on parking areas and "common areas." The County "strictly" limits the use of parking zones "for public and government automobile parking purposes and to effect the business of the Government buildings

which they serve." *Id*. at 5. In parking zones, the Policy provides that "[v]ehicles may display political signs attached to the vehicles in accordance with the Texas Election Code." *Id.* at 6.

Separate from parking zones, the Policy defines "common areas" as "[a]reas not identified as parking zones in Attachment 'C'[.]" *Id*. Attachment C to the Policy shows maps of county property. In these maps, a thin red line delineates the boundaries of county property and a thick red line delineates the parking zones. *See id.* at 11-16.

"Common areas" as defined by the Policy include sidewalks, lawns, parks, picnic areas and public building grounds. *Id.* at 6, 11-16. The County's Response (Dkt. 14) also demonstrates that the Policy applies to public areas far beyond parking lots. *See, e.g.*, Response at ¶ 5 ("The Use Policy's Section 13, 'Use of Common Areas,' restricts the use of the areas that are not Parking Zones.") (emphasis in original).[1]

The Policy provides that "[t]he use of common areas by persons who are not employees of the County of Starr or not specifically authorized to do so is strictly prohibited." Pl. TRO Hrg. Ex. 2 at 6. The Policy further provides that "[p]ersons may apply to the Starr County Judge's Office for a permit to use common areas for any public purpose."[2] *Id.; see also* County's Response at ¶ 5 ("should a person want to use a part of one of the County's common areas, they may file an application for a permit for the use.").

[1] Under the County's Policy, "common areas" also include meeting rooms and other interior spaces of county buildings. *See, e.g.*, Pl. TRO Hrg. Ex. 2 at 7, 9 ("Starr County Courthouse Historical Preservation . . . The Starr County Judge . . . shall have the overall responsibility for reservations, interior/exterior locations and meeting room use in those common areas other than the courtrooms."); *see also id.* ("Public Use Request. Groups or individuals who desire authorization to use the courthouse or grounds shall complete a Starr County Courthouse Public Use Request form and request Commissioners' Court approval."); *id.* ("Common Areas are defined as hallways, elevator, bath rooms, and lawns.").

[2] In common areas, the Policy also flatly prohibits trailers, BBQ pits, chairs, ice chests, tents, and similar items. *Id.* ("Trailers, BBQ pits, chairs, ice chests, tents, and any other similar items are prohibited on common areas."); *see also* County's Response at ¶ 6 ("Nonetheless, trailers, BBQ pits, chairs, ice chests, tents and similar items are not permitted in the common areas.").

The permitting process for use of common areas requires submission of an application which is subject to approval by the Commissioner's Court or the County Judge. *See* Pl. TRO Hrg. Ex. 2 at 6. The applicant must be over age 18, pay a refundable deposit, and pay any additional fees the County chooses to impose in its discretion. *See, e.g., id.* at 2-3, 7, and 9. The amount of the deposit is set at $50.00 for county property specifically listed in the Policy, including the County Courthouse and Annex. *Id.* at 7. The amount of the deposit to use the County Courthouse or its grounds is also an amount "ranging from $0-1,000." *Id.* at 9. An application to use County common areas is "not valid until all fees are paid." *Id.* at 2.

The "Starr County Building and Property Use Policy - Request Form" posted on the County's website and attached here at Exhibit 1, is a three page application that requires the applicant to provide the purpose for which the County property will be used, sign a release of liability, and to have the applicant's signature notarized by a Texas notary public. *See* Ex. 1.

2. The Policy is an unconstitutional prior restraint on political speech

The Policy's permit requirement is unconstitutional as a prior restraint on political speech because it imposes a burdensome process on those who wish to speak, grants unfettered discretion to the County to deny permission to speak, and imposes monetary fees that are not narrowly tailored to serve the County's purported interests. *See* Pl. TRO Hrg. Ex. 2 at 5, 7.

As described above, the Policy requires individuals who wish to use County common areas, including individuals who wish to electioneer, to obtain a permit. *See id.* at 6 (prohibiting public use of County common areas and further providing that "[p]ersons may apply to the Starr County Judge's Office for a permit to use common areas for any public purpose."); *see also* County's Response at ¶ 5 ("should a person want to use a part of one of the County's common areas, they may file an application for a permit for the use.").

Prior restraints on speech are those that give "public officials the power to deny use of a forum in advance of actual expression" and are therefore "the most serious and the least tolerable infringement on First Amendment rights." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). There is a "heavy presumption" against their constitutional validity. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks and citation omitted); *see also Conrad*, 420 U.S. at 553 ("Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.").

A. Burdensome permit procedure

As noted above, the permitting process requires submission of an application and payment of a deposit and any additional fees the County chooses to impose in its discretion. *See, e.g.*, Pl. TRO Hrg. Ex. 2 at 2-3, 7, and 9. To apply, Plaintiffs are required to complete a three-page application form that requires Plaintiffs to provide the purpose for which the County property will be used, sign a release of liability, and to have the applicant's signature notarized by a Texas notary public. Ex. 1. This burdensome and time-consuming application process is not narrowly tailored to serve the County's purported interests. *See, e.g., Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166, (2002) (holding that content-neutral ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand violated the First Amendment, noting that "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that [person's] anonymity.").

B. Unfettered discretion

To pass constitutional muster, a permit scheme must "not delegate overly broad licensing discretion to a government official." *Forsyth Cty., Ga.*, 505 U.S. at 130. As the Supreme Court has explained:

> A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority. The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.

Id. at 130–31. Here, the Policy does not provide safeguards in the permitting process. First, as to the intended purpose of the license applicant, the Policy provides that "[p]ersons may apply to the Starr County Judge's Office for a permit to use common areas *for any public purpose*" but does not define a "public purpose" or set out when a permit may be denied for not articulating a "public purpose." Pl. TRO Hrg. Ex. 2 at 6 (emphasis added). Second, as to the time period required to obtain a permit, the Policy provides that applications must be submitted to the Starr County Judge at least 30 days prior to the intended use, but adds, without explanation, that the Starr County Judge may accept applications less than 30 days in advance "if the circumstances allow for the intended use." *Id*. at 2-3. Third, the Policy states that the County may elect to waive any of the fees assessed for use of County facilities, but again, does not describe the parameters for such a waiver, or how an applicant may even apply for one. *Id*. at 3. As a result, the Policy restricts electioneering in County common areas but does not sufficiently confine the County's unfettered discretion.

C. Required payment of fees

The Policy's permit procedure requires a $50.00 deposit and additional after-hour fees (*i.e.*, fees applicable after regular business hours of Monday through Friday from 8:00 am to 5:00 p.m.). *Id*. at 3, 7. The Policy prescribes that an application is not valid unless all fees are paid. *Id*. at 2.

"Exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court." *Fernandes v. Limmer*, 663 F.2d 619, 632 (5th Cir. 1981) (citations omitted) (holding that $6.00 daily fee under permit system was unconstitutional). "Distinguishing a proper 'cost of regulation fee' from an impermissible 'flat license tax' is a slippery process." *Id*. Therefore, when the government imposes a fee on the right to use a public forum for constitutionally protected purposes, it must demonstrate "a link between the fee and the costs of the licensing process." *Id*. at 633; *see also Horton v. City of Houston, Tex.*, 179 F.3d 188, 189 (5th Cir. 1999) (holding that fee requirement was a content-neutral regulation that served a significant governmental interest, but that regulation failed because defendant did not show that the fee was narrowly tailored to serve that interest).

Here, Starr County's $50.00 deposit applies to all individuals who want to use County common areas, regardless of the planned use's impact on county property or the Policy's articulated interests in minimizing: "the risk of damage or destruction to county property, the probability of interruption to the normal course of governmental functions of the County, [preserving] the historical value of any common areas, and the liability, risk and the danger of injury posed to the public." Pl. TRO Hrg. Ex. 2 at 6. As a result, the County applies its $50.00 deposit indiscriminately to Plaintiff Hilda Garza, who intends to wear a political t-shirt and

distribute campaign literature, and to another user who plans to host a fundraiser with staked tents, tables and chairs, food, music and a large crowd of supporters.

The Policy fails because there is no relationship between assessing a flat $50.00 deposit and the County's interests in maintaining its property and ensuring the smooth workings of County government offices. There is no basis to require Plaintiffs, who use County common areas to display political signs, wear political t-shirts, and hand out political literature, to pay the same undifferentiated fee as an individual whose planned activities will have a greater impact on County property. There is also no basis for charging Plaintiffs (or anyone else) $25.00 to express their political views after regular business hours, such as at a peaceful candlelight vigil.

Thus, the deposit required by the Policy is not narrowly tailored and operates as an impermissible tax on free speech. "[F]reedom of speech . . . (must be) available to all, not merely to those who can pay their own way." *Fernandes*, 663 F.2d at 632 (internal quotation marks and citations omitted).

3. The Policy is unconstitutional because it is not narrowly tailored to serve a significant government interest

Streets, sidewalks, public lawns, public parks and places which "by long tradition or by government fiat have been devoted to assembly and debate" are considered quintessential public fora for purposes of the First Amendment. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also Warren v. Fairfax Cty.*, 196 F.3d 186, 189 (4th Cir. 1999) (holding that large grassy mall in front of government building is a traditional public forum). In addition, where a piece of land is indistinguishable from one of these types of public fora, that piece of property is also considered traditional public fora. *See Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000) (holding that The University of Texas' paved area adjacent to the Austin sidewalk near Red River is a public

forum, noting that there is no indication or physical demarcation of the public sidewalk, which is a public forum, and the university grounds, and that "concerns with chilling otherwise constitutionally-protected speech are paramount.").

Even assuming Defendants' Policy is content-neutral, restrictions on speech in these public fora are subject to strict scrutiny—in order to survive review, the Policy must be narrowly tailored to serve a significant governmental interest and leave ample alternative channels of communication.[3] *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005) ("In order to survive First Amendment strict scrutiny, a content neutral restriction on speech must be narrowly tailored to a significant state interest and must leave open ample alternative channels of communication.").

The County offers that its significant interests lie in minimizing: "the risk of damage or destruction to county property, the probability of interruption to the normal course of governmental functions of the County, [preserving] the historical value of any common areas, and [minimizing] the liability, risk and the danger of injury posed to the public." Pl. TRO Hrg. Ex. 2 at 6.

However, even assuming these interests are "significant," as demonstrated below, the Policy regulates speech in ways that extend far beyond serving these interests. As a result, the Policy is not narrowly tailored and unconstitutionally infringes on Plaintiffs' free speech rights.

A. The Policy does not distinguish between passive speech and active speech

Although the County's Response is silent as to the specific activities on County property that prompted the Policy, the Starr County District Attorney testified at the February 26, 2018 hearing that the County enacted the Policy at least in part in response to political campaign

[3] The County incorrectly asserts that its Policy is subject to intermediate scrutiny but correctly concedes that the Policy is subject to the narrow tailoring test. *See* Defendants' Response at ¶¶ 15-16.

activities in the back parking lot of the Starr County Courthouse that included tents, BBQ pits and chairs. *See also* Pl. TRO Hrg. Ex. 7 (Feb. 16, 2018 Facebook post of 229th Judicial District Attorney) ("Voters and members of the public should rest assured that there will be no tents, bbq pits, or persons crowding county parking zones at polling locations.").

Despite the County's articulated interest in regulating activities such as setting up tents, tables and chairs, and inviting voters to gather and eat BBQ plates outside of the County Courthouse, the Policy's broad language sweeps in and regulates passive speech. Under the Policy, wearing a t-shirt or holding up a campaign sign in common areas requires a permit. *See* Pl. TRO Hrg. Ex. 2 at 6. Sitting in a chair and offering campaign literature or water from an ice chest is flatly prohibited in common areas. *See id.* ("Trailers, BBQ pits, chairs, ice chests, tents, and any other similar items are prohibited on common areas."); *see also* County's Response at ¶ 6 (". . . chairs, ice chests, tents and similar items are not permitted in the common areas.").

The County's restriction of Plaintiffs' speech, through either an outright ban or a permit requirement, is overbroad because it reaches far beyond the County's articulated interest in ensuring the smooth operation of government and the availability of parking.

B. The Policy does not distinguish between the location and uses of county property

The Policy applies to all County common areas, whether or not they are subject to overcrowding or have experienced an interruption of government business as a result of activities in the common areas. For example, at the February 26, 2018 hearing, the District Attorney only testified to problems of crowding or interruption of government business as a result of activities in County parking lots. The County offered no reason to restrict activities, including Plaintiffs' electioneering activities, in other common areas such as parks, sidewalks, walkways, public lawns and picnic areas. *See* Pl. TRO Hrg. Ex. 2 at 6.

Similarly, the County was unable to articulate why the Policy needed to reach County parking lots and common areas at non-polling places. For example, the Policy applies to the Starr County Annex but the County offered no justification for limiting public activity at the Annex other than that the Annex "might" be a polling place in the future and that the Annex is currently used to count votes on election day. *See* Dkt. 14-1 (map of Annex attached to Policy). The County identified, as regulated common areas at the Annex, two large grassy areas located on the far side of the parking lot. The County maintained that any public activity on these grassy areas is subject to the permit requirement for common areas but offered not reason why it was necessary to limit activity in this area.

Finally, the County's Policy regulates activity on public sidewalks. *See id*. at 5 (map identifying public sidewalks near County Courthouse as "common area" subject to the Policy). As a result, Plaintiffs and others must secure a permit and pay a deposit in order to electioneer or engage in other activities on the sidewalks near County buildings. The Policy's regulation of public sidewalks are not connected to the County's concerns for business operations or traffic safety and demonstrate that the Policy is not narrowly tailored. *See United States v. Grace*, 461 U.S. 171, 182 (1983) (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 sideways, 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.")

4. The Policy is unconstitutionally overbroad and therefore facially invalid

For the reasons stated above, the Policy is also unconstitutionally overbroad because a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep. *See Forsyth Cty., Ga.*, 505 U.S. at 129 ("It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.").

The County's Policy sweeps in and restricts far more activity than necessary to ensure traffic safety, availability of parking places and the ability to conduct governmental business. For example, under the Policy, Plaintiffs must secure a permit to stand on a sidewalk near the courthouse and distribute sample ballots and copies of the Constitution. Plaintiffs must secure a permit to gather at a public park and protest a county policy. Plaintiffs must secure a permit to collect petition signatures in common areas outside the La Rosita Community Center. As conceded by Defendants at the February 26, 2018 hearing, all these uses of county property fall under the purview of the Policy.

The County's defense of its Policy is that the Policy has some constitutional applications. That defense is insufficient. Even if the County's Policy permissibly regulates some conduct, the Policy's sweeping regulation suffers from unconstitutional overbreadth. The Court should decline Defendants' invitation to lend its imprimatur to a regulation of this far-reaching scope. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (holding that the overbreadth doctrine responds

to "the threat [that] enforcement of an overbroad law may deter or 'chill' constitutionally protected speech.")

5. The County's Policy violates the Texas Election Code because it is not a reasonable regulation concerning the time, place, and manner of electioneering.

The Policy is also unlawful because it violates the Texas Election Code which provides that Starr County "may not, at any time during the voting period, prohibit electioneering on the [polling place] building's premises outside of the [100 ft. perimeter], but may enact reasonable regulations concerning the time, place, and manner of electioneering." Tex. Elec. Code § 61.003(a-1). For the reasons stated above, specifically its lack of narrow tailoring and overbreadth, the Policy is not a reasonable time, place or manner regulation. Therefore, it is invalid as applied to polling places pursuant to state law.

CONCLUSION

In sum, the Policy is an unconstitutional prior restraint on protected speech that is also overbroad and suffers from a lack of narrow tailoring. Defendants' Policy dangerously censors political speech in public fora. Therefore, emergency relief is necessary, and Plaintiffs respectfully request that this Court grant their application and temporarily enjoin Defendants from implementing or enforcing the Policy.

Dated: February 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing Reply in Support of Plaintiffs' Emergency Application for Temporary Restraining Order was filed with the Court via the CM/ECF system on February 27, 2018, which will serve a copy on all counsel of record.

/s/ Alejandra Ávila
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