

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, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**PLAINTIFFS' SECOND EMERGENCY APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Plaintiffs Hilda Gonzalez Garza and Rosbell Barrera (“Plaintiffs”) respectfully move for a temporary restraining order pursuant to Fed. R. Civ. P. 65(b) enjoining Starr County and Starr County official Defendants (collectively, “Defendants”) and their employees and agents from implementing or enforcing certain portions of the revised Starr County Building and Property Use Policy adopted by the Starr County Commissioners’ Court on April 9, 2018, and the supplemental Electioneering Regulation adopted on May 9, 2018, as more fully set forth in the accompanying proposed order.

Plaintiffs are entitled to a Temporary Restraining Order because: (1) there is a substantial likelihood that Plaintiffs will prevail on the merits of their claims; (2) there is a substantial threat that Plaintiffs will be irreparably harmed if the injunction is not granted; (3) the threatened injury to Plaintiffs outweighs the threatened harm to Defendants; and (4) granting the preliminary injunction will not disserve the public interest.

In support of this application, Plaintiffs rely upon and incorporate herein their Third Amended Complaint, their Memorandum of Law in Support of Plaintiffs' Second Emergency Application for Temporary Restraining Order, including attached declarations and exhibits, and Plaintiffs' proposed order granting the requested relief, which Plaintiffs contemporaneously filed with the Court today.

Dated: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On May 6, 2018, the undersigned counsel for Plaintiffs emailed Mr. Ysmael Fonseca, Esq., counsel for all Defendants, with a proposed agreed order and motion for entry of agreed order to seek an agreement on the injunction of certain provisions of the revised Starr County Building and Property Use Policy in order to avoid the need to file this application. On May 11, 2018, Mr. Fonseca responded via e-mail with the following: “We do not agree with the proposed motion.” Later that day, on May 11, 2018, the undersigned counsel for Plaintiffs emailed Mr. Fonseca again with a second proposed agreed order and motion for entry of agreed order, seeking an agreement on the enjoinder of certain provisions of the revised Starr County Building and Property Use Policy and certain provisions of the Electioneering Regulations that were adopted by the Starr County Commissioners’ Court on May 9, 2018. Mr. Fonseca communicated Defendants’ opposition to the second proposed agreed order by stating: “Thank you, Mr. Moreno. However, the County has duly enacted a Use Policy and Electioneering Regulations and will continue to enforce them; I cannot agree to an injunction. Should my clients instruct me otherwise next week, I will let you know.” As of the filing of this application, Mr. Fonseca has not communicated a different position to Plaintiffs or suggested amendments to the proposed agreed orders.

/s/ Celina Moreno
Celina Moreno

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 21st day of May 2018, which will serve a copy on all counsel of record for Defendants.

/s/ Alejandra Ávila
Alejandra Ávila

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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STARR COUNTY, *et al.*,

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CIVIL ACTION NO. 7:18-cv-00046

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

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

INTRODUCTION

Plaintiffs Hilda Gonzalez Garza and Rosbell Barrera (“Plaintiffs”) respectfully move for a temporary restraining order enjoining Defendants from implementing or enforcing portions of the revised Starr County Building and Property Use Policy, the most recent version of which was adopted by the Starr County Commissioners Court on April 9, 2018, (“Policy”), as well as the County’s new supplemental electioneering regulations adopted on May 9, 2018 (“Electioneering Regulation”).

Defendants maintain far-reaching regulations of speech in violation of the First Amendment and the Texas Election Code. The County began with an unconstitutionally vague January 8, 2018 order banning electioneering on all county property and subsequently added to and revised its speech restrictions twice. The County’s speech restrictions remain unconstitutional and illegal.

Defendants’ Policy prohibits Plaintiffs from exercising their First Amendment rights during county holidays on all county property, even in parks and on sidewalks. The Policy also requires Plaintiffs to undergo a burdensome permit application process if they wish to speak or assemble peaceably on six identified county properties, and they prohibit Plaintiffs from speaking and assembling on all other county property, including the Starr County Veterans Memorial and Cemetery in Rio Grande City. The County most recently supplemented its policies with the Electioneering Regulation, which prohibits electioneering on areas in county property such as sidewalks, lawns, and grassy areas outside the 100-foot perimeter under the Texas Election Code. The Electioneering Regulation further prevents holding or posting any “political sign” on any non-voting day at four enumerated county properties.

Temporary injunctive relief is warranted because Plaintiffs are likely to prevail on the merits of the following constitutional and state law claims:

- First Amendment: Both the Policy and Electioneering Regulation are facially unconstitutional because they are overbroad, not narrowly tailored to serve a compelling or significant government interest, and not reasonable time, place, and manner regulations. The Electioneering Regulation is a content-based restriction of speech and, therefore, presumptively unconstitutional. The Policy is also unconstitutional because it is a prior restraint of protected First Amendment activities.
- Texas Election Code: The Policy and Electioneering Regulation violate Section 61.003 of the Texas Election Code, which prohibits electioneering within 100 feet of an outside 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.
- Ultra Vires: The Policy and Electioneering Regulation constitute *ultra vires* activity in violation of the Texas Election Code because Defendants acted without legal authority by adopting and enforcing the Policy and Electioneering Regulation.

It is well-established that a constitutional violation constitutes irreparable injury sufficient to support injunctive relief. The Policy and Electioneering Regulation on their face evidence the substantial threat of irreparable injury.

Plaintiffs' injuries outweigh any purported injury Defendants might claim, because the Application asks 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 Policy and Electioneering Regulation.

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 local policy that violates state law.

For all these reasons, Plaintiffs respectfully request that the Court grant their Second Emergency Application for a Temporary Restraining Order and schedule a preliminary injunction hearing as soon as practicable.

FACTUAL BACKGROUND

I. Defendants Adopted an Unconstitutional Order and Policy

On January 8, 2018, the Starr County Commissioners' Court adopted an order expressing the County's desire to ban electioneering on all county property during any voting period ("January Electioneering Ban"). Dkt. No. 4-2. Subsequently, on February 12, 2018, the Commissioners Court adopted a Building and Property Use Policy ("February 12 Policy"), which expressly incorporated the Order. *See* Dkt. No. 4-3 at § 12.

II. The Court Partially Granted Plaintiffs' First Request for a Temporary Restraining Order

Plaintiffs sued Defendants and requested preliminary injunctive relief, arguing that the January Electioneering Ban and February 12 Policy violate the First Amendment to the U.S. Constitution and the Texas Election Code. *See* Dkt. Nos. 1, 4, 16. On February 26, 2018, the Court held a hearing on Plaintiffs' Emergency Application for Temporary Restraining Order. *See* Dkt. No. 5.

At the hearing, after considering the parties' exhibits and hearing testimony from Plaintiff Hilda Gonzalez Garza and Defendant Omar Escobar, Jr., the Court declared Defendants' January Electioneering Ban unconstitutionally vague and found that it "is a document that expresses only the desires of the county and it contains no language actually adopting any order or rule" and that

if it “were actually something . . . enforceable it would be *ultra vires*.” 2-26-18 Tr. at 103:16-24, 116:17-21.

On February 28, 2018, the Court issued a written decision partially granting Plaintiffs’ Emergency Application for a Temporary Restraining Order. Dkt. No. 18. In its order, the Court explained that the February 12 Policy’s provision incorporating the Order was surplusage. *Id.* at 2, n. 3. The Court also enjoined Section 13 of the February 12 Policy, which required a permit for use of any “common areas” on county property. *Id.* at 9. “Common areas” was defined in the February 12 Policy as all county property except for the five parking zones. *See* Dkt. No. 4-3 at § 13.

III. Defendants Continued to Enforce Their Speech Restrictions After the Court’s Injunction

Despite the Court’s ruling, Defendants continued to enforce the January Electioneering Ban and the February 12 Policy on Election Day for the 2018 primary election. On March 6, 2018, at the El Cenizo polling location, the Starr County Sheriff’s Office asked residents who sought to electioneer on the grassy areas and sidewalks to leave the property. *See* Exh. A at ¶ 26. Specifically, Sheriff Deputy Esmeralda Muñiz, who was at El Cenizo to enforce the Policy, was advised by Sergeant Armando Treviño that no one could electioneer on the El Cenizo property. *Id.* As a result, Deputy Muñiz directed the residents who planned to electioneer to leave. *Id.* The Starr County Sheriff’s Office did not advise Deputy Muñiz of the Temporary Restraining Order. *Id.* Deputy Muñiz subsequently allowed residents to stand on the lawns and grassy areas of the El Cenizo property, but only after Plaintiff Hilda Gonzalez Garza informed her of the Temporary Restraining Order. *Id.*

IV. Following the Court’s Injunction, Defendants Adopted an Unconstitutional Revised Policy

Approximately one month later, on April 9, 2018, the Commissioners’ Court adopted a revised Building and Property Use Policy. *See* Exh. A-2. The Policy applies to all county property, is not limited to any voting period, and provides that any violation will result in removal from the premises and prosecution “to the fullest extent of the law.” *See* Exh. A-1 (hereinafter “Policy”) at § 9(a). It “supersedes previously enacted policies concerning the use of Starr County buildings and property.” *Id.* at §§ 13-14.¹

The Policy distinguishes between and imposes separate rules on: (1) six county properties specifically listed in Attachment A of the Policy (“Attachment A Properties”), (2) the Starr County Courthouse, (3) areas designated by the County as parking areas, (4) sidewalks, (5) parks, and (6) all other county properties not specifically covered in items (1) through (5). The Policy also prohibits Plaintiffs from using any county property on County holidays.

A. County holiday ban

The Policy prohibits all speech and assembly on county property, including on sidewalks and in grassy areas, during county holidays. *See* Policy at §§ 3(a)-3(d). Memorial Day (May 28, 2018) is a County holiday. *See* Exh. A-3. Election Day on November 6, 2018 is a county holiday. *Id.* Other county holidays include Independence Day (July 4, 2018), Labor Day (September 3, 2018), and Veterans Day (November 12, 2018). *Id.*

B. Burdensome permit application process

Similar to the Policy originally adopted by Defendants and enjoined by the Court, the revised Policy imposes a burdensome permit application process on private citizens who wish to

¹ As of the filing of this application, Defendants continue to maintain the February 12, 2018 Policy on Starr County’s official website. *See* Exh. A at ¶ 4, Exh. B at ¶ 18. To date, Defendants have not published the revised Policy on Starr County’s official website or otherwise publicly posted the revised Policy. *Id.*

speak or assemble peaceably at the six Attachment A Properties: the Starr County Courthouse, Starr County Fairgrounds, El Cenizo Park Community Center, La Rosita Library, Starr County Annex Conference Room, and Zarate Park Community Center. *See* Policy at § 3, Attach. A. To use any of the Attachment A Properties, Plaintiffs must be at least 21 years of age, complete and notarize a three-page application,² sign a release of liability, and submit a permit application to the Starr County Judge’s office no less than 30 days before the intended use. *See* Policy at §§ 5-7. Plaintiffs must also pay a \$50 deposit and after-hour fee of \$25 per hour. *Id.* at § 8. In addition, the Policy grants the Commissioners’ Court and the Starr County Judge unfettered discretion to grant an application, refund a deposit, impose a deposit amount, and waive or modify the Policy’s requirements, such as the 30-day submission requirement or the after-hour fee. *See id.* at §§ 2(c), 5(a), 5(c), 6(c), 8(b), 8(e), 9(h). Plaintiffs can only use these six properties for “events that support a public purpose, benefit, service, training or interest to Starr County residents.” *Id.* at § 3(a). However, the Policy does not explain what constitutes a “public purpose, benefit, service, training, or interest.”

A permit is also required to use the following four parks after hours; those hours vary depending on the park: Alto Bonito Park, La Casita Park, Fort Ringgold Park, and Abel N. Gonzalez Park. *Id.* at § 12(d), Attach. C.

C. Starr County Courthouse

The Policy outlines additional prohibitions and regulations specific to the Starr County Courthouse. *See id.*, Attach. B. For example, individuals must complete a Starr County

² Defendants posted a request form under a Request Use Form link on the Starr County website when they published the February 12 Policy on their website. *See* Exh. A at ¶ 8. This same form continues to be available online. *Id.* Plaintiffs assume for purposes of this application that they must complete the form available online under Request Use Form, even though Defendants have not updated the county website. *Id.*

Courthouse Public Use Request Form³ and pay a deposit of up to \$1,000 at the “sole discretion of the Commissioner’s Court.” Policy, Attach. B at § (xii)(a). In addition, “[n]o displays or exhibitions are to be set into the grass surrounding the Courthouse,” and “[p]ersonal notices” and “community event(s) announcement” are prohibited “except in areas designated by the Commissioners’ Court.” *Id.* at §§ (i)(b), (vi). The Policy also provides that as to the Starr County Courthouse, the Commissioners’ Court “may impose additional restrictions and regulations for approved use on a case by case basis” *Id.* at § (xii)(a).

D. Sidewalks and parks

The Policy prohibits certain activities in public spaces, such as “[d]epositing or posting” signs and other literature. *Id.* at § 12(c). Thus, for example, the Policy prohibits posting campaign signs in public spaces. At the same time, the Policy allows for “[c]hairs, tables, ice chests, and grills,” as well as “[p]eaceful picketing and leafletting.” *Id.* at §§ 12(c), (e).

E. All other property

The Policy completely bans private citizen use of the following County property: Falcon County Park, the Starr County Cemetery in Rio Grande City, the Starr County Sheriff’s Office, the Starr County Adult Probation Office, the Starr County War Dead Memorial, and the Starr County Veterans’ Memorial. *See* Policy at §3(b); *see also* Exh. A at ¶¶ 12-13; Exh. B at ¶¶ 10-11, 16.

F. Parking Zones and Parking Lots

With the exception of authorizing the “display of political signs attached to . . . vehicles in accordance with the Texas Election Code,” the Policy prohibits all speech and assembly on county property designated by the County as a parking area, regardless of the type of activity and

³ Defendants have not published the Starr County Courthouse Public Use Request Form on the Starr County website, so Plaintiffs cannot discern if additional requirements must be met to use the Starr County Courthouse other than those specified in the text of the Policy. *See* Exh. A at ¶ 9.

whether the use occurs beyond the 100-foot marker under the Texas Election Code. Policy at § 11.

The Policy’s Attachment D shows maps of the designated parking zones in which speech and assembly are prohibited but the markings designating parking zones are not consistent and encroach on sidewalks, streets, and unpaved or grassy areas in county parks. *See id.*, Attach. D. Attachment D also contains two different maps of the same property – La Rosita – with boundaries delineating two different Parking Zones. *Id.*

V. Defendants Adopted an Unconstitutional Supplemental Electioneering Regulation

On May 9, 2018, less than a week before the early voting period of the 2018 Democratic Primary runoff election commenced, the Commissioners Court’ adopted the Electioneering Regulation. *See* Exh. A-8 (hereinafter “Electioneering Regulation”).

The Electioneering Regulation prohibits, outside a voting period, “holding [] by hand,” as well as placing or posting, any type of political sign at the following locations in Starr County: the County Courthouse, El Cenizo Park Building, La Victoria Community Center, and La Rosita Community Center. *Id.* at §§ 4(a), 2(d); *id.*, Attach. A. The Electioneering Regulation does not define “political sign” and does not limit “political sign” to campaign or candidate-related material. Thus, on non-voting days, no individual may hold a political sign anywhere on the grounds of the four enumerated County locations.

The Electioneering Regulation further regulates electioneering activity during voting periods by designating areas for electioneering at the four listed polling places (“Designated Areas for Electioneering”). *Id.*, Attach. A.⁴ At the County Courthouse, only the sidewalks

⁴ At the May 9, 2018 meeting, Defendant County Attorney Victor Canales, Jr. stated that the Electioneering Regulation “overlap[s] with [the County’s] Property Use Policy” and electioneering “is prohibited everywhere where you don’t see the green” in the attached maps in Exhibit A. *See* Exh. A at ¶ 15. Defendant Omar Escobar, Jr. stated, “certain sidewalks will not be used for electioneering . . .” *Id.*

facing the east and west sides of the building are Designated Areas for Electioneering. *See* Electioneering Regulation, Attach. A. Electioneering is prohibited on some sidewalks and in all grassy areas, even when these areas fall outside the 100-foot marker under the Texas Election Code. *Id.*⁵ At La Rosita, electioneering is permitted in some parts of the parking lot. *Id.*, Attach. A. At El Cenizo, strips of paved areas adjacent to the highway are Designated Areas for Electioneering. *Id.* There are no Designated Areas for Electioneering at the La Victoria polling place. *Id.*

The Electioneering Regulation also makes it unlawful to place or post, including “holding it by hand,” political signs “in public easements or rights-of-way,” prohibits electioneering on driveways of polling places, and makes it unlawful to hold or display a political sign within 15 feet from the curb of any County fire station driveway. *Id.* at §§ 2(d), 4(j)-4(l), 4(o). The Electioneering Regulation thus treats political speech differently from all other types of speech.

A violation of the Electioneering Regulation constitutes a Class C misdemeanor. *Id.* at § 5(a).

VI. Plaintiffs Have Electioneered on County Property for Years and Plan to Continue to Do So

Plaintiff Hilda Gonzalez Garza is the newly-elected Starr County Democratic Party Precinct Chair, Precinct No. 10. *See* Exh. A at ¶ 2. Plaintiff Rosbell Barrera is the chair of the Starr County Republican Party. *See* Dkt. No. 4-5, ¶ 2. For years, Plaintiffs have electioneered

⁵ Section 4(f) of the Electioneering Regulation provides:

It shall be unlawful for any person to loiter or electioneer on sidewalks and interfere with citizen access to polling locations unless the sidewalks are a specifically Designated Area for Electioneering. This prohibition does not apply to passive expressions of speech such as wearing clothing, hats or pins which may be considered electioneering.

Id. at § 4(f). A similar exception for these types of passive expressions of speech does not exist for grassy areas or parking lots, nor is there a similar exception for peacefully handing out or holding political signs and literature on sidewalks, in grassy areas, or in parking lots.

and advocated for issues, political parties, and candidates of their choice in areas surrounding county-owned or -operated polling places, including parking lots, parks, lawns, and sidewalks. *See* Dkt. No. 4-4 at ¶¶ 3-6, 23; Dkt. No. 4-5 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. *Id.* They have engaged in these electioneering activities on county property and near the polls for years and regard electioneering as part of their civic duty. *Id.*

In that time, Plaintiffs have never observed or been made aware that: 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* Dkt. No. 4-4 at ¶ 25; Dkt. No. 4-5 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 beyond the 100-foot marker. *Id.* To the contrary, 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* Dkt. No. 4-4 ¶¶ 5-6, 25; Dkt. No. 4-5 at ¶ 5.

As they have done for many years, Plaintiffs intend to electioneer on county property, including near polling places as permitted by Texas law, in the upcoming May 2018 Democratic runoff elections and the November 2018 elections, as well as during the early voting periods for those elections. *See* Exh. A at ¶ 27, Dkt. No. 4-5 at ¶ 6; *see also 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 May 20, 2018).⁶ Plaintiffs fear that exercising their First Amendment rights to electioneer and assemble peaceably on county property will lead to their arrest and prosecution. *See* Exh. A at ¶ 28; Dkt. No. 4-5 at ¶ 6.

VII. Plaintiffs Have a Long History of Civic Engagement on Starr County Property Where Speech and Peaceable Assembly Are Now Prohibited or Unconstitutionally Restrained

Plaintiff Ross Barrera is a retired Colonel of the U.S. Army and a life member of Veteran of Foreign Wars, a nonprofit veterans' service organization. Exh. B at ¶ 3. For almost two decades, Mr. Barrera has organized and participated in public gatherings that honor veterans and their families on Starr County property, including at the Starr County Cemetery in Rio Grande City. *Id.* at ¶¶ 4-6, 14. For example, on Memorial Day and Veterans Day, Mr. Barrera has organized the gatherings, offered remarks as a guest speaker, participated in gun salutes, and sung the national anthem. *Id.* He invites members of the community to participate and distributes flyers and other materials to encourage others to attend. *Id.* at ¶ 7. As a veteran, Mr. Barrera considers those activities an important part of his civic duty. *Id.* at ¶ 13. He plans to participate in these activities on Memorial Day on May 28, 2018, as well as during future county holidays. *Id.* at ¶¶ 9, 15. He fears Defendants will arrest or fine him if he engages in this type of speech and assembly at the Starr County Cemetery, where such activities are now censored under the Policy. *Id.*

Plaintiff Hilda Gonzalez Garza is an active member of her community. As a member of the Catholic Church and a former Starr County Assistant District Attorney, Plaintiff Hilda Gonzalez Garza cares deeply about issues related to child abuse, drug use awareness, and

⁶ The early voting period for the Texas primary runoff election is May 14-18, 2018. *Id.* Election Day for the Texas primary runoff election is May 22, 2018. *Id.* Early voting for the 2018 general election runs from October 22, 2018 to November 2, 2018. Election Day for the 2018 general election is November 6, 2018. *Id.*

healthcare access. Exh. A at ¶¶ 21-23. For years, she has participated in candlelight vigils and public gatherings on county property that are designed to bring awareness to those issues, including events held on the County Courthouse lawn and steps, at community centers, in parks, and on sidewalks. *Id.* As part of these activities, she has offered remarks as a guest speaker, worn clothing with symbolic messages, and assembled peaceably with other members of the Starr County community. *Id.* at ¶ 24. Plaintiff Hilda Gonzalez Garza fears she will be arrested or fined if she engages in those activities on county property now regulated by the Policy and Electioneering Regulation. *Id.* at ¶ 28.

LEGAL STANDARD

The Court may grant preliminary injunctive relief if Plaintiffs show “(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 Policy and Electioneering Regulation violate 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 Defendants; and (4) a preliminary injunction would serve the public interest. For these reasons, Plaintiffs respectfully request that the Court enjoin Defendants from enforcing or implementing the Policy and Electioneering Regulation.

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

Plaintiffs are likely to prevail on their claims that (1) the Policy and Electioneering Regulation are unconstitutional because they violate the First Amendment to the U.S. Constitution, (2) the Policy and Electioneering Regulation violate the Texas Election Code, and (3) Defendants acted *ultra vires*.

A. The Policy and Electioneering Regulation violate the First Amendment to the U.S. Constitution

The Electioneering Regulation is a content-based restriction of speech and, therefore, presumptively unconstitutional. The Policy and Electioneering Regulation are also unconstitutional because they apply to a substantial amount of public fora—such as sidewalks, parks, and lawns—and are not narrowly tailored to serve a compelling government interest. Even if considered content-neutral regulations, the Policy and Electioneering Regulation violate Plaintiffs’ First Amendment rights because they are not reasonable time, place, and manner regulations narrowly tailored to serve a significant government interest. Similarly, the Policy violates Plaintiffs’ First Amendment rights because it amounts to a total prohibition of speech and assembly on certain county properties, *e.g.*, Falcon County Park and the Starr County

Cemetery in Rio Grande City. To the extent the Policy authorizes the use of the Attachment A Properties, the Policy is an unconstitutional prior restraint of speech and assembly because it grants Defendants unfettered discretion to authorize or deny Plaintiffs' ability to speak and assemble peaceably at those six properties. Both the Policy and the Electioneering Regulation are also unconstitutionally overbroad and therefore facially invalid because a substantial number of their applications are unconstitutional judged in relation to their legitimate sweep.

1) The Electioneering Regulation is a content-based restriction of protected speech and peaceable assembly and, therefore, presumptively unconstitutional

The Electioneering Regulation is a content-based regulation of speech and, therefore, presumptively unconstitutional. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015); *see also F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (a law is content-based if "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed" are prohibited or restricted).

The Electioneering Regulation applies only to speech that is political in nature. It regulates where and when electioneering activities may be carried out. The Electioneering Regulation also bans the holding of a "political sign" anywhere on the four enumerated properties every day on which voting does not occur (which is almost every day of the year). The Electioneering Regulation does not similarly ban holding a religious sign, or an artistic sign, or even a commercial sign. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (law was content-

based when it regulated political speech but did not “reach other categories of speech, such as commercial solicitation, distribution, and display.”).

Under the Electioneering Regulation, electioneering is not permitted on some sidewalks and in all lawns of the Starr County Courthouse or in parks and grassy areas at La Victoria, La Rosita, or El Cenizo. *See* Electioneering Regulation, Attach. A. Other forms of speech are not similarly regulated by the County. Thus, because enforcement authorities must necessarily examine the content of the message conveyed on those county properties to determine whether the views expressed are prohibited or restricted under the Electioneering Regulation, it is a presumptively unconstitutional content-based restriction of Plaintiffs’ First Amendment freedoms.

2) The Policy and Electioneering Regulation are subject to strict scrutiny, regardless of whether the Policy constitutes a content-neutral or content-based regulation

Even if the Policy were content neutral standing alone, both the Electioneering Regulation and the Policy must survive the most exacting standard of review because they regulate a substantial amount of speech and peaceable assembly in traditional public fora. Under well-established U.S. Supreme Court precedent, when the government regulates First Amendment-protected speech and assembly in traditional public fora, it may not enforce content-based restrictions unless the regulation is narrowly drawn to achieve a compelling government interest. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). Similarly, content-neutral restrictions on speech and assembly in those fora must also be narrowly tailored to serve a significant government interest and must leave open ample channels of communication. *Id.* In other words, regardless of whether a regulation is content-based or content-neutral, it must be narrowly tailored and survive strict scrutiny review when it regulates

speech in public fora. *Id.*; 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.”).

i. The Policy and Electioneering Regulation apply to a substantial number of public fora

Both the Policy and Electioneering Regulation apply to a substantial number of public fora. It is well established that property “historically associated with the free exercise of expressive activities,” such as streets, sidewalks, lawns, and parks, are considered traditional public fora. See *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). Moreover, where a piece of land is adjacent to and indistinguishable from public fora, that adjacent and indistinguishable piece of property is also considered a traditional public forum. See *Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000) (holding that The University of Texas’ paved area inside campus grounds and adjacent to the Austin sidewalk near Red River is a public forum and noting that there is no indication or physical demarcation of the public sidewalk (a public forum) and the university grounds and “concerns with chilling otherwise constitutionally-protected speech are paramount.”).

Here, the Policy regulates speech and assembly in quintessential public spaces such as sidewalks, parks, grassy areas, and lawns. See Policy at § 3 (grassy areas and lawns);⁷ *id.* at § 12, Attach. C (sidewalks and parks); *id.*, Attach. B at §§ (i), (xii)(c) (grassy areas and sidewalks

⁷ As noted above, the Policy states that “the words ‘buildings’ and ‘facilities’ include structures *and surrounding property belonging to Starr County, including, but not limited to*, formal meeting spaces, porticos, and greens.” *Id.* Under this definition, grassy areas and lawns surrounding county-owned or operated structures are regulated by the Policy.

of County Courthouse). Similarly, the Electioneering Regulation applies to sidewalks, parks, lawns, and grassy areas surrounding polling places. *See* Electioneering Regulation, Attach. A.

The Policy also regulates unpaved and paved areas that are indistinguishable from and adjacent to public streets, sidewalks, parks, and grassy areas. *See* Policy, Attach. D. Like the university grounds in *Brister*, these unpaved and paved areas constitute traditional public fora. 214 F.3d at 681. The County cannot argue that these areas on county property are nonpublic fora merely by including them in the definition of “Parking Zones” and “Parking Lots” and stating these areas are intended for parking only. *See Grace*, 461 U.S. at 180 (holding the government cannot “transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.”).

As to all those public fora, the Policy and Electioneering Regulation must survive strict scrutiny.⁸

ii. The Policy and Electioneering Regulation do not survive strict scrutiny

Under strict scrutiny review, the County bears the burden of “specifically identify[ing] an ‘actual problem’ in need of solving” and showing that the curtailment of Plaintiffs’ First Amendment rights is “actually necessary to the solution.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011). “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *see also Reeves v. McConn*, 631 F.2d 377, 388 (5th Cir. 1980) (“the city may not broadly prohibit

⁸ To the extent Defendants can argue that some county properties are nonpublic fora, the Policy nonetheless fails because it is not a reasonable time, place, and manner regulation or a viewpoint neutral regulation that is “reasonable in light of the purpose which the forum at issue serves.” *Perry Educ. Ass’n*, 460 U.S. at 46, 49. For example, as to parking areas, with the exception of displaying of political bumper stickers on vehicles, the County has indefinitely banned all speech and assembly, irrespective of the time of the day, the nature of the speech, or whether the speech occurs during a voting period. Plaintiffs cannot apply to use any parking lots, regardless of the nature and scope of the intended use. In addition, as more fully set forth below, the Policy is facially unconstitutional under the overbreadth doctrine and an unconstitutional prior restraint on First Amendment freedoms.

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.”); *Watkins v. City of Arlington*, No. 4:14-CV-381-O, 2014 WL 3408040, at *6 (N.D. Tex. July 14, 2014) (government “cannot merely recite an interest in the abstract; there must be a genuine nexus between the regulation and the interest it seeks to serve.”) (internal quotation marks and citations omitted). Defendants do not meet that burden.

1. The Policy is not narrowly tailored

Defendants state that the purpose of the Policy is to “support county operations, public service, and historical values” and to “preserve the general health and welfare of the citizens of Starr County.” Policy at § 2(a). At the TRO hearing before the Court on February 26, 2018, Defendant Omar Escobar explained that, more specifically, Defendants drafted the Policy in part to regulate activities including: setting up tents, tables, and chairs; inviting voters to gather and eat barbeque plates outside of the County Courthouse during voting periods; and parking trailer parks with cattle on county property. 2-26-18 Tr. at 72:16-76:5.

Even assuming that any of the above-mentioned justifications are compelling or significant interests, the Policy is not narrowly tailored to serve those interests. That the Policy is both significantly overinclusive and underinclusive undermines the County’s purported interests. *See League of Women Voters of California*, 468 U.S. at 365 (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]”).

The Policy is overinclusive because it restricts Plaintiffs’ speech and assembly year-round and at all times of the day, regardless of whether voting is taking place or whether there is County business being conducted at any of the regulated buildings, facilities, or surrounding properties. It also applies to all county property, regardless of whether various fora are the subject of overcrowding or have experienced an interruption of government business as a result of activities in those fora. Defendant Escobar testified as to the interruption of government business in the county parking lots of La Rosita and the County Courthouse during the voting periods. *See* 2-26-18 Tr. 73:23-76:5, 86:16-88:14. However, the County offers no reason to restrict speech or assembly on county property such as the lawns and grassy areas of the Starr County Veterans Memorial or Starr County Cemetery, or the County Courthouse outside the voting period. Indeed, the Policy bans all speech and assembly on all county property—including sidewalks and parks—even during county holidays, precisely when offices are closed and there is no county business to disrupt. *See* Policy at § 3(d).

The Policy’s permit scheme is also overinclusive because it requires persons who wish to speak or assemble peaceably at the Attachment A Properties or in four county parks after hours to apply for a permit regardless of the timing, size, or length of the event. *See id.* at §§ 3(a), 12(d), Attach. A, C.⁹ To obtain a permit, individuals must be at least 21 years of age, complete and notarize a three-page application, sign a release of liability, and submit a permit application to the Starr County Judge’s office no less than 30 days before the intended use. *Id.* at §§ 5-7. Plaintiffs must also pay a \$50 deposit and an after-hours fee of \$25 per hour. *Id.* at § 8. To use the Starr County Courthouse, individuals must complete a Starr County Courthouse Public Use Request Form and pay a deposit of up to \$1,000 at the “sole discretion of the

⁹ As noted above, the Policy also requires Plaintiffs to obtain a permit to use the following parks after hours: Alto Bonito Park, La Casita Park, Fort Ringgold Park, and Abel N. Gonzalez Park. *Id.* at § 12(d), Attach. C.

Commissioner's Court." *Id.*, Attach. B, § (xii)(a). Therefore, if Plaintiffs wish to hold a sign, distribute literature, or participate in a peaceful candlelight vigil on the lawns or grassy areas of the Attachment A Properties or at the four listed parks after hours, they must pay the hefty deposit and complete the lengthy application process just like a group of individuals would have to do to organize a large protest or to set up numerous barbeque pits and tents. Defendants' hefty monetary requirements, notary, and release-of-liability requirements reach even the most passive forms of speech with no nexus to the County's asserted interests. *See also Fernandes v. Limmer*, 663 F.2d 619, 632 (5th Cir. 1981) (citations omitted) ("Exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court.").¹⁰ In addition, under the 30-day application requirement, Plaintiffs are effectively forbidden from expressing their views on matters of public concern in urgent situations. Defendants' overinclusive requirements are thus not narrowly tailored and chill a significant amount of protected speech.¹¹

The Policy is also underinclusive because Defendants offer no justification for imposing a permit restriction on some county facilities while prohibiting all speech and assembly on other similar county facilities. For example, Defendants prohibit all speech and assembly at county cemeteries and memorials, but authorize the use of other buildings and facilities, such as La Rosita and its grounds, subject to a permit. *See* Policy at §§ 3(a)-(b). Although Defendants cite to an interest in the preservation of public property, they did not narrowly tailor the Policy, which imposes a one-size-fits-all deposit requirement of up to a \$1,000 at the Courthouse but a \$50 deposit at other polling places. *Id.* at § 8(b). Similarly, the Policy freely allows peaceful

¹⁰ The Policy's age restrictions also bear no nexus to the County's purported interests. Under the Policy, high school students or college students under age 21 who wish to gather on the Courthouse lawns or steps cannot request a permit, while persons over age 21 can.

¹¹ At the February 26, 2018 TRO hearing, Defendants attempted to evade those issues by arguing that the permit requirements can be waived. *See* 2-26-18 Tr. 78:2-8. As noted below, however, the waiver provisions in the Policy do not absolve Defendants because the amount of discretion granted to the Starr County Judge and the Commissioners' Court to modify or waive those requirements is unconstitutional.

picketing and leafletting on sidewalks but not on adjacent grassy areas or lawns, even when the grassy areas are beyond the 100-foot marker during a voting period. *Compare id.* at § 3(a) *with id.* at § 12(c). Moreover, as to the County Courthouse, Defendants restrict the display of some categories of signs, such as personal notices and community announcements, but not other signs with a different content. *See id.* at Attach. B, § (vi). These arbitrary distinctions further show that the Policy bears no relation to the County’s purported interests in regulating county operations or enhance public safety.

2. The Electioneering Regulation is not narrowly tailored

The Electioneering Regulation is similarly overinclusive and underinclusive. Defendants state that the purpose of the Electioneering Regulation is: (1) to “provide reasonable regulations for electioneering . . . when [county] property is used as a polling place during the voting period,” (2) “[t]o establish an electioneering-free zone” within the 100-foot radius from the outside door of a polling place during any voting period, (3) “[t]o prevent damage to public property,” (4) to ensure availability of a polling place “for those who use the facilities other than for election purposes,” (5) “[t]o protect the public health, safety, and welfare of the County, and (6) “[t]o protect the voter and the integrity of the election process.” Electioneering Regulation at § 1(c).

Although Defendants purport to regulate electioneering during the voting period to ensure availability of polling places and preserve the integrity of the voting process, they regulate speech and assembly even outside the voting period. *Compare id.* at § 1(b) (“These Electioneering Regulations apply only to County property used as polling locations during a voting period.”) *with id.* at § 4(a) (“It shall be unlawful . . . to post, leave or place a political sign on County-owned or –controlled property, including within a Designated Area for

Electioneering, outside a voting period.”). As a result, on every non-election day of the year it is illegal to hold a political sign at any of the four properties listed in the Electioneering Regulation.

In addition, Defendants offer no justification for arbitrarily selecting pieces of county property as Designated Areas for Electioneering that bear no relationship to access to voting or to the public health, safety, and welfare of the County. For example, although Mr. Escobar offered his opinion during the February 26, 2018 TRO hearing regarding interruption of government business in the county parking lots of La Rosita, *see* 2-26-18 Tr. 86:16-88:14, parking areas in La Rosita are now Designated Areas for Electioneering under the recently-enacted Electioneering Regulation. *See* Electioneering Regulation, Attach. A. On the other hand, only the east and west sidewalks at the County Courthouse are Designated Areas for Electioneering, even though Mr. Escobar testified about interruption of business only in the parking lots of the Courthouse and Defendants offer no basis for prohibiting electioneering in lawns and sidewalks beyond the 100-foot marker. *See* 2-26-18 Tr. 73:23-76:5.

Finally, the Electioneering Regulation is underinclusive because it crafts an exception for passive speech in the form of wearing political t-shirts and apparel on sidewalks, *see* Electioneering Regulation at § 4(f), but not for other types of passive speech such as holding political signs. The Electioneering Regulation also prohibits all forms of passive political speech and assembly on lawns and grassy areas, regardless of whether those areas are beyond the 100-foot marker. *Id.*, Attach. A.

3) The Policy is unconstitutional because the County’s permit scheme is an unconstitutional prior restraint of protected speech and assembly and is not a reasonable time, place, and manner regulation

As noted above, the County authorizes private citizens to use the six Attachment A Properties subject to a permit application. *See* Policy at § 3(a). The permit scheme is an

unconstitutional prior restraint of speech because it enables viewpoint discrimination and grants Defendants unfettered discretion to grant or deny permission to speak. Therefore, it is not a reasonable time, place, and manner regulation.

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 constitutionality. *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.”). 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 (internal quotation marks and citations omitted).

Here, the Policy does not provide standards for or safeguards in the permitting process. As noted above, the Policy grants the Commissioners’ Court and the Starr County Judge unfettered discretion to grant an application, refund a deposit, impose a deposit amount, require the presence of a licensed peace officer, and waive or modify the Policy’s requirements, such as

the 30-day submission requirement or the after-hours fee. Policy at §§ 2(c), 5(a), 5(c), 6(c), 8(b), 8(e), 9(h). For example, the Policy provides that county property is available for “events that support a public purpose, benefit, service, training or interest to Starr County residents.” *Id.* at § 3(a). However, the Policy does not describe what those public purposes are or how Defendants will evaluate what constitutes a “public purpose.” In addition, 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 § 6(c). As to deposits, the Policy states that the County “may” refund the assessed deposit and “may” impose a deposit ranging from \$0 to \$1,000 to use the Courthouse or its grounds, but does not include any guidance for determining the amount of the deposit within that wide range. *Id.* at § 8(b). Defendants can elect to waive those requirements but the Policy does not describe the specific guidelines for a waiver or how an applicant may even apply for one. *Id.* at § 8(e). As a result, the Policy restricts Plaintiffs’ speech and assembly on county property but does not sufficiently confine the County’s unfettered discretion, therefore failing to safeguard against viewpoint discrimination.

4) The Policy is an unconstitutional ban on speech and assembly on all county property not specifically referenced in the Policy, including parks, lawns, and other county facilities where Plaintiffs engage in protected speech and assembly

The Policy flatly prohibits all speech and assembly on county property not specifically identified in the Policy. *See id.* at § 3(b) (“Buildings and facilities that are excluded from [the six properties listed in] Attachment A are not available for use by private citizens unless otherwise allowed under this Policy.”); *Id.* at § 3(a) (“[T]he words ‘buildings’ and ‘facilities’ include structures and surrounding property belonging to Starr County, including, but not limited to,

formal meeting spaces, porticos, and greens.”). Such an indefinite and absolute ban on speech and assembly is unconstitutional regardless of the forum at issue. *See Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding that even in nonpublic fora, such as an airport, a total ban on speech runs afoul of the First Amendment “because no conceivable governmental interest would justify such an absolute prohibition of speech.”).

Upon information and belief, Starr County owns or operates a number of county properties not specifically identified in the Policy, including, but not limited to, Falcon County Park, the Starr County Cemetery in Rio Grande City, the Starr County Sheriff’s Office, the Starr County War Dead Memorial, and the Starr County Veterans’ Memorial, as well as other structures such as county cemeteries, community centers, or offices, and surrounding property including grassy areas and lawns. *See* Exh. A. at ¶¶ 12-13; Exh. B at ¶ 10.

Plaintiffs regularly speak and assemble peaceably at these properties. For example, Plaintiff Ross Barrera, a retired Colonel of the U.S. Army, has organized and participated in services honoring veterans and their families in Starr County property, including at the Starr County Cemetery in Rio Grande City, on Memorial Day and Veterans Day. Exh. B at ¶¶ 4-8, 14. Mr. Barrera typically offers remarks as a guest speaker, participates in gun salutes, and sings the national anthem, for example. *Id.* He also invites members of the community to participate and distributes flyers and other materials to encourage others to attend. *Id.* As a veteran, Mr. Barrera considers those activities an important part of his civic duty and intends to participate in these activities on Memorial Day on May 28, 2018, as well as on future county holidays. *Id.* at ¶¶ 13, 15. He fears Starr County will arrest or fine him if he engages in that type of speech and

assembly at the Starr County Cemetery, where speech and assembly is now prohibited under the Policy, on County holidays. *Id.* at ¶¶ 9, 15.

Plaintiffs cannot use fora that fall under Section 3(b) at any time or for any purpose. Indeed, Plaintiffs cannot even apply for a permit to use these properties. As a result, Defendants prohibit Mr. Barrera from engaging in protected speech and assembly at the Starr County Cemetery on Memorial Day, for example, and on other county holidays.¹²

5) The Policy and Electioneering Regulation are 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.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Here, as explained above, the Policy and Electioneering Regulation restrict Plaintiffs’ protected speech and right to assemble peaceably in a far broader manner than is reasonably necessary to protect the County’s purported interests. *See* Sections I.A.2-4. As a result, the Policy and Electioneering Regulation are unconstitutionally overbroad and facially invalid.

B. The Policy and Electioneering Regulation violate 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*,

¹² As noted above, the Policy prohibits the use of *any* county property on county holidays. Similarly, the Electioneering Regulation prohibits holding a political sign at the four enumerated County properties even outside the voting period.

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’ Policy and Electioneering Regulation, on their face, violate Section 61.003 because they are a complete prohibition of electioneering in areas at Starr County polling places beyond the 100-foot zone created by the Election Code. The Policy and Electioneering Regulation further violate § 61.003 because, as noted above, they are not reasonable regulations concerning the time, place, and manner of electioneering.

C. Defendants acted *ultra vires*

Defendants acted *ultra vires* and in violation of state law when they enacted the Policy and Electioneering Regulation. 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 election administration that Defendants must perform. By adopting a Policy and Electioneering Regulation expressly prohibited by the Texas Election Code, Defendants acted *ultra vires*.

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 Policy and Electioneering Regulation threaten Plaintiffs with irreparable harm because they abridge their First Amendment free speech rights. Plaintiffs have lost the freedom to speak freely and assemble peaceably on county property and will continue to suffer that harm unless Defendants are enjoined from enforcing the Policy and Electioneering Regulation.

Plaintiffs are under a credible threat of prosecution by Starr County law enforcement officials for a violation of the Policy and Electioneering Regulation. *See Babbit v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted). Both plaintiffs engage in activities prohibited by the Policy and Electioneering Regulation. See Exh. A at ¶¶ 20-24; Exh. B at ¶¶ 4-17. Plaintiff Garza has already testified that the County enforced its electioneering rules to limit her speech in the past. 2-26-18 Tr. at 17:2-29:13; *see also* Exh. A at ¶ 26. Plaintiff Garza further testified that the current Policy and Electioneering Regulation have chilled her expressive activities. Exh. A at ¶ 27.

The looming threat of prosecution is a substantial threat of irreparable injury that supports injunctive relief. *See Lamar Outdoor Advert., Inc. v. Mississippi State Tax Comm’n*, 701 F.2d 314, 316 (5th Cir.), *on reh’g sub nom. Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (holding that appellees need not have violated the law or have been subjected to sanctions in order to show injury); *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 506–07

(5th Cir. 1981) (“The fear of punishment for violations of the ordinances may inhibit appellants [from exercising] their First Amendment rights. This is a sufficient injury to confer standing upon appellants.”).

Furthermore, enforcement of regulations that are 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 Cir. 2012) (finding irreparable harm when state statute conflicts with federal law). Plaintiffs are forced to choose between exercising free speech and assembly rights and facing prosecution—or relinquishing those precious rights and complying with the County’s unlawful regulations.

The Policy and Electioneering Regulation hinder the culture of civic participation to which electioneering and other expressive activities contribute. 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’ Injuries Outweigh Any Harm That Would Result From an Injunction

The equities tip heavily in favor of granting Plaintiffs’ application for a preliminary injunction that halts the enforcement of the unconstitutional portions of the Policy and Electioneering Regulation. Plaintiffs simply seek to maintain the status quo by enjoining Defendants from infringing on First Amendment freedoms. *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 Defendants have no authority to enforce unconstitutional policies. *See Fund For Louisiana's Future v. Louisiana Bd. of Ethics*, 17 F. Supp. 3d 562, 576 (E.D. La. 2014) (holding that the government “does not have an interest in the enforcement of an unconstitutional law.”) (citations omitted).

IV. The Injunction Will Not Disserve the Public Interest

“[I]njunctions protecting First Amendment freedoms are always in the public interest.” *Texans for Free Enter. v. Texas Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013). In addition, allowing counties across Texas to implement their own local policies that violate state law 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 or enforcing specific portions of the revised Starr County Building and Property Use Policy, adopted by Defendants on April 9, 2018, and supplemental Electioneering Regulation, adopted on May 9, 2018, as set out in the accompanying Proposed Order (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.

Dated: May 21, 2018

Respectfully submitted,

**MEXICAN AMERICAN LEGAL DEFENSE
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CERTIFICATE OF CONFERENCE

On May 6, 2018, the undersigned counsel for Plaintiffs emailed Mr. Ysmael Fonseca, Esq., counsel for all Defendants, with a proposed agreed order and motion for entry of agreed order, seeking an agreement on the enjoinder of certain provisions of the revised Starr County Building and Property Use Policy in order to avoid the need to file this application. On May 11, 2018, Mr. Fonseca responded via e-mail: “We do not agree with the proposed motion.” Later that day, on May 11, 2018, the undersigned counsel for Plaintiffs again emailed Mr. Fonseca with a revised agreed order and motion for entry of agreed order, seeking an agreement on the enjoinder of certain provisions of the revised Starr County Building and Property Use Policy as well as the Electioneering Regulations, which Starr County adopted on May 9, 2018. Plaintiffs advised Mr. Fonseca that if Defendants did not join the motion for entry of the agreed order, Plaintiffs intended to move for the relief sought in the form of a preliminary injunction. Mr. Fonseca responded to that email and stated: “Thank you, Mr. Moreno. However, the County has duly enacted a Use Policy and Electioneering Regulations and will continue to enforce them; I cannot agree to an injunction. Should my clients instruct me otherwise next week, I will let you know.” As of the filing of this Memorandum of Law in Support of Plaintiffs’ Second Emergency Application for Temporary Restraining Order, Mr. Fonseca has neither communicated a different position to Plaintiffs nor suggested any amendments to the proposed agreed orders.

/s/ Celina Moreno
Celina Moreno

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 21st day of May 2018, which will serve a copy on all counsel of record for Defendants.

/s/ Alejandra Ávila
Alejandra Ávila