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

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFFS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Hilda Gonzalez Garza, Rosbell Barrera, and Mario Mascorro Jr. ("Plaintiffs") respectfully submit this response in opposition to Defendants' Motion for Judgment on the Pleadings (Dkt. 67) and cross motion for judgment on the pleadings. Plaintiffs request that the motion be denied because the pleadings show that the Starr County Building and Property Use Policy ("Property Use Policy" or "Policy") and the Starr County Electioneering Regulations ("Electioneering Regulation"), both most recently revised and adopted on June 25, 2018, violate the U.S. Constitution and the Texas Election Code. Plaintiffs further cross move for judgment on the pleadings because the challenged Starr County policies are unconstitutional on their face.

This Court has already invalidated portions of Starr County's speech ban. *See* Dkt. 18. Faced with further evidence of the unconstitutionality of its policies, Starr County amended, rescinded, and re-adopted various provisions on February 12, April 9, May 9, and June 25, 2018. Each time, Plaintiffs responded by amending their complaint to show that the replacement policies are unconstitutional.

As set out in careful detail in Plaintiffs' Fifth Amended Complaint, Starr County's Electioneering Regulation is a content-based regulation of speech without any nexus to a compelling government interest. The Electioneering Regulation is also overbroad and unduly vague. The County's Property Use Policy violates the Equal Protection Clause because it infringes on the fundamental right of persons under the age of 21 to peaceably speak and assemble. The Property Use Policy also is unconstitutional because it is: a prior restraint of speech; a regulation of protected speech and peaceable assembly in traditional public fora that is not narrowly tailored to serve a compelling or significant government interest; and is overbroad and unduly vague.

Moreover, the Property Use Policy and the Electioneering Regulation violate the Texas Election Code because they impose a content-based, blanket ban on electioneering, and they establish restrictions that are not reasonable as to time, place, and manner. Finally, all Defendants are properly sued and the Court should reject Defendants' request to dismiss Defendants Escobar, Canales, and Fuentes.

Therefore, Plaintiffs respectfully request that Defendants' motion be denied and further request that the Court enter judgment in favor of Plaintiffs.

FACTUAL BACKGROUND

In January 2018, the Starr County Commissioners' Court enacted a sweeping ban on electioneering on Starr County property. *See* Dkt. 63 ("Compl.") ¶ 20. Prompted by this litigation, the County has revised its ban multiple times. The latest Property Use Policy and Electioneering Regulation were adopted by the Commissioners' Court on June 25, 2018. *Id.* ¶¶ 47, 85.

Despite the County's attempts to repair its policies, under the current Electioneering Regulation, Plaintiffs are banned from electioneering in a substantial number of public fora, including lawns and sidewalks at the County Courthouse. *Id.* ¶¶ 87-97. Similarly, the Property Use Policy prohibits all persons from speaking or assembling in areas of six identified county properties: the County Courthouse, the Starr County Fairgrounds, El Cenizo Park Community Center, La Rosita Library, the Starr County Annex Conference Room, and Zarate Park Community Center on county holidays, including Election Day. *Id.* ¶¶ 55-57, 76-79. The Property Use Policy does not allow individuals under age 21 to speak or assemble peaceably in these same areas any day of the year. *Id.* ¶ 59. For individuals over the age of 21, the Property Use Policy requires Plaintiffs to undergo a burdensome permit application process to apply for a permit to speak or assemble in those areas: Plaintiffs must state the purpose for which the county property will be used, sign a release of liability, and have the applicant's signature notarized by a Texas notary public. *Id.* ¶ 59. In addition, the applicant is required to submit his or her permit application to Defendant County Judge Eloy Vera no less than 30 days before the intended use. *Id.* ¶ 63. Plaintiffs must also pay after-hour fees of $25 per hour and a $50 deposit, which "may" be refunded at the discretion of the County. *Id.* ¶¶ 60-61. To use the Courthouse or its lawns, Plaintiffs must pay a deposit of up to $1,000 at the discretion of Defendant County Judge Eloy Vera. *Id.* ¶ 67.

Whether or not Starr County grants a permit to an individual is left to the unfettered discretion of the County Commissioners' Court and Defendant County Judge Eloy Vera. *Id.* ¶¶ 67-72. For example, the Property Use Policy contains no procedures or standards that guide: when a deposit is to be refunded; how the County is to assess the deposit amount for use of the Courthouse grounds; when fees are to be waived or how an applicant can even apply for such a

waiver; under what circumstances the County will require an applicant to pay for a peace officer; and under what circumstances are any of the Property Use Policy requirements modified or waived. *Id.*

Plaintiff Mario Mascorro Jr., who is 19 years old and running for office in Starr County, cannot apply for a permit and cannot speak or assemble on designated county property like other candidates and persons over the age of 21. *Id.* ¶¶ 10, 65-66. Plaintiffs Hilda Gonzalez Garza and Rosbell Barrera must pay a substantial deposit before they speak or assemble on designated county property, including if they wish to peacefully stand alone on grassy areas of these properties to verbally advocate for candidates of their choice or speak about other matters of public concern unrelated to electioneering. *See id.* ¶¶ 55-61. Plaintiffs Garza and Barrera are also prohibited from immediately speaking or assembling on designated county property should they desire; they must wait at least 30 for the County to process their application under the Property Use Policy, even if they want to protest a recently adopted ordinance. *Id.* ¶ 63.

Finally, the Property Use Policy categorically forbids placing signs on county property, including in public fora such as sidewalks, parks, and lawns, and including the "Vote Here" signs with wire legs temporarily placed in grassy areas outside polling places during the voting period. *Id.* ¶¶ 64, 73-74. However, the Property Use Policy permits the placement of chairs, tables, and tents on those same lawns, parks, and sidewalks. *Id.* ¶ 74.

STANDARD

"Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain." *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir. 1998) (citation omitted). In considering Defendants' motion, "the district court is confined to the pleadings and must accept all allegations contained therein as true."

Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 420 (5th Cir. 2001) (citations omitted). As the Fifth Circuit has instructed, "[p]leadings should be construed liberally." *Id*.

ARGUMENT

I. The Pleadings Show That the Electioneering Regulation is a Content-Based Regulation That Fails Strict Scrutiny.

In their motion, Defendants do not dispute that the Electioneering Regulation is a content-based regulation of First Amendment freedoms and, therefore, a presumptively unconstitutional regulation subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). To defeat Plaintiffs' claims, Defendants bear the burden of showing that the regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (emphasis added). Defendants appear to argue that they meet this burden because they contend that the Electioneering Regulation only restricts electioneering on county sidewalks, *see* Dkt. 67 ¶¶ 30-36, and the County has a compelling interest in ensuring "access" to polling locations (*id*. ¶¶ 31, 34), ensuring "access" to county properties that are *not* serving as polling locations, such as community centers, county offices, and fire stations, (*id*. ¶¶ 32-33, 35), and ensuring that drivers are not "obstructed" or "distracted," *see id*. ¶¶ 35-36. These arguments are without merit.

First, Defendants' reading of the Electioneering Regulation is wholly at odds with the plain language of the regulation, which explicitly designates certain areas of county property for electioneering activities and bans electioneering elsewhere, including in public fora such as greens and sidewalks. *See* Compl. ¶¶ 89-97. The Electioneering Regulation creates "Designated Areas for Electioneering," which are identified by maps attached to the Electioneering Regulation. Dkt. 67-2 at 7-10. Defendants themselves agree that certain public fora, that are not

sidewalks, are off-limits to electioneering. *See, e.g.*, *id.* ¶ 96. ("[a]t a public Commissioners' Court meeting, Defendant CANALES, JR. stated that . . . electioneering is 'prohibited everywhere where you don't see the green' in the attached maps in Exhibit A" of the Electioneering Regulation.). The Court must accept these facts as true. *Hughes*, 278 F.3d at 420.

Second, whether or not the County has a compelling interest in restricting electioneering in its public areas turns on factual allegations outside the pleadings, and the Court must accept the pleadings as true for the purpose of deciding the motion. *See id.*; *see also* Dkt. 63 ¶ 107 ("In the many years in which Starr County residents have electioneered and assembled peaceably on county property, county governmental operations have not been disrupted. Similarly, there have been no health or safety problems caused by assembling peaceably and electioneering.").

Whether Starr County's articulated interests are compelling enough to justify prohibiting electioneering on county grassy areas is a disputed material fact, and judgment on the pleadings is improper. *See Hebert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) ("A motion brought pursuant to Fed. R. Civ. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts."); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (holding that the government "bears the burden of specifically identify[ing] an 'actual problem' in need of solving").[1]

Finally, the Electioneering Regulation does not survive strict scrutiny because it is not narrowly tailored to serve a compelling or even significant interest. A regulation is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to

[1] Plaintiffs have propounded discovery on this issue and pursuant to the Court's scheduling order, discovery does not close until January 4, 2019. Dkt. 52. at 2.

remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *see also Reeves v. McConn*, 631 F.2d 377, 388 (5th Cir. 1980) ("When First Amendment freedoms are involved, the [government] 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) (holding that the 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).

On its face, the Electioneering Regulation is both significantly over-inclusive and under-inclusive, undermining any argument that there is a genuine nexus between the regulation and the County's purported interests. *See League of Women Voters of California*, 468 U.S. 364, 365 (1984) (holding that the statute's "overinclusiveness and underinclusiveness . . . undermines the likelihood of a genuine governmental interest"); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 440 (5th Cir. 2014) ("Such obvious underinclusiveness undermines any argument that [the government] is truly interested in regulating [for that purpose]"). For example, the Electioneering Regulation is under-inclusive because it prohibits electioneering on certain sidewalks, but it does not similarly ban other speech such as commercial solicitation or religious speech on those same sidewalks, even if the permitted commercial and religious speech may very well preclude access to polling locations or other county buildings and obstruct or distract drivers. Compl. ¶¶ 87-88. The Electioneering Regulation is also under-inclusive because it allows individuals to stand on a sidewalk wearing a political t-shirt but does now allow individuals to stand on that same sidewalk and verbally advocate for a particular candidate, despite the fact that both activities have the same potential to block ingress and egress to a building. *See* Dkt. 67-2 § 4(f). The Electioneering Regulation is also under-inclusive because it permits electioneering in a paved area of county property at La

Rosita by designating it a Designated Area for Electioneering, even though this area of county property is adjacent to the parking lot and the highway where presumably drivers can be distracted. *See id.* at 7. This designation is inconsistent with Defendants' claim that the County banned electioneering on sidewalks adjacent to the parking lot of the Courthouse because it has an interest in preventing driver distraction. *See* Dkt. 67 ¶ 36. Finally, the Regulation is over-inclusive because its restrictions apply 24 hours per day, whether or not there are county operations occurring at the property.

Defendants fail to explain how their content-based regulation is narrowly tailored. As best as Plaintiffs can discern, Defendants appear to argue the Electioneering Regulation is narrowly tailored because Plaintiffs are able to electioneer "elsewhere"—*i.e.*, in some areas of county property where the regulation does not ban electioneering activities. *See, e.g.*, Dkt. 67 ¶ 35 ("There are several alternatives to electioneering on County properties that serve as polling locations"); *id.* ¶ 34 (arguing Plaintiffs "have failed to identify" how county property where electioneering is prohibited by the Electioneering Regulation "is so essential to their electioneering that they cannot otherwise carry out" their electioneering in other county property). This is not the legal standard. The question before the Court is not whether alternative channels of communication exist; it is whether the County can show that the regulation is narrowly tailored to serve a real problem in need of solving. *See Perry Educ. Ass'n*, 460 U.S. at 45. That Plaintiffs can exercise their First Amendment rights on some county property does not permit Defendants to ban First Amendment activities on other county property without justification or precision.

For all of these reasons, the Electioneering Regulation on its face is not narrowly tailored, even if the pleadings revealed a compelling County interest (they do not).

II. The Pleadings Show That Defendants' Property Use Policy is Also Facially Unconstitutional Under Both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

A. Equal Protection

Defendants argue that Plaintiffs' challenge to the Property Use Policy's age restrictions under the Equal Protection Clause of the Fourteenth Amendment are subject to rational basis review, and that the Property Use Policy's permit scheme meets this burden because "the County has determined that only applicants of a mature age can be responsible for losses to property." Dkt. 67 ¶¶ 26-27. Not only is the County's purported maturity determination a disputed fact outside the pleadings, but Defendants also apply the wrong legal standard.

The "equal protection analysis requires strict scrutiny of a legislative classification [] when the classification impermissibly interferes with the exercise of a fundamental right," such as the right to speak and assemble. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (holding that laws that place "unequal burdens" on First Amendment rights of different groups are subject to strict scrutiny); *see also Town of Gilbert, Ariz.*, 135 S. Ct. at 2230 ("[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

Defendants do not dispute that the Property Use Policy's permit scheme implicates the First Amendment rights of Plaintiff Mario Mascorro Jr., and they have failed to articulate how the exclusion of persons under the age of 21 from the permit scheme survives strict scrutiny.[2] For example, even if the County could prove that the challenged policy responds to a problem of property damage and the County's lack of financial means to repair property damage (it does

[2] Defendants appear to claim the Policy's ban on minors is constitutional because Plaintiff Mascorro has "other means of expression" and can apply for a permit "with the help of a sponsor." Dkt. 67 at ¶ 25. However, this is not the standard, and Defendants do not cite to any controlling case law for their position.

not), and that these interests are compelling, Defendants do not explain how banning all minors from the permit application process under the Property Use Policy bears any nexus to potential damage to county property.

The Property Use Policy categorically bars all persons under the age of 21 from securing the necessary permit to speak or assemble on certain county properties listed in Attachment A of the Policy, including the County Courthouse. The County bars these young individuals regardless of their level of personal responsibility or ability to pay for property damage. Compl. ¶ 65. At the same time, the Property Use Policy allows all individuals over the age of 21 to secure a permit, even if those individuals do not have the financial means to cover damages or losses to county property, so long as those individuals declare that they "assume responsibility for the repair or replacement of any Starr County premises and/or equipment which might be damaged during the reservation period." *See* Dkt. 67-3 at 2. The Property Use Policy's overinclusiveness and underinclusiveness demonstrate that the exclusion of those under age 21 from the permit scheme is not narrowly tailored to serve a compelling interest.

B. First Amendment

The Property Use Policy is also unconstitutional because it restricts Plaintiffs' First Amendment rights in traditional public fora in a manner that is not narrowly tailored to serve any significant County interest. When the government regulates First Amendment-protected speech and assembly in traditional public fora, it may not enforce content-neutral restrictions unless the regulation is narrowly drawn to achieve a significant government interest and the regulation leaves ample alternative channels of communication. *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.").

Here, Defendants do not dispute that county-owned sidewalks, parks, and other grassy areas such as lawns constitute public fora as a matter of law. Defendants further do not dispute that the Property Use Policy regulates Plaintiffs' protected speech and the right to assemble in these areas. Defendants also correctly note that, as a result of this litigation, the Property Use Policy now provides that Plaintiffs may exercise their First Amendment rights in limited, so-called "Public Spaces." *See* Dkt. 67-1 ("Policy") § 12 ("Sidewalks on County property and County Parks, Cemeteries and Memorials are considered Public Spaces. Permitting is NOT required for the use of Public Spaces.").[3]

Defendants' justifications for their Property Use Policy depend on disputed facts that are outside the pleadings and thus Defendants' motion must be denied. *See Hughes*, 278 F.3d at 420. In addition, as more fully set forth below, Defendants have not established that the Building Use Policy is narrowly tailored, and the Policy is an unconstitutional prior restraint on speech. Therefore, the Property Use Policy remains unconstitutional because it unnecessarily restricts Plaintiffs' ability to speak and assemble on County lawns and greens, including the Courthouse lawns.

The Permitting Scheme Sweeps in Large Areas of County-Owned Property

On its face, the Property Use Policy requires individuals to apply for a permit to use County "structures and surrounding property," which includes lawns and other grassy areas. Compl. ¶ 57. County-owned lawns and grassy areas are available for public use, but individuals must secure a permit in order to have permission to use these areas. *Compare* Policy Attach. B,

[3] However, "[d]epositing or posting" signs is prohibited in these same areas. *Id.*

§(i)(d)) ("The Courthouse greens are available at all times for public use to the extent that there is no threat to the security of the Courthouse and the safety of County employees and citizens.") *with id*. § (xii) (setting sets forth an application process for the public use of County grounds, including the Courthouse lawns.) *and* Policy § 3(b) (identifying properties not available for reservation as properties "not available for use by private citizens"). Indeed, when the County has decided to bring specific fora outside the permitting scheme of the Policy—as it did with sidewalks and parks and subsequently with cemeteries and memorials—it has expressly listed that fora in the "Public Spaces" section of the Policy. *See id*. § 12(a).

To the extent that Defendants claim that County Courthouse lawns and greens are not subject to the permitting process, they misread the Property Use Policy. *See* Dkt. 67 ¶ 19. In any event, Defendants make no effort to address the constitutionality of the permitting scheme with respect to lawns and greens at other County-owned locations such as La Rosita Library, El Cenizo, and the Courthouse Annex.[4]

The Permitting Scheme Imposes Burdensome Requirements that are not Narrowly Tailored

The pleadings demonstrate that the County's permitting scheme is unconstitutional because it is not narrowly tailored. The Property Use Policy imposes a one-size-fits-all set of burdensome requirements regardless of the nature and scope of the speech. *See* Compl. ¶¶ 55-63. For example, to speak or assemble in any of the six county properties identified in the Property Use Policy,[5] Plaintiffs must:

[4] Defendants also claim that "Courthouse Annex greens [] are available for public sue use" but do not cite to any support for the suggestion that use of greens in the Courthouse Annex—which is a separate property from the County Courthouse—does not require a permit application. Dkt. 67 ¶ 15; *see also* Dkt. 4-3 at 15 (map of Courthouse Annex).

[5] Those properties are 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. *Id*. ¶ 56.

- pay a $50 deposit (or in the case of the Courthouse, a deposit of up to $1,000) that the County may or may not refund;
- state the purpose for which the county property will be used;
- sign a release of liability;
- have the signature notarized by a Texas notary public; and
- submit the permit application to Defendant County Judge Eloy Vera no less than 30 days before the intended use. *Id.* ¶¶ 58-63, 67.

The overbroad nature of the Property Use Policy renders it unconstitutional.

The Property Use Policy's permitting scheme also flatly prohibits Plaintiffs from applying for a permit to speak or assemble at these county properties on county holidays, including Election Day. *See id.* ¶¶ 76-79. Defendants argue that prohibiting Plaintiffs' speech and assembly on county property on holidays is necessary to "preserv[e] the resources that would have to be spent on keeping the facilities open and operating at a time when they would typically be closed." Dkt. 67 ¶ 18. However, preservation of resources cannot justify Defendants' infringement on Plaintiffs' constitutional rights. *See Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973) (where government claimed discrimination against women "saves the Government [] money," holding that "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'") (citation omitted); *see also Plyler v. Doe*, 457 U.S. 202, 226 (1982) (holding that State's "concern for the preservation of resources" was constitutionally insufficient); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest."); *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 858

(9th Cir. 1992) ("federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights") (collecting cases).[6]

Even assuming the County could establish that saving money is a significant government interest, the Property Use Policy is not narrowly tailored to that interest. The Property Use Policy permits Plaintiffs to apply for a permit to use county property outside of business hours for additional fees, for example, showing the ban on speech on county holidays bears no relation to the County's purported interest. *See* Compl. ¶ 61. Defendants' conjectural justification cannot stand. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 379 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

Finally, the Property Use Policy bars Plaintiffs from participating in certain First Amendment activities in these fora all together. For example, during the voting period, a common sight across Texas is groups of campaign and "Vote Here" signs with thin wire legs set into grassy areas outside polling places. The County's Property Use Policy prohibits Plaintiffs from temporarily posting these signs on county property, as well as any other signs. Compl. ¶¶ 64, 73-74.

Defendants claim this restriction is necessary to "eliminate visual clutter," to "maintain sidewalks clear for the safety of pedestrians," and to make sure "that lawns and greens are always available for active citizen use." Dkt. 67 ¶ 24. Once again, the County's justifications are without merit. First, these interests were created after-the-fact; they are entirely absent from the County's Property Use Policy and the pleadings. Second, to the extent they exist, the Property Use Policy is not narrowly tailored to address them. For example, the Property Use Policy does not forbid Plaintiffs from standing and holding signs in the same areas where

[6] Defendants cite to *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989). Dkt. 67 ¶ 18. However, that case does not hold that saving money is a substantial government interest as a matter of law.

Plaintiffs are prohibited from setting the signs wire legs into the ground. The Property Use Policy also permits the placing of chairs, tables, tents, and grills in the areas where the Property Use Policy prohibits posting of signs. *Id.* ¶ 74. It is evident that the County is not genuinely interested in eliminating visual clutter or preserving lawns for other uses, and that, to the extent these interests are actual problems in need of solving, the County has failed to address them with sufficient specificity. Therefore, the Property Use Policy is unconstitutional.[7]

Unconstitutional Prior Restraint

The pleadings make clear that the Property Use Policy is unconstitutional because its permitting scheme is a prior restraint of speech that also enables viewpoint discrimination. *See* Compl. ¶¶ 67-75. 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 permitting scheme must "not delegate overly broad licensing discretion to a government official." *Forsyth Cty., Ga.*, 505 U.S. at 130-31.

[7] Defendants' reliance on *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) is inapposite. Dkt. 67 ¶ 24. That case involved the constitutionality of the City of Los Angeles' removal of dozens of signs left unattended on utility poles around the city, *i.e.*, left unattended in nonpublic fora. *Taxpayers for Vincent*, 466 U.S. at 809. Here, Plaintiffs bring a facial challenge to the Policy's sweeping prohibition on posting of all signs in public fora.

Defendants claim that the Property Use Policy "provides the guidance necessary for the County to exercise discretion." Dkt. 67 ¶ 20. In support of this argument, they contend that the Property Use Policy provides the County Judge the discretion to waive fees only "if the community at large is receiving a valuable service in return" and to impose additional restrictions "with the primary focus of maintaining and protecting the historical structure" of the Courthouse. Dkt. 67 ¶ 20 (citing Policy § 8(e), Attach. B, § (xii)(a)). However, Defendants do not explain how County Judge Eloy Vera is to make the determination of whether the County is "receiving a valuable service" and what constitutes "maintaining and protecting the historical structure" of the Courthouse, both overly broad phrases. Similarly, Defendants argue the County can require a peace officer in its discretion because "large demonstrations may at times require the presence of law enforcement to keep the peace." Dkt. 67 ¶ 20. However, that is not what the Property Use Policy provides. The Property Use Policy does not specify under what circumstances these police services "may be required" of Plaintiffs and who is responsible for making this determination. Compl. ¶ 70. Under this broad language, the County is free to require Plaintiffs to pay for a licensed peace officer if they wish to engage in individual advocacy for any reason, including because the County disagrees with the content of Plaintiffs' message, while the County need not require the same of a "large demonstration" by someone else. The Property Use Policy's lack of standards does indeed facilitate viewpoint discrimination and is therefore unconstitutional.

Defendants do not even attempt to address additional portions of the Property Use Policy that delegate overly broad licensing discretion to County officials. For example, the Property Use Policy grants the Commissioners' Court and the Starr County Judge unfettered discretion to grant or deny an application to begin with. *Id*. ¶ 68. The Property Use Policy also grants

Defendants unfettered discretion to refund a deposit and impose a deposit amount. *Id.* ¶¶ 60, 67. As to the Courthouse and its grounds, the Property Use Policy states that the Starr County Judge "may" require a deposit ranging from $0 to $1,000, but does not include any guidance for determining the amount of the deposit within that wide range. *Id.* ¶ 67.[8] Simply put, the Property Use Policy does not sufficiently confine the County officials' discretion; it thus fails to safeguard against viewpoint discrimination and the chilling of protected speech.

III. Defendants' Interpretation of the Property Use Policy and Electioneering Regulation, Even if Correct, Cannot Save These Policies From Unconstitutionality.

Defendants misconstrue their own Property Use Policy and Electioneering Regulation in an attempt to escape liability under the Constitution. However *even if* Defendants' interpretation of their challenged policies were correct (and it is not), the Property Use Policy and Electioneering Regulation would still be unconstitutional. Defendants do not dispute any of the following scenarios, which demonstrate how the challenged policies infringe on Plaintiffs' protected activities:

- During the voting period, Plaintiffs want to talk to voters and offer campaign cards on the sidewalks at the far ends of the County Courthouse property, outside the 100-foot state law perimeter. The County Electioneering Regulation prohibits Plaintiffs from talking to voters and offering campaign cards on the sidewalks at the far ends of the County Courthouse property because those areas are not Designated Areas for Electioneering under the Electioneering Regulation.

- Plaintiffs want to temporarily post wire-legged political signs in green areas of county property to show their support for candidates. The County Building and Property Use Policy prohibits posting signs in all county property, including in "Public Spaces," at any time during the year.

[8] Defendants claim the Policy prescribes sufficient standards as to the Courthouse grounds because "the deposit amount for use of the Courthouse must be 'based on the risk of damage or destruction to county property and its historical preservation.'" Dkt. 67 ¶ 20 (citing Policy Attach. B § (xii)(a)). However, the Policy does not prescribe how risk is assessed or who makes the assessment. In addition, Defendants' argument does not address the lack of parameters as to deposits and refunds applicable to other county property aside from the Courthouse.

- Before the voting period begins, Plaintiff Mario Mascorro wants to talk to voters and offer campaign cards about his candidacy outside of the El Cenizo Park Community Center, the Zarate Park Community Center, the Starr County Fairgrounds, the Courthouse Annex, and La Rosita Library. The County Building and Property Use Policy prohibits persons under the age of 21, such as Plaintiff Mascorro who is 19 years old, from applying for a permit to use the green areas at these locations.

- On Election Day, Plaintiffs want to talk to voters about candidates of their choice and offer campaign cards on the green areas outside the 100 foot-perimeter of La Rosita Library, the Starr County Fairgrounds, the El Cenizo Park Community Center, the Courthouse Annex, and the Zarate Park Community Center. Some of these locations are polling places and some are not. The Property Use Policy prohibits Plaintiffs from using any of these county properties on Election Day and other county holidays.

- Plaintiffs want to inform the public of any revised speech ordinance when it is adopted by the Commissioners' Court and they want to inform the public by speaking and gathering on county property such as El Cenizo Park Community Center, the Zarate Park Community Center, the Starr County Fairgrounds, the Courthouse Annex, and La Rosita Library. The Property Use Policy prohibits Plaintiffs from immediately speaking in these areas (every day of the year) because Plaintiffs must submit a permit application 30 days in advance.

IV. The Property Use Policy and Electioneering Regulation are Unconstitutionally Overbroad and Unduly Vague.

In their motion, Defendants do not seek to dismiss Plaintiffs' claims that the Property Use Policy and Electioneering Regulation are overbroad and unduly vague. *See* Compl. ¶¶ 119-120, 127-128.

V. The Property Use Policy and Electioneering Regulation Violate the Texas Election Code and Constitute *Ultra vires* Activity.

Defendants further argue that the Property Use Policy "incidentally restricts the use" of County properties and that these restrictions are reasonable time, place and manner restrictions under the Texas Election Code. Dkt. 67 ¶ 28. Defendants' argument fails. Under Section 61.003(a-1) of the Texas Election Code, a county may impose reasonable time, place and manner restrictions outside of the 100-foot buffer zone, but, among other things, any such restrictions (i)

should be content-neutral, and (ii) must not be blanket prohibitions. *See* Texas Secretary of State Election Division Advisory No. 2017-14, *available at* https://www.sos.state.tx.us/elections /laws/advisory2017-14.shtml (last visited Oct. 1, 2018).

The challenged policies fail on both fronts. First, the Electioneering Regulation and Property Use Policy, when taken together, distinguish between political speech (i.e., electioneering) and other types of speech. Second, the Property Use Policy, as drafted, is a blanket prohibition. The Property Use Policy completely prohibits Plaintiffs from receiving a permit to electioneer on designated county properties on Election Day, even properties without a polling place. Policy § 3(e). Additionally, the Property Use Policy also totally prohibits use, including electioneering use, in designated "Parking Zones," which Defendants delineate with red lines in Attachment D. Of note, these lines include not only parking lots, but also in some cases sidewalks, streets, and unpaved or grassy areas on or adjacent to County parks. Compl. ¶¶ 82-84. Defendants do not explain the reasonableness of including various sidewalks and green areas within the definition of parking lot to ban all speech and assembly.

In support of their argument, Defendants cite to *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984). However, that case did not involve the Texas Election Code or a Texas jurisdiction, and the case does not support Defendants' position that the Property Use Policy is in fact lawful under the Code.

A. The Electioneering Regulation Violates the Texas Election Code

State law prohibits an outright ban of electioneering outside of the 100-foot barrier at a polling location, but allows the enactment of "*reasonable* regulations concerning the time, place, and manner of electioneering." Tex. Elec. Code 61.003(a-1) (emphasis added). Defendants argue that the county's Electioneering Regulation is a reasonable restriction, but offer only

minimal support for their position. Dkt. 67 ¶ 39. Defendants point to a Texas Secretary of State Election Division Advisory for support, claiming that provisions in the Electioneering Regulation prohibiting electioneering on sidewalks and driveways should be "declared as reasonable under the Texas Election Code." *Id.* Defendants' phrasing is misleading. The full text of the relevant section of the advisory reads as follows:

> Only a court of law can determine what is reasonable in terms of time, place and manner. However, an example of a reasonable regulation *may* include prohibiting electioneering on sidewalks or driveways to keep them clear for pedestrians and traffic. Finally, *we recommend that all regulations be content neutral*. If you have questions, we suggest that you contact your attorney.

Texas Secretary of State Election Division Advisory No. 2017-14, *available at* https://www.sos.state.tx.us/elections/laws/advisory2017-14.shtml (last visited Oct. 1, 2018) (emphasis added). Therefore, the Secretary of State Advisory does not, in and of itself, demonstrate that the Electioneering Regulation is reasonable.

The Electioneering Regulation is not content-neutral and, therefore, not a reasonable time, place, and manner regulation. For example, under the Electioneering Regulation, Plaintiffs are free to stand on the sidewalks and lawns around the County Courthouse during the voting period if they are holding a religious vigil, or presenting an artistic performance. However, if Plaintiffs want to vocally promote candidates and hand out campaign literature, they cannot stand on those very same sidewalks and lawns.

In *Reed v. Town of Gilbert, Ariz.*, the Supreme Court struck down a town's sign ordinance, which placed different restrictions on allowable size, duration, and location of signs depending on the content of the sign. 135 S.Ct. at 2232. Specifically, although the town claimed that the restrictions on certain signs were necessary to ensure traffic safety, it could not explain why other signs, with a different message on them, presented less of a risk to traffic safety. *Id.*

Here, the Electioneering Regulation makes a similarly arbitrary distinction between political signs, literature, and materials and other signs, literature, and materials, such as "County-authorized" messages, for example. Dkt. 67-2 ¶ 4(n). Defendants claim that much of the Electioneering Regulation's purpose is "to prevent damage to public property" and "to protect the public health, safety, and welfare of the County[.]" *Id*. ¶ 1(a). However, the Electioneering Regulation states specifically that these regulations "shall not apply" to "County-authorized signs, literature, [or] materials," *id*. ¶ 4(n), when Defendants cannot show that limiting these County-authorized signs would not also promote the same purported interests in protecting public property, health, safety, and welfare. The regulations are therefore an unreasonable restriction.

The Electioneering Regulation is also unreasonable because the restrictions are an outright ban on electioneering outside the 100-foot perimeter. As Plaintiffs have noted, Defendants mischaracterize the Electioneering Regulation when they suggest that it allows Plaintiffs to electioneer in areas not expressly labeled a "Designated Electioneering Area," such as on greens and grassy areas. *See* Dkt. 67 ¶¶ 31-34. To the contrary, the Electioneering Regulation prohibits electioneering on areas not noted as "Designated Electioneering Areas," including the greens and grassy areas in La Rosita, La Victoria, El Cenizo, and the Starr County Courthouse, which extend beyond the 100-foot perimeter under state law. *See* Compl. ¶¶ 87-97. Moreover, Defendant Canales Jr. stated specifically at a public Commissioners' Court meeting that the Electioneering Regulations "overlap[] with [the County's] Property Use Policy" and that electioneering "is prohibited everywhere where you don't see the green" in the attached maps to the Electioneering Regulations. *Id*. ¶ 96. Even when Defendants provide "designated" areas for electioneering, Defendants cannot explain, for example, why prohibiting Plaintiffs from

electioneering on sidewalks at the northern and southern boundaries of the County Courthouse outside the 100-foot perimeter is reasonable. For this reason, too, the regulation's restrictions violate the Texas Election Code

B. The Property Use Policy and Electioneering Regulation Constitute Ultra Vires *Activity*

Defendants claim that Plaintiffs failed to identify either a ministerial act or an exercise of limited discretion that is *ultra vires*. Dkt. 67 ¶ 40. To the contrary, Plaintiffs have done just that in their Fifth Amended Complaint. *See* Compl. ¶¶ 138-141. Again, Defendants are responsible for administering elections in Starr County and enforcing laws related to these elections. *Id*. Texas law both constrains Defendants' election authority and prescribes specific, ministerial acts for election administration that Defendants must perform. *Id*. Defendants ignored the requirements of state law when they enacted and enforced the Property Use Policy and Electioneering Regulation, both of which are strictly prohibited by Texas Election Code § 61.003. Defendants' conduct conflicts with their obligations under state law and was thus *ultra vires*. *Id*.

VI. Plaintiffs' Claims Against Defendants District Attorney Omar Escobar, County Attorney Victor Canales, Jr., and Sheriff Rene "Orta" Fuentes are Proper.

Defendants assert that Defendants District Attorney Omar Escobar, County Attorney Victor Canales Jr., and Sheriff Rene "Orta" Fuentes should be dismissed from this action because they "did not enact or enforce the complained of legislation." Dkt. 67 ¶ 7. Defendants' argument is unsupported by the law. Here, it is undisputed that Defendants Escobar, Canales, and Fuentes are responsible for and indeed enforce the Property Use Policy and the Electioneering Regulation, as alleged in Plaintiffs' Fifth Amended Complaint. Compl. ¶¶ 17-19; *see, e.g., James v. Harris County*, 577 F.3d 612, 617 (2009) ("[S]heriffs are final policymakers in the area of law enforcement for the purpose of holding a county liable . . . ."); *Supreme Court*

of Virginia v. Consumers Union of U. S., Inc., 446 U.S. 719, 736 (1980) (holding that "enforcement officers" such as prosecutors are proper defendants in suits for declaratory and injunctive relief under § 1983 since they are officers "who are threatening to enforce and who are enforcing the law."). Accordingly, Defendants Escobar, Canales, and Fuentes are proper defendants in this action.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Judgement on the Pleadings and render judgment in favor of Plaintiffs.

Dated: October 1, 2018

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
By: */s/ Nina Perales*
Nina Perales
State Bar No. 24005046
SDTX Bar No. 21127
nperales@maldef.org
Celina Moreno
State Bar No. 24074754
SDTX Bar No. 2867694
cmoreno@maldef.org
Alejandra Ávila
State Bar No. 24089252
SDTX Bar No. 2677912
aavila@maldef.org
110 Broadway, Suite 300
San Antonio, TX 78205
Tel: (210) 224-5476
Fax: (210) 224-5382

TEXAS CIVIL RIGHTS PROJECT
By: */s/ Efrén C. Olivares*
Efrén C. Olivares
State Bar No. 24065844
SDTX Bar No. 1015826
efren@texascivilrightsproject.org
Rebecca Harrison Stevens
State Bar No. 24065381

beth@texascivilrightsproject.org
Emma Hilbert
State Bar No. 24107808
emma@texascivilrightsproject.org
1017 W. Hackberry Ave.
Alamo, Texas 78516
Tel: (956) 787-8171

Attorneys for Plaintiffs HILDA GONZALEZ GARZA, ROSBELL BARRERA, and MARIO MASCORRO JR.

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 1st day of October, 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
MCALLEN DIVISION

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

ORDER

After considering Defendants' Motion for Judgment on the Pleadings (Dkt. 67) and Plaintiffs' Cross Motion for Judgment on the Pleadings (Dkt. 68), the Court **GRANTS** Plaintiffs' motion and **DENIES** Defendants' motion.

SIGNED on October _____, 2018.

Hon. Randy Crane, U.S. District Judge